[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH . . . . APPELLANTS;
DEFENDANTS,

AND

THE BRISBANE MILLING COMPANY LIMITED . . . . . } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 1, 2, 5; *June* 13.

Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

High Court—Jurisdiction—Supreme Court of State exercising federal jurisdiction—Verdict of jury—Appeal—Motion for new trial—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73, 75, 76, 77—*Judiciary Act* 1903-1914 (*No.* 6 *of* 1903—*No.* 11 *of* 1914), *secs.* 2, 35, 38, 39.

The High Court has no jurisdiction to entertain an application by way of appeal for a new trial after a verdict of a jury in an action in the Supreme Court of a State exercising federal jurisdiction.

Baume v. *The Commonwealth*, 4 C.L.R., 97, overruled.

Musgrove v. *McDonald*, 3 C.L.R., 132, affirmed.

An action was brought in the Supreme Court of New South Wales in its federal jurisdiction against the Commonwealth to recover damages for breach of contract. The jury having found a verdict for the plaintiff, the Commonwealth, within the time limited for serving notices of motion for new trials, filed in the High Court and served a notice stating that they appealed to the High Court against so much of the verdict of the jury as awarded damages, and that the High Court would be moved by way of appeal to set aside the finding of the jury for the sum awarded and to enter a verdict for the plaintiff for nominal damages or to grant a new trial. The grounds stated were, substantially, that the damages should have been nominal and the Judge should have so directed the jury, and that if the damages should not have

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been nominal those awarded were excessive. Thereafter, and before security was given by the Commonwealth for the prosecution of the appeal to the High Court, final judgment in the Supreme Court was signed.

Held, by *Griffith* C.J. and *Barton*, *Higgins*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), that the High Court had no jurisdiction to entertain the matter either as an appeal or as a motion for a new trial.

The King v. *Snow*, 20 C.L.R., 315, followed.

APPEAL from the Supreme Court of New South Wales.

By a writ issued on 19th March 1915 an action was brought in the Supreme Court of New South Wales in its federal jurisdiction by the Brisbane Milling Co. Ltd. against the Commonwealth, claiming damages for breach of contract. The action was heard before *Ferguson* J. and a jury. On 21st October 1915 the jury returned a verdict for the plaintiffs for £722 5s. 3d. On 28th October 1915 the Commonwealth filed in the High Court, and served on the plaintiffs, a notice stating that the Commonwealth "appeals to the High Court of Australia against so much of the verdict of the jury as awarded to" the defendants "£566 13s. 4d. as damages," and also stating that "the High Court of Australia will be moved by way of appeal . . . to set aside the finding of the said jury for £566 13s. 4d., and to enter a verdict for" the defendants "for nominal damages or to grant a new trial in respect thereof" upon certain grounds. On 11th November 1915 final judgment for £722 5s. 3d. and interest thereon from 21st October was signed in the Supreme Court. On 14th January 1916 the Commonwealth gave security as required by sec. 35 of the *High Court Procedure Act* 1903, for the prosecution of the appeal and for payment of costs.

The appeal was directed to be argued before a Full Bench, and now came on for hearing.

Knox K.C. and *Broomfield*, for the appellants.

Rolin K.C. (with him *Davidson*), for the respondents, took a preliminary objection. This matter is not within the appellate jurisdiction of the High Court. It is not an appeal from a judgment, decree, order or sentence of the Supreme Court within the

meaning of sec. 73 of the Constitution: *R.* v. *Snow* (1). What is complained of here is the verdict, but the verdict must be taken as standing (*Musgrove* v. *McDonald* (2); *Brisbane Shipwrights' Provident Union* v. *Heggie* (3)), and the judgment which was signed was the only judgment that could follow upon that verdict. [Counsel also referred to *Rules of the Supreme Court*, 22nd January 1902, r. 169; *Rules of the Supreme Court*, 7th July 1910, r. 150; *Supreme Court Procedure Act* 1900, sec. 7.]

[GRIFFITH C.J. referred to *George D. Emery Co.* v. *Wells* (4).]

Knox K.C. The decision in *Baume* v. *The Commonwealth* (5) is an express decision that a motion for a new trial after a verdict of a jury in an action brought in the Supreme Court of a State exercising federal jurisdiction will lie to the High Court. That case was rightly decided. If such a motion is an appeal from a judgment, decree, order or sentence, within the meaning of sec. 73 of the Constitution then the Commonwealth Parliament may regulate the conditions under which this Court can entertain it, and they have done so in sec. 39 of the *Judiciary Act* 1903-1914. If that motion is not such an appeal, then sec. 73 of the Constitution does not touch it, and the Commonwealth Parliament has, under sec. 77, power to confer on this Court jurisdiction to entertain that motion as part of the original jurisdiction, and has done so by sec. 39 of the *Judiciary Act*. Under sec. 2 of the *Judiciary Act* the word "appeal" in the Act includes a motion for a new trial unless a contrary intention appears. No intention appears that the word "appeal" in sec. 39 (2) should not include a motion for a new trial. Sec. 20 bears out the view that it was intended to give the High Court jurisdiction to entertain a motion for a new trial in the case of an action in the Supreme Court of a State exercising federal jurisdiction. The Commonwealth Parliament, by sec. 39 of the *Judiciary Act*, have conferred federal jurisdiction upon the Courts of the States, and they state in that section the terms on which that jurisdiction is given. One of them is that, in the case of the Supreme Court of a State, appeals and motions for new trials are to be entertained by the High Court.

(1) 20 C.L.R., 315.
(2) 3 C.L.R., 132.
(3) 3 C.L.R., 686.
(4) (1906) A.C., 515.
(5) 4 C.L.R., 97.

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The Commonwealth Parliament had, under secs. 75 and 77 of the Constitution, authority to confer federal jurisdiction subject to that term whether a motion for a new trial is or is not an appeal within sec. 73 of the Constitution.

[ISAACS J. referred to *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* (1).]

Rolin K.C., in reply. The answer to the contention that the effect of sec. 39 of the *Judiciary Act* is to confer federal jurisdiction upon the Supreme Courts of the States subject to a condition that motions for new trials may be made to the High Court, is that matters with respect to which the Courts of the States have been invested with federal jurisdiction are not coextensive with, but wider than, the matters in respect of which jurisdiction has been conferred upon the High Court. If the words "motion for a new trial" are substituted for the word "appeal" in sec. 39 (2), they have no meaning. *Baume* v. *The Commonwealth* (2) was wrongly decided. See *R.* v. *Snow* (3).

Cur. adv. vult.

May 5. GRIFFITH C.J. In this case a majority of the Court are of opinion that the appeal must be dismissed as incompetent. The reasons for the judgment will be given later.

June 13. The following judgments were read :—

GRIFFITH C.J. This action was brought by the respondents against the appellants in the Supreme Court of New South Wales exercising the federal jurisdiction conferred upon it by sec. 39 of the *Judiciary Act*. The action (which was for damages for breach of contract) proceeded, according to the practice of that Court, to trial before a Judge with a jury, when the plaintiffs obtained a verdict, upon which judgment was entered in due course. By the practice of the Supreme Court of New South Wales an application to set aside a verdict of a jury, and for the grant of any consequent relief, must be made by motion upon notice served within a limited time after verdict. If no such

(1) 41 Ind. App., 110, at p. 119. (2) 4 C.L.R., 97.
(3) 20 C.L.R., 315.

notice is given, the judgment is final. The present proceeding was initiated in this Court by a notice, given within the time allowed in the Supreme Court of New South Wales for giving notice of motion for new trials, stating that the appellants appealed against so much of the verdict of the jury as awarded £566 13s. 4d. damages, and that the High Court would be moved by way of appeal to set aside the finding of the jury for that sum and to enter a verdict for the respondents for nominal damages or to grant a new trial in respect of the sum named.

A preliminary objection was taken that an application by way of appeal for a new trial after verdict of a jury in an action pending in the Supreme Court of a State does not lie to the High Court, and in support of the objection the case of *Musgrove* v. *McDonald* (1) was cited. That case, which was a considered judgment of the whole Court as then constituted, cannot be distinguished from the present case unless the fact that in this case the Supreme Court was exercising federal jurisdiction is a valid ground of distinction. The plaintiffs rely on the case of *Baume* v. *The Commonwealth* (2), which was also an action in the Supreme Court of New South Wales exercising federal jurisdiction, and in which this Court allowed the validity of the distinction. Both decisions were expressed by my mouth. In the case of *R.* v. *Snow* (3) three members of the Court expressed the opinion that the first case was rightly, and the second wrongly, decided. I pointed out that *Baume's Case,* which was not a considered judgment, had proceeded upon a manifest misapprehension of the effect of sec. 2 of the *Judiciary Act.* I will now state at length my reasons for adhering to this opinion.

Sec. 39 (2) of the *Judiciary Act* confers upon the several Courts of the States federal jurisdiction in all matters (with an exception not material) in which the High Court has original jurisdiction or can have original jurisdiction conferred upon it, subject to certain conditions and restrictions, of which the first is: "(*a*) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the

(1) 3 C.L.R., 132.

(2) 4 C.L.R., 97.

(3) 20 C.L.R., 315.

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Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court." Sec. 2 of the same Act provides that in that Act unless the contrary intention appears the word "appeal" includes an application for a new trial.

In *Baume's Case* (1) the Court seems to have assumed that this definition applied to sec. 39 (2) (*a*). They, therefore, read the provision as "except so far as an appeal or application for a new trial may be brought to the High Court," which, for reasons I will give, was probably an erroneous construction, and then fell into the further error of construing this last phrase as equivalent to "except *that* an application for a new trial may be brought to the High Court," so converting it from a statement of an exception into a positive enactment conferring jurisdiction.

The original jurisdiction of the Court is dealt with by Part IV. of the *Judiciary Act*. Part V. deals with its appellate jurisdiction. Sec. 35, in exercise of the power conferred on the Parliament by sec. 73 of the Constitution, excepts decisions of the Supreme Courts of the States in certain cases from the right of appeal. Part VI. of the Act deals with the exclusive jurisdiction of the High Court and the invested jurisdiction of State Courts. It is not probable, *à priori*, that a provision creating an entirely new form of appellate jurisdiction would find a place in this Part, in which sec. 39 stands, and still less probable that if such a creation were intended it would be made by a phrase which in form does not confer, but creates an exception from, jurisdiction, and then would only have effect by calling in aid an artificial interpretation of its language.

The intention of sec. 39, so far as regards the Supreme Courts of the States, is quite clear. It was that in the class of cases mentioned there should be no appeal from decisions of those Courts to any Court but the High Court. And, as the right of appeal to the High Court was limited by Part V., it was desirable, though perhaps not necessary, to make it clear that the provision was not intended to enlarge the right of appeal. The words "except so far as an appeal" from the decision "may be brought to

(1) 4 C.L.R., 97.

the High Court" are apt words to express this intention, and merely mean "except so far, if at all, as the decision is appealable to the High Court." For these reasons I think that "a contrary intention" appears, and that the word "appeal" as used in sub-sec. 2 (*a*) of sec. 39 does not include an application for a new trial.

I am of opinion, therefore, that the reasoning in *Baume's Case* (1) cannot be supported, and that no foundation for the jurisdiction of this Court to entertain the present application is to be found in sec. 39 (2) (*a*).

The only other suggested foundation is that an application for a new trial is, in a sense, an appeal. In *Musgrove* v. *McDonald* (2) the Court held, and stated at length its reasons for holding, that it is not an appeal within the meaning of sec. 73 of the Constitution. I adhere to my opinion expressed in *Snow's Case* (3) that this case was well decided. The appellate jurisdiction of this Court is conferred by the Constitution, and cannot be added to by the Parliament. The Parliament could not, therefore, even if it had attempted to do so, have conferred upon the High Court the jurisdiction sought to be invoked. It follows that *Baume's Case* was wrongly decided and should be overruled, and the preliminary objection allowed.

This appeal must, therefore, be dismissed as incompetent.

It is right to add that the decision of the Court in *Snow's Case*, to which the appellants were parties, was pronounced before the present proceedings were instituted, so that they were not taken unawares as to the doubtful validity of *Baume's Case* on which they thought fit to rely.

BARTON J. In this case judgment has been reserved upon the preliminary objection of the respondents that the appeal is not competent, and we have now to decide that point. The action was by the respondent Company against the Commonwealth in the Supreme Court of New South Wales for damages for breach of a charter party for the hire of a ship. The proceedings were in the federal jurisdiction of that Court. Certain issues of fact

(1) 4 C.L.R., 97.
(2) 3 C.L.R., 132.
(3) 20 C.L.R., 315.

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were arrived at on the pleadings, and the case went to trial before *Ferguson* J. and a jury, and resulted in a verdict for the plaintiff for £722 5s. 3d. The trial was on 18th, 19th and 20th October 1915. The verdict appeared upon the *postea* made up on 21st October.

On 28th October the appellant filed a document intituled "In the High Court of Australia, New South Wales Registry, on appeal from the Supreme Court of New South Wales in its exercise of Federal Jurisdiction." The document styled itself "Notice of Appeal." It recited the verdict, and purported to notify that the defendant appealed to the High Court "against so much of the verdict of the said jury as awarded to the now respondents £566 13s. 4d. as damages." It further notified "that the High Court of Australia will be moved by way of appeal to set aside the findings of the said jury for £566 13s. 4d. and to enter a verdict for the said respondents for nominal damages or to grant a new trial in respect thereof" upon certain grounds of non-direction, of finding against evidence and of excessive damages. Judgment was not signed till 11th November—a fortnight later in date than this document.

The respondents contend that the verdict of the jury, against which the document quoted is an attempt to appeal, is not a "judgment, decree, order or sentence" within sec. 73 of the Constitution of the Commonwealth, and that the document is equally ineffective considered either as a notice of appeal from a verdict or as a notice of motion for a new trial of an action, whether in the federal or the ordinary jurisdiction of the Supreme Court. *R.* v. *Snow* (1), which has been cited in this case, related to a criminal trial. It gave rise to an argument upon this point. There the endeavour was to obtain special leave to appeal from a verdict of not guilty and a judgment of discharge. The Crown sought to appeal both from the verdict of acquittal and from the decision of the trial Judge upon which he based a direction to the jury to find a verdict of not guilty, which they had done. It was argued that this decision was a judgment within sec. 73 of the Constitution.

The case was in the federal jurisdiction of the Supreme Court

(1) 20 C.L.R., 315.

of South Australia, and the Crown contended that sec. 73 warranted an appeal both in civil and criminal matters, because the granting of a new trial after verdict was included in the power to entertain appeals. So far as the case involved the point now again arising, it was the subject of an equal division of opinion in a Bench of six Judges. The present case having provided the opportunity, it has now been argued before the entire Bench, so as to obtain the decision of a majority, and if such a decision is to be obtained without trammel, the case of *Baume* v. *The Commonwealth* (1) must also be reconsidered. It will be observed that the notice of appeal in the present case deals only with the verdict. At the time it was filed judgment had not been signed. As my learned brother *Higgins* observed in *R.* v. *Snow* (2) "one cannot appeal from a verdict, which is the act of a jury; one can only, under sec. 73 of the Constitution, appeal from the judgment, &c., of a Court." But if judgment had been signed before the filing of the notice and the notice had in form appealed from the judgment as well as the verdict, it would have been useless to impeach the judgment if the verdict on which it was merely consequent must stand. The contention of the appellant is founded on the unanimous decision of this Court in *Baume* v. *The Commonwealth.* In that case the decision was that where a State Court is exercising federal jurisdiction the High Court has jurisdiction to entertain a motion for a new trial. If that decision was right, I agree with Mr. *Knox* that it concludes the matter. But I am afraid that it was wrong. The *Judiciary Act*, sec. 39 (2), invests the several Courts of the States with federal jurisdiction, within the limits of their several jurisdictions, in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it, except as provided in sec. 38 (A) (which need not be discussed now) and subject to certain conditions and restrictions; and of these the now material one is as follows:—"(*a*) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High

(1) 4 C.L.R., 97.

(2) 20 C.L.R., at p. 355.

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Court." I agree with the Chief Justice that in *Baume's Case* (1) this Court, whose decision was not a considered one, mistakenly assumed that the words "except so far as an appeal may be brought to the High Court" constituted an affirmative enactment, and that they must also be read in connection with the definition of "appeal" in sec. 2 of the same Act. Of course, there is an appeal from a decision of the Supreme Court of a State, but that is when it is embodied in a judgment, decree, order or sentence within the meaning of sec. 73, subject to exceptions and regulations made under that section; and an appeal in that sense is treated in par. (*a*) of sec. 39 (2) as one that may be brought to the High Court; but that still leaves the difficulty, that a motion for the new trial of an issue the subject of a verdict in the federal jurisdiction cannot be truly termed an appeal from a judgment, decree, order or sentence. I do not think that sec. 39 (2) (*a*) takes a verdict in the Supreme Court in New South Wales, or a judgment founded upon it, out of the operation of the procedure of the State so as to enable the term "appeal" to apply to a new trial motion made to this Court by way of short cut. There must be a decision of the Supreme Court of the kind contemplated in sec. 73 of the Constitution—that is, a judgment, decree, order or sentence—before an appeal will lie to this Court; and the Parliament could not give a meaning, as it purported to do in sec. 2 of the *Judiciary Act*, which would include in the definition of the word "appeal" anything which was not warranted by sec. 73. Moreover, the word "appeal" as last used in sec. 39 (2) of the *Judiciary Act*, par. (*a*), would *primâ facie* be construed in the sense which belongs to it in the previous expression "an appeal lay to the Queen in Council." But that is evidently the sense which the words bears, as I think, in sec. 73 of the Constitution. Can the Sovereign in Council be moved for a new trial upon a verdict given in New South Wales? The procedure in Gibraltar is, or at any rate was in 1886, identical with that in New South Wales. This appears from the report of *Dagnino* v. *Bellotti* (2), where it was objected that an appeal would not lie from a judgment of the Supreme Court at Gibraltar founded on a verdict of a Judge and assessors. The

(1) 4 C.L.R., 97.

(2) 11 App. Cas., 604.

Judicial Committee said, by the mouth of Sir *Barnes Peacock* (1): —"In the present case it is contended that the judgment was wrong, because it gave effect to a verdict which was not warranted by the evidence . . . . It would be very inconvenient if parties, without moving the Court for a new trial, could be at liberty to ask Her Majesty in Council to set aside the judgment upon the ground that the verdict was wrong, without having taken that course which is pointed out by the rules made in pursuance of the charter to be adopted in the case of an objection to a verdict . . . . *Her Majesty cannot alter the verdict or set it aside*, and their Lordships are of opinion that they cannot advise Her Majesty to direct a new trial, the parties not having applied to the Court in the regular course instead of coming here." See also *Tronson* v. *Dent* (2). The position in which the High Court stands under the Constitution is similar. *Musgrove* v. *McDonald* (3) was the simple case of an attempted appeal to the High Court from the verdict of a jury, and the consequent judgment founded upon it in the Supreme Court of a State in its ordinary jurisdiction. It was held that such an appeal does not lie, but this Court pointed out that the appeal contemplated by sec. 73 included an appeal from a judgment of the Supreme Court dealing with a new trial motion. *Musgrove* v. *McDonald* was, it is true, not a case of federal jurisdiction, but the grounds upon which it was decided have only to be examined to evince that the reasoning applies to all cases in which, by the procedure law of the State, the proper course in order to obtain a review of an adverse verdict is to apply to the Court in which it was given for such relief as is applicable in such a case. There is a quasi-discretionary power of the Court in which the case is brought to grant a new trial upon application, but such an application, as the learned Chief Justice of this Court pointed out in that case, was never regarded as an appeal. The old practice of the Courts of common law obtains in New South Wales as well as in South Australia. The Supreme Court is bound by the findings unless the verdict is set aside upon motion to that Court, and unless that Court sets them aside

(1) 11 App. Cas., at p. 606. (2) 8 Moo. P.C.C., 419.
(3) 3 C.L.R., 132.

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the judgment based on the findings must stand, for the Court will not do what would be futile. In fine, I think—perhaps I should say, I confess—that the decision in *Baume* v. *The Commonwealth* (1) was clearly wrong, and that *Musgrove* v. *McDonald* (2) is not only unchallengeable in its application to cases in South Australia and in New South Wales which are not in the federal jurisdiction, but that its reasoning is not prevented by any enactment from applying to a case within the federal jurisdiction of the Supreme Courts of those States.

Accordingly, I think this appeal is incompetent and must be dismissed.

ISAACS J. The material facts are these:—An action brought in federal jurisdiction by the present respondents against the Commonwealth was tried in the Supreme Court of New South Wales before *Ferguson* J. and a jury. A verdict for £566 13s. 4d. for deprivation of the respondents' ship was given on 21st October 1915. On that verdict, there being no rule *nisi* granted by the Supreme Court of New South Wales, judgment automatically followed within the first four days of term in accordance with the verdict, and an *incipitur* of final judgment was signed for a sum including the £566 13s. 4d. on 11th November, with interest on the verdict from 21st October 1915 to the date of judgment. The Commonwealth, being desirous of challenging the validity of the verdict on various grounds, and therefore of the judgment, gave notice that this Court "will be moved by way of appeal at the first sitting of the Court in Sydney, after the expiration of two months from the date of the notice," to set aside the finding of the jury for £566 13s. 4d. and to enter a verdict for respondents for nominal damages or to grant a new trial in respect thereof.

It has been decided in *Delph Singh* v. *Karbowsky* (3) that the mere giving of a notice of appeal is not the institution of an appeal. What was done on 28th October by giving notice that the Commonwealth would appeal, was *not the appeal*, and, as the majority held in the case cited, there was not until all rules had

(1) 4 C.L.R., 97.
(2) 3 C.L.R., 132.
(3) 18 C.L.R., 197.

been complied with any cause existing in the appellate jurisdiction. There was a mere *notice* to the party within the time required by the New South Wales rules, made applicable to the case by federal law, and that notice was given in anticipation of the judgment, which it would automatically be the right of the respondents to sign long before the time notified for appeal would arrive. That judgment was signed as already stated, and was in existence when this appeal was instituted and came on for hearing. That was *the appeal*. Thus there was a judgment appealed against, because the verdict constituting the sole foundation for the judgment was challenged for invalidity for various reasons. The reasons included the following:—No. 1: "That his Honor should have directed the jury that the now respondent was only entitled to nominal damages in respect of the deprivation of the steamship *Upolu*." No. 3: "That there was no evidence upon which the jury were entitled to find more than nominal damages in respect of the deprivation of the steamship *Upolu*." There were two other grounds, to which it is unnecessary to refer.

The simple question is whether, on the one hand, the appeal is competent to this Court under either (i.) the appellate power granted in sec. 73 of the Constitution, or (ii.) the original jurisdiction of this Court in view of sec. 75 of the Constitution and sec. 39 of the *Judiciary Act*; or whether, on the other hand, the appeal is incompetent because the Constitution is so faulty as to drive litigants in such a case to a multiplicity of appeals—with all their attendant expense and delay—first, to the Full Supreme Court, and then to this Court.

As to the appellate power the matter appears to me, with the deepest respect to the opposite opinion, incontestable, unless we are prepared to disregard the clearest decisions of the Privy Council, repeated and emphasized.

The relevant words of our Constitution are these:—"The High Court shall have jurisdiction . . . to hear and determine appeals from all judgments, decrees, orders, and sentences . . . of any . . . Court exercising federal jurisdiction." The one point in contest is, whether a judgment is appealable on the ground that the Judge at the trial has misdirected the jury as to the law, or that there was no evidence upon

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which a jury could, as reasonable men, give their verdict. *Knight* v. *Egerton* (1) and *Miles* v. *Commercial Banking Co. of Sydney* (2) are authorities that the misdirection or even non-direction by the Court as to damages—of course, not contributed to by the party complaining—is an error on the part of the Court, a challengeable act of the Court, which entitled the party to a new trial. As to the absence of evidence, *Wakelin* v. *London and South Western Railway Co.* (3) is one of the many instances establishing that a verdict founded upon insufficient evidence is bad in law, and incapable of supporting a judgment. See also *per* Lord *Kinnear* in *Folkestone Corporation* v. *Brockman* (4). Assuming that, we have to determine by this decision whether such a case comes within the jurisdiction of appeal from the judgment.

Now, at the threshold, I wish to emphasize one point before quoting the Privy Council decisions to which I refer. Those decisions were given not by virtue of the Royal Prerogative, but solely by virtue of the Imperial Act of Parliament (7 & 8 Vict. c. 69) and of the powers granted by the enactment, just as we can act solely by virtue of the Imperial Act of Parliament enacting our Constitution. Both authorities rest on the same basis, namely, strict statutory power. The decisions which I am about to mention on the point here in contest were in respect of *nisi prius* cases, as is the present one before us, and in all of them the Judicial Committee held that an appeal lay by reason of legal defects in the verdicts. And what is all-important is that the words of the Act 7 & 8 Vict. c. 69 are precisely those in sec. 73, though transposed, namely, "*judgments, sentences, decrees, and orders*" of colonial Courts, other than Courts of error and Courts of appeal.

In *In re Barnett* (5) leave was granted under that Act because of a ruling of the trial Judge given during his charge to the jury, and excepted to. *Harrison* v. *Scott* (6) was a case of misdirection, and the Privy Council for this granted a new trial. *Attorney-General of Jamaica* v. *Manderson* (7) was similarly a case of misdirection leading to a challengeable verdict.

(1) 7 Ex., 407.
(2) 1 C.L.R., 470.
(3) 12 App. Cas., 41.
(4) (1914) A.C., 338, at p. 355.
(5) 4 Moo. P.C.C., 453.
(6) 5 Moo. P.C.C., 357.
(7) 6 Moo. P.C.C., 239.

While I am fully conscious of the weight of opinion from which I have the misfortune to differ, I cannot but feel some comfort in the fact that I am humbly following the deliberate and sustained opinion not merely of the august tribunal which rendered those decisions, but also of the personally illustrious men who composed that tribunal on the occasion referred to. Perhaps I may recall their names:—Lord *Langdale*, Lord *Campbell*, *Parke* B., Dr. *Lushington*, *Pemberton Leigh* (afterwards Lord *Kingsdown*) and *Knight Bruce*.

The grounds on which the appeal was held to lie were errors made by the Court itself in relation to the verdict.

In *Tronson* v. *Dent* (1), which did not in any way purport to be contrary to the cases mentioned, the Judges were some of those who had previously decided the earlier cases. I refer generally to my analysis of that case in *Snow's Case* (2), and to my observations on the other cases mentioned at pp. 347 and 348. I add this quotation from *Tronson* v. *Dent* (3):—"We think, according to the true interpretation of the Ordinances, the *practice in our Courts here is the practice which ought to prevail*, and which, according to the Ordinances, does prevail in the Court of Hong Kong."

So that it was because those Ordinances expressly enacted that that practice should govern, it had to be followed by the Privy Council. That entirely differentiates the Australian Constitution from the Hong Kong Ordinances, and leaves *Tronson* v. *Dent* no authority to govern us upon this question. And as *Tronson* v. *Dent* is the only basis for *Musgrove* v. *McDonald* (4) the latter case is without proper foundation, for it assumes that, no matter what the practice is in the Court below, the judgment cannot be appealed from if only a verdict *de facto* exists however contrary to law. It may be that the trial Judge has directed the jury that a Commonwealth Statute is invalid, and the verdict has been rendered accordingly. Still, the argument is that the mere fact that the verdict is there, renders the judgment sacrosanct from appeal until the Full Supreme Court has been solemnly asked for a new trial.

(1) 8 Moo. P.C.C., 419.
(2) 20 C.L.R., 315, at pp. 342-344.
(3) 8 Moo. P.C.C., at p. 459.
(4) 3 C.L.R., 132.

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The earlier decisions of the Privy Council, which are in point under our Constitution, establish that judgments may be appealed against not merely in form, but substantially and effectually where they rest on verdicts that are impeachable for errors of the Court itself. There are other cases of the Privy Council which affirm the principle I have stated. See the judgment of *Higgins* J. in *R.* v. *Snow* (1).

When our Constitution was framed and passed by the Imperial Parliament, it certainly did not, as I read it, tie down the Australian Parliament or this Court to the requirements of the differently worded Hong Kong Ordinances, and the practice they ordained, which formed the basis of *Tronson* v. *Dent* (2). The authoritative decisions which were based on the very words of the Imperial Act adopted in the Constitution, and which were pronounced by the highest legal tribunal of the Empire, so far as we were concerned, stood and still stand unqualified. I am unable, having regard to hitherto universally accepted canons of construction, to ignore those decisions, and place a different construction on the words expressly adopted.

The mode of bringing the appeal is, of course, immaterial so long as it is sanctioned by competent authority. By English common law, appealable error was confined to a very limited number of legal errors (see *Snow's Case* (3)). English legislation as to bills of exceptions extended the number. There is no reason why all errors of law affecting the judgment should not be included in a bill of exceptions. And, again, there is no constitutional reason that I can see, why the Legislature should not choose as the proper procedure the method of notice of motion instead of a bill of exceptions. The Commonwealth Parliament has chosen the simpler form, and has allowed by that means every objection to any act of the Court which can affect the judgment of another Court in federal jurisdiction to be brought before this Court for revision of the judgment. And by permitting the appeal to take the form of motion for new trial, it enables this Court to grant that remedy.

I have so far considered this point entirely on English law

(1) 20 C.L.R., at pp. 357-359. (2) 8 Moo. P.C.C., 419.
(3) 20 C.L.R., at pp. 349-350.

and precedents, because, whatever authority existed to the contrary, we are bound by Privy Council rulings in such a matter. But it is, nevertheless, satisfactory to know that the Supreme Court of the United States takes the same view. The exact point was decided in *Tracy* v. *Swartwout* (1). It had been objected by counsel that a misdirection to the jury as to damages was not a subject for appeal, but for an application for new trial to the Court below, and the Supreme Court in their unanimous judgment said:—"The objection that the proper remedy for the plaintiffs was by a motion for a new trial, and that the question now made on this writ of error is substantially a motion for a new trial, seems not to be well founded. The amount of damages found by the jury is only referred to, as showing that they considered their verdict as controlled by the direction of the Court. And this Court consider that direction erroneous in law." The Supreme Court accordingly reversed the judgment of the Court below. And it must be remembered that in America the appellate power of the Supreme Court was more restricted than our own, because it was limited by Act of Congress to "final judgment and decree" (*Ray* v. *Law* (2)).

I see no reason why our Constitution should be cramped in the way suggested. I am of opinion that this appeal should be entertained as a competent exercise of the appellate power of this Court.

Mr. *Knox* argued that the jurisdiction to entertain the motion in this case was either appellate and therefore within sec. 73 of the Constitution, or else was original and therefore within secs. 75 and 77 of the Constitution and regulated in sec. 39 of the *Judiciary Act*. He relied also on *Baume's Case* (3), a distinct decision of this Court as far back as 1906. That was the reasoned judgment of the learned Chief Justice and *Barton* and *O'Connor* JJ. So far as that case rests on the appellate power, I hold it is good law.

As to the alternative branch of the argument, respecting the original jurisdiction, I think the Commonwealth Parliament intended this Court to have, by sec. 39 of the *Judiciary Act*,

(1) 10 Pet., 80, at p. 98.
(2) 3 Cranch, 179.
(3) 4 C.L.R., 97.

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all the corrective jurisdiction, both appellate and original, that it was possible to have, limited only to a "decision" of the other Court. "Decision" is a wider word than "judgment," "decree," "order" or "sentence." The only question to my mind is this: whether corrective power by way of new trial can be allotted as original jurisdiction to a Court other than that in which the cause in fact originates. On full consideration I do not think that is possible. Jurisdiction so far as it is not appellate is original, but original with respect to the Court in which the proceedings have originated. And where the same tribunal reconsiders a controversy anew on its own merits, or considers whether its proceedings in regard to the controversy have so far been satisfactory or lawfully conducted, that may still be original. A new trial granted by the Court to which a record is returnable comes within that class. So soon, however, as another tribunal proceeds, not to determine the rights of the parties as those rights may appear to it independently of any decision already given, but to revise the proceedings of another and entirely distinct tribunal, and correct its errors within its jurisdiction, the revisory tribunal is not, in my opinion, exercising original jurisdiction, but corrective or appellate jurisdiction (see *Story's Commentaries*, sec. 1,761; *Marbury* v. *Madison* (1); and *Metropolitan Railroad Co.* v. *Moore* (2)). As *Marshall* C.J., in *Parsons* v. *Bedford* (3), in speaking of re-examination of facts found by a jury, said:—"The only modes known to the common law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable; or the award of a *venire facias de novo*, by an appellate Court, for some error of law which intervened in the proceedings."

For this reason and this reason only, I think the power to entertain this appeal is referable to the Constitutional appellate power alone. But, so referring it, my opinion is, as I have said, that the appeal is competent, and should be entertained.

HIGGINS J. The question is, can the High Court entertain an

(1) 1 Cranch, 137, at p. 175, last few lines.

(2) 121 U.S., 558, at p. 573, lines 21 to 27.

(3) 3 Pet., 433, at p. 448.

application for a new trial of an action tried before a Supreme Court Judge with a jury, in a case of federal jurisdiction, on the grounds, substantially—(*a*) that the damages should be nominal, and the Judge should have so directed the jury, and (*b*) that if not to be nominal the damages are excessive?

The jurisdiction is treated on all sides as federal, because the Commonwealth is sued (sec. 75 (3)). The federal Parliament can invest any Court of a State with federal jurisdiction (sec. 77); and it has purported to do so, though in a devious and complicated fashion, by sec. 39 of the *Judiciary Act*. Under sec. 39 (1) the jurisdiction of the High Court is exclusive of the jurisdiction of the State Courts, "except as provided in this section." Under sub-sec. 2 the State Courts are invested with federal jurisdiction as to all matters mentioned in sec. 75 and sec. 76 of the Constitution (with certain exceptions immaterial for the present purpose), "subject to the following conditions and restrictions." The first (so-called) "condition and restriction" is that the decision of the State Supreme Court is to be final and conclusive except in so far as an appeal may be brought to the High Court. This was meant to prevent appeals from being brought to the Privy Council from the State Supreme Court, meant to compel the appeal to be brought to the High Court; and it has been held to be invalid and ineffectual by the Privy Council in *Webb* v. *Outrim* (1).

The second condition and restriction is that "wherever an appeal lies from a decision of any Court or Judge of a State to the Supreme Court of the State, an appeal from the decision may be brought to the High Court." The other conditions and restrictions are irrelevant to this case. As to this second "condition and restriction," *primâ facie* an application to the Supreme Court for a new trial is not an "appeal" from a Court or a Judge at all. The Court or a Judge has not given a decision. The jury has given a verdict; but it does not follow that that verdict will be acted on by the Court. The verdict is the act of the jury—not of the Court or Judge. An "appeal" from a Court or a Judge means that some judicial act in the way of a judgment, decree, order or sentence is to be called in question.

(1) (1907) A.C., 81, at pp. 91-92.

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Here, the verdict was given on 21st October; the notice of application for a new trial was given on 28th October. The question is, what is the right of the applicant as on the latter day? It is true that since 28th October the plaintiff in the case signed judgment for the amount of the verdict with interest from 21st October; but this application does not relate to the judgment. Had the defendant a right to ask the High Court for a new trial on 28th October?

We are dealing with a verdict given by a jury in the New South Wales Supreme Court; and under the New South Wales practice there seems to be no doubt that an application could be made to the Supreme Court for a new trial within eight (or fourteen) days after the verdict. The Supreme Court had been invested with federal jurisdiction, had power to try actions against the Commonwealth; and, if the verdict of the jury was wrong for any reason, the New South Wales Court could refuse to give effect to it, could order a new trial. Can the High Court do so except as incidental to setting aside a judgment (sec. 36 of *Judiciary Act*)?

But although an "appeal" does not ordinarily include an application for a new trial, sec. 2 of the *Judiciary Act* provides that "unless the contrary intention appears . . . 'appeal' includes an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge." Moreover, by sec. 20 it is provided that the jurisdiction of the High Court "to hear and determine applications for a new trial of any cause or matter, after a trial before . . . any such Court exercising federal jurisdiction, shall be exercised by a Full Court." The latter words do not purport to confer on the High Court jurisdiction to hear and determine applications for a new trial after a trial before the New South Wales Court, but it assumes that the High Court has the jurisdiction, and it provides that the application is to be heard before a Full High Court, not before the High Court consisting of a single Judge. I may assume—without deciding—that sec. 20 relates to trials before a Judge with a jury; and, if so, it seems as if the framers of the *Judiciary Act* thought that the Full High Court would have power to make an order for a new trial in the case

of an action tried with a jury before a Supreme Court exercising federal jurisdiction. But if they meant the word "appeal," in sec. 39 (2) (*b*), to include an application for a new trial in a jury case, why did they, in that sub-section, use the phrase "appeal . . . . from *a decision of any Court* or Judge of a State"? The verdict in the case of a jury trial is not the "decision of any Court or Judge."

Assuming, however, that the Federal Parliament used the word "appeal" with this wide meaning, at all events in such a case as a verdict given owing to some misdirection of the Judge, how can sec. 39 (2) (*b*) be treated as a "condition" or "restriction" on a grant of federal jurisdiction? Moreover, has the word "appeal" this wide meaning in the Constitution, sec. 73? This section, 73, contains the only appellate power which the High Court has under the Constitution; and Parliament has no power to confer on the High Court any jurisdiction, appellate or original, other than that contemplated by the Constitution. Parliament cannot improve on the Constitution, or add to it. Sec. 73 allows Parliament to reduce or to qualify the appellate power, but not to increase it. The appellate power is given by the Constitution to the High Court "with such exceptions and subject to such regulations as the Parliament prescribes." Subject to such exceptions and regulations, the High Court can "hear and determine appeals from all judgments, decrees, orders, and sentences . . . . of any other federal Court, or Court exercising federal jurisdiction, or of the Supreme Court of any State." But the verdict of a jury is not the act of any Court (*Tronson* v. *Dent* (1)); it is not a "judgment, decree, order, or sentence" of the Court. The word "appeal" in sec. 73 obviously refers to a proceeding to review or call in question some curial act.

But it is said that the word "decision" in sec. 39 is wider than the words "judgment, decree, order, or sentence" in sec. 73 of the Constitution, and that this application, so far as it involves an objection to the direction of the Judge to the jury, is allowed by sec. 39 (2) (*b*). I do not take this view of the word "decision." I adhere to the view which I took in the income tax case (*Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2)). I think that

(1) 8 Moo. P.C.C., 419, at p. 422.

(2) 4 C.L.R., 1087, at p. 1172.

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the only "decision" that can be the subject of appeal under the Constitution is a "judgment, decree, order, or sentence," although "decision" seems to take in rather the aspect of law expounded than the aspect of an operative direction of the Court. But if "decision" is to be treated as wider than "judgment, decree, order, or sentence" then sec. 39 (2) (*b*) is, to the extent of the excess, invalid and ineffectual as a gift of appellate power. Nor can it be sustained as conferring original jurisdiction on the High Court; for a gift of a right to hear applications for new trial is not a gift of *original* jurisdiction in respect of any of the matters as to which the Parliament can confer, under the Constitution, original jurisdiction. The position was quite different in *R.* v. *Snow* (1); for in that case judgment had been given—oral judgment releasing the prisoner—and the appeal was from that judgment. Yet, on an appeal from the judgment, the verdict can, as *Parke* B. said in *Nathoobhoy Ramdass* v. *Mooljee Madowdass* (2) be "indirectly appealed from . . . . But the verdict only, prior to judgment being given, could not be appealed from in a common law suit." On an appeal from the judgment, if the Court did wrong in accepting the verdict, it does not matter whether the verdict was given under a mistake of the jury, or a misdirection or other wrong proceeding of the judge. The case of *Tracy* v. *Swartwout* (3), to which my brother *Isaacs* has referred us, seems to strongly favour the view which I took in *Snow's Case.* In *Tracy* v. *Swartwout,* there had been a verdict and judgment obtained through misdirection in the Circuit Court; and the judgment was reversed, and the case remanded to that Court for further proceedings.

To put my view shortly as to the present case, this application will not lie for a new trial, as it is not an appeal from any "judgment, decree, order, or sentence" within sec. 73 of the Constitution; but if it were an appeal from a judgment, an appeal would lie; and in this respect the case of *Musgrove* v. *McDonald* (4) is wrong in law.

(1) 20 C.L.R., 315.
(2) 3 Moo. P.C.C., 87, at p. 96.
(3) 10 Pet., 80.
(4) 3 C.L.R., 132.

I am of opinion, therefore, that this Court cannot entertain this application.

GAVAN DUFFY and RICH JJ. In *R.* v. *Snow* (1) we expressed an opinion similar to that contained in the judgment of the Chief Justice just read. We agree with that judgment, and have nothing to add.

Gavan Duffy J.
Rich J.

POWERS J. The real questions for decision on this appeal are (1) whether an appeal lies to this Court against a judgment of a Supreme Court of a State exercising federal jurisdiction where the case has been tried by a Judge and jury; (2) whether "appeal" in sec. 73 of the Constitution includes an "application for a new trial" in such a case; (3) if not, whether this Court in the original jurisdiction vested in it by the Constitution or by Parliament can grant applications for a new trial in such a case.

As to the first question—this Court (a Full Court of three Judges) in *Baume* v. *The Commonwealth* (2) held unanimously that the High Court has jurisdiction to entertain a motion for a new trial after the verdict of a jury in the Supreme Court of a State exercising federal jurisdiction under sec. 39 of the *Judiciary Act*. That decision was arrived at although the Court's attention was particularly drawn to its decision in *Musgrove* v. *McDonald* (3) (see *Baume's Case* (4)). The decision in *Baume's Case* was later on questioned in this Court in *R.* v. *Snow* (5), but has not been overruled.

In *Snow's Case*, following *Baume's Case*, I held that this Court, under sec. 73 of the Constitution, had jurisdiction to entertain appeals from judgments of the Supreme Court of a State exercising federal jurisdiction in cases tried before a Judge and jury and to grant a new trial. *Baume's Case* has not been overruled by this Court, and I feel bound by it, and I hold that an appeal in this case lies to this Court, and that an order for a new trial can, on that appeal, be entertained and granted by this Court. My reasons for holding that view are stated at length in *Snow's Case* (6).

(1) 20 C.L.R., 315, at pp. 362-363.
(2) 4 C.L.R., 97.
(3) 3 C.L.R., 132.
(4) 4 C.L.R., 97, at pp. 101-102.
(5) 20 C.L.R., 315.
(6) 20 C.L.R., 315, at pp. 368-369.

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It was contended that this Court had power in its original jurisdiction to grant the new trial, but I am not satisfied that such a power has been granted by the Constitution or that it can be granted by Parliament as original jurisdiction. It appears to have been granted by Parliament as part of the appellate jurisdiction, and I think rightly so.

I hold that this Court has jurisdiction to entertain and grant the appeal and to order a new trial in this case.

Appeal dismissed with costs.

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

Solicitors for the respondents, *Mark Mitchell & Forsyth.*

B. L.

Cons *Amalgamated Metals Foundry & Shipwrights Union, Re* 4 FCR 319

Appl *Davison* v *Electoral Commissioner of New South Wales* (1992) 74 LGRA 246

Cons *Fenlon* v *Radke* [1996] 2 QdR 157

Cons *King* v *Electoral Comr* (1998) 72 SASR 172

Cons *Featherston* v *Tully* (2002) 83 SASR 302

Appl *Forrest, Application of* (1991) 74 LGRA 141

Foll *Wasaga* v *Tahal* (1991) 33 FCR 438

Dist *Forrest, Application of* [1993] 1 QdR 478

Cons *Liston* v *Davies* (1937) 57 CLR 424

[HIGH COURT OF AUSTRALIA.]

BRIDGE . . . . . APPELLANT;

AND

BOWEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 2, 3, 4; *June* 13.

Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Local Government—Alderman—Ouster—Election—Personation—"Unduly elected"—Onus of proof—Sydney Corporation Act 1902 (*N.S.W.*) (*No.* 35 *of* 1902), *secs.* 21, 40, 54, 56.

Sec. 21 of the *Sydney Corporation Act* 1902 (*N.S.W.*) provides that "There shall be two aldermen for each ward, who shall be elected by the persons on the roll for such ward." Sec. 40 provides that (1 and 2) before voting at an election a person claiming to vote shall make and subscribe before the presiding officer a declaration to the effect that he is entitled to vote in respect of the particular name which appears upon the roll, that (3) no question