

[HIGH COURT OF AUSTRALIA.]

PEACOCK APPELLANT;
PLAINTIFF,

AND

D. M. OSBORNE & CO. AND ANOTHER . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Practice—Appeal to High Court from Supreme Court of State—Cause remitted to*
1907. *Supreme Court—Stay of proceedings by Supreme Court—Duty of Supreme*
— *Court—Judiciary Act 1903 (No. 6 of 1903), sec. 37.*

MELBOURNE,
Sept. 12, 13.

Griffith C.J.,
Barton,
O'Connor,
Isaacs and
Higgins JJ.

When the High Court, on the hearing of an appeal from the Supreme Court of a State, has remitted the cause to the Supreme Court for the execution of the judgment of the High Court pursuant to sec. 37 of the *Judiciary Act* 1903, the Supreme Court is authorized to make any order for the purpose of executing the order of the High Court, but not to make an order which has the effect of preventing or obstructing the execution of that order.

Where, therefore, a cause was remitted to the Supreme Court for an inquiry as to damages, an order by the Supreme Court staying proceedings as to the inquiry was, on appeal to the High Court, discharged.

Judgment of *à Beckett J.* reversed.

APPEAL from the Supreme Court of Victoria.

In an action brought in the Supreme Court of Victoria by Walter Chamberlain Peacock against D. M. Osborne & Co. and the International Harvester Co. of America, the judgment was given for the defendants with costs: *Peacock v. D. M. Osborne & Co.* (1).

(1) (1906) V.L.R., 375; 27 A.L.T., 207.

On appeal by the plaintiff to the High Court, judgment was ordered to be entered for the plaintiff, and the cause was remitted to the Supreme Court of Victoria for an inquiry as to damages: *Peacock v. D. M. Osborne & Co.* (1).

The order of the High Court, so far as it related to remitting the cause to the Supreme Court, was drawn up as follows:—

“And it is hereby ordered that this action be remitted to the Supreme Court of the State of Victoria and that the further consideration of this appeal be adjourned and that either party be at liberty to apply to this Court as he or they may be advised.”

The case was subsequently set down by the plaintiff for further consideration in the Supreme Court of Victoria, and an inquiry as to damages was held before the Chief Clerk of the Supreme Court of Victoria, who reserved his decision.

Special leave to appeal to the Privy Council from the judgment of the High Court having been obtained, on an application in Chambers on behalf of the defendants, *à Beckett J.* ordered that all further proceedings in the Supreme Court in relation to the inquiry as to damages directed by the judgment of the High Court should be stayed until further order, but that the plaintiff should be at liberty to proceed with the taxation of his costs of the action in the Supreme Court, and that the amount of such costs when so taxed should be paid by the defendants to the plaintiff or his solicitors upon security being given to refund the amount thereof if the Privy Council should so order.

From that order of *à Beckett J.* the plaintiff now by special leave appealed to the High Court.

Coldham, for the appellant. When the High Court has directed a certain thing to be done, no State Court has a right to interfere and say it shall not be done. When the High Court exercises its power under sec. 37 of the *Judiciary Act* 1903 by remitting a cause to the Supreme Court of a State for the execution of the judgment of the High Court, the Supreme Court has no jurisdiction to stay proceedings in that cause.

[HIGGINS J. referred to *The “Khedive”* (2); *Hamill v. Lilley* (3).]

(1) 4 C.L.R., 921.

(2) 5 P.D., 1.

(3) 19 Q.B.D., 83.

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H. C. OF A. Any application for a stay should be made to this Court.
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Irvine K.C., for the respondents. The cause having been remitted to the Supreme Court, that was the only Court to which an application for a stay could be made. The High Court has substituted a judgment with all the virtues of a Supreme Court judgment for that which they said was wrong. The Chief Clerk who makes the inquiries is an officer of the Supreme Court, and owes no duty to the High Court. It is only the Supreme Court that can give him directions which are binding on him.

[HIGGINS J.—Under sec. 37 of the *Judiciary Act* 1903 it is the duty of the Supreme Court “to execute the judgment of the High Court in the same manner as if it were its own judgment.” That is binding on officers of the Supreme Court.]

According to the English practice the Supreme Court was the right Court to which to apply for a stay: *Justice v. Mersey Steel and Iron Co.* (1).

[ISAACS J.—The Privy Council has laid it down that it is the duty of every subordinate tribunal to whom its order is addressed to carry it into execution: *Pitts v. La Fontaine* (2). He also referred to *Rodger v. Comptoir D’Escompte de Paris* (3).]

No appeal lies to this Court from an interlocutory judgment of the Supreme Court.

[GRIFFITH C.J.—This Court has in *Willis v. Trequair* (4) decided that it does.]

The High Court is a separate Court from the Supreme Court of a State, and has no active power to direct the Supreme Court to carry out its orders. The only power of the High Court to control the Supreme Court is as an Appeal Court. [He referred to *Parkin v. James* (5).]

Coldham, in reply, referred to *Bayne v. Blake* (6).

The judgment of the Court was delivered by

GRIFFITH C.J. In March last this Court, on the hearing of an appeal from the Supreme Court of Victoria, gave judgment

(1) 1 C.P.D., 575.

(2) 6 App. Cas., 482.

(3) 7 Moo. P.C.C., 314, at p. 327.

(4) 3 C.L.R., 912.

(5) 2 C.L.R., 315, at p. 343.

(6) 4 C.L.R., 944.

reversing the judgment appealed from—which was a judgment for the defendants in the action—and gave judgment for the plaintiff, granted an injunction, directed certain inquiries to be made as to damages, and remitted the matter to the Supreme Court to execute the judgment. Unfortunately an error occurred in drawing up the judgment of this Court so that it does not accurately express what the Court ordered. But the matter has been dealt with here on its merits, and irrespective of any defect in form. Later on an application was made to *àBeckett J.* to stay proceedings under the judgment as pronounced by this Court. His Honor with considerable doubt held that he had power to give such a stay, and he ordered that all proceedings in the Supreme Court in relation to the inquiry as to damages should be stayed until further order, and that the plaintiff should be at liberty to go on with some other matters. The ground taken before His Honor for asking for the stay was that special leave had been granted by the Privy Council to appeal from the judgment of this Court. This appeal is now brought from His Honor's order.

There is no doubt that the appeal lies. The order, although made by a Judge in Chambers, is an order of the Supreme Court, and disobedience of that order would be punished by proceedings for contempt of Court—the Court to which the contempt would be shown being the Supreme Court.

The ground of the present appeal is that, when a judgment is pronounced by this Court, it is the duty of the Supreme Court to obey, and not to make an order inconsistent with obedience. Sec. 37 of the *Judiciary Act* 1903 provides that:—"The High Court in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance, and if the cause is not pending in the High Court may in its discretion award execution from the High Court or remit the cause to the Court from which the appeal was brought for the execution of the judgment of the High Court; and in the latter case it shall be the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment." Now, there is no doubt that the Supreme Court has jurisdiction

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to make any order consequent on an order of this Court for the purpose of executing the latter order, but the Supreme Court has no power to make any order for the purpose of preventing its execution. When I say "power," I do not mean that in one sense the Supreme Court has no power to make an order, but, although technically the Supreme Court has power to make such an order, it is an order that ought not to be made. Just as an order made without hearing both parties is an order that ought not to be made, although it may be a just order. *Quicumque aliquid statuerit, parte inauditâ alterâ, æquum licet statuerit, haud æquus fuerit.* An order staying proceedings until further order is not an order in execution of a judgment of this Court, but is an order thwarting or obstructing the execution of that judgment. Therefore, whatever the merits may be, it is an order that ought not to be made, and must be set aside on appeal. To put it shortly, the judgment of this Court, when the case was remitted to the Supreme Court, is to be regarded on the same footing as a judgment of the Supreme Court from which no appeal has been or can be brought. Matters subsequent to the case being remitted are within the ordinary jurisdiction of the Supreme Court. But that Court has no authority, though it may have formal power, to make any order inconsistent with the order of this Court. The appeal, therefore, must be allowed.

I think it right to say that *à Beckett J.* was probably misled by the form in which the order of this Court was drawn up. I think that appears from his reasons for his judgment. The appeal will be allowed, and the order appealed from will be discharged.

I may add that it is desirable that the judgment of this Court as drawn up should be amended.

Appeal allowed. Order appealed from discharged. Respondents to pay costs of appeal.

Solicitors, for appellant, *Waters & Crespin*, Melbourne.

Solicitors, for respondents, *Blake & Riggall*, Melbourne.

B. L.