

## [HIGH COURT OF AUSTRALIA.]

PRESLEY . . . . . APPLICANT;  
 DEFENDANT,

AND

GERAGHTY . . . . . RESPONDENT.  
 INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF  
 THE NORTHERN TERRITORY.

H. C. OF A. *Northern Territory—Supreme Court—Deputy Judge—Appointment—Validity—*  
 1921. *Supreme Court Ordinance 1911-1919 (Northern Territory) (No. 9 of 1911—*  
*No. 13 of 1919), secs. 3-9, 10B, 10C.*

MELBOURNE,  
 Mar. 11, 17.

Knox C.J.,  
 Higgins,  
 Gavan Duffy,  
 Rich and  
 Starke JJ.

Sec. 10B of the *Supreme Court Ordinance 1911-1919* (Northern Territory) provides that "(1) Notwithstanding anything contained in this ordinance the Governor-General may, by commission, appoint a person to be a Deputy Judge of the Supreme Court during such period and for such purposes as are specified in the commission. (2) In relation to the purposes for which he is appointed the Deputy Judge shall have all the powers and may exercise all the authorities which are vested in or may be exercised by the Judge of the Supreme Court."

*Held*, by Knox C.J., Gavan Duffy and Rich JJ. (Higgins and Starke JJ. dissenting), that that section gives no power to appoint a Deputy Judge at a time when there is no Judge of the Supreme Court.

APPLICATION for leave to appeal from the Supreme Court of the Northern Territory.

On 9th and 10th August 1920 at Darwin, in the Northern Territory, before Gerald Hogan, a Special Magistrate of the Northern Territory, an information was heard whereby Edward Patrick Geraghty charged that Villiers Clarence Murray Presley unlawfully had in his possession certain beer upon which duty had not been paid. The

information was dismissed, and the informant appealed to the Supreme Court of the Northern Territory. The appeal came on for hearing on 2nd November 1920 before the same Gerald Hogan, purporting to sit as a Deputy Judge of the Supreme Court, and he, on 8th November 1920, at the conclusion of the hearing, allowed the appeal and imposed a penalty upon the defendant.

The defendant now, on notice to the Minister for Home and Territories, moved for leave to appeal to the High Court from that decision, one of the grounds of the proposed appeal being that Mr. Hogan had not been duly appointed to the position of Deputy Judge. It appeared that in the *Commonwealth Gazette* of 30th September 1920 there was published a notice that David John Davies Bevan, Esq., who was then the Judge of the Supreme Court, was removed from office as from 22nd September 1920; that thereafter no Judge of the Supreme Court had been appointed; and that Mr. Hogan was, by commission dated 21st October 1920, appointed Deputy Judge for a term of three months from 15th October 1920 "for the purpose of dealing with any cases which may in accordance with law come before the Supreme Court."

*Sanderson*, for the applicant. The word "deputy" ordinarily implies that there is an existing principal, and there is nothing in the *Supreme Court Ordinance* 1911-1919 which shows that it has not that implication in secs. 10B and 10C of that ordinance. See *Stroud's Dictionary*, sub "Deputy," citing from *Termes de la Ley*; *County Courts Act* 1888 (51 & 52 Vict. c. 43), sec. 21; *Ex parte Corles*; *In re Palmer* (1); *Hoey v. M'Farlane* (2); *Commonwealth Conciliation and Arbitration Act* 1904-1920, sec. 14 (2A).

[RICH J. referred to *Shrewsbury's Case* (3); *Cruise's Digest* (4th ed.), vol. III., p. 105.]

*Owen Dixon*, for the Minister for Home and Territories and the respondent. The *Supreme Court Ordinance*, by sec. 10B, intended to authorize the appointment of a person to hold an independent office, viz., that of Deputy Judge, and not the appointment

H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.

(1) 3 DeG. & J., 484; 28 L.J. Bky.,  
15.

(2) 4 C.B. (N.S.), 718.

(3) 9 Rep., 46b, at p. 48b.

H. C. OF A. of a person to exercise the power of an existing Judge of the  
 1921. Supreme Court while that Judge held office. The words "Deputy  
 PRESLEY Judge" are used as a name for the person appointed to the inde-  
 v. pendent office. The word "deputy" is often used as indicating  
 GERAGHTY. an independent office, and in the case of the Deputy Postmaster-  
 General indicates a permanent official who holds his office notwith-  
 standing that from time to time there may be no Postmaster-General  
 (*Post and Telegraph Act* 1901, sec. 7).

[KNOX C.J. referred to *R. v. Lloyd* (1); *R. v. Edye* (2).]

To construe the ordinance so that the machinery of the Supreme Court should cease to work when there was no Judge of the Supreme Court would be to defeat the useful purposes of the ordinance. The proper remedy here is by prohibition, and not by appeal.

*Sanderson*, in reply.

*Cur. adv. vult.*

Mar. 17. The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND RICH JJ. In this case Mr. *Sanderson* asked us for leave to appeal from an order made by Mr. Gerald Hogan, purporting to act as Deputy Judge of the Supreme Court of the Northern Territory. One of the grounds of the proposed appeal was that Mr. Hogan had not been duly appointed to the position of Deputy Judge, and, as we thought it inexpedient that this question should remain in suspense, we directed that notice of the motion should be served on the Minister of State for Home and Territories. In pursuance of such notice the Minister appeared before us by counsel, and the question of the validity of Mr. Hogan's appointment was fully argued.

The *Supreme Court Ordinance* 1911-1919 provides as follows :—  
 "3. There shall be a Supreme Court of the Northern Territory, which Court shall be constituted in the manner provided by this ordinance. . . . 6. The Supreme Court shall be constituted by the Judge of the Northern Territory sitting as such Supreme Court. 7. The qualifications of the Judge of the Northern Territory shall be as follows : He must either be or have been a practising barrister or



solicitor of the High Court or of the Supreme Court of a State or of the Supreme Court of the Northern Territory of not less than five years' standing. 8. (1) The Judge of the Northern Territory shall be appointed by the Governor-General by commission, and shall hold office for a period of five years, or such longer period as is specified in his commission, unless sooner removed by the Governor-General, on the ground of misbehaviour or incapacity. (2). The Judge of the Northern Territory, holding office at the commencement of this ordinance, shall be the Judge of the Northern Territory while his commission remains in force, or until a Judge of the Northern Territory is appointed under this ordinance. 9. Where, by any law of the State of South Australia which is continued in force in the Northern Territory as a law of that Territory, any power or function is vested in any Judge of the Supreme Court of South Australia, that power or function shall, in relation to the Northern Territory, be vested in the Judge of the Northern Territory. 10B.— (1) Notwithstanding anything contained in this ordinance the Governor-General may, by commission, appoint a person to be a Deputy Judge of the Supreme Court during such period and for such purposes as are specified in the commission. (2) In relation to the purposes for which he is appointed the Deputy Judge shall have all the powers and may exercise all the authorities which are vested in or may be exercised by the Judge of the Supreme Court. 10c. The Deputy Judge shall, before entering upon the duties of his office, take, before the Judge of the Supreme Court, an oath or affirmation in the form contained in section 8A of this ordinance. Provided that in taking an oath or affirmation in pursuance of this section the words 'Deputy Judge' shall be substituted for the word 'Judge'."

Mr. Hogan's appointment and the order appealed against were made when there was no person holding the office of "Judge of the Northern Territory," as the officer is called in secs. 6, 7 and 9, or "Judge of the Supreme Court," as he is called in secs. 10B and 10c. It might appear at first sight that the powers and authorities mentioned in sec. 10B (2) are only those specific powers and authorities which are set out in other parts of the ordinance, and that, because of sec. 6, if there be no Judge there can be no Supreme Court. But

H. C. OF A.

1921.

PRESLEY

v.

GERAGHTY.

Knox C.J.

Gavan Duffy J.

Rich J.

H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.

Knox C.J.  
Gavan Duffy J.  
Rich J.

we think that they must include capacity to constitute the Supreme Court under sec. 6, because the Judge of the Northern Territory constitutes that Court only when sitting as such Supreme Court, and it cannot be intended that a deputy should have jurisdiction only during the period when the Judge was actually sitting in Court. But, assuming that the deputy might exercise jurisdiction at a time when the Judge was not actually sitting, we have still to decide whether he can be appointed or act at a time when there is no Judge. The word "deputy" strictly means one having authority to act for or in place of another, and hence his authority must be as limited as that of his principal; no act can be competent to him which would not also at the same time be competent to his principal. We recognize that words are sometimes carelessly and even inaccurately used in legislative enactments, and we proceed to inquire whether there is any indication in the ordinance that the word "deputy" should have any other than its strict meaning. Sec. 9 provides that the powers therein specified "shall, in relation to the Northern Territory, be vested in the Judge of the Northern Territory." This, we think, means: shall be vested on his appointment and during his tenure of office. Sec. 10B (2) provides that in relation to the purposes for which he is appointed the Deputy Judge shall have all the powers and may exercise all the authorities which are vested in, or may be exercised by, the Judge of the Supreme Court. This, we think, means not such powers as are appropriate to the office of Judge, but such powers as in fact are vested in or may be exercised by an existing Judge. Sec. 10C provided that the Deputy Judge should take his oath of office before the Judge of the Supreme Court; so the Legislature evidently thought that there could be no deputy without an existing Judge. It is said that this inference can be no longer drawn because Ordinance No. 13 of 1919, by sec. 2, provides that the oath may thereafter be taken before the Minister of State for Home and Territories or some person appointed by the Minister in that behalf. But this amendment does not show that the Legislature contemplated the existence of a Deputy Judge when there was no Judge, but only that they recognized that in certain circumstances it might be inconvenient to require the personal attendance of the Deputy before the Judge. It is clear that

the Deputy may be required to act in the Territory when the Judge is away from the Territory, or for any limited purpose or time in one part of the Territory while the Judge is in another part of the Territory. Some light is thrown on this necessity by Ordinance No. 1 of 1918, which extends the time for making an application for a prerogative writ until the expiration of fourteen days after the return to Darwin of the Judge after absence from the Territory. It is unnecessary to consider what would be the consequences of the construction contended for by the Minister, but in view of the qualifications required in a Judge we think it highly improbable that the intention of the ordinance was that a person without any prescribed qualifications might be appointed for an unlimited period to constitute the Supreme Court of the Northern Territory.

H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.

KNOX C.J.  
GAVAN DUFFY J.  
RICH J.

As the question has been fully argued before us, and we have arrived at a conclusion that Mr. Hogan's appointment is bad, it seems undesirable to put the informant to further expense, and we suggest that litigation in this Court should cease on the Minister consenting to pay the costs of the motion and on an undertaking being given that no steps will be taken to enforce the conviction.

HIGGINS J. The question is as to the meaning of the power to appoint "a Deputy Judge" in the Northern Territory *Supreme Court Ordinance* No. 6 of 1919.

An order was made by Mr. Gerald Hogan, purporting to act as "Deputy Judge" of the Supreme Court of the Territory. This order quashed an order made by a Special Magistrate, and convicted the defendant of an offence charged; and the defendant seeks leave to appeal to this High Court under sec. 21 of the *Supreme Court Ordinance* 1911. The ground of the appeal is that under the Ordinance No. 6 of 1919 the appointment of Mr. Hogan as Deputy Judge is invalid, inasmuch as at the date of the appointment and of the order there was no existing "Judge" of the Supreme Court. The Judge was removed from office on 22nd September 1920; and Mr. Hogan was appointed by commission (for a fourth term) for three months, from 15th October 1920, "for the purpose of dealing with any cases which may in accordance with law come before the



H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.

Higgins J.

Supreme Court." The order now impugned was made on 8th November 1920. It is urged that the Ordinance No. 6 does not authorize the appointment of a "Deputy Judge" unless there be an existing Judge. It is purely a question of construction of the ordinances.

Under sec. 2 of the Ordinance No. 6 of 1919 (sec. 10B of the principal ordinance) "the Governor-General may by commission appoint a person to be a Deputy Judge of the Supreme Court *during such period and for such purposes* as are specified in the commission"; and he "shall have all the powers and may exercise all the authorities which are vested in or may be exercised by the Judge of the Supreme Court." That is to say, whatever powers are from time to time attached to the office of Judge within the period and the purposes specified in the commission may be exercised by any Deputy Judge during his term.

Apart from the use of the word "deputy" in the phrase "Deputy Judge," it is incontrovertible that the length of the period of appointment and the purpose of the appointment—the dealing with any cases coming before the Supreme Court—are within the powers of the Executive. Does the use of the word "deputy" involve the conclusion that the Deputy Judge is to be a mere agent of an existing Judge, so that if there is no existing Judge there can be no deputy, and so that if the existing Judge die or resign the functions of the Supreme Court cannot be exercised?

Now, the word "deputy" is not technical; much less is the expression used here—"Deputy Judge." According to the dictionaries, a very common synonym for "deputy" is "substitute"; and, of course, B may be a substitute for A whether A is ill or abroad or has died or been removed. It may be conceded that the title "deputy" where used by itself is often appropriately applied to an agent for an existing principal—an agent whose agency ceases when his principal ceases; but such agency is not part of the necessary connotation, and it is rarely implied except when the appointment is made by the principal, not (as here) by a superior authority. There is not the slightest indication that the ordinances, as they stood at the time of the appointment, contemplated the narrower meaning of the word "deputy." On the other hand, the power conferred was to appoint "*during such period and for such purposes*

as are specified in the commission." It is not a power to appoint "during such period as there is an existing Judge." There is no limitation of the power to the case of illness or of absence or of pressure of business. The period and the purposes are all left to the discretion of the Governor-General in Council. There can be no *à priori* presumption in favour of a limitation of the discretion; for the Governor-General makes the ordinance, is the donor as well as the donee of the power to appoint. The words of the power are not even to appoint a person "to be a deputy of the Judge."

It has been pointed out in the argument that there may be a Deputy Postmaster-General during a time when there is no Postmaster-General. In the *Standard Dictionary* "deputy" is defined as a person appointed to act as *substitute* for another. In *Murray's Dictionary* also "substitute" is treated as one of the synonyms for "deputy." In the *Standard Dictionary* "depute" means, amongst other things, to "send with authority." In the authorized version of the Scriptures the word "deputy" is actually used where there was no existing principal: "There was then no king in Edom: a deputy was king" (1 Kings, xxii., 47). To say the least, it would be quite in accord with correct usage to call a stop-gap appointee, who is to act if there is a vacancy in the office of Judge as well as when the Judge is ill or unable to overtake the business of the Court, a "Deputy Judge." To my mind, however, the matter is concluded in favour of the broader meaning by the fact that no limit whatever is placed by the ordinance on the period for which the Deputy Judge is to act. The words used are not "during such period *within the Judge's tenure of office*." The fact that the Deputy Judge is enabled, by the Ordinance No. 13 of 1919, to take his oath of office before the Minister for Home and Territories (or some person appointed by him), instead of before the Judge, tends to favour rather than to repel the notion that the ordinances at the time of the appointment contemplated the case of there being no Judge to administer the oath.

But there is still another aspect to be regarded—the object which was to be attained by the ordinance. If the defendant's contention is right, a Deputy Judge, even if appointed during the Judge's tenure of office, would lose all his powers on the Judge's death or resignation

H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.  
Higgins J.



H. C. OF A. 1921. or removal; and, as there was only one Supreme Court Judge, the Court would become paralysed. No one could exercise its functions. If the words are equally susceptible of two meanings, it is our duty to accept that meaning which leads to a reasonable result (per Keating J. in *Boon v. Howard* (1)). This is what Lord Coke called the *argumentum ab inconvenienti* (per Bowen L.J. in *Gard v. Commissioners of Sewers* (2)).

~  
PRESLEY  
v.  
GERAGHTY.  
—  
Higgins J.

Further, if we look to the origins of the Latin word "*deputo*" it has no connotation of agency. It had a meaning of *destine, allot*—as in *deputata sibi a naturâ sedes*. In the strict meaning of the word, historically examined, there is no suggestion of agency, but of destination, appointment.

We have been referred to some cases; but they do not seem to be any guide to the construction of this ordinance. In *Hoey v. McFarlane* (3) the power to appoint a deputy was expressly limited by the Act 9 & 10 Vict. c. 95, sec. 20, to the illness or unavoidable absence of the Judge proper. Here the power to appoint the Deputy Judge is not so limited; the power is not confined to any set of circumstances. In *Ex parte Corles*; *In re Palmer* (4), also, the power to appoint in question was in the case of the "illness or unavoidable absence" of the official; and the appointment was to be "during his illness or unavoidable absence." It followed necessarily that any step taken by the deputy after the official had died was void.

I am of opinion, as to the effect of the ordinances, that the Governor-General has power to appoint a deputy to act in the vacancy of the office of Judge, a deputy to take up any Supreme Court cases that may arise during the vacancy as well as any cases which any existing Judge finds it impossible or inconvenient to take. Indeed, I cannot think of any one word which would more conveniently or appropriately be applied as a title to such an officer than the word "deputy."

I have to add that if the defendant's point be upheld, if the appointment is invalid, it follows that the order made by Mr. Hogan is not an order of the Supreme Court, and that this High Court, therefore, has no power to grant leave to appeal under sec. 21 (1) of the Supreme Court Ordinance.

(1) L.R. 9 C.P., 277, at p. 308.  
(2) 28 Ch. D., 486, at p. 511.

(3) 4 C.B. (N.S.), 718.  
(4) 28 L.J. Bky., at p. 16.

STARKE J. The whole question in this case is whether, according to the true construction of certain ordinances relating to the Northern Territory, the appointment of Mr. Gerald Hogan as Deputy Judge was an appointment to exercise the powers and authorities of an office or the powers and authorities of a person.

As my brother *Higgins* says, the word "deputy" is frequently used as applying to an agent for an existing principal but such is not its necessary connotation. It is not the connotation in which the word is used, in my opinion, in the Ordinance No. 6 of 1919. Thus, in sec. 10B, the power is not to appoint the deputy of a person, but to appoint "a person to be a Deputy Judge of the Supreme Court." Further, the tenure of the appointment is not limited by any express reference to the tenure of office of the Judge, but is for such period as is specified in the commission. Again, in secs. 10c and 10d, reference is made to the duties of "his" (the Deputy's) "office," and the oath the Deputy is required to take is to "serve . . . in the office of Deputy Judge of the Northern Territory." The fact that the deputy is not required to have the same qualifications as the Judge, and was originally required to take the oath of office before the Judge of the Supreme Court, has, in my opinion, little bearing upon the question at issue.

Admittedly, the Governor-General in Council has power to create the office of Judge or Deputy Judge with or without qualifications. If the Governor-General in Council has used the power unwisely, the remedy is wholly political. A direction to take the oath before a given person postulates, of course, the existence of that person, but I cannot see that it throws any light upon the nature of the office or of the authority conferred upon the person taking the oath. Moreover, the argument based upon sec. 10c of the Ordinance No. 6 of 1919 turns the other way in the present case; for the Ordinance No. 13 of 1919, sec. 2, now allows the oath to be taken before a Minister of State or some person appointed by him. The only argument left is based upon the Ordinance No. 9 of 1911, sec. 6, providing that the Supreme Court shall be constituted by the Judge of the Supreme Court sitting as such Supreme Court. It was said that there could be no Court without "the Judge" existing. But it is clear, in my opinion, that the effect of the Ordinance No.

H. C. OF A.  
1921.

PRESLEY  
v.  
GERAGHTY.

Starke J.

H. C. OF A. 6 of 1919, sec. 10c, is to allow the constitution of the Court by means  
1921. of the Deputy Judge.

Presley The appointment of Mr. Gerald Hogan was a lawful one, in my  
v. opinion, and leave to appeal should be refused.  
Geraghty.

[The consent and undertaking mentioned above were given by  
the Minister for Home and Territories.]

Solicitor for the applicant, *N. W. Barratt*, Darwin, by *McCay & Thwaites*.

Solicitor for the Minister and the respondent, *Gordon H. Castle*,  
Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

JAMES FENWICK AND COMPANY LIMITED APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXA- }  
TION . . . . . } RESPONDENT.

H. C. OF A. *Income Tax—Assessment—Income—Source of income—Requisitioning of property by*  
1921. *Commonwealth—Compensation—Income Tax Assessment Act 1915-1918 (No.*  
*34 of 1915—No. 18 of 1918), secs. 3, 10—Defence Act 1903-1915 (No. 20 of*  
*1903—No. 3 of 1915), sec. 67—Regulations under the Defence Act, reg. 627*  
*(Statutory Rules 1915, No. 173).*  
SYDNEY,  
April 18.

Knox C.J.,  
Gavan Duffy  
and Rich JJ.

Reg. 627 of the *Regulations under the Defence Act* (Statutory Rules 1915, No. 173) provides, by sub-reg. 1, that in time of war the Governor-General may issue a general authority to the Minister of Defence authorizing him to issue an authority to such person as he thinks fit to requisition certain articles, including vessels, for naval and military purposes; by sub-reg. 2, that upon receipt of such an authority from the Minister the person to whom it is issued may require the owner of such articles to deliver them up to him; and, by