

The plaintiff might elect to bring either an action of account or of debt—*Core's Case*, 1 Dyer 21a. The County Court cannot entertain an action for an injunction only, save where, if damages had been claimed, they would not have exceeded the statutory limit—*Stiles v. Ecclestone*, (1903) 1 K.B. 544. Nor for an injunction, except as ancillary to some other cognisable claim—*The King v. Cheshire County Court Judge*, (1921) 1 K.B. 301; *Simpson v. Crowle*, (1921) 3 K.B. 243. The Court rules as to taking accounts are for the purpose of equitable claims.

IRVINE, C.J., delivered the judgment of the Court: A great deal of the argument addressed to us by Mr. Jacobs does not affect, in our opinion, the real question which is raised in this Special Case; and, even admitting that many of his conclusions are well founded in view of the authorities he has cited to us, we think the question is reduced to a very simple one, and that is whether, in this particular action, defined by the claim and the agreement which is appended as part of the Special Case, there is jurisdiction, if it becomes necessary, to make an order for accounts. We think there is no doubt that the answer to that question should be in the affirmative. In order to arrive at that conclusion we have to look at the nature of the action. It may be that the action might have been framed more strictly in accordance with Common Law forms, and if it had been, this question might never have arisen. The first paragraph of the claim sets up a contract, and then the facts are alleged which give rise to the claim as on a Common Law right to recover a debt. The amount of that debt is, from the statement of facts, necessarily not within the knowledge of the plaintiff. It claims an account of sales and an account of money received by the defendant, and claims payment of the amount found due. The plaintiff might just as easily have claimed as money due the sum of £500, and asked for an account to be taken for the purpose of determining how much of the £500 was actually due.

The main contest was in regard to the construction of the last part of the claim. The plaintiff says that the amount of the subject-matter of this action does not exceed £500. We think that is a clear limitation of the amount sought to be recovered. Looking at the "County Court Act," sec. 48, the jurisdiction given is to hear and determine all personal actions where the amount, value or damages sought to be recovered is not more than £500, whether on balance of account or otherwise. We think the substance of this action is that it is a personal action for the recovery of money due on a contract, and that the amount sought, to be recovered is limited to an amount not exceeding £500. If that be the proper construction of the claim, it renders much of the argument addressed to us beside the question. We think that is the proper construc-

tion to be put on the claim, and, viewing the action as such, there is no doubt that, for the purpose of determining the amount of this uncertain claim, the County Court judge has jurisdiction, either to take accounts himself, which means nothing more than ascertaining on the evidence placed before him what sums are due on one side and what sums on the other; or to direct that such an account be taken to aid the Court in determining the amount due under the contract, which is claimed in the action. With regard to the actual power of the Court within itself to direct an account to be taken, we only refer to the last part of sec. 148, that provides that, in any case not provided for in the Act or by the rules, "the general principles of practice and the rules observed in the Supreme Court may be adopted and applied with such modifications as the different constitutions of the two Courts may render necessary at the discretion of the County Court Judge before whom the proceeding is depending to all causes suits matters and proceedings in the County Courts and it shall not be necessary in any case that the facts necessary to give jurisdiction should appear by recital averment or otherwise upon any proceeding in or issuing out of any County Court."

For these reasons, the question must be answered in the manner I have indicated, and the case referred back to the County Court, with an intimation to the effect I have mentioned, and we direct that the defendant pay the costs of the Special Case.

Question answered accordingly.

[Solicitors—For the plaintiff, Luke Murphy; for the defendant, Arthur Phillips.] S. K. H.

High Court of Australia.

FULL COURT — (Knox, C.J.,
Isaacs, Higgins, Rich and
Starke, JJ.) } April 23, 24;
June 5.
(Sydney.)

THE STATE OF NEW SOUTH WALES v. COMMONWEALTH OF AUSTRALIA.

Constitutional law — Vessels of Commonwealth and State—Collision—Claim for damages against State—Jurisdiction of High Court—Consent of State unnecessary—"Matters"—"Sovereign" State—The Constitution, secs. 51 (XXIX.), 75, 76, 78—"Acts Interpretation Act 1901," sec. 22 — "Judiciary Act 1903," Part IX., secs. 56, 57, 58, 59, 60, 62, 65, 67.

By virtue of section 75 of the Constitution, the High Court of Australia has original jurisdiction to entertain an action brought by the Commonwealth against a State to recover damages in respect of a collision between vessels belonging to the Commonwealth and State respectively. The Constitution itself confers the jurisdiction, which does not depend on Commonwealth legislation.—

So held, per Knox, C.J., Isaacs, Rich and Starke, JJ.

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South Australia v. Victoria, 17 A.L.R. 207, followed. Per Higgins, J.—Section 75 of the Constitution does not confer such jurisdiction being a mere procedural section, but the jurisdiction exists by virtue of section 78 of the Constitution and Part IX. of the "Judiciary Act."

APPLICATION referred to the Full Court.

The Commonwealth brought an action in the High Court against the State of New South Wales to recover damages in respect of the collision between vessels belonging to the plaintiff and the defendant respectively. The State entered a conditional appearance, denying the jurisdiction of the High Court to entertain the action against it without its consent, and applied for an order setting aside the service of the writ or staying proceedings in the action.

The application came before Higgins, J., who referred it to the Full Court.

Flannery, K.C., and H. M. Stephen for the applicant State.

E. M. Mitchell and Evans for the respondent Commonwealth.

The following authorities were referred to:—*Quick and Garran* (1st ed.), pp. 774, 804; *Chisholm v. Georgia*, 2 Dall. 419; *Hans v. Louisiana*, 134 U.S. 1; *Harrison Moore* (2nd ed.), 496; *The Parlement Belge*, 5 P.D. 197; *Halsbury*, vol. VI., page 428; Chitty on *Prerogative*, page 339; *Tobin v. The Queen*, 16 C.B. (N.S.) 310, at 353, 356; *R. v. Mogileff*, 38 T.L.R. 71, 279; *Young v. s.s. Scotia*, (1903) A.C. 501 at 504; *Commonwealth v. New South Wales*, 12 A.L.R. 541; *United States v. Texas*, 143 U.S. 621, at 639, 642, 646; *United States v. Michigan*, 190 U.S. 379; *South Australia v. Victoria*, 17 A.L.R. 206; *Canada v. Ontario*, (1910) A.C. 637 at 645; *Farnell v. Bowman*, 12 App. Cas. 643, at 648, 650; *Commonwealth v. Miller*, 16 A.L.R. 424; *Baume v. Commonwealth*, 11 A.L.R. 124, 13 A.L.R. 22; *The Wheat Acquisition Case*, 21 A.L.R. 128; *Commonwealth v. Queensland*, 27 A.L.R. 73; *Commonwealth v. New South Wales*, 24 A.L.R. 253.

Cur. adv. vult.

The following judgments were given:—

KNOX, C.J.—This is an application by the defendant, the State of New South Wales, for an order setting aside the service of the writ or staying proceedings in an action brought by the Commonwealth against the State to recover damages in respect of a collision between vessels belonging to the plaintiff and defendant respectively. The ground of the application is that this Court has no jurisdiction to entertain an action brought by the Commonwealth against the State of New South Wales without the consent of that State. Section 75 of the Constitution provides that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party, the High Court shall have original jurisdiction. Apart from authority, I should have thought that the meaning

of the words used in sec. 75 was not open to doubt, and that under that section the right of this Court to entertain this action could not be seriously disputed. But it is unnecessary for me to state at length my views on the matter, for the question now raised is, in my opinion, concluded by the decision of this Court in *The State of South Australia v. The State of Victoria*, 17 A.L.R. 206. and by the reasoning by which that decision was supported. The plaintiff in that action claimed recovery of possession, an account of mesne profits, and an injunction to restrain trespass by the defendant State, in respect of a piece of land *de facto* in the occupation of the defendant which was alleged to belong to the plaintiff. In effect, the cause of action was trespass to land. For the defendant it was argued that the High Court had no jurisdiction to entertain the action, because the dispute was not justiciable before federation, and the jurisdiction given by sec. 75 of the Constitution to deal with matters between States was limited to matters arising in connection with the Constitution, or which at the time the Constitution was enacted were justiciable between States. The unanimous decision of the Court was (1) that the word "matters" in sec. 75 meant matters which were of a like nature to those which would arise between individuals, and which were capable of determination upon principles of law; and (2) that the High Court had jurisdiction to entertain an action by one State against another founded on an alleged trespass by the latter on the territory of the former. It necessarily involved a decision that the High Court had what has been called in argument in the present case "compulsive jurisdiction" against the defendant State, or, in other words, that the jurisdiction of the High Court under this section over a State was not dependent on the consent of the State against which proceedings were instituted.

The following extracts from the reasons given in the case referred to, in my opinion, cover the whole ground of the present case. Griffith, C.J., said (at page 211)—"The word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before a Court of Justice. . . In my opinion a matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. This definition includes all controversies relating to the ownership of property or arising out of contracts. In the simple case of a trespass by one State upon territory in the *de facto* possession of another I have no doubt that this Court would have jurisdiction." And at pp. 211, 212—"There is another way in which the point of jurisdiction may be approached, which leads to the same result. The law of the Empire, including the Statute law, is binding as well upon the dependencies, regarded as political

"entities, as upon individual subjects. If, therefore, any dependency infringes the law of the Empire governing its relation with a neighbouring dependency it is guilty of a wrong towards that other dependency. Similar wrongs committed by one independent State against another are not justiciable, because there is no tribunal which has jurisdiction to take cognizance of them. But if there is a tribunal which has jurisdiction to sum up a dependency before it, there is no reason why such a wrong should not be redressed. This Court has such jurisdiction. The question, therefore, whether the State of Victoria has infringed the Statute law of the Empire as regards South Australia may be inquired into by this Court as a 'matter between States' within the meaning of sec. 75 of the Constitution."

O'Connor, J., said (at page 223)—"The suit is in substance one in which a State seeks to recover a portion of her territory, of which she alleges that an adjoining State is in wrongful occupation." And at page 224—"The language of the Commonwealth Constitution in this respect is so entirely free from ambiguity that, in my opinion, no authorities are needed for its interpretation. It plainly says, and it clearly means, that whenever a question is raised as to the position of a boundary line between two States this Court will have jurisdiction to entertain it, if the question arises in a controversy between the States which is capable of being determined on recognised legal principles."

At page 226 my brother Isaacs said—"The first question is as to the jurisdiction of the Court to entertain the suit. This depends on the meaning of the word 'matters' in sec. 75 of the Constitution. In my opinion that expression, used with reference to the judicature, and applied equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations and constitutes the measure of their respective rights and duties." And at page 229 he said—"If on examination of the case it be found that the claim is not supported by any law binding the defendant but is dependent on political considerations merely, the Court must say so. It has jurisdiction to entertain the suit, but in the course of its exercise it may be compelled to adjudge adversely to the plaintiff on the ground that no paramount law can be found to support its claim."

Barton, J., agreed with the reasons given by the Chief Justice, and my brother Higgins (at page 237) concurred with the other members of the Court in rejecting the argument that the High Court had not power to entertain the action, and to give some judgment in favour of the plaintiff, if the plaintiff had a cause of action. It is evident, indeed it was not disputed, that a claim to recover damages in

respect of a collision between two vessels is a "matter" within the meaning of sec. 75. It is apparent also that in this "matter" the Commonwealth is a party. It follows that by sec. 75 original jurisdiction is conferred on the High Court in this case, and "jurisdiction" means "the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision"—Halsbury, *Laws of England*, IX., page 13, par. 10.

Thus power is conferred by the Constitution itself on this Court to take cognizance of this matter. Any legislation by Parliament directed to conferring this power would, therefore, be as superfluous as legislation by Parliament to restrict the limits of the jurisdiction would be ineffective. The argument for the applicant based on sec. 78 of the Constitution ignores the essential distinction between matters which come within the terms of sec. 75 and those which come within sec. 76. In respect of the former class the jurisdiction of the High Court is independent of, while in respect of the latter class it is dependent upon, Parliamentary enactment. The result of acceding to this argument would be in effect to remove sub-sec. (iii.) from sec. 75, and place it in sec. 76.

In my opinion the application should be dismissed.

ISAACS, RICH and STARKE, JJ.—In this case the Commonwealth has sued the State of New South Wales in this Court, in original jurisdiction, for damages occasioned to the plaintiff by a collision between a vessel belonging to the defendant and a motor-launch belonging to the plaintiff. The cause of action as a tort in its inherent nature would, as between subject and subject, be justiciable in a competent Court. It therefore falls within the meaning of the word "matter" in sec. 75 of the Commonwealth Constitution.

The question arising on the defendant's summons—referred by our brother Higgins to the Full Court—is whether this Court has jurisdiction to entertain this action without the consent of the State?

The Commonwealth maintains that there is jurisdiction, and rests primarily on sec. 75 of the Constitution. Alternatively, it contends that in various ways the "Judiciary Act" has made whatever Parliamentary provision is necessary. The defendant State has entered a conditional appearance, and contests jurisdiction unless it elects to consent.

The contention urged at the bar on behalf of the defendant was—(1) That it is a sovereign State, and therefore cannot be sued without its consent; (2) that no actual consent has been given; (3) alternatively, that the jurisdiction given by the terms of the Constitution in sec. 75 is conditioned on Parliament under sec. 78 of the Constitution conferring on the Commonwealth the right to proceed against the State. It may be convenient to refer first to

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the assertion—which is at the root of the defendant's contention—that an Australian State is a "sovereign State." Learned Counsel placed the matter on the same plane as a foreign independent State, the "representative" of which is included in sub-sec. (ii.) of sec. 75. As to such a "representative," it was said the consent of the foreign State was necessary, and so of an Australian State.

There are two fallacies involved in this. The first is that there is not any analogy whatever between the position of the "representative" of a foreign State and that of one of the States of Australia. In saying that we put aside all the distinctions between consuls and ambassadors, and assume the highest character, that of an ambassador. This is conceding very much, seeing that it is difficult to imagine an ambassador to Australia. But what is the principle of the immunity of an ambassador? We need refer to three cases only, as they are very recent—*Musurus Bey v. Gadban*, (1894) 2 Q.B. 542; *Republic of Bolivia Syndicate*, (1914) 1 Ch. 139; and *In re Suarez*, (1918) 1 Ch. 176. In the first mentioned case A. L. Smith, L.J., quotes with approval from Lord Campbell's judgment in the *Magdalena Case*, 2 E. & E. 94, that an ambassador "is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed to be in his own country." Davey, L.J. (at p. 361), quoting from the *Parlement Belge*, 5 P.D. 197, says—"As a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within the jurisdiction."

There is nothing in the Constitution to prevent the Court from observing in a proper case the respect due to the independence and dignity of foreign nations on the principle of what is called international comity—see, *per* Lord Shaw, in *Lecouturier v. Rcy*, (1910) A.C. at p. 266; and Westlake on *Private International Law* (6th ed.), pp. 256 and following folio. But what possible analogy is there between such a case, where person and property are juridically deemed to be outside the territory and beyond the territorial jurisdiction of the local Courts—and the case of an Australian State, an integral and necessary part of the territory of the Commonwealth in relation to this Court? New South Wales is not a foreign country. The people of New South Wales are not, as are, for instance, the people of

France, a distinct and separate people from the people of Australia. The Commonwealth includes the people of New South Wales, as they are united with their fellow Australians as one people, for the higher purposes of common citizenship, as created by the Constitution. When the Commonwealth is present in Court as a party the people of New South Wales cannot be absent. It is only where the limits of the wider citizenship end that the separateness of the people of a State as a political organism can exist. To appeal to the analogy of an entirely foreign independent State is to appeal to an impossible standard. And again, this Court is not a foreign Court. It is the tribunal specially created by the united will of the Australian people as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and obligations, springing from the Constitution and the laws made under it, matters which concern the Commonwealth as the organisation of the whole population of this continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth. Besides these Federal functions, this Court has by the Constitution an appellate jurisdiction, which extends to the interpretation and enforcement of purely State laws, unrelated to any Federal consideration. In this aspect it is as truly an appellate Court for each State as if it were competently created for the purpose by State or Imperial legislation. How in the face of these considerations can there possibly be any logical resemblance between the case of an independent sovereign or his representative at the bar of the Court of a foreign country, and the position of a State of Australia at the bar of this the highest Australian tribunal? The second fallacy in the defendant's argument is in the use of the expression "sovereign State" in relation to a State of Australia. Before the great struggle of the American Union for existence, costing uncounted lives and treasure, that expression was not uncommon in the United States, and that despite the warning given by Mr. Justice Story in his work on *The Constitution*. He says—"In the first place, antecedent to the Declaration of Independence, none of the Colonies were, or pretended to be, sovereign States in the sense in which the term 'sovereign' is sometimes applied to States. The term 'sovereign,' or 'sovereignty,' is used in different senses, which often leads to a confusion of ideas, and sometimes to very mischievous and unfounded conclusions"—paragraph 207. The conclusion to which we were invited to come in interpreting the Constitution upon the assumption that New South Wales is a "sovereign State," would be both mischievous and unfounded. The term "sovereign State" as applied to constituent States is not strictly correct, even in

America, since the severance from Great Britain—see *Story*, par. 208. Still further from the truth is it in Australia. The appellation "sovereign State," as applied to the construction of the Commonwealth Constitution is entirely out of place, and worse than unmeaning.

This Court has recently, in the *Amalgamated Society of Engineers v. Adelaide Steamship Company Limited*, 26 A.L.R. 337, stated the true method of interpreting the compact made by the people of Australia in founding their wider citizenship. That method is to ascertain the true meaning of its language as applied to the subject-matter. We applied the standard, universal in British Courts, by giving effect to the actual bargain made with all its mutual rights and obligations, as they are stated on the face of the instrument. Applying now the same method of interpretation, by allowing the words of the Constitution to speak for themselves, it is difficult to see how any real doubt can exist.

Section 75 of the Constitution is explicit. It says—"In all matters (i.) arising under any treaty (ii.) affecting consuls or other representatives of other countries (iii.) in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party (iv.) between States or between residents of different States or between a State and a resident of another State (v.) in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction."

What can be plainer? "In all matters" (and this is one) "in which the Commonwealth is a party" (and this is such a matter) "the High Court shall have original jurisdiction." How, without direct violence to these explicit words, can it be contended then that this Court has not in this case "original jurisdiction?" We put aside, for reasons already given, the contentions as to "foreign Sovereigns" and "sovereign States," and take up the other grounds of contest. Section 78 says—"The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power." The exercise of that power, it is said, is a condition precedent to the suability of a State in the High Court in original jurisdiction. That is an error which it is not difficult to detect. There is undoubtedly in our Common Law a principle that the Sovereign cannot be sued in his own Courts. A tort by the Sovereign is impossible by the Common Law; the fault, if any, being attributed to the subject who actually committed or authorised it, the Sovereign being assumed never to authorise a breach of the law. A contract or deprivation of property is open to redress by means of a petition of right, when by consent of the Sovereign justice is done.

But there is also another principle in our Common Law, that the Sovereign may always sue in his own Courts—see *Bradlaugh v. Clarke*, 8 A.C. at 360. Even apart from Statute, the Crown may in some instances sue in one right and defend in another—see *Williams v. Attorney-General of New South Wales*, 19 A.L.R. 378, and *per Privy Council*, (1915) A.C. at page 580. Obviously the matter was one to be dealt with by the Constitution, which created mutual rights and obligations between Commonwealth and States, and foresaw the necessity of some tribunal, not the judicial organ of any one State exclusively, to determine or finally determine possible disputes between Commonwealth and States, and between different States, and between States and residents of other States. As to these the Constitution at once enacted sec. 75 as a self-executing provision in the terms mentioned. The words "in all matters" are the widest that can be used to signify the subject-matter of the Court's jurisdiction in the specified cases. "Matters" read with the context and in relation to "judicial power" are limited by the inherent sense of matters which a Court of law can properly determine, that is by some legal standard. In *State of South Australia v. State of Victoria*, 17 A.L.R. 206, this point was fully expounded at pp. 211 and 212 (Griffith, C.J.), 223 (Barton, J.), 224 (O'Connor, J.), 227 and 229 (Isaacs, J.), 237 (Higgins, J.).

The word "matters" is certainly wide enough to include the words which formed the basis of decision in *Farnell v. Bowman*, 12 A.C. 643. At page 648 the Privy Council, referring to the words in sec. 2 of the Act, namely—"Any person having or deeming himself to have any just claim or demand whatever against the Government," say—"These words are amply sufficient to include a claim for damages for a tort committed by the local Government by their servants." Their Lordships made some valuable observations showing why they considered those earlier words should not be restricted by the maxim "the King can do no wrong." They referred to the circumstances of local Governments as pioneers of improvements and to the consequential difference of circumstances when compared with those in England, and to the "greater hardship" that would arise here from the strict application of the maxim. Again, reference is made to a recital as to the reasons inducing the Legislature to pass the earlier Act afterwards amended, and their Lordships say—"It could not, therefore, have been intended to limit the operation of the Act to cases in which the subject had a remedy by petition of right. The very object of the Act was to give a remedy in cases to which a petition of right did not extend. Why, then, should it be supposed that the Legislature intended to exclude cases of tort? Justice requires that the subject should have relief against the Colonial Governments for torts, as

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"well as in cases of breach of contract or the detention of property wrongfully seized into the hands of the Crown. And when it is found that the Act uses words sufficient to embrace new remedies, it is hard to see why full effect should be denied to them."

It is true that their Lordships went on to state further reasons, confirming the conclusion just stated, and those further reasons included a reference to sec. 3, in which the rights of the parties were declared to be as between subject and subject. But the earlier reasons are the broad main reasons, and are sufficient in themselves. They amount to saying that, notwithstanding the Common Law maxim, plain words of a Statute expressly dealing with actions against the Crown, are not to be cut down from their full signification where the nature of the Statute requires for its proper and just effect that their full sense should be retained.

Applying that principle, is it not obvious that the Constitution would fail greatly in effect if the word "matters" were not considered to include even "torts?" In other words, if they were not considered to include all claims for infringements of legal rights of every kind, all claims referable to a legal standard of right. The word would, without question, include a claim for breach of contract. Why should it not include a breach of some constitutional declaration of right or duty created by the very instrument containing sec. 75? For instance, sec. 90 forbidding States imposing Customs laws or granting bounties on the production or export of goods after uniform Customs duties were imposed by the Commonwealth. Suppose a State proceeded to raise a military force, contrary to sec. 114, or suppose the Commonwealth imposed a tax on the property of a State, or suppose the Commonwealth proceeded to make a railway in a State without that State's consent. In any of those cases is it possible to think that sec. 75 of the Constitution was not intended to enable the complaining party—whether Commonwealth or State—to approach the High Court for redress? And if so, where is the room for the maxim at all in sec. 75, in view of this new constitutional situation? The truth is that the King, in his Imperial Parliament, in passing the Constitution, preserved the doctrine of the indivisibility of the Crown that applies throughout his dominions, but also recognised the divisibility of the powers of the Crown in respect of self-governing units of the Empire. In distributing powers, and providing for their respective spheres of application, and the effect of possible conflict, specific provision was also made by means of sec. 75, for the Royal power of administering justice through the High Court in the cases mentioned, so that the new political relations established for Australians should, in case of controversy, be effectively determined. In a much higher degree, and with a vastly greater force, can these considerations be applied to sec. 75, so as to preserve the full

meaning of the word "matters" in sec. 75, than could the important, but less far reaching considerations, mentioned in *Farnell v. Bowman* (*supra*) be applied to the phrase there in question. Further, if the word "matters" does not include tort, then nowhere is it included.

If it be said that it does include torts, but that torts have to be additionally dealt with, the question at once arises: "Under what provision of the Constitution can a State be made liable for torts?" It is, of course, unthinkable that a State can defeat sec. 75 by declining to be liable for its torts against Commonwealth or another State. It was, however, suggested that sec. 78 enabled the Federal Parliament to declare either the Commonwealth or a State liable for torts. That would be at best a very one-sided provision. It would enable the Commonwealth to render a State liable to the Commonwealth, and to refuse a reciprocal liability. It would also enable the Commonwealth to make one State liable to another, and leave that other irresponsible to the first. In short, there would be no certainty of equal and indiscriminating responsibility to obey the law or make reparation. The always present duty of the Crown to abide by and obey the law—*Eastern Trust Co.*, (1915) A.C. at 759, would be one of imperfect obligation except so far as the Commonwealth chose to impose a perfect sanction. But in truth, sec. 78 has no such ambit or purpose.

Approaching the matter once more from the standpoint of sec. 75, we see that, as to the cases there set out, wherein the Commonwealth and the States are specifically mentioned, it is plain those organisations are bound, that is, the Crown in right of them is bound. But that was not a provision that covered all possible cases. As to the Commonwealth, it was complete so far as original process in the High Court was concerned. As to all cases of controversies, in which there might be the element of conflicting interests politically considered, an opportunity was definitely created of invoking the jurisdiction of a tribunal independent of any State, and so placed as to tenure as to be specially secure, even in relation to the Commonwealth. But the Constitution itself gave no right to anyone, whether State or individual, to proceed against the Commonwealth in any other Court, whether a Federal or a State Court. As to States, it gave no right to any of the residents of a State to sue that State, either in the High Court or any other Court. There was not the same apparent necessity. Much ground remained to be covered within the ambit of the judicial power of the Commonwealth before there existed the same facility of suing the Crown, as exists in most of the States, within their own jurisdiction. To this sec. 78 is directed; and by that section the Commonwealth Parliament is empowered to confer in respect of all matters within the Federal judicial power, rights to proceed that are not already conferred by sec. 75. Observe the word

is "rights to proceed." It is not "the right to proceed," which is really the sense which the defendant's argument applies to sec. 78. We do not read sec. 78 as directed to mere procedural regulations, which affect not any right to proceed, but the method of procedure. That is covered by other sections, as, for instance, sec. 51 (xxix.). But we do read it as merely supplementary to what the Constitution, so far as sec. 75 extends, did for itself in relation to the matters there mentioned. It enables the Commonwealth Parliament, if it thinks right, to do the same in other matters within the judicial power. But it does not enable the Commonwealth to subject a State to liability for tort in cases within sec. 75. That is not its function. The Constitution assumes that a right to proceed, either under sec. 75 of its own force, or under sec. 76 by force of sec. 78, connotes an effective procedure. The various sections of the "Judiciary Act" which were referred to in argument thus fall, at all events for the most part, into their appropriate places. But it is profitless to pursue them in detail, except to say that none of them provides for the Commonwealth suing a State. The word "person" (even if sec. 22 of the "Acts Interpretation Act 1901" be assumed to include Commonwealth and State as a body politic, unless the contrary intention appears, as to which we say nothing) does not include either of them in the relevant sections in the "Judiciary Act," because the contrary intention plainly appears.

Unless, therefore, sec. 75 of the Constitution embraces this case, the action cannot stand. But sec. 75 needs no Parliamentary enactment to include this case. The jurisdiction conferred by sec. 75 is beyond the power of Parliament to affect. It can aid it and direct the method of its exercise, but it cannot diminish it. The Court needs no actual consent of Commonwealth or State to the exercise of this jurisdiction. The High Court, for the purposes there set out, is the King's Court, to which His Majesty has entrusted the duty of judicial determination in the cases specifically enumerated. It is unnecessary, and in a sense irrelevant, to refer to American decisions as to the suability of States of the United States. But whatever the hesitation of the Supreme Court in America with respect to such jurisdiction in earlier years, it appears to be now a definitely settled doctrine, resting on constitutional provisions certainly no clearer than our own, that both the United States and the States themselves, are subject to the jurisdiction of the Court. The pertinent cases are: As to the States—*United States v. Texas*, 143 U.S., p. 621; *Oklahoma v. Texas* (in 1920), 256 U.S., at p. 86. As to the United States—*Minnesota v. Hitchcock*, (1902) 185 U.S. 373; *Kansas v. United States*, (1906) 204 U.S., at p. 342. And see Willoughby on *The Constitution*, vol. II., p. 1058.

The summons, therefore, ought in our opinion to be dismissed.

HIGGINS, J.—An action has been brought by the Commonwealth in the High Court for damages against the State of New South Wales—damages occasioned by a collision between a steamship belonging to the State and a motor-launch belonging to the Commonwealth. The State entered a conditional appearance, denying the jurisdiction of this Court to entertain the action against the defendant State without its consent. The State is the King acting by one set of agents; and the Commonwealth is the King acting by another set of agents; and, except by virtue of some Act of the British Parliament, the King cannot sue himself or be sued by other persons, either in contract or in tort. An action for collision is an action of tort.

But by sec. 78 of the Constitution power is given to the Federal Parliament "to confer rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power." If there is a right to proceed against the State for this collision it must be by virtue of an Act of the Federal Parliament passed under this section of the Constitution. Before examining the Federal Act—the "Judiciary Act"—however, it is necessary to consider sec. 75 of the Constitution, which, it is contended, gives a right, without the aid of sec. 78, for the King in right of the Commonwealth to sue the King in right of the State—to sue him for a tort, for a wrong done by the King, even though (apart from Statute) "the King can do no wrong."

Section 75 of the Constitution provides—"In all matters (i.) arising under any treaty (ii.) affecting consuls or other representatives of other countries (iii.) in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party (iv.) between States or between residents of different States or between a State and a resident of another State (v.) in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth the High Court shall have original jurisdiction."

Now, this section does not change the substantive law; it is a mere procedural section. If there is a matter to be tried the High Court can try it, that is all; and the position remains untouched that, without statutory authority, the King cannot sue himself (it is a contradiction in terms), nor can one agent of the King sue another agent of the King. If a case were to arise, such as the Admiralty claiming for a naval dockyard *jure coronae* the same land as claimed for a charity under some will, I have no doubt that a Court of Chancery would find a means to have both interests of the King properly represented in argument—*cf. Attorney-General v.*

STATE OF NEW SOUTH WALES v. COMMONWEALTH.

Dean, &c., of Windsor, 8 H.L.C. 369; but such an exceptional case does not justify the inference that the same party can be both plaintiff and defendant in an action for damages. Section 75 does not create a new cause of action, or make a matter justiciable which is not justiciable otherwise. Under placita (i.) and (ii.), if there is a justiciable matter arising under a treaty or affecting consuls, the High Court may try it; under placitum (iii.), where there is a justiciable matter to which the Commonwealth is a party, the High Court may try it; under placitum (iv.), where there is a justiciable matter between States or between a resident of one State and a resident of another, the High Court may try it; under placitum (v.), where a *mandamus*, &c., would be a proper remedy, as between subject and subject, and the claim for a *mandamus*, &c., is a justiciable matter, the High Court may try the claim. It so happens that here the action for collision is an action in tort, and there is another constitutional principle to be faced—that the King can do no wrong; and there can be no action against him for a tort (without statutory authority). In most of the Australian States, I understand, there are Statutes authorising actions against the King in right of the State either in contract or in tort; in Victoria there is a right to petition the King in contract, not in tort.

There is a great gap between this sec. 75, giving jurisdiction to the High Court to try a justiciable matter, and the giving of a right to one agent of the King to sue another agent. As a learned writer (Dr. Baty) put it, in the *Harvard Law Review* (June, 1921, p. 846)—“The Government of the colony is simply the King acting by a particular set of agents. The suit of one colony by another would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by (against ?) the Board of Agriculture because men who might be soldiers were kept to work at the harvest.” Of course, I reject the argument used by Counsel for the State, that the State is to be treated as if it were a foreign country, or as if it were “sovereign.” I have in other cases commented on the misapplication of the word “sovereign” to the States of the Commonwealth. As the same writer stated, in the same passage, “we forget that the colonies are not sovereign; not even (unless the Versailles treaty has worked a change) *mi-souverain*.” But the failure of this argument does not in the least afford an answer to the claim made in the summons to stay proceedings in this action, if the gap to which I have referred be not filled. But the gap can be filled by sec. 78 of the Constitution, and the Commonwealth Parliament. Section 78 leaves to the Federal Parliament the power “to confer rights to proceed against the Commonwealth or a State.”

If there were need of authority, it is to be found in the case of *South Australia v. Victoria*, 17 A.L.R. 206. It was an action between two States as to their boundary, and the defendant urged that the action did not lie. The majority of the Court treated the claim as a claim for property and possession or trespass. Griffith, C.J., said—“In substance the Sovereign, as head of the body politic of the State of South Australia, is plaintiff, and as head of the body politic of Victoria, is also defendant. . . . So far, therefore, as a controversy requires for its settlement, the application of political, as distinguished from judicial, considerations, I think that it is not justiciable under the Constitution.” “Matters,” in sec. 75, are confined to matters which might come before a Court of justice—as, for instance, running agreements over railways. “A matter between States, in order to be justiciable, must be such that a controversy of like nature could arise between individual persons, and must be such that it can be determined upon principles of law. . . . In trespass by one State upon territory in the *de facto* possession of another, I have no doubt that this Court would have jurisdiction.” The late Barton and O'Connor, JJ., concurred. The latter defined “matters” in sec. 75 as “matters capable of judicial determination.” Isaacs, J., said that the word “matters includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject.” As for myself, I doubted whether there was any cause of action, as the State was not proprietor of the lands, but only donee of a power over them; but I concurred with the view that the High Court had power to entertain the action under sec. 75, and to give some judgment in favour of the plaintiff, if the plaintiff had a cause of action. “Under the Constitution it is our duty to give relief as between States in cases where, if the facts had occurred between private persons, we could give relief on principles of law, but not otherwise.” In short, to give jurisdiction to a particular Court over actions or matters of a certain character is not to make a matter actionable or justiciable if it is not otherwise actionable or justiciable under some law to which the parties are alike subject; and the King in right of one State is not subject to any law binding him in right of another State, or of the Commonwealth, unless by force of some positive enactment; and sec. 78 was designed to supply such an enactment through the Federal Parliament. Section 78 has authority equal to sec. 75, and sec. 75 is to be read in the light of sec. 78.

This case of *South Australia v. Victoria* was taken to the Privy Council on appeal, and was affirmed on the merits; but, according to the report of the arguments, Counsel for the State of Victoria did not again raise its point that the action did not lie. The decision of the High Court that the action did lie, therefore, remains undisturbed.

I pass on now to consider how the Federal Parliament has made use of its power under sec. 78 of the Constitution—what laws it has made "conferring rights to proceed against the Commonwealth or a State." To this end Part IX. of the "Judiciary Act" was enacted in 1903, headed "Suits By and Against the Commonwealth and the States." Section 56 enables "any person making any claim against the Commonwealth whether in contract or in tort" to bring a suit "against the Commonwealth in the High Court or in the Supreme Court of the State in which the claim arose;" but sec. 57 provides what I regard as an exception—that where a State makes the claim—against the Commonwealth—the suit may be brought in the High Court. There is no power for a State to sue the Commonwealth in the Supreme Court. So far as to suits against the Commonwealth. Then sec. 58 enables "Any person making any claim against a State whether in contract or in tort in respect of a matter in which the High Court has original jurisdiction [sec. 75] or can have original jurisdiction conferred on it" [sec. 76] to "bring a suit against the State in the Supreme Court of the State or (if the High Court has original jurisdiction in the matter) in the High Court;" but sec. 59 provides what again seems to be an exception, that where a State makes a claim against another State it may bring the suit in the High Court. It is clear that secs. 58 and 59 are mutually complementary, dealing with suits against a State, just as secs. 56 and 57 are mutually complementary dealing with suits against the Commonwealth. The only question is, do the words "any person," in sec. 58, include the Commonwealth as a plaintiff against a State? Now, at the time that the "Judiciary Act 1903" was passed the "Acts Interpretation Act 1901" was on the Statute Book; and, by sec. 22 thereof, it was enacted that—"In any Act unless the contrary intention appears 'person' shall include a body politic or corporate as well as an individual." *Primâ facie*, therefore, the Commonwealth can bring an action against a State "unless the contrary intention appears." Where does the contrary intention appear? Counsel for the State here rely on the special provision as to State suing State contained in sec. 59, and say that that special provision is useless if "any person," in sec. 58, includes bodies politic under "any person." But this sec. 59, as to State suing State, is probably due to the special provision in sec. 75 (iv.) of the Constitution giving the High Court jurisdiction in matters "between States;" and, having exhausted the provision of sec. 75 (iii.) as to suits to which the Commonwealth is a party, it may well have been thought necessary to make it clear that suits between States are to be brought in the High Court only. It may well have been thought that no Court but the High Court should have the formidable power to grant and enforce an injunction against the State and its officers (sec. 60). But, whatever the explanation, sec. 61

allows the name of the Commonwealth to be used in "suits on behalf of the Commonwealth," just as sec. 62 allows the name of the State to be used in suits on behalf of the State; and there is no limitation of sec. 61 to suits on behalf of the Commonwealth against individuals. That Parliament had the widest definition of "person" in mind when it framed Part IX. appears also from sec. 67, taken with sec. 65; for whereas sec. 65 forbids execution against property of the Commonwealth or of a State, sec. 67 provides for such execution when in any suit a judgment is given in favour of the Commonwealth or of a State and against "any person." It can hardly be contended that "any person," in sec. 67, does not include bodies corporate, such as limited companies.

The heading of Part IX., too, "Suits By and Against the Commonwealth and the States," favours the view that the Commonwealth can sue the States as the States can sue the Commonwealth. Unless "any person," in sec. 58 includes the Commonwealth there is no provision whatever in Part IX. enabling the Commonwealth to sue the States, although the States can sue the Commonwealth; and we should not act on such an absurd conclusion unless forced to it, "unless the contrary intention appears." The contrary intention must "appear," not be matter of surmise.

In my opinion, therefore, the Commonwealth is enabled to bring this suit by the "Judiciary Act," and the summons to set aside the service of the writ or to stay proceedings should be dismissed.

*Application dismissed,
with costs.*

[Solicitors—For the applicant, Crown Solicitor for New South Wales; for the respondent, Commonwealth Crown Solicitor.]

H. V. E.

FULL COURT — (Knox, C.J., } May 22.
Higgins, Rich and Starke, JJ.) } April 6, 9;
(Sydney.)

THE REPATRIATION COMMISSION, Defendant Appellant v. KIRKLAND, Plaintiff Respondent.

*Prerogative — Goods of Repatriation Commission—
Hire purchase agreement — Distress for rent—
Seizure by Commission—Action for pound breach—
Exemption of Crown from distress — Relation of
Commission to Crown — Government department—
"Australian Soldiers' Repatriation Act 1920"—
Australian Soldiers' Repatriation Regulations 1919
— "Landlord and Tenant Act 1899" (N.S.W.), sec.
51.*

A returned soldier applied to the Minister for Repatriation for assistance to purchase furniture. The application was approved, and he duly executed a hire purchase agreement in the form provided under the Regulations. Certain furniture was thereupon