

foreign to my notions as to the nature of an action for deceit. It was attempted by the plaintiffs alternatively to show that there was evidence of the value of the property as a whole; that you take the contract and there you find a price fixed by the parties, and, assuming that to be a fair price for the property, you are then at liberty to say that if the representation had been true it would have been worth much more. But the fallacy of that is obvious. If you look for the price in the contract you look for the property in the contract, and the property in the contract does not include the property in respect of which the plaintiffs are claiming. Therefore, if you say that the property in the contract is sold at a fair price, that ends the matter. But if you wish to prove that the property in the contract was worth much less than stated, then to establish the damages sustained you must bring evidence to that effect. Therefore, it is perfectly consistent with the evidence given by the plaintiffs that they have suffered no loss or even that they have made a good bargain. If they have, then they have not altered their position for the worse, and consequently have failed to maintain the three essentials in an action of deceit, namely, loss occasioned by action which they were induced to take by reason of the defendants' fraud.

With regard to the question of evidence I agree with what has been already said. It seems to me that the section in question was intended to regulate the rule of law which enables a party, not to bring what I may call original evidence in support of his case, but evidence breaking down and discrediting a witness called by his opponent. It would be a singular thing if this class of evidence could be given by the defendant to contradict a witness of the plaintiff on the first part of the plaintiff's case, and should not be open to him when the plaintiff calls a witness to rebut the case made by the defendant. The object of such evidence is not to support the party's case, but to break down or discredit a witness who has given evidence on the other side. The witness may be asked whether he did not previously make a statement contrary to the testimony which he is then giving. The fact that he had done so would not be regarded as evidence for the other side on the issues in the case, but as tending to break down the evidence of the side calling the witness, so far as it depended upon the credibility of the witness. He may be asked whether he had received a bribe to give evidence. If he had, that would simply break down his evidence; or he may be asked whether he had not been convicted of some offence. These are some of the recognised means of discrediting a witness. But a proper foundation has to be laid for the contradiction by a proper cross-examination. A strong case showing that is *Hemming v. Maddick*, L.R. 7 Ch. 395. There a witness had made an affidavit on behalf of the plaintiff, and it was sought to put in a statement in writing

made by the witness to the defendant's solicitor which was alleged to be inconsistent with the affidavit. It was held that the only purpose for which such a document could be used was to discredit the witness who made it, and that, if it were used for that purpose, the witness ought to have been cross-examined, and then the document might have been put in his hand and he might have been cross-examined upon it. It seems to me that that being the law the evidence may be used at any stage of the case.

For these reasons, I agree with the judgment proposed by the Chief Justice.

Appeal allowed, with costs. Verdict for the plaintiffs on the first count set aside, and verdict entered for the defendants.

[Solicitors—For the appellants, Colquhoun and Barrett for J. A. Busby; for the respondents, Minter, Simpson and Co.] G. W. W.

FULL COURT—(Griffith, C.J.,
Barton, O'Connor, Isaacs
and Higgins, JJ.)
(Sydney.)

Aug. 2, 5, 6, 7,
8, 1907.

THE KING v. THE GOVERNOR OF THE STATE OF SOUTH AUSTRALIA.

Constitutional law—Void election of Senator—Vacancy filled by State Parliament—Refusal of Governor to issue writ for popular election—Mandamus—Governor acting as constitutional head of State—"Vacancy" in Senate—Question for Senate to decide—The Constitution (63 and 64 Vic., c. 12), secs. 13, 15, 47, 75—"Judiciary Act 1903" (No. 6), sec. 33.

Where, under section 12 of the Constitution, the Governor of a State causes a writ to be issued for the election of Senators, he acts as the constitutional head of the State and not as an officer of the Commonwealth within the meaning of section 75 (v.). Therefore, as the jurisdiction in respect of *mandamus* vested in the High Court by section 75 (v.) has not been enlarged by section 33 of the "Judiciary Act 1903," the Court has no power, in the event of a vacancy occurring in the Senate, to grant a *mandamus* to compel the Governor of the State concerned to issue a writ for a popular election.

The question whether or not there is a vacancy in the representation of a State in the Senate is, until under section 47, Parliament otherwise provides, a question for the decision of the Senate itself.

The places of three of the Senators for South Australia having become vacant by effluxion of time, a popular election was held, and three others were returned. Upon a petition presented to the Court of Disputed Returns under the "Commonwealth Electoral Act 1902," the election was declared void so far as regarded one of them, and the Parliament of South Australia, assuming to act under the provisions of section 15 of the Constitution, chose a person in the place of the Senator whose seat had thus been vacated. This choice was certified by the Governor, and the person so chosen sat and voted. Thereupon the

candidate whose election had been avoided obtained from the High Court, on the ground that the case did not fall within section 15, a rule *nisi* for a *mandamus* to compel the Governor to issue a writ for a popular election. On motion to make the rule absolute,—

Held, that a *mandamus* did not lie to the Governor to compel him to issue the writ, and therefore the rule *nisi* must be discharged.

MANDAMUS.

At the end of 1906 the seats of three of the Senators for South Australia became vacant by effluxion of time under the provisions of sec. 13 of the Constitution. An election was held in due course, and three persons, of whom the present applicant, Mr. Joseph Vardon, was one, were returned. Thereupon, one of the defeated candidates, Mr. R. P. Blundell, presented a petition to the Court of Disputed Returns, under the provisions of the "Commonwealth Electoral Act 1902," and the election was declared by Barton, J., to be absolutely void in respect of the return of Mr. Vardon. The two Houses of the Parliament of South Australia, assuming to act under the provisions of sec. 15 of the Constitution, then held a joint sitting, and chose a person to fill the place of Mr. Vardon. This choice was certified by the Governor, and the person so chosen took his seat and voted as a Senator. Mr. Vardon thereupon applied to, and obtained from, Barton, J., an order *nisi* for a *mandamus* to the Governor, on the ground that, the election having been declared absolutely void in respect of the return of Mr. Vardon, a new popular election must be held, and the Governor must issue a writ accordingly. He contended that there was no vacancy within the meaning of sec. 15 of the Constitution, and that the choice of a Senator by the two Houses was therefore a nullity.

The applicant now moved to make the rule absolute, leave being given to the Commonwealth to intervene.

Sir John Downer, K.C. (Piper with him) for the applicant.—The Commonwealth has no interest in this application, and should not have been given leave to intervene. [*Per Curiam*.—The matter is one for our discretion, and we think that in granting leave it was properly exercised.] There was no vacancy within the meaning of sec. 15. He referred to—The Constitution, secs. 1, 7, 11, 15 and 47; and to the "Commonwealth Electoral Act 1902," secs. 197 (iv.), (v.), (vi.) and 205 (iii.). Under sec. 76 of the Constitution and sec. 30 of the "Judiciary Act 1903," the Court can issue a *mandamus* in a matter arising out of the Constitution.

Sir Julian Salomons, K.C., and *Rolin* for the Governor of South Australia.—A *mandamus* will not lie, as the applicant is a mere elector, and has no interest under secs. 11, 12. They referred to—*The Queen v. Commissioners of Inland Revenue, In re Nathan*, 12 Q.B.D. 461, at p. 470; *The King v. Arndel*, 12 A.L.R. 97. Here the only party aggrieved is the State of South Australia. And in issuing a writ for

an election the Governor acts as a representative of the Crown; if he refuses to administer the law, he may be indicted as an individual or removed from his position—*Kentucky v. Dennison*, 24 How. 66; *Sutherland v. The Governor*, 29 Mich. 320; *The People v. Morton*, 156 N.Y. Rep. 136; Anson, *Law and Custom of the Constitution* (2nd ed.), vol. II., at p. 356. There is no provision in the Constitution or the "Commonwealth Electoral Act" for a popular election for one Senator, and here the vacancy arose after the Senator's term of office had begun and before its expiration, so that the case is within sec. 15. In England the office of a member of the House of Commons is regarded as becoming vacant if his election is avoided—*Stevens v. Tillett*, L.R. 6 C.P. 147; May, *Law and Practice of Parliament* (10th ed.), at p. 620; Anson, *Law and Custom of the Constitution* (3rd ed.), vol. I., at p. 162. The High Court has only the powers given it by the "Commonwealth Electoral Act"—*Holmes v. Angwin*, 13 A.L.R. 128, and no provision has been made to enable it to decide whether there is or is not a vacancy within the meaning of sec. 15 of the Constitution. They referred also to—*The Queen v. Lofthouse*, L.R. 1 Q.B. 433, at p. 440; Shortt on *Mandamus and Prohibition* (1st ed.), at p. 151; *Frost v. Mayor of Chester*, 5 E. & B. 531, at p. 539; *Rea v. Mayor of Cambridge*, 4 Burr. 2008; *Rea v. Bankes*, 3 Burr. 1452; *The Queen v. Secretary of State for War*, (1891) 2 Q.B. 326; May's *Parliamentary Practice* (10th ed.), p. 631; *The King v. Mayor of Colchester*, 2 T.R. 259; *Mayor of Rochester v. The Queen*, E. B. & E. 1024; *In re Stafford, Coroner for*, 2 Russ. 475, at p. 483; Maxwell, *Interpretation of Statutes* (3rd ed.), at p. 531. [GRIFFITH, C.J., referred to—High Court Procedure Rules, Order XLI., rr. 14 *et seq.*; Rogers on *Elections* (7th ed.), at pp. 2, 354. BARTON, J., referred to *Chanter v. Blackwood*, 10 A.L.R. (C.N.) 18. ISAACS, J., referred to *Railroad Company v. Hecht*, 95 U.S. 168, at p. 170. HIGGINS, J., referred to—*The King v. Trevenen*, 2 B. & A. 339; *Governor of Georgia v. Madrazo*, 1 Peters 110, at p. 124; *American and English Encyclopædia of Law*, vol. VI., at p. 379.]

Cullen, K.C., and *Bavin* for the Attorney-General for the Commonwealth.—The question is one of the construction of the Constitution, which cannot be affected by the "Commonwealth Electoral Act." The term "vacancy" must be construed by reference to the Constitution only, and a vacancy arises whenever the term of office of a Senator, whose name is certified, expires, or his election is declared void, or he is declared not to have been duly elected. They referred to—*In re Carter and Kenderdine's Contract*, (1897) 1 Ch. 776; *Frost v. Mayor of Chester*, 5 E. & B. 531; *The King v. Mayor of Winchester*, 7 A. & E. 215; *Bowman v. Blyth*, 7 E. & B. 26; *Linnett v. Connah*, (1902) S.R. Qd. 104; The Constitution, secs. 32, 33, 45 and 47. [ISAACS, J., referred to *In re Delgado*, 140 U.S. 586.]

Sir John Downer, K.C., and Piper in reply.—The Constitution shows that the vacancies referred to are casual or interim vacancies arising in the places of Senators who had been duly elected. But, as to the seat now in question, there never had been an election. They referred to—Rogers on *Elections* (13th ed.), at p. 241; May, *Parliamentary Practice* (11th ed.), at pp. 631, 644; *Ex parte Siebold*, 100 U.S. 371. The Court has jurisdiction to issue this *mandamus* to the Governor. When a Governor is sued, his course is to plead that his act was an act of State, and, if he fails to make out that plea, he is liable like any other individual—*Musgrave v. Pulido*, 5 Ap. Cas. 102. He has a statutory duty cast upon him here, and the performance of such a duty can be compelled by *mandamus*—*Queen v. Lords Commissioners of the Treasury*, 16 Q.B. 357. [ISAACS, J., referred to *Nireaha Tamaki v. Baker*, (1901) A.C. 561, at pp. 575, 576.] The Governor is the *persona designata* to perform this duty, and unless it can be enforced by the High Court the Constitution will become ineffective. They referred to—"Judiciary Act 1903," secs. 30, 33; the Constitution, secs. 76, 77; *Marbury v. Madison*, 1 Crouch 137; *Martin v. Hunter's Lessee*, 1 Wheat. 304. *Quo warranto* is not the appropriate remedy, as such a writ will not go to a member of Parliament, and the place is not now full, the present occupant having no colour of title—*Reg. v. Mayor of Bangor*, 18 Q.B.D. 349, 13 Ap. Cas. 241; *Reg. v. Mayor of Cambridge (supra)*; *Re Borough of Basing (Tintagel)*, 2 Stra. 1003. The Senate has no power to compel the Governor to issue a writ, while this Court has; and to so compel him would be to aid and not to interfere with Parliament. They referred to—*Stockdale v. Hansard*, 9 A. & E. 1, at p. 118; *Bradlaugh v. Gossett*, 12 Q.B.D. 271; *Harford v. Linskey*, (1899) 1 Q.B. 852.

Cur. adv. vult.

BARTON, J., read the judgment of the Court as follows:—This is an application on behalf of an elector of the State of South Australia for a prerogative writ of *mandamus* addressed to the Governor of that State, commanding him to cause a writ to be issued for the election of a Senator to fill a vacancy, which undoubtedly occurred, and which it is alleged has not been filled. The material facts are as follows:—At the end of the year 1906 the places of three of the Senators for South Australia became vacant by effluxion of time under the provisions of sec. 13 of the Constitution. An election was held in due course, and three persons were returned as duly elected. Upon a petition presented to the Court of Disputed Returns under the provisions of the "Commonwealth Electoral Act 1902" it was declared that the election was void so far as regarded one of them. Thereupon both Houses of the Parliament of South Australia, assuming to act under the provisions of sec. 15 of the Constitution, sat together and chose a

person to hold the place of the Senator whose place had become vacant; this choice was certified by the Governor, and the person so chosen has since sat and voted as a Senator. The applicant contends that the case was not within sec. 15, and that the attempted choice of the Houses of Parliament was a mere nullity. He maintains that when the election of a Senator elected at a popular election becomes ineffective for any reason, a new popular election must be held, for which purpose the Governor of the State is bound to cause a writ to be issued, and that the performance of this duty may be enforced by *mandamus*.

The respondent contends that sec. 15 applies to all cases in which there has been an election *de facto*, and that in such a case every person returned has a term of service, which may expire with the declaration of the Court of Disputed Returns that he was not duly elected. He says that, since challengeable elections become unchallengeable at the expiration of the time allowing for petitioning, an irregular election is voidable and not void, and that the words "the place of a Senator" in sec. 15 consequently mean the place *de facto* occupied, whether *de jure*, or not.

It is necessary to refer to some of the provisions of the Constitution in detail. Sec. 7 of the Constitution provides that "the Senate shall be composed of Senators for each State directly chosen by the people "of the State voting . . . as one electorate." They are to be chosen for a term of six years, and the names of the Senators chosen for each State are to be certified by the Governor of the State to the Governor-General. Sec. 9 authorises the State Parliament to make laws for determining the time and place of elections for the Senate. Sec. 11 provides that "the Senate may proceed to the despatch of "business, notwithstanding the failure of any State "to provide for its representation in the Senate." This phrase seems to suggest *prima facie* that the doings of all things necessary for giving the State its representation in the Senate is entrusted to the State itself, an idea which is emphasised by the provisions of sec. 9 just quoted. Sec. 12 provides that "the "Governor of any State may cause writs to be issued "for elections of Senators for the State." This, of course, means in any case in which the choice of a Senator is under the Constitution to be made by popular election.

Sec. 13 provides that "the term of service of a "Senator chosen in ordinary rotation shall be taken "to begin on the first day of January following his "election" (except in certain cases not now material). It was suggested that this provision is inconsistent with an election being held after the first of January to fill vacancies which ought to have been filled at an election held before that day, but we do not think that there is anything in this point. If the election ought now to be held, it should, we think, be taken to be held *nunc pro tunc* for all purposes. Otherwise

the main purpose of securing a regular rotation of Senators would be frustrated.

Sec. 15 provides that "if the place of a Senator becomes vacant before the expiration of his term of service the Houses of Parliament of the State for which he was chosen shall sitting and voting together choose a person to hold the place until the expiration of the term or until the election of a successor" as prescribed. If the State Parliament is not in Session the Governor of the State in Council may appoint a person to hold the place of Senator temporarily. In either case the name of the person chosen or appointed is to be certified by the Governor of the State to the Governor-General.

Sec. 19 provides for the vacation of a seat in the Senate by resignation, and sec. 20 for the vacation of a seat by continued absence without permission.

Sec. 45 provides for the vacation of the seat of Senator upon the arising of certain disqualifications.

Sec. 47 prescribes that "until the Parliament otherwise provides any question respecting the qualification of a Senator or of a member of the House of Representatives or respecting a vacancy in either House of the Parliament and any question of a disputed election to either House shall be determined by the House in which the question arises."

Sec. 21 provides that whenever a vacancy happens in the Senate it shall be notified by the President or by the Governor-General to the Governor of the State in the representation of which the vacancy has happened. It was not disputed in argument that a vacancy, occurring in consequence of a declaration under sec. 47 that a Senator was not duly elected, would be a vacancy within the meaning of sec. 21.

In execution of the power conferred by sec. 47, the "Commonwealth Electoral Act 1902" provided that the Court of Disputed Returns may declare that a Senator who has been returned as elected was not duly elected, or that an election was absolutely void—sec. 197. It also provided—sec. 205, sub-sec. iii.—that if the Court declares that the election is absolutely void a fresh election shall be held.

It is clear, however, that when a vacancy occurs in the Senate it must be filled in the manner prescribed by the Constitution, whatever that may be, and that the Parliament cannot by any Statute make any valid provision to the contrary. It is equally clear that the Senate could not by any exercise of its powers under sec. 47 affect the question of the proper mode of filling a vacancy, and that the powers of the Court of Disputed Returns are not more extensive. In the present case, as already stated, the decision of the Court was that the election was void as regarded one of the Senators returned. Its validity as regarded the other two was not impeached. The Court did not, therefore, in fact, declare the election, *i.e.*, the election held under the writ commanding the election of three Senators, to be wholly void. We think the form of the order

is quite immaterial. The only relevant fact is that the attempted choice of one of the three Senators, who ought under sec. 7 to have been directly chosen by the people, was ineffectual. There is no doubt then that there was a vacancy within the meaning of sec. 21. Was it a vacancy within the meaning of sec. 15? And, if not, has this Court any and what jurisdiction to rectify the alleged mistake in the mode of choosing by the issue of a *mandamus* to the Governor?

The learned Counsel for the Governor of South Australia contend that, whatever may be the proper mode of choosing a Senator under the circumstances, a *mandamus* will not lie against the Governor. The Counsel for the Commonwealth (the intervenants) further contend that no mistake has been made. We think that we are bound first to consider the objection to the jurisdiction of the Court.

The answer to the question thus raised for decision depends upon the nature of the functions and duties of the Governor of a State under the Constitution with respect to the election of Senators. The formal functions and duties of the Governor are, as already pointed out, (1) to cause writs to be issued for the election of Senators (sec. 12); (2) to certify to the Governor-General the names of Senators elected, chosen or appointed (secs. 7, 15); and (3) to receive notification of vacancies in the office of Senator (sec. 21). The object of the notification required by sec. 21 is obviously to inform the State, *quâ* State, of the vacancy, so that the State may do what it thinks necessary in accordance with the Constitution to complete its representation in the Senate. The Governor, as the officiating Constitutional Head of the State, is accordingly named as the person to whom the notification is to be given, and the notification must be regarded as addressed to him in that capacity. So, in certifying to the Governor-General the names of the Senators elected, chosen or appointed the Governor must be regarded as acting in the capacity of the Constitutional Head of the State, being in that capacity the proper channel of communication with the officiating Constitutional Head of the Commonwealth, the Governor-General. We think that he must be regarded as acting in the same capacity when discharging the function of issuing a writ for the election of Senators under sec. 12. For the purposes of the present inquiry the case may be considered as if the Governor had omitted to issue a writ for the election of three Senators to fill vacancies occurring by effluxion of time. We will assume, without deciding, that sec. 12 imposes a duty upon the Governor to issue a writ in such a case. But the question remains—To whom does he owe this duty? A somewhat analogous duty is cast upon the State Governors under the Constitutions of the States, all of which provide that upon a dissolution of the Houses of Assembly the writs for a

general election are to be issued by the Governor. It has never been suggested that if the Governor failed to issue the writs a *mandamus* would lie from a State Court to compel him to do so. There is, of course, a remedy in such a case, but it is to be sought from the direct intervention of the Sovereign and not by recourse to a Court of law. The case of an election to the Senate is not quite analogous. It is conceivable that the Executive Government of a State for the time being might desire that no Senator should be chosen to fill a particular vacancy. If they advised the Governor to abstain from taking any action to fill it, and refused to afford him the necessary administrative facilities, and he accordingly did nothing, it may be that he would have failed in his duty. But, if so, it is clear that the duty would be one which he owed to the State collectively. It is not easy to see how, in such a case, he could perform this duty without dismissing his Ministers and finding others, and that power is manifestly one the exercise of which could not be reviewed by any authority but the Sovereign. The duty, therefore, is one of the duties which the Constitutional Head of a State owes to the State (and in the case of a Governor, but in a slightly different sense, to the Sovereign), and its performance must be enforced in the manner appropriate to the case of such duties. Instances of such duties—duties of imperfect obligation—are familiar to students of Constitutional Law.

It follows from what we have said with regard to the election of Senators that, although the Governor is the person designated to bring into operation certain provisions of the Constitution which ought to be brought into operation, and which cannot be brought into operation without his action, he cannot be regarded *quoad hoc* as an officer of the Commonwealth. The States are not subordinate to the Commonwealth, and the Commonwealth Judiciary cannot command the Constitutional Head of a State to do in that capacity an act which is primarily a State function. If, indeed, this Court could in any case undertake to command the necessary steps to be taken to secure the full representation of a State in the Senate, it is not easy to see why its authority should be limited to the case when the mode of choice alleged to be appropriate is a popular election. There are in fact three modes in which the place of a Senator may be filled—popular election, choice by both Houses of Parliament, and appointment by the Governor with the advice of the Executive Council. In a case where the choice ought to be made by both Houses of Parliament it is quite clear that this Court could not command those Houses to meet and choose a Senator, and it would be immaterial whether a writ had or had not been issued by the Governor for holding a popular election. It is equally clear that the Governor could not be commanded to do an act which he can only do with the advice of the Execu-

tive Council. As, therefore, this Court would have no authority to correct by *mandamus* a mistake of one kind as to the mode of choice, it seems clear that it was not intended to have authority to interfere by *mandamus* in such matters at all.

Apart from these considerations we think that a *mandamus* will not lie to the Governor of a State to compel him to do an act in his capacity of Governor. There is, of course, no British precedent for such a writ. Reference was made in argument to the cases in which it has been held that an action will lie against a colonial Governor for wrongful acts done by him. But it by no means follows that, because a Governor is liable to an action for a wrongful act done by him to the prejudice of an individual, he is liable to be commanded by *mandamus* to repair an omission to do a lawful act.

It is settled law that a *mandamus* will not lie against an officer of the Crown to compel him to do an act which he ought to do as agent for the Crown, unless he also owes a separate duty to the individual seeking the remedy. We do not think that the Governor of a State in the issuing of a writ for the election of Senators is acting as agent for the Sovereign in this sense, since the duty imposed by the Constitution is imposed by Statute law and not by delegation from the Sovereign himself. But, as already pointed out, it is a duty cast upon him as Head of the State. And the same reasons which prevent a Court of law from ordering the Sovereign to perform a constitutional duty are applicable to a case where it is alleged that the Constitutional Head of a State has by his omission failed in the performance of a duty imposed on him as such Head of the State.

This argument is independent of that arising upon the language of sec. 75 of the Constitution. But in our opinion the Governor of a State is not, so far as regards the matter now in question, an officer of the Commonwealth within the meaning of the section. Nor do we think that the "Judiciary Act" has enlarged the jurisdiction of the Court in this respect.

For these reasons we hold that the application fails.

We refrain from expressing any opinion upon the other important and difficult question which the applicant desires to have decided. It seems to be clear that the question whether there is or is not now a vacancy in the representation of South Australia in the Senate is one of the questions to be decided by the Senate under sec. 47 "unless the Parliament otherwise provides." Parliament can, no doubt, confer authority to decide such a question upon this Court, whether as a Court of Disputed Returns or otherwise. But until the question is regularly raised for decision we reserve our opinion upon it.

Rule nisi for a mandamus discharged with costs against the applicant. Intervenants to bear their own costs.

[Solicitors—For the applicant, Minter, Simpson and Co., Sydney, for P. R. Stow, Adelaide; for the respondent, the Crown Solicitor for South Australia, the Crown Solicitor for the Commonwealth.] G. W. W.

FULL COURT—(Griffith, C.J.,
Barton and O'Connor, JJ.)
(Melbourne.)*

March 19.

BAYNE and Another v. BLAKE and Another.

Constitutional law—Relation of High Court to Supreme Court—Duty of Supreme Court to execute judgment of High Court—Refusal of Supreme Court Judge to hear inquiry ordered by High Court pending hearing of an appeal by Privy Council—Power of High Court to order Chief Clerk of Supreme Court to proceed with inquiry—Validity of "Judiciary Act 1903," sec. 37—"Commonwealth Constitution Act," sec. 5—The Constitution, sec. 51.

Section 37 of the "Judiciary Act 1903," which provides that the High Court may remit a cause, in which it has heard an appeal, to the Court of the State from which the appeal was brought for the execution of the judgment of the High Court, and that in such 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, is a valid exercise of the powers conferred by section 51 of the Constitution to make laws as to matters incidental to the execution of any power vested in the Federal judicature.

Section 37 of the "Judiciary Act" imposes a duty on the Judges of the Supreme Court of a State to execute a judgment of the High Court which has been remitted under that section to the State Court for execution.

A Supreme Court Judge has no power to stay inquiries ordered by the High Court in a remitted cause, or to defer the hearing of such inquiries pending the hearing of an appeal from the decision of the High Court to the Privy Council.

Peacock v. Osborne, 13 A.L.R. 365, applied.

Semble, where a Supreme Court Judge has refused to proceed with an inquiry ordered by the High Court in a remitted cause, the High Court has power to order the Chief Clerk or other proper officer of the Supreme Court to proceed with such inquiries as the Supreme Court should have ordered him to hold.

APPEAL from the Supreme Court of Victoria.

This was an appeal, by special leave, granted on 6th March, 1908, from an order made by Madden, C.J., in Chambers on 24th October, 1907, deferring the hearing of an inquiry ordered by the High Court on 17th September, 1906 (see 12 A.L.R. 454), until the result of the decision of the Privy Council on appeal from the said decision of the High Court had been made known. The learned Chief Justice, in making the said order, also directed the plaintiffs appellants to pay £3 3s. costs to the defendants.

The action was originally heard by Holroyd, J., who on 6th December, 1905, gave judgment for the defendants. From this judgment the plaintiffs appealed to the High Court, which on 17th September, 1906, reversed the judgment of Holroyd, J., with costs, and remitted the cause to the Supreme Court, to do therein what was right in pursuance of the judgment—see 12 A.L.R. 454. On 2nd November, 1906, the defendants were granted special leave to appeal by His Majesty in Council from the said judgment of the High Court, but the Judicial Committee declined to make any order staying execution under the judgment. On 13th November, 1906, Hodges, J., ordered that the case be adjourned until the determination of the appeal by the Privy Council or until further order, and, on 14th December, 1906, Griffith, C.J., in Sydney, also ordered a stay of all proceedings under the judgment of the High Court until further order. An application was subsequently made to Griffith, C.J., on behalf of the plaintiffs, to remove this stay, but was at first refused—see 13 A.L.R. 101. On 27th March, 1907, on further materials, Griffith, C.J., varied the order made by him on 14th December, 1906, and allowed the plaintiffs to proceed with the inquiries in the Supreme Court of Victoria, as ordered by the judgment of the High Court on 17th December, 1906, and removed the stay of proceedings so far as might be necessary to enable further inquiries to be proceeded with. On 22nd July, 1907, the plaintiffs applied to Hodges, J., to proceed with the inquiries ordered, but that learned Judge adjourned the case to a date to be fixed, and declined to hear any evidence until after the Privy Council had given its decision—see *The Argus*, 23rd and 24th July, 1907. On 27th September, 1907, Griffith, C.J., removed altogether the stay of proceedings, and the plaintiffs had execution for the costs of their judgment. On 22nd and 24th October, 1907, the plaintiffs made fresh application to Madden, C.J., to hear the inquiries, but that learned Judge, after consulting Hodges, J., also refused to proceed or to interfere with the order made by Hodges, J., in July, and dismissed the plaintiffs' application, with £3 3s. costs—see *The Argus*, 23rd and 25th October, 1907. On 5th March, 1908, an application was made to a High Court Judge in Chambers for an order *nisi* for a *mandamus* directed to the Judges of the Supreme Court to hear the case. This application was refused. The plaintiffs then applied to the Court for special leave to appeal from the orders made respectively by Hodges, J., in July, 1907, and by Madden, C.J., in October, 1907. The Court, on 6th March, granted special leave to appeal from the last-mentioned order only.

Agg (with him *Ah Ket*) for the appellants.—It was the duty of Madden, C.J., to proceed with the inquiries ordered by the High Court under sec. 37 of the "Judiciary Act"—*Peacock v. Osborne*, 13 A.L.R. 565; *Martin v. Hunter's Lessee*, 1 Wheat. 304. The High Court should now remit the matter to the Chief

* Isaacs and Higgins, JJ., having been Counsel in this case when at the bar, did not sit on this appeal.