Privy Council Appeal No. 2 of 1923.

David Ross Jamieson - - - - - - *Appellant*

v.

Frederick Joseph Thomas Downie - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 29TH JUNE, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD TREVETHIN.

[*Delivered by* LORD BUCKMASTER.]

The simple question upon this appeal is whether the right of the Crown to resist discovery in an action has been taken away by Section 4 of the Government and Crown Suits Act (No. 30) of 1897. The Supreme Court of New South Wales has decided this question in the affirmative and the Crown has appealed from their decision.

For the present purpose it is unnecessary to consider whether there are any, and if so, what, limitations and restrictions upon the general right of the Crown to resist discovery. The extent and character of that right does not arise for determination. The only point is, whatever the right be, has it been taken away. By the Act (The amendment of the Law as to Claims against the Crown Act) No. 27 of 1861, the law with regard to petitions of right was made statutory and the essential principles of the law of England affecting the matter were adopted.

Section 7 of that statute enacted that :—

"So far as the same may be applicable and except in so far as may be inconsistent with this Act the laws and statutes in force as to pleading evidence hearing and trial security for costs amendment arbitration special cases the means of procuring and taking evidence set-off appeal and proceedings in error in suits in equity and personal actions between subject and subject and the practice and course of procedure of the Supreme Court at Law and in Equity respectively for the time being in reference to such suits and personal actions shall unless the Court shall otherwise order be applicable and apply and extend to such Petition of Right. Provided that nothing in this Act shall give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

The decision in the English Courts in *Tobin* v. *The Queen* (14 C.B. (N.S.) 505) shows that the words so far as the same may be applicable do not take away the rights of the Crown with regard to pleading, and the case *Thomas* v. *The Queen* (L.R. 10 Q.B., p. 31) shows that they do not affect the right to resist discovery.

The statute was, however, repealed by No. 38 of 1876, and this in turn was itself repealed by the Government and Crown Suits Act (No. 30) of 1897.

Section 3 (1) of that Act provides that :—

"(i) Any person having or deeming himself to have any just claim or demand whatever against the Government of New South Wales may set forth the same in a petition to the Governor praying him to appoint a nominal Defendant in the matter of such petition and the Governor may by notification in the Gazette appoint any person resident in New South Wales to be a nominal Defendant accordingly."

And Sections 4 and 5 were in the following terms :—

Section 4.—"The Petitioner may sue such nominal Defendant at law or in equity in any competent Court and every such case shall be commenced in the same way and the proceedings and rights of parties therein shall as nearly as possible be the same, and judgment and costs shall follow or may be awarded on either side as in an ordinary case between subject and subject."

Section 5.—"The nominal Defendant in any case under this Act shall not be individually liable in person or property by reason of his being such Defendant."

The Statute No. 30 of 1897 was repealed by the relevant statute upon the present appeal, viz., The Claims against the Government and Crown Suits Act (No. 27) of 1912, Sections 3, 4 and 8 of which reproduce Sections 3, 4 and 5 of No. 30 of 1897.

The argument for the Crown is that as at the passing of this statute there were undoubtedly existing privileges in the Crown with regard to discovery, these rights could not be taken away except by express statutory provision or the operation of clear and necessary implication. That proposition might be accepted, but it is subject to this, that the implication may arise from the use of general words which, properly construed, will exclude the right, and this is illustrated by a decision arising under a similar statute containing provisions comparable to

those under Section 3 (1). One of the rights of the Crown is not to be liable in any action of tort at the instance of a subject. That right is not, by express provision, taken away by the statute except so far as that express provision can be gathered from general words. It has, however, been held by this Board in *Farnell* v. *Bowman* (12 A.C. 643) that the phrase "any just claim or demand whatever" includes a claim in tort as well as a claim under contract, and it consequently follows that the Act does materially affect the existing rights of the Crown.

Section 4 is again phrased in the most general way. The proceedings and rights of the parties are to be "as nearly as possible" those as between subject and subject. It is urged on behalf of the Crown that this phrase is closely allied to the phrase "so far as the same may be applicable," and that these words had been held to leave the prerogative unaffected. Their Lordships are unable to take this view. "As nearly as possible," in their opinion, refers to the fact that there is a nominal defendant representing the Crown before the Court and that there may be resulting conditions which would prevent the unmodified application of the rules and procedure as between subject and subject. Section 5 itself points to this conclusion and shows that in that respect at least the ordinary rules do not apply. Again, the fact that the statute must, in their Lordships' opinion, be taken to leave wholly unaffected the right of the Crown to refuse production of a document which in the public interest ought not to be disclosed, explains the phrase "as nearly as possible" on the assumption that the proceedings and rights of the parties include the usual rights of a litigant party to discovery. Their Lordships can see nothing in the phrase mentioned to destroy the general effect of the preceding words, which are wide enough to create the right claimed in this action, and for the same reasoning that supports the judgment in *Farnell* v. *Bowman* (*supra*) their Lordships think it is not right to limit the wide operation of the general words of the section. The Act was intended materially to change the existing rights of the Crown, and just as it has brought within its ambit actions that were hitherto not permitted, their Lordships think it has included procedure heretofore inapplicable. For these reasons, they think the judgment of the Supreme Court should be affirmed and this appeal dismissed, and will humbly advise His Majesty accordingly. As the respondent has not appeared there will be no order as to costs.

In the Privy Council.

DAVID ROSS JAMIESON

v.

FREDERICK JOSEPH THOMAS DOWNIE.

DELIVERED BY LORD BUCKMASTER

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.