H. C. OF A. 1905.

BEETHAM v. TREMEARNE.

*Appeal allowed. Order appealed from discharged, case remitted to justices with directions to convict. The respondent to pay the costs of this appeal.*

Solicitors for appellant, *Tully & McCowan.*

Solicitors for respondent, *Stephens & Tozer.*



[HIGH COURT OF AUSTRALIA.]

AH YICK . . . . . APPELLANT;
DEFENDANT,

AND

LEHMERT . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM COURT OF GENERAL SESSIONS OF THE STATE OF VICTORIA.

H. C. OF A. 1905.

MELBOURNE, *August* 2, 3, 7.

Griffith C.J. and Barton J.

*The Constitution* (63 & 64 *Vict.*, *c.* 12), *secs.* 71, 73, 75, 76, 77—*The Judiciary Act* 1903 (*No.* 6 *of* 1903), *secs.* 30, 33, 34, 39, 68, 79, 80—*Justices Act* 1890 (*Victoria*) (*No.* 1105), *sec.* 127—*Authority of Parliament to confer appellate federal jurisdiction on other Court than High Court—Whether appellate jurisdiction conferred on State Courts—Offence against Commonwealth Law—Summary Conviction—Appeal to State Court—Remedy where Court denies jurisdiction—Mandamus—Appeal.*

Where a Court of a State declines jurisdiction in a matter as to which it is invested with federal jurisdiction, the remedy is by recourse to the appellate jurisdiction of the High Court.

The federal jurisdiction which Parliament is by sec. 77 of the Constitution authorized to confer upon the Courts of the several States, and upon federal Courts other than the High Court, includes both original and appellate jurisdiction.

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Sec. 39 of the *Judiciary Act* 1903 is a valid exercise of the authority so conferred, and under it the Courts of the several States have federal appellate jurisdiction, as regards the matters enumerated in secs. 75 and 76 of the Constitution, to the same extent that, and subject to the same conditions as, under the State laws they have appellate jurisdiction in matters to which the State laws apply.

*Held*, therefore, that a person being convicted in Victoria by a Police Magistrate of an offence under sec. 7 of the *Immigration Restriction Act* 1901, and by sec. 127 of the *Justices Act* 1890 (Vict.), an appeal lying from a conviction by a Police Magistrate to a Court of General Sessions, such person may appeal to a Court of General Sessions.

MANDAMUS.

Before James Anderson Panton, Esq., a Police Magistrate, one Ah Yick was, on the information of Albert Lehmert, charged with an offence against sec. 7 of the *Immigration Restriction Act* 1901, and being convicted, was ordered to be imprisoned for fourteen days. The defendant gave notice of appeal against this conviction to the Court of General Sessions under the provisions of the *Justices Act* 1890 (Victoria). The appeal coming on for hearing before His Honor Judge Johnston, Chairman of the Court of General Sessions, objection was taken that the Court had no jurisdiction to entertain the appeal, inasmuch as the matter being one of federal jurisdiction, an appeal could only be had to the High Court. On this ground the learned Judge held that he had no jurisdiction. An order *nisi* was then obtained from the High Court calling upon the learned Judge and the informant to show cause why a writ of mandamus should not issue to compel the learned Judge to hear and determine the appeal.

*Coldham* (with him *Ah Ket*), for the defendant, moved the order absolute.

*Harrison Moore*, for His Honor Judge Johnston. The jurisdiction under which the Police Magistrate acted is conferred by sec. 68 of the *Judiciary Act* 1903. Two questions arise, whether any right of appeal was given by that Act, and if so, had the Court of General Sessions jurisdiction to entertain the appeal. Sec. 68 deals exclusively with original jurisdiction, and not with appellate jurisdiction. Sub-sec. (3) of that section is definite on

that point, using emphatic negative words, and providing that the only person who can deal with such a matter as the present, is one of the persons therein described. Sec. 72 of the *Judiciary Act* 1903 deals with appeals in cases of indictment, but if sec. 68 gives an appellate jurisdiction, it would by sub-sec. (2) (*c*) bring in the appellate jurisdiction of the State Courts as to indictments, in spite of sec. 72. By sec. 4 of the *Punishment of Offences Act* 1901, which was passed as a temporary measure until the establishment of the High Court, an appellate jurisdiction was given to the Courts of the States in such a matter as the present. It is impossible to suppose that the legislature intended the same result to follow from the totally different provisions of the *Judiciary Act* 1903. If sec. 68 has nothing to do with appeals, the appellate jurisdiction of the Court of General Sessions and the right to appeal must be sought elsewhere. Sec. 39 of the *Judiciary Act* 1903 confers certain federal jurisdiction on the several State Courts. It is in a Part of the Act distinct from that in which sec. 68 is. Part X., in which sec. 68 occurs, deals throughout with matters which are made offences by the laws of the Commonwealth, and deals with them exclusively and exhaustively. Sec. 39 deals with civil jurisdiction, and with certain criminal jurisdiction in matters as to which the State Courts would ordinarily have jurisdiction, but in which some federal matter intervenes which transfers the case to federal jurisdiction. The present offence is wholly a creature of federal Statute, and any jurisdiction as to it is given by sec. 68 and not by sec. 39. If sec. 39 did include cases like the present, it might bring into operation the whole of the State laws respecting appeals in cases of indictment, although the appellate jurisdiction in criminal matters is dealt with exhaustively by sec. 72. There is no doubt that the appellate jurisdiction contended for in the present case is within the words of sec. 39, but a consideration of other parts of the *Judiciary Act* shows that that section is not to have such a wide meaning. Sec. 39 merely deals with the transformation of State jurisdiction into federal jurisdiction; if it was intended to have the wider meaning contended for, sec. 68 would be superfluous. Even if sec. 39 gives this appellate jurisdiction, no right of appeal is given by it. Sec. 4 of the *Punishment of Offences Act* 1901 did give

H. C. OF A. 1905.

AH YICK v. LEHMERT.

that right in definite words. Unless it is given by Statute in plain words no right of appeal exists; its existence will not be presumed: *R.* v. *Justices of Surrey* (1). Sec. 39 confers original jurisdiction only, and not appellate jurisdiction. It is one of a set of sections dealing with original jurisdiction only, the appellate jurisdiction of the High Court being dealt with elsewhere. Assuming that sec. 39 is effective to incorporate the appellate provisions of the State laws and also the provisions of the State laws giving the right of appeal,—in this case sec 127 of the *Justices Act* 1890 (Vict.)—the penalty imposed by sec. 7 of the *Immigration Restriction Act* 1901 is of such a peculiar nature that it does not fall within sec. 127 of the former Act. It is more nearly like the penalty referred to in the proviso to that section. As to the power of this Court to issue a prerogative writ of mandamus, it may be that under sec. 75 (v.) of the Constitution that power only exists where the writ is sought against an officer of the Commonwealth. [He also referred to *Curtis's Jurisdiction of Courts of United States*, pp. 67, 68.]

*Cussen* (with him *Power*), for the respondent Lehmert. An appellate jurisdiction is not conferred on a Court of General Sessions by sec. 39 of the *Judiciary Act* 1903, and if it is purported to be conferred, Parliament has gone beyond its powers under the Constitution. The *Customs Act* 1901, the *Excise Act* 1901, and the *Distillation Act* 1901, all contained special provisions for appeals to the Courts of the States. Then the *Punishment of Offences Act* 1901 by sec. 4 gave an appeal to the Courts of the States as to offences against laws of the Commonwealth at a time when Parliament was contemplating the creation of the High Court. It is a reasonable inference from prior legislation, and from the terms of the *Judiciary Act* 1903, that the intention of the legislation was that the High Court should be the only Court of Appeal for offences against the Commonwealth laws. That inference should be drawn even though the terms of sec. 39 (2) of the *Judiciary Act* 1903 when read by themselves appear to give an appellate jurisdiction to the Courts of the States. Secs. 68 to 72 of the *Judiciary Act* 1903 support this

(1) 2 T.R., 504.

view. A right of appeal must be given by something like express words. Looking at secs. 75, 76 and 77 of the Constitution, forming a group of sections apart from sec. 73, which deals with appellate jurisdiction, no authority is by sec. 77 given to Parliament to invest the Courts of the States, or the Courts created by Parliament, with appellate jurisdiction. The use of the words "with respect to any of the matters mentioned in the last two sections," *i.e.* with respect to the matters in which the High Court is given original jurisdiction, shows that clearly. The meaning of those words is that Parliament may create Courts and give them power, or may invest the State Courts with power, to do what the High Court can do under secs. 75 and 76.

[GRIFFITH C.J.—Sec. 71 seems opposed to that view. It says that the judicial power of the Commonwealth, which must include appellate as well as original jurisdiction, shall be vested in the High Court and "in such federal Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction."]

That section must be controlled by the subsequent sections. Sec. 71 only deals with the creation of Courts other than the High Court, while sec. 77 provides for the matters with which those Courts are to deal. The *Judiciary Act* 1903 carries out that view. Part IV. deals with original jurisdiction of the High Court, Part V. with its appellate jurisdiction, and Part VI. deals with exclusive and with invested jurisdiction. The exclusive jurisdiction must be original jurisdiction only, and invested jurisdiction was also intended to be original jurisdiction only. In *Quick & Garran's Australian Constitution*, at p. 802, the view is taken that the invested jurisdiction includes both original and appellate jurisdiction, and *Martin* v. *Hunter's Lessee* (1) is cited in support of it. So also in *Clark's Constitutional Law*, 2nd ed., p. 168, citing *Börs* v. *Preston* (2). The views of these writers are based on American cases. No doubt under the United States Constitution a heirachy of Courts having appellate jurisdiction has been created. The language of that Constitution, however, as to the

(1) 1 Wheat., 304. (2) 111 U.S., 252.

H. C. OF A. 1905.

AH YICK v. LEHMERT.

granting of judicial power is very different from that in the Australian Constitution. [He also referred to *Holt's Concurrent Jurisdiction*, pp. 8, 156.]

[*Harrison Moore.*—What has been decided in the United States, notably in *Osborn* v. *Bank of the United States* (1), is that in those matters in which the Supreme Court has original jurisdiction under the Constitution, appellate jurisdiction cannot be conferred upon it. But if the case be one which, though in one aspect—from the character of the parties—within the original jurisdiction, is in another aspect—as arising under the Constitution or some law of Congress—within the appellate jurisdiction, the Supreme Court will not be prevented from exercising appellate jurisdiction merely because it would have original jurisdiction over the parties. That was the case in *Cohens* v. *Virginia* (2). Put shortly, the decisions are to this effect—Where original jurisdiction is granted to the Supreme Court, that Court may exercise original jurisdiction only unless there is an appellate jurisdiction *aliunde*.]

If Parliament has power to create a hierarchy of Courts, it does not follow that it will take the hierarchies of Courts existing in the several States. It may choose to give a right of appeal from a federal Court to a State Court. Without the *Judiciary Act* 1903 this Court could, under the Constitution, entertain this appeal. Sec. 39 (2) (*b*) of the *Judiciary Act* 1903, therefore, seems to be unnecessary, but if any conclusion is to be drawn from it, it supports the view that it was intended to confer only original jurisdiction. It was intended to cover appeals from decisions, not of Judges of the Supreme Court, but of Courts outside the Supreme Court. It was never intended by sec. 73 of the Constitution that Parliament might take away the appellate jurisdiction of the High Court, and give it to some other Court. That undoubtedly might be the result if the contention for the appellant were correct. Parliament might take away the whole appellate power of the High Court, except as to appeals from the Supreme Courts of the States, and might give that appellate power to a State Court. By sec. 39 (2) (*d*) of the *Judiciary Act* 1903 the persons therein mentioned are

(1) 9 Wheat., 738, at p. 820 (2) 6 Wheat., 264.

*personæ designatæ*, and come within the principle that they are not subject to ordinary appeals.

*Coldham* in reply. Parliament has power to confer an appellate jurisdiction upon the Courts of the States. The construction put by the respondent upon sec. 77 of the Constitution is too narrow. It requires the insertion of the word "original" before the word "jurisdiction" wherever it occurs in that section. Where it was intended to distinguish between appellate and original jurisdiction it has been done in specific language. The judicial power of the Commonwealth—and that includes appellate as well as original power—is by sec. 71 vested not only in the High Court, but also in such other Courts as Parliament creates, and such other Courts as Parliament invests with federal jurisdiction. If the respondent's view is correct, Parliament cannot invest either State Courts, or federal Courts of its own creation, with appellate jurisdiction. By sec. 71 of the Constitution nothing is created or done; the section is merely matter declaratory. Sec. 51 (xxxix.) gives Parliament authority to make laws as to matters incidental to the execution of any power vested by the Constitution in the federal judicature. The determination as to which of the Courts created by Parliament, or invested by it with federal jurisdiction, shall exercise original jurisdiction, and which appellate jurisdiction, is a matter incidental to the execution of a power vested by the Constitution in the federal judicature. Sec. 77 was intended to get over the difficulties which arose in the United States. The Parliament has effectively given an appellate jurisdiction in this matter to the Court of General Sessions of Victoria. The words "federal jurisdiction" in sec. 39 of the *Judiciary Act* 1903 are used in the same sense as they are used in sec. 77 of the Constitution. The intention of Parliament was that the several Courts of the States should hear and determine matters as to which they were given federal jurisdiction in the same way as they would hear and determine matters as to which, as State Courts, they had jurisdiction. The words in sec. 39 (2) of the *Judiciary Act* 1903 "within the limits of their several jurisdictions" mean within the limits of their jurisdictions as to State matters. The word "several" is applied both to Courts and jurisdictions, and indicates

H. C. OF A. 1905.

AH YICK v. LEHMERT.

the several jurisdictions of each Court. There is nothing in the section itself which suggests a limitation to original jurisdiction. It is said that sec. 39 must be limited to original jurisdiction, because secs. 34 and 35 deal with appellate jurisdiction. But those sections do not confer jurisdiction, but limit the jurisdiction conferred by the Constitution, sec. 73. The only conclusion to be drawn from Part V. of the *Judiciary Act* 1903 is in the appellant's favour. A jurisdiction to hear the appeal is conferred in this case on the Court of General Sessions. The argument that there is a presumption that no right of appeal exists unless it is given in express terms has been pushed too far.

Whether the appellant has gone to the right Court or not, he is a person who has a right to appeal: The Constitution, sec. 73. If he is such a person, why should he not go to the Court which has jurisdiction to entertain this particular class of appeals? If Parliament intended by the *Judiciary Act* 1903 to do away with the right of appeals to the State Courts in federal matters, it is curious that it should have left unrepealed those sections of the *Customs Act* 1901, the *Beer Excise Act* 1901, the *Distillation Act* 1901, and the *Excise Act* 1901, which give a right of appeal in certain matters to the State Courts. By sec. 79 of the *Judiciary Act* 1903 it was intended not only that the laws of procedure of each State, but also those laws giving substantive rights, should apply to Courts exercising federal jurisdiction. The nature of the penalty imposed by sec. 7 of the *Immigration Restriction Act* 1901 does not bring the case within the proviso to sec. 127 of the *Justices Act* 1890 (Vict.). The imprisonment is absolute in the first instance, and there is no order to find security. Mandamus is the proper remedy in this case. Sec. 80 of the *Judiciary Act* 1903, which directs that, so far as the provisions of the laws of the Commonwealth are inadequate to provide adequate remedies, the common law of England shall govern all Courts exercising federal jurisdiction, was intended for this very class of cases. Mandamus is under the common law the proper remedy in a case like this.

*Cur. adv. vult.*

August 7th.

GRIFFITH C.J. This is in form a motion to make absolute an order for mandamus directing the Chairman of the Court of

General Sessions in Melbourne to hear an appeal from a conviction by a Police Magistrate. It is in reality an invocation of the appellate jurisdiction of this Court. The granting of writs of mandamus, prohibition, and *habeas corpus* at common law may be regarded as in one sense an exercise of original jurisdiction, and in another as the exercise of appellate jurisdiction. When there is a general appeal from an inferior Court to another Court, the Court of Appeal can entertain any matter, however arising, which shows that the decision of the Court appealed from is erroneous. The error may consist in a wrong determination of a matter properly before the Court for its decision, or it may consist in an assertion by that Court of a jurisdiction which it does not possess, or it may consist in a refusal of that Court to exercise a jurisdiction which it possesses. In all these cases the Court of Appeal can exercise its appellate jurisdiction in order to set the error right. For instance, if the Court of Appeal in England were to hear an appeal from the King's Bench Division in a case in which no appeal lay, the remedy would be by appeal to the House of Lords, and that tribunal, as it has, I think, done in some instances, would allow the appeal and reverse the decision of the Court of Appeal, on the ground that it had sought to exercise a jurisdiction which it did not possess. In the same way if the Court of Appeal declined to entertain an appeal from the King's Bench Division in a case in which it could entertain an appeal, the House of Lords, as an appellate tribunal, would set it right. These considerations show that this is really an invocation of the appellate jurisdiction of this Court. It was so held in the United States in 1803 in *Marbury* v. *Madison* (1). No question therefore arises as to the validity of sec. 33 of the *Judiciary Act* 1903, which provides that "The High Court may make orders or direct the issue of writs—(*a*) commanding the performance by any Court invested with federal jurisdiction, of any duty relating to the exercise of its federal jurisdiction; or (*b*) requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess; or . . . (*e*) of mandamus." It was pointed out in *Parkin* v. *James* (2) that the jurisdiction of the High

(1) 1 Cranch., 137.

(2) 2 C.L.R., 315.

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Griffith C.J.

Court is conferred by the Constitution and not by the *Judiciary Act* 1903, and sec. 33 therefore ought not to be construed as conferring a new jurisdiction on this Court, but merely as a direction as to the manner in which its jurisdiction may be exercised. This is sufficient to show that no difficulty exists as to the jurisdiction of this Court to entertain an appeal in the present case, and that it is quite immaterial whether this motion is regarded as an application for a mandamus, or as an application for an order to the Court of General Sessions to hear the case, or as an appeal from a decision of that Court refusing to entertain the case. It follows incidentally from what I have said, that in this case an appeal lies as of right, and therefore that it was not strictly necessary to move for an order *nisi* for a mandamus, and that the proper title of the matter is *Ah Yick* v. *Lehmert*.

I pass now to the main question raised before us, which is whether the Courts of General Sessions of Victoria have appellate federal jurisdiction conferred upon them by Statute. It is not seriously in controversy that, if the offence charged in the case before us had been an offence created by State law, an appeal would lie to the Court of General Sessions. By that law an appeal to the Court of General Sessions is given from a conviction of a Court of Petty Sessions imposing a penalty exceeding £5 or a term of imprisonment, with a proviso that an appeal does not lie where imprisonment is adjudged for failure to comply with an order for the finding of sureties or for the giving of any security. The appellant in the present case was sentenced to a term of imprisonment. A point was made that, owing to the peculiar language of sec. 7 of the *Immigration Restriction Act* 1901, an appeal might not lie from a conviction under it to a Court of General Sessions. However, the argument was not seriously pressed, and I do not think there is anything in it.

Whether the Court of General Sessions had jurisdiction to entertain this appeal depends upon the terms of the Constitution and of the *Judiciary Act* 1903. The Constitution (sec. 71), provides that: "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal Courts as the Parliament creates, and in such other Courts as it invests with federal

jurisdiction." I pause there to remark that judicial power is an attribute of sovereignty which must of necessity be exercised by some tribunal, that that tribunal must be constituted by the sovereign power, and that the limits within which the judicial power is to be exercised by the tribunal must be defined. In the case of the High Court, the extent to which that Court may exercise judicial power is defined by the Constitution; in the case of other Courts it is not defined by the Constitution, and must, again of necessity, be defined by the Commonwealth law which creates those Courts or invests them with federal jurisdiction. The term "federal jurisdiction" means authority to exercise the judicial power of the Commonwealth, and again that must be within limits prescribed. Then "federal jurisdiction" must include appellate jurisdiction as well as original jurisdiction. The whole scheme of the Constitution assumes that the judicial power includes both in the case of the High Court, and from the history of the Constitution and the practice in English-speaking countries, it must be taken for granted that the judicial power was known by the framers of the Constitution to include both, and that those framers intended that the judicial power might be exercised by Courts of original jurisdiction or by Courts of appellate jurisdiction. Then sec. 73 of the Constitution defines the appellate jurisdiction of the High Court. Amongst other matters of appellate jurisdiction the High Court is authorized to hear appeals from all Courts having federal jurisdiction, "with such exceptions and subject to such regulations as the Parliament prescribes," and none have been prescribed which affect the present case. Sec. 75 defines and enumerates five classes of cases in which the High Court has original jurisdiction, and sec. 76 four others in which Parliament may confer original jurisdiction upon the High Court. In all other matters, as at present advised, I think the High Court has no original jurisdiction, and cannot, *quâ* High Court, have it. Then sec. 77 provides that Parliament may make laws—"(I.) Defining the jurisdiction of any federal Court other than the High Court," and "(III.) Investing any Court of a State with federal jurisdiction." Now, the power to create a federal Court depends upon sec. 71. The judicial power exists as an attribute of sovereignty, and, so far as it is not left to the High Court, it is for the Parlia-

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Griffith C.J.

ment to say what jurisdiction each Court shall have. Taking sec. 71 into consideration, sec. 77 (I.) means that the Parliament may establish any Court to be called a federal Court, and may give it jurisdiction to exercise any judicial power of the Commonwealth, which the Parliament may think fit to confer upon it, either by way of appellate or original jurisdiction. Sub-sec. (III.) must receive a precisely similar interpretation. Parliament may invest any Court of a State with authority to exercise federal judicial power, again to the extent prescribed by the Statute. There is nothing to restrict that judicial power to original jurisdiction any more than to appellate jurisdiction, and there is no reason why there should be a restriction. There can be no doubt that Parliament might think fit to invest one Court exclusively with original jurisdiction, another with appellate jurisdiction, and another with both. There is nothing to limit that power. Any power that falls within the words "federal jurisdiction" may be conferred on any Court which Parliament thinks fit to invest with federal jurisdiction.

Those being the powers of Parliament, we come next to sec. 39 of the *Judiciary Act* 1903, in which Parliament attempted to exercise its powers, and the question is, what is the effect of that enactment? There is no doubt that sec. 39 is framed for the purpose of exercising the powers conferred by sec. 77 of the Constitution. The words of sec. 39 (2) are:—"The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions." In the first place it is to be remarked that the words "in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it," are mere words of reference to the matters enumerated in secs. 75 and 76 of the Constitution. With respect to those matters, and those only, the several Courts are invested with federal jurisdiction. The circumstance that the words "original jurisdiction" are used twice in sec. 39 of the *Judiciary Act* does not in any way

limit the subject of the power—the words are mere words of reference. We start then with this,—as to the nine classes of cases enumerated in secs. 75 and 76 of the Constitution the several Courts of the States are invested with federal jurisdiction. I have already pointed out what "federal jurisdiction" means. But the jurisdiction with which those Courts are invested is qualified by the words "within the limits of their several jurisdictions." The enactment is general and applies to all the Courts of all the States. Some of the Courts of the States have original jurisdiction only. Two at least of those Courts have appellate jurisdiction only. A great many have both original and appellate jurisdiction. This enactment relates to all the Courts of the States, and may be read as if all those Courts were enumerated. Let us take the Court of General Sessions of Victoria and apply the section to this Court, and it will read thus:—"Courts of General Sessions of the State of Victoria shall within the limits of their jurisdiction be invested with federal jurisdiction in all matters enumerated in secs. 75 and 76 of the Constitution." Then we have to inquire what is the jurisdiction of Courts of General Sessions in Victoria? On that inquiry we find that they have both original and appellate jurisdiction. Why should it be said, when those Courts can exercise the judicial power of the Commonwealth within the limits of their jurisdiction, that it is to be limited to original jurisdiction, and is not to include appellate jurisdiction? I can see no sufficient reason for so limiting the words. In my judgment, sec. 39 confers authority on each State Court to exercise the judicial power of the Commonwealth in the enumerated classes of cases, as to all such matters as are in other respects within the limits of its jurisdiction as defined by the State laws by which it is established. And I think that that authority is conferred to the same extent, and for the same purposes, and is to be exercised in the same manner, as if the Court had been established as a federal Court with jurisdiction to exercise the federal judicial power to the extent, and for the purposes, for which it was actually established. That being so, it appears to me that, on the plain words of sec. 39, the Court of General Sessions had authority to exercise its appellate jurisdiction, and to hear the appeal from a Police Magistrate, with regard to an offence against the *Immigration Restriction Act* 1901. That

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Griffith C.J.

appears to me the literal construction of sec. 39, and it is impossible to arrive at any other conclusion without imposing a limit upon the words which is not to be found within the section itself.

Reliance, however, has been placed upon previous legislation. An Act called the *Punishment of Offences Act* 1901, passed in December 1901, and which was a temporary Act, contained a provision in sec. 2 that:—"The law in each State respecting the arrest and custody of offenders, and the procedure for their summary conviction or for their examination and commitment for trial on indictment or information and for holding accused persons to bail, shall apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth committed within the State." It further provided by sec. 3 that the several Courts and magistrates of each State, exercising jurisdiction as to the matters mentioned in sec. 2, should have the like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth, with a proviso that such jurisdiction should only be exercised with respect to summary conviction or examination and commitment for trial "by a Stipendiary, Police, or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction." Sec. 4 of the Act expressly gave an appeal from any Court of a State exercising jurisdiction under the Act "to the Court and in the manner provided by the law of that State for appeal from the like convictions judgments sentences or orders in respect of persons charged with offences against the laws of that State." That Act was a temporary one, to cease to have effect upon the establishment of the High Court. It was therefore conferring federal jurisdiction of a certain class upon Courts of the States, and, as by the Constitution an appeal from the decisions of such Courts lay to the High Court, there being no High Court then constituted, the result would have been that, if sec. 4 had not existed, there would have been no practicable appeal—it would have been an appeal in name, but to a non-existent Court. It was necessary, therefore, to make provision for some appeal, and it was also natural that that provision should be temporary, because, as soon as the High Court was established, it became an appellate Court

in all these cases. Now, the *Judiciary Act* 1903 and the constitution of the High Court were contemplated and proposed before December 1901. When the *Judiciary Act* came to be passed in 1903, it was no longer necessary to provide special Courts of Appeal from summary convictions by State Courts. Whether other Courts of Appeal should be created or not was a matter for the consideration of Parliament. It might have been contented to leave appeals to the High Court, or it might have created other intermediate appeal Courts.

If the construction of sec. 39 of the *Judiciary Act* 1903 which I have given be correct, the Parliament has adopted the latter course, and has conferred upon State Courts which have appellate jurisdiction similar appellate federal jurisdiction in the enumerated classes of cases. So that no inference can be drawn from the existence of the appellate jurisdiction created by the *Punishment of Offenders Act* 1901, and the fact that the language creating that jurisdiction is not repeated in terms in the *Judiciary Act* 1903.

A stronger argument was drawn from sec. 68 of the *Judiciary Act* 1903, which, in effect, repeats the provisions of secs. 2 and 3 of the *Punishment of Offenders Act* 1901, but does not repeat those of sec. 4 of that Act. Now, if secs. 68 and 39 of the *Judiciary Act* 1903 covered precisely the same ground, there might be some force in that argument, though it would still be contrary to the accepted canons of construction to hold that, where there are two affirmative enactments in the same Act each dealing with the same matter, one is to be taken as negativing the other. But on examination it will be seen that secs. 68 and 39 probably do not cover the same ground. Sec. 39 applies only to the nine classes of cases enumerated in secs. 75 and 76 of the Constitution. Sec. 68 applies to all persons charged with offences against the laws of the Commonwealth. Now, unless it can be asserted that there can be no offence against the laws of the Commonwealth which does not fall within one of the nine classes of cases enumerated in secs. 75 and 76 of the Constitution, sec. 68 of the *Judiciary Act* 1903 was necessary. I should be very sorry to affirm that secs. 75 and 76 of the Constitution do cover every possible case of offences against the laws of the Commonwealth.

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Griffith C.J.

They cover every offence against the Statutes of the Commonwealth as they at present exist, so far as I know, but I apprehend that many cases may arise in which it will be at least doubtful whether those sections cover them. At any rate that point is not so clear as not to admit of argument. In that view sec. 68, if it was not a necessary provision, was a very wise one, in order to deal with any case which did not fall within the original jurisdiction of the High Court.

For these reasons I am of opinion that the Court of General Sessions had jurisdiction to hear and determine the appeal from the Police Magistrate, and ought to have entertained it, and therefore that this appeal should be allowed.

BARTON J. I am of the same opinion. His Honor the Chief Justice has said that this is a case of the exercise of appellate rather than of original jurisdiction. While agreeing with him, I do not for a moment say that this is not a case in which a mandamus could issue from this Court. I am not sure it was actually necessary to make the special provision contained in sec. 33 of the *Judiciary Act* 1903 authorizing the issue of writs of mandamus. It is established in the case of *Marbury* v. *Madison* (1), that, if a mandamus is sought from a Court of appellate jurisdiction, it must be shown that its grant is an exercise of appellate jurisdiction. The position is clearly stated in *Quick and Garran's Constitution of the Australian Commonwealth*, at p. 779. It is as follows:—"The principles established in *Marbury* v. *Madison* are very clear. Where a writ of mandamus is sought, the first question is whether 'the principles and usages of law' warrant the issue of a mandamus as the proper remedy in the case; and if that question is answered in the affirmative, the question remains whether the Supreme Court has jurisdiction over the parties or the subject-matter. If the mandamus is sought against a non-judicial officer, it is an exercise of original jurisdiction, and the Court can only act if the matter comes within the scope of its original jurisdiction." (That is the mandamus provided for by sub-sec. (v.) of sec. 75 of the Australian Constitution.) "If the mandamus is sought against a Court it is

(1) 1 Cranch., 137.

an exercise of appellate jurisdiction, and the Court can only act if the matter comes within the scope of its appellate jurisdiction." That represents the law as laid down in *Marbury* v. *Madison* (1). Of course it is well known that there is a difference between our Constitution and that of the United States, because in the former, original jurisdiction is by sec. 75 (v.) given to the High Court in matters in which mandamus is sought against a non-judicial officer of the Commonwealth. That case was not provided for in the United States Constitution, and hence the decision in *Marbury* v. *Madison* that mandamus to a non-judicial officer was outside the powers of the Constitution, and that therefore the Act of Congress purporting to authorize the grant of such a mandamus was not valid. That additional jurisdiction, however, being given by our Constitution, it seems to me that there is nothing in the contention that, as sub-sec. (v.) of sec. 75 gives original jurisdiction to the High Court in that particular class of mandamus, it has an exclusive effect as to other cases of mandamus. In my opinion it is clear that sec. 75 (v.) was inserted to prevent doubts from arising by reason of the decision to which I have referred, and that it has no other effect than to add a new and distinct power to the powers which the High Court inherently possesses—I mean those which are necessary to secure that any other Court created or invested with federal jurisdiction by the Parliament does not either exceed, or deny the exercise of, its jurisdiction.

Passing to the main contentions in the case, it is argued on behalf of the respondent that sec. 68 of the *Judiciary Act* deals exclusively with original jurisdiction, and not with any appellate jurisdiction, and that sub-sec. (3) of that section in particular deals exclusively and exhaustively with the jurisdiction of the enumerated persons in respect of summary convictions, &c., so telling us that it is dealing with original jurisdiction only. The words of the sub-section seem strongly to support that contention. After the provisions of sub-secs. (1) and (2) applying State laws respecting the arrest and custody of offenders, their summary conviction, their examination and commitment for trial, and their trial and conviction on indictment, to persons charged

(1) 1 Cranch., 137.

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Barton J.

with offences against the laws of the Commonwealth, and conferring upon the several Courts of the States, exercising jurisdiction in respect of those matters, a like jurisdiction in respect of offences against the laws of the Commonwealth, sub-sec. (3) provides that "such jurisdiction shall not be judicially exercised with respect to the summary conviction or examination and commitment for trial of any person except by a Stipendiary or Police or Special Magistrate," &c. The authorities indicated in that sub-section are clearly such authorities as do exercise original jurisdiction, and do not include chairmen of General Sessions, nor does their enumeration include the name of any judicial authority upon whom it might be expected that appellate jurisdiction would be conferred. That being so, it seems clear the respondent has adopted the right construction of sec. 68. But I think that one strong difference between secs. 68 and 39 is that sec. 68 does deal with matters of original jurisdiction, not necessarily only with those enumerated in secs. 75 and 76 of the Constitution, while sec. 39 goes far beyond that purpose.

The next matter to which the respondent's counsel refers is the *Punishment of Offences Act*, passed in 1901 and to cease to have effect upon the establishment of the High Court, and therefore now spent. It is pointed out that secs. 2 and 3 of that Act deal with the same matters as are subsequently dealt with by sec. 68 of the *Judiciary Act*, and in almost the same words. But sec. 4 of the *Punishment of Offences Act* 1901 clearly conferred an appellate jurisdiction on State Courts, and it is argued that the absence of such a section from the *Judiciary Act* leads to the implication that no appellate jurisdiction is in such matters conferred by the latter Act. But I am of opinion, as will be seen, that sec. 39 of the *Judiciary Act* was designedly passed to cover the entire ground of sec. 4 of the *Punishment of Offences Act*, which it was therefore unnecessary to repeat.

Coming then to sec. 39 of the *Judiciary Act*, the main subject of contest in this case, it is contended that it does not deal with the same subject-matter as sec. 68 of the same Act. The offence, it was said, was created by a Commonwealth Statute, and, even if sec. 39 deals with original as well as appellate jurisdiction, it is said that it does not give any right of appeal in

such a case as this, which has nothing to do with secs. 75 and 76 of the Constitution, and that, assuming sec. 39 (2) to embrace all the matters as to which an appellate jurisdiction is given to State Courts, it cannot be shown that there was any intention to confer this right of appeal. Let us turn to the mode in which sec. 39 is expressed. The second sub-section, which is in question here, provides: [His Honor read the sub-section and continued.] Let us consider from what source sec. 39 (2) originates. It is an exercise of the power given by sec. 77 of the Constitution. In sec. 75 of the Constitution there are enumerated the matters in which the High Court is, as soon as constituted, to have original jurisdiction. In sec. 76 there are enumerated other matters in which Parliament is given power to legislate so as to confer original jurisdiction upon the High Court. Then sec. 77, the obvious source of sec. 39 of the *Judiciary Act*, is as follows: [His Honor read the section and continued]. Sec. 39 (2) of the *Judiciary Act* is unquestionably, and upon the very face of it, an exercise of the power given by sec. 77 (3) of the Constitution to the Parliament to make laws investing the Courts of the States with federal jurisdiction. The expression of sec. 39 (2) which chiefly calls for examination is the term "federal jurisdiction," and in the absence of any context in the *Judiciary Act* or in the Constitution to explain its meaning, and, in the absence of any argument to the contrary, one may take it that it is used in that section in the same sense as in the Constitution. What does it mean in the Constitution? It is rightly pointed out that, where the United States Constitution gave, in Article III., sec. 2 (2), original jurisdiction in some matters and appellate jurisdiction in others, a grant of appellate jurisdiction in those matters as to which original jurisdiction was conferred could not be implied, and that original jurisdiction could not be implied as to those matters in which appellate jurisdiction was given. As to that there is no doubt. I do not from that derive—and I do not think counsel asked us to derive—any argument in favour of the view that the expression "federal jurisdiction" was limited exclusively to original jurisdiction. That expression must include *primâ facie* all jurisdiction within the limits of the judicial power. There may be a context in various cases of the use of that term which

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Barton J.

will limit its relation to that judicial power within which it must always be exercised. But judicial power itself, apart from any limits imposed on its application by Acts of Parliament, must be understood as including original *and* appellate jurisdiction, and the words "federal jurisdiction," used without qualification, cannot be limited to original *or* appellate jurisdiction. The context, no doubt, may furnish us with means of determining whether the federal jurisdiction granted is original, or appellate, or both, as it may be. Now, how is it in the case of sec. 39 of the *Judiciary Act*? It has been argued that the federal jurisdiction is in that section, so to say, cut down, so as to mean original jurisdiction only, by the operation of the words which follow the term, viz., "in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it." I am unable to see that federal jurisdiction, given in *matters* in which the High Court has original jurisdiction, is necessarily limited in its exercise to original jurisdiction. These words of reference do not appear to do more than define the subject matters—the classes of cases,—and to hold that they confine the federal jurisdiction to cases of original jurisdiction would not be a reasonable interpretation, unless we found something in the context which tends to show that the words are not used merely in reference to subject-matter, but also for the purpose of limiting the jurisdiction itself, and I do not find anything in the language that carries that implication. If we look at sec. 77 of the Constitution, we find some light thrown upon the matter. In that section, under which sec. 39 of the *Judiciary Act* is enacted, the opening words conferring power upon the Parliament, are, "with respect to any of the matters mentioned in the last two sections." Now, there is no doubt that, with respect to the matters referred to in those two sections, the High Court has or can have original jurisdiction only, and it is only by virtue of sec. 73 that appellate jurisdiction over the original jurisdiction exists in the High Court in those matters. But, looking at the plain language of sec. 77, it deals with matters enumerated in secs. 75 and 76, matters arising under any treaty and so on right down the category of them. Sec. 77 does not therefore limit the power of Parliament to make laws to the power of conferring original jurisdiction, but it limits

that power to the subject-matters mentioned in these two sections, 75 and 76, which is an entirely different thing. That being the scope of the authority conferred by sec. 77 for sec. 39 of the *Judiciary Act*, we have to look at the meaning of the words "in all matters in which the High Court has original jurisdiction, or in which original jurisdiction can be conferred upon it." If the limitation contended for does not exist as to sec. 77 of the Constitution, was it intended to do any more in sec. 39 of the *Judiciary Act*, by the words of reference I have last read, than to deal with the matters mentioned as subject-matters in secs. 75 and 76 of the Constitution? The words at the beginning of sec. 77 are a short form to indicate all these subject-matters, and that is also the sense of the expression used in sec. 39 of the *Judiciary Act*. It is difficult to contend that, in the words in sec. 39 used by way of description, there is any effective limitation upon the words "federal jurisdiction" in that section which is not imposed on the same words by the equivalent expression at the outset of sec. 77 of the Constitution. Pursuing the question of the effect of sec. 39, is there anything else in the terminology of it which gives force to the construction on one side or the other? It is urged on the part of the appellant that the earlier words of sub-sec. (2) of that section give considerable force to his contention. They are these:—"The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter or otherwise, be invested with federal jurisdiction." We asked some questions during argument with a view to obtain the assistance of the bar as to the sense in which the words "whether such limits are as to locality, subject-matter or otherwise," are used, and we received assistance. It may be conceded that the limits "as to locality" refer to the territorial limits of the jurisdiction of the several Courts of the States, and that the limits as to "subject-matter" may refer to such matters as pecuniary limits, and do refer generally to what is elsewhere usually denoted by the word "subject-matter" in relation to jurisdiction. But I do not find that, on the part of the respondent, the words "or otherwise" are given any effective construction. Having applied the meaning of jurisdiction as to locality and jurisdiction as to subject-matter, we are bound to give some meaning to the

H. C. OF A. 1905.

AH YICK v. LEHMERT.

Barton J.

words "or otherwise." What jurisdiction can be pointed at by these words? As far as I can see there is only one conclusion left, and that is this, that in using the words "or otherwise" it was intended to apply to the purposes of the section the whole State jurisdiction not already mentioned—the whole of the jurisdiction possessed by any Court of a State, whether that jurisdiction was civil or criminal, original or appellate. Unless we come to some such conclusion I am unable to see how effect is to be given to the whole of the phraseology of the section. Therefore, I conclude that it was the intention of sec. 39 (2) to invest the State Courts with federal jurisdiction, not only as to locality and subject-matter, but also as to quality. I am of opinion that the words "federal jurisdiction" as there used include appellate or original jurisdiction or both, as the case may be, wherever, under the laws of the State, such jurisdiction is already exercised by any of the State Courts. Therefore, I am of opinion that the contention on behalf of the appellant is right in this case, and that the Chairman of General Sessions,—who no doubt had a very difficult question to deal with—should have exercised jurisdiction, and entertained the appeal.

I wish to add that I am in agreement with the Chief Justice as to the probable reason why sec. 68 of the *Judiciary Act*, as well as sec. 39, finds a place in that Act. There was ground to be covered by the passage of sec. 68, not covered by sec. 39.

GRIFFITH C.J. It is not necessary to issue a writ of mandamus. The case will be remitted to the Chairman of General Sessions to hear and determine. The respondent Lehmert ought to pay the appellant's costs.

*Case remitted for re-hearing with costs.*

Solicitors, for appellant, *Wollaston & McComas*, Melbourne.

Solicitor, for His Honor the Judge of the County Court, *Guinness*, Crown Solicitor for Victoria.

Solicitor, for respondent, *Powers*, Commonwealth Crown Solicitor.

B. L.