[HIGH COURT OF AUSTRALIA.]

THE FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA . . . . . } CLAIMANTS;

AND

THE COLONIAL SUGAR REFINING COMPANY LIMITED AND OTHERS . . } RESPONDENTS.

H. C. OF A. 1916.

MELBOURNE, *Sept.* 5, 6, 20.

Constitutional Law—Power of Commonwealth Parliament—Validity of legislation—High Court—Exception from appellate jurisdiction—Jurisdiction conferred on one Justice—Chambers—Prohibition—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 73, 75, 76, 79—*Commonwealth Conciliation and Arbitration Act* 1904-1915 (*No.* 13 *of* 1904—*No.* 35 *of* 1915), *sec.* 21AA.

Griffith C.J., Barton, Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

The whole of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 is a valid exercise of the legislative power of the Parliament of the Commonwealth.

So *held* by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting).

Held, also by *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Rich* JJ., that the provision in sub-sec. 4 of sec. 21AA that the decision of the Justice is not to be subject to any appeal to the High Court in its appellate jurisdiction is an exception from that jurisdiction within the meaning of sec. 73 of the Constitution.

By *Isaacs*, *Gavan Duffy* and *Rich* JJ.—Sub-sec. 4 of sec. 21AA only applies to a decision of a Justice sitting in Chambers.

By *Higgins J.*—Even if sub-sec. 4 of sec. 21AA were invalid, the rest of the section would be valid; and it is the duty of the Justice before whom the application comes to proceed with the inquiry in pursuance of the words of the Act, and to leave the effect of his decision for proceedings in which the question of its effect can no longer be evaded or postponed.

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

REFERENCE.

A plaint having been instituted in the Commonwealth Court of Conciliation and Arbitration in which the Federated Engine Drivers' and Firemen's Association of Australasia were claimants and the Colonial Sugar Refining Co. Ltd. and a large number of other companies, corporations, firms and individuals were respondents, the claimants moved the High Court for a decision on the question (*inter alia*) whether an industrial dispute or any part thereof existed between the claimants and the respondents, or was threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State. The motion came on for hearing before *Gavan Duffy* J., who referred the matter to the Full Court.

J. A. Ferguson, for the applicants. If sub-sec. 4 of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 is invalid the whole section is invalid. But sub-sec. 4 is not invalid. The matter with which sec. 21AA deals is within the original jurisdiction of the High Court under sec. 75 (IV.) of the Constitution, for the parties are residents of different States. As to the locality of the organization, see secs. 51 and 52 of the *Commonwealth Conciliation and Arbitration Act*. At any rate the matter is one as to which the Parliament has conferred original jurisdiction upon the High Court under sec. 76 (I.) and (II.). The provision made by sub-sec. 4 of sec. 21AA is an exception from the appellate jurisdiction of the High Court, and is authorized by sec. 73 of the Constitution. See *Quick and Garran's Constitution of the Australian Commonwealth*, p. 742.

Mann, for the Brisbane Tramways Co. and other respondents. These respondents do not contest the validity of sec. 21AA. This Court will not determine the validity of sub-sec. 4 until the necessity for doing so arises. Sub-sec. 3 does not exclude the exercise of the jurisdiction by the Full Court or by a Justice sitting in Court. Sub-sec. 4 only applies to a Justice sitting in Chambers, as is shown by the use of the words "*the* Justice." Here the application was made to the Court by motion, and therefore sub-sec. 4 has no application and its validity need not be considered. The word "may"

in sub-sec. 3 should not be read as "must." Even if sub-sec. 4 applies to Justices or a Justice sitting in Court, the provisions of sub-secs. 1, 2 and 3 are severable from that of sub-sec. 4. Provisions conferring jurisdiction may be severed from provisions limiting the effect of a judgment when pronounced. If the validity of sub-sec. 4 has to be considered it would seem to be in conflict with sec. 75 (v.) of the Constitution, under which the High Court has power to determine on prohibition whether the Commonwealth Court of Conciliation and Arbitration is acting within the powers conferred by sec. 51 (xxxv.) of the Constitution. Prohibition will still lie to the President of the Arbitration Court notwithstanding sub-sec. 21AA, which is not aimed at taking away the right of prohibition granted by sec. 75 (v.) of the Constitution. This is not the time, however, to decide whether prohibition will still lie.

Owen Dixon (*Stanley R. Lewis* with him), for the Colonial Sugar Refining Co. Ltd. and other respondents. Sub-sec. 4 of sec. 21AA, either by reason of its construction or by reason of its invalidity, does not hinder the ultimate right to prohibition to the President of the Arbitration Court. As to the remainder of the section its validity or invalidity is a matter of indifference to these respondents.

Starke, for the Commonwealth intervening. It is in the public interest that the validity of the whole of sec. 21AA should be now determined. If sub-sec. 4 is invalid the other sub-sections are not thereby rendered invalid. Sub-sec. 4 is not a condition of the exercise of the jurisdiction conferred by sub-secs. 1, 2 and 3, but is an amplification of their provisions for the purpose of preventing an appeal, and therefore the validity or invalidity of sub-sec. 4 does not affect the validity of sub-sec. 1, 2 or 3. The validity of the judicial powers which arise out of the exercise of the legislative power conferred by sec. 51 (xxxv.) of the Constitution must be determined according to the judicial power conferred by the Constitution. Apart from sub-sec. 4 there are manifest advantages to the parties in sub-secs. 1, 2 and 3. They could get a decision as between the parties which, if not appealed from, would be binding on them. Sub-sec. 4 is not *ultra vires*. Under sec. 79 of the

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Constitution the Parliament may confer this jurisdiction upon one Justice, and sec. 73 contains ample power in the Parliament to take away the right of appeal from any Justice exercising the original jurisdiction of the High Court. It is within the absolute discretion of the Parliament to determine to what extent the appellate power of the High Court shall be exercised, and whether it shall be exercised at all. See *Willoughby's American Constitutional System*, pp. 970, 975, 976; *Durousseau* v. *United States* (1); *Ex parte McCardle* (2).

[ISAACS J. referred to *Ex parte Yerger* (3); *Cross* v. *Burke* (4).]

A decision under sec. 21AA is a decision *inter partes*. If afterwards one of the parties should apply for prohibition to the Arbitration Court, alleging want of jurisdiction on the same ground which had been already litigated under sec. 21AA, this Court, in the exercise of its discretion, would refuse the writ: *Farquharson* v. *Morgan* (5). Whether prohibition would go to a Justice acting under sec. 21AA would depend on whether he was acting as a Justice of the High Court. Prohibition does not go to the Court itself or a member of the Court or to a co-ordinate Court.

[ISAACS J. referred to *R.* v. *Bloomsbury Income Tax Commissioners* (6).]

[Counsel also referred to *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (7); *Warren* v. *Mayor &c. of Charlestown* (8); *El Paso and North Eastern Railway Co.* v. *Gutierrez* (9).]

Ferguson, in reply.

Cur. adv. vult.

Sept. 20.

GRIFFITH C.J. read the following judgment:—These matters come before us on a reference made by *Gavan Duffy* J. under sec. 18 of the *Judiciary Act*, of certain questions which arose upon applications made to him under sec. 21AA of the *Commonwealth Conciliation and Arbitration Acts*, which was added to the Acts by Act No. 18 of 1914. That section is as follows:—

(1) 6 Cranch, 307.
(2) 6 Wall., 318.
(3) 8 Wall., 85.
(4) 146 U.S., 82.
(5) (1894) 1 Q.B., 552, at p. 558.
(6) (1915) 3 K.B., 768, at p. 782.
(7) 16 C.L.R., 591, at p. 647.
(8) 2 Gray (Mass.), 84, at p. 99.
(9) 215 U.S., 87.

"(1) When an alleged industrial dispute is submitted to the Court—

(*a*) in the case of a dispute submitted to the Court by plaint —the complainant or respondent organization or association ; and

(*b*) in any other case—any party to the proceeding or the Registrar,

may apply to the High Court, for a decision on the question whether the dispute or any part thereof exists, or is threatened or impending or probable, as an industrial dispute extending beyond the limits of any one State or on any question of law arising in relation to the dispute or to the proceeding or to any award or order of the Court.

"(2) The High Court shall have jurisdiction to hear and determine the question.

"(3) The jurisdiction of the High Court under this section may be exercised by any Justice of the High Court sitting in Chambers.

"(4) The decision of the Justice on the question shall be final and conclusive, and shall not be subject to any appeal to the High Court in its appellate jurisdiction, and shall not be challenged, appealed against, reviewed, quashed, or called in question, or be subject to prohibition mandamus or injunction, in any Court on any account whatever."

Upon the matter being opened, it appeared to my brother *Gavan Duffy* that the following questions of a preliminary nature arose for determination :—

(1) Whether he had any jurisdiction to make such an order as asked, or, in other words, whether the section was a valid law within the competence of the Commonwealth Parliament :

(2) What is in law a dispute extending beyond the limits of any one State :

(3) What rules of evidence should be applied on the hearing of the application.

The foundation of the whole matter is, of course, the much debated provision of sec. 51, pl. xxxv., of the Constitution, which empowers the Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to conciliation and

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Griffith C.J.

arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

As was pointed out by the Judicial Committee in the recent case of *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1), "the burden rests on those who affirm that the capacity to pass" the Act "was put within the powers of the Commonwealth Parliament to show that this was done."

The capacity to pass laws which will operate upon an industrial dispute is made by pl. xxxv. dependent upon two questions, one a question of law—what is the meaning of the expression "an industrial dispute extending beyond the limits of any one State,"—the other a question of fact, that is, whether the facts relating to an alleged dispute are such as to bring it within the words of the Constitution properly interpreted. If an alleged dispute is not within the ambit of the power the Commonwealth cannot by any law which it passes bring it within that power, any more than a man can by taking thought add a cubit to his stature. The remedy provided by the Constitution for usurpation of jurisdiction by a judicial officer of the Commonwealth is provided by sec. 75 (v.), namely, prohibition, and no law of the Commonwealth can take away or diminish that remedy. The remedy for usurpation of legislative authority by the Parliament is provided by the Courts of law, which will refuse to give effect to a law passed without authority.

Now, the question whether a given alleged dispute is a dispute extending beyond the limits of any one State involves, as has been shown by weeks of weary litigation, a mixed question, and sometimes a difficult one, of law and fact, upon which it may almost be said *Quot judices tot sententiæ*. But there can be only one true rule of law on the subject. A case is now before the King in Council for decision which raises the whole question, but it is apparently desired that this decision should be anticipated by the decision of a single Justice without appeal.

If follows from what I have said that, if the Arbitration Court entertains an application for an award with respect to an industrial dispute which, either in fact or in law, is not within the ambit of

(1) (1914) A.C., 237, at p. 255; 17 C.L.R., 644, at p. 653.

the power of the Court, the proceedings are *coram non judice* and can be attacked by prohibition. It follows also that the Commonwealth Parliament cannot by any law take away that right.

Bearing these considerations in mind, I proceed to consider the provisions of sec. 21AA. I leave for the present some questions of construction which arise upon the first three paragraphs, and pass to the fourth paragraph, which, as Mr. *Ferguson* very properly admits, is the only one which his clients regard as conferring any substantial right worth fighting for.

What does that enactment mean? Its words are to the ordinary mind plain enough. The declaration of the Justice is to be final and without appeal, and is not to be subject to appeal to the High Court in its appellate jurisdiction or to be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition, mandamus or injunction in any Court on any account whatever. The language could not be wider, although the word "prohibition" is, of course, inapt as referring to an order of a Justice of the High Court. The intended reference is obviously to an application for a prohibition directed to the Arbitration Court and made notwithstanding the declaration. In my opinion that which the Commonwealth Parliament intended to enact was that a decision of a single Justice, both on the vexed question of law and on questions of fact, should have the effect of a judgment in rem or of a judgment on the question of status, and should be binding upon all the world: that is to say, that, whether upon the true construction of pl. XXXV. there was or was not a dispute extending beyond the limits of any one State, his decision that upon his view of the law there was such a dispute should be final and conclusive for all purposes, and as against all persons; so that, if an application for a prohibition to the Arbitration Court should afterwards be made, the High Court would be precluded from entertaining the point, and would be bound to hold that proceedings which were really *coram non judice* were, nevertheless, within the jurisdiction of the Arbitration Court. On that point I have nothing to add to what I have already said. In my judgment such an enactment is wholly invalid.

The *Judiciary Act* 1912 enacts (sec. 3) that a Full Court consisting of less than all the Justices of the High Court shall not give a decision

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Griffith C.J.

on a question affecting the constitutional powers of the Commonwealth unless a majority of all the Justices concur in the decision. It follows that, upon an application to the Full Court for a prohibition to the Arbitration Court raising the question whether a particular dispute is in law a dispute within the ambit of the powers of the Commonwealth, the concurrence of four Justices in the decision would be necessary. It is obvious that the four Justices would not be bound by the opinion, on the matter of law, of the single Justice who made a declaration under sec. 21AA (*Gray* v. *Dalgety & Co. Ltd.* (1)). The decision would, therefore, so far, be futile. I do not think that sec. 21AA can be construed as a repeal *pro tanto* of the enactment of 1912.

It is, however, suggested that par. 4 may be supported on the ground that it would be wholly inoperative and inefficacious, and that it is therefore unnecessary to declare it invalid. This contention, which is not very respectful to the Parliament, raises an important question as to the construction of sec. 21AA as a whole, with which I will afterwards deal. I will first show that the section would for all practical purposes be inoperative unless construed in the sense that would make it invalid. The supposed order would be made as an incident to a proceeding in the Arbitration Court over which *ex concessis* that Court *may* have no jurisdiction, and relating to matters which *may* not be within the ambit of the Commonwealth power. It would be, as I will afterwards show, an order in the nature of a mandamus or prohibition. Such an order cannot be relied upon as an estoppel, even as against parties who *de facto* attend the proceedings. In the next place, if the order had any such effect, it would be only as *res judicata inter partes*, and only as to the sole question determined, that is, whether the alleged dispute did, in fact, at the date of the plaint or of the order extend beyond the limits of a single State. It might, perhaps, also be an adjudication that at that date a particular person was a party to the dispute. But, for reasons already given, it could not be set up as *res judicata* as to a matter of law. Upon an application made to the High Court for a prohibition against the Arbitration Court by a person aggrieved by the award but not a party to the previous

(1) 21 C.L.R., 509.

litigation, as, for instance, by the Attorney-General of a State affected by the award, or even by a stranger so affected, it would not even be admissible in evidence. I do not think it necessary to cite authorities for these propositions, which seem to me to be elementary.

It follows that the intention of the Commonwealth Parliament as expressed in par. 4 of sec. 21AA cannot be carried into effect, for the double reason that it endeavours to bring within the ambit of Commonwealth powers matters which may be outside them, and that such an endeavour is futile.

I now pass to the question of the construction of sec. 21AA as a whole. Mr. *Ferguson*, for the claimants, contends that par. 4 is inseparable from the rest of the section, and is valid, and he says, further—and I agree with him—that if it is invalid the rest of the section would be useless. I will consider for a moment what would be the effect of the first three paragraphs of the section standing alone. The only question that could be raised under these paragraphs would be one as to the jurisdiction of the Arbitration Court. The provisions may, therefore, be regarded from one point of view as a new form of procedure, authorizing a suitor, instead of waiting to see whether the Court will or will not entertain his suit, to ask for a declaratory order to the effect that, if it does not, a mandamus will be granted, and that, if it does, a prohibition will not be granted, or *vice versâ*. This would be an entirely novel form of procedure, analogous in some respects to the old bill *Quia timet*. I am not affrighted by the objection of novelty, but I ask what would, according to ordinary rules of law, be the effect of a judgment in such a suit. For reasons which I have already given, it could not have any operation except as against the parties in whose presence it was made, and could only bind them as to the precise point determined, namely, that the Court ought or ought not to proceed to hear the suit as against them. It would be exactly analogous to an order granting or refusing a new trial, and could not have the effect of a judgment in rem or declaration of status binding upon all the world. It would therefore be useless for the purpose for which par. 4 of sec. 21AA was passed. The result would be of an entirely different nature from that of the section taken as

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Griffith C.J.

a whole. The elimination of par. 4 would, therefore, have the effect of converting the section into a substantially different enactment. In other words, par. 4 is so essential a part of the whole enactment that, if it is left out, the Parliament would in effect be declared to have enacted a law which they did not intend to enact. I think, therefore, that the whole section is invalid.

For these reasons I am of opinion that my brother *Gavan Duffy* had no jurisdiction to make the order asked for.

As to the second point submitted, it would, I think, be indecorous to answer it pending the decision of the Judicial Committee in the case now before it. If, therefore, it were necessary to answer it, this case should stand over until we have the advantage of the Committee's decision. And I cannot bring myself to believe that any member of this Court would, pending that decision, pronounce a decision with the idea of overriding any decision which the Judicial Committee may give to the contrary.

It is not necessary to answer the third question, but I think it plain that in any judicial inquiry before this Court the evidence must be taken in conformity with the ordinary rules of evidence. Sec. 25 of the *Commonwealth Conciliation and Arbitration Act* has no application to such a case.

I have not thought it necessary to deal with a question which was debated before us as to the construction of sec. 21AA with par. 4 omitted. I think the better view is that it would give jurisdiction to the High Court, to be exercised either by a Full Court or a single Justice, and, in the latter case, whether sitting in Court or in Chambers.

BARTON J. I have read and considered the judgment which has just been delivered. I agree in its reasons and therefore in its conclusions.

The judgment of ISAACS, GAVAN DUFFY and RICH JJ., which was read by ISAACS J., was as follows :—

In the result, there is only one question which the Court has to answer, namely, "Is sec. 21AA valid?" If it is valid, then an

effective order, that is, an order as effective as the Legislature intended upon a proper construction of its words, can, of course, be made.

Learned counsel on all sides found themselves unable to contend absolutely that the section was wholly invalid. On the one side, counsel for the Association urged that if sub-sec. 4 were itself invalid as an unwarranted attempt to cut down the appellate power of the High Court—which, however, he contended it was not—then, because in his view that sub-section was inseparable from the rest, it would render the whole section unlawful. He said he was impelled to say this because the section in that case would be useless to his clients. It is plain that, even if that reason of inutility were well founded—which it certainly is not,—it could not affect the Court's decision. The enactment was not passed for the benefit of any one association or class of persons. It was passed for the general benefit of the Commonwealth, and to cure an evil affecting the whole community that had manifested itself in considerable proportions and had been referred to in this Court.

Counsel for the respondents, on the other hand, so far from suggesting invalidity, gave reasons for maintaining the validity of the section. As to sub-secs. 1, 2 and 3 taken by themselves, no doubt could be suggested. Secs. 76 (I.) and (II.), 79, and 51 (XXXIX.) of the Constitution plainly support them.

As a *Quia timet* precaution, however, counsel for the respondents urged that if—contrary to their view—the true construction of sub-sec. 4 were held to be that it forbade any subsequent prohibition against the Arbitration Court for what the law would regard as an unauthorized assumption by it of jurisdiction, then the sub-section would be invalid. But even then, they maintained, the rest of the section would be good, because separable ; and all that would result would be a good and binding order in the first place, subject, however, if made by a single Justice, to appeal to the Full Court. They added that such an order even if appealable would be of great benefit to their clients and others in a similar position. Again it is to be observed that for reasons already stated, such a consideration cannot sway the Court in determining the validity of the enactment. Neither this nor any other Court has the function of considering the wisdom or usefulness of the measures that Parliament has

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Isaacs J. Gavan Duffy J. Rich J.

deliberately chosen to adopt. Whether or not they are sufficient to meet a given evil, is a question for the Legislature alone. Nor can such considerations be entertained for the purpose of conjecturing some meaning in an enactment which its words as ordinarily understood would not bear. If such an indirect approach to the meaning of any document were allowed, no form of words, however distinct, would secure them from misapprehension.

A suggestion was made by which such an indirect approach was adopted. The steps in the reasoning were these:—(1) Parliament must have meant to provide for an effective order; (2) no order can be effective unless it prevents the Court on an application for prohibition from inquiring whether there is or is not an inter-State dispute; (3) therefore sub-sec. 4 though in its literal terms confined to the order of the High Court must be construed as intended to protect an unauthorized award of the Arbitration Court when prohibition is applied for; (4) such an enactment is unconstitutional, and, being inseparable from the rest of the section, vitiates the whole. The premises, if correct, so profoundly affect the working of the Constitution that they merit the most careful scrutiny.

It is obvious that the answer to the first step is, that no assumption of parliamentary intention can be made except from what Parliament itself has said. If it be within its powers to authorize a certain order, then the Court cannot attribute to it any intention except to authorize that specific order with precisely whatever consequence, effective or ineffective, the law will attach to it. To go beyond that is to violate the very first canon of interpretation and to judge of intention by conjecturing what a writer intended to say and not by what he has said—that is, to read his mind apart from his words, instead of reading it by means of his words alone.

The second step assumes there can be no effectiveness short of that suggested. As a practical proposition both the contestant parties to this application have expressed their dissent, and we agree with them. As a legal proposition also, we are of opinion it is unsound. If a judicial decision of a Justice, not open to appeal in Australia, that an alleged dispute does or does not exist has no legal efficacy, neither has a judicial decision to the same effect of the *fullest* Bench of this Court. And if the proposition suggested

is true as to an alleged inter-State dispute, it must be equally true as to an alleged trade mark, or an offence against Commonwealth law alleged to have been committed within Australian territory.

In our opinion, the inherent fallacy in the suggestion is the failure to recognize that *what a competent Court has decided must be taken—at all events as between the parties—as true both in fact and in law, until lawfully reversed or set aside.* Of course it is correct to say that Parliament cannot determine whether a given subject matter is or is not within the Constitution. That is the function of some Court exercising the judicial power. Nor can Parliament empower a Court to determine that something which is not within the Constitution is within it. Any enactment purporting to do so—if we could imagine such an enactment—would be void. But it is equally true that the Constitution has not authorized this Court, nor could Parliament authorize this Court, to prohibit the Arbitration Court from proceeding where there is an inter-State dispute, or to prohibit any Court from exercising its proper jurisdiction. The solvent of the whole difficulty is in not forgetting the fundamental principle that the decision of a competent Court is the legal test of whether a given set of circumstances comes within the Constitution or not as an inter-State dispute. For instance, could any of the parties be permitted to say that the various instances of prohibition already granted by this Court to the Arbitration Court were contrary to the Constitution, because there was in each case, in fact, an actual dispute? What would the answer be? That which we have given, namely, the decision of this Court so long as it stands unimpeached finally decides the question of dispute or no dispute—at all events as between the litigants.

Parliament in the exercise of legislative power may validly under sec. 76 (I.) and (II.) authorize this Court to determine any judicial question there referred to in original jurisdiction. It might assign the prohibition jurisdiction under sec. 75 (v.) to one Judge. If this Court, under the authority either of sec. 75 of the Constitution or of Parliament under sec. 76, does hear and determine that the given subject matter is within or is without the Constitution, then so long as the judgment stands the law regards that question as

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Isaacs J. Gavan Duffy J. Rich J.

settled, so far at least as concerns the parties engaged in the litigation. As between them at all events the law speaks with no uncertain voice, and unquestionably with no double voice. The judicial power of the Commonwealth having in such case validly and solemnly determined that any given subject matter—whether it is a marriage or a trade mark, or a crime, or an industrial dispute is immaterial—is or is not within the Constitution, the same judicial power is not so self-contradictory or inconsequential as to say on another occasion to the same parties precisely the reverse. If it is, then it may again and again, by differently constituted Courts, disregarding entirely all prior determinations, alter its mind and its pronouncement. It might, for instance, first prohibit a Court from proceeding and, without reversing or setting aside that judgment, subsequently issue a mandamus to compel the Court to proceed. That is too obviously wrong to require comment. The principle is clear that "it is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal" (*Badar Bee* v. *Habib Merican Noordin* (1)). A distinct authority bearing directly on the present question is the *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co. Ltd.* (2). We refer particularly to the words of the learned Chief Justice at p. 257 and of our learned brother *Barton* at p. 268.

The result is that in a prohibition motion the Court, if it finds a question already finally decided by the Court itself, is precluded from entering into any further inquiry, but is bound to determine it according to its own recorded decision.

Whether a stranger would have the right to obtain a different judgment is not before us, but in view of the observations in the case last quoted it would be going far to encourage him in the belief that he would. Whether he could or could not, however, depends not on the words of the section but on general principles of law, which do not now call for decision and as to which we express no opinion.

The third step in the reasoning impeaching the validity of the section is met by the same considerations as apply to the first.

(1) (1909) A.C., 615, at p. 623. (2) 16 C.L.R., 245.

As to the fourth, which is the conclusion, it necessarily falls with the rest.

The question propounded to us must really be determined in the usual way, by first construing the enactment according to ordinary principles, and then asking whether such a provision is authorized by the Constitution. Reading the section as a whole, and reading with it the provisions of the *Judiciary Act*, notably secs. 15 and 16, its effect is that an application such as is referred to in sub-sec. 1 may be made to, and determined by, the High Court in original jurisdiction; that this jurisdiction of the High Court may be exercised by one or more Justices; that, if exercised by one Justice, he may sit either in Court or in Chambers; and that, if exercised by one Justice in Chambers, his decision is to be "final and conclusive," that is, unappealable to the High Court in its appellate jurisdiction (see *Waterhouse & Co.* v. *Gilbert* (1) and *Lyon* v. *Morris* (2)). To prevent any misapprehension as to the meaning of the word "appeal" and to displace by anticipation any argument that the word had a narrower meaning than the same word used in the Constitution, other words were added, even to saying that the decision of the Justice authorized by the section should not be attacked by prohibition or any other means. Those additional expressions are really superfluous; they only emphasize the intention of the Parliament to confer the fullest jurisdiction it could confer on the single Justice sitting in Chambers, and to take away, to the fullest extent it could take, the appellate jurisdiction of the High Court in relation to the decision of that Justice in Chambers. They have no reference whatever to any determination or award of the Arbitration Court, and in no way purport to touch the jurisdiction as to prohibition conferred on this Court by sec. 75 (v.) of the Constitution, which, of course, does not include prohibition to the High Court itself.

As to the power of the Parliament to except this order from the appellate power, it is beyond serious question. The relevant words were referred to in the *Tramways Case* [*No.* 1] (3), where some English and American authorities are also cited. In fact, since the argument in this case, the point has been actually decided unanimously by

(1) 15 Q.B.D., 569.

(2) 19 Q.B.D., 139.

(3) 18 C.L.R., 54, at p. 76.

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Higgins J.

the Court in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (1) in relation to article 2 of the Second Schedule to the *Commonwealth Workmen's Compensation Act* (No. 29 of 1912).

In our opinion sec. 21AA is valid.

HIGGINS J. read the following judgment:—There is here no case stated, or question reserved for the Full Court; but our learned brother *Gavan Duffy* J. informs us verbally that he has directed that a motion which was made to him be argued before the Full Court under sec. 18 of the *Judiciary Act*. The motion was made by the Federated Engine Drivers' and Firemen's Association under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, for a decision on the question whether an alleged industrial dispute extending beyond one State exists or is threatened, &c.; and as no special case has been stated, no specific question reserved for us, as the whole application is directed to be argued before us, it would seem to be our duty to determine on the evidence, whether there is such a dispute—unless, indeed, sec. 21AA is altogether invalid, so that no such determination can be made.

The argument for the invalidity of the whole section comes, curiously enough, from the applicant union, which urges, through its counsel, that if the final clause (4)—which purports to make the decision on the application conclusive and without appeal—is invalid, the whole section is invalid; but the union, of course, urges that the final clause (4) is valid.

Even if the final clause (4) is invalid, I see no ground for saying that the whole section is invalid. No doubt, Parliament desired that the decision on the application should not be subject to appeal; but even if Parliament could not achieve that end completely there is no reason for thinking that it would not have provided a means for getting a decision from the High Court which would be binding on the parties to the application subject to the right of appeal. Before the enactment of sec. 21AA, the position might fairly be called monstrous. An alleged two-State dispute would be presented to the Court of Conciliation; and after that Court had spent days, weeks, months, in satisfying itself of the existence of the dispute

(1) *Post.*

and in determining the merits of the dispute, and in framing an award, any one dissatisfied party could bring an application for prohibition; in that application the whole question of dispute or no dispute was open to inquiry, the finding of the Court of Conciliation was not treated as being even *primâ facie* right; and if a majority of the Full High Court thought that the two-State dispute was not established, the long labours of the Court of Conciliation were rendered useless, the expenditure of the parties was lost, and the employees were thrown back on the baneful remedy of "strike." Under clauses 1, 2, and 3, even if clause 4 were struck out, it is now competent for the parties before entering on the labour and expenditure of arbitration, to get a decision from the High Court or a Justice thereof, which will be final and conclusive unless an appeal be lodged; on the appeal, the decision will be treated as *primâ facie* right; and if the time for appealing has expired before the arbitration comes on, the decision must be treated as conclusively right as between the parties to the application. Henceforth, under these clauses, the parties and the Court can, after the decision, proceed with confidence in the arbitration, and the country's industries will not be liable, as hitherto, to be thrown into chaos. This of itself is a great gain, even if there were no clause 4; and what doubt can there be that Parliament would take the qualified finality if it could not get the absolute finality?

Another way of putting the matter is that Parliament had evidently two distinct objects in view. One was to get the High Court to give an authoritative decision on the question which is at the foundation of the jurisdiction of the Court of Conciliation, is there a dispute, actual or threatened, extending beyond one State; the other was to make that decision final and conclusive as between the parties. If the first object can be attained and the other not, there is absolutely no ground suggested for supposing that Parliament would not seek to attain its first object. If the first three clauses of sec. 21AA were in one Act, and clause 4 in a subsequent Act, there could be no doubt as to our conclusion; and the mere fact that clause 4 happens to be in the same Act cannot alter the case. As I pointed out during the argument, the provision in sec. 31 of the *Commonwealth Conciliation and Arbitration Act* that no

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRAL-ASIA v. COLONIAL SUGAR REFINING CO. LTD.

Higgins J.

award shall be subject to prohibition has been held by the Court to be invalid, and yet no one has suggested that because this provision is invalid, the whole provisions of the Act are invalid.

It follows, from what I have said, that in my view the provisions of the first three clauses of the section are very far indeed from being futile. It is true that sec. 75 (v.) of the Constitution still remains, which gives the High Court original jurisdiction to issue a writ of prohibition against " an officer of the Commonwealth " ; and it has been held that the President of the Court of Conciliation is an officer within these words. But sec. 75 (v.) has no greater authority than sec. 79, which would enable Parliament to commit the jurisdiction of prohibition to a single judge, or than sec. 73 under which Parliament could make the decision of a single judge final and without appeal. Moreover, if an application were made for prohibition under sec. 75 (v.) by a party to the application under sec. 21AA, the decision of the single judge under the first three clauses of sec. 21AA would be binding against that party under a plea of *res judicata* ; and I rather think that if that party obtained an order *nisi* for prohibition an order would be made setting aside the order *nisi* as having been improperly obtained, or staying proceedings. In cases somewhat analogous, such as a shareholder suing on behalf of himself and other shareholders, when it turns out that the shareholder who so sues is precluded by his conduct from complaining, the bill, or action, is dismissed, although the other shareholders have a good cause of action (*Burt* v. *British Nation Life Assurance Association* (1)).

It is not necessary for this decision, from my point of view, to say whether clause 4 makes the decision of a Judge in Chambers final, but fails to make the decision of the same Judge in open Court final. But if clause 4 does perpetrate this absurdity, the clause does not apply to the present case, which is an application in open Court ; and therefore the provision for finality in clause 4 cannot affect the duty of the High Court to decide the question under clauses 1 and 2.

But I entertain no doubt as to the validity of clause 4. Under sec. 73 of the Constitution, Parliament has power to make exceptions from the jurisdiction of the High Court to hear appeals from

(1) 4 De G. & J., 158.

judgments or orders; and it has made an exception in this case (see *Ex parte McCardle* (1) on the corresponding clause in the American Constitution).

The whole case having been sent to us to be argued, it appears to me that if we do not hear argument as to the merits of the motion, if we do not determine as to the existence or non-existence of the dispute, the case should be expressly remitted to the learned judge for decision—if there is now power to remit it. Lest the procedure in this case should be treated as a precedent, so far as my own personal view is concerned, I may venture to say that in future the best course in such cases would be simply to obey the words of the Act, to make the inquiry and give a decision, leaving the question as to the validity of clause 4 to be tested if the beaten party desired to test it afterwards. Nothing is clearer than that a Court should assume the validity of an Act of Parliament until the time comes when the question of validity can no longer be evaded or postponed.

POWERS J. read the following judgment:—The Federated Engine Drivers' and Firemen's Association of Australasia under the authority of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 applied to my brother *Gavan Duffy* as a Justice of the High Court exercising the original jurisdiction of that Court, *for a decision* on the question whether an alleged industrial dispute (submitted to the Commonwealth Conciliation and Arbitration Court) or any part thereof exists, or is threatened, or impending, or probable—as an industrial dispute extending beyond the limits of any one State. The application was made to a Justice of the High Court who is not the President or a Deputy President of the Commonwealth Conciliation and Arbitration Court. The matter was referred by my brother *Gavan Duffy* to this Court.

Sec. 21AA has already been quoted. The principal question for the consideration of the Court is whether sec. 21AA as a whole is *ultra vires*.

Counsel for the respondents did not contend that it was not within the power of the Commonwealth Parliament to pass sub-secs.

(1) 7 Wall., 506.

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

Powers J.

1, 2 and 3 of sec. 21AA, but they contended that the Commonwealth Parliament could not pass sub-sec. 4 of that section, and if, as they contended, the sub-sections were not properly severable, the whole section should be declared invalid because beyond the powers of the Commonwealth Parliament. It was admitted by counsel for all parties that the Constitution (secs. 76 and 79) authorized Parliament to make laws conferring original jurisdiction, including matters involving the interpretation of the Constitution, on one Justice of the High Court, and therefore that sub-secs. 1, 2 and 3 of sec. 21AA were not *ultra vires*, even if the matter referred to in that section involved an interpretation of any part of the Constitution. The only disputed point, so far as the parties are concerned, was whether sub-sec. 4 of sec. 21AA making the decision of the Justice of the High Court exercising the jurisdiction of the High Court under the section, final and conclusive and not subject to any appeal to the High Court in its appellate jurisdiction, was within the powers of the Commonwealth Parliament.

Sec. 73 of the Constitution confers the appellate jurisdiction on the High Court to hear and determine appeals from all judgments decrees, orders, and sentences, *inter alia*, "(I.) of any Justice or Justices exercising the original jurisdiction of the High Court." That appellate jurisdiction is, however, conferred on the High Court by sec. 73 of the Constitution "with such exceptions and subject to such regulations as the Parliament prescribes." There is no doubt that sec. 21AA makes an exception in the particular matter referred to, by declaring that the decision is to be final and conclusive and not subject to appeal to the High Court; but it was contended that the exception made cannot be held to be within the exceptions referred to in sec. 73 of the Constitution.

During the present sittings this Full Court of seven Judges has decided that the Commonwealth Parliament can, under the power to make such exceptions as the Parliament prescribes (sec. 73), make decisions of County Courts in New South Wales (exercising federal jurisdiction) under the *Commonwealth Workmen's Compensation Act* 1912 final and not subject to appeal to the High Court (see *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (1)).

(1) *Post.*

I am satisfied that the Commonwealth Parliament can, under sec. 73, declare that the decision of a Justice of the High Court exercising the original jurisdiction of the High Court in any case, whatever amount is in dispute, is to be final and conclusive and not subject to appeal to the High Court, even if the case involved questions of law and fact. I do not see any good reason why the Commonwealth Parliament *cannot* make the exception it has made in this case and say that the decision of a Justice of the High Court exercising original jurisdiction on the question whether there is or is not an industrial inter-State dispute is to be as final as if it had been decided by a Full Bench. (See secs. 76 and 79 of the Constitution.) I cannot take on myself to say what exceptions Parliament is to make, or what exceptions I think it should not make, within its jurisdiction. That is for Parliament alone under the powers given to it by the Constitution to decide. Personally, I do not think that one Justice should be authorized to decide finally any matter "involving the interpretation of the Constitution," but I am not here to legislate, but to interpret the law as it stands.

The respondents admitted that the section would be useful and effective without sub-sec. 4.

As I agree that Parliament must have intended to pass the section as a whole, and that it had authority under the Constitution to make the exception it did, I do not propose to refer to the question of severability or any of the other questions raised during the argument, except to point out that we are only asked to deal with the power of Parliament to make the decision of a Justice of the High Court exercising the original jurisdiction of the High Court—and not the decision of a Judge of the Arbitration Court—final on evidence submitted to him. I am not considering the question whether the award of another Justice of the High Court as President or Deputy President of the Commonwealth Conciliation and Arbitration Court, possibly on different evidence, at a different time, when he deals with the dispute, is subject to prohibition or not.

I hold that the Commonwealth Parliament had power to pass sec. 21AA, sub-secs. 1, 2, 3 and 4.

GRIFFITH C.J. I must not be supposed to concede that the

H. C. OF A. 1916.

FEDERATED ENGINE DRIVERS' AND FIREMEN'S ASSOCIATION OF AUSTRALASIA v. COLONIAL SUGAR REFINING CO. LTD.

provision in sec. 21AA that no appeal shall lie from the decision of the single Justice is an exception within the meaning of sec. 73 of the Constitution. On that question I reserve my judgment.

Declaration that sec. 21AA is valid. Order that the case be remitted.

Solicitor for the claimants, *H. Hoare.*

Solicitors for the respondents, *Blake & Riggall*; *Derham, Robertson & Derham*; *Fink, Best & Hall.*

Solicitor for the Commonwealth, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

Aff *Sands & McDougall Pty Ltd v Robinson* (1917) 23 CLR 49

Appl *Desktop Marketing v Telstra Corp* (2002) 55 IPR 1

[HIGH COURT OF AUSTRALIA.]

ROBINSON . . . . . PLAINTIFF;

AND

SANDS & McDOUGALL PROPRIETARY LIMITED . . . . . DEFENDANTS.

H. C. OF A. 1916.

SYDNEY, *Aug.* 29, 30, 31; *Sept.* 1.

MELBOURNE, *Sept.* 14.

Barton J.

Copyright—Infringement—Original literary work—Map—Exemption from liability to pay damages—Knowledge of existence of copyright—Name of author on map—Copyright Act 1912 (*No.* 20 *of* 1912), *Schedule—Copyright Act* 1911 (1 & 2 *Geo. V. c.* 46), *secs.* 1, 2, 5, 6, 7, 8, 31, 35.

The word "original" in sec. 1 (1) of the *Copyright Act* 1911 means "not copied," "not imitated."

Held, therefore, that a map which is produced by a cartographer applying his faculties to the best sources of information within his reach, and which is in no sense a copy but presents points of difference from previous maps according to the use to which he purposes to apply it, is an original literary work within the meaning of sec. 1 (1), and entitled to copyright.