[HIGH COURT OF AUSTRALIA.]

TROY . . . . . APPELLANT;
DEFENDANT,

AND

WRIGGLESWORTH . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *June* 4, 5, 18.

Barton, Isaacs, Higgins, Gavan Duffy, and Rich JJ.

High Court—Appellate jurisdiction—State Court of summary jurisdiction invested with Federal jurisdiction—Court of Petty Sessions of Victoria—Court not consisting of Police Magistrate—Matter involving interpretation of Constitution—Information—Offence against State police law—Immunity of Commonwealth officer—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 71, 73, 76, 77—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *secs.* 30, 38, 38A, 39—*Justices Act* 1915 (*Vict.*) (*No.* 2675), *sec.* 63—*Motor Car Act* 1915 (*Vict.*) (*No.* 2702), *sec.* 10.

Held, by *Barton*, *Isaacs*, *Higgins* and *Rich* JJ. (*Gavan Duffy* J. dissenting), that where a State Court of summary jurisdiction not consisting of one of the magistrates specified in sec. 39 (2) (*d*) of the *Judiciary Act* 1903-1915 entertains a matter which is one of Federal jurisdiction, it is exercising, though unlawfully, Federal jurisdiction, even although it professes to be exercising State jurisdiction, and an appeal will lie from its decision to the High Court under that section.

Roberts v. *Ahern*, 1 C.L.R., 406; *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), 4 C.L.R., 1087, and *Miller* v. *Haweis*, 5 C.L.R., 89, considered and followed.

On a prosecution in a Court of Petty Sessions of Victoria, constituted of two Justices of the Peace, for driving a motor-car in a manner dangerous to the public, contrary to the provisions of the *Motor Car Act* 1915 (Vict.), the objection was taken that, as the defendant when driving the motor-car was engaged in the performance of his duties as an officer of the Defence Department, the matter was one of Federal jurisdiction, and therefore should be

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dealt with by a Police Magistrate. The objection having been overruled and the defendant having been convicted, on appeal by him to the High Court,

Held, by *Barton*, *Isaacs*, *Higgins* and *Rich* JJ., that the matter raised by the objection involved the interpretation of the Constitution, and was therefore a matter of Federal jurisdiction which should, under sec. 39 (2) (*d*) of the *Judiciary Act* 1903-1915, have been heard and determined by a Police Magistrate, and that the case should be remitted to the Court of Petty Sessions to be so heard and determined.

APPEAL from a Court of Petty Sessions of Victoria.

At the Court of Petty Sessions at Melbourne an information came on for hearing whereby Horace Wrigglesworth charged that Edmund Troy did, on 8th August 1918, drive a motor-car on St. Kilda Road in a manner dangerous to the public, having regard to all the circumstances of the case, contrary to the provisions of sec. 10 of the *Motor Car Act* 1915. The Court of Petty Sessions was constituted by two Justices of the Peace. Before evidence was heard it was stated on behalf of the defendant that he was an employee of the Commonwealth, and that as his liability would on that ground be contested the matter was one of Federal jurisdiction, and therefore that the Court should consist of a Police Magistrate. The justices said that they did not think the matter was one of Federal jurisdiction, and proceeded to hear it. After evidence had been given for the prosecution as to the manner in which the defendant had driven the motor-car, it was contended for the defendant that the *Motor Car Act* could not bind the Commonwealth without its own authority, and the justices said that they thought that Commonwealth servants should obey the law like other people. The defendant then gave evidence that he was a soldier on active service on home duty in the sole employ of the Commonwealth Government as a motor-driver at the Base Hospital, and that on the day in question he had been instructed by the Base Hospital authorities to bring from Essendon a patient—an urgent case—and that, while he was returning to the Hospital with the patient in a motor ambulance, the circumstances occurred out of which the prosecution arose. The justices having convicted the defendant, he now, by an order to review, appealed to the High Court from their decision on the grounds (1) that the Court of Petty Sessions as constituted had no jurisdiction to entertain

the information; (2) that the *Motor Car Act* 1915 did not apply to the defendant as a servant of the Commonwealth, and (3) that that Act to the extent to which it interfered with a Commonwealth instrumentality was *ultra vires*.

R. G. Menzies, for the appellant. The defence having been taken that the defendant was a Commonwealth instrumentality and therefore that the *Motor Car Act* 1915 did not bind him, the Court of Petty Sessions had to determine whether the contention was valid. The determination of that question involved the interpretation of the Constitution, and is a matter of Federal jurisdiction which is vested in Courts of Petty Sessions, among other State Courts (secs. 30 and 39 of the *Judiciary Act* 1903-1915; *Roberts* v. *Ahern* (1); *Miller* v. *Haweis* (2)). If the matter was one of Federal jurisdiction the Court of Petty Sessions was invested with that jurisdiction by sec. 39 of the *Judiciary Act*, but solely on the condition (*d*) that the jurisdiction should only be exercised by a Police Magistrate. The jurisdiction that the Court exercised was therefore Federal jurisdiction, which was unlawfully exercised or exercised through an improper channel. Consequently an appeal lies to this Court under sec. 39 (2) (*b*); and the proper method of bringing the appeal is by order to review (*Rules of the High Court*, Part II., Sec. IV., r. 1), as was done in *Miller* v. *Haweis*. The *Motor Car Act* 1915 does not apply to a servant of the Commonwealth in the performance of his duties: *Roberts* v. *Ahern* (3). In that case the defendant was merely a servant of an independent contractor who had contracted to perform certain services for the Commonwealth. This is an *à fortiori* case.

Mann, for the respondent. Under sec. 71 of the Constitution and sec. 39 of the *Judiciary Act*, Federal jurisdiction is exclusively in the High Court. The exception relevant to this case is that Federal jurisdiction is given to Courts of Petty Sessions only when constituted in a particular way. Assuming that there was an excess of jurisdiction, the facts of this case do not bring it within

(1) 1 C.L.R., 406. (2) 5 C.L.R., 89.
(3) 1 C.L.R., at p. 419.

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that exception. Those facts show that a tribunal, called a Court of Petty Sessions, not invested with Federal jurisdiction purported to exercise or unlawfully exercised Federal jurisdiction. No appeal to this Court lies in such a case. Under sec. 73 (II.) of the Constitution it is from a Court "exercising" Federal jurisdiction, and not from a Court invested with Federal jurisdiction, that an appeal is given to the High Court. Here the Court of Petty Sessions was not exercising Federal jurisdiction, because the grant to it of that jurisdiction was coupled with a limitation upon the grant. If an appeal lay, this Court might make the order which the Court of Petty Sessions should have made; but that Court had no power to make any order. The proper remedy was by order to review in the Supreme Court, which would have to determine whether the Court of Petty Sessions had any jurisdiction to deal with the matter before it. No question involving the interpretation of the Constitution was raised before the Court of Petty Sessions. It is not sufficient that a defendant should merely appeal to the Constitution. In a case like the present the defendant must be able to show that at the time of the alleged offence he was an officer of the Commonwealth engaged in the performance of his duties as such officer, and that the performance of those duties would have been hindered by the operation of the law under which he was prosecuted. The defendant must go at least as far as saying that obedience to that law would in some appreciable way have hindered him in the performance of his duty. The mere fact that the defendant was engaged in Commonwealth business when he did the acts complained of does not raise a question involving the interpretation of the Constitution. He must allege some incompatibility between the State law and the performance of his Commonwealth duties. If this Court has jurisdiction to entertain the appeal, the only order it can make is that the case should be adjourned to be heard by a Police Magistrate.

R. G. Menzies, in reply.

Cur. adv. vult.

June 18

The following judgments were read :—

BARTON, ISAACS AND RICH JJ. (read by ISAACS J.). This case has been very ably argued on both sides.

The first question we have to consider is the jurisdiction of this Court to entertain the appeal. The appeal is said to be incompetent because the Court of Petty Sessions, in fining the appellant for the alleged offence, was not a "Court exercising Federal jurisdiction" (sec. 73 of the Constitution). The reason most relied on by learned counsel for the respondent in support of this contention is that the investiture of the Court of Petty Sessions is contained in clause (*d*) of sec. 39 (2) of the *Judiciary Act*, and that investiture is in the Court when consisting of the Magistrate, and not otherwise. Another reason, not stressed by learned counsel, was that the justices asserted they were exercising State jurisdiction only, and therefore could not be taken to have exercised Federal jurisdiction.

Cases already decided—*Roberts* v. *Ahern* (1); *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2), and *Miller* v. *Haweis* (3)—are clear authorities, so long as they stand, that an appeal may lie from a State Court, as a "Court exercising Federal jurisdiction," notwithstanding it assumes to be determining the cause before it purely under the authority of State law; provided, however, in reality its determination involves a decision on a question requiring Federal jurisdiction. Those cases, of course, may be shown to be wrong, and the question has been here reasoned out. Examination of the matter, however, shows the view taken in those cases as to this question to be correct.

Sec. 76 of the Constitution enables Parliament to confer original jurisdiction on the High Court in any matter—"(I.) Arising under this Constitution, or involving its interpretation." Sec. 77 enables Parliament to make laws—"(II.) Defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States: (III.) Investing any Court of a State with Federal jurisdiction." It is plain that jurisdiction in any matter arising under the Constitution, or involving its interpretation, is Federal jurisdiction; and it is equally plain that, if the High Court is given that jurisdiction as original jurisdiction (even if jurisdiction to decide such a matter exists in a State Court under State authority), so that it "belongs to" the High Court, or is "invested" by the Parliament in that Court, the High

(1) 1 C.L.R., 406.
(2) 4 C.L.R., 1087, at pp. 1136-1138, 1140-1143.
(3) 5 C.L.R., 89.

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Barton J. Isaacs J. Rich J.

Court jurisdiction may be made exclusive to the extent that the Parliament declares. Now, by sec. 30 of the *Judiciary Act*, the High Court is given original jurisdiction in all matters arising under the Constitution or involving its interpretation. By sec. 39 (2) "the several Courts of the States" are invested with Federal jurisdiction, except as provided by sec. 38A, which is an exception of subject matter. The section adds these words: "subject to the following conditions and restrictions." The investiture is complete, so far as the Court is concerned, but it is accompanied by what are called "conditions and restrictions." One of these is contained in clause (*d*), which says: "The Federal jurisdiction of a Court of summary jurisdiction shall not be judicially exercised except by a . . . Police . . . Magistrate," &c. That clause does not contain the investiture of the Court: it is a condition or restriction of the investiture already made. "Exercise" of jurisdiction necessarily implies that it is already "invested." But by sec. 39 the jurisdiction of the High Court—which, as seen, includes constitutional questions—is made exclusive of the jurisdiction of the State Courts, except as provided by the section; that is (so far as is here relevant) except the power to decide such questions under the "invested" power, which is Federal jurisdiction. The result is that the reasoning in the cases referred to, so far from being shown to be wrong, is shown to be perfectly right. State jurisdiction to decide such a matter, there is none; Federal jurisdiction exists. If, then, the Court does proceed to determine such a matter, what jurisdiction does it in fact exercise? Clearly Federal jurisdiction; and none the less that the provisions of clause (*d*) are infringed. They would be similarly infringed if a Police Magistrate and the two justices sat together. How could anyone in that case say they were not exercising Federal jurisdiction?

The second reason given, namely, that the justices said they were exercising State jurisdiction, cannot be maintained. The justices might as well have said they were exercising arbitral jurisdiction or Chinese jurisdiction—both of which would have been equally existent with State jurisdiction. They were in fact exercising—though unlawfully—Federal jurisdiction, and an appeal lies to this Court to correct any error they as a Court made. Then, on that

assumption, the question is: Was there a question calling for the exercise of Federal jurisdiction properly raised? *Miller* v. *Haweis* (1) lays down the law as to this. The facts relied on were *bonâ fide* raised, and were such as to raise it before the decision was given, in a very pronounced way.

The justices should have held their hand and have refrained from adjudicating further, and should have adjourned the case to be heard and determined as required by clause (*d*) of sec. 39 (2).

The appeal should be allowed, the order set aside, and the case remitted to the Court of Petty Sessions to be heard and determined as required by the clause referred to.

HIGGINS J. The appellant has been convicted in a Court of Petty Sessions of an offence under the Victorian *Motor Car Act*—the offence of driving a motor-car on a road in a manner dangerous to the public. At the trial it was proved beyond controversy that the defendant was a soldier in active service on home duty; that he was at the time of the alleged offence employed as a motor-driver at the Base Hospital; and that, under the instructions of the Base Hospital authorities, he was bringing a patient to the Hospital. The defence was raised that as an employee of the Commonwealth, acting on Commonwealth duty, the defendant was not subject to the Act; and that as this defence involved a matter of Federal jurisdiction the trial could not take place unless before a Police Magistrate. There was no Police Magistrate on the bench—only two Justices of the Peace.

Under secs. 76-77 of the Constitution cases "arising under this Constitution or involving its interpretation" are matters of Federal jurisdiction. It is not disputed that this case came within these words; as it could not be decided without determining that the defendant in his operation of driving for the Commonwealth was or was not subject to the Act. Sec. 77 of the Constitution enables the Commonwealth Parliament to invest any State Court with Federal jurisdiction; and this power has been exercised by sec. 39 of the *Judiciary Act*, which confers on the Court of Petty Sessions (not on a Police Magistrate) Federal jurisdiction with certain "exceptions"

(1) 5 C.L.R., 89.

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Higgins J.

and subject to certain "conditions and restrictions," which are set forth. One of these conditions or restrictions is as follows (sec. 39 (2) (*d*)): "The Federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction." It is not contended that this clause with its conditions or restrictions is invalid; it is not contended that the Parliament had no power to affix such conditions or restrictions when it invested the Court with Federal jurisdiction (see sec. 79 of the Constitution). But the point is taken that there is no appeal to this Court, inasmuch as the Court of Petty Sessions was not "exercising" any Federal jurisdiction; that according to the appellant's contention it had no Federal jurisdiction unless a Police Magistrate constituted the Court; and that under the Constitution (sec. 73) and the Appeal Rules, Sec. IV., rule 1, the only appeal allowed to this Court is from Courts "exercising Federal jurisdiction." Under sec. 73 of the Constitution, the High Court has jurisdiction to hear appeals from all judgments, &c., "of any Court exercising Federal jurisdiction"; and it is said that the Court of Petty Sessions was not "exercising Federal jurisdiction" which it had not got, but was purporting to exercise or usurping such jurisdiction. It is suggested that the remedy, if any, is by prohibition, or by order *nisi* of the Supreme Court of the State.

The first ground of the appeal is "that the said Court of Petty Sessions as constituted had no jurisdiction to entertain the said information." On the facts which I have stated, the said Court should not have heard the information unless the Court consisted of a Police Magistrate. The Victorian *Justices Act* 1915 provides (sec. 63) that every Court of Petty Sessions shall consist either of two or more Justices of the Peace or of a Police Magistrate. The question is: Can this Court allow the appeal, can we make the order *nisi* absolute, where it appears that the Court below ought not to have convicted unless it consisted of a Police Magistrate? Can we allow the appeal when the Court below had no Federal jurisdiction that it could exercise as constituted? Is there a remedy by way of appeal to this Court? The objection is microscopic, and it

has to be dealt with microscopically. At first I was impressed by the objection, absurd as it must appear to a mind unused to our methods of verbal discrimination. But, on examining sec. 39 of the *Judiciary Act*, I find that the Court of Petty Sessions had full Federal jurisdiction over the case, and that it has merely failed to comply with a certain condition annexed to the exercise of the jurisdiction. Sec. 39 does not, in its final clause, "except" cases arising under the Constitution from the jurisdiction of the Court below. It is the Court that is "invested" with the jurisdiction, not a Police Magistrate; but a "condition" is imposed that when the Court exercises the jurisdiction it must exercise it with certain precautions; and those precautions have not been taken. There has always been investiture of the Court with the garment, but the movement of the Court has not been carried out in the prescribed manner. This is not a case of usurpation of Federal jurisdiction, but of abuse in the exercise thereof. The difference between "exceptions" and "conditions" is well recognized in conveyancing. An "exception" must be of part of the thing granted; as, for instance, of a close of land within the boundaries (*Davidson on Conveyancing*, 4th ed., vol. I., p. 96). There are certain "exceptions" from the grant of jurisdiction in sec. 39 (2)—"except as provided in the last preceding section"; but the "condition or restriction" as to the exercise of the jurisdiction by a particular Magistrate is not an "exception" from the jurisdiction of the *Court* of Petty Sessions. The position seems to me to be the same substantially as if the Act prescribed that before any exercise of Federal jurisdiction the Court should cause notice to be given to the Commonwealth authorities, and that no such notice had been given. The jurisdiction would be in the Court, but it would be wrongly exercised. Under these circumstances I am of opinion that the Court below has exercised Federal jurisdiction, but in the wrong way; and that the appeal should be allowed, and the order *nisi* made absolute.

There is no need for us to decide at present as to grounds 2 and 3 of the order *nisi*. The whole question as to the immunity of Federal servants from State Acts deserves very careful examination when the occasion arises.

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Gavan Duffy J.

GAVAN DUFFY J. This case was argued before us principally on the first ground taken in the order *nisi* to review, which as amended stands thus: "(1) That the said Court of Petty Sessions as constituted had no jurisdiction to entertain the said information." On the hearing before us this ground was treated as an allegation that there was no jurisdiction to convict. The reason alleged in support of this contention was that the Court of Petty Sessions had no right to judicially exercise any Federal jurisdiction under the provisions of the *Judiciary Act* 1903-1915, sec. 39 (2) (*d*). This ground will, in my opinion, entitle the appellant to have the conviction quashed if his appeal lies, but if the Court of Petty Sessions had no jurisdiction to convict, it seems to me that we have no jurisdiction to entertain the appeal. Sec. 73 of the Constitution gives an appeal to this Court from all judgments, decrees, orders and sentences of any Court exercising Federal jurisdiction. If, as was suggested during the argument, the phrase "exercising Federal jurisdiction" in sec. 73 is to be read as including the usurpation of Federal jurisdiction, we have the curious anomaly of an appeal lying on the ground that the Court of Petty Sessions was exercising Federal jurisdiction, and being allowed on the ground that it was not exercising Federal jurisdiction. But I think it is beyond doubt that sec. 73 gives an appeal only in cases where the Court from which the appeal comes is in fact exercising a Federal jurisdiction with which it has been invested by Parliament, and not in cases where it is usurping jurisdiction. The section confers on this Court a right to entertain an appeal where the Court from which the appeal comes, in the exercise of its jurisdiction, has made a wrong order, not a power to prevent the usurpation of authority such as is exercised by English and Australian Courts in granting prerogative writs of prohibition. If this be so, we must next consider whether, in convicting the appellant, the Court of Petty Sessions was in fact exercising a Federal jurisdiction with which it had been invested by Parliament. Sec. 77 of the Constitution authorizes Parliament to make laws investing any Court of a State with Federal jurisdiction with respect to any of the matters mentioned in sec. 75 and sec. 76 of the Constitution. Sec. 39 of the *Judiciary Act* 1903-1915 invests

the various Courts of the States with Federal jurisdiction in certain of such matters subject to specified conditions and restrictions. The condition or restriction relevant to the present case is as follows: "(*d*) The Federal jurisdiction of a Court of summary jurisdiction of a State shall not be judicially exercised except by a Stipendiary or Police or Special Magistrate, or some Magistrate of the State who is specially authorized by the Governor-General to exercise such jurisdiction." This provision is express, and its intention is clear. Parliament did not wish to commit the judicial exercise of Federal jurisdiction to any but paid Magistrates, but it had no authority to control the constitution of State Courts. It could create Federal Courts, but if it chose to invest State Courts with Federal jurisdiction it must take such Courts as it found them. The Victorian *Justices Act* 1915 is as follows:—"63. Except where otherwise expressly enacted, every Court of Petty Sessions shall consist—(1) Of two or more justices, of whom two at least shall be present and acting together during the whole time of the hearing and determination of the case; or (2) Of a Police Magistrate; or (3) Of a single justice other than a Police Magistrate if all parties to the proceedings consent that such justice shall hear and determine the case. Such consent shall be forthwith entered upon the minutes of the Court by such justice or by the clerk of the Court."

If the Court of Petty Sessions in this case had been constituted as provided by sec. 63 (2), it might have entertained the information, and, in doing so, would have been exercising Federal jurisdiction within the meaning of sec. 73 (2) of the Constitution; but it was constituted entirely of honorary justices under sub-sec. 1, and, being so constituted, had no authority under the *Judiciary Act*, sec. 39 (2) (*d*), to judicially exercise any of the Federal jurisdiction mentioned in that section, and therefore in entertaining the information was not exercising Federal jurisdiction within the meaning of sec. 73 (2) of the Constitution, but was usurping such jurisdiction.

In my opinion the appeal does not lie.

Appeal allowed. Order appealed from set aside. Case remitted to Court of Petty Sessions to be heard and determined as required by

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sec. 39 (2) (*d*) *of the Judiciary Act* 1903-1915. *Respondent to pay costs in this Court and in the Court of Petty Sessions.*

Solicitors for the appellant, *Strongman & Crouch.*

Solicitor for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

Foll/Cons *Ash Street Properties Pty Ltd v Pollnow* (1987) 9 NSWLR 80

Discd *Conpers (No664) Pty Ltd v NZI Securities Aust Ltd* 20 ATR 1084

Appl *Exbea Pty Ltd, Re; Ex parte M & W Holdings Pty Ltd* (1989) 1 WAR 287

Foll/Discd *Connell v Zuks* (1995) 17 ACSR 539

Appl *Richlaw Pty Ltd v Blackburne* (1998) 19 WAR 164

Appl *Hoggett v O'Rourke* [2002] 1 QdR 490

Appl *Proficient Building Co Pty Ltd v Daimaru Pty Ltd* 21 ATR 965

Foll *Ash St Properties Pty Ltd v Pollnow* 18 ATR 935

[HIGH COURT OF AUSTRALIA.]

DENT . . . . . APPELLANT;
DEFENDANT,

AND

MOORE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 16, 17, 23, 30.

Barton, Isaacs and Rich JJ.

Stamp Duties—Unstamped instruments—Contract of sale of land—Evidence of contract—Admission by party to contract—Action for commission on sale—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *sec.* 15.

Sec. 15 of the *Stamp Duties Act* 1898 (N.S.W.) provides that no unstamped instrument shall, except in criminal proceedings, be admissible in evidence, or available or effectual for any purpose whatsoever in law or equity.

Held, that where a contract is reduced to writing in an instrument which is intended by the parties to be the binding record of the contract and that instrument is required by the *Stamp Duties Act* 1898 to be stamped, a person who wishes to rely on that contract cannot do so unless the instrument is stamped.

Held, therefore, in an action to recover commission for procuring a sale of the defendant's land, the instrument recording the contract of sale being insufficiently stamped, that the plaintiff was not entitled to prove the contract