[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH OF AUSTRALIA . APPLICANT;

AGAINST

THE DISTRICT COURT OF THE METROPOLITAN DISTRICT HOLDEN AT SYDNEY AND ANOTHER . . . } RESPONDENTS.

H. C. OF A. 1954.

SYDNEY, *March* 25; *April* 13.

Dixon C.J., Kitto and Taylor JJ.

Federal Jurisdiction—State court—District Court—Jurisdiction—Money claim—Amount actionable—Limitation—Upper limit increased by State statute—Claim by Commonwealth—Excess over original limit—Quaere, actionable—Judiciary Act 1903-1950 (*No.* 6 *of* 1903—*No.* 80 *of* 1950), *s.* 39 (2)—*District Courts Act* 1912-1951 (*N.S.W.*) (*No.* 23 *of* 1912—*No.* 19 *of* 1951), *s.* 41 (1) (*a*)—*The Constitution* (63 & 64 *Vict. c.* 12), *ss.* 75, 77.

Section 39 (2) of the *Judiciary Act* 1903-1950 should be construed as an ambulatory provision operating in relation to State jurisdiction as it exists from time to time and within the limits imposed from time to time by State law upon such jurisdiction.

Decision of the District Court of the Metropolitan District (N.S.W.): *Commonwealth* v. *Bernes* (1953) 70 W.N. (N.S.W.) 318, reversed.

ORDER NISI to show cause.

On 24th March 1953, upon a plaint filed by the Commonwealth of Australia, a default summons was issued out of the District Court of the Metropolitan District holden at Sydney, New South Wales, against the defendant Ettore Bernes, claiming the sum of £569 11s. 6d. for board and lodging supplied by the Commonwealth to the defendant and his wife and children at the Parkes Migrant Centre and at the Cowra Immigration Centre, during the period which commenced on 19th December 1949 and ended on 22nd March 1953.

In his notice of defence the defendant pleaded that he never was indebted as alleged for the reason that there was not any contract

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express or implied under which any obligation to pay the moneys sued for arose, and he also gave notice that he objected to the jurisdiction of the court on the ground that the matter was one of federal jurisdiction and no such jurisdiction had been conferred on that court in respect of the said claim.

At the hearing it was agreed that the objection to the jurisdiction should be determined at the conclusion of evidence and that the adoption of that course would not constitute any waiver or submission to the jurisdiction.

Evidence was given on behalf of the plaintiff Commonwealth and its case was closed. Counsel for the defendant did not call any evidence but submitted (i) that the court did not have any jurisdiction, and (ii) that, if it had, then he was entitled to a verdict.

After argument *Stephen* D.C.J. before whom the matter was heard, came to the conclusion that that court was exercising federal jurisdiction, that the amount claimed was in excess of its limits of jurisdiction, and that therefore it could not entertain the action.

Upon an application by the Commonwealth under s. 33 (1) (*a*) of the *Judiciary Act* 1903-1950, *Dixon* C.J. ordered that the District Court of the Metropolitan District and the Judge holding the Court show cause before the Full Court of the High Court why an order should not be made directed to the said District Court and Judge commanding them to hear and determine according to law the action commenced in the District Court by the Commonwealth against Bernes.

Upon the return of the order nisi.

B. P. Macfarlan Q.C. (with him *E. M. Martin*), for the applicant. The applicant does not contend in this Court that the Commonwealth was exercising other than federal jurisdiction. Section 39 (2) of the *Judiciary Act* 1903-1950 was intended to cover all the cases which the judge below described under the general heading of " a blank cheque ". Wherever new jurisdictions are created, or existing jurisdictions are varied, then from time to time by the direct operation of s. 39 (2), operating itself, there is invested in those new courts federal jurisdiction. The contention that because of the increase in the actionable amount beyond the limit existing at the date of the coming into operation of the *Judiciary Act* 1903 there is now not any federal jurisdiction in the District Court of New South Wales, is erroneous. By the direct operation of s. 39 (2) the alteration made by Act No. 44 of 1949 to the jurisdiction of the District Court is taken up. That court is invested with federal jurisdiction. This Court has held that notwithstanding the decision

in *Webb* v. *Outtrim* (1) s. 39 is valid (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (2); *Lorenzo* v. *Carey* (3)).

[DIXON C.J. referred to *Ffrost* v. *Stevenson* (4).]

Lorenzo v. *Carey* (5), established that the jurisdiction which s. 39 (1) of the *Judiciary Act* 1903-1950 takes away from the State courts is authorized by s. 77 (ii.) of the Constitution, and that the jurisdiction which s. 39 (2) grants to the State courts is authorized by s. 77 (iii.).

[DIXON C.J. referred to *Commonwealth* v. *Limerick Steamship Co. Ltd.* (6).]

The declared object of s. 39 is to prevent any circumvention of this Court's jurisdiction, and the investment of jurisdiction may be by means of a law which is ambulatory in its operation (*Lorenzo* v. *Carey* (7)). The cases cited above, and also *Le Mesurier* v. *Connor* (8), emphasize the importance of giving to s. 39 a construction which will prevent any avoidance of this Court's jurisdiction in matters which could be classed as matters of federal jurisdiction. The construction of s. 39 was directly dealt with by *Isaacs* J. in *Le Mesurier* v. *Connor* (9) where he correctly stated what had long been the practice and continued view of this Court relating to the interpretation of s. 39, but his Honour was not correct when he assimilated the operation of s. 39 to the operation of s. 18 of the *Bankruptcy Act* 1924-1928. There must be a law. It is not sufficient that the vesting shall take place by operation of Executive act. The majority in *Le Mesurier* v. *Connor* (8) said that the vesting must take place through the operation of the law, operating according to the tenor and terms in which it is expressed; and if that vesting law is expressed to operate both presently and *in futuro*, then when the circumstances occur in the future that fall within the stated terms of that law there is a vesting because of the operation of s. 39. In that case *Isaacs* J. did not appreciate correctly that distinction but what his Honour stated about s. 39 is correct as a matter of construction and is correct and consistent with the decision of the majority of this Court as to the requirements and the conditions precedent to the vesting of federal jurisdiction. If this Court takes the view that *Isaacs* J. correctly stated the interpretation of s. 39 the Court must reverse the opinion of the judge below. The argument now

(1) (1907) A.C. 81.
(2) (1907) 4 C.L.R. 1087.
(3) (1921) 29 C.L.R. 243, at pp. 249, 251.
(4) (1937) 58 C.L.R. 528, at p. 573
(5) (1921) 29 C.L.R. 243.
(6) (1924) 35 C.L.R. 69, at p. 87.
(7) (1921) 29 C.L.R., at pp. 251, 253.
(8) (1929) 42 C.L.R. 481.
(9) (1929) 42 C.L.R., at pp. 502-504.

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put to the Court is supported by *Seagg* v. *The King* (1); *Adams* v. *Cleeves* (2); *Ffrost* v. *Stevenson* (3); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (4), and *Minister for Army* v. *Parbury Henty & Co. Pty. Ltd.* (5). The question for the Court on this application is: what is the true construction of s. 39, and whether it can be so construed as to cover future courts or future limits of jurisdictions granted to or in respect of existing courts. There is not any doubt on the authorities that such was the legislative intention; it was intended to cover the whole field of federal jurisdiction invested in State courts. The words of s. 39 are apt to, and do, achieve an ambulatory effect and no reason is shown or suggested in the abovementioned cases why they should not be given that ambulatory effect. Given that effect, the decision of the judge below on this point was wrong.

Dr. *F. Louat* Q.C. (with him *M. D. Finlay*), for the defendant in the action. The most that can be said about the decisions and dicta in the cases referred to on behalf of the applicant, is that some of them appear to have made an assumption about s. 39 (2); that at all events they are not inconsistent with the view that s. 39 (2) is an ambulatory provision. There is, however, a great deal which is inconsistent with that view: see *Ah Yick* v. *Lehmert* (6). The cases show that there is a basic reiterated principle that in investing the State courts with federal jurisdiction the State courts must be taken as they are found, and that that includes not only the character and organization of the court, but also, if they are to be invested by reference, the subject matter as it stands at the time. The dicta in those cases show, or tend to show, that the law investing the State courts with federal jurisdiction must confer on them a then ascertained jurisdiction; it must be defined. There are also, particularly in *Ah Yick* v. *Lehmert* (7), passages in those judgments which say that s. 77 (iii.) of the Constitution takes its character from the fact that it is assimilated in construction to s. 77 (i.) with regard to the creation of federal courts, and, also from s. 77 (ii.), which speaks of defining the extent of exclusiveness. If the State court has to be taken as it is found, with its limits as to jurisdiction, then where there is, as here, legislation by reference to an existing state of affairs, the decisions in *Federal Sawmill, Timberyard and General*

(1) (1932) 48 C.L.R. 251, at pp. 254-257.
(2) (1935) 53 C.L.R. 185, at pp. 189, 190.
(3) (1937) 58 C.L.R. 528, at pp. 553, 559, 560, 570, 571.
(4) (1943) 67 C.L.R. 25, at pp. 34, 35, 37, 41, 42, 45.
(5) (1945) 70 C.L.R. 459, at pp. 476, 504, 506.
(6) (1905) 2 C.L.R. 593.
(7) (1905) 2 C.L.R., at pp. 603, 612-614.

Woodworkers' Employes' Association (Adelaide Branch) v. *Alexander* (1) and *R.* v. *Whitfeld* (2) show that what has been said is that s. 39 takes the State courts as they stand, not only with regard to their organization and character but also with regard to the subject matter of their jurisdiction, that is the then existing jurisdiction. In *Le Mesurier* v. *Connor* (3) it is pointed out that the Governor-General might not act and until he acted there was not any investing. In the same way it can be said with regard to s. 39 (2) that there may be courts without any federal jurisdiction until the State gives them jurisdiction of a kind which can serve as federal jurisdiction with the aid of s. 39 (2). It is not within the power of the Commonwealth Parliament to commit to the Governor-General the power by proclamation to invest a court. Parliament must do it itself. Even on the view that s. 39 (2) is explicit enough to select the courts, it still does not define the jurisdiction. If that principle is to be taken to apply to s. 39 (2) so that it is said that the State jurisdiction being conferred is sufficiently defined merely because it refers to the courts as they stand and however they may develop or become, then it is submitted that that would not be found consistent with what has been said in, *inter alia*, *Le Mesurier* v. *Connor* (4), and there is not any logical difficulty in the view now contended for, that it is the jurisdiction as found at the time of the investing in law: see *Washington* v. *The Commonwealth* (5). The analogy in that case is a fairly close analogy because there the Commonwealth was submitted to actions in contract and in tort and this decision, if it be soundly decided, is a decision that the State cannot by creating new kinds of torts, subject the Commonwealth to them. If it is requisite that the Commonwealth in making a law investing State courts should define the jurisdiction then s. 39 (2) does not define it (*Le Mesurier* v. *Connor* (4); *Peacock* v. *Newtown Marrickville and General Co-operative Building Society No. 4 Ltd.* (6)). This Court has held that an investing law must define the jurisdiction. The only way in which it can be said that s. 39 (2) defines anything in the way of jurisdiction is to read it as meaning that it is the then existing jurisdiction. The case of the respondent stands or falls on whether or not what has been held in some of the cases referred to, and mostly *Le Mesurier* v. *Connor* (4) and *Ah Yick* v. *Lehmert* (7)

(1) (1912) 15 C.L.R. 308, at pp. 312, 313.
(2) (1913) 15 C.L.R. 689.
(3) (1929) 42 C.L.R., at pp. 499, 500.
(4) (1929) 42 C.L.R. 481.
(5) (1939) 39 S.R. (N.S.W.) 133, at p. 143; 56 W.N. 60, at p. 63.
(6) (1943) 67 C.L.R., at p. 51.
(7) (1905) 2 C.L.R. 593.

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means that the investing must define the jurisdiction. The effect of interpreting s. 39 (2) in an ambulatory fashion is to make it impossible to know, without a reference to the changing circumstances of State law, what is the jurisdiction that has been confided.

[DIXON C.J. referred to *R.* v. *Murray*; *Ex parte Commonwealth* (1) and *Ah Yick* v. *Lehmert* (2).]

B. P. Macfarlan Q.C., in reply. It has been held in the Supreme Court of New South Wales that it is inappropriate to appeal against a refusal of jurisdiction by the District Court, for the reason that the only order that the Supreme Court, on appeal, can make is to enter judgment for one party or the other, or direct a new trial: *Jones* v. *McEvoy* (3); *City Finance Co. Ltd.* v. *Matthews Harvey & Co. Ltd.* (4). *Washington* v. *The Commonwealth* (5) was on a very different point from the one that is now before the Court. The decision in that case, although given in favour of the contentions submitted on behalf of the Commonwealth, is wrong. The law of tort and the law of contract, to which the Commonwealth is subject, is not fixed as in 1903, or at some later time when an amending Act may have been enacted. The decision in *Washington* v. *The Commonwealth* (5) was based upon the decision of the Supreme Court of Canada in *Gauthier* v. *The King* (6) and the point that the Crown, in right of the Dominion, becomes subject to the State by force of the enacting Dominion law itself does not seem to have been adverted to in any sense by the judges in the Canadian case; it was only that, if the Crown were bound by subsequent legislation, then it would be because of the force of that State legislation. That case follows *R.* v. *Armstrong* (7) and *R.* v. *Desrosiers* (8) and neither that case nor *Washington* v. *The Commonwealth* (5) gives effect to the fact that the federal law of its own terms speaks, and operates, to the future and takes in by force of federal law such changes as may be made from time to time in State law. The State law has no operative effect other than to define the cases in which the federal law has said federal jurisdiction may operate. That view is the correct view and would be an answer to the decision in *Washington* v. *The Commonwealth* (5). That case was wrongly decided, the reason being that s. 79

(1) (1916) 22 C.L.R. 437.
(2) (1905) 2 C.L.R. 593.
(3) (1868) 8 S.C.R. (N.S.W.) 15.
(4) (1914) 14 S.R. (N.S.W.) 438, at p. 440.
(5) (1939) 39 S.R. (N.S.W.) 133; 56 W.N. 60
(6) (1918) 40 D.L.R. 353.
(7) (1907) A.C. 500; 40 S.C.R. (Can.) 229.
(8) (1908) 41 S.C.R. (Can.) 71.

of the *Judiciary Act* would have the effect, in the absence of any contrary Commonwealth law, of bringing into operation in the decision of the case subsequent State law. Section 79 has an ambulatory effect (*Commissioner of Stamp Duties (N.S.W.)* v. *Owens* [*No.* 2] (1); *Huddart Parker Ltd.* v. *The Mill Hill* (2)). The true view is that the Commonwealth through s. 39, has spoken to the future and defined in the section the circumstances in which that section will operate.

Cur. adv. vult.

April 13.

THE COURT delivered the following written judgment:—

This is an application under s. 33 (1) (a) of the *Judiciary Act* 1903-1950 for an order directed to the District Court of the Metropolitan District and the Judge holding the Court commanding that an action commenced in the District Court by the Commonwealth for the recovery of an alleged debt amounting to £569 11s. 6d. be heard and determined according to law. The effect of s. 33 (1) (*a*) is that the High Court may make an order or direct the issue of a writ commanding the performance by any court invested with federal jurisdiction of any duty relating to the exercise of its federal jurisdiction.

Up till 13th February 1950, when the *District Courts* (*Amendment*) *Act* 1949 (N.S.W.) commenced, the jurisdiction of the District Court in personal actions was limited to claims not exceeding an amount of £400. The limitation resulted from s. 41 (1) (a) of the *District Courts Act* 1912-1947. But by s. 3 (a) of the *District Courts* (*Amendment*) *Act* 1949 the amount of £400 mentioned in s. 41 (1) (a) was increased to an amount of £1,000. The action to which this application relates was instituted in the District Court by the Commonwealth, no doubt in reliance upon the combined operation of s. 39 of the *Judiciary Act* 1903-1950 and s. 75 (iii.) of the Constitution. Section 75 (iii.) of the Constitution gives jurisdiction to this Court in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party. Section 39 (2) of the *Judiciary Act* provides that the several courts of the States shall, within the limits of their several jurisdictions, whether such limits are as to the 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, subject to certain exceptions and conditions and restrictions which are not presently material.

(1) (1953) 88 C.L.R. 168.

(2) (1950) 81 C.L.R. 502, at p. 507.

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The defendant in the action objected to the jurisdiction of the District Court on the ground that s. 39 of the *Judiciary Act* came into force at a time when the jurisdiction of the District Court was limited to claims not exceeding £400 and that the section does not operate upon any State jurisdiction so far as it is conferred or increased after that date. For this reason, so it was objected, the District Court has no federal jurisdiction with respect to personal actions corresponding with the State jurisdiction given by the *District Courts (Amendment) Act* 1949 over claims for a larger amount than £400. Section 39 was included in the *Judiciary Act* as passed in 1903 and it would seem that if the defendants' contention were sustained the correct date as at which to apply it would be 1903. At that date the jurisdiction of the District Court over personal actions was limited to an amount of £200: see s. 34 (1) of the *District Courts Act* 1901.

The learned District Court Judge took the view that s. 39 of the *Judiciary Act* applied to give federal jurisdiction only to the State courts existing at the date when the section came into operation and to give them federal jurisdiction only within the limits then existing of the State jurisdiction of such courts; any variation of such limits made by any subsequent State law must be disregarded in ascertaining the extent of the federal jurisdiction invested by s. 39 (2). It will be seen that the question of interpretation really is whether s. 39 is ambulatory in its meaning and application. Although there is no actual decision so interpreting it, in this Court s. 39 has always been regarded as ambulatory and consequently as operating upon State courts whether constituted before or after the commencement of the *Judiciary Act* 1903 and upon State jurisdiction according to the definition thereof under State law in force from time to time. The view that has been tacitly accepted is that the expression "within the limits of their several jurisdictions" refers to the limits imposed by the relevant State law in operation from time to time whether enacted before or after the commencement of the *Judiciary Act* 1903. There is nothing in the language of s. 39 to prevent the provision receiving an ambulatory effect and the known purpose of the provision could hardly be achieved unless it received such an effect or was repeatedly re-enacted at frequent intervals. Although there is no direct decision of the Court giving s. 39 this operation, on two occasions it has been so interpreted by individual judges of the Court. In his dissenting judgment in *Le Mesurier* v. *Connor* (1), *Isaacs* J.

(1) (1929) 42 C.L.R., at p. 503.

stated most emphatically that this was the received meaning of the provision. His Honour's observations occur in the course of a passage invoking s. 39 in order to illustrate the particular view he was advancing. The fact that the majority of the Court were not in accord with the conclusion his Honour reached does not detract from the weight to be given to his Honour's statement, made in giving the illustration, of the common understanding of s. 39. The material part of what *Isaacs* J. said is this :—"And as the provision in sec. 39 is a standing provision *constantly speaking in the present* (see *Halsbury's Laws of England*, vol. 27, p. 208, and *Craies* on *Statute Law*, 4th ed. (1936), at p. 29), the identification of a given State Court depends on the circumstances as they exist at the moment when jurisdiction is exercised. Prior to that event, and perhaps since the passing of the Act, new Courts may have come into existence, old Courts have been abolished or remodelled, jurisdiction extended or restricted, and it would be impossible to say that in 1903, when that Act was passed, the State Courts pointed to by sec. 39 were all in effect enumerated and inalterable. Never in the whole history of this Court has it even been suggested that a State Court exercising Federal jurisdiction under sec. 39 must be one of the Courts identifiable on 25th August 1903 or with its jurisdiction in all respects as then identifiable " (1).

Many years later, in *Minister for the Army* v. *Parbury Henty & Co.* (2), it was again referred to as one presumably accepted :— " The provision was meant to cover the whole field of Federal jurisdiction so that the conditions embodied in the four paragraphs of sub-s. 2 should govern its exercise whether the cause of action, the procedure and the liability to suit arose under existing or future legislation. To that end it invested State courts with the full content of the original jurisdiction falling within the judicial power of the Commonwealth and, as it has been held, some of the appellate jurisdiction. The limits of jurisdiction of any court so invested found their source in State law and, I presume, any change made by the State in those limits would, under the terms of s. 39 (2), *ipso facto* make an identical change in its Federal jurisdiction. An acknowledged purpose was to exclude appeals as of right to the Privy Council, and it was intended to exclude them over the whole field of Federal jurisdiction. That jurisdiction was, therefore, conferred in its entirety, leaving it to future legislation to bring into being new subject matters and deal with procedure and liability to suit "—per *Dixon* J. (3). This understanding represents

(1) (1929) 42 C.L.R., at p. 503.
(2) (1945) 70 C.L.R. 459.
(3) (1945) 70 C.L.R., at p. 505.

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the interpretation which we think the section should receive. It is the traditional view of the section and it is not a view which seems ever before to have been contested.

There is no constitutional reason why s. 39 should not be so construed. Section 39 (2) has been upheld as a law made in the exercise of the power conferred by s. 77 (iii.) of the Constitution, aided perhaps by s. 51 (xxxix.), and it is of course true that to fall under s. 77 (iii.) s. 39 (2) must be a law investing courts of a State with federal jurisdiction. But s. 39 (2) of the *Judiciary Act* construed as an ambulatory provision answers that description. It is a law operating upon the courts of the States as those courts exist from time to time and its operation is to invest them with federal jurisdiction. In restricting the grant of federal jurisdiction within the limits of the jurisdiction under State law of the several courts, s. 39 (2) is again taking up the limits of the jurisdiction which State law may prescribe from time to time for the State jurisdiction of those courts. The jurisdiction invested is none the less defined by the investing provision because the definition operates with reference to the law of the State as it exists from time to time. Section 39 (2) does not delegate any power to the States to invest a court with federal jurisdiction. It deals with the courts of the States by description and it describes them according to the very character in virtue of which they fall under the constitutional power conferred by s. 77 (iii.). The transformation of the jurisdiction on federal matters into federal jurisdiction is not done by the State but is effected by s. 39 notwithstanding the State's enactment that the Court shall have State jurisdiction. It is not made any the less an enactment investing the courts of the States with federal jurisdiction because it continues in force from day to day as a law presently speaking, and operates upon the courts of a State as they are brought into existence and upon the limits of their respective jurisdictions as they are defined or redefined. This is an entirely different thing from the legislative provision discussed in *Le Mesurier* v. *Connor* (1). The law there in question purported to empower the Governor-General to select any court of a State and by naming it to effect an investing of federal jurisdiction. That was not a law operating according to its terms to invest State courts of a given description with federal jurisdiction but a law purporting to empower the Executive to invest jurisdiction when and if it chose.

The whole question depends upon the construction of s. 39. It is sufficient to say that the section should be construed as an

(1) (1929) 42 C.L.R. 481.

ambulatory provision operating in relation to State jurisdiction as it exists from time to time and within the limits imposed from time to time by State law upon such jurisdiction. It follows that the objection ought to have been overruled and the action should have been entertained by the District Court. The order nisi will therefore be made absolute.

Order nisi made absolute.

Solicitor for the applicant, *D. D. Bell*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Harrie R. Mitchell & Evans.*

J. B.