[HIGH COURT OF AUSTRALIA.]

IN RE THE JUDICIARY ACT 1903-1920

AND

IN RE THE NAVIGATION ACT 1912-1920.

nstitutional Law—Legislative power of Parliament of Commonwealth—Power to confer jurisdiction on High Court—Determination of validity of Commonwealth Act—Reference by Governor-General—Judicial power of Commonwealth—"Matter," meaning of—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 71, 73-77—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *sec.* 30, *Part XII.* (*secs.* 88-94).

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SYDNEY, *April* 5, 6, 7; *May* 2.

MELBOURNE, *May* 16.

Knox C.J., Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Held, by *Knox*, C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that Part XII. of the *Judiciary Act* 1903-1920, which purports by sec. 88 to give the High Court jurisdiction to "hear and determine" any question referred to it by the Governor-General as to the validity of any enactment of the Parliament of the Commonwealth, and by sec. 93 to make the determination "final and conclusive and not subject to any appeal," is not a valid exercise of the legislative power conferred on the Parliament by the Constitution.

Held, also, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the word "matter" in Chapter III. of the Constitution involves some right, privilege or protection given by law or the prevention, redress or punishment of some act inhibited by law.

Per Higgins J. :—(1) Part XII. is valid, whether the determination is to be treated as mere advice or as a judicial decision; but it is a judicial decision, though not in the sense of settling a specific litigation between parties: it is not necessary for a judicial decision that there shall be opposing parties. (2) An application under Part XII. is a "matter" within the meaning of sec. 76 of the Constitution; but even if it is not, sec. 71 in vesting the judicial power of the Commonwealth in the High Court does not imply that no other jurisdiction or judicial function shall be vested in the Court. (3) The cases in the United States rest on the very different words of the United States Constitution. (4) Under sec. 51 (XXXIX.) of the Australian Constitution, Parliament can make a law in aid of the execution of the executive powers vested in the Government of the Commonwealth.

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REFERENCE by the Governor-General to the High Court.

Acting in pursuance of Part XII. of the *Judiciary Act* 1903-1920 the Governor-General of the Commonwealth, with the advice of the Executive Council, referred to the High Court the question whether and to what extent secs. 14, 43, 44, 135, 136, 288 and 293 and Schedules I and II. of the *Navigation Act* 1912-1920 (No. 4 of 1913—No. 1 of 1921) are valid enactments of the Parliament of the Commonwealth.

Leverrier K.C., *Brissenden* K.C. and *Street*, for the Attorney-General for the Commonwealth.

Sir Edward Mitchell K.C. and *E. M. Mitchell*, for the Newcastle and Hunter River Steamship Co. and a number of other owners of ships engaged in intra-State trade.

Broomfield K.C. and *H. E. Manning*, for the Attorney-General for the State of Western Australia.

Bavin and *Braddon*, for the Australasian Institute of Marine Engineers and others.

Owen Dixon, for the Attorney-General for the State of Victoria, took a preliminary objection. Part XII. of the *Judiciary Act* 1903-1920 is invalid. The jurisdiction which that Part purports to invoke is not conferred upon the High Court by sec. 75 of the Constitution, and the only power under which such a jurisdiction could be conferred by the Federal Parliament upon the High Court is that contained in sec. 76, namely, "in any matter (I.) arising under this Constitution, or involving its interpretation." But the word "matter" there means a claim of right in litigation between parties, and an abstract question of law is not a "matter." That word has in sec. 75 the same meaning (*State of South Australia* v. *State of Victoria* (1)). The word "matter" defines the subjects in respect of which the judicial power which is vested in the High Court by sec. 71 of the Constitution is to be applied. The provision in sec. 74

(1) 12 C.L.R., 667, at pp. 675, 714-715, 742.

of the Constitution reserving the right of the Crown to grant special leave to appeal to the Privy Council shows that in proceedings in the High Court there must be parties who can appeal. What Part XII. of the *Judiciary Act* seeks to obtain from the High Court is a judicial decision, and not an advisory opinion. That is shown by sec. 93, which purports to make the determination binding and conclusive and not subject to any appeal. If that were not so, the power would not be judicial; and there is an implied prohibition in the Constitution against conferring any other than judicial powers upon the High Court. Sec. 93 seeks to make the determination binding for all time, because the only persons upon whom it could be conclusive would be persons who afterwards sought to attack it.

[KNOX C.J. referred to *Attorney-General for Ontario* v. *Attorney-General for Canada* (1).]

Part XII. of the *Judiciary Act* cannot be justified under any of the powers contained in sec. 51 of the Constitution. If it could, then the same jurisdiction might be conferred on any individual. Under the United States Constitution, where the words corresponding to "matter" are "cases" and "controversies," it has been held that it is not part of the judicial power to give advisory opinions or decide abstract questions of law.

Leverrier K.C. Part XII. of the *Judiciary Act* is a valid exercise of the power conferred upon the Commonwealth Parliament by sec. 51 (XXXIX.) of the Constitution. Its provisions are incidental to the execution of the powers vested in the Parliament and in the Executive. The incidental power includes a power which will assist the Executive to carry the law into effect, and the obtaining of a determination by the High Court as to the validity of Federal legislation will assist the Executive to carry that legislation into effect. The words "hear and determine" are frequently used in relation to persons or bodies which do not exercise any judicial powers; as used in sec. 89 of the *Judiciary Act* they do not import that the High Court in acting under it is exercising the judicial power of the Commonwealth, and a determination given under it does not bind the High Court when exercising that judicial power. The determination

(1) (1912) A.C., 571, at p. 573.

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is intended to be not in the nature of a judgment *in rem* but only advisory, and binding on no one.

[KNOX C.J. referred to *In re Green* (1); *Green* v. *Lord Penzance* (2).]

The language of sec. 93 is not sufficient to make the determination binding on every one: its effect is merely that, the determination having been given, the matter can be carried no further. It may be that in that view sec. 93 is entirely unnecessary. There is authority under the Constitution to give to the High Court an advisory power as well as judicial power. [Counsel referred to the *Judicial Committee Act* 1833 (3 & 4 Will. IV. c. 41), secs. 3, 4, as to reference of questions to the Privy Council.]

[RICH J. referred to *Ex parte County Council of Kent* (3); *Overseers of the Poor of Walsall* v. *London and North-Western Railway Co.* (4).

[STARKE J. referred to *In re Knight and Tabernacle Permanent Building Society* (5).

[RICH J. referred to *Safford & Wheeler's Privy Council Practice*, pp. 33, 771.]

That the power is intended to be consultative only is borne out by the provisions that the Court may direct what persons are to be notified (sec. 91), that the Court may ask counsel to argue the question (sec. 92), and that the determination is to be final (sec. 93); showing that as it is not subject to appeal it is not to be binding on every one. [Counsel also referred to *Attorney-General for Ontario* v. *Attorney-General for Canada* (6).]

[STARKE J. referred to *Moses* v. *Parker* (7).]

If sec. 93 of the *Judiciary Act* indicates a judicial determination and is held to be therefore invalid, it is severable from the rest of the Act (*Owners of s.s. Kalibia* v. *Wilson* (8).

[GAVAN DUFFY J. referred to *Australian Steamships Ltd.* v. *Malcolm* (9).

[HIGGINS J. referred to *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (10).]

(1) 51 L.J. Q.B., 25.
(2) 6 App. Cas., 657, at p. 669.
(3) (1891) 1 Q.B., 725.
(4) 4 App. Cas., 30.
(5) (1892) 2 Q.B., 613.
(6) (1912) A.C., at p. 585.
(7) (1896) A.C., 245.
(8) 11 C.L.R., 689.
(9) 19 C.L.R., 298.
(10) 25 C.L.R., 434.

Sir Edward Mitchell K.C. Part XII. of the *Judiciary Act* is valid. The intention is to give jurisdiction to the High Court to make a judicial determination binding on the States, at any rate if they appear, on all persons who appear and on the Commonwealth. If that is the proper interpretation, the legislation is authorized by sec. 76 of the Constitution. The jurisdiction is in a matter involving the interpretation, of the Constitution. The word "matter" in sec. 76 has a wider meaning than "case" or "controversy" in the American Constitution. It does not involve the existence of a *lis*. It includes matters which are non-judicial. A "matter" is something capable of judicial determination by the application of principles of law, and of a kind which ordinarily came before Courts for determination. The word "matter" should be given a broad general meaning, and not the narrow meaning given to the word "case" in the American Constitution. In *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (1) it was said that the Attorney-General of a State may obtain from the High Court a declaration that an intrusion by the Parliament of the Commonwealth into a field of legislation reserved to the States was not authorized. Part XII. seeks to enable the Commonwealth to obtain a similar declaration, and unless a wide meaning is given to the word "matter" that object will be defeated. The jurisdiction is similar to that which a person may invoke a Court to exercise when he asks for the interpretation of a document or for a declaration of his rights.

[KNOX C.J. referred to *Williams* v. *North's Navigation Collieries (1889) Ltd.* (2); *Offin* v. *Rochford Rural Council* (3).]

Part XII. of the *Judiciary Act* is also authorized by sec. 51 (XXXIX.) of the Constitution. It is incidental to the power conferred by sec. 76 on the Parliament and to the executive power conferred by sec. 61 on the Governor-General, which extends to the execution and maintenance of the laws of the Commonwealth. See *Jumbunna Coal Mine No Liability* v. *Victorian Coal Miners' Association* (4) as to the extent of the incidental power. The jurisdiction given by secs. 21AA of the *Commonwealth Conciliation and Arbitration Act*

(1) 6 C.L.R., 469, at p. 557.
(2) (1904) 2 K.B., 44.
(3) (1906) 1 Ch., 342, at p. 357
(4) 6 C.L.R., 309.

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1904-1920 to the High Court to hear and determine a question as to the existence of a dispute, and that given by sec. 31 of the same Act to the High Court to hear and determine any question of law asked by the President of the Commonwealth Court of Conciliation and Arbitration, are similar to the jurisdiction given by Part XII. of the *Judiciary Act*. In neither case is there any "matter" in the narrow sense, the only proceedings out of which the jurisdiction arises being before a non-judicial tribunal (*Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (1)). But the High Court has held that both sec. 21AA and sec. 31 are valid (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (2); *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co.* (3)). If in a non-judicial proceeding the Parliament may authorize any person to apply to the High Court to get a determination as to the validity of any part of the *Commonwealth Conciliation and Arbitration Act*, it cannot be said that the Parliament has no power to authorize the Executive to obtain from the High Court a determination as to the validity of any Commonwealth enactment. The "matter" which is referred to in Part XII. is constituted by the application to the High Court for its determination.

Broomfield K.C. did not argue.

Bavin adopted the arguments of counsel for the State of Victoria.

Owen Dixon, in reply. Whether Part XII. purports to confer power to make a curial order or to enable the opinion of the majority of the Justices to be obtained, it is outside sec. 76 of the Constitution. In the one case the order sought does not relate to a "matter"; in the other the opinion neither relates to a "matter" nor is within the judicial power. The word "matter" means a claim of legal right—a claim by some one who can legally enforce it. Part XII. cannot be supported by sec. 51 (XXXIX.) of the Constitution. "Matter" in pl. XXXIX. means something which may occur in the

(1) 25 C.L.R., 434.
(2) 16 C.L.R., 245.
(3) 22 C.L.R., 103.

exercise of the legislative or executive power. The thing must be incidental to what the Legislature or the Executive is doing. If it were incidental to the legislative or executive power to have the law declared by a determination whether binding on every one or on no one, jurisdiction to make the determination might be conferred upon any individual, and if the determination were binding on every one the opinion of that individual would be the measure of the meaning of the Constitution.

[Counsel also referred to *Lefroy's Canada's Federal System*, 2nd ed., p. 674; *United States* v. *Evans* (1).]

Cur. adv. vult.

May 16.

The following written judgments were delivered:—

KNOX C.J., GAVAN DUFFY, POWERS, RICH AND STARKE JJ. This was a reference by the Governor-General under sec. 88 of the *Judiciary Act* for the determination of the question whether, and to what extent, certain sections of the *Navigation Act* 1912-1920 are valid enactments of the Parliament of the Commonwealth. Mr. *Dixon*, for the Attorney-General of the State of Victoria, having raised the objection that Part XII. of the *Judiciary Act*, in which sec. 88 is found, was beyond the powers of the Commonwealth Parliament, the Court heard argument on that question before proceeding to hear and determine the question referred.

In order to decide the preliminary question it is necessary first to ascertain the meaning of the provisions of Part XII., which comprises secs. 88-94. By sec. 88 Parliament purports to confer on this Court "*jurisdiction to hear and determine*" "any question of law as to the validity of any Act or enactment of the Parliament" which "the Governor-General refers to the High Court for hearing and determination." Sec. 89 provides that any matter so referred shall be heard and determined by a Full Court consisting of all the available Justices. Sec. 90 provides for notice of the hearing to be given to the Attorney-General of each State, and for his right to appear or be represented at the hearing. Sec. 91 empowers the Court to direct that notice be given to other persons, and that they

(1) 213 U.S., 297.

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shall be entitled to appear or be represented at the hearing. Sec. 92 empowers the Court to request counsel to argue the matter as to any interest which in the opinion of the Court is affected and as to which counsel does not appear. Sec. 93 provides that the determination of the Court upon the matter shall be final and conclusive and not subject to any appeal. Sec. 94 provides for the making of rules—none have yet been made.

Mr. *Leverrier*, for the Commonwealth, contended that a determination of the Court pronounced under this Part of the Act was, on the true construction of these sections, merely advisory and not judicial. In our opinion this contention is untenable. After carefully considering the provisions of Part XII., we have come to the conclusion that Parliament desired to obtain from this Court not merely an opinion but an authoritative declaration of the law. To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question. What, then, are the limits of the judicial power of the Commonwealth? The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales* v. *The Commonwealth* (1)). In each case the Constitution first grants the power and then delimits the scope of its operation (*Alexander's Case* (2)). Sec. 71 enacts that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction. Secs. 73 and 74 deal with the appellate power of the High Court, and we need make no further reference to those sections as it is not suggested that the duty imposed by Part XII. of the *Judiciary Act* is within the appellate jurisdiction of this Court. Sec. 75 confers original jurisdiction on the High Court in certain matters.

(1) 20 C.L.R., 54, at p. 88. (2) 25 C.L.R., at p. 441.

and sec. 76 enables Parliament to confer original jurisdiction on it in other matters. Sec. 77 enables Parliament to define the jurisdiction of any other Federal Court with respect to any of the matters mentioned in secs. 75 and 76, to invest any Court of the States with Federal jurisdiction in respect of any such matters, and to define 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. This express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction. The question then is narrowed to this: Is authority to be found under sec. 76 of the Constitution for the enactment of Part XII. of the *Judiciary Act*? Sec. 51 (xxxix.) does not extend the power to confer original jurisdiction on the High Court contained in sec. 76. It enables Parliament to provide for the effective exercise by the Legislature, the Executive and the Judiciary, of the powers conferred by the Constitution on those bodies respectively, but does not enable it to extend the ambit of any such power. It is said that here is a matter arising under the Constitution or involving its interpretation, and that Parliament by sec. 30 of the *Judiciary Act* has conferred on this Court original jurisdiction in all matters arising under the Constitution or involving its interpretation. It is true that the answer to the question submitted for our determination does involve the interpretation of the Constitution, but is there a matter within the meaning of sec. 76? We think not. It was suggested in argument that "matter" meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word "matter" in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.

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If the matter exists, the Legislature may no doubt prescribe the means by which the determination of the Court is to be obtained, and for that purpose may, we think, adopt any existing method of legal procedure or invent a new one. But it cannot authorize this Court to make a declaration of the law divorced from any attempt to administer that law. The word "matter" is used several times in Chapter III. of the Constitution (secs. 73, 74, 75, 76, 77), and always, we think, with the same meaning. The meaning of the expression "in all matters between States" in sec. 75 was considered by this Court in *State of South Australia* v. *State of Victoria* (1). *Griffith* C.J. said that it must be a controversy of such a nature that it could be determined upon principles of law, and in this *Barton* J. agreed. *O'Connor* J. said that the matter in dispute must be such that it can be determined upon some recognized principle of law. *Isaacs* J. said that the expression "matters" used with reference to the Judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties. *Higgins* J. appeared to think that the expression involved the necessity of the existence of some cause of action in the party applying to the Court for a declaration. He said (2):—"Even assuming that the State is to be regarded as being substantially the donee of the power, I know of no instance in any Court in which a donee of a power such as this—a power in gross—has obtained by action a declaration that he has the power. Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise." All these opinions indicate that a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law. The adjudication of the Court may be sought in proceedings *inter partes* or *ex parte*, or, if Courts had the requisite jurisdiction, even in those administrative

(1) 12 C.L.R., 667.

(2) 12 C.L.R., at p. 742.

proceedings with reference to the custody, residence and management of the affairs of infants or lunatics. But we can find nothing in Chapter III. of the Constitution to lend colour to the view that Parliament can confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.

During the argument a strenuous attempt was made to show that this Court had, in earlier cases, approved of the exercise of original jurisdiction in circumstances like those of the present case. We have examined the cases relied on in support of this proposition, and we are satisfied that in all of them the use of the judicial power was approved only when it was used for the purpose of effecting or assisting in effecting a settlement of existing claims of right under the law of the Commonwealth.

In *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (1) a case was stated by the Commonwealth Court of Conciliation and Arbitration for the opinion of the High Court, pursuant to sec. 31 of the *Commonwealth Conciliation and Arbitration Act*, upon certain questions of law arising in the proceedings before the Arbitration Court. This Court determined these questions of law. The provisions of sec. 31 provide for the determination of questions of law which affect the rights of parties to an award under the Arbitration Act. In our opinion, the determination of such questions is a clear exercise of judicial power under sec. 76 of the Constitution, and therefore rightly bestowed upon the Judiciary. In *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co.* (2) the provisions of sec. 21AA of the *Commonwealth Conciliation and Arbitration Act* were upheld as a valid exercise of the legislative power of the Commonwealth. In connection with this section it is well to remember that it is not within the jurisdiction of the Arbitration Court to determine whether a dispute of the character required by the Constitution and the Arbitration Act exists or does not exist so as to prevent prohibition issuing from the High Court if there is in fact no dispute. The existence of the dispute is, however, a condition of jurisdiction (*R.* v. *Commonwealth Court of Conciliation*

(1) 16 C.L.R., 245. (2) 22 C.L.R., 103.

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and Arbitration ; *Ex parte Allen Taylor & Co.* (1) ; *Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (2)).

Now sec. 21AA provides a summary method for the determination by the Judiciary of the question of jurisdiction. It also provides for the determination of questions of law arising in relation to the dispute or to the proceedings or to any award or order of the Court. All these questions affect actual existing rights of parties to a dispute which it is sought to determine under the Arbitration Act, and their decision is an exercise of the judicial power within the provisions of sec. 76 of the Constitution.

The *Jumbunna Case* (3) declared that the provisions of Part V. of the Arbitration Act relating to the formation and registration of organizations were within the legislative power of the Commonwealth. This conclusion was based upon the provisions of sec. 51 (xxxv.) and (xxxix.) of the Constitution. The formation and registration of an organization is not and could not be part of the judicial power of the Commonwealth, and there is nothing in the case to suggest that it is. The decision of the Court is rested upon the view that proper representation of parties before the arbitral tribunal set up under the Arbitration Act was necessary to the execution of the arbitral power under sec. 51 (xxxv.) of the Constitution, and that to provide for their organization by means of registration was an incident to that power. The case has no relevance, in this respect, to the judicial power of the Commonwealth or its exercise.

HIGGINS J. The Governor-General in Council, acting in pursuance of Part XII. of the *Judiciary Act*, has referred to this Court a question of law as to the validity of certain sections of the *Navigation Act*—which has been enacted but not yet proclaimed.

The preliminary point is taken, by counsel for the State of Victoria, that Part XII. is itself invalid, and that the Commonwealth Parliament had no power to confer on the Court jurisdiction to hear and determine the question. The State of Western Australia and a number of shipowners support Part XII. as valid.

(1) 15 C.L.R., 586, at p. 606. (2) 12 C.L.R., 398, at p. 454.
(3) 6 C.L.R., 309.

It is the Executive Government of the Commonwealth that asks for our determination as to the *Navigation Act*. Under sec. 61 of the Constitution, the executive power is vested in the King and is "exercisable by the Governor-General as the King's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." When the *Navigation Act* is proclaimed, certain drastic provisions for manning and accommodation, involving grave structural alterations in the ships, will (if that Act is valid) apply to the ships; and the Government and the shipowners want to know how far the shipowners are obliged to obey the provisions, and how far the Government can enforce them. The question before us now is, therefore, had Parliament power to enable the Government to come to this Court for guidance before taking the responsibility of enforcing the provisions. To ascertain, as far as it is possible to ascertain, whether the sections of the *Navigation Act* are valid is necessary—incidental—to the execution and maintenance of the Constitution and the laws. But, it is said, Parliament has no power to confer upon this Court jurisdiction to hear and determine the question of validity.

Under sec. 51 of the Constitution the Parliament has power to make laws for the peace, order and good government of the Commonwealth "with respect to" many subjects, including trade and commerce with other countries and among the States; and it has also power (pl. XXXIX.) to make laws "with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth." Part XII. of the *Judiciary Act* seems to me to come precisely under these words. The Government must execute the laws so far as valid; and in order to carry out its duty it is enabled by Part XII. to get the highest legal opinion in the country as to the validity of the sections before acting on them. In my opinion, Part XII. is valid, whether our determination is to be treated as mere advice or as a judicial decision.

Much argument has been addressed to the question, Is it mere advice or is it a judgment that this Court is to give under Part XII.? Counsel for the Commonwealth says it is mere advice. I cannot reconcile this view with the strong words "hear and determine,"

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"final and conclusive," &c. One may conjecture that the draughtsman used these words (which are the same as used in sec. 73 of the Constitution, as to appeals to the High Court) in order to avoid the possible objection that a mere advisory opinion is not part of the *judicial* power of the Commonwealth (sec. 71), and in order to satisfy the pronouncements of the Supreme Court of the United States against the giving of advisory opinions. But, to my mind, the distinction is immaterial. The determination sought is to aid the Government in the carrying out of its executive functions; and that is enough.

That a determination would be an aid to the Government is unquestionable. It would not be a judgment binding all the world, as has been suggested, or binding as *res judicata* between parties who have not been heard; but it would be an authority of great weight —a decision which, unless overruled, the Courts would follow in actions between parties; just as a decision between A and B is an authority in a subsequent action between C and D. C and D are certainly "affected" by the decision between A and B; but it is open to C or D to satisfy this Court that the law of the decision was wrong. It is to be noticed that in sec. 93 the word "binding" is not used in addition to "final and conclusive"; it was so used in the analogous Tasmanian Act discussed in *Moses* v. *Parker* (1). "Final and conclusive" means, in my opinion, that the determination of the High Court is to be an end to the whole proceeding; and, lest it should be contended that it is to be final and conclusive as to the *High Court only*, the words are added "and not subject to any appeal." It is unnecessary to consider the effect of these last words on the prerogative right of the King to admit appeals, as we are concerned at present with the intention of Parliament in the Act; but it is worthy of notice that, in the Orders in Council reserving this prerogative right, the words used are "judgment or *determination*" (*cf. Order in Council*, 9th June 1860). It is also unnecessary to consider at present whether the parties who are heard, or who have an opportunity to be heard, before the High Court, are bound by the determination, as suggested by counsel for the shipping companies. It is enough to say that in the absence

(1) (1896) A.C., 245.

of clear words to the contrary we must accept that meaning for Part XII. which is in accord with the first principles of justice—that a man's rights are not to be bound by a decision in a proceeding in which he had no opportunity of being heard (*Cooper* v. *Wandsworth Board* (1); *Broom's Legal Maxims*, 8th ed., pp. 91, 267; *Maxwell on Statutes*, 6th ed., pp. 149 *et seq.*); and that in an ordinary controversy between parties, the determination under Part XII. would not support any plea of *res judicata*. Nevertheless, the proceeding, the determination, is judicial. It is not judicial in the sense of settling a specific litigation between parties but in the sense of pronouncing the law authoritatively. The determination would be treated as an authority in the Courts of Australia until overruled either by the High Court or by the Privy Council. It is not necessary for a judicial proceeding that there should be opposing parties. I put during the argument the case of an application to a Court by the committee of a lunatic as to residence of the lunatic. There is also the case of an application for letters of administration, unopposed. Even if the application is non-contentious, there can be an appeal from a refusal on the part of the primary Judge (*In re Clook* (2)). So in the case of an application for the renewal of a patent, &c.

These considerations bring me to say something as to Chapter III. of the Constitution—"The Judicature." It is said that this Court, as a Court, is forbidden by the Constitution to perform any functions which are not within "the judicial power of the Commonwealth," and that the function of determining the validity of an Act except between litigating parties is not within that judicial power. I cannot accept either proposition. To say that Blackacre shall be vested in A (and in A only) does not carry as a corollary that Whiteacre shall *not* be vested in A; to say that the judicial power of the Commonwealth shall be vested in the High Court (and other Federal Courts and such other Courts as Parliament invests with Federal jurisdiction—sec. 71 of Constitution) does not imply that no other jurisdiction, or power, shall be vested in the High Court or in the other Courts. This is surely obvious, on the mere form of words. There is a great deal of force in the argument, favoured by lawyers,

(1) 14 C.B. (N.S.), 180. (2) 15 P.D., 132.

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that decisions of a Court where there is no active controversy between interested parties are not so valuable as when there is such controversy; and that, when a litigated case comes before the Court subsequently, the Court would approach it with prejudiced minds. But this argument is an argument of expediency, and is not for us. It may be that we shall have in the future attempts at preventive law as well as at preventive medicine; and that, on a balance of expediencies, the law-makers may prefer judicial proceedings before acting, rather than to keep all judicial proceedings till after the doubtful step has been taken. The point is that the Constitution does not expressly forbid the vesting of other powers in this Court, and that there is no necessary implication to that effect. In the next place, I think that an application under Part XII. does come (if that is necessary) within the words of sec. 76, "matter arising under this Constitution, or involving its interpretation." Counsel for the State of Victoria says that "matter" in this contest means a "claim of right": but this definition is too broad, I think, in that it omits the idea of some curial proceeding; and too narrow, in that it assumes that there must be a contest between parties. It is not necessary that a "matter" should be between parties. I pass by the fact that in the *Judiciary Act* itself, "matter" includes any proceeding in a Court "*whether between parties or not*"; for it may be urged that the Act was not in force at the time of the Constitution. But in the English *Judicature Act* 1873 the word "matter" is defined as "every proceeding in the Court *not in a cause*"; and "cause" includes "any action, suit, or other original proceeding *between a plaintiff and a defendant*." This is the language of the Parliament which enacted our Constitution; and the distinction between "causes" and "matters" or "suits" and "matters" was common in still earlier legislation (15 & 16 Vict. c. 80; 15 & 16 Vict. c. 86; General Orders of 1841). In the Oxford Dictionary the meaning of "matter," as used in law, is "something which is to be tried or proved." It may be that the connotation of words used in the Constitution may not be extended by Parliament; but surely not the denotation. The Constitution does not stereotype the denotation of words for all subsequent time. The States can create new matters. Any State may hereafter adopt the French

law of *prodigue*, under which a wife may apply for an interdict against extravagance on the part of her husband; and if such a law were adopted the High Court would have jurisdiction of the matter (or cause) if it involve in any way the interpretation of the Constitution. What the State can do, the Commonwealth can do —within the ambit of its specific subjects; and if the Commonwealth Parliament see fit to create a new legal proceeding under sec. 51 (xxxix.), that legal proceeding comes under the High Court jurisdiction to decide matters involving the interpretation of the Constitution (sec. 76).

But, in my opinion, the only real question necessary to decide here is the meaning of sec. 51 in its relation to sec. 61 of the Constitution. Hitherto, this Court has given the widest construction to pl. xxxix. and to the words "with respect to" in the opening words of sec. 51. In the *Jumbunna Case* (1) it was held that Parliament could assist the operations of the Court of Conciliation, which it had created under pl. xxxv., by providing for the registration and incorporation of industrial associations. It is true, of course, that to create corporations is not to act judicially; but by sec. 31 of the Conciliation Act Parliament has authorized the Court of Conciliation to state a case for the opinion of the High Court, and has authorized the High Court to hear and determine it. This legislation was held to be valid (*Federated Engine-Drivers' and Firemen's Association of Australasia* v. *Broken Hill Proprietary Co.* (2)). Yet it gives the High Court judicial power which cannot be brought within sec. 75 or sec. 76 of the Constitution. The points of law need not be points "arising under this Constitution, or involving its interpretation," &c. The case is stated by the President for his own guidance, whether the parties to the conciliation proceedings ask him or not, and even though they may not (they often do not) discuss the points. Moreover, Parliament has, by sec. 21AA of the Conciliation Act, given the High Court jurisdiction to decide as to the existence of an industrial dispute, or "on any question of law arising in relation to the dispute . . . or to any award or order of the Court." This legislation has also been held to be valid (*Federated Engine-Drivers' and Firemen's Association of Australasia* v.

(1) 6 C.L.R., 309.

(2) 16 C.L.R., 245.

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Colonial Sugar Refining Co. (1)). Yet it gives judicial power which cannot be brought under Chapter III. of the Constitution at all. The High Court is enabled to decide questions which do not arise between parties asserting "existing claims of right" in a legal controversy or at all. The Court of Conciliation does not, either in its primary function of procuring agreement (conciliation) or in making awards (arbitration) determine existing rights: it rather is an instrument for creating rights. In both instances, there was no "matter" actual or possible until Parliament specially created it. "Matter" does not *mean* merely legal proceeding, but some legal proceeding is probably implied—not necessarily a proceeding where some immediate right, duty or liability is to be established by the determination of the Court; for under such a limited meaning the High Court could not decide as to the existence of an industrial dispute under sec. 21AA.

Nor is the jurisdiction given to this Court to entertain and give a determination as to law in non-litigious matters anything startling or novel. In the British Act which organized the Judicial Committee of the Privy Council (3 & 4 Will. IV. c. 41) His Majesty was empowered to refer to the Judicial Committee "for hearing or consideration" any matters (other than appeals, &c.) as His Majesty thought fit; and the Committee has to hear or consider the same, and advise His Majesty (sec. 4). It appears that the Judicial Committee, when acting under this section, does not make a pronouncement in a formal reasoned judgment, but merely advises His Majesty (*Bentwich's Privy Council Practice*, p. 241). As Lord *Loreburn* L.C. said in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2)), the Judicial Committee exercises most important judicial functions, yet it is bound to answer His Majesty under this section; and there never has been any suggestion of inconvenience or impropriety. In Canada in several successive Acts the Government was enabled to put before the Supreme Court of Canada questions touching the validity of Dominion or Provincial legislation. In the Act of 1906 (sec. 6): "The opinion of the Court upon any such reference although advisory only shall for all purposes of appeal to His Majesty in Council be treated as a final judgment of the said Court between parties." These words imply that for other purposes the opinion

(1) 22 C.L.R., 103. (2) (1912) A.C., 571.

is not to be treated as a *res judicata* between parties, and yet an appeal lies to the Judicial Committee therefrom. Many such appeals have been heard. In this case sec. 6 was held to be valid; although the argument was used that it was an interference with the judicial character of the Supreme Court, and that the Judges would approach litigation with preconceived opinions. That, the Judicial Committee said, was a matter of policy for Parliament to consider. But for the fact that in Canada the residuary powers of legislation belong to the Dominion, not to the Provinces, this case would be a direct authority in favour of Part XII. of our Act. Why should the Canadian Court have jurisdiction to give an opinion that may be the subject of an appeal, and yet the Australian Court be incapable of giving a determination that is not subject to appeal? In both cases, there is no litigation between parties.

It is true that in the United States the Supreme Court has steadfastly refused to advise the Executive on its request. The principle has been recently stated and explained in *United States* v. *Evans* (1). In 1793 Washington, as President, sought to take the opinion of the Supreme Court as to various questions arising under treaties with France; but there was no response. *Marshall* C.J. thus speaks of the matter in his *Life of Washington*: "Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, the Judges deemed it improper to enter into the fields of politics by declaring their opinions on questions not arising out of the case before them." But it will be observed that the question put by Washington was a question under a treaty; and, whatever the question was, it was assumed to be a question of politics, as to external relations—a matter for the Executive, or for Congress. No American case has been cited to us in which, under the Constitution of 1789, an Act of Congress has been held to be invalid which purported to give to the Supreme Court jurisdiction to state the interpretation of the Constitution, or to pronounce as to the validity of an Act made as under the Constitution. Probably the difficulty in the way of such an Act is greater than under our Constitution; because in the article of the United States Constitution as to judicial power the words used are not so wide as in our Constitution. Here, the words

(1) 213 U.S., 297.

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are "*matters* arising under this Constitution, or involving its interpretation" (sec. 76); in the United States the words are "*all cases in law and equity* arising under the Constitution." There must be in the United States, a case or a controversy, at law or in equity, between litigating parties. The position is very different.

There is nothing in the utterances of the members of the Bench in *State of South Australia* v. *State of Victoria* (1) that conflicts with the view which I here express. There, the discussion was as to sec. 75 of the Constitution—"matters between States"; and the word "between" necessarily implies a litigious case or controversy. It was clear that the action could not be maintained unless there were such a case or controversy; and my difficulty was that the State of South Australia, as a mere donee of a power, had no cause of action.

To sum up:—Part XII. of the *Judiciary Act* purports to enable the High Court to exercise a judicial function, in aid of sec. 61 of the Constitution. This function is either within "the judicial power of the Commonwealth" referred to in sec. 71 of the Constitution, or it is not. In my opinion, it *is* within that judicial power; for it is the function of deciding a "matter arising under the Constitution, or involving its interpretation," within sec. 76. But even if it is not within sec. 76, there is nothing in the Constitution to prohibit Parliament from giving other functions to the High Court than the exercise of "the judicial power" referred to in Chapter III.; and we are not justified in implying such a prohibition.

The separation of the legislative, executive and judicial powers under the Constitution leaves these arms of the Commonwealth interdependent. In Australia executive Ministers must sit in the Legislature (sec. 64) (not as in the United States); and Parliament can regulate the working of the judicial power. There is nothing in the separation of powers that necessarily involves that the High Court cannot be employed to aid the Executive—judicially, at all events.

I much regret to find myself differing from my learned colleagues, but I can see no sufficient ground for holding Part XII. of the *Judiciary Act* to be invalid.

(1) 12 C.L.R., 667.

Solicitor for the Attorney-General for the Commonwealth, *Gordon H. Castle*, Commonwealth Crown Solicitor.

Solicitor for the Newcastle and Hunter River Steamship Co. and others, *H. de Y. Scroggie*.

Solicitor for the Attorney-General for Western Australia, *F. L. Stow*, Crown Solicitor for Western Australia.

Solicitor for the Australasian Institute of Marine Engineers and others, *Sullivan Brothers*.

Solicitors for the Attorney-General for Victoria, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.

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[HIGH COURT OF AUSTRALIA.]

INNES . . . . . APPELLANT AND RESPONDENT;

AND

LINCOLN MOTOR COMPANY . RESPONDENT AND APPELLANT.

H. C. OF A. 1921.

SYDNEY, *April* 20, 29.

Knox C.J., Gavan Duffy, Rich and Starke JJ.

Trade Mark—Application—Applications by two persons—Nearly identical marks—Power of Registrar of Trade Marks—Refusal to register—Trade Marks Act 1905-1912 (*No.* 20 *of* 1905—*No.* 19 *of* 1912), *secs.* 27, 32, 33.

Sec. 27 of the *Trade Marks Act* 1905-1912 provides that "Where each of several persons claims to be the proprietor of the same trade mark, or of nearly identical trade marks in respect of the same goods or description of goods, and to be registered as such proprietor, the Registrar may refuse to register any of them until their rights have been determined by the Court, or have been settled by agreement in a manner approved by him or (on appeal) by the Law Officer or the Court."

Held, that the power conferred by that section on the Registrar may be exercised at any time whether before or after the Registrar has, under sec. 33, accepted the applications of the persons so claiming.

Held, also, that in determining the question whether the marks are "nearly identical" within the meaning of sec. 27, the inquiry is not whether the marks are likely to be confused with one another or are calculated to deceive, but whether there is claimed by several persons one mark or what the statute treats as one mark.