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Judges' Chambers,

Hobart,

Tasmania.

29th July, 1907.

My dear Mr. Irvine,

I am prompted to write this letter to you because I believe that you will more readily appreciate the argument of it than any other member of the Federal Parliament to whom I could send it. The subject which I desire to discuss is the Bill to amend the Judiciary Act 1903 which has been introduced into the Senate by Mr. Best, and which has been read there a third time. The whole purport of the Bill appears to me to be the removal from the cognisance of the Supreme Courts of the States all cases which involve any question for the determination of which the Court would be required to declare the extent, or limits, of the legislative power of the Commonwealth, or of any State, in respect of any subject whatever in regard to which there is any possibility of a conflict of jurisdictions. The alleged authority for the proposed legislation is doubtless section 77 of the Constitution of the Commonwealth. But I venture to suggest that the proposed legislation goes beyond the alleged authority for it, for the ~~three~~ following reasons:-

1. All the subsections of section 77 of the Constitution ought to be read together, because they refer conjointly and exclusively to the same matter, and are manifestly intended to be supplementary of one another in regard to that matter. The

matter to which the whole section refers is the extent of the federal jurisdiction which the Parliament of the Commonwealth may confer upon any federal court other than the High Court, or upon any court of a State; and the transposition of subsections II and III would not require the alteration of a single word or letter in either of them, to preserve the grammatical sequence or the intelligibility or meaning of either of them. It may therefore be confidently contended that the meaning or purport of either of them does not depend upon their numerical position in the section. But if subsections II and III are read together, without any notice of their numerical positions in the section, I think that there cannot be any rational doubt that the power conferred upon the Parliament of the Commonwealth by subsection II is a power to define the extent to which the jurisdiction of any federal court (other than the High Court) shall be exclusive of the federal jurisdiction conferred by the Parliament upon any court of a State. If an attempt is made to base a contrary argument upon the form of the language of subsection II which uses the present tense in regard to the courts of the States, and speaks of a jurisdiction which "belongs to or is vested in the courts of the States", any such attempt will be found to be a two edged sword; because if the language of subsection II is to be taken to refer to a jurisdiction already belonging to the courts of the States before the establishment of the Commonwealth, or vested in them by the Constitution, then the Parliament of the Commonwealth is not authorised by subsection II

to declare the jurisdiction of any federal court to be in any degree exclusive of the federal jurisdiction which it may at any time confer on any court of a State, because such last mentioned jurisdiction is not within the language of subsection II. I therefore venture to contend that the word "jurisdiction", as used in subsection II should be read as "federal jurisdiction", and as referring to such federal jurisdiction as the Parliament of the Commonwealth may confer upon the courts of the States. It must be so read when used in the same section in reference to the federal courts other than the High Court, because they are courts which the Parliament of the Commonwealth is authorised to create to assist the High Court in the exercise of the judicial power of the Commonwealth only, and consequently the only jurisdiction which the Parliament can confer on them is a federal jurisdiction. Therefore, if the word "jurisdiction", as used in subsection II, is to include something more than federal jurisdiction in relation to the High Court, it must have two interpretations given to it, although it is used only once in the subsection, and with a simultaneous application to the High Court and to other federal courts and the courts of the States. If nothing less than this double interpretation of the word "jurisdiction" would make the whole subsection intelligible and operative, it would be imperative on all the courts of the Commonwealth to give that double interpretation to it. But if the subsection is made perfectly intelligible and every word of it is made operative, when the word "jurisdiction" is read as "federal jurisdiction", in relation to all the courts

mentioned in the section, where is the necessity or the justification for a double interpretation of it?

If the foregoing contention as to the interpretation that should be given to the word "jurisdiction" in subsection II of section 77 of the Constitution of the Commonwealth is correct, the extent of the legislative power of the Commonwealth in respect of the matter to which the whole of section 77 relates is determined by the true meaning of the phrase "federal jurisdiction" as used in subsection III. Upon this question there seems to me to be a large amount of misapprehension in the mind of Mr. Best, as it is disclosed in his speech on the second reading of the Bill, if I have succeeded in following his arguments intelligently; and he indicates that such misapprehension is shared by some persons outside of the Parliament of the Commonwealth upon whose opinions he relies for the validity of the legislation which he invites the Parliament to enact upon the subject. If the proposed legislation will be a valid law under the Constitution, ~~when it is enacted~~ in accordance with Mr Best's arguments for its validity, it will be so because the courts of the States have been previously invested with federal jurisdiction by section 5 of "The Commonwealth of Australia Constitution Act", and because they necessarily exercise such a jurisdiction whenever they declare that any alleged or apparent law of a State is invalid because inconsistent with a law of the Commonwealth. If this contention is correct, it follows that whenever a court of a State decides that any alleged law enacted by the Parliament of that State is inconsistent with the

Merchant Shipping Act of the Imperial Parliament or any other Act of the Imperial Parliament in force in the Commonwealth, that Court is exercising an "imperial jurisdiction". But I am of opinion that in each of the cases above mentioned the court is exercising a purely local jurisdiction, and is simply declaring that the local law of the State does not include the apparent portion of it which is ultra vires the legislative power of the Parliament of the State, and therefore void. In other words the court in any such case is simply declaring what is the law of the State. All the courts of the States have always had jurisdiction to declare the laws of their States without any authority conferred upon them by the Parliament of the Commonwealth for that purpose; and if by virtue of section 5 of "The Commonwealth of Australia Constitution Act", ~~this jurisdiction becomes~~ they are invested with a "federal jurisdiction" to enable them to decide any ~~anything~~ question of a conflict between an alleged law of a State and a provision of the Constitution or a law enacted by the Parliament of the Commonwealth ~~arises~~, then the power conferred upon the Parliament of the Commonwealth by subsection III of section 77 of the Constitution is supererogatory and superfluous.

Courts and Judges are very properly reluctant to state a proposition of law in the form of an exclusive definition of a legal relation, or of a legal consequence, that may arise in a variety of unforeseen circumstances; but I venture to define "federal jurisdiction", as the phrase is used in section 77 of the Constitution of the Commonwealth, as that

jurisdiction which is exercised by any court in the Commonwealth when, in direct response to an application made to it for that immediate purpose, it determines the rights or liabilities, or the immunities or obligations, or the status, or the guilt or innocence of any person, under any provision of the Constitution of the Commonwealth, or under any law made by the Parliament of the Commonwealth, and when its determination is enforceable by the executive power of the Commonwealth, or by the executive power of a State acting under the authority of a law of the Commonwealth. This is clearly the character of the jurisdiction which is described as "federal" in subsection III of section 77 of the Constitution; and the insertion of that subsection in the Constitution and the explicit grant of the power conferred upon the Parliament of the Commonwealth, by section 71, to vest any portion of the judicial power of the Commonwealth in the courts of the States, appear to me to amount to a positive declaration that, in the absence of these two provisions of the Constitution, the Parliament of the Commonwealth could not empower the courts of the States to determine the rights and liabilities of any persons under the laws of the Commonwealth, so that their decisions should be enforceable either by the Executive Government of the Commonwealth or by the Executive Governments of the States. The question of the relation of the Courts of the States to the provisions of the Constitution and to the laws enacted by Congress has been much debated in the United States of America, and the large balance

of authority is directly in support of the argument which I have propounded in reference to the position of the courts of the States of the Commonwealth in relation to the exercise of a "federal jurisdiction". See paragraph 1756 of Story's Commentaries 5th Edition vol.2 p.537, and the cases there cited. In this connection I may also direct your attention to the chapter on the Judicial Power of the Commonwealth in my Studies in Australian Constitutional Law, in which I have argued that the jurisdiction which the High Court exercises when it hears and determines appeals from the courts of the States, in cases arising wholly under the local law of the States and in which no question of its inconsistency with the Constitution or a law of the Commonwealth arises, is not a "federal jurisdiction", although the High Court is then exercising a portion of the judicial power of the Commonwealth. See 2nd Edition pp. 154 - 155.

2. With regard to section 5 of the proposed legislation I venture to say that it is clearly outside of the authority conferred on the Parliament of the Commonwealth by sections 76 and 77 of the Constitution of the Commonwealth. In order to bring any case within the language of subsections I and II of section 76, it ought to be a case which raises directly, as the fundamental subject matter of the controversy, a question immediately within the language of one of those two subsections. But section 5 of the proposed legislation would oust the jurisdiction of the Supreme Court of a State immediately a question of the legislative power of the Parliament of the Commonwealth, or of a State, arose incidentally in the

trial of a case which was primarily and substantially unrelated to any such question. The result of such legilsation would often be oppressively and intolerably vexatious and expensive to litigants by the unexpected appearance of it in the course of a trial and the consequent interruption and transfer of the trial to the High Court. Moreover, questions of the limits of the legislative power of a State may arise before a Judge in Chambers under the provisions of a taxing Act of the State which provide for the settlement of disputes as to liability under it by a Judge in Chambers. There are several such taxing Acts in force in Tasmania, and in October 1905 I heard and determined in Chambers a case of disputed liability under one of them in which The Australian Automatic Weighing Machine Company claimed to be exempt from liability to taxation under the Constitution of the Commonwealth. The proposal to compel every person who disputes his liability in such a case to resort primarily to the High Court for relief is nothing less than an attempt to make the collection of the revenue of the State primarily subject to the supervision and control of the High Court, whenever a question of the liability of the taxpayer depends upon the validity of the taxing Act as a proper exercise of the legislative power of the State.

(3) So far I have confined my arguments to the language of sections 76 and 77 of the Constitution of the Commonwealth. I now proceed to consider the validity of the proposed legislation in the light of its consequences. The courts of every State exist to administer the laws of the State, and there is

not a word in the whole Constitution of the Commonwealth which indicates that it was the intention of the framers of the Constitution to confer upon the Parliament of the Commonwealth the power to preclude the courts of the States from administering any portion of the laws of the States. But if the proposed legislation becomes the law of the Commonwealth, the courts of every State will be thereby prohibited from administering any law of a State in regard to which a litigant shall choose to assert that it is inconsistent with the Constitution of the Commonwealth, or with a valid enactment of the Parliament of the Commonwealth. There is not any proposed, or possible, restriction upon a litigant's right to place such a plea upon the record of any case brought in any court of a State, and therefore the proposed legislation would place it in the power of any litigant in any State, at any time, to oust the jurisdiction of the courts of the State to adjudicate in any case arising wholly under the law of the State. When this result is stated in all its impudent nakedness, the proposed legislation is immediately seen to be an outrageous interference with the judicial power of the States, and to be directly repugnant to the federal system of government which is contemplated by the Constitution of the Commonwealth. In this connection I think that the following passage from the judgment of Mr. Justice Miller (speaking for the majority of the Supreme Court of the United States), in The Slaughter House Cases, (16 Wallace 36), may be very appositely quoted by me: "The argument, we admit, is not

always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other, and both of these Governments to the people; the argument has a force that is irrestible in the absence of language which expresses such a purpose too clearly to admit of doubt." In the case of the proposed legislation to amend the Judiciary Bill 1903, the legality of its revolutionary consequences would depend entirely upon the question whether a double interpretation should be given to the word "jurisdiction" when used only once in subsection II of section 77 of the Constitution. Surely this is a flimsy and tottering foundation on which to erect such a heavy superstructure.

It is my intention to send a copy of this letter to my friend Professor Harrison Moore, and I shall be pleased if you and he can arrange to discuss it together.

I am,

Very sincerely Yours,