

# HIGH COURT OF AUSTRALIA

Roche

Vs.

Kronheimer

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

2 June 1921

Knox C.J.

announced that the *Court* was of opinion that the *Treaty of Peace Act* and the [Treaty of Peace Regulations](#) made under the Act were valid, and the reasons would be delivered later.

The following written reasons were subsequently delivered:—

June 2

Knox C.J.,

Gavan Duffy, Rich and Starke JJ.

In this case we have already intimated that we shall do no more than inquire into the validity of reg. 20 of the Regulations under the *Treaty of Peace Act 1919* (Statutory Rules 1920, No. 25); and we now proceed to give our reasons for declaring that regulation to be valid. The Statutory Rules are made under the authority of the *Treaty of Peace Act 1919*, and it is said that that Act is not within the competence of the Federal Parliament. The preamble recites the signing of the Treaty of Peace with Germany by representatives of the Commonwealth of Australia on behalf of His Majesty the King, and declares that it is expedient that the Government of the Commonwealth shall have power to do all such things as are necessary and expedient for giving effect to the said Treaty on the part of the Commonwealth. Sec. 2 is as follows: "The Governor-General may make such regulations and do such things as appear to him to be necessary for carrying out and giving effect to the provisions of Part X. (Economic Clauses) of the said Treaty." It is to be observed that the Act does not in express terms adopt or ratify the Treaty, and much argument was addressed to us as to whether its true effect was to make the provisions of the Treaty, or any of them, part of the statute law of the Commonwealth, or merely to enable the Governor-General to provide machinery for putting certain of those provisions into operation within the Commonwealth. We think that the intention of the Legislature, as expressed in the words we have already cited, was to enable the Governor-General to enforce the provisions of Part X. of the Treaty within the Commonwealth, and, if he thought it necessary for that purpose, to make any of such provisions part of the statute law of the Commonwealth. Is such an enactment within the competence of the Federal Parliament? We think it is. A catena of cases commencing with *Farey v. Burvett*<sup>[1]</sup> has made it clear that the power of Parliament under sec. 51 (VI.) is not confined to military operations but extends to every measure of defence which circumstances may require as they present themselves. The termination of hostilities by the imposition of terms of peace and the enforcement of those terms are, in our opinion, such measures.

Next, it was said that, even if the Federal Parliament had authority to legislate for the purpose of carrying out and giving effect to the provisions of Part X. of the Treaty, it had no power to confer that authority on the Governor-General. On this topic we were referred by counsel to *Hodge v. The Queen*[2], and by our brother Rich to *R. v. Halliday*[3] and *In re Initiative and Referendum Act*[4]; and much interesting argument was devoted to the real meaning and effect of the first of those cases. It is enough to say that the validity of legislation in this form has been upheld in *Farey v. Burvett*[5], *Pankhurst v. Kiernan*[6], *Ferrando v. Pearce*[7] and *Sickerdick v. Ashton*[8], and we do not propose to enter into any inquiry as to the correctness of those decisions.

Lastly, it was said that reg. 20 (5), under which the Minister acted, purported to bestow upon him a judicial power which, because of [sec. 71](#) of the [Constitution](#), could be vested only in a Federal Court. In our opinion the order which the Minister is empowered to make is not a judicial order. We see no reason why property should not be vested or divested by a legislative enactment or by an executive act done under the authority of the Legislature as well as by a judicial act.

It follows from what we have said, that *sec. 2* of the *Treaty of Peace Act 1919* is within the powers of the Federal Parliament, and reg. 20 is authorized by that section both so far as it purports to re-enact the provisions of Part X. of the Treaty and also as far as it purports to provide machinery for enforcing those provisions within the Commonwealth.

Higgins J.

Counsel for Max Kronheimer have not, in my opinion, shown us any clause in Part X. of this Treaty which is not within some power conferred on the Commonwealth Parliament by the [Constitution](#).

By the *Treaty of Peace Act 1919*, after reciting the signing of the Treaty and that "it is expedient that the Government of the Commonwealth should have power to do all such things as are necessary and expedient for giving effect to the said Treaty on the part of the Commonwealth," it is enacted (*sec. 2*) that "the Governor-General may make such regulations and do such things as appear to him to be necessary for carrying out and giving effect to the provisions of Part X. (Economic Clauses) of the said Treaty." The form of the enactment was probably adapted from the enactment of the British Parliament (9 & 10 Geo. V. c. 33): "His Majesty may make such appointments, establish such offices, make such Orders in Council, and do such things as appear to him to be necessary for carrying out the said Treaty, and for giving effect to any of the provisions of the said Treaty." Part X. of this Treaty clearly involves a grave interference with private rights; and, as the question whether a treaty of peace in itself can authorize such interference was deliberately left open by the Judicial Committee of the Privy Council in *Walker v. Baird*[9], Parliament has by Act expressly given power to the Governor-General to carry the provisions of Part X. into effect. The Act was expedient, if not necessary.

But it remains to be seen whether the Commonwealth Parliament has been empowered by the [Constitution](#) to pass such an Act. The [Constitution](#) gives that Parliament power to make laws with respect to (*inter alia*) (a) external affairs (pl. XXIX.), (b) the naval and military defence of the Commonwealth (pl. VI.), (c) trade and commerce with other countries (pl. I.). It is difficult to say what limits (if any) can be placed on the power to legislate as to external affairs. There are none expressed. No doubt, complications may arise should the Commonwealth Parliament exercise the power in such a way as to produce a conflict between the relations of the Commonwealth with foreign Governments and the relations of the British Government with foreign Governments. It may be that the British Parliament preferred to take such a risk rather than curtail the self-governing

powers of the Commonwealth; trusting, with a well-founded confidence, in the desire of the Australian people to act in co-operation with the British people in regard to foreign Governments.

In this case, we have in [Part X.](#) of this Treaty provisions such as appear in annex 4 to art. 297, which in effect enable any Allied or Associated Power to deprive German subjects of property which is theirs, for the satisfaction of obligations of other German subjects or of Germany to the Allies or to subjects of the Allies. More specifically, "all property, rights and interests of German nationals within the territory of any Allied or Associated Power ... may be charged by that Allied or Associated Power" (1) "with payment of amounts due in respect of claims by the nationals of that ... Power with regard to their property," &c., "in German territory, or debts owing to them by German nationals"; (2) "with payment of claims growing out of acts committed by the German Government ... since 31st July 1914, and before that Allied or Associated Power entered into the War"; (3) "with payment of the amounts due in respect of claims by the nationals of such ... Power with regard to their property," &c., "in the territory of other enemy Powers." Australia is enabled to charge the Australian property of any German Schmidt with payment of any debts owing by any German or by Germany to any Australian Smith or to Belgium or to Italy. Apart from the power as to external affairs, such a law can be upheld, in my opinion, under the power as to naval and military defence; for, though there may be other reasons also, the weakening of an enemy and enemy subjects may contribute as effectively to defence as the increasing of one's own fighting force; and to punish an enemy severely may be reasonably regarded as a deterrent against future attacks, on Polonius's principle as to a quarrel—"Bear't that the opposed may beware of thee." It is not for this Court to consider the wisdom of the Treaty; it has merely to find whether these provisions are within the Commonwealth powers.

If the Treaty of Peace, [Part X.](#), is valid, the regulations made under the *Treaty of Peace Act* by the Governor-General are, in my opinion, valid also (*Powell v. Apollo Candle Co.*[\[10\]](#), and the cases cited by my learned brothers).

I concur also in the opinion that reg. 20 (5) of the [Treaty of Peace Regulations](#) and the order of the Minister of Trade and Customs thereunder are not invalid as involving an exercise of the judicial power of the Commonwealth by other than Commonwealth Courts (sec. 71). I can hardly understand how the point is arguable; for the vesting is not the result of a judicial finding as to rights—it is in defiance of admitted rights. To give the property of A to B is not a judicial proceeding.

Declare that the *Treaty of Peace Act 1919* and the [Treaty of Peace Regulations](#) made thereunder are valid. Costs as between solicitor and client of all parties in the High Court other than those of Attorney-General of the Commonwealth to be costs in the summons.

Solicitors for the plaintiffs, P. D. Phillips, Fox & Overend.

Solicitors for the defendants and the intervener, Eggleston & Eggleston; Gordon H. Castle, Crown Solicitor for the Commonwealth.

[1] [\[1916\] HCA 36; 21 C.L.R., 433.](#)

[2] 9 A.C., 117.

[3] [\[1917\] UKHL 1; \(1917\) A.C., 260](#), at p. 307.

[4] [\(1919\) A.C., 935](#), at p. 945.

[5] [\[1916\] HCA 36; 21 C.L.R., 433.](#)

[6] [\[1917\] HCA 63; 24 C.L.R., 120.](#)

[7] [\[1918\] HCA 47; 25 C.L.R., 241.](#)

[8] [\[1918\] HCA 54; 25 C.L.R., 506.](#)

[9] (1892) A.C., at p. 497.

[10] 10 App. Cas., at p. 291.

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