RES JUDICATAE

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WHAT IS AN *INTER SE* QUESTION?

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I. Introduction

IN recent years the Privy Council has been much concerned in deciding just when the presence of an *inter se* question in an appeal from the High Court of Australia prevents the appeal being heard by it without a Certificate of the High Court under s. 74 of the Constitution that "the question is one which ought to be determined by Her Majesty in Council".[1] The effect of these decisions is that "the question whether s. 74 applies seems to depend much less upon what the parties choose to raise than upon what is inherent in a decision of the matter, in point of law and logic".[2] In other words, "appeals are not divisible, and . . . if an *inter se* point is involved in an appeal, s. 74 applies and the appeal cannot be brought to the Privy Council without the High Court's Certificate".[3]

At no time during these discussions, and indeed at no time since Federation, has the Privy Council ventured far into the other problem raised by s. 74, that of defining an *inter se* question. And even in the Australian cases there are only two at all extensive surveys of this problem.[4] Unfortunately, the Privy Council has in its recent judgments made statements "off the hip" on this question, without the benefit of full argument. And some of these statements cause considerable difficulty.

II. The Privy Council's Approach

Nothing was said on the definition question in the *Bank Nationalization* case,[5] where the nature of the questions raised was admitted. The validity of the Banking Bill 1947 was challenged in the High Court on several grounds, some of which raised *inter se* questions. The plaintiffs in those proceedings lost (or at the least did not win) on those grounds, but did succeed in establishing that the Act contravened s. 92 of the Constitution. The Commonwealth sought leave

[1] *The Commonwealth of Australia and ors. v. Bank of New South Wales and ors.* [1950] A.C. 235, (1948) 76 C.L.R. 1; *Nelungaloo Pty. Ltd. v. The Commonwealth of Australia* [1951] A.C. 34, (1950) 81 C.L.R. 144; *Grace Brothers Pty. Ltd. v. The Commonwealth of Australia* [1951] A.C. 357, (1951) 82 C.L.R. 53.

[2] Dixon J. (as he then was) in *Nelungaloo Pty. Ltd. v. The Commonwealth* (1951) 85 C.L.R. 545, 567.

[3] Professor K. H. Bailey, Commonwealth Solicitor-General, "*Fifty Years of the Australian Constitution*", (1951) 25 *A.L.J.* 314, 353.

[4] Both from Dixon J., in *Ex parte Nelson* (No. 2) (1929), 42 C.L.R. 258 and in *Nelungaloo Pty. Ltd. v. The Commonwealth* (1951) 85 C.L.R. 545.

[5] [1950] A.C. 235.

to appeal on that issue alone, which does not, as will be shown, raise an *inter se* question. The Board then laid down its rule, that since the determination of what were admittedly *inter se* questions in favour of the appellants had been "a necessary condition of the successful defence of the impugned Act in the High Court", and it remained "a necessary condition of obtaining the relief sought on the appeal to His Majesty in Council",[6] a Certificate was necessary.

The trouble, if one may say so, started when that litigious serial, *Nelungaloo Pty. Ltd. v. The Commonwealth*[7] reached the Privy Council.

The Commonwealth Government compulsorily acquired wheat belonging to the plaintiff, under the National Security (Wheat Acquisition) Regulations. Regulation 14 stated that the rights and interest of every person in the wheat acquired were converted into claims for compensation. Regulation 19 prescribed the compensation to which the growers would be entitled. The plaintiff claimed that Regulation 19 was invalid as contravening the constitutional requirement that terms of acquisition must be "just", and that Regulation 14 therefore entitled it to claim compensation according to the normal principles of the law of compensation.

The first step in the plaintiff's argument was therefore to show that Regulation 19 was invalid, and this step depended upon s. 51 (xxxi) of the Constitution, laying down the power of the Commonwealth for "the acquisition of property on just terms". The Board held with little discussion that this was an *inter se* question, and the ground of the decision was that it was a question arising under a power conferred by s. 51:[8]

> ". . . where a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any States. . . . But s. 51 does not expressly divest the States of any power, and it falls to the Courts to determine where the limits of the States' power and the limits of the Commonwealth powers are fixed."

In a later case, the Board has reaffirmed this criterion of the *inter se* question.[9] A dispute arose as to whether s. 29 (1) of the Lands Acquisition Act 1906-36 laid down just terms of compensation. Thus the point again depended on the consideration of those terms in the light of s. 51 (xxxi). And the Board's decision was equally swift:[10]

[6] *ibid.* at 292. [7] [1951] A.C. 34, (1950) 81 C.L.R. 144. [8] [1951] A.C. 34, 48
[9] *Grace Brothers Pty Ltd. v. The Commonwealth*, (1951) 82 C.L.R. 357.
[10] *ibid.* at 363.

"The question for decision is the same as that dealt with by their Lordships in the *Nelungaloo Case*. It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an *inter se* question."

From these statements, the following principles emerge:

(a) Powers derived under s. 51 are concurrent powers.
(b) Questions as to the limits of powers derived under s. 51 are *inter se* questions.
(c) Powers derived elsewhere than under s. 51 are exclusive powers.
(d) Questions as to the limits of those powers derived elsewhere than under s. 51 are not *inter se* questions.

In other words, the derivation or otherwise of the power from s. 51 answers the questions: (i) Is the power exclusive or concurrent? and (ii) Is the question as to its limit an *inter se* question?

The present argument is that, failing of course a clear decision to this effect from the Board, after argument of the point before it, derivation of the power answers neither of these questions. Further, High Court authorities to the contrary have been approved by the Board, and there still stands a decision of the Board itself which goes the other way.

III. Derivation under s. 51 and "Exclusive or Concurrent?"

The first thing to do on this topic is to read the judgment of Dixon J. (as he then was) in *Nelungaloo Pty. Ltd. v. The Commonwealth*,[11] when that case was brought a second time before the High Court, in an endeavour to obtain the Certificate which the Privy Council had declared necessary. His Honour there points out that powers conferred by s. 51 *may or may not* be concurrent: "Thus the power with respect to bounties conferred by pl. (iii) is made exclusive by s. 90."[12]

It is true that s. 51 makes no power exclusive in terms, as do certain other power-giving clauses – e.g., s. 52. But two classes of power derived under s. 51 are nevertheless clearly exclusive:

(i) Powers given to the Commonwealth by s. 51, and removed from the States by another section. The Chief Justice's example is one of this class. Others are *coinage* (given to the Commonwealth by s. 51 (xii) and taken from the States by s. 115), *defence forces* (s. 51 (vi) and s. 114), *lighthouses* (s. 51 (vii) and s. 69), and *posts and telegraphs* (s. 51 (v) and s. 69). This list could be extended.
(ii) Powers in their very nature exclusive to the Commonwealth – e.g., that under s. 51 (xxx), "the relations of the Commonwealth with the islands of the Pacific".

[11] (1952) 85 C.L.R. 545, esp. 562-5. [12] *ibid.* at 564.

The conclusion is inescapable, that derivation under s. 51 is no criterion by which to distinguish exclusive and concurrent powers. In each case it must be a matter of examining the Constitution to see if the particular power be exclusive or concurrent. Certainly no simple formula to replace the "derived under s. 51" criterion is here suggested.

IV. The Rules for Exclusive and Concurrent Powers

If the argument to date is accepted, that derivation under s. 51 or otherwise does not separate exclusive from concurrent powers, then it follows that the test of derivation will not tell us whether the question is a question *inter se*.

But the Board's statements have gone further, and have indicated that exclusive powers, however they may be distinguished from concurrent powers, do not raise *inter se* questions: ". . . where a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any States."[13]

This means that a decision that a certain action is within the Commonwealth's exclusive power, and therefore in a sphere denied to the States, could not raise an *inter se* question. The problem is to reconcile with this the principle of "mutual correlation" expounded by Dixon J. in *Ex parte Nelson,*[14] and approved by the Privy Council in the *Nelungaloo* case.[15] His Honour stated:

> "The expression 'limits *inter se*' refers to some mutual relation between the powers belonging to the respective Governments of the Federal system."[16]
>
> "The essential feature in all these instances is a mutuality in the relation of the constitutional powers."[17]

Consider in the light of this principle the point raised in *R. v. Brislan*:[18] "Is wireless telegraphy within the power over 'postal, telegraphic, telephonic and other like services' conferred upon the Commonwealth by s. 51 (v) and expressly made an exclusive power by s. 69?" If the answer was "yes", then the Commonwealth had exclusive power over wireless telegraphy; if "No," then the States had exclusive power in this field. Was this not clearly an *inter se* question, although arising under an exclusive power?

And indeed, the Privy Council thirty years ago gave a decision, still quoted by it with approval, which was quite wrong if exclusive powers do not raise *inter se* questions. The power of "Conciliation and arbitration for the prevention and settlement of industrial dis-

[13] [1951] A.C. 34, 48. [14] (1929) 42 C.L.R. 258. [15] [1951] A.C. 34.
[16] (1929) 42 C.L.R. 258, 270-1. [17] *ibid.* at 272. [18] (1934) 54 C.L.R. 262.

putes extending beyond the limits of any one State" conferred on the Commonwealth by s. 51 (xxxv) is shared by no State; yet in *Jones v. Commonwealth Court of Conciliation and Arbitration*,[19] an extremely powerful Board[20] held that an *inter se* question was raised on a dispute as to the limit of that power.

The opinion of the Chief Justice has now been stated on this problem. His Honour's support can with some assurance be claimed for the view that the recent statements of the Board represent new law, if "exclusive" is given what had been thought to be its normal constitutional meaning:

> "It certainly states new doctrine if it means that no question *inter se* can exist where the legislative power of the Commonwealth over a subject-matter is exclusive up to the exact limits of the power so that the very boundary line of Federal exclusive power is necessarily the boundary line of State legislative power."

But it may be, His Honour asserts, that the Privy Council did not use the word "exclusive" in that sense:

> "But the judgment of the Privy Council may very well refer to another type of exclusive power. If a Federal legislative power is conferred over a subject-matter, and the power over part only of the subject-matter is made exclusive, then *the definition of the exclusive power does not give a common boundary between State and Federal power*. The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of Federal power. It tells you only that within the boundary there is no State power."[21]

One may be forgiven for taking this suggestion as a sincere and subtle attempt to avoid saying that a superior court has erred. And yet if it be such an attempt, the attempt fails; for referring to the portion of the passage which I have italicized, is it not clear that a common boundary between State and Federal power is what such a decision would give? Even if a State's power is only concurrent, the line where it ends marks a boundary between it and Commonwealth power, just as the line where its power changes from exclusive to concurrent, from plenary to controlled, from absolute to conditional, marks another such boundary.

The Chief Justice posits as an example of his theory a case set in the days when s. 92 was held applicable only to States. At that time a question as to that section's limits was not, we are told, an

[19] (1917) 24 C.L.R. 396.
[20] Earl Loreburn, Viscount Haldane, Lord Atkinson, Lord Sumner, Lord Parmoor.
[21] (1952) 85 C.L.R. 545, 573.

inter se question. True, but because such a question did not touch Commonwealth power at all, not because it only defined a sphere of Commonwealth exclusive as against concurrent power. A decision whether the State had validly exercised its powers could not, because of s. 109, in any way affect Commonwealth power. (Contrast the position which would have arisen if s. 92 had applied only to the Commonwealth; a decision as to that section's limit would have been an *inter se* question, because the power thus denied to the Commonwealth would have fallen within the States' residuary power.)

His Honour's attempt to define an "exclusive" power to which the Privy Council's statements can apply seems to run counter to his own "mutual correlation" theory so ably expounded is *Nelson's* case. For, as indicated above, a line marking exclusive from concurrent power, is also a line marking States' "no-power" from their concurrent power; it marks the line where the State orbit ends and the Commonwealth's sole control begins. And one had expected that this was an *inter se* question, even though from the Commonwealth's standpoint it marks only the limit between where it walks alone, and where it walks, though unequally, yet supposedly in step.

Whatever be the true answer to the Chief Justice's suggestion, it is, with respect, plain that the Privy Council did give "exclusive" its normal constitutional connotation. If this be so, we have then to face clearly the dilemma: Either these statements of the Privy Council, made *per incuriam* and without argument, are not to be taken as the last word on the subject, or a long line of constitutional authority, including a previous decision of the Board, and other decisions and reasoning approved by the Board, is wrong. It is felt that the former horn provides the more comfortable resting point.

One presents diagrammatical arguments to the lawyer with reluctance, for he justifiably distrusts them. Yet it may be that the present argument really can be made clearer in diagrams.

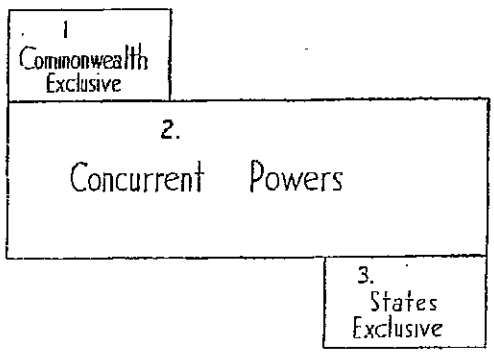

Fig. 1

The Privy Council has visualized governmental powers in Australia as set out in Fig. 1, with correlation possible only in concurrent powers. A decision on an exclusive Commonwealth power has no effect on what is in the States' power. (And yet the very name "States' residuary power" would make

us expect some correlation.)

The true view, it is submitted, is that the powers are best imagined as set out in Fig. 2. On this basis the cases fit easily.

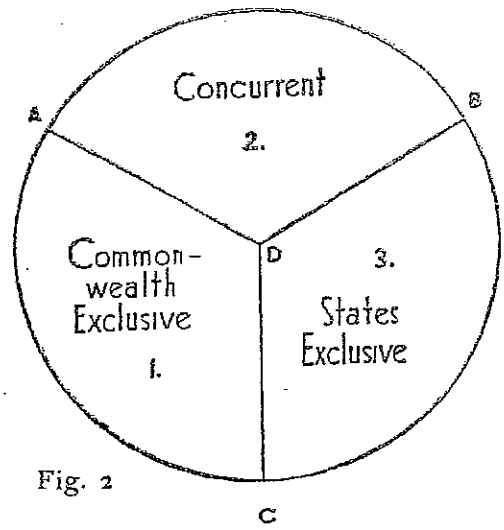

Fig. 2

(i) Laws prohibited by constitutional prohibitions affecting all governments—e.g., s. 92—are altogether outside the power of Australian governments. The decision whether a law is one so prohibited is therefore a question regarding the circumference of the circle, which is not a limit *inter se*. The question is not a question *inter se*. See *Ex parte Nelson*.

(ii) *R. v. Brislan* was on the point whether wireless telegraphy was in field 1 or 3. Clearly this question involved an *inter se* limit.

(iii) The question whether a Commonwealth law can be justified as being to do with the Commonwealth's relations with the islands of the Pacific may or may not be *inter se*. If the law *could* be passed by a State, then the question is whether the law falls in field 1, or in field 3, and it is a question *inter se*. If, because of the constitutional limits on the powers of States, no State *has power* to pass such a law, then the law falls either in field 1, or altogether outside the power of Australian governments (as are laws contravening s. 92). Hence a decision as to the validity of the Commonwealth law will not in such a case raise an *inter se* question.

(iv) *Jones'* case concerned the line DC, and was clearly an *inter se* question.

V. Conclusion

So far we have reached this position, that an *inter se* question can be raised by decisions as to the limits of either concurrent or exclusive powers. Which decisions?

For concurrent powers, the answer seems simple. In their very nature they raise *inter se* questions. This now has the authority of the Chief Justice:

> "To advance or retract Federal legislative power by interpretation, where by virtue of s. 109 it is a paramount concurrent power,

> is therefore to diminish or enlarge the area of State absolute or exclusive power. . . . The very general statement has been thought warranted that the interpretation of any paramount concurrent legislative power of the Commonwealth always involves a question of the limits *inter se* of State and Federal constitutional power."[22]

Questions as to exclusive Commonwealth powers are more difficult, for, as pointed out above, there are two alternative possibilities: (i) that the power claimed by the Commonwealth would otherwise be within the States' residuary powers, and (ii) that either the Commonwealth has the power, or no Australian government has it. Whatever the power, the approach must be the same. The test is the pragmatic one—does the decision affect State power? Does the State power increase if the power is denied to the Commonwealth? On the answer to this question, it seems, will depend the answer to the question—Is it an *inter se* question?

The foregoing propositions may be summed up:

(i) "Derived under s. 51" is not synonymous with "concurrent", and is a wholly misleading criterion on this subject.
(ii) The question "concurrent or exclusive?" can be answered in any particular case only by an examination of the whole Constitution.
(iii) The Privy Council has indicated that concurrent powers do give rise to *inter se* questions, and this is clearly correct.
(iv) The Privy Council has stated that exclusive powers do not give rise to *inter se* questions.
(v) Failing a direct decision, this cannot be accepted as good law.
(vi) The Privy Council has already given a decision which is contrary to its more recent statements on exclusive powers.
(vii) Some questions as to the limits of exclusive powers do raise questions *inter se*.
(viii) The question "which ones?", if (vii) be correct, can be answered only by an examination of the facts of the particular case. No *a priori* test has been evolved.
(ix) The principle to proceed upon in (viii) is that of "mutual correlation".

[22] (1951) 85 C.L.R. 545, 563-4.

Limits *Inter Se*

1. Various case citations and quotations are as follows:

   a. **This issue alone is an Inter Se one, involving conflict of powers and excess of jurisdiction. (Beyond power)**

      i. Pirrie v. McFarlane (1925) 36 CLR 170

      Knox, C. J. at clause 4 states:

      "The duty of this, as of every Court, being to take care that it does not go beyond the limits of the jurisdiction conferred upon it, the first question for consideration is whether the Court is properly seised of the matter. It was introduced into this Court by force of secs. 40A and 41 of the Judiciary Act 1903-1920, which are in the words following: - "40A (1). When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court. (2). Thereupon the proceedings in the cause, and such documents if any relating thereto as are filed of record in the Supreme Court of the State, shall be transmitted by the Registrar, Prothonotary, or other proper officer of the Court, to the Registry of the High Court in the State" &c. "41. When a cause or part of a cause is removed into the High Court under the provisions of this Act, the High Court shall proceed therein as if the cause had been originally commenced in that Court and as if the same proceedings had been taken in the cause in the High Court as had been taken therein in the Court of the State prior to its removal, but so that all

subsequent proceedings shall be according to the course and practice of the High Court." *(at p176)*

ii. Pirrie v. McFarlane (1925) 36 CLR 170

Knox, C. J. at clause 9 states:

"On this footing it then became necessary to decide whether the Act. So construed, was within the constitutional powers of the Parliament of Victoria. On this question the contention of the defendant was founded on the provisions express or implied of the Federal Constitution and laws made under it ; that of the informant on the power of the Victorian Parliament under the Constitution of that State : and it seems to me to follow necessarily that a question as to the limits inter se of the constitutional powers of the Commonwealth and of the State of Victoria thereupon arose. It is clear, therefore, in my opinion, that this question also should be answered in the affirmative, and that the application to make absolute the order nisi to review is properly before this Court". (At p180)(Portion only)

iii. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 1 states:

"it is correct that for the purposes of State legislation, all Commonwealth executive officers of Australia, from the Governor-General and the Ministers of State to the junior member of the public service, while engaged in performing their public functions are to be regarded, not as Crown officials representing the King in right of the Commonwealth, but merely as private citizens, and as such amenable to the ordinary State regulations" (At p186) (Portion only)

iv. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 7(1) states:

"It is perhaps desirable to pause for a moment at this point in order to see what questions confronted the Supreme Court. That Court had no outlet of escape from deciding a constitutional point." (At p194)(Portion only)

v. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 7(1) states:

"Such attempted destruction or weakening is prima facie outside the respective grants of power" (at p194) (Portion only)

vi. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 7(1) states:

"Their Honours, after partly hearing the case, obviously perceiving that position and, seeing that, however regarded, the matter involved a constitutional question inter se, falling within the terms of sec. 40A of the Judiciary Act, declined to proceed further, and allowed the section to operate of its own force. The limits inter se of the respective constitutional powers of Commonwealth and State came into question in a double aspect." (At p194) (Portion only)

vii. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 7(1) states:

"Pursuant to sec. 40A, the proper officer of the Supreme Court transmitted the proceedings in the cause, and such documents relating thereto as were filed of record in the Supreme Court, to the Principal Registry of this Court (At p194) (Portion only)"

viii. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 8 states:

"The powers are not limited to legislative powers or to executive powers or to judicial powers. They are not the "powers" of any specific Department of the organism, but include every power of the organism itself by whatsoever means it assumes to exercise or possess it. Nor is the source of the contested power material. It may be based upon the common law, or on the direct provisions of a written constitution, or on the intermediate authority of a statute founded on the Constitution." (At p197) (Portion only)

ix. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 8 states:

"In my opinion, there are no circumstances in this case which make it competent for me, following my duty as an Australian Judge, to disregard the explicit and prima facie lawful direction of the Australian Parliament in sec. 41 by declining to entertain this matter" (At p197) (Portion only)

x. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 8 states:

"It seemed to me when we first considered our duty in this matter, and it still so seems, that we were bound to hear it, having full jurisdiction to determine the validity of the sections in question and the consequent effect upon the jurisdiction to determine the merits." (At p197)(Portion only)

xi. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 8(3) states:

"For Commonwealth purposes Australia is one undivided territory holding one undivided people and knowing no State boundaries for effectuating its national purposes." (At p200) (Portion only)

xii. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 9 states:

"The opinion of the Governor-General as Commander-in-Chief and of the defence authorities counts for nothing" (at p202) (Portion only)

xiii. Pirrie v. McFarlane (1925) 36 CLR 170

Isaacs J. at clause 13 states:

"It is the actual enlistment, the oath of allegiance that changes the status from a civilian to soldier." This change of status from civilian to soldier (at p207) (Portion only)

xiv. Pirrie v. McFarlane (1925) 36 CLR 170

Higgins J. at clause 9 states:

1. *"Will be to make it clear that a soldier is also a citizen and must obey the laws of the State in which he is, as well as the Federal laws". (At p219) (Portion only)*
2. *"The Crown is one and indivisible" (At p219) (Portion only)*

xv. Pirrie v. McFarlane (1925) 36 CLR 170

Starke J. at clause 3 states:

"Should this Court proceed with the matter at all in view of the Order in Council made on the advice of the Judicial Committee? It was in point of fact seised of the case before the Order was made. But that is relatively unimportant and at best, merely a matter of comity as between the two tribunals. This Court might well, I think, defer to the Judicial Committee, if that were all that was involved in

the present case. The Supreme Court, however, refused to proceed, in view of the provisions of sec. 40A of the Judiciary Act : that section provides that "when, in any cause pending in the Supreme Court of a State, there arises any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court." The intention of the Parliament, in matters on which questions as to the limits inter se of the constitutional powers of the Commonwealth and the States or of the States inter se or in which Federal jurisdiction is involved (Judiciary Act sec. 39(2)), is clear and distinct: it is emphatically to this Court that these questions must be brought, under the laws made by the Parliament. And it is not for this Court to abdicate its functions or to refuse a jurisdiction intended by the Parliament to be exercised by it (see Flint v. Webb (1907) 4 CLR 1178). But, if the Court is to exercise that jurisdiction in the present case, then it must be satisfied that the case falls within the terms of sec. 40A, and also, of course, that the section is within the authority of the Parliament of the Commonwealth. The proceedings by way of order nisi to review constituted "a cause pending in the Supreme Court" of the State of Victoria within the opening words of sec. 40A (see Hudson's Case (1922-23) 32 CLR 413). But did there arise any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States?" (At p223)

xvi. Pirrie v. McFarlane (1925) 36 CLR 170

Starke J. at clause 8 states:

"The real solution must depend upon the powers or immunities given to or conferred upon the State and Commonwealth Governments by their Constitutions". (At p227) (Portion only)

xvii. Pirrie v. McFarlane (1925) 36 CLR 170

Starke J. at clause 9 states:

1. *"A soldier or a member of the Air Force does not cease to be a citizen: if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian. (At p229) (Portion only)*
2. *These Acts restrict to some extent the civil rights and duties of soldiers, but nowhere do they exempt them from obedience to the civil law(At p229) (Portion only)*

b. Flint v. Webb (1907) 4 CLR 1178

i. *"An appeal lies in this case to the High Court under section 39 of the Judiciary Act 1903. The Court of Petty Sessions was exercising Federal Jurisdiction, for this was a matter involving the interpretation of the Constitution within the meaning of section 73 of the Constitution and section 30 of the Judiciary Act 19 As Three" (at 1180).*

ii. *"A Question of the Limits Inter Se of the Powers of the Commonwealth and State means nothing more than a question as to the distribution of those powers." (at 1182).*

iii. *"It is not a question of a conflict of powers that are the limits of powers" (at 1182).*

iv. *"The question whether a particular Act is within the principal must in every case turn on a Question of Fact, even if the view in Deakin, v. Webb (1 CLR 585) is right. (At 1183)*

v. *"That would not be of any effect, unless State Courts were deprived of Jurisdiction in all cases in which a Plea of a Question of the limits Inter Se was raised by either party." (At 1186).*

vi. *"Circumstances might arise which would make it right in the public interests that the final interpretation of the Constitution, on some question involving the Constitutional powers Inter Se of the Commonwealth and a State or of State and State should be left to the Privy Council. When those circumstances arise, they will be considered." (At 1187 O'Connor, J.).*

c. The Commonwealth of Australia v. Kreglinger 1926 VLR 310.

i. *"The result has been unfortunate for, in the opinion of the majority of this Court, the Supreme Court entered upon a matter which it had no Jurisdiction to determine, and its final judgment in the proceeding before it is therefore null and void" (at 364)*

ii. *"There was a question of conflict, where the one Power of the State --, namely, its Judicial Power --, or one Power of the Commonwealth --, namely, its Legislative Power --, should prevail. The contest was which of these two Australian Powers of the Crown -- the State Judiciary Power or the Commonwealth Parliamentary Power -- dominated in the case before the Court." (at 354)*

iii. *"That were under section 40 (a) of the Act (Judiciary Act), it is because the duty of the Full Court on the question arising, to*

proceed no further, the causes being removed to the High Court." (At 332).

iv. *"Declared that, upon the said question arising before the said Full Court, it was the duty of that Court to proceed no further in the cause." (at 340).*

v. *"And at once, by section 40 (a) of the same Act, the cause was automatically transferred to the High Court." (At 333/334).*

vi. *"Also, another question of Limits Inter Se arose on the application to the Full Court for Leave to Appeal, the Supreme Court had no jurisdiction to consider the constitutional validity of section 39 (2)(a) of the Judiciary Act. Once it had been decided that on its proper construction, if valid, it* ***precluded an appeal****." (at 334).*

Respectfully,

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C/o 12 Thompson Street Ascot WA 6104

Supreme Court — No Jurisdiction.

"The result has been unfortunate, for, in the opinion of the majority of this Court, the Supreme Court entered upon a matter which it had no jurisdiction to determine, and its final judgment in the proceedings before it is therefore null and void".

[The Commonwealth of Australia v. Kreglinger 1926 VLR 310. at 364.]

"THERE WAS A DISTINCT QUESTION INTER SE"

"THERE WAS A QUESTION OF CONFLICT WHETHER ONE POWER OF THE STATE — NAMELY, ITS JUDICIAL POWER — OR ONE POWER OF THE COMMONWEALTH, NAMELY, ITS LEGISLATIVE POWER — SHOULD PREVAIL. THE CONTEST WAS, WHICH OF THESE TWO AUSTRALIAN POWERS OF THE CROWN — THE STATE JUDICIARY POWER OR THE COMMONWEALTH PARLIAMENTARY POWER — DOMINATES IN THE CASE BEFORE THE COURT".

[THE COMMONWEALTH OF AUST
v
KREGLINGER + FERNAU
1926 U.L.R. 310 AT. 354.]

"OUT OF JURISDICTION"

"SECTION 38A (JUDICIARY ACT) MARKS AS THE TERMINUS AD QUEM OF THE JURISDICTION OF THE SUPREME COURT OF A STATE TO ENTERTAIN ANY MATTER THE MOMENT IT INVOLVES "ANY QUESTION, HOWEVER ARISING, AS TO THE LIMITS INTER SE OF THE CONSTITUTIONAL POWERS OF THE COMMONWEALTH AND THOSE OF ANY STATE"

IN SUCH A MATTER, THE SECTION PRESCRIBES, THE HIGH COURT SHALL HAVE EXCLUSIVE JURISDICTION, AND THE SUPREME COURT SHALL HAVE NO JURISDICTION "TO ENTERTAIN" OR DETERMINE ANY SUCH MATTER, EITHER ORIGINALLY OR ON APPEAL. THEN SEES 40A (JUDICIARY ACT) CONSEQUENTIALLY AND PRO PRIO VIGORE REMOVES THE MATTER (IF A CAUSE) INSTANTLY INTO THE COURT (HIGH COURT), WHERE, IN CONTEMPLATION OF LAW, IT AWAITS DETERMINATION."

[THE COMMONWEALTH OF AUSTRALIA
V. KREGLINGER + FERNAU
1926 ULR. 310 AT 355/356.]

INTER SE

"That there had arisen, on the hearing of the appeals to the Full Court, a question as to the limits inter se of the constitutional powers of the Commonwealth and those of a State: that, by virtue of Sec 39(2)(A) any appeal from the judgment of Cussen J lay only to the High Court of Australia but that under Sec 40A of the Act it became the duty of the Full Court, on the question arising, to proceed no further, the causes being remitted to the High Court."

[The Commonwealth of Australia v Kreglinger 1926 VLR 310, at 332,]

Section 40A Judiciary Act.

"Declare that, upon the said question arising before the said Full Court, it was the duty of that Court to proceed no further in the cause in which the said judgment of Cussen J. was pronounced, and that such cause was, by virtue of Sec 40A of the said Judiciary Act, removed to this Court".

The Commonwealth of Australia
v. Kreglinger
1926 VLR 310 at 340.

"INTER SE"

"AS SOON AS THE VALIDITY OF SEC 39(2)(A) OF THE JUDICIARY ACT 1903-1910 WAS CHALLENGED ON THE HEARING OF THE APPEAL FROM CULLEN, J, THERE AROSE A QUESTION AS TO THE LIMIT INTER SE OF THE CONSTITUTIONAL POWERS OF THE COMMONWEALTH AND A STATE WITHIN THE MEANING OF SEC 38A OF THE JUDICIARY ACT, AND AT ONCE, BY SEC 40A OF THE SAME ACT, THE CAUSE WAS AUTOMATICALLY TRANSFERRED TO THE HIGH COURT".

THE COMMONWEALTH V KREGLINGER & NUTTERLEIN
1926 CLR 310 AT 333/334.

"INTER SE"

"ALSO, ANOTHER QUESTION OF LIMITS INTER SE AROSE ON THE APPLICATION TO THE FULL COURT FOR LEAVE TO APPEAL. THE SUPREME COURT HAD NO JURISDICTION TO CONSIDER THE CONSTITUTIONAL VALIDITY OF SEC 39 (2)(A) OF THE JUDICIARY ACT ONCE IT HAD DECIDED THAT ON ITS PROPER CONSTRUCTION, IF VALID, IT PRECLUDED AN APPEAL."

THE COMMONWEALTH OF AUST
v
KREGLINGER
1926 VLR. 310 AT 334

"INTER SE QUESTION + TITLES"

"A JUDGMENT MAY BE PRONOUNCED IN 1910, IN INNOCENT IGNORANCE OF ANY INTER SE QUESTION. ON THE STRENGTH OF THAT JUDGMENT TITLES MAY PASS TO SUCCESSIVE PURCHASERS: BUT IN 1960 SOME INGENIOUS LAWYER MAY DISCOVER THAT THERE WAS SOME INTER SE QUESTION LOGICALLY INVOLVED IN THE JUDGMENT OF 1910. IS THIS JUDGMENT TO BE TREATED AS HAVING BEEN MADE WITHOUT JURISDICTION, AND NUGATORY".

The Commonwealth of Australia
v. Kreglinger
1926 ULR 310 AT 362.

KREGLINGER v COMMONWEALTH 1926 ULR. 310.

(1) PARKIN v JAMES (1905) 2 CLR 315.

(2) "IT FOLLOWS THAT IT IS A 'MATTER' WITHIN THE JURISDICTION OF THE HIGH COURT, AND THAT, IF SEC 39 OF THE JUDICIARY ACT 1903 IS A VALID EXERCISE OF LEGISLATIVE POWER OF THE PARLIAMENT, THE JURISDICTION OF THE STATE SUPREME COURT (IF ANY) WAS TAKEN AWAY BY SEC 39 (1) OF THE JUDICIARY ACT." (AT 314)

(3) IT CANNOT BE DISPUTED THAT THIS ISSUE COMES WITHIN THE EXPRESSION 'MATTER ARISING UNDER THE CONSTITUTION OR INVOLVING ITS INTERPRETATION' IN SEC 76 (1) OF THE CONSTITUTION AND IN SEC 30 OF THE JUDICIARY ACT 1903, AND THAT THEREFORE IT FELL WITHIN THE JURISDICTION OF THE HIGH COURT "IN SEC 39 (1) OF THE JUDICIARY ACT." (AT 316)

1/7 (1)

(4) IT WAS FORMERLY CLEAR THAT THE RATIO DECIDENDI OF THE PRIVY COUNCIL IN WEBB V OUTRIM WAS THAT THE METHOD OF EXCLUDING STATE JURISDICTION AND SUBSTITUTING FEDERAL JURISDICTION WITH A BAR TO APPEALS TO THE PRIVY COUNCIL ATTACHED, IN MATTERS IN WHICH, BUT FOR THAT ENACTMENT, AN APPEAL WOULD HAVE LAIN TO THE PRIVY COUNCIL AS OF RIGHT, WAS AN ATTEMPT BY PARLIAMENT TO DO INDIRECTLY WHAT IT HAD NO POWER TO DO DIRECTLY, AND WAS BEYOND ITS LEGISLATIVE AUTHORITY. (AT 316)

(5) THE APPEAL TO THE PRIVY COUNCIL LAY IN ALL MATTERS OF STATE JURISDICTION " (AT 317)

(6) IT IS A NECESSARY RESULT OF THAT DECISION THAT IN SO FAR AS SEC 39 PURPORTS TO TAKE AWAY THE APPEAL TO THE PRIVY COUNCIL IN ALL SUCH CASES, THAT ENACTMENT IS NOT WITHIN THE LEGISLATIVE COMPETENCE OF THE PARLIAMENT. (AT 317).

(7) IT APPEARS IMPOSSIBLE TO RECONCILE THESE TWO DECISIONS, AND IN THIS CONFLICT OF AUTHORITY WE ARE BOUND BY THE DECISION OF THE PRIVY COUNCIL. (AT 318)

(8) WE ARE NOT AT LIBERTY TO RECAST THE LANGUAGE USED BY PARLIAMENT. (AT 318)

9. The principles governing severability with respect to by-laws have been held to be applicable to laws of a parliament having limited legislative authority: in the owners of Kalibia v Wilson (1907 AC 81) Isaacs J. says:

'No distinction can be made in this respect between a by-law and a statute, although very different considerations apply in determining the extent of the power granted when it is given to a municipal corporation or a parliament: yet, once the limit of the power are ascertained, the excess is as unlawful in one case as in the other, and the partial validity of the act done must depend on the same principles'. (At 318-319)

(10) The Decision of the Judicial Committee rested upon the Constitution which their Lordships regarded upon the Constitution of the Commonwealth Act, read by itself as an Imperial Act. (At 320)

(11) The answer must be that, assuming two Imperial enactments conflict, the latter must prevail. (At 321.)

(12) Upon the application in Victoria for leave to appeal to the Priy Council the objection taken was based, as already stated, upon the proposition that the matter in controversy arose under the Constitution and involved its interpretation and this proposition was expressly assumed by Higgins J, to be true when deciding that if Sec 39 purported to take away the right of appeal in that case to the Priy Council it was ultra vires. (At 327)

5/7 (5)

13 The matter in controversy came under a second and more important head of High Court jurisdiction in that it raised a question of the limits inter se of the powers of the Commonwealth and a State. (At 327.)

14 That the Commonwealth Constitution gives no authority to take away the right of appeal in the manner attempted by Sec 39(2)(A) (At 327.)

15 # The status of the Commonwealth as a litigant in the State Courts can only be that of an independent sovereign State unless and until # there has been a general grant of jurisdiction (At 328). #

(16) IF I HAVE TO EXPRESS MY OWN VIEW, I AM OF OPINION THAT THE CORRECT INTERPRETATION OF THE PRIVY COUNCIL'S DECISION IS THAT ADOPTED BY KNOX CJ, AND DUFFY, J, IN THE LIMERICK CASE (AT P79) NAMELY, THAT SEC 39(2)(A) IS INVALID IN SO FAR AS IT PURPORTS TO TAKE AWAY APPEAL TO THE PRIVY COUNCIL FROM THE SUPREME COURT OF A STATE WHEN EXERCISING A JURISDICTION WHICH HAS BEEN TAKEN AWAY BY SEC 39 AND THEN RESTORED BY THAT SECTION, OR, AS IT HAS BEEN OTHERWISE EXPRESSED, THE PARLIAMENT CANNOT TAKE AWAY THE STATE JURISDICTION WHICH BELONGED TO THE SUPREME COURT AND RETURN IT TO THE SUPREME COURT AS FEDERAL JURISDICTION, BUT SHORN OF THE APPEAL TO THE PRIVY COUNCIL.

(AT ----)

COMMONWEALTH V KREGLINGER 1926.

HC of A. VLR 331.

IT IS A POWER GRANTED TO THE SUPREME COURT, NOT UNDER THE STATE CONSTITUTION, BUT BY THE KING AND THE IMPERIAL PARLIAMENT. (AT 360)

THE IMPERIAL PARLIAMENT, THROUGH IT[S] ACT AND THE ORDER IN COUNCIL THEREUNDER, SAYS THAT THERE MAY BE AN APPEAL (TO THE PRIVY COUNCIL), THE FEDERAL PARLIAMENT SAYS THAT THERE MAY NOT. (AT 361.)

COMMONWEALTH v KREUTZER HC of A.

1926 VLR 331. (AT 357-358)

IN THE RESULT, THE CAUSE INSTANTLY STOOD REMOVED TO THIS COURT, PRIOR TO THE JUDGMENT OF NOVEMBER AND THERE WAS NO JURISDICTION TO FURTHER ENTERTAIN IT AND NONE TO DETERMINE IT. THE JUDGMENT OF NOVEMBER WAS A NULLITY

(i) ATT-GEN v HOTHAM (1823) TUR & R 200 (AT 219)

H. C. OF A. 1949.

WAY v. COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon J. McTiernan J. Williams J. Webb J.

Ltd. (1) where the settlor had appointed himself one of the trustees, Lord *Russell of Killowen*, delivering the judgment of the Privy Council, said (2) that "the trustees alone were not the donee. They were in no sense the object of the settlor's bounty. . . . The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty." In the present case the beneficial possession and enjoyment of the donor's bounty was immediately and indefeasibly vested in the objects of the charitable trust. The income and corpus of the trust property could be applied for the benefit of those objects and for no other purposes. The settlor as donor was therefore entirely excluded *ab initio* from possession and enjoyment of the settled property and had no enjoyment and possession such as is contemplated by the section. Further it follows from what has already been said that the settlor was excluded from any benefit of whatsoever kind or in any way whatsoever whether enforceable at law or in equity because the benefit from the exercise of the power contained in clause 24 was a benefit to the settlement and not to the settlor. Accordingly the respondent's claim, so far as it is based upon s. 102 (2) (d), also fails.

The appeal should be allowed with costs. The order of the Supreme Court should be set aside and in lieu thereof an order made answering the first question in the negative, the second question "£74,915 4s. 4d.", and the third question "by the Commissioner of Stamp Duties." There should be an order that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repaid by the respondent to the appellants. The respondent should pay the costs of the proceedings in the Supreme Court.

Appeal allowed with costs. Order of Supreme Court set aside and in lieu thereof order answering first question in the negative, second question "£74,915 4s. 4d.", and third question "by the Commissioner of Stamp Duties." Order that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repaid by the respondent to the appellants. Respondent to pay the costs of the proceedings in the Supreme Court.

Solicitors for the appellants, *Sly & Russell.*

Solicitor for the respondent, *F. P. McRae*, Crown Solicitor for New South Wales.

(1) (1943) A.C. 425.

(2) (1943) A.C., at p. 440.

[PRIVY COUNCIL.]

PRIVY COUNCIL. 1949.

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,
AND
BANK OF NEW SOUTH WALES AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

Mar. 14-17, 21-25, 28-31; *Apr.* 1, 4-7, 26-29; *May* 2-5, 9, 10, 23-27, 30, 31; *June* 1; *July* 26; *Oct.* 26.

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,
AND
BANK OF AUSTRALASIA AND OTHERS . RESPONDENTS.
PLAINTIFFS,

Lords Porter, Simonds, Normand, Morton of Henryton, and MacDermott.

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,
AND
STATE OF VICTORIA AND ANOTHER : RESPONDENTS.
PLAINTIFFS

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,
AND
STATE OF SOUTH AUSTRALIA AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

THE COMMONWEALTH AND OTHERS . APPELLANTS;
DEFENDANTS,
AND
STATE OF WESTERN AUSTRALIA AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

PRIVY COUNCIL. 1949. THE COMMONWEALTH v. BANK OF N.S.W.

The respondents assert that our construction restricts s. 74 to a relatively narrow scope.

The truth is that the Constitution did in its final form preserve the prerogative to a greater extent in s. 74 than was at first proposed, and that was not done accidentally.

Then they refer to the sections of the *Judiciary Act* of Australia, s. 38A and s. 40A. Section 38A provides: Any matters involving any question howsoever arising as to the limits *inter se*—incidentally showing that they are dealing with the possibility of the point arising in Australia and not in the final court of appeal—the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts so that the Supreme Courts shall not have jurisdiction to entertain or determine any such matter. That is, the whole cause is completely stopped at that stage if an *inter se* question is involved in the matter. It is a very different conception from s. 74. The statute was passed after the Constitution was enacted, and it results to some extent from the suggestions of the judges in *Baxter's Case*. The respondents cannot succeed in establishing a wider prohibited area in the Imperial statute, of which the Constitution is a part, by relying upon sections subsequently enacted by the Commonwealth Parliament for the purpose of cutting short or preventing an appeal on *inter se* questions from the Supreme Court to the Privy Council. The wording of s. 74 really is an answer to that contention.

[Lord SIMONDS. What would the result be supposing you got a tribunal of six judges and they decided an *inter se* point and a s. 92 point; two judges declare the Act invalid because of *inter se* points, two declare it is invalid because of s. 92 points, and therefore you have a clear majority of four that the particular legislation is invalid. The other two do not express an opinion. Now you have not a decision of the majority on any point at all?]

No. The only difficulty as far as s. 74 is concerned is the first point: Has there been a decision of the High Court upon a question as to the limits *inter se*, and in the case of six Justices sitting, the opinions of two would not be a decision of the High Court, because there is a section in our *Judiciary Act* which deals with that very point; it is s. 23.

[Lord SIMONDS. An answer is that there is no decision upon which anybody could appeal.]

No, I do not say that. Section 74 barring an appeal would not apply in such a case, because there is no decision. It is not determined by the High Court and under s. 23 of the *Judiciary Act* it is provided: "A Full Court consisting of less than all the Justices

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shall not give a decision on a question affecting the constitutional powers of the Commonwealth"—it is even wider than *inter se* questions—"unless at least three Justices concur in the decision." You might theoretically get six Justices each deciding in favour of invalidity on a different ground, but nonetheless there is a decision of the High Court upon an *inter se* question in accordance with the *Judiciary Act*. Unless you can point to such a determination of that question, all that happens is that s. 74 does not prevent an application for special leave being heard and the appeal being fully determined.

[Lord MORTON. The certificate would not be needed?]

No.

[Lord MORTON. The result would be that all those *inter se* questions would in fact be debated. You say: Never mind, it does not come within s. 74.]

Yes. I submit that is the importance of the word "decision." Is not that from the broad point of view the only satisfactory practice? If the High Court, having an *inter se* question before it, chooses not to determine it but, let us say, determines the case on the question of construction or on a non *inter se* point and determines it wrongly, because that is the hypothesis, should the losing party be debarred the right of access to the Privy Council to correct that error simply because the High Court has deliberately chosen not to decide the other point? It would be quite in accordance with practice, or, at all events, it would be just and convenient, if the Privy Council in dealing with these matters dealt with them and then remitted the matter back to the High Court so that they would have to determine the *inter se* questions, but as far as s. 74 is concerned I submit there is no embargo.

[Lord MORTON. Suppose six objections were raised to the statute of which five were *inter se* questions and one was not and you had six judges sitting and each one thought the statute was invalid but each one for a different reason?]

A different *inter se* reason?

[Lord MORTON. So that five of them thought for different *inter se* reasons it was bad and the sixth thought for a non *inter se* reason it was bad, so that you got a decision that it was bad. You say that does not come within s. 74?]

That is so.

[Lord MORTON. What would you suggest? When it comes to the Privy Council they might decide the non *inter se* question and remit the other five questions back to the High Court who had already considered them?]

Yes.

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[Lord MACDERMOTT. Is there a distinction between putting the goods on board ship by means of a stevedore and arranging for the payment by means of a banker ?]

Taking the second case, arranging for payment through a bank, although you might regard it in its inter-State manifestation as relating to inter-State trade, it is precisely of the character of the dealings which were regarded in *McArthur's Case* as being protected by s. 92, a denial to that point of view being subsequently given in *James* v. *The Commonwealth*. I am not concerned to question that many transactions taking place in the course of a banking business are inter-State transactions; they are in almost every business that is organized in Australia. There is hardly any business which has not inter-State manifestations and, to some extent, divisions. My point is this, that the sequence of events, from beginning to end of a State transaction, was regarded in *McArthur's Case* as being protected by s. 92, and that that is denied by the decision of the Privy Council in dealing with *McArthur's Case*. So that from the point of view of s. 92 it would be completely immaterial, if my submission is right, whether banking in a broad sense was to be regarded as commerce or not. The business of banking, I submit, is a centre. The essence of it is the relationship between the banker and the customer and the contract expressed or implied between the banker and customer.

Suppose a law were passed that there should be no bills of exchange and cheques should not be employed for the purpose of inter-State trade, that the cheque system should not apply to inter-State trade, the Commonwealth passing such a law under its power over bills of exchange together with its power over commerce. That would present some analogy to the view expressed by the High Court in *McArthur's Case*; in other words, you would have in that case some definite and inherent relationship between what was being enacted and the flow of trade and commerce and intercourse among the States, because cheques of that character could be deemed an integral portion of the trade. A Commonwealth law which forbade the use of the cheque system in inter-State trade, and to that extent had disadvantaged inter-State trade and denied it a facility which was valuable to trade generally and to persons generally, could be regarded and would be regarded, I think, as an infringement of s. 92. Suppose a tax were imposed upon cheques in inter-State trade and each cheque had to bear a special duty.

[Lord PORTER. I do not know how far you want to press that because we at present have to pay twopence on every cheque. Is that an interference with trade ?]

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Consider a suppression of cheques in inter-State trade.

[Lord PORTER. I thought you were saying, suppose you put a tax on them.]

I am talking of a tax and I would like to put my view upon that. I should say that a tax imposed upon the cheque system would be perfectly valid as long as it did not pick out inter-State transactions, and, of course, that is the practice.

[Lord PORTER. The only reason why you would say that discrimination made any difference would be because you could then gather that it was intended to discriminate against inter-State trade.]

That puts what I submit is the summing up of all the cases referring to discrimination. Discrimination is evidentiary of the fact that what is being hit at in substance is the freedom of the border. It is not because discrimination in itself is necessary to establish an infringement of s. 92, but you can show from discrimination of that kind that Parliament is really interfering with the freedom as at the border.

As air, rail and land transport may be co-ordinated by State law with direct consequences to the inter-State trade, including the inter-State carrier, preventing him perhaps from carrying on his business, refusing him, because of the scheme of co-ordination, licences for his inter-State vehicles—the same principle applies to every subject of law. If you can apply that in the case of trade and traffic among the States, it must apply *a fortiori* to subjects which are further removed than that concept, subjects like banking or insurance or trade-marks, or matters of that kind. Just as the number of workers on the waterfront actually engaged in inter-State trade and transport may be fixed, and the persons selected, the same principle is applicable to all aspects of trade, warehousing, wharving and navigation, so far as they are facilities for trade, and trade itself. You can have by Commonwealth law within its jurisdiction, limited by subject-matter, and the State within its jurisdiction, limited only territorially, a complete rationalization or co-ordination of trade and its instruments and facilities subject only to one condition. That condition takes one back to *James* v. *The Commonwealth* and the application of the true criterion. That condition is that the substance of any such plan of co-ordination or enactment must not be directed against the freedom of the frontier. In other words, it must not be enacted with the object of limiting or prohibiting trade, commerce and intercourse across the borders.

Part II., Div. 1, of the *Banking Act* 1945 provides, by s. 6 that "Subject to this Act, a person other than a body corporate shall

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word "business" by the respondents. Never is there any claim that a business as such gets any immunity because it is a business.

The Commonwealth Constitution having been modelled on that of the United States, decisions on the latter which were in existence in 1900, throw some light on s. 92—in particular, as to what is "commerce." It had been decided in America before 1900 that the commerce power was exclusive; that is to say, the power of Congress to regulate commerce among the States ("among the States" being the precise expression) was exclusive. It had been held that because of this exclusiveness the States could not pass laws which impaired the freedom of commerce in the States certainly so long as Congress itself had passed no law on the subject. That was a peculiar doctrine in some ways, that because of the silence of Congress there had been an idea of freedom of commerce among the States created. It had been decided that commerce included all forms of commercial intercourse. In particular it included transportation as a business and it included dealings with such intangibles as information.

[Lord MORTON. You mean the circulation of information?]

Yes, that is by telegraph or that type of communication. It had been decided that monopoly in the individual was a breach of this freedom of commerce. [Counsel referred to *Gibbons* v. *Ogden* (1); *Prentice & Egan, The Commerce Clause of the Federal Constitution* (1898), at pp. 43, 46, 48, 315, 316.]

One thing more had been decided in America, and it was this, that every citizen of the Federation had a right of access to every part of the Federation. There was no provision in the Constitution for that, but by judicial exposition there had been that decision that every citizen had a right of access to every part of the Federation.

In the light of that, what is the particular significance of s. 92? Is it not that whereas the Constitution which was the model for the Australian Constitution had created a doctrine of free commerce and free intercourse by judicial exposition—that is how those things had come about in America—the Australian Constitution in the first place made those things express? It put expressly into the Constitution at least that—indeed, it did more, but at least it brought in that—which had been decided before 1900 by judicial exposition to be the position in America.

It did more. It not only made it express, it extended it, because the American doctrine was limited to an inability on the part of the States to burden inter-State Commerce. The commerce power in

(1) (1824) 22 U.S., at pp. 193, 229 [6 Law. Ed., at pp. 32, 78].

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the Federal body, the Congress, was absolute and exclusive, but the framers of the Australian Constitution extended the American doctrine most notably. They did two things. First of all, they made s. 51 (i.) only a concurrent power. They did not make the commerce power of the Federation exclusive, they made it expressly concurrent. Then they put s. 92 in as binding both the Federal body and the State body. Then, apparently for a more abundant caution, they put in the word "absolutely." The American doctrine was of freedom from State intervention. In the Australian Constitution the word "absolutely" was inserted to make quite clear two things. There was to be no interference in the way not permitted; and neither the Federal nor the State body was to have the power of interference. Of course, the word "absolute" also carried with it the idea that it was not comparative: it was not a comparative freedom, it was an absolute freedom.

It would be an extremely odd thing, with that background, to say, as is said and as is fundamental to the appellants' case here, that s. 92 only protects the passage of goods. The steps in my argument against it, as far as I have developed it, are these. You had as at 1900 a settled American doctrine of free inter-State commerce. You had a definition of the word "commerce" wide enough to include all forms of commercial intercourse. You had an American doctrine of free access, a physical access on the part of persons, to all parts of the Federation. You then find s. 92 inserted by a deliberative assembly, as Lord *Haldane* said, where everything had been examined with minute care, and they use the American word "commerce," which has been defined in the Constitution they are copying, when they say: "Trade, commerce and intercourse among the States"—using the American words "among the States"—"shall be absolutely free."

In a case where the validity of an Act is questioned in relation to s. 92 or where the question is as to the scope of s. 92, which may be almost the same question, the Court sits as part and parcel of the constitutional machinery, and its function is not to make a Parliamentary enactment workable, not to carry out the Parliamentary function, but to maintain the Constitution in which the dominant idea is the reservation in the hands of the people themselves of this area of inter-State commerce.

In the intervening years between the decision in *McArthur's Case* that s. 92 did not bind the Commonwealth and the decision to the contrary in *James* v. *The Commonwealth* the test sometimes applied by the High Court in determining whether a State law infringed s. 92 was a subject-matter test, "pith and substance". You

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asked the question: Is this a law on the subject of trade? If it is, then it infringes, because s. 92 prevents the States from making laws on that subject. Of course, that soon appeared to limit the powers of the States unduly, and you then had distinctions made which were only important because of this subject-matter rule, distinctions between trade and instruments of trade. Having divided the topic up into trade and "not trade," more particularly trade and instruments of trade, because it is realized that a State may in the guise of legislating about an instrument of trade be really making laws on trade, and so still using this subject-matter idea, the words "directed against" creep in. You find passages which say: "Well, now, if a State making a law not on the subject of trade but on some other subject is directing itself against trade, that will be bad." The reason is not the reason which is suggested by the Attorney-General. The reason was because in reality it had become a law on the subject of trade. That is where one first sees in the decisions of the High Court the intrusion of this idea of "directed against." It is introduced not by way of speaking of motive for the Act or the reason or policy of it; it is introduced first as a means of identifying the subject-matter of the law. Is it a law about trade? It purports to regulate bankers, but we see from the way in which it does it that it is really a law on trade. If it is, it is a law which is bad. A State has no power to legislate on trade, and therefore it is bad if it is a law on trade. It is into that area that *James* v. *The Commonwealth* comes, and it reduces the scope of the freedom. It qualifies that statement in *McArthur's Case* as to the scope of the freedom and it emphasizes the fact that you have to impair the freedom of the movement. It is not enough that the law burdens some incident of an inter-State transaction which is not related to its inter-State character, its movement, its interchange. That is expressed by the phrase "as at the frontier." The other consequence was that you could no longer test the validity or invalidity of a law by simply finding out what it was about. To deny the States any power to legislate on the topic of inter-State trade was to say, in substance, that the Commonwealth power was exclusive. *James* v. *The Commonwealth* says there is a concurrent power. Once you have got a concurrent power, the test of simply finding out whether a law is on the subject of trade will not work. A great deal of what is said in the cases about "directed against" when used in connection with the subject-matter test must, of necessity, go by the board; it is no longer apposite. The test is: What is the operation of the law?

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As a result of the decision in *McArthur's Case* s. 51 (i.) of the Commonwealth Constitution had virtually become an exclusive power. To state that in another way one could say: The State could not pass any law on the subject of inter-State trade which affected part of an inter-State transaction in any respect, and the emphasis here is on "in any respect." That was the result of *McArthur's Case*, and it is a consequence of regarding s. 51 (i.) as exclusive. In the intervening years before the decision of *James* v. *The Commonwealth*, logically each case ought to have been decided on the simple question: Is this a law on the subject of inter-State trade (a State law, because by hypothesis the Commonwealth was not bound)? If it is, it is bad. As Lord *Wright* pointed out in *James* v. *The Commonwealth* that course was not uniformly followed. Lord *Wright* was at some pains to point out in his review of the cases that the High Court did not logically apply what flowed from *McArthur's Case* in that respect but began to regard only certain laws on the subject of inter-State trade as invalid. Lord *Wright* said that it had been pointed out that *Roughley* v. *New South Wales*; *Ex parte Beavis* (1) was in truth inconsistent with *McArthur's Case* and that is correct for this reason. In *Roughley's Case* the law said that the inter-State trader in fruit had to market his fruit through a registered agent, and *Isaacs* J. quite logically said in his judgment: That is a law on the subject of inter-State trade; you have touched a step in the inter-State transaction in some respect, and that is the power that is denied by *McArthur's Case*. Some of the cases were decided straight out on a subject-matter basis like *Nelson's Case* [*No.* 1] (2). Then a distinction was made between trade and the vehicles or the instruments of trade, thus enabling the States to make laws about the instruments. *Willard* v. *Rawson* (3) and the judgments of *Gavan Duffy* and *Rich* JJ. in *Vizzard's Case* (4) are illustrations.

[Lord PORTER. I am not sure that you do not get it marked in the Chief Justice's judgment in the *Airways Case*.]

To some extent, to show that *Vizzard's Case* was not inconsistent with what he was deciding. The effect of this subject-matter test, which came from *Vizzard's Case*, one can find still in some of the judgments; it has not been completely removed and naturally after such a long period of judgments it is not readily removed. Flowing from the decision of *McArthur's Case* also is a sort of reservation which was made by the courts when the division between instruments and trade was made. It was apparently

(1) (1928) 42 C.L.R. 162.
(2) (1929) 42 C.L.R. 209.
(3) (1933) 48 C.L.R. 316.
(4) (1933) 50 C.L.R. 30.

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& Egan, The Commerce Clause of the Federal Constitution (1898), pp. 27, 28, 43, 46-49, 315, 316; *Rottschaefer* on *Constitutional Law* (1939), pp. 229-237.]

The next step to take is to see what it is that a banker really does. He conducts his affairs as a business, for profit. In that business he employs both his own capital and the deposits of others, with a view to making profit. Writers on banking and economics regard him as a dealer. A list of such writers appears in the report of the argument of this case in the court below (1). He is called variously a merchant, a trader, a commercial banker. In the *Macmillan Report* private banks, such as the Australian banks, are referred to as commercial banks. In essence one of the principal functions of the banker is the movement of money from place to place. A great deal of attention is given by the appellants to what happens when a banker grants an overdraft and too little attention to what he does when he sells a draft or when he furnishes a traveller's cheque or when he establishes a credit across the State border, not to fulfil an overdraft, but upon a deposit made with him in one State. If I go to the banker and give him £100 and get a letter of credit to somebody in the next State, the banker has undertaken to move what I have in one State so that I may have it in another. Whether he physically posts the money across or whether he manages to get somebody to provide the money for him in the next State, or whether he already has some money there out of which he can honour his contract, is little to the point. His actual bargain with me is that that which I have here I shall have in another place.

[Lord PORTER. I am not quite sure how far you can carry that. What the actual letter promises is that a credit which you have in one place shall be transferred into a credit at the other place, and that does not necessarily involve the shifting of money.]

May I take it back to the days when we had sovereigns? Say I took to the banker 100 sovereigns and I said to him: "Here are 100 sovereigns. I do not want the risk of them being stolen from me whilst I am on the Melbourne Express tonight. You give me something which will entitle me to get 100 sovereigns in Melbourne tomorrow." The banker says: "Very well, I will send the 100 sovereigns down in a strong room on the train so that you can have that 100 sovereigns tomorrow."

[Lord PORTER. And you would in fact get those particular sovereigns. There is no obligation of that kind. It is credit, it is not a physical thing.]

(1) (1948) 76 C.L.R., at p. 24.

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But would it matter a bit so far as the real transaction was concerned if the banker, instead of sending those specific sovereigns, arranged with somebody whom he rang up in Melbourne to get another 100 sovereigns and provide them for me when I arrived in Melbourne? There would be no difference.

[Lord PORTER. Not a bit, but on the other hand it need not involve the transfer of something physically from one State to another; that is all.]

True, but it does involve this: if he does not actually send the money he has to ring up or write a letter, he has to communicate. He cannot avoid crossing the border in some form. Of course all the evidence in this case was that he sends letters every time that he has got to do these things. But if instead of sending a letter to his correspondent, his agent or his branch, he rings up, equally he has engaged in commercial intercourse with his own branch, and to say to the banker: "You shall not have that inter-State banking transaction," is essentially to prevent at least his intercourse across the State line, whether one is tied to the notion of something moving or not. [Counsel referred to *Trinidad Lake Asphalt Operating Company Limited* v. *Commissioners of Income Tax for Trinidad and Tobago* (1).]

[Lord NORMAND. Once you have said that intangibles come within the purview of s. 92 you are no longer concerned to show that there is anything actually moving.]

Only this, that I am answering a second very closely allied argument that even if you could have a trade in an intangible, when you come to s. 92 you must have something which is forbidding movement, and unless the intangible is moving in some way then s. 92 cannot operate.

[Lord NORMAND. Intangibles cannot move literally. Therefore, all you have to show is that something is done on one side of the border which has an effect on the other side of the border.]

I would accept that.

[Lord SIMONDS. You are simply dealing with the too literal use of the words, "movement of goods across the frontier," and trying to get rid of the application of that phrase.]

It would be far too narrow to say there must be an actual movement. Take the activities, say, of a flour miller who buys wheat at the early part of a season. He is not sure what the movement of world markets will be through the season, so he has to hedge. Through the season he buys and sells wheat in order to keep his

(1) (1945) A.C., at pp. 9-13.

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first was that s. 46 was contrary to an implied constitutional limitation of Commonwealth legislation. The State puts it in this way: There is an implication, resulting from the terms of the Constitution and the Federal structure it erects for the government of Australia, that neither the Commonwealth nor a State can exercise its powers so as either (1) to prevent the other from performing the constitutional functions necessary for its continued existence as a co-ordinate and independent body politic within the Federation, or (2) to interfere with or control the other in the performance of such functions so as to deprive it of its co-ordinate and independent position. The second contention was that s. 46 was contrary to an express constitutional limitation of Commonwealth legislative power, namely s. 92. The appellants have conceded that the question of the implied limitation is an *inter se* question. It cannot be correct that an implied limitation would *ex concessis* raise an *inter se* point, and the question of an express limitation would not. In the case of the implied limitation the powers that conflict are clearly the Commonwealth legislative power and the State executive power, the executive power to manage its fiscal operations through a private bank. It is submitted that the second contention of the State, based on s. 92, raises a question of just the same character, the only difference being that the limitation on the Commonwealth legislative power is in this case express. This was in effect decided, it is submitted, in *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (the *Steel Rails Case*) (1).

[Lord PORTER. You are saying broadly, are you not, that a s. 92 point is an *inter se* point ?]

When there is involved the question of the executive powers of the State.

[Lord NORMAND. Does it come to this, that if the Commonwealth Act trammels the executive powers of the State, the challenge of that Act raises an *inter se* point ?]

Yes, if it trammels the powers of the State. For the moment on this point it is enough for me to go to the extent that that point arises and has to be decided.

[Lord SIMONDS. I do not quite follow why you bring in s. 92. Your point is that it is an interference with the executive power.]

Yes.

[Lord SIMONDS. And it is an interference with the executive power whether s. 92 is in the *Constitution Act* or not.]

(1) (1908) 5 C.L.R. 818.

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Yes, but for the moment I am arguing that a decision of the High Court, whether it be based on an express constitutional limitation or an implied constitutional limitation, is a decision on an *inter se* point when the executive powers of a State are involved.

[Lord PORTER. Your answer to my Lord, as I understand it, is this: I am distinguishing between the implied breach of an inter-State right and the express breach and I am quoting s. 92 because that is where I find the express breach, whereas if I do not deal with s. 92 I am merely relying on an implied one.]

I start with this. It is conceded that, if it is an implied limitation, it is an *inter se* point. The Attorney-General has conceded that. He says it is not an *inter se* point if it is an express limitation because apparently that then becomes a decision on the limitation, that is, a decision on s. 92 and not on the *inter se* point. My answer is that it does not matter whether it is express or implied if the effect of the decision is to leave operating a statute which infringes the powers of the State or delimits the powers of the State.

[Counsel referred to *Baxter's Case* (1); *Pirrie* v. *McFarlane* (2).]

James v. *Cowan* is not opposed to the present submission. The question there was whether a State Act stood up in the concurrent field; that did not affect the Commonwealth one way or the other. At all events, the point was not taken that the Act would interfere with the executive powers of the Commonwealth. No such question was raised in *James* v. *The Commonwealth*.

The power to manage and control its public moneys, including the power to deal with private banks, is a power essential to the efficient working of the business of Government. Such a power in a State is part of the executive power of the State (*Melbourne Corporation* v. *The Commonwealth* (3)).

As already mentioned, Victoria banks with private banks, and its Ministers and officers would be guilty of an offence in withdrawing the public revenue of the State from the Public Account in a private bank to which a notice had been given under s. 46, on the expiry of that notice. In addition s. 46 would override the provisions of the *Audit Act* of Victoria and the appointments made by the Governor in Council thereunder. The evidence also is that, if private banking were to be prohibited, the States would have to bank with the Commonwealth Bank. In this case the Commonwealth Bank has been held to be a corporate agency of the Commonwealth. It follows that to prohibit private banking would in

(1) (1907) 4 C.L.R., at pp. 1118, 1119, 1154.
(2) (1925) 36 C.L.R. 170, at p. 194.
(3) (1947) 74 C.L.R. 31, at pp. 52, 54, 67, 75, 77.

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The fourth is the one which I have put already on the first part of the argument, that s. 46 of the *Banking Act* does authorize the Treasurer of the Commonwealth to control the States in arranging for the collection, management and custody of public moneys and to render the States dependent on the Commonwealth Bank.

The first of these propositions requires a consideration of the position of the States as self-governing bodies politic. The constitution of Victoria before the federation in 1901 is to be found in the Victorian *Constitution Act* of 1855, 18 and 19 Vict., c. 55. By s. 1 Her Majesty had power by and with the advice of the legislative council, that is the legislative assembly established by the Act, to make laws in and for Victoria for all cases whatsoever. The other notable point is that by s. 60 the legislature of Victoria should have power to alter the *Constitution Act* notwithstanding its character as an Imperial Act. The executive power was in the Governor in Council. The position was that, apart from the power to make laws in and for Victoria in all cases whatsoever, there was a power to change the Constitution, there were provisions as to the executive and the judicial system and the consolidated revenue.

Even before the federation, Victoria already had its *Audit Act* in 1890, which is practically the same as the *Audit Act* which comes into this case and is one of the Acts which were preserved in the federation. The position was that before the federation Victoria was a self-governing colony with a system of responsible self-government on the English pattern and with its own executive, legislature, judiciary, civil service and financial system, and the only limitation on its sovereignty was the legislative omnipotence of the Imperial Parliament with the usual consequence that any Act of the Victorian Parliament inconsistent with an Act of the Imperial Parliament applicable to Victoria was invalid under the *Colonial Laws Validity Act*.

On federation the colony became a State without any change in its constitutional structure, and the executive, legislative and judicial powers, the civil service and financial system remained, and its system of responsible Government remained also. As far as the Commonwealth *Constitution Act* was concerned, it did not amend any particular provision of the State Constitution or the laws of the State but of course it provided that the *Constitution Act* and the laws made by the Parliament of the Commonwealth should be binding throughout Australia notwithstanding anything in the laws of any State. In the Commonwealth *Constitution Act*, one sees in the preamble the words "Indissoluble Federal Commonwealth" and in s. 3 "Federal Commonwealth." These Lord

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Haldane underlines in *Attorney-General of the Commonwealth* v. *Colonial Sugar Refining Co.* (1). The implication that is relied on arises from the fact that the Imperial Parliament established both Commonwealth and States in such a way that the continued existence of both the Commonwealth and the States is necessary if the federal form is to go on. That is far from being a "speculative" conception, as the appellants say it is. It is a necessary implication in the position that was set up.

The State's proposition is supported by the Australian authorities. The first of these is *D'Emden* v. *Pedder* (2), which was applied in *Deakin* v. *Webb* (3). It is conceded that these and other cases prior to *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (4) carried the doctrine of implication too far, as was shown in the last-mentioned case, but it is not correct to say that the last-mentioned case destroyed the doctrine of implication.

D'Emden v. *Pedder* (2) and *Deakin* v. *Webb* (3) were disapproved by the Board in *Webb* v. *Outrim* (5), but, whenever that decision has been considered, it has been almost universally accepted that part, at any rate, of the reasoning was unsatisfactory. It attempted to apply the principles of a unitary, to a federal, constitution and attached too much importance to the fact that the Australian Constitution is monarchical. Other early cases to which it is desired to refer are:—*Baxter's Case* (6); *R.* v. *Sutton* (the *Wire Netting Case*) (7); *Attorney-General* (*N.S.W.*) v. *Collector of Customs* (*N.S.W.*) (8); *R.* v. *Barger* (9); *Chaplin* v. *Commissioner of Taxes for South Australia* (10).

The *Engineers' Case* (11) must be considered subject to the comments of *Dixon* J. and *Evatt* J. in *West* v. *Commissioner of Taxation* (*N.S.W.*) (12), which show that some implications are necessary and support at least the implication which is now contended for.

It would be contended, if necessary, that the dissenting judgments in *Pirrie* v. *McFarlane* (13) are correct.

In *South Australia* v. *The Commonwealth* (the *Uniform Tax Case*) (14) four Commonwealth Statutes were under consideration. The first was the *Income Tax Act* 1942. That imposed a tax at the high rates which, of course, were necessary during a war, and the effect of it was that the rates at which the tax was imposed were calculated

(1) (1914) A.C. 237, at p. 253.
(2) (1904) 1 C.L.R. 91.
(3) (1904) 1 C.L.R. 585.
(4) (1920) 28 C.L.R. 129.
(5) (1907) A.C. 81.
(6) (1907) 4 C.L.R. 1087.
(7) (1908) 5 C.L.R. 789.
(8) (1908) 5 C.L.R. 818.
(9) (1908) 6 C.L.R. 41.
(10) (1911) 12 C.L.R. 375.
(11) (1920) 28 C.L.R. 129.
(12) (1937) 56 C.L.R. 657.
(13) (1925) 36 C.L.R. 170.
(14) (1942) 65 C.L.R. 373.

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scheme which sub-ss. 1, 2 and 3 are dealing with, that is, since the avowed intention of the Act is to acquire the businesses of the private banks, to steady them, as it were, in their position at August 1947 until the taking over could be effected. Just as a vendor who has sold his business by a contract of sale must continue the business reasonably in operation pending the transfer, they were steadying intended transferors until the taking over could become effective. That was what sub-ss. 1, 2 and 3 were directed to, and sub-s. 4, instead of being something independent from the rest of the section and creating a new and quite separate prohibition from that effected by sub-s. 1, is merely a way of winding up the whole intended transfer by preventing the private bank when it has been expropriated ever rising again, providing as they should a precise day to be fixed under the statute as from which the maintenance of banking business should become a legal impossibility.

On this question of construction of the Act s. 6 neither advances nor impedes the argument. It is something which comes and is intended to come after the question of the construction of the Act has been solved. In putting that view of the effect of s. 6 and of comparable though perhaps less elaborate provisions such as you get in the general Act, the *Acts Interpretation Act*, I am only putting the unanimous view of the Judges of the High Court. They were all, as they would be, very familiar with the purpose and operation of provisions of this kind, intended to deal with some of the problems raised by the question of severability or inseverability, and they all agreed that provisions of this kind do not, and are not intended to, affect the construction of the Act itself. They are intended to meet, and if possible to solve, questions that arise after the construction of the Act as a whole has been determined and when it has been found, if it be found, that parts of an Act are incapable of having legislative validity owing to the impediments of the Constitution. Section 6 is nothing more than a declaration of the intention of Parliament. It is not in itself enacting and it cannot be: "It is hereby declared to be the intention of Parliament." Giving it the fullest possible measure which a court treating the legislation of Parliament with respect would wish to do, it remains true, as all the judges have said, that the legislative function under the Constitution lies with Parliament and the judicial function with the High Court, and it is not for Parliament so to express itself as to leave to the High Court the power in effect of making legislation which it has not made itself. Provisions such as s. 6, if they are driven too far, are in danger really of presenting a picture of Parliament putting together a series of phrases and handing them to the

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High Court and saying: See what law you can make out of them. That, as the High Court accepts, is impossible because it turns the judicial body into a law-making body. All it can do, therefore, with this declaration of the intention of Parliament before it and with the desire to honour it is to attribute to this declaration the maximum effect that it can consistently with the fact that law in the end must be made by Parliament and not by the High Court. This is very much the same thing as the High Court recognized in relation to the provisions in s. 15 and s. 25 of this Act, that fair compensation should be paid for the compulsory acquisition of shares or of businesses; they found that the court which had been created for finding the compensation was not valid, and they felt that they could not, owing to the condition of making provision for compensation dependent upon the intended court of claims, hold that ss. 15 and 25 were effective.

[Lord SIMONDS. Has it ever been suggested that such a section as s. 6 is unconstitutional and ultra vires in that it purports to give legislative power to a judicial body?]

I think it is accepted by all the members of the Court that if you pressed it too far it would be unconstitutional. I think that is what *Dixon* J. calls an inadmissible delegation. I think (*c*) is in a more extreme form than has appeared before. I think all the judges are careful to say: After all, s. 6 is only a general statement of parliamentary intention, and if we were going, having avoided one part of the Act, to allow another part of the Act to survive, and really make that into a new law simply because of the mandate given by s. 6, we would be going too far because it is only a general guide as to what Parliament wanted done. It is not a specific direction that the Act could be operated so as to be a law for the destruction of businesses without compensation.

The result of the appellants' argument would be that, in an Act the major part of which is devoted to the acquisition by one means or another of the assets of these private banks, Parliament is to be treated as having inserted an unconditional power in the Treasurer to determine the businesses of any one or more of these private banks at any time and in any circumstances, and that without paying a penny for the right so to stop their activities. The only power given to the Commonwealth to provide for the acquisition of property is the power to do it upon just terms. That means that when it legislates for the acquisition of property it must be careful, if it should not be scrupulous, to see that it does not arm the acquiring authority or person with a power as between himself and the expropriated party that is too great for justice, because then

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Parliament about his exercise of this power which it is said has been given him by the statute, and he may be subject to expressions of Parliamentary approval or disapproval according to what he has done. But, if it be right that the true meaning of the Act is that they have said to him: "You may have this power, and you are limited by no restrictions or conditions in your exercise," his answer is: "You gave me an arbitrary and uncontrolled power. It was you in making the Act that imposed no conditions upon me, and, therefore, there is no ground for querying or disapproving of any particular application of that arbitrary power which your statute has conferred upon me." It really amounts to this: when one says "arbitrary power" one means a power—one tests this by possibilities—which might be exercised for any irresponsible, irrelevant or personal reason having no connection with the activity of banking and yet be a good exercise of the power as given. That, in my submission, is something which, since the Commonwealth power can be derived only from a power to legislate with respect to the activity of banking, cannot be achieved under the Constitution.

A. J. Hannan K.C. (with him *J. Harcourt Barrington*), for the respondents in the fourth and fifth appeals (the States of South Australia and Western Australia and others.) It is submitted that s. 46 is invalid for the reasons that have already been presented in argument on behalf of the respondents.

It is submitted that s. 46 is invalid on the further ground that it is inconsistent with clause 5 (9) of the Financial Agreement, which, by virtue of s. 105A (5) of the Constitution, limits the legislative powers of the Commonwealth. The effect of s. 105A (5) is to make the Financial Agreement and all its terms a part of the Commonwealth Constitution and to give to the Agreement and its terms the effect of a paramount binding source of rules of constitutional law, to that extent overriding the constitutional powers of the Commonwealth Parliament conferred by the *Constitution Act* and the various State Parliaments acting under their own Constitutions.

The power which s. 46, if valid, would give to the Treasurer to put an end to the business of the private banks necessarily involves the prohibition of their doing business with the States. The necessary effect of that is that if the States want to borrow money at all they must borrow from the Commonwealth Bank and they thereby immediately fall under the control of the other party to the agreement, which is the Commonwealth.

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The effect of clause 5 of the Financial Agreement may be stated as follows:—(1) Borrowing for permanent purposes is controlled as follows: (*a*) The State must not invite the public to lend it money by the issue of a public prospectus, that is, public borrowing is prohibited (sub-clause 8); (*b*) Semi-private borrowing for permanent purposes must be used for the purposes mentioned in a programme approved by the Loan Council; (*c*) It is only intra-State. That is sub-clause 1 (*a*). (2) Borrowing for temporary purposes is controlled if securities are issued for the loan, for these must be Commonwealth securities and the Loan Council fixes their terms (sub-clause 2). The only cases where securities will not be issued are where the loan is on overdraft or on fixed or special deposit. Such temporary borrowing is only intra-State. (3) Borrowing for temporary purposes is not controlled (except as to maximum interest rates) if the loan is on overdraft from a bank or on fixed or special deposit, for in these cases no security is issued and the only control whether by the Loan Council or by the Commonwealth or any other authority is that specified in sub-clause 9. It may be inside or anywhere outside the State. Clause 5 (9) of the agreement gives each State the legal right to borrow on overdraft from a bank for temporary purposes without being subject to the control of the Commonwealth. Such borrowing is not to be subject to the control either of the Commonwealth or of the Loan Council as other kinds of borrowing are; it is subject only to the one kind of control (which is permissive) expressed in that sub-clause, namely, that of the Loan Council in relation to maximum rates of interest &c. This right of the States imports a contractual obligation on the part of the Commonwealth, the party on which the burden of the right is imposed. That obligation involves a promise on the part of the Commonwealth that the Commonwealth Parliament will not use its power under s. 51 (xiii.) of the Constitution to make any law which would prevent the States from borrowing on overdraft in accordance with clause 5 (9) of the agreement or would control such borrowing. The legislative power to which a limitation is put is necessarily that in s. 51 (xiii.); the Commonwealth has no other power through which it could touch the States in breach of the sub-clause. Included in the class of statutes which the Commonwealth is forbidden to enact is any Act the effect of which is to give the States no alternative but to borrow from the Commonwealth Bank if they wish to borrow on overdraft. The passing of s. 46 of the *Banking Act* 1947 is a breach of contract, for it is legislation which subjects the States in their borrowing on overdraft to the control of the Commonwealth by reason of ss. 8 and 9 of the *Commonwealth Bank Act*, for borrowing

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from the Commonwealth Bank means borrowing subject to Commonwealth control. Accordingly, s. 46 of the *Banking Act* is invalid, for it is legislation inconsistent with the Financial Agreement which the Commonwealth has contracted not to enact and this legislation by reason of s. 105A (5) of the Constitution is invalid.

It is no answer to the present submission to say that a State can have its own bank and obtain advances from it. This would not be borrowing on overdraft at all. Moreover, it would not be practicable for a State bank to have on hand such large sums as are needed.

If, as is submitted, clause 5 (9) confers a right on the States, it follows that action on the part of the Commonwealth which impaired that right would be a breach of the contract. If one asks what kind of action that might be, the typical—if not the only—kind of action would be legislative action. Regard must be had to the fact that this agreement is between sovereign Governments. It cannot be construed like a contract between private citizens on the assumption that, whatever terms the contract contains, they are subject to future changes in the law of the land. *Dixon* J. was in error in the present case in construing it in that way.

[Lord MORTON. Supposing there were three private banks in South Australia and the Federal Government passed a law forbidding one of them to carry on banking business and that was one which the State had been in the habit of going to for its overdrafts, but it still had the choice of two others, would such an Act be contrary to the Constitution with this clause inserted in it ?]

It would be a question of fact : Does the elimination of one bank out of three defeat or diminish or condition the State's power to raise on overdraft from the remaining banks the money it requires in as complete a manner as is necessary ?

[Lord MORTON. It is a question of degree and fact ?]

It is a question of degree.

[Lord MORTON. At any rate you say that to shut all the private banks is well beyond the line.]

Yes ; the effect is equivalent to what was held in the *Melbourne Corporation Case* to be prohibited legislation.

[Lord MACDERMOTT. You have stressed sub-clause 9. Does it carry you any further than sub-clause 1 (*a*) ?]

Yes ; because of sub-clause 2 of clause 5 : " Any securities that are issued for moneys so borrowed or used shall be Commonwealth securities, to be provided by the Commonwealth upon terms approved by the Loan Council." When the State borrows under the first sub-clause of clause 5, the Loan Council fixes the terms of the securities which it offers in exchange for the money. It is controlled borrowing. The contrast is between controlled borrowing, which is dealt with in sub-clauses 1-7 of clause 5, and sub-clause 9 which is uncontrolled borrowing without security. In the practical exigencies of the situation the State would not borrow except either on security when it is permanent or by way of overdraft when it is temporary.

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That s. 105A (5) and the Financial Agreement constitute a paramount and overriding rule of constitutional law is the view expressed in *New South Wales* v. *The Commonwealth* [*No.* 1] (1), per *Rich* and *Dixon* JJ. (2) and per *Starke* J. (3).

In the *Melbourne Corporation Case* the present point was not taken in argument, and the effect of clause 5 (9) of the agreement was not appreciated by the members of the Court other than *Latham* C.J. and *Williams* J. *Starke* J. in that case referred to the words of clause 5 (1), but he does not appear to have addressed his mind to clause 5 (9) at all, and in the present case he failed to recognize the obligation imposed by sub-clause 9 on the Commonwealth.

It is submitted that the view of clause 5 (9) taken by *Rich* and *Williams* JJ. in the present case is consistent with that of *Williams* J. in the *Melbourne Corporation Case* and is correct. Logically, *Latham* C.J. should have taken the same view in the present case as in the *Melbourne Corporation Case*, but he did not do so. Taking his two judgments together, it is correct, it is thought, to say that he recognizes that clause 5 (9) confers a right on the States, but he regards it merely as a right to prevent the Commonwealth from discriminating against the banks by legislation expressly designed to prevent them from borrowing on overdraft from the banks for temporary purposes. This confuses the discrimination argument with that relating to the Financial Agreement. The control over the banks given to the Federal Treasurer by s. 48 of the *Banking Act* 1945 is indistinguishable for the purposes of the present argument from the power given to the same Treasurer by s. 46 of the 1947 Act to forbid the banks doing any banking business. It cannot be that s. 105A means that the Commonwealth is forbidden to pass legislation, directly aimed at a State, forbidding banks to deal with it, and permits the Commonwealth, without committing a breach of sub-clause 9, to pass legislation which affects the States just as intimately, works just as great a destruction of the right, and is excusable only on the unsubstantial ground that it is

(1) (1932) 46 C.L.R. 155.
(2) (1932) 46 C.L.R., at p. 177.
(3) (1932) 46 C.L.R., at p. 186.

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general legislation. It is to misunderstand what the States stipulated for in sub-clause 9. The States did not stipulate that their financial independence should be preserved and protected against legislation directly aimed at it. They wanted it to be preserved. Of the other judges who rejected this argument in the present case, it is submitted that *Starke* and *McTiernan* JJ. misunderstood it and that *Dixon* J. misconstrued it, he having clearly construed it as being subject to the frustration rule of contracts and the impossibility of performance owing to change in the law.

The question is not as to how many banks can be left and how many can be eliminated. It is: How is the free exercise of the right conferred on the States affected? It never was the argument that clause 5 (9) conferred a kind of immortality on existing banks. The contention has always been that the obligation was purely negative, to refrain from the enactment of legislation of the prohibited nature, that is, rendering the right of the States nugatory or diminishing or prejudicially affecting it.

The Attorney-General of the Commonwealth, in reply. The appellants submit that s. 74 of the Constitution prescribes a procedure for isolating certain types of constitutional questions decided in the High Court of Australia and for preventing an appellant from challenging the High Court decision on any such question without a certificate of the High Court itself. The third paragraph of the section makes it clear that the preceding paragraphs may involve an invasion of the Royal prerogative. The words limiting or controlling the prerogative should be construed strictly. It was suggested that the appellants make the word "decision" do a double duty. In ordinary language it always does a double duty. The word should not be separated from its context in the first paragraph of s. 74. The word cannot merely mean the formal order in that context, because it does not make sense. If you read the word "order" in "No appeal shall be permitted to the Queen in Council from an order of the High Court upon any question," there is never an order of the High Court "upon any question." There would have to be some words added, even to make sense of the phraseology. Therefore it means in this context that you see what the High Court has decided and you see if it has made a decision upon an *inter se* question, and it is only that decision which is given a special position by the first paragraph of s. 74, a decision of the High Court upon a particular *inter se* question, and even in that case the High Court is enabled to certify, not that the case as a whole is one fit for determination here, but that the question is one

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which ought to be determined by Her Majesty in Council. The policy behind this is clear. It is not to treat the cause as a whole in a special way because an *inter se* question is involved in some degree in the litigation, but the policy is simply that a decision of the High Court upon this type of question, involving matters of domestic jurisdiction, so to speak, domestic concern in Australia, stands unless the High Court itself thinks that the question ought to be brought to Her Majesty in Council. Parallel with the first paragraph is the provision in the second paragraph, and the certificate is granted only if the High Court is satisfied that for a special reason it should be granted, and, if it is granted, an appeal lies to Her Majesty in Council on the question without further leave.

In *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) the appeal was held incompetent because an *inter se* question arose. In that case the Board went behind the formal order. On an application for special leave, or, if leave is granted, on an appeal, the Board always has before it the material necessary for this purpose—the formal order of the High Court and the reasons for judgment.

[Lord PORTER. Are these propositions right: (1) An appellant can always defend a decision upon an *inter se* question if it has been decided in his favour in the High Court. (2) A respondent can always raise an *inter se* question in order to defend a decision which has been made for him below?]

Yes.

[Lord PORTER. In the first case I put you rely on the word "decision," and in the second case you rely on the word "appeal."]

[Lord SIMONDS. The policy which the High Court, since the Commonwealth was established, has insisted upon is that this question of *inter se* power is a matter for the High Court to determine; and yet by a side wind it may be brought up for determination by this Board.]

The policy is merely to cut off the right of access to the Privy Council in the case of a person who wants to appeal against a decision on an *inter se* question in the High Court when he has lost the day. The only difficulty is the case of the respondent.

[Lord SIMONDS. It is a matter of great importance, one would assume, that *inter se* questions, such as we have here, should be determined by the High Court, unless they certify. We have to determine those very points. What is to happen? The High Court will give what persuasive power they think fit to our judgment. Is that right?]

(1) (1917) A.C. 528.

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[Lord SIMONDS. It means that the Commonwealth is itself a commonwealth of self-governing units and it is to be presumed that they will continue to be such self-governing units, a thing which is impossible if their essential activities are unduly interfered with.]

We say the foundation of the Constitution is the subjection of both Commonwealth and States to law, that there is no room for such a general implication. If we can see something indicative of an attempt by the Commonwealth to exercise a power so as, for instance, to tax the State under an *Income Tax Assessment Act*, I submit the answer to the suggestion of undue interference is that the court would not hold that to be a law with respect to taxation, because the term " taxation " implies that the Parliament is dealing with subjects and the State is not a subject in that sense. But, whichever way it is put, we submit that it is unsound.

[Counsel referred to *In re Silver Brothers Ltd.* (1).]

As to the Financial Agreement, it is submitted that clause 5 (9) merely puts outside the scope of the Financial Agreement certain transactions which are mentioned, that is, the use of moneys for temporary purposes if the moneys are available under State law, and, secondly, it permits that moneys may be borrowed for temporary purposes on a similar principle to meet a lag in revenue, or matters of that kind. It does not lay down a rule of the Constitution itself, and it is not intended to. It simply says that there are serious restrictions imposed upon State borrowing for the future through the Loan Council system. Those restrictions are not to apply, and the parties recognize, both the Commonwealth and the State, that this system of temporary finance or temporary use of State moneys may go on without that being regarded as governed by the agreement. I submit in truth it is to be regarded as an exception from the agreement. In fact, it says: " And the provisions of this agreement shall not apply to such moneys." The agreement is not couched in the terms of constitutional right.

[Lord MORTON. Does it come to this, that your submission is that clause 5 (9) has no contractual or constitutional force but is merely an exception which leaves matters as they were, or has it any force at all, directly or otherwise ?]

It is a declaration of liberty and has a contractual force, because it is part of the agreement, but it is not to be regarded as an overriding constitutional command. It simply says: " These matters are outside the scope of the agreement."

Assuming that the sub-clause has the same force as any other portion of the agreement, it merely says, in its first branch, that

(1) (1932) A.C. 514.

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the State may use for temporary purposes any public moneys of the State which are available under the laws of the State. It is a curious position if that is some constitutional right which is given to the State, to use for temporary purposes its own moneys which the State law makes available. It does not seem to sound in constitutional right. Then turning to the second branch: " Or may, subject to maximum limits (if any) decided upon by the Loan Council . . . borrow money for temporary purposes by way of overdraft or fixed, special, or other deposit," all it does is to say: " You may borrow temporarily by way of overdraft from such financial institutions as you are able to deal with and with whom you are able to make an arrangement." It expresses a liberty rather than a right. The authority of the State is to use for temporary purposes certain moneys. What moneys ? Those which are available under the laws of the State. That means the laws of the State in force from time to time. So, when authority is given in the second part of the same paragraph to borrow money for temporary purposes by way of overdraft, the agreement is not directing itself to, and is not concerned with, the groups from whom that may be done, except in the general way that you find used in clause 5 (1) (*a*), that is, all authorities, bodies, funds, or institutions (including savings banks) constituted or established under Commonwealth or State law or practice. That means from time to time existing. If the implication that the respondents suggest is to be made from this sub-clause, it is an implication that must be considered in conjunction with Commonwealth borrowing under clause 6 (7) as well as in conjunction with State borrowing under clause 5 (9). It would mean that a State Parliament could not terminate or abolish a State bank because under the next clause the Commonwealth may wish to have recourse to a State bank for a purpose of temporary borrowing. Equally it means that the Commonwealth Parliament could not repeal the *Commonwealth Bank Act*, because the termination of the existence of the Commonwealth bank would directly limit the possible source of borrowing for the States.

Sir *Walter Monckton* K.C., in reply on the preliminary point. If the appellants' argument on s. 74 of the Constitution is right, then the High Court's determination of the *inter se* question can be reversed by the Judicial Committee on appeal without a certificate being obtained from the High Court. The argument came to this: Section 74 precludes an appeal without a certificate only in a case when an *inter se* question has been answered adversely to the