based upon the length of absence from the State or on the footing of a daily allowance, although both these matters are elements to be taken into consideration in fixing the lump sum.

The application to review the taxation will therefore be allowed, but as the case is one of first impression, and I cannot blame the respondents for taking the objection, I make no order as to costs.

The question raised by this application being one of general importance, I have consulted my learned brothers *Barton* and *O'Connor* before coming to a conclusion. They authorize me to say that they concur in my view as to the rule which should be followed in such cases.

Solicitors, for the appellants, *Stone & Burt.*

Solicitors, for the respondents, *Downing & Downing.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

LEE FAY . . . . . APPELLANT;
DEFENDANT,

AND

VINCENT . . . . . RESPONDENT.
INFORMANT,

CASE STATED, TRANSMITTED FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Factories Act (*W.A.*), (*No.* 22 *of* 1904), *sec.* 46—*Case removed under sec.* 5 *of Judiciary Act* 1907 (*No.* 8 *of* 1907)—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 18—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 117—*Discrimination between residents of different States.*

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The appellant was convicted in a Court of Petty Sessions of an offence under the *Factories Act* 1904 of which offence it was an element that there should be employed a Chinese who had not been so employed on or before 1st November 1903. Objection was taken to the validity of the Act, on the ground of its imposing a discrimination between residents of different States. A case was stated by the magistrate for the consideration of the Supreme Court, which, on the assumption that the case fell within sec. 5 of the *Judiciary Act* 1907, ordered the proceedings to be transmitted to the High Court.

Held, that no question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States was in question, and that therefore the Supreme Court had power to determine the case.

But, *held*, that the case should under the circumstances be treated as a case stated by the Supreme Court under sec. 18 of the *Judiciary Act* 1903 for the consideration of the High Court.

Held, that whether the *Factories Act* did or did not apply to Chinese who were employed in a factory on 1st November 1903 in another State, the provision was not *ultra vires* the legislature of Western Australia as discriminating between residents of different States ; also, that the construction of the Act was a matter of which the High Court had not original jurisdiction, but was a matter which they could only determine on appeal from the Supreme Court of Western Australia.

The case was accordingly remitted to the Supreme Court for determination.

THE appellant was convicted in a Court of Petty Sessions for that being the occupier of a factory he employed one Lee New, a Chinese, who had not been so employed on or immediately before 1st November 1903, contrary to the provisions of sec. 46 of the *Factories Act* 1904. Lee New was a naturalized British subject, now resident in Western Australia, who was employed in a factory in the State of Victoria on 1st November 1903, but had not been so employed in Western Australia. A case was stated by the magistrate for the consideration of the Supreme Court which, acting on the assumption that the case fell within sec. 5 of the *Judiciary Act* 1907, ordered the matter to be transmitted to the High Court.

Barsden, for the appellant. The word "factory" must be taken to include factories situated outside the State of Western Australia ; otherwise there would be a disability or discrimination

created contrary to the provisions of sec. 117 of the Commonwealth Constitution: *Minnesota* v. *Barber* (1).

[GRIFFITH C.J. referred to *Miller* v. *Haweis* (2).

BARTON J.—Sec. 117 refers to residents of one State endeavouring to assert their rights in another. But Lee New was a resident of Western Australia at the time of the prosecution.]

Northmore, for the respondent.

Nov. 6.

The judgment of the Court was delivered by

GRIFFITH C.J. This was a prosecution in a Court of Petty Sessions for breach of a provision of the local *Factories Act* 1904 which provides (sec. 46) that no person of the Chinese or other Asiatic race shall be employed in a factory unless the employer satisfies the inspector that such person was so employed or engaged on or immediately before 1st November 1903.

Upon the hearing it appeared that immediately before that date the Chinese in question, being then a naturalized British subject resident in the State of Victoria, was engaged in a factory in that State.

Two questions were raised: First, that on these facts the Chinese in question was brought within the exemption, it being contended that the word "factory" as used in the exemption includes factories outside of Western Australia; and secondly, that, if it did not, the provision was invalid under the Constitution. The magistrate convicted the appellant, who appealed by way of a case stated to the Supreme Court. The Court, being under the impression that under the *Judiciary Act* 1907, which had just become law, this Court had exclusive jurisdiction to decide the second question raised, directed the case to be removed to this Court as provided by that Act.

That Act, however, only applies to questions 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. The real question which arises in this case is not one of that kind, but whether the Statute in question was within the competence of the legislature of Western Australia under the Constitution. The ground of

(1) 136 U.S., 313. (2) 5 C.L.R., 89.

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reference to this Court was therefore mistaken, and the case was cognizable by the Supreme Court. But the question whether the local Act was invalid under the Constitution, which was in fact raised, was a matter of federal jurisdiction; and under sec. 18 of the *Judiciary Act* 1903 the Supreme Court could refer that question for the consideration of a Full Court of the High Court. Under these circumstances we think that this case should be treated as a question reserved for consideration of this Court under that section. The question so raised arises upon sec. 117 of the Constitution, which provides that "a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be applicable to him if he were a subject of the Queen resident in such other State." That section only applies to a person who, being resident in one State, is seeking to assert rights in another. In the present case the person in respect of whom the rights are asserted is a resident in Western Australia, not in another State, and the rights are asserted in Western Australia. The section has therefore no application, and the point, although it was raised as a question of federal jurisdiction, is not tenable, as Mr. *Barsden* now admits.

The other point to be decided is as to the meaning of sec. 46 of the *Factories Act* 1904. But that is not a question of federal jurisdiction, and this Court has no jurisdiction to determine it except as a Court of Appeal from the Supreme Court. The proper course then, the point which the Supreme Court must be taken to have referred to this Court being disposed of, is to remit the case to that Court to dispose of the question which is within their jurisdiction, but not within ours. A difficulty might perhaps have arisen if the appeal had been brought, as it might have been, direct to this Court from the magistrate. It was, however, properly brought to the Supreme Court, and we have jurisdiction to remit it to them for decision. The case must therefore be remitted to the Supreme Court for determination. The appellant must pay the costs of this appeal.

Case remitted to the Supreme Court for determination.

Solicitors, for the appellant, *Moss & Barsden.*

Solicitor, for the respondent, *Crown Solicitor for Western Australia.*

H. V. J.

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[HIGH COURT OF AUSTRALIA.]

FIELDING AND ANOTHER . . . . APPELLANTS;

AND

HOUISON AND OTHERS . . . . RESPONDENTS.

TOVEY AND OTHERS . . . . . APPELLANTS;

AND

HOUISON AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1908.

SYDNEY, *July* 29, 30, 31; *Aug.* 5, 6, 7, 10, 18, 19, 25, 26, 27; *Dec.* 9.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

Trusts of St. Phillip's glebe—Disposition of surplus rents and profits—Endowment of other Churches—Irrevocable appointment—Express trusts—Church of England Act, 8 Wm. IV. No. 5, sec. 21—Constitutions of the Church of England (N.S.W.) 1866—Sydney Church Ordinance 1891, Art. 34—Church Acts Repealing Act (N.S.W.) 1897.

In 1862 certain lands were granted by the Crown to trustees upon trust for appropriation as the glebe annexed to St. Phillip's Church of England, Sydney, in conformity with the provisions of the Acts 8 Wm. IV. No. 5 and 21 Vict. No. 4, so far as they applied to the trusts of the grant. Under sec. 21 of that Act, the trust for the application of surplus rents was as follows:—"and so often as the rents issues and profits of any such glebe