[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . } APPELLANTS;

AND

THE COMMONWEALTH AND OTHERS RESPONDENTS.

THE COMMONWEALTH . . . . PLAINTIFFS;

AND

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . } DEFENDANTS.

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MELBOURNE, *March* 1, 2, 3, 4, 5, 8, 9, 23.

Griffith C.J., Barton, Isaacs, Gavan Duffy, Powers and Rich JJ.

Constitutional Law—Powers of Parliament of Commonwealth—Inter-State Commission—Power to create Commission a Court—Powers of "adjudication"—Injunction—Validity of Commonwealth legislation—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 72, 101, 103—*Inter-State Commission Act* 1912 (*No.* 33 *of* 1912), *Part V., secs.* 23-31.

Constitutional Law—Powers of Parliament of State—Freedom of inter-State trade and commerce—Compulsory acquisition by State of goods within State—Annulment of contracts as to such goods—Eminent domain—Validity of State legislation—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 92, 106, 107—*Wheat Acquisition Act* 1914 (*N.S. W.*) (*No.* 27 *of* 1914), *secs.* 3, 8, 9.

Sec. 101 of the Constitution does not authorize the Parliament of the Commonwealth to constitute the Inter-State Commission a Court, and therefore the provisions of Part V. of the *Inter-State Commission Act* 1912 are *ultra vires* the Parliament of the Commonwealth.

So *held* by *Griffith* C.J. and *Isaacs*, *Powers* and *Rich* JJ. (*Barton* and *Gavan Duffy* JJ. dissenting).

Held, therefore, by *Griffith* C.J. and *Isaacs*, *Powers* and *Rich* JJ. (*Barton* and *Gavan Duffy* JJ. dissenting), that the Inter-State Commission has no power to issue an injunction.

The *Wheat Acquisition Act* 1914 (N.S.W.) provides by sec. 3 that the Governor may by notification in the *Gazette* declare that any wheat therein described or referred to is acquired by His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, and the rights and interests of every person in the wheat at the date of such publication shall be taken to be converted into a claim for compensation. Sec. 8 (1) provides that "Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery." Sec. 9 provides that "Every contract for the sale of flour made in New South Wales prior to the passing of this Act, so far as it relates to the sale of flour to be delivered after 1st January 1915, is hereby declared to be and to have been void and of no effect."

Held, by the whole Court, that none of those provisions violated the provision in sec. 92 of the Constitution that trade, commerce and intercourse among the States should be absolutely free, and therefore that the *Wheat Acquisition Act* 1914 was *intra vires* the Parliament of New South Wales.

Decision of the Inter-State Commission reversed.

APPEAL from the Inter-State Commission, and MOTION.

A complaint before the Inter-State Commission was, pursuant to the *Inter-State Commission Act* 1912, instituted by petition by the Commonwealth against the State of New South Wales and the Inspector-General of Police for that State alleging a contravention of the provisions of the Constitution in respect of three parcels of wheat.

The acts alleged, and which were substantially proved, were as follows :—

(1) On 5th December 1914 T. J. Gorman, a resident of New South Wales, sold wheat then in New South Wales to Arnott & Doyle of Yarrawonga in Victoria, to be delivered at Yarrawonga. Some of the wheat had been delivered on 18th December 1914, and, while a further portion of the wheat was being carried from New South Wales to Victoria in pursuance of the contract, the defendants seized it and prevented it from being delivered at Yarrawonga.

(2) On 5th December 1914 E. J. Gorman, a resident of New South Wales, sold wheat then in New South Wales to J. F. Goulding of Melbourne, to be delivered on railway trucks at Yarrawonga or Cobram, both in Victoria. Part of this wheat had been delivered on 18th December 1914, and the defendants prevented E. J. Gorman

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from carrying the balance of the said wheat to, and delivering it in, Victoria.

(3) Before 18th December 1914, on various dates, Sheppard, Harvey & Co. sold wheat then in New South Wales on account of a number of farmers in New South Wales to W. S. Kimpton & Son of Melbourne. On 19th December 1914 part of the said wheat was lying in trucks at railway stations in New South Wales and another part of it was lying at such railway stations waiting to be loaded on trucks. Such wheat was in course of transit from New South Wales to Melbourne in pursuance of the sale, and the defendants permitted the wheat which was in trucks to be carried to and delivered in Melbourne, but seized the wheat which was lying at the railway stations and prevented it from being carried to and delivered at Melbourne.

The Commonwealth asked for an order commanding the defendants to cease and desist from the contravention of the Constitution complained of.

The defendants by their answer alleged that when the wheat was taken possession of by them it was the property of His Majesty the King by virtue of the *Wheat Acquisition Act* 1914 (N.S.W.) and notifications thereunder by the Governor of New South Wales. Each notification was that the wheat therein described was acquired by His Majesty "provided that this declaration shall not extend to wheat now actually in transit to the States of the Commonwealth of Australia other than New South Wales."

On the opening of the case before the Inter-State Commission the preliminary objection was taken that the Commission had no jurisdiction to entertain the petition or to grant the relief asked for, but the Commission overruled it. After the hearing of evidence and arguments the Commission, by a majority (the Chief Commissioner, A. B. Piddington, Esq., K.C., dissenting), found that the *Wheat Acquisition Act* was invalid as being an infringement of sec. 92 of the Constitution, and that the acts complained of were also an infringement of that section; and they therefore granted an injunction in the terms asked, and ordered the defendants to pay the plaintiffs' costs.

From that decision the defendants now appealed to the High Court by way of case stated by the Commission.

The case stated set out the following questions of law for the decision of the High Court:—

1. Had the Commission jurisdiction to hear and determine the petition, to grant the injunction or to make the order for costs?

2. If question 1 be answered in the affirmative, was the wheat the subject of the petition or any and what portion thereof the subject of inter-State commerce at the time when the Government of New South Wales acquired or purported to acquire it under the provisions of the *Wheat Acquisition Act* 1914?

3. Did the action of the defendants or either of them in connection with the wheat or any portion thereof constitute a breach of the provisions of the Constitution relating to trade and commerce amongst the States?

4. On the facts stated are the injunction and order of the Commission right in law?

5. Is the *Wheat Acquisition Act* 1914 a valid exercise of power by the Legislature of New South Wales?

During the hearing of the appeal a suit was instituted by the Commonwealth against the State of New South Wales and the Inspector-General of Police for New South Wales by a writ claiming (1) a declaration that the *Wheat Acquisition Act* 1914 was beyond the powers of the Legislature of New South Wales, and (2) an order restraining the defendants and each of them from infringing the provisions of sec. 92 of the Constitution or from taking steps to enforce the provisions of the *Wheat Acquisition Act* 1914. It was agreed by all the parties that in the event of the Court holding that the Inter-State Commission had no jurisdiction in the matter the argument should proceed as on a motion by the Commonwealth for an injunction in the suit treated as the hearing of the cause on the facts stated in the case.

The nature of the arguments fully appears in the judgments hereunder.

Blacket K.C. (with him *J. A. Browne*), for the appellants.

Starke (with him *Ian Macfarlan*), for the respondents.

Knox K.C. (with him *Mackay*), for the Farmers and Settlers

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Association of New South Wales (who had obtained leave to intervene from the Inter-State Commission).

Mitchell K.C. (with him *Mann*), for the State of New South Wales, intervening.

During argument reference was made to *The Tramways Case* [*No.* 1] (1); *Moses* v. *Parker* (2); *Quick and Garran's Constitution of the Commonwealth*, pp. 740, 897, 899; *Inter-State Commerce Commission* v. *Northern Pacific Railway Co.* (3); *Allbutt* v. *General Council of Medical Education and Registration* (4); *Canadian Pacific Railway Co.* v. *Toronto Corporation* (5); *Southern Pacific Terminal Co.* v. *Inter-State Commission* (6); *Gloucester Ferry Co.* v. *Pennsylvania* (7); *Savage* v. *Jones* (8); *Fox* v. *Robbins* (9); *McLean* v. *Denver and Rio Grande Railroad Co.* (10); *International Textbook Co.* v. *Pigg* (11); *Texas and New Orleans Railroad Co.* v. *Sabine Tram Co.* (12); *Gulf, Colorado, and Santa Fé Railway Co.* v. *Texas*; *Loewe* v. *Lawlor* (13); *Railroad Commission of Louisiana* v. *Texas and Pacific Railway Co.* (14); *Rearick* v. *Pennsylvania* (15); *American Express Co.* v. *Iowa* (16); *Robbins* v. *Shelby County Taxing District* (17); *Minnesota Rate Cases* (18); *Mobile County* v. *Kimball* (19); *Chicago, Milwaukee &c. Railway Co.* v. *Solan* (20); *Lake Shore and Michigan Southern Railway Co.* v. *Ohio* (21); *R.* v. *Smithers* (22); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (23); *Osborne* v. *The Commonwealth* (24); *Owners of s.s. Kalibia* v. *Wilson* (25); *Minnesota* v. *Barber* (26); *Baer Brothers Mercantile Co.* v. *Denver and Rio Grande Railroad Co.* (27); *Geer* v. *Connecticut* (28); *Oklahoma* v. *Kansas Natural Gas Co.* (29); *Schollenberger* v. *Pennsylvania* (30);

(1) 18 C.L.R., 54, at p. 71.
(2) (1896) A.C., 245.
(3) 216 U.S., 538, at p. 544.
(4) 23 Q.B D., 400, at p. 412.
(5) (1911) A.C., 461.
(6) 219 U.S., 498.
(7) 114 U.S., 196, at p. 204.
(8) 225 U.S., 501, at p. 519.
(9) 8 C.L.R., 115.
(10) 203 U.S., 38, at p. 50.
(11) 217 U.S., 91.
(12) 227 U.S., 111, at pp. 120, 122.
(13) 208 U.S., 274.
(14) 229 U.S., 336.
(15) 203 U.S., 507.
(16) 196 U.S., 133, at p. 143.
(17) 120 U.S., 489.
(18) 230 U.S., 352, at p. 399.
(19) 102 U.S., 169, at pp. 697, 702.
(20) 169 U.S., 133.
(21) 173 U.S., 285, at p. 296.
(22) 16 C.L.R., 99.
(23) 11 C.L.R., 1, at pp. 27, 55.
(24) 12 C.L.R., 321, at pp. 342, 346, 367.
(25) 11 C.L.R., 689, at pp. 698, 702, 713.
(26) 136 U.S., 313, at p. 318.
(27) 233 U.S., 479.
(28) 161 U.S., 519.
(29) 221 U.S., 229, at p. 249.
(30) 171 U.S., 1, at p. 49.

First Employers' Liability Cases (1); *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (2); *Newington Local Board* v. *Cottingham Local Board* (3); *Judson on Inter-State Commerce*, 2nd ed., pp. 88, 473; *Cooley's Constitutional Limitations*, 7th ed., p. 753; *Leake on Contracts*, 6th ed., p. 508.

Cur. adv. vult.

The following judgments were read :—

GRIFFITH C.J. The first of these cases is in form an appeal from an order of the Inter-State Commission purporting to enjoin the State of New South Wales from taking certain action under the provisions of the *Wheat Acquisition Act* 1914 (No. 27 of 1914) on the ground that the Act itself is invalid and the action taken under it is unlawful as being in contravention of the provision of sec. 92 of the Constitution. The first question raised in the case is whether the Commission had jurisdiction to make such an order.

Sec. 101 of the Constitution provides that "There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

Sec. 102 empowers the Parliament by a law with respect to trade and commerce to forbid as to railways any preference or discrimination by any State or State authority if such preference or discrimination is undue and unreasonable or unjust to any State, and proceeds to declare that no preference or discrimination shall be taken to be undue and unreasonable or unjust to any State unless so adjudged by the Inter-State Commission. Sec. 103 provides that the members of the Inter-State Commission shall be appointed by the Governor-General in Council, and shall hold office for seven years subject to removal by the Governor-General in Council on an address from both Houses of Parliament praying for such removal on the ground of proved misbehaviour or incapacity, and that the Commissioners shall receive a remuneration to be fixed by the

(1) 207 U.S., 463, at p. 496. (2) 6 C.L.R., 469, at pp. 518, 545.
(3) 12 Ch. D., 725, at p. 731.

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Parliament and not liable to be diminished during their continuance in office.

By the *Inter-State Commission Act* 1912 Parliament established an Inter-State Commission, to consist of three members, and constituted it a corporation (sec. 4). The term of office was to be seven years, subject to a power of suspension by the Governor-General for misbehaviour or incapacity and of removal by the Governor-General on an address from each House of Parliament for proved misbehaviour or incapacity (sec. 5). This power of suspension is not explicitly authorized by sec. 103 of the Constitution. Part III. of the Act confers on the Commission certain powers of investigation. Part IV. prescribes certain rules to be observed by the public with respect to inter-State traffic. Part V. of the Act, which is headed "Judicial Powers of the Commission," enacts (sec. 23) that the Commission in the exercise of its powers for the hearing or determination of any complaint, dispute or question, or for the adjudication of any matter, shall be a Court of record. Sec. 24 purports to confer upon the Commission jurisdiction to hear and determine any complaint, dispute or question, and to adjudicate upon any matter arising as to—

> "(*a*) any preference, advantage, prejudice, disadvantage, or discrimination given or made by any State or by any State authority or by any common carrier in contravention of this Act, or of the provisions of the Constitution relating to trade and commerce or any law made thereunder;
>
> "(*b*) the justice or reasonableness of any rate in respect of inter-State commerce, or affecting such commerce;
>
> "(*c*) anything done or omitted to be done by any State or by any State Authority or by any common carrier or by any person in contravention of this Act or of the provisions of the Constitution relating to trade or commerce or any law made thereunder."

Then follow various provisions as to the exercise of this jurisdiction. Sec. 29 purports to confer power to grant any relief to which any of the parties are entitled in respect of any claim properly brought forward by them in the matter. Sec. 30 purports to authorize the Commission to award damages, and either to assess

them itself or by inquiry before one or more of its members or some officer of the Commission. Sec. 31 purports to empower the Commission to grant injunctions against future contraventions of the law. Secs. 32 and 33 purport to authorize it to declare that any regulation made by a State or State Authority in contravention of the Act or of the Constitution is void, and to prescribe what shall be done in future with respect to the subject matter. Sec. 34 purports to empower the Commission to fix penalties for disobedience of its orders, which may be enforced by summary conviction. By sec. 35 any order of the Commission may be made a rule or order of the High Court and enforced as such. Sec. 36 provides that for all matters whatsoever necessary or proper for the due exercise of its jurisdiction under this Part of the Act the Commission shall have all such powers, rights and privileges as are vested in the High Court.

The State of New South Wales contends that the effect of these provisions, if valid, is to confer these powers upon the Commission as a Court, and not as a corporation or as individuals, that the Constitution does not authorize the creation of such a Court, and that this invalid attempt to create a Court is so far bound up with, and so far governs, the subsequent provisions of Part V. as to be inseparable from it, with the result that if the provisions which are only applicable to the Commission regarded as a Court are treated as omitted the remaining provisions would be a different law from that which the Parliament intended to enact, and that they are consequently altogether invalid.

The Commonwealth contend that sec. 102 of the Constitution authorizes the Parliament to make the Commission a Court if it thinks fit to do so. They base their contention mainly upon the words " powers of adjudication " in sec. 101, and upon the provision of sec. 73 by which an appeal lies to the High Court from decisions of the Commission upon matters of law.

Sec. 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in the High Court and in such other federal Courts as the Parliament creates and in such other Courts as it invests with federal jurisdiction. Sec. 72 provides that the Justices of the High Court and of the other Courts created by

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Parliament (*i.e.*, federal Courts) shall hold office during good behaviour. It is plain from the provisions of sec. 103 as to the term of office of the Inter-State Commissioners that they were not to be a federal Court within the meaning of sec. 72. But it is contended that sec. 102 should be read as an exception from, or as a supplement to, the provisions of sec. 72. I am unable to accept this argument. In my judgment the provisions of sec. 71 are complete and exclusive, and there cannot be a third class of Courts which are neither federal Courts nor State Courts invested with federal jurisdiction. It was also contended in the alternative that the provision of sec. 73 that appeals shall lie to the High Court from decisions of the Commission, although on questions of law only, puts the Commission on the same footing as a Court. I do not think so. It is manifest that the Commission, for the purpose of adjudging whether an alleged preference or discrimination is undue and unreasonable or unjust to a State, as well as for the purpose of adjudication upon other matters, may have to deal with mixed questions of law and fact, and that very important questions of law may be involved. It was, therefore, very important that its determinations so far as they depended on questions of law should be subject to appeal. The circumstance that this right of appeal is given in the same section which gives an appeal from Courts, properly so called, seems to me rather to suggest that the Commissioners were not a Court (for, if they were, they would already be included in the term "federal Court") than that they are regarded as a Court of a different and exceptional kind. It recognizes, no doubt, that they may have quasi-judicial functions, but that is not sufficient to show that they were regarded as a Court.

I pass to the independent argument founded, on both sides, on sec. 101. That section is contained in Chapter IV., which is headed "Finance and Trade," and deals in substance with the powers of the Parliament and of the States with respect to matters of finance and trade, and not in Chapter III. which is headed "The Judicature."

It provides that the Inter-State Commission shall have "such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance . . . of the provisions

of this Constitution relating to trade and commerce, and of all laws made thereunder." The words "of adjudication and administration" are, in my opinion—to use the artificial terminology by which for many years poor little children were so much perplexed—"an extension of the object," or, in simpler terms, an adjectival qualification of the word "powers." The phrase should therefore be read "such powers (whether by way of adjudication or administration) as the Parliament deems necessary" for the purpose stated, that is, such powers for the execution and maintenance of the provisions of the Constitution and laws made thereunder as Parliament deems necessary. Sec. 61, which is the introductory section of Chapter II., headed "The Executive Government," provides that the executive power of the Commonwealth extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. Sec. 101, using the same words "execution and maintenance," authorizes Parliament to entrust such of the general executive functions of the Government as relate to trade and commerce to the Inter-State Commission, and further to entrust it with powers of "adjudication." It is contended that this power implicitly authorizes the creation of a Court, because the primary, and, in one sense, the sole, function of a Court is to adjudicate. That is no doubt true, but it is not true that the function of adjudication is either by common law or by the course of modern legislation confined to Courts. It has been the practice for many years in the United Kingdom and in the Australian Colonies and States to confer quasi-judicial powers upon officers of Government and administrative bodies. The Board of Trade and Local Government Board are well known instances in the United Kingdom. See, for instances, 9 Edw. VII. c. 44 (*Housing, Town Planning &c. Act* 1909), secs. 11, 39, by which powers of adjudication are conferred upon local authorities, which are administrative bodies, subject to appeal to the Local Government Board, which is another administrative body, with a further appeal on points of law to the High Court of Justice. Another instance is the London County Council. In the case of *R.* v. *London County Council*; *Ex parte Akkersdyk* (1), *A. L. Smith* J., delivering the judgment of the Divisional Court, said :—

(1) (1892) 1 Q.B., 190, at p. 195.

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"In our judgment the London County Council is adjudicating as to whether a man is or is not to be deprived of his licence; to use the words of *Cotton* L.J., in *Leeson* v. *General Council of Medical Education* (1), 'though not in the ordinary sense Judges, they have to decide judicially as to whether or not the complaint made is well founded'; " and in the rest of his judgment he several times uses the word " adjudicate " to denote their determination on such a matter. The General Council of Medical Education is another well known instance in which an administrative body has power of adjudication, in that case extending to the determination of questions of professional status. In *Leeson's Case*, quoted by *A. L. Smith* J. in *Akkersdyk's Case*, the word " adjudicating " was used by *Cotton* L.J., and the word " adjudication " by *Bowen* L.J., to denote their functions in such a matter. It is plain, therefore, that the word " adjudication " is well known to lawyers, and regarded as apt to describe the functions of an administrative body entrusted with quasi-judicial powers. On the other hand, no instance has been found in which it has been used by a legislature of the British Dominions to create a Court. In the Bankruptcy Acts the word " adjudication " is used in the phrase " order of adjudication," and denotes a particular order called by that name. In Chapter III. of the Constitution different language is used to express the intention of creating a Court.

In my judgment, the functions of the Inter-State Commission contemplated by the Constitution are executive or administrative, and the powers of adjudication intended are such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication as are incidental and ancillary to those functions. For instance, if a federal law imposed obligations as to structures or appliances to be used in connection with inter-State railway traffic, and entrusted the duty of carrying out those provisions to the Inter-State Commission, it might empower the Commission to determine the question whether in any particular case the provisions of the law had been observed in point of fact, and, if they had not, to demolish the structures or forbid the use of the appliances

(1) 43 Ch. D., 366, at p. 379.

contravening the law, and for that purpose to use any necessary force, or to invoke the aid of a Court of law to ensure obedience to its order. The provisions of the Act 9 Edw. VII. c. 44 already mentioned afford an instance of similar powers of adjudication and enforcement.

For these reasons I am of opinion that the Inter-State Commission is not in any relevant sense of the word a Court.

It remains to consider whether the provisions of sec. 23 are so far separable from the rest of Part V. that without them the remainder of the Part would be substantially the same law. In my judgment they are not separable. It is impossible to say that a law conferring executive powers upon an instrumentality of the Government with incidental powers of adjudication for the purpose of administration is not substantially a different law from a law creating a Court of Justice and defining its jurisdiction.

For these reasons I am of opinion that the whole of Part V. of the Act is invalid, and that the question must be answered in the negative. This is enough to dispose of the appeal.

It would, however, have been a misfortune if the other important questions raised in the case should be unanswered. This misfortune has been avoided by the action of the Commonwealth, which, acting upon a suggestion made from the Bench, has since the opening of the argument issued a writ against the State of New South Wales and the Inspector-General of Police of that State, claiming a declaration that the *Wheat Acquisition Act* is *ultra vires* of the State, and an injunction against infringing sec. 92 of the Constitution. This Court undoubtedly has jurisdiction to entertain that suit and to grant the injunction asked for. It was agreed by all parties that in the event of the Court holding that the Inter-State Commission had no jurisdiction in the matter the argument should nevertheless proceed as on a motion by the Commonwealth for an injunction in the suit treated as the hearing of the cause on the facts stated in the case.

I proceed, therefore, to deal with the question of the validity of the *Wheat Acquisition Act*.

That Act, which was passed on 11th December 1914, enacts by sec. 3 that the Governor may, by notification published in the *Gazette*,

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declare that any wheat therein described or referred to is the property of His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, and the proprietary rights of every person in the wheat at the date of publication shall be taken to be converted into a claim for compensation in pursuance of the provisions of the Act relating to compensation, to which I need not refer in detail.

The Act was passed in attempted exercise of the power to expropriate private property, which is generally, and I think rightly, regarded—to use the apt words of an American Court (see *Cooley on Constitutional Limitations*, 7th ed., p. 753*n*.)—as a power inherent in sovereignty. In my judgment the only condition of its exercise is that the property, whether real or personal, shall at the moment of the exercise of the power of expropriation be within the territorial limits of the State. The Commonwealth contends that this right is controlled by sec. 92 of the Constitution, which provides that " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."

This provision is equally binding upon the Commonwealth and the States. The language is plain enough, and the words " absolutely free " cannot be qualified as to anything which is within the subject matter of the enactment. The real question to be determined is what is that subject matter.

The argument for the Commonwealth is that the words of the Act authorize the State of New South Wales to acquire the whole of the wheat in the State, and were intended to be (as they have in fact been) used for that purpose, that such an acquisition would have the necessary result of preventing the performance of any existing contracts for the sale of wheat in New South Wales to be exported to another State, and that such a result is a contravention of the provision that trade, commerce and intercourse among the States shall be absolutely free. It may be conceded that such prevention was a contemplated, if not the necessary, result of the acquisition of all the wheat. This argument, if valid, would, in effect, invalidate any State law couched in general terms for the expropriation of personal property, unless it contained an exception of any such

property which might at the time of the attempted exercise of the power be the subject matter of inter-State commerce. In my judgment the well known case of *Macleod* v. *Attorney-General for New South Wales* (1) affords a complete answer to this argument. The general power of expropriation is a power which is by the Constitution neither withdrawn from the States nor exclusively vested in the Commonwealth. It, therefore, by virtue of sec. 107 of the Constitution, continues as at the establishment of the Commonwealth. When a State law is enacted in general terms, I do not think that it can be held invalid merely because its language is wide enough to cover cases with which by reason of some provisions of the Constitution it is beyond the competence of Parliament to deal. In such a case I think that, as a matter of construction, the Act should be construed as applying only to matters within the competence of Parliament, just as in the case of a Statute which in its terms includes matters beyond the territorial jurisdiction of the State, unless it appears on the face of the Act that it was intended to deal with matters beyond, as well as with matters within, the competence of Parliament, and that the provisions dealing with both are not severable (*The Kalibia Case* (2)). It follows that in such a case the Statute should be construed as limited in its operation, not that it is invalid altogether.

The real question upon which the validity of the *Wheat Acquisition Act* depends turns upon the meaning of the words in sec. 92 describing the subject matter of that section, which may be conveniently spoken of as " inter-State commerce." We listened to an interesting argument as to the time at which goods become the subject of " inter-State commerce " as that phrase is understood in the United States of America, but I am unable to derive any assistance from the decisions of the Supreme Court of the United States on this point. In the present case the relevant point of time is not when goods become, but when they cease to be, the subject of inter-State commerce. The term " commerce " assumes the existence of persons willing to engage in it, and who are the owners of property which is to be the subject of it. The title to property is governed by State law, and, in general, the right of the owner to dispose of his property

(1) (1891) A.C., 455. (2) 11 C.L.R., 689.

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is also governed by State law. The right to control such disposition is limited by sec. 92 of the Constitution. But that section has nothing to say to the question of title. The duration of the power of disposition, which depends upon title, is coextensive with the duration of the title itself, and ceases with it. There cannot therefore be any conflict between the law of title and the law of disposition, and a law which deprives a man of the ownership of property does not interfere with his power of disposition while owner. Sec. 92 may, therefore, so far as it relates to commerce, be paraphrased thus: Every owner of goods shall be at liberty to make such contracts for the transportation of goods from one State to another as he thinks fit without interference by law. It follows that as soon as he ceases to be the owner of goods the section ceases to have any operation so far as those goods are concerned.

When the wheat in New South Wales became the property of His Majesty, the Sovereign, as the new owner, had the exclusive right of disposing of it. If the Government desired to export it to another State they were free to do so. Whether they did or did not, their power of disposition was not interfered with.

This view is amply supported by the opinion of most eminent members of the Supreme Court of the United States if it were necessary to have recourse to them for support.

I pass to a subsidiary objection to the Act founded upon sec. 8, which provides that "Every contract made in the State of New South Wales prior to the passing of this Act, so far as it relates to the sale of New South Wales 1914-15 wheat to be delivered in the said State, is hereby declared to be and to have been void and of no effect so far as such contract has not been completed by delivery."

It is contended that this section offends against sec. 92 of the Constitution by attempting to cancel contracts relating to the sale of wheat for exportation to another State, as for instance a contract to deliver wheat on board a ship or railway truck or to a carrier in New South Wales for transportation to another State.

The provision is in its terms limited to contracts for the sale of wheat to be delivered in New South Wales. As a matter of construction, I think that the contracts meant are contracts under the terms of which the obligations of the vendor so far as regards

delivery are to be completed by transfer of possession from him to the purchaser in New South Wales. The section does not, therefore, operate to affect the validity of contracts the subject matter of which has come into the possession of the purchaser. If that purchaser desired to dispose of the wheat by exportation he could do so as long as it was his, but after it became the property of His Majesty his wish became irrelevant, and his power ended. It is quite immaterial whether at the moment of acquisition by His Majesty the property in the wheat contracted to be sold had or had not passed to the purchaser. In either case the ownership, and with it the power of disposition, came to an end.

Sec. 8 has no application to a contract for the sale of wheat to be delivered in another State. In such a case, if the wheat had been transported to the other State, the Act did not affect it. If it had not, the Act deprived the owner of his ownership on which his power of disposition depended. I am therefore unable to see any ground for holding that this section offends against the provisions of sec. 92 of the Constitution. But if it did I think that it is clearly severable from the other provisions of the Act. The apparent object was to relieve persons who by reason of the acquisition of wheat by the Government had become unable to perform their contracts from the hardship of leaving them liable to actions for damages. If there were some cases of hardship which it did not cover, that is no reason for saying that it is invalid altogether.

I have not thought it necessary to deal with the arguments founded upon the actual conditions (of war) existing when the Act was passed, and the alleged, and indeed admitted, intention of the Government to prevent the exportation of wheat from New South Wales. Those conditions and that intention may be relevant to the propriety of the action of the New South Wales Parliament, which is a question of politics, but have no relevance to the question of its power to enact the law, with which alone the Court is concerned.

For these reasons I am of opinion that the Act is valid, and the Commonwealth's action fails.

BARTON J. I think sec. 101 of the Constitution should be read as it stands, and not as if the words following the word "necessary"

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were at the beginning of the section, instead of being, as they are, at its end. But I am not sure that the suggested transposition of the terms of the section would work any material change in its meaning. The powers of adjudication and administration which the Inter-State Commission is to have are to be such as the Parliament deems necessary for a particular and specific purpose, namely, the execution and maintenance within the Commonwealth of the trade and commerce provisions of the Constitution and of all valid laws made by virtue of those provisions. If there is any adjudicatory or administrative power which the Parliament deems necessary for those purposes the Parliament has authority to bestow it on the Commission. In this respect the Parliament is given an absolute discretion ; that is to say, the Parliament alone, and not this Court, is to decide whether any power of a specified kind is necessary for the specified purpose. Provided only that the power be adjudicatory or administrative, its necessity for the execution and maintenance of the Constitutional provisions indicated and of the laws made or to be made within them is for the determination of Parliament, and must not be questioned by any Court. Once the Parliament has exercised its judgment in that regard it may choose the kind of adjudicatory or administrative power which it prefers to allot, and none may say it nay.

By way of parenthesis I would say that the powers of adjudication given by the Parliament need not be merely incidental to the powers of administration. The contention that they must, rests on a strained construction not supported by the order observed or the natural meaning of the terms employed.

In exercising this liberty of choice, there is nothing to confine Parliament to the setting up of any particular method of adjudication. The instances are frequent in which adjudicatory powers are given by English Acts of Parliament to arbitration bodies, to Local Government authorities, and their like. They are given by such an Act to the Railway and Canal Commission, which is undoubtedly a Court. It may therefore be conceded, as the learned Chief Justice has stated, that it is not true that the function of adjudication is, either by common law or by the course of modern legislation, confined to Courts. As obviously, it is not confined to

bodies which are not Courts. At common law the parties could always refer matters to an arbitrator, whose determination, after hearing both parties, was and is in the natural sense adjudication. But to say that this function is not confined to Courts appears to me, speaking with great deference, not materially to affect the question. Adjudication is a function common to Courts and many other bodies, whether existing under the common law or under legislation. But when a Parliament is authorized by Statute to confer such powers of adjudication as it pleases upon a contemplated body, it seems to me clear that Parliament can choose for itself whether or not it will give that body the status of a Court for the more effective fulfilment of its prescribed purpose. If this view is correct, the Parliament, in giving the Commission the status and some of the powers of a Court, has acted in exercise of a discretion expressly committed to it, an exercise which this Court cannot dispute or frustrate except in obedience to some controlling context. The opposite contention amounts to this, that Parliament was bound to withold any status or power of a Court from a body which was to perform the extremely important functions which the framers of the Constitution declared that this Commission was to exercise, the nature of those functions being such that many of them could only be exercised *inter partes*. I cannot think that it was so bound. The Parliament has said by its Statute that these functions or some of them can be best exercised by the Commission as a Court. Even if one thinks otherwise, his opinion avails nothing, for the Constitution has made the Parliament the sole arbiter of that question, if sec. 101 is to prevail.

So much at least I hold as the true construction of this section, considered by itself, upon the natural and ordinary meaning of its words. It remains to be seen whether the discretion given to the Parliament, and which it has exercised in terms which purport to constitute a Court, is controlled by the context; that is to say, by any other provision or provisions of the Constitution.

Adjudication for the execution and maintenance of provisions of law is a plain enough expression. A Court, according to its functions, is in its adjudications executing and maintaining, or, in other words, enforcing and upholding those provisions. But the

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same words, "execution and maintenance" of the Constitution, and of the laws of the Commonwealth, are used of the executive powers of the Commonwealth in sec. 61, and it is argued that their use in that connection indicates that as used in sec. 101 they give the Inter-State Commission only executive functions to perform, to which its adjudicatory powers must be merely incidental. I do not accept that contention. Both Courts and Executive Governments are to execute and maintain, or, if equivalent terms are preferred, enforce and uphold the laws of which they are the guardians. They do so by differing means and processes. To say that powers of adjudication, when applied to the execution and maintenance of laws by that which is to be a tribunal, are necessarily to be taken as powers merely analogous or equivalent to those of an Executive Government, is, in my humble judgment, not by any means a clear conclusion. I say this with great respect to the able counsel who have so argued.

But a more powerful contention was founded upon the third Chapter of the Constitution, headed "The Judicature;" sec. 101 being on the other hand one of the provisions placed under the heading of "Finance and Trade" (Chapter IV.). It was said that Chapter III. covered the whole ground of the judicial power of the Commonwealth, and that sec. 101, being entirely apart from that Chapter, could not be said to authorize the giving of any judicial power to the Inter-State Commission.

Holding the opinion above expressed as to the true construction of sec. 101, taken by itself, I am further of opinion that the power given to Parliament in that section is independent of the powers given in the Judiciary Chapter properly so called. Chapter III. relates to the composition, attributes, and functions of the general judiciary, whether the tribunal in question be the Federal Supreme Court designated the High Court, or some other federal Court created by the Parliament, or any other Court not created by Parliament, but invested by it with federal jurisdiction (sec. 71).

There is provision in sec. 72 as to the appointment, the tenure and remuneration of the Justices of the High Court or of the other Courts created by the Parliament, such other Courts obviously meaning the "other federal Courts" created under sec. 71. The

appellate jurisdiction of the High Court is dealt with in sec. 73, and embraces, subject to Parliamentary exception and regulation, appeals from "all judgments, decrees, orders, and sentences" of enumerated Courts (sub-secs. I. and II.), and, as to questions of law only, of the Inter-State Commission (sub-sec. III.). I shall return to sub-sec. III. presently. Sec. 74 relates to the right of the Sovereign to grant special leave of appeal from the High Court save in certain Constitutional cases, in which no appeal is to be permitted except upon a certificate granted for special reason by this Court. Secs. 75 and 76 relate to the original jurisdiction of the High Court, the first of them giving such jurisdiction in enumerated matters, and the second enabling Parliament to give such jurisdiction in other enumerated matters. Sec. 77 gives the Parliament power to make certain provision as to jurisdiction with respect to the matters mentioned in secs. 75 and 76, but without extending the subject matters of jurisdiction prescribed in those two sections. Secs. 78, 79 and 80 affect the matters now in question only remotely, if at all.

Under this Chapter the general judiciary system of the Commonwealth is provided for, and it has no relation to tribunals instituted or appointed for special purposes and confined in their jurisdiction to the enforcement and upholding of any special and limited class of laws. The body upon which it is the object of sec. 101 to enable the Parliament to confer such powers of adjudication as it deems necessary for stated purposes, is on the other hand treated of in sec. 101, which confines the functions of that tribunal, whether made by Statute a Court or not, to the upholding and enforcement of a certain class of laws, whether fundamental or statutory, which are dealt with in Chapter IV., and it seems evident enough that the framers preferred to place in this Chapter, along with the trade and commerce provisions, those relating to their protection and enforcement by the Inter-State Commission,—its powers, and their purposes. To have embodied these in Chapter III., divorced from the trade and commerce provisions themselves, would have been ungainly and without clear reason, for it would not have been in consonance with the more general purposes of Chapter III. It was not intended, in my judgment, to make the Inter-State

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Commission a federal Court as a part and in the sense of the scheme embodied in Chapter III. Whether it was to be a Court in the ordinary acceptation of the term or not, was left to Parliament to decide, and hence it would have been absurd to place it amongst the Courts ordained outright in Chapter III., since the Constitution left the question of Court or no Court to a Parliament which could not exist until the Constitution came into being. The Inter-State Commission, so far as the frame of the Constitution is concerned, was not necessarily to be a Court. That was to depend on the judgment of Parliament, exercising its wisdom in relation to the purposes to be secured. And it is manifest that it was a matter of common sense to leave the kind of adjudicatory power to Parliament, because the provisions of the *Inter-State Commission Act*, exercising fully or only partly the Constitutional powers of Parliament in that behalf, might in their view require the adjudicating tribunal to be invested with the full status of a Court, or with a lower status. So the framers placed sec. 101 where it seems to me they ought to have placed it, among the trade provisions, and not as part of a scheme to which it did not in reason belong, especially as it was not then known whether it would need to be a Court or not. It was intended that the Parliament should be able to give the Commission adjudicatory powers according to the importance and scope of the Act which it alone could pass. Parliament would thus be able to give the Commission a higher or a lower status than that of a Court, according as the higher or a lower status would be commensurate with or sufficient for the full or the limited exercise of the powers deemed necessary " for the execution and maintenance &c." by the Legislature at the time of enactment.

I am therefore of opinion that as the necessity for a Court or a less important adjudicative body depended on the quantum of legislation yet to be, the power given to Parliament was entirely supplemental and apart from Chapter III., though it might result in the establishment of a Court.

Mr. *Knox* based an alternative argument upon the use of the word " adjudged " in sec. 102 and on the third sub-section of sec. 73, and urged that in view of these provisions and the force of the word " adjudication " in sec. 101 the Commission might be considered a

"federal Court" within the meaning of Chapter III. If I am right in thinking that the quantum of adjudicative power and the degree of status and authority necessary for its exercise were left to the discretion of Parliament, I cannot think that it was also intended that the Commission must be a federal Court of the character contemplated in Chapter III. The scheme of that Chapter is self-contained. Sec. 73 relates to the powers of the High Court, not to those of the Inter-State Commission. The Commission's decisions on questions of law might no doubt be expressed in "orders," whether they were "judgments, decrees and sentences" or not; but they might still be those of a body which Parliament might either make a Court or a tribunal less than a Court; endued nevertheless with some power of adjudication.

I am of opinion that Chapter III. does not afford a context "equally clear" to control what I take to be the unambiguous meaning of sec. 101.

I am in agreement with the learned Chief Justice in thinking that Part V. of the *Inter-State Commission Act*, No. 33 of 1912, purports to make the Commission a Court in the ordinary acceptation of that term, with many powers such as ordinarily belong to Courts, in addition to purely administrative powers conferred by the same Statute, but all for the purposes limited by sec. 101 of the Constitution; and from what has been already said, it will be seen that while his Honor thinks that the Parliament could not validly make these—shall I say, curial?—provisions, I respectfully think that it could.

The power to hear and determine controversies *inter partes* and to grant consequent relief is in my view validly given to the Commission as a Court, because so far as I can see it is confined to the purposes defined in sec. 101 of the Constitution.

I shall not deal in detail with the various sections of this part of the *Inter-State Commission Act*, but shall content myself with the opinion I have expressed as to their substantial effect.

The fact that by sec. 4 in Part II. of the Act the Commission is to be a body corporate does not, I think, affect the present question. The provision was no doubt intended to facilitate the performance of the administrative part of the Commissioners' duties. Its

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occurrence in an enactment which at the same time gives it the adjudicatory powers of a Court does not seem to impair the grant of the latter powers. If Parliament has, as I think it has, made the Commission a Court of limited function, but still a Court, that exercise of legislative power is not shaken by such a provision as is contained in sec. 4 of the Act of 1912.

I must not omit to mention an argument based on sec. 103 of the Constitution. That section is, save in one particular, couched in terms substantially, and almost verbally, identical with those of sec. 72. The members of the Inter-State Commission, like the Justices mentioned in sec. 72, are to be appointed by the Governor-General in Council. Like those Justices, they are removable during their tenure only on an address from both Houses of Parliament in the same session on the ground of proved misbehaviour or incapacity. They, as well as the Justices, are to receive a remuneration, fixed by Parliament but not to be lessened during their continuance in office. The one difference is that, subject to removal in the contingency indicated, the Justices mentioned in sec. 72 may hold office for life, while the Commissioners can only hold office for seven years. It was said that this difference indicated that the Commissioners must not be made members of a Court for the purposes of sec. 101. I am not of that opinion. Sec. 103 is a strong provision for the independence of the Commissioners, and is such a provision as the framers might in their wisdom deem to be sufficient for the purposes of sec. 101, whether the Commission was to be made a Court by subsequent Statute or not. I think it shows nothing to the purpose of the objectors. For sec. 103 does not, either of itself or when read with Part III., afford the context which the attack upon the jurisdiction appears to me to need for its support.

In the construction of sec. 101 of the Constitution one should bear in mind that this Court is not considering the limits *inter se* of the Constitutional powers of the Commonwealth and of any State, or any question of conflict of powers between Commonwealth and State. The limitations under which the Constitutional powers are to be interpreted where questions of that class arise, as in the *Railway Servants' Case* (1) and many other cases here, and in the

(1) 4 C.L.R., 488.

Sugar Company's Case (1), do not impede us in giving full value to the terms of sec. 101.

On the question of the validity of Part V. of the *Inter-State Commission Act*, which, if not valid, gives the Commission no power to make as a Court the order complained against, I am against the appellants, the defendants below, and think the case should be determined upon the question of the validity of the *Wheat Acquisition Act*.

Inasmuch, however, as it has been agreed by all parties that the validity of the *Wheat Acquisition Act* may, if necessary, be determined upon the action instituted by the Commonwealth in this Court, that question can now be dealt with irrespective of the objection to the jurisdiction of the Commission.

I proceed to discuss the question vital to the decision of the case on the merits, namely, the validity of the *Wheat Acquisition Act*. The action can only succeed if this Act is invalid. I am of opinion that it is valid. The power of the State to pass it is impeached on the ground that its necessary consequence is the infraction of sec. 92 of the Constitution.

The power of the State to expropriate real property by Statute is in these days never questioned. If the power to expropriate personal property is questioned as to any Australian State, it can only be because its exercise has been so rare that its novelty rather exposes it to criticism and opposition. But a power newly used is nevertheless a power. If the property is taken without compensation, that is to say, if it is confiscated, the question which arises is constitutional only in the political and not in the legal sense. In other words a Statute passed by a Sovereign Parliament is equally within the legal rights of the Legislature whether it nakedly confiscates property or takes it upon terms of payment more or less. That is the position in the United Kingdom, and the right flows from the Sovereignty of Parliament, and does not depend for its defence upon the doctrine called "eminent domain."

The Constitution of New South Wales was at the establishment of the Commonwealth, and is now, preserved by sec. 106 of the Federal Constitution, subject to the latter Constitution. The New South

(1) (1914) A.C., 237; 17 C.L.R., 644.

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Wales *Constitution Act* empowers the Parliament of that State to make laws for its "peace, welfare, and good government *in all cases whatsoever.*" The grant includes of course the power of expropriation (or eminent domain, if that term is more pleasing), according to the sole judgment of the Parliament of the State on the question of the public welfare. In some of the States of the American Union the power of expropriation is limited by their Constitutions to acquisition on just terms. So in our Federal Constitution not only must the terms be just, but the power is limited to the purposes in respect of which the Parliament has power to make laws: Constitution, sec. 51, sub-sec. XXXI. Whether there is or is not in that instance a power of eminent domain also, I do not discuss now. But the power to make laws is unlimited in New South Wales save by territorial jurisdiction, and, since January 1901, by the Federal Constitution in some respects.

The question between confiscation and "taking on just terms" is therefore merely political in this case, and so also are the questions whether compensation ought to be given at all, and whether terms affecting to be just are so or not. I am clearly of opinion that in respect of property real or personal, the power of the Parliament to assume or resume that property is as absolute *quoad* New South Wales as the power of the Parliament of the United Kingdom in its sphere, with this qualification only, that the power of any State of the Commonwealth must be exercised subject to the Federal Constitution.

Is there anything in the Federal Constitution which vests the general power of expropriation in the Federal Parliament exclusively, or withdraws it from the Parliament of the State? See sec. 107. Clearly there is not anything, and therefore the power continues, unless its exercise constitutes an infraction of some other provision in that charter. In this case the provision alleged to bar the full exercise of the power is sec. 92. Does that section set a limit, and if so, what limit, upon the exercise of the otherwise clear power to take wheat or any other property?

What the *Wheat Acquisition Act* purports to do is to change the ownership of wheat upon *Gazette* notice by the Governor in Council, issued in accordance with the statutory provision. On publication

of such a notice the wheat becomes the absolute property of the King, and the rights and interests of every person in that wheat at the date of publication are taken to be converted into a claim for compensation. The owner, therefore, is entitled to the compensation fixed, in place of the wheat, and to no more.

It was argued (1) that the taking authorized by the Act is of itself an infraction of sec. 92, whether the wheat be in actual transit, or be the subject of contract for sale, or not; (2) that at least the taking is such an infraction where the wheat is at the time the subject of inter-State trade; (3) that the wheat is the subject of inter-State trade not only when in actual transit, but when its sale and delivery for transport into another State have been contracted for, and that it is then not subject to obstruction in the course of that trade even by a State changing its ownership.

The first of these contentions was not strongly persisted in. As to the second, the respondents, who were complainants and interveners respectively before the Inter-State Commission, have delivered able and exhaustive arguments to this Court, and have cited a large number of cases from the United States Reports. It is not necessary, in the view I take, to examine the correctness of those decisions. (It may be repeated, in passing, that the decisions of that great Court do not bind us as authorities, although they are often supported by powerful reasons, and especially we have given great weight to such reasons where the subject matter of decision has been the construction of expressions in the United States Constitution identical with, or clearly equivalent to, expressions in the Australian Constitution the meaning of which has been represented as doubtful. In this case, even if the decisions cited are accepted as correct, they do not support the Commonwealth and the Farmers and Settlers Association of New South Wales in the position which they take up.

Sec. 92 appears to me to have been framed to secure the owner of any commodity in exercising his dominion over it in the way of sending or transporting it from State to State, without obstruction on the part of Commonwealth, or State, or any other authority or person. If the owner has contracted to sell it, but the property has not passed, he is the person protected in respect of his dominion

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over it. If one that was the owner has sold it so that the property in it, with or without the possession, has passed, it is still the owner's dominion that is the subject of protection. If the ownership changes under agreement, the protection passes to the new owner, still in respect of his dominion. No matter to whom any Statute gives the right to sue or the liability to be sued, it is this dominion which is safeguarded by sec. 92, and the real dominion is in the owner.

Here the Statute converts the dominion of the owner into the dominion of the State. It is no answer to the effect of that change of dominion to say that the sale is not voluntary. The protection given by sec. 92 to the dominion of the old owner is lost to him, and becomes a protection to the dominion of the new owner, whether State or ordinary citizen. It would be a strange thing to say that sec. 92 means that a protection given in respect of dominion is retained by him who lost that dominion under the law, or to say that liability instead of protection is the lot of him to whom the law gives the dominion.

But it is said that, whatever may be the effect of sec. 3 alone, sec. 8, the other crucial section of the *Wheat Acquisition Act*, renders the Statute invalid. Now sec. 8 only avoids contracts of sale preceding the Act, and then only so far as they have not yet resulted in complete delivery. Besides being confined to sales of 1914-15 wheat grown in New South Wales, it is further confined to sales of that wheat to be delivered in New South Wales. Where the contract has been "completed by delivery" there is no longer a sale, and sec. 8 has no application. The wheat has passed to a new owner; and it is clear from the terms of this section that it relates only to contracts for sale in respect of wheat still deliverable under the contract, and does not touch any dominion and ownership remaining in the contracting owner. It simply annuls his contract to complete the delivery. Where, or to the extent that, the delivery is incomplete, the contract is unfulfilled and the ownership remains where it was; that is, so far merely as sec. 8 is concerned. A contract for the sale of property, whether movable or immovable, situated within the territorial limits of a State and to be completed within the same State by delivery or its equivalent, has always been deemed without

question to be subject to no legislative control except that of the State. If, however, there is any class of such contracts which, though the *Wheat Acquisition Act* might possibly be read to embrace them, the Constitution impliedly forbids by sec. 92, the *Wheat Acquisition Act* must be read as not embracing them, because such a construction is reasonable and the State Legislature apparently intended the law to apply only to cases within its legislative domain: *Macleod* v. *Attorney-General for New South Wales* (1).

If the meaning of sec. 92 is as I have indicated, there is nothing here incompatible with that Constitutional provision. No owner is deprived of the benefit of sec. 92 so long as his ownership, which it is not for the Commonwealth to regulate, lawfully exists. Each successive owner during his ownership is entitled to the same benefit. It makes no difference in the operation of sec. 92 that the ownership passes to a State and not to a private citizen. It can transfer all or any of the wheat or not across the border as seems good to it, just as any citizen of New South Wales could who had bought and taken delivery of that wheat or any part of it from a previous owner or owners in the same State.

It may be that the avoidance of certain contracts is unjust. Opinions on such a question are not for the Courts. Nor have we anything to do with the motives of legislators. The Constitution of New South Wales gave power to pass this section, and there is nothing in sec. 92 to render it an invalid provision unless that section has some meaning which has not yet been fathomed.

The object of sec. 8 appears clearly to be the protection from lawsuits of owners who have been prevented by the operation of a notice under sec. 3 from fulfilling their contracts of sale. It may or may not have been right to free them from the consequences of the failure to fulfil. How can a Court pronounce on that? The Statute, in avoiding the contract, frees the seller from liability for his inability to complete his contract, presumably because the inability is caused by the State's own action without any fault of the seller. If it is arguable that this is a wrong, it is as a political and not as a legal wrong, and this is not the place to discuss it. The provision does not run counter to sec. 92, because, as the Chief

(1) (1891) A.C., 455.

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Justice observed during the argument, the Constitutional provision and the whole of the State Statute are of widely different scope and legal subject matter. As he said, with clear correctness if I may say so, they are on parallel lines, and the one cannot touch the other.

For the above reasons I think that the *Wheat Acquisition Act* is valid, and that the petition and action of the Commonwealth must be dismissed.

ISAACS J. Questions of vast importance present themselves for consideration.

1.—The first arises upon the contention on the part of the State of New South Wales that sec. 31 of the *Inter-State Commission Act* 1912, under which the injunction was issued by the Commission, is invalid.

The ground of that contention is that the power of injunction given to the Commission by the Act is given as a strictly curial power, a "process" as it is called in sec. 31, that all the judicial powers created by Part V. are conferred on the Commission in the character of a Court of Justice in the strict sense, and that this is contrary to the proper intendment of the Constitution, and therefore invalid.

The provision in Part V. constituting the Commission a Court of record, in the terms by which "jurisdiction" is conferred, the authority to grant "relief" given, the avoidance of State regulations provided for, and penalties and the enforcement of the orders of the Commission prescribed, and in the terms by which all ordinary judicial ancillary procedure is enacted, leave no doubt whatever that the judicial powers entrusted to the Commission are in fact entrusted to it in the capacity of a Court of Justice, and not otherwise.

It was not contested on behalf of the Commonwealth that this was the effect of Part V., and that the grant of the powers therefore is inseparable from the character of the Court of record which Parliament intended to exercise them. The true test of the severability of invalid legislative provisions from the rest of the enactment will be more conveniently stated presently, but applying that test to Part V. internally, sec. 42 is involved in the invalidity. That is the section under which the rule of Court was framed, providing for

the case stated which we have before us. The circumstance, however, is immaterial. If sec. 42 disappears, as part of the scheme, the only result is that the general right of appeal given by sec. 73 of the Constitution in matters of law stands unabridged. The writ issued under the original jurisdiction of this Court, though the Commission is not a party to the action, is also sufficient in itself to enable the Court to determine the question as between the litigants themselves.

It is desirable to add at this point that applying the same test of severability to Part V. externally, that is, in its relation to Parts I., II., III. and IV., for instance, and certainly some parts of Part VI., those other Parts are not thereby infected with illegality.

As the ultimate test for determining whether after discarding invalid portions of a Statute the portions that remain are to be regarded as law or not, I apply the rule I have stated in *Osborne's Case* (1) and the cases there cited. It is like the case of various promises in a contract apart from questions affecting the consideration. " Where," says *Lopes* L.J. in *Kearney* v. *Whitehaven Colliery Co.* (2), " some of the provisions are legal and others illegal, the illegality of those which are bad does not communicate itself to, or contaminate, those which are good, unless they are inseparable from and dependent upon one another."

The first question, then, comes to this :—Has the Commonwealth Parliament power under sec. 101 of the Constitution to create the Inter-State Commission a Court of Justice, that is, a federal Court in the strict sense, and to invest it with judicial powers on that basis ?

If it has not, then no matter how far the State of New South Wales infringed sec. 92 of the Constitution, the Commission had no power to grant the injunction. The matter must in that case be left to the ordinary Courts of law.

The main, and almost the sole, support of the contention on the part of the Commonwealth and the owners of the wheat that the Commission was validly created a Court of Justice, really rested on the word " adjudication " in sec. 101. It was said that the primary and natural signification of that word connotes a Court of Justice. But in 1900 when the Constitution was framed the word " adjudica-

(1) 12 C.L.R., 321, at pp. 367-368. (2) (1893) 1 Q.B., 700, at p. 713.

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tion" was extensively used to denote decisions of a quasi-judicial character, a meaning that is found continued, though not enlarged, since that date.

During the argument I referred to two cases where the word or its variant "adjudicate" had been so employed—*Allbutt's Case* (1) in 1889, and *Leeson's Case* (2) in the same year. The expression was used in respect of the Medical Council, who, as *Cotton* L.J. said in the last mentioned case (3), "were not in the ordinary sense Judges, but they had to decide judicially." To those cases might be added many others. For instance, in *Allinson's Case* (4) Lord *Esher* M.R., *Lopes* L.J. and *Davey* L.J., all employed the term "adjudication" as applicable to a decision of the Medical Council. In *Wood* v. *Woad*, (5), a case of partnership expulsion, *Kelly* C.B., in referring to the principle of *Audi alteram partem*, says, "this rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals." *Jessel* M.R., in *Russell* v. *Russell* (6) in 1880, quoted that passage and again applied it to the case of a partnership expulsion; and in *Lapointe's Case* (7) the Privy Council again quoted the passage as applicable to partnership. *Cozens-Hardy* M.R., in *Green* v. *Howell* (8), used the word "adjudication" with reference to partnership decisions, and independently.

The position of persons so adjudicating is "judicial" or "quasi-judicial." See, for example, the last mentioned case at page cited. It is plain therefore that the use of the word "adjudication" is ambiguous. The tendency, greatly increasing of late years, is to invest administrative bodies with quasi-judicial functions without at all creating them Courts of Justice. This practice was adverted to by Lord *Loreburn* L.C. in *Board of Education* v. *Rice* (9), and by *Buckley* L.J. in *Arlidge's Case* (10). Those functions may on occasions relate to fact or law or both. And apart from mandamus or (perhaps) certiorari for "non-judicial" conduct, the decisions

(1) 23 Q.B.D., 400, at p. 412.
(2) 43 Ch. D., 366, at p. 383.
(3) 43 Ch. D., 366, at p. 379.
(4) (1894) 1 Q.B., 750.
(5) L.R. 9 Ex., 190, at p. 196.
(6) 14 Ch. D., 471, at p. 478.
(7) (1906) A.C., 535, at p. 540.
(8) (1910) 1 Ch., 495, at p. 504.
(9) (1911) A.C., 179, at p. 182.
(10) (1914) 1 K.B., 160, at p. 184.

of such bodies stand unchallengeable in a Court of law (*Rice's Case* (1)). Their orders are enforceable, as the Lord Chancellor there says, by application to a Court of law. *Arlidge's Case* (2) is enlightening and authoritative. That was a case where the Local Government Board sat in appeal from a closing order made by a local authority under the *Housing, Town Planning &c. Act* 1909. Prior to that Act such orders were made and appeals heard by Courts of law. The powers themselves were identical, but under the new Act were to be exercised by bodies that were not Courts of law. Sec. 39 of the Act conferred jurisdiction in terms that leave no doubt as to the identity of powers. The procedure including costs was to be as the Board might fix by rules, they could make any order they thought equitable, their order was to be binding and conclusive on all parties, and an order might be confirmed, varied or quashed as the Board thought just. So far it is clear that even for wrong construction of law the order once made was to be unchallengeable unless of course quite outside the province of the Board or contrary to natural justice. Then the section provided that the Board might and, if so directed by the High Court, must state a special case for the opinion of the Court on any question of law arising in the course of the appeal.

The Board proceeded to hear the appeal, but not in presence of the party aggrieved, and otherwise, as it was said, contrary to the natural justice as understood in ordinary judicial proceedings. The Divisional Court held the Board was an administrative department "a great central controlling body" (3), and, although *Bankes* J. (now L.J.) termed the Board's action as "adjudicating" (4), it did not possess the characteristics of a true judicial tribunal and its order was administrative.

In the Court of Appeal, *Vaughan Williams* L.J. and *Buckley* L.J. thought the decision wrong, resting largely on sec. 39; Lord *Sumner* (then *Hamilton* L.J.) was of a different opinion and, though he termed the Board's decision a "judgment" (5), regarded the Board as an administrative department, and its procedure was not to be regarded as that of an ordinary Court.

(1) (1911) A.C., 179.
(2) (1913) 1 K.B., 463; (1914) 1 K.B., 160; (1915) A.C., 120.
(3) (1913) 1 K.B., 463, at p. 476.
(4) (1913) 1 K.B., 463, at p. 478.
(5) (1914) 1 K.B., 160, at p. 202.

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When the case came before the House of Lords the distinction was even more clearly marked. Lord *Haldane* L.C. (1) held that though in deciding the appeal the Board was bound to act judicially, the nature of the tribunal determined the principles to which its procedure must conform. With great appositeness to the present case he said (2):—"In modern times it has been increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently."

I stop there for a moment to observe that if we see that the Constitution regarded this body as an administrative body the procedure applicable to Courts of Justice would be contrary to what "is necessary if it is to be capable of doing its work efficiently."

Lord *Shaw's* judgment maintains the same distinction between an administrative body and an ordinary Court. Lord *Parmoor* pointedly contrasts the decisions of the classes of tribunals, and quotes and applies the celebrated passage from Lord *Selborne's* judgment in *Spackman's Case* (3), where he says of an arbiter: "he is not a Judge in the proper sense of the word." Lord *Moulton* says (4):—"I have no doubt that the new procedure as to appeal was intended to be an appeal to a superior executive body as such, and that it was not intended that the Local Government Board should act in a purely judicial capacity." And this although power was given to the Board to state a special case for the opinion of the Court on any point of law arising in the course of the appeal.

(1) (1915) A.C., 120, at p. 130.
(2) (1915) A.C., 120, at p. 132.
(3) 10 App. Cas., 229.
(4) (1915) A.C., 120, at p. 146.

And his Lordship observes (1) :—" The Legislature has provided an appeal, but it is an appeal to an administrative department of State and not to a judicial body." No one could deny that in the broad and perfectly accurate sense of the word the Local Government Board's determination was an " adjudication."

The case therefore emphasizes the point that though an " adjudication " in the true sense—and as effective and binding as if made by a Court of Justice—may be made by an administrative body, it does not become the adjudication of a Court of Justice. The nature of the power conferred does not alter the character of the body exercising it, and convert an executive body into a strictly judicial body.

We have therefore to look beyond the word " adjudication " to see with what character the Constitution itself invested the Inter-State Commission, or permitted it to be invested.

The Commonwealth contends that the Constitution either itself stamped the Commission with a double character—strictly judicial and strictly executive, leaving Parliament nothing to do but to specify the powers under each head; or that Parliament could shape the Commission in whichever of the two forms it pleased—in other words, Parliament could make it simply a Court of Justice, without powers of administration, or simply an administrative body without powers of adjudication. Or it could invest it with both characters to be exercised simultaneously and with some probable occasional difficulty of identification.

The first mentioned possibility was not pressed by the Commonwealth, but was strongly relied on by Mr. *Knox*. He urged that sec. 73 of the Constitution, by expressly mentioning the Inter-State Commission, and giving an appeal from " judgments, decrees, orders, and sentences," necessarily regarded it as a Court. But the word " order " applies as much to an order of a quasi-judicial body as to that of a strict Court. Lord *Sumner*, as I have mentioned, calls it a " judgment." The " order " of the Local Government Board is an instance. The reference in a separate paragraph, III., of sec. 73 to the Inter-State Commission after the exhaustive words of par. II., which embrace all Courts, other than the High Court, to which the High Court appellate jurisdiction extends, indicates that the

(1) (1915) A.C., 120, at p. 150.

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Commission was not one of the "Courts" within the meaning of Part III. of the Constitution. Judicial power is undoubtedly conferred by sub-sec. III., but that is in the High Court, and the jurisdiction to correct errors of law—similar to that of the English High Court in sec. 39 of the Act in *Arlidge's Case* (1)—does not connote that the Commission is a Court, any more than the Local Government Board is a Court.

The second position was urged by both Commonwealth and owners. The phrase "such powers of adjudication and administration as the Parliament thinks necessary" means, it was said, that Parliament could if it chose erect the Commission into a Court. But that contention appears to me to confuse the "powers" that may be granted with the nature of the instrument which is to exercise them. The powers are to be conferrable, but consistently with the rest of the Constitution, including the portion exclusively vesting true judicial power in Courts of Justice.

We have to read the whole section to get the force of that phrase, and not only the whole section, but the rest of the Constitution so far as relevant.

The first consideration in this regard is the general frame of the Constitution.

In *John Deere Plow Co. Ltd.* v. *Wharton* (2) the Lord Chancellor said, as applicable to both the Australian and Canadian Constitutions, "that if there is at points obscurity in language, this may be taken to be due, not to uncertainty about general principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages."

When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity.

By the first Chapter the legislative power of the Commonwealth is vested in a Parliament, consisting of the Sovereign and two Houses, and for this purpose the Governor-General is the Royal representative. By Chapter II., headed "The Executive Govern-

(1) (1913) 1 K.B., 463; (1914) 1 K.B., 160; (1915) A.C., 120.
(2) (1915) A.C., 330, at p. 338.

ment," the executive power of the Commonwealth is vested in the Sovereign simply, the Governor-General again being the representative. There might be some ambiguity as to what is meant by executive power, arising from the fact that sometimes in relation to the British Constitution the Judiciary are classed among the executive officers of the Crown. See, for instance, *Halsbury's Laws of England*, vol. VII., pp. 19, 20 and 21. And in one sense Judges do execute laws. They execute laws relating to the Judiciary, by performing their judicial functions. But, in the contrasted sense, executive powers are distinct from judicial powers.

And in order to avoid misapprehension as to what is meant by the executive power of the Commonwealth, to be vested in the Sovereign as "the Executive Government" it is specifically defined as the one which "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." The phraseology is important to remember.

This language accords with *Blackstone*, vol. I., p. 270, who observes that "though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate."

Chapter II., taken alone, left, as a matter of law, the means and method of executing and maintaining the laws entirely to the Sovereign's discretion, and tacitly subjected the exercise of the power only to the conventions of responsible government.

Chapter III. is headed "the Judicature," and vests the judicial power of the Commonwealth not in the Sovereign simply, or as he may in Parliament direct, but in specific organs, namely, Courts strictly so called. They are the High Court, such other federal Courts as Parliament creates, and such other Courts as it invests with federal jurisdiction. There is a mandate to create a High Court; there is a discretionary power to create other federal Courts; and there is a discretionary power to invest with federal jurisdiction such Courts as Parliament finds already in existence, that is, State Courts. But that exhausts the judicature. And as to federal Courts, the Justices are to have a specific tenure. And the distinct

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command of the Constitution is that whatever judicial power—that is, in the contrasted sense—is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals. This command is, as I have said, only emphasized by the manner in which the appeal from the Inter-State Commission is introduced. Sec. 77 enables Parliament to define the jurisdiction of any federal Court other than the High Court—which means, either original or appellate jurisdiction.

Sec. 80 has supreme importance, in my opinion, in this connection. It is, as I have recently said in *Bernasconi's Case* (1), a limitation on the other provisions of Chapter III. In other words, it is a limitation applicable only to the judicial power vested in Courts of Justice by Chapter III.

It follows that if the Inter-State Commission is a federal Court within the meaning of sec. 71, then sec. 80 would apply to its proceedings. But if it be a strict Court—independently of Chapter III.—then its proceedings are free from any protective influence of sec. 80.

So far we find delimited with scrupulous care, the three great branches of government. To use the words of *Marshall* C.J. in *Wayman* v. *Southard* (2): "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." That describes the primary function of each department, though there may be incidents to each power which resemble the other main powers, but are incidents only.

It would require, in view of the careful delimitation I have mentioned, in my opinion, very explicit and unmistakable words to undo the effect of the dominant principle of demarcation. And still more does that necessity press me when I remember how vast a portion of the constitutional field is covered by trade and commerce. So far from finding any such unambiguous words, the language appears to me to point in the opposite direction.

First of all, the mandate is to create an Inter-State Commission. That *primâ facie* is not language implying a Court of Justice, but rather implying an executive body. Of course, a Parliament of

(1) 19 C.L.R., 629.

(2) 10 Wheat., 1, at p. 46.

plenary power may do as it pleases, but this section is a direction to the Parliament, and intended to bind the Parliament to follow that direction. The *raison d'être* of the Commission is manifestly "the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder." Those words are practically a repetition of the phraseology of sec. 61, the introductory executive section. The Commission, in short, is to be a department under the Crown to assist in executing and maintaining trade and commercial law in Australia.

The mandate arises as a necessity from the provisions of sec. 102. It is common knowledge that, at the time the Constitution was framed, railway rates in some adjacent colonies were of a fiercely competitive nature, "cut-throat rates" was what they were termed, and were not only productive of loss, and artificial diversion of trade and commerce, but also of irritation.

Sec. 102 enabled Parliament to correct this, but between the parliamentary majority for the moment and the State railway systems, there was interposed by the final clause of the section the opinion of a body free from political control, and having the function of "adjudging" whether any given preference or discrimination was undue and unreasonable or unjust to any State complaining of it. Sec. 104 gives first place to development if there is the specified equality of treatment. The adjudication contemplated by sec. 102 is not that of a Court. It is rather discretion or judgment in sense of the well-considered statesmanlike opinion, and is not measurable by any legal standard. It resembles an authoritative report, which the Constitution makes a condition precedent to parliamentary action.

But when making the adjudication of the Commission a *sine quâ non* of rate correction, a mandate to create the Commission was essential and was given. Obviously I should say the Commission so far was not a Court, but a great, perhaps a unique government Expert Department, dealing with Inter-State trade and commerce in railways. If a parliamentary precedent be sought for interposing a quasi-judicial inquiry before parliamentary enactment as to railways, it may be found in the Victorian *Railways Standing*

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Committee Act 1890 (No. 1177), sec. 13. The Inter-State Commission deals also with finance so far as concerns the financial responsibilities of the States in connection with railways (see sec. 102). If it had no further duties assigned to it by Parliament than those I have mentioned, the Constitution would still be satisfied.

This would make it in no respect different in inherent character from the American Inter-State Commission, which is recognized even with its most recent extended powers as an administrative body only (see *Louisville and Nashville Railroad Co.* v. *F. W. Cook Brewing Co.* (1)). Its orders may be enforced by suit brought by it against those who depart from them, and the Courts accord to those orders finality of effect unless in conflict with some legal provision or principle (see *Inter-State Commerce Commission* v. *Union Pacific Railroad Co.* (2)). Its orders for reparation for past injuries are designated by the Supreme Court as made in a " quasi-judicial capacity " : *Baer Bros.* v. *Denver Railroad Co.* (3). This is in line with the English cases quoted on the meaning of adjudication.

Thus the Constitution provided for the possible establishment of a novel administrative and consultative organ with incidental quasi-judicial functions, very much as a Commissioner of Patents has to exercise quasi-judicial functions before exercising the executive act of issuing a patent, or a Collector of Customs has sometimes in a quasi-judicial way to examine and come to a conclusion on the dutiability of goods, and the conclusion is sometimes made a binding one. The usefulness of the Commission was not necessarily to stop at sec. 102. It might be seen that the commerce provisions of the Constitution or the Commonwealth laws would be greatly aided if the same body were to have its authority extended, and the ordinary administrative departments might be materially assisted by such an extension.

That, in my opinion, is the true import of the power given to Parliament in sec. 101. The extension would in no respect alter the character of the Commission, or convert it from an executive to a judicial branch. The dominant words in section 101 are " the

(1) 223 U.S., 70, at p. 84.
(2) 222 U.S. 541, at p. 547.
(3) 233 U.S., 479, at p. 486.

execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder." Those words denote the purpose and nature of the power to be conferred, and mark their limit. Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim and object of the constitutional separation of powers would be frustrated. A result so violently opposed to the fundamental structure and scheme of the Constitution requires, as I have before observed, extremely plain and unequivocal language.

Reading the section as I have read it, does no violence to any part of the instrument; on the contrary it harmonizes it. It gives the same effect to the words "execute and maintain the laws" in the three places where they, or like words, are found, viz., sec. 51 (VI.), sec. 61 and sec. 101.

It also avoids serious consequences, hardly supposable as intended. For instance, the Commonwealth's argument either assumes the Commission to be a federal Court created by the Parliament within the meaning of sec. 71, in which case the tenure of the members departs from sec. 72, or it assumes it to be an additional Court, exercising true judicial power, though sec. 71 is exhaustive in its terms.

Further, if it be the first class of Court, it may be authorized under the assumedly unlimited words of sec. 101, combined with sec. 77, to try criminal cases, and even, notwithstanding its less independent tenure, to entertain appeals from all State Courts or any other federal Court except the High Court in relation to commerce litigation. Indeed, in reply to a question by the Court, learned counsel for the Commonwealth claimed that the Inter-State Commission could now validly try such a case as the *Vend Case* (1), or Customs prosecutions. It would be rather remarkable to permit two laymen to overrule a lawyer in a criminal case, or to overrule perhaps a unanimous judgment of the Supreme Court of a State (say) upon

(1) 18 C.L.R., 30; 15 C.L.R., 65; 14 C.L.R., 387.

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the *Sea-Carriage of Goods Act* — The Harter Act. They might even overrule that Court upon the facts of a case; and then this Court would be prohibited by the Constitution itself from re-considering the decision. And the functions contemplated by the Constitution in relation to finance, railways, and commercial transactions do not presuppose a body composed exclusively of lawyers.

On the other hand, if it be an excrescent Court of Justice, quite outside the Judicature Chapter of the Constitution, sec. 80 would be inapplicable to it. This would lead to a most astounding result. Parliament by virtue of its alleged unlimited power under sec. 101 could confer both criminal and civil jurisdiction on a body presumably in the main consisting of non-lawyers, and could enable it to try offences even on indictment without the security of sec. 80 in relation to a jury. Not only so, even Parliament could not enable this Court to re-examine the facts in case of error, or the sentence, however severe, unless absolutely illegal.

On the whole I reject the notion of the Commission as a Court of Justice, and regard its quasi-judicial powers, where given, as incidental and assistant to its main and paramount purpose, as in the making of some executive order. Its order, subject to any appeal to this Court on law, is taken to be lawfully made and binding, if the necessary judicial powers are given and exercised. See, for example, the observations of *M'Lean* J. in *Watkins* v. *Holman* (1) and of *Curtis* J. in *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (2), and a very clear and summarized statement in *Willoughby on the Constitution*, p. 1277; sec. 753, headed "Judicial Powers of Administrative Agents."

But the end must be administrative, either by way of order or by way of an application made to a recognized Court to deal with a question in the ordinary exercise of judicial power. I do not see any obstacle whatever to investing the Commission with sufficiently and probably equally effective powers, provided they are created in a proper way. There has not been found any difficulty in arming the American Inter-State Commerce Commission with ample quasi-judicial powers, while leaving the body as it must be left an executive organization.

(1) 16 Pet., 25, at pp. 60, 61.

(2) 18 How., 272, at p. 280.

As the Act stands, Part V. in my opinion is for the reasons stated invalid, and the injunction granted is incompetent to the Commission.

2.—But apart altogether from the first point, and assuming the Commission possessed the jurisdiction claimed for it, the further serious question is raised whether the Act of the New South Wales Legislature—the *Wheat Acquisition Act* 1914—is valid or not.

It is said to be invalid as being in violation of sec. 92 of the Constitution. That section, as I have stated in *Fox* v. *Robbins* (1) and *R.* v. *Smithers* (2), is an absolute limitation on the powers which either Commonwealth or States alike would otherwise have, to do anything to prevent the absolute freedom of Inter-State trade, commerce and intercourse.

Once ascertain whether any given Commonwealth or State action is within the terms of that section, nothing that either can do is of any avail to legalize its action. But, as pointed out in *Smithers' Case* (3), the meaning of the words must be ascertained, the section must be properly construed. Here the force of the section is not in doubt; all that is in controversy so far as section 92 is concerned, is whether what has been done is within the limitation or restriction. If it is, then, applying Lord *Selborne's* rule in *R.* v. *Burah* (4), the Court gives effect to the restriction, and declares the attempted act unlawful.

The Statute is attacked in two ways. In the first place, it is argued that secs. 8 and 9 are direct attempts to annul contracts which, on the true and ample interpretation of the language of those sections, include contracts which form an inseparable part of Inter-State commerce. Many American cases were cited to show that a contract by which a vendor in one State contracted with his purchaser to deliver to a carrier in that State for transport to another State, was itself a contract of an inter-State character, and came within the definition of trade and commerce among the States.

Perhaps the strongest case in support of that position is one not cited, *Stewart* v. *Michigan* (5), where it was held, following a prior decision, that the negotiation of sales of goods which are in another

(1) 8 C.L.R., 115.
(2) 16 C.L.R., 99.
(3) 16 C.L.R., 99, at pp. 112, 113.
(4) 3 App. Cas., 889, at p. 904.
(5) 232 U.S., 665.

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State for the purpose of introducing them into the State in which the negotiation is made is inter-State commerce. It had long been held that sale is an essential part of commercial intercourse, as by *Marshall* C.J. in *Brown* v. *Maryland* (1). I see no reason, as at present advised, to deny that. Indeed, if it be not true, I could well understand an argument against the validity of the Australian Anti-trust legislation. But assuming so much for the present purpose, the question remains whether secs. 8 and 9 of the New South Wales Act do interfere with an inter-State transaction, or whether they are not, on a proper construction, to be confined to a purely intra-State transaction complete in itself, and though perhaps intended to be followed by a further transaction itself of an inter-State character, yet is preserved in complete legal independence from the new transaction. Such a contract would come within the rule of *Gulf, Colorado and Santa Fé Railway Co.* v. *Texas* (2). There is a cardinal rule of English law applicable to all documents, namely, that they are to be construed *ut res magis valeat quam pereat.* We have the authority of Lord *Brougham* that it is a rule both of law and of common sense (*Langston* v. *Langston* (3)). In *R* v. *Saddlers' Co.* (4) Lord *Wensleydale*, speaking of a bye-law, said :—" As in one sense of the word the bye-law is good and in the other not, the rule is that it ought to be construed so as to make it valid, not to defeat it, according to the principle laid down in *Poulter's Co.* v. *Phillips* " (5).

Accordingly, in *Macleod's Case* (6) an Act of New South Wales unlimited in literal terms was read down to territorial limits, because it was a presumption of law, in the absence of clear words or implication to the contrary, that the colonial Legislature did not intend to enact anything beyond its competent limits. See also, as to that case, *per* Lord *Halsbury* in *Swifte* v. *Attorney-General for Ireland* (7), where the same principle was applied.

The presumption has been frequently applied, but it is unnecessary to refer further to cases on this point except to the distinct statement of the rule of *Fletcher Moulton* L.J. in *Moulis* v. *Owen* (8),

(1) 12 Wheat., 419.
(2) 204 U.S., 403.
(3) 2 Cl. & F., 194, at p. 243.
(4) 10 H.L.C., 404, at p. 463.
(5) 6 Bing. (N.C.), 314.
(6) (1891) A.C., 455.
(7) (1912) A.C., 276, at p. 278.
(8) (1907) 1 K.B., 746, at p. 764.

which, though he dissented from the actual decision, is not at variance with anything else said in the case.

Reading sec. 8 first with this guide, it is clear from the deliberate limitation of the avoidance of contracts to the case where the wheat was "to be delivered in the said State," and from the concluding words of the first sub-section, that the State Parliament was endeavouring to keep within its limits. This is a guide to sub-sec. 2 of sec. 8 and also to sec. 9. The word "delivered" in sub-sec. 1 of the latter section must have the same meaning as in sec. 8, and being *in pari materiâ* should be read with it, and this is aided by the reference to the "purchaser" in the second paragraph of sec. 9, which assumes the purchaser is a person subject to the local law.

I therefore read secs. 8 and 9 as limited to purely New South Wales transactions, made and to be completely performed there. No question, therefore, arises as to separability of those sections. Then, as to sec. 3. If that section stood alone I should, if sec. 92 forbids the taking of wheat covered by an inter-State contract, be prepared to read sec. 3 by the light of the presumption of validity referred to, and to limit it to wheat not so covered.

But, having regard to the difference of language between sec. 3 and secs. 8 and 9, I conclude the Legislature meant to cover all wheat in New South Wales, thinking there was a difference between trade and commerce, and the subject of trade and commerce; just as there is a difference between railway travelling and the persons who travel. The very recent case of *Attorney-General for Alberta* v. *Attorney-General for Canada* (1) illustrates both positions. In that case the Alberta Act used the terms "any other railway company," and Lord *Moulton*, for the Judicial Committee, said it was possible to give to the words "railway company" the limited meaning of a company owning and operating a railway situated entirely within the Province, and to that extent the legislation was *intra vires*. But as a later Act expressly extended the enactment so as to make it apply to a Dominion railway, the extending Act was *ultra vires*.

In my opinion sec. 3 must be read as intended to cover all wheat

(1) (1915) A.C., 363.

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in New South Wales, but merely because it is therein and the section has no special reference to inter-State commerce, either by way of inclusion or exclusion. In other words, any transaction of inter-State commerce is irrelevant to the operation of sec. 3.

Further, it should be added that, if it be incompetent to the State to take wheat the subject of inter-State contracts, the whole section must fall. It is inseparable, and if the bad be excised there is nothing left, and so the good goes with the bad.

Now, in my opinion, it was competent to the State Parliament to take all the wheat in New South Wales notwithstanding the fact that some of it was, as we may assume, already the subject of sale to purchasers in other States. But said learned counsel for the respondents, the object of the Act was to restrict inter-State sales, and they pointed to the *Necessary Commodities Control Act* 1914, and said a gap was left which it was necessary to cover.

In the *Wheat Acquisition Act*, however, much more than a gap in prior legislation was covered. A new and different policy covering the entire field was adopted, and we have to see whether this was validly done.

It must be remembered that the motive of the Legislature is immaterial. The question always is: What have they done? What is the effect of the legislation, or, if you like, the object at which it is aimed, judging of the object by what it enacts shall be done or left undone?

In 1895, in the course of the argument on the *Canadian Liquor Case*, Lord *Watson*, after observing that there might be many objects of an Act, one behind the other, said :—" Which is the object of the Act? I should be inclined to take the view that that which it accomplished, and that which is its main object to accomplish, is the object of the Statute; the others are mere motives to induce the Legislature to take means for the attainment of it " (Quoted in *Lefroy's Canada's Federal System*, p. 213).

The Privy Council, in *Union Colliery Co. of British Columbia* v. *Bryden* (1), tested certain legislation by ascertaining what Lord *Watson* termed " the whole pith and substance of the enactments."

(1) (1899) A.C., 580, at p. 587.

Finding that a certain aspect was struck at, the enactments were *ultra vires*.

The pith and substance of this Act is the Government acquisition of all wheat in New South Wales with power to dispose of it to the public.

In *John Deere Plow Co.* v. *Wharton* (1) the Lord Chancellor, speaking for the Judicial Committee, finding that a provincial enactment from its terms did not apply the law to all companies without distinction but only to Dominion companies, said that the provincial Legislature had struck at matters beyond their power. If, for instance, the only wheat dealt with by the Act had been indicated by reference to inter-State transactions, a very different question would present itself.

But here there is no discrimination, and all wheat in New South Wales territory is treated alike, no differentiation arising by reason of inter-State trade; and, unless the final argument offered by the respondents be sound, there is no reason for finding that the New South Wales Parliament exceeded its powers. That argument is that, inasmuch as the Statute does include wheat covered by inter-State transactions, that is a permission to interfere with inter-State trade and commerce, and consequently void.

The point made is that as commerce in goods cannot proceed without the goods themselves, deprivation of the goods amounts to an interference with the commerce to which they have been attached. It is as if a man had agreed to sell all the wool now on his sheep, or all the fruit now on his trees; the State, it is urged, must not touch the sheep or the wool or the trees because the vendor would be thereby prevented from carrying out his contract. That cannot be. Inter-State carriage, for instance, cannot be carried on without human agency, or in most cases without trade instruments. If a man had contracted to carry a waggon-load of goods across the Murray on a certain day, it would, if the argument be sound, be an interference with inter-State trade and commerce to arrest the man for theft, or compel his attendance as a witness or a juryman, or to seize his horse and cart in bankruptcy or as a distress for rent. Any State law authorizing those steps must, if the respondents be right, be held invalid.

(1) (1915) A.C., 330, at pp. 343, 344.

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And as sec. 92 applies equally to Commonwealth and State, the Commonwealth would, upon the argument, be precluded from taking food or other material in course of inter-State movement if wanted for defence purposes.

The key to the matter lies, in my opinion, in the fact that *trade and commerce consists of acts not things.* The things themselves are indispensable, just as the human actors are; but they do not form part of the trade and commerce itself. Under sec. 51 (I.) the Commonwealth Parliament may, of course, regulate the conduct of men in relation to the act and the use of things employed in and about the act, otherwise the power to regulate trade and commerce would be futile. But, nevertheless, the men and the things are not withdrawn from State control in other relations, merely because they are engaged in the act of inter-State trade or traffic.

Therefore, when a State deals with property on the basis of property and regulates its ownership irrespective of any element of inter-State trade, there is no abridgment of absolute freedom of trade. The State cannot know what contracts exist at a given moment, or what movement of property towards another State has begun, and if it proceeds to exercise its own lawful powers of legislation without reference in any way to and perfectly independent and irrespective of such inter-State operations, it is not an unlawful exercise of legislative power. It cannot do indirectly what it cannot do directly; but here it is not directly or indirectly interfering with commerce at all. It does no more than would be done if the property passed to an assignee under a bankruptcy law, or were retaken by the vendor under the State law of stoppage *in transitu.*

When the State without reference to inter-State contracts as a criterion, or as influencing the operation of its enactment, proceeds to acquire wheat to feed its citizens, it merely changes ownership. It does not assume to govern the duties of the contracting parties to each other, or regulate in any way the interchange of goods belonging to the vendor. It would be strange indeed if sec. 92 enabled individuals, by merely passing goods to and fro between States from one end of Australia to the other, to prevent any of the States, and even the Commonwealth, from exercising the most

vital and elementary function of an organized society in the protection and safety of its members.

I am clearly of opinion that sec. 92 has no such function, and that while neither States nor Commonwealth can detract from the absolute freedom of trade and commerce between Australian citizens in the property they possess, there is nothing to prevent either States or Commonwealth, for their own lawful purposes, from becoming themselves owners of that property and applying it, according to law, to the common welfare.

I agree that the appeal should be allowed, and the action dismissed.

GAVAN DUFFY J. The first question that arises in this case is as to the competency of the inter-State Commission to entertain the petition filed by the Commonwealth, and that depends on the validity of Part V. of the *Inter-State Commission Act* 1912. It is said that Parliament has attempted to confer judicial powers on the Commission, and to make it a Court, and that, in so doing, it has exceeded the authority vested in it by sec. 101 of the Constitution. It must be conceded that Parliament has purported to do this, and we have to determine whether its enactment is *ultra vires* or not. In the argument for the invalidity of the Statute it has been said that the language of sec. 101 on examination does not purport to deal with judicial power at all, and that even if the terms of that section are ambiguous they are made clear by a reference to Chapter III. of the Constitution, which vests the whole judicial power of the Commonwealth in Courts other than the Commission.

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Sec. 101 of the Constitution runs thus :—"There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder." It will be observed that the Commission may have assigned to it powers both of adjudication and administration: the word adjudication may, and probably does, include a determination which is not judicial, but it also includes determinations which are judicial, and Parliament is authorized to bestow on the Commission such powers of adjudication as it deems necessary

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for the prescribed purposes. The powers of adjudication are not expressed as ancillary to, but are independent of, the powers of "administration," a word nearly equivalent to management and apt to describe all executive functions. Powers whether of adjudication or administration must be such as shall be deemed necessary for the execution within the Commonwealth of the provisions of the Constitution relating to trade and commerce and of laws made thereunder, that is to say, to the maintaining and giving effect to such provisions and laws; but there is no other fetter placed on the discretion of Parliament.

It is said that sec. 61 vests the executive power of the Commonwealth in the Sovereign, and describes it as extending to the execution and maintenance of the Constitution, and that the powers of adjudication which may be conferred under sec. 101, being expressed to be for the execution and maintenance of certain provisions of the Constitution, are intended to perform the same functions as the executive power conferred by sec. 61, and so must themselves be executive and not judicial. But these powers are not directed to perform the same functions, but to attain the same end. Powers entirely different in their nature may be exercised for the purpose of bringing about the same result, and the exercise of judicial functions may appear to Parliament to be as necessary for the prescribed purposes as the exercise of administrative functions. The duties which the Constitution has itself assigned to the Commission, as in secs. 102 and 104, include some which may properly be performed by a Court, and so with other duties not specifically prescribed but naturally falling to the Commission. It is urged that all the duties which may be properly entrusted to the Commission can be performed although the Commission is not made a Court, that all necessary powers of adjudication can be conferred on it without making it a Court or enabling it to do what only a Court has hitherto done. But what are necessary powers of adjudication except those which Parliament deems necessary; and why should Parliament be hampered in its choice of "powers of adjudication" when sec. 101 has in terms left it free? It is true that a Court usually confines itself to the performance of strictly judicial duties and that many of the duties of the Commission must be purely executive,

and it is equally true that a "corporation" (sec. 4) discharging judicial duties as a Court and executive duties which require none of the special powers of a Court, must look ugly and anomalous in the eyes of a lawyer, but that does not determine the question at issue. It may well be that those who framed the Constitution were impressed with the necessity of giving to the Inter-State Commission in Australia such an anomalous character because they recognized that in the United States the Inter-State Commission was enfeebled and impeded in the performance of its duties by its want of judicial power and by the inability of Congress to give it such power. When we look at the provisions of the Constitution as to appeal from the Commission to the High Court (sec. 73 (III.)), and as to the remuneration and tenure of the Commissioners (sec. 103), we find them to be appropriate to a Court, or a body exercising the functions of a Court, and its members. Sec. 73 (III.) enacts that there shall be an appeal from all "judgments, decrees, orders, and sentences" of the Inter-State Commission, and sec. 103 provides for a security of tenure and remuneration usually reserved for judicial officers.

Then we are told by the appellants that Chapter III. of the Constitution contains a gift of the whole judicial power to the Commonwealth—an exclusive gift, and that sec. 101 must therefore deal only with other than judicial power. No doubt Chapter III. when read apart from sec. 101 appears to deal with the whole of the judicial power, just as Chapter I. appears to deal with the whole of the legislative power, and Chapter II. with the whole of the executive power, but Chapter IV., dealing with the subject of finance and trade and with that subject only, creates and regulates both legislative and executive functions in respect of that subject matter, and it does the like with respect to the function of adjudication. Chapter III. has reference to the general Judicature of the Commonwealth; Chapter IV., without intruding on the domain of the general Judicature or detracting from its authority, and without itself constituting any Court, enables Parliament to use judicial power through the instrumentality of the Inter-State Commission when it deems it necessary to do so for the prescribed purposes, and to constitute the Commission a Court, or not, at its

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pleasure. If Parliament had not chosen to make the Commission a Court it might still have given to it any powers of adjudication which it thought desirable, and whatever powers of adjudication it possessed, and whether it was constituted a Court or not, an appeal would still have lain from it to the High Court under the terms of sec. 73 (III.) of the Constitution, which were apparently carefully chosen in order to preserve the rights of appeal to the High Court whatever Parliament might choose to do or leave undone under sec. 101.

It has been suggested that certain absurdities may follow from the interpretation of the phrase "powers of adjudication" which I have adopted, and, no doubt, they may if Parliament takes leave of its corporate common sense, or deliberately misuses its high functions. It is enough to say that absurdities similar in substance, if not in form, may follow from the interpretation which denies judicial powers to the Commission. Such considerations are of little weight, for the whole gift of legislative power is based on the assumption that Parliament, like the Judicature and the Executive, is to be trusted in the exercise of its authority subject only to well recognized constitutional restraints.

It follows from what I have said that the attack on the validity of the *Inter-State Commission Act* fails, and the preliminary objection to the competency of the Commission should be overruled.

I have next to consider the question of the validity of secs. 3, 8 and 9 of the New South Wales *Wheat Acquisition Act* 1914; of sec. 3, because the seizure of wheat is justified under that section; and of secs. 8 and 9, because it is said that their provisions are so connected with the provisions of sec. 3 that it must fall with them if they fall. The validity of all these sections is attacked on the ground that they are inconsistent with sec. 92 of the Constitution. That section, so far as it is relevant, runs thus:—"On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." It is to be observed that sec. 51 (I.) of the Constitution enables Parliament to make laws for the peace, order, and good government of the Commonwealth with respect to "Trade and commerce with other countries, and

among the States." The words "absolutely free" in sec. 92 must, therefore, be subject to some limitation so as to give them a meaning which is consistent with the existence of this legislative power, and the meaning when ascertained must be the same always and in all conceivable circumstances; it must apply equally when we are considering the right of the Commonwealth to legislate under section 51 (I.), and of the States to legislate under sec. 107.

Notwithstanding sec. 92, the Commonwealth Parliament in dealing with trade and commerce between the States under sec. 51 (I.) would apparently have been at liberty to give preference to one State or part of a State over another State or part of a State, because it was thought necessary to enact sec. 99, which in terms forbids such legislation. Again a State or an authority constituted under a State might apparently have preferred or discriminated with respect to railway rates against another State except for sec. 102. It may apparently still do so if the preference or discrimination is not, in the opinion of the Inter-State Commission, undue and unreasonable or unjust to any State. In view of all this it may perhaps be correct to say that no enactment of a State Parliament offends against sec. 92 unless it expressly forbids or restrains inter-State trade, commerce or intercourse. It is enough for the present case to say that sec. 3 of the *Wheat Acquisition Act* does not so offend. It does no more than empower the King to acquire any or all of the wheat in New South Wales, and makes no distinction between grain the subject matter of inter-State trade and other grain. It enables a change of ownership to be effected at the will of the Crown, and leaves the new owner free to act as he pleases. Wheat not acquired by the King is not touched by the Act; wheat acquired by the King may be dealt with by the Board and by purchasers from the Board without any restriction, and trade and commerce so far as it affects the wheat in their hands remains "absolutely free." In truth, the Act is not primarily an interference with inter-State trade or commerce at all; it is an exercise of the legislative power declared by sec. 107 of the Constitution to remain in the Legislature of New South Wales for the purpose of managing its own internal affairs.

We heard much argument as to the true meaning of secs. 8 and 9

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of the *Wheat Acquisition Act*. On the one side it was said that the only contracts invalidated by these sections were contracts which themselves formed no part of inter-State trade or commerce, on the other side it was urged that the terms of the sections were such that they must include contracts which were prohibited by sec. 92. It is not necessary for us to decide whether any specific contract would or would not come within these sections or either of them. Applying the principles laid down in *Macleod* v. *Attorney-General for New South Wales* (1), as they have already been applied on several occasions in this Court, I think we should hold that the Parliament of New South Wales intended to legislate and has legislated only with respect to such contracts as it could legally invalidate having regard to the provisions of sec. 92 of the Constitution. When a contract comes before this Court for the purpose of determining whether it has been invalidated by the *Wheat Acquisition Act* or not, it may become necessary more closely to delimit the scope and define the meaning of that section.

POWERS J. I agree with the Chief Justice and my brother *Isaacs*, and for the reasons given by them, that the Inter-State Commission, as such, cannot by the Constitution legally be constituted, in any relevant sense of the word, a Court, and that Parliament has by Part V. of the Act constituted the Commission as a Court.

I agree that the functions of the Inter-State Commission under the Constitution are, as the Chief Justice and my brother *Isaacs* have said in their judgments, solely executive or administrative, and that the powers of adjudication intended under sec. 101 are such powers of determining questions of fact as may be necessary for the performance of their executive or administrative functions, that is, such powers of adjudication as are incidental and ancillary to those functions.

The argument relied on for the contrary view was based principally on the word "adjudication" in sec. 101. That claim has, I think, been fully dealt with in the judgments of my learned brothers, and I only wish to add that the power of adjudication on questions of fact is also given to the Inter-State Commission by secs.

(1) (1891) A.C., 455.

102 and 103 of the Constitution, but without any power to enforce their findings as a Court or otherwise. Under sec. 101 of the Constitution, I hold that the power of adjudication is given solely with a view of enabling the Inter-State Commission to determine questions before they exercise any executive or administrative powers which Parliament may from time to time deem necessary to grant to them under sec. 101.

I therefore agree with my learned brothers that Part V. of the *Inter-State Commission Act* 1912 is invalid, although several of the powers vested in the Commission by Part V. could be vested in them by Parliament as a Commission but not as a Court. All the powers set out in Part V. of the *Inter-State Commission Act* could be given to a properly constituted federal Court, and the individual members of the Inter-State Commission could be Judges of that Court, with the tenure provided by sec. 72 of the Constitution for Justices of Courts created by the Commonwealth Parliament.

As to the *Wheat Acquisition Act* 1914 of New South Wales : I also agree that the State of New South Wales had power to acquire any property in the State, and after acquisition to exercise the right of an owner to decide whether its property is to remain in the State or to be a subject of inter-State commerce. Sec. 92 of the Constitution does not affect that right. Secs. 3, 8 and 9 of the New South Wales Act can reasonably be, and ought, if possible, to be, construed as referring only to matters within the jurisdiction of the State Parliament.

I agree that the New South Wales Act in question is valid, and that the Commonwealth action fails.

RICH J. The first question raised in this appeal relates to the jurisdiction of the Inter-State Commission to entertain the complaint in this matter. The appellants contend that the Constitution does not authorize Parliament to create the body which it has purported to create under the *Inter-State Commission Act* 1912.

The respondents on the other hand argue that the Inter-State Commission created by that Act is a valid exercise of the powers conferred on Parliament by sec. 101 of the Constitution.

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This directly raises the question whether the *Inter-State Commission Act* is, or at any rate some of its provisions are, *ultra vires* the Constitution.

In order to determine this it is necessary, in the first place, to construe sec. 101 of the *Commonwealth of Australia Constitution Act* so as to ascertain the nature of the body which Parliament is authorized to erect under that section.

The Constitution draws a clear distinction—well known in all British communities—between the legislative, executive and judicial functions of Government of the Commonwealth. The legislative power is, by sec. 1, vested in Parliament, the constitution and powers of which are carefully defined in Chapter I. Chapter II. deals with the Executive Government, and the executive power is vested in the Queen and is made exercisable by the Governor-General as provided by sec. 61 and extends "to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." Chapter III. deals with the Judiciary, and contains the most ample and meticulous provisions as to the tribunals which shall exercise such judicial powers and as to the subject matter of their jurisdiction.

Sec. 71 provides that the judicial power of the Commonwealth shall be vested in (*a*) the High Court of Australia; (*b*) such other federal Courts as the Parliament shall create; (*c*) such other Courts as it invests with federal jurisdiction.

Sec. 72 provides for the tenure of the Justices of the High Court and of the other Courts created by Parliament, *i.e.*, of the "other federal Courts" mentioned in sec. 71. Sec. 73 deals with the appellate jurisdiction of the High Court. Secs. 75 and 76 define the original jurisdiction which the High Court shall or may have.

Sec. 77 provides that Parliament may confer any portion of that original jurisdiction on the "other federal Courts." Pausing here, there can be no doubt that whatever powers are necessary for the execution of the Constitution (including the trade and commerce provisions thereof) and of the whole of the laws of the Commonwealth are vested in the Executive. Then under Chapter IV. which is headed "Finance and Trade" provision is made in sec. 101 for the creation of an Inter-State Commission "with such powers

of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

The powers which may be conferred must be powers necessary for the execution and maintenance within the Commonwealth of the trade and commerce provisions of the Constitution and the laws made thereunder. In executing and maintaining the Constitution and laws of the Commonwealth the Executive may, and indeed must often, adjudicate upon various matters, and I see no reason why powers of adjudication and administration which may be conferred by Parliament on the Inter-State Commission for the purpose of executing and maintaining a portion of the Constitution and the laws made under that portion should be any wider in scope than the power conferred upon the Executive by sec. 61. Indeed one would expect that they might well be something less. The whole force of the argument of the respondents rests upon the word "adjudication." It is true that the meaning of this word might be wide enough in some contexts to include judicial power in the strict sense. If it has that meaning here, the body created would, in my opinion, be an "other federal Court" within the meaning of sec. 71, and it is certainly surprising that the body, if intended to be a Court, should be nowhere specifically mentioned in secs. 71, 72 or 77, and that entirely different language should have been used with regard to its creation and to the subject matter of its jurisdiction than is used in respect of the other federal Courts, and that there should be such a marked distinction between the provisions of the Constitution as to the tenure of its members (sec. 103) and those with regard to the tenure of the Justices of the High Court and the other Courts created by Parliament.

The same construction would also lead to the creation of a curiously anomalous body which might at once be an executive department and a Court of law with jurisdiction wide enough to deal with such cases as the *Vend Case* (1) and *Fox* v. *Robbins* (2), and to combine the investigating department, the prosecuting authority, the Court and the Sheriff's department. It seems to me a much more rational

(1) 14 C.L.R., 387. (2) 8 C.L.R., 115.

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interpretation of sec. 101 to hold that it authorizes the creation of a body which is to take over from the Executive the administration and execution of the trade and commerce provisions of the Constitution and laws made thereunder, and to have such powers of giving decisions upon facts as are incidental to such execution and administration. Sec. 102, which uses the word "adjudged," and sec. 104, which uses the word "deemed," afford in the Constitution itself illustrations of the type of adjudication which it was intended that the body created under sec. 101 should exercise. A great deal of stress was laid by the respondents on sec. 73 (III.), which, it was said, indicated that the Inter-State Commission contemplated by sec. 101 was intended to be a Court in the strict sense of the word.

That section deals with the appellate jurisdiction of the High Court, and, so far from supporting the respondents' contention, points to the contrary conclusion, inasmuch as it indicates that the body created by sec. 101 was at any rate one from which there should be no appeal on questions of fact. This suggests an administrative rather than a judicial body. If it had been intended that the body to be erected under sec. 101 should be a Court, the Constitution would surely have provided or empowered Parliament to provide for a general appeal from it. If the body contemplated was intended to be merely an executive body, it would paralyze its usefulness to allow any appeal from it on questions of fact.

In my judgment, therefore, sec. 101 authorizes the creation of an executive and administrative, and not a curial, body.

Turning now to the *Inter-State Commission Act* 1912. Is the body thereby created in substance and in truth a Court, or is it such a body as is authorized by sec. 101 as thus construed? Looking at secs. 23-31 I have no doubt that Parliament has attempted to constitute the Inter-State Commission a curial body and to give it powers some of which might properly, others of which might not, be conferred on it. It only remains to be considered whether that part of the Act which might validly have been passed under sec. 101 of the Constitution is severable or not. Applying the principles which have been laid down in this Court, I consider that so much of the Act as purports to constitute the Commission a Court and to confer judicial powers upon it is severable from the rest of the Act.

With regard to the second question—the validity of the *Wheat Acquisition Act* 1914—I agree with the judgment of the Court, and adopt what has been said by my brother *Gavan Duffy*.

Appeal allowed. Order of Inter-State Commissioners discharged. Petition dismissed with costs. Action dismissed with costs. Respondents to pay costs of appeal. One set of costs in High Court.

Solicitor, for the appellants, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors, for the respondents, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the interveners, *E. J. D. Guinness*, Crown Solicitor for Victoria; *Dibbs, Parker & Parker.*

B. L.

[HIGH COURT OF AUSTRALIA.]

HEWITT . . . . . APPELLANT;
DEFENDANT,

AND

HOLLIDAY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Negligence—User of land without permission of owner—Licensee—Permission of lessee—Erection of dangerous fence.

The plaintiff and other persons had been accustomed to use a track across the defendant's land. The defendant knew of the practice and objected to it, but the lessee of the land permitted it. In order to prevent the use of the track the defendant erected a single wire across one end of it, stretched from one to another of several trees. The plaintiff, who had been accustomed to