[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND OTHERS . . APPELLANTS;
DEFENDANTS,

AND

KREGLINGER & FERNAU LIMITED AND ANOTHER . . . . . } RESPONDENTS.
PLAINTIFFS,

THE COMMONWEALTH AND OTHERS . . APPELLANTS;
DEFENDANTS,

AND

BARDSLEY . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 24-26; *Mar.* 1, 2, 6.

SYDNEY, *April* 20.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Constitutional Law—High Court—Jurisdiction—Power of Commonwealth Parliament—Appeal from Supreme Court of State exercising Federal jurisdiction—Taking away right of appeal to Privy Council—Repugnancy—Removal of cause into High Court—Question as to limits inter se of constitutional powers of Commonwealth and those of State—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 74, 77—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 38A, 39, 40A—*Privy Council Appeal Act* 1844 (7 & 8 *Vict. c.* 69), *sec.* 1—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *secs.* 2, 5—*Supreme Court Act* 1915 (*Vict.*) (*No.* 2733), *secs.* 30, 38, 232-234—*Imperial Order in Council of* 23*rd January* 1911.

An action having been brought against the Commonwealth in the Supreme Court of Victoria and judgment having been given for the Commonwealth, on appeal to the Full Court of the Supreme Court by the plaintiff a contention

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was raised by the Commonwealth that under sec. 39 (2) (*a*) of the *Judiciary Act* 1903-1920 the only right of appeal was to the High Court. The Full Court, on the ground that sec. 39 (2) (*a*) was *ultra vires*, rejected the contention, and then heard the appeal and dismissed it. On the hearing of an application by the plaintiff to the Full Court for leave to appeal to the Privy Council pursuant to the Imperial Order in Council of 23rd January 1911, the Full Court, accepting as binding on it the decision that sec. 39 (2) (*a*) was invalid, made an order granting the leave asked. On appeal to the High Court from the order granting leave,

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Powers* and *Rich* JJ. (*Higgins* J. dissenting), that on the hearing of the appeal to the Full Court a question arose as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of Victoria, within the meaning of sec. 74 of the Constitution and of secs. 38A and 40A of the *Judiciary Act*; that under sec. 40A the cause was removed to the High Court: and, therefore, that the Full Court had no jurisdiction to entertain the appeal or to make the order granting leave to appeal to the Privy Council.

Per Isaacs, *Rich* and *Starke* JJ.: Whether the Full Court had or had not jurisdiction to entertain the appeal, sec. 39 (2) (*a*) of the *Judiciary Act* is a valid exercise of the power conferred by sec. 77 (III.) of the Constitution, and therefore the Full Court had no jurisdiction to make the order granting leave to appeal to the Privy Council.

Pirrie v. *McFarlane*, (1925) 36 C.L.R. 170, and *Commonwealth* v. *Limerick Steamship Co.*, (1924) 35 C.L.R. 69, followed.

Webb v. *Outrim*, (1907) A.C. 81; 4 C.L.R. 356; *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), (1907) 4 C.L.R. 1087, and *Union Steamship Co. of New Zealand* v. *Commonwealth*, (1925) 36 C.L.R. 130, discussed.

Bardsley and Kreglinger & Fernau Ltd. v. *Commonwealth*, (1925) 47 A.L.T. 181, overruled.

Decision of the Supreme Court of Victoria (Full Court) reversed.

APPEALS from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Kreglinger & Fernau Ltd. and W. Angliss & Co. Pty. Ltd., on behalf of themselves and all other suppliers of skin wool under the provisions of the *War Precautions* (*Wool*) *Regulations* and the *War Precautions* (*Sheepskins*) *Regulations*, other than Frederick Bardsley, against the Commonwealth, the Central Wool Committee, Sir John Michael Higgins, Edmund Jowett, Franc Brereton Sadlier Falkiner, Walter James Young, Andrew Howard Moore, William Stevenson Fraser, Robert Bond McComas, Burdett Laycock, John Fox, John Mackay,

Charles Robert Murphy (the two last-named defendants being sued on their own behalf and as representing all other persons interested as suppliers of shorn wool under the provisions of the above mentioned Regulations), the British Australian Wool Realization Association Ltd., and the defendant Sir John Michael Higgins, who was also sued as the trustee under certain deeds. The plaintiffs' claim was, shortly, to recover a share in certain moneys alleged to have been received by the Commonwealth or by some or one of the other defendants upon trust for the persons who had supplied skin wool under the provisions of the Regulations above mentioned.

An action was also brought by Frederick Bardsley against the same defendants, claiming substantially the same relief.

The actions were heard by *Cussen* J., who dismissed both of them with costs. The plaintiffs in each case appealed to the Full Court, which dismissed each appeal with costs: *Bardsley and Kreglinger & Fernau Ltd.* v. *Commonwealth* (1).

An application was in each case made by the plaintiffs to the Full Court of the Supreme Court for leave to appeal to the Privy Council pursuant to the Order in Council of 23rd January 1911, and in each case leave was granted: *Bardsley and Kreglinger & Fernau Ltd.* v. *Commonwealth* (2).

From the order granting leave to appeal to the Privy Council in each case the defendants now, by leave, appealed to the High Court; and the appeals were heard together.

Owen Dixon K.C. (with him *Russell Martin*), for all the appellants other than those separately represented. The Commonwealth being a party to the action, the jurisdiction of the Supreme Court to hear it was Federal jurisdiction. Being Federal jurisdiction, sec. 39 (2) (*a*) of the *Judiciary Act* 1903-1920 operated to make an appeal to the High Court the only means of appealing from the judgment of *Cussen* J. The validity of sec. 39 (2) (*a*) is expressly decided in *Commonwealth* v. *Limerick Steamship Co.* (3). The decision in that case is not inconsistent with the decision in *Union Steamship Co. of New Zealand* v. *Commonwealth* (4) as to the effect of the *Colonial*

(1) (1925) 47 A.L.T. 181.
(2) (1925) 47 A.L.T. 190 (note).
(3) (1924) 35 C.L.R. 69.
(4) (1925) 36 C.L.R. 130.

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Laws Validity Act 1865. Sec. 2 of the *Colonial Laws Validity Act* is qualified by sec. 5, which was intended to give colonial legislatures the power to confer jurisdiction on Courts and to regulate appeals therefrom both positively and negatively—that is, by giving or by taking away a right of appeal, subject always to the prerogative right to allow appeals to be brought to the King in Council. Sec. 39 (2) (*a*) is an exercise of that power, and is not affected by sec. 2 of the *Colonial Laws Validity Act*. Any conflict with regard to sec. 39 (2) (*a*) is between secs. 77 and 51 (xxxix.) of the Constitution, under the authority of which sec. 39 (2) (*a*) was enacted, and the *Privy Council Appeal Act* 1844, under which the Order in Council of 23rd January 1911 (*Victorian Statutes* 1915, vol. v., pp. 4527 *et seqq.*) was made—a conflict between two Imperial Acts; and in that case the later Act must prevail (*Commonwealth* v. *Limerick Steamship Co.* (1)). The question whether sec. 39 (2) (*a*) is valid is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State, and the case therefore falls within secs. 38A and 40A of the *Judiciary Act*. If sec. 39 (2) (*a*) operates in a case of Federal jurisdiction, it takes away from the subject a right of appeal to the Privy Council which he had under the Victorian *Supreme Court Act*. There is thus a collision between the legislative power of the Commonwealth and that of a State (see *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2)). There is also a collision between the legislative power of the Commonwealth and the judicial powers of the State, which are constitutional powers; for the validity of sec. 39 (2) (*a*) depends upon whether there can be ascribed to the Federal Parliament a legislative power the demarcation of which affects the power of the State Judicature (see *Pirrie* v. *Macfarlane* (3); *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (4)).

Russell Martin, for the appellants the British Australian Wool Realization Association Ltd., Mackay, Murphy and Sir John Higgins. These appellants rely upon the decision in *Commonwealth* v. *Limerick Steamship Co.* (5).

(1) (1924) 35 C.L.R., at p. 95.
(2) (1917) A.C. 528; 24 C.L.R. 396.
(3) (1925) 36 C.L.R. 170, at pp. 192, 195.
(4) (1919) 27 C.L.R. 249.
(5) (1924) 35 C.L.R. 69.

Sir Edward Mitchell K.C. and *Gregory* (*C. Gavan Duffy* with them), for the respondents. The respondents challenge the correctness of the decision in *Commonwealth* v. *Limerick Steamship Co.* (1), on the grounds that it is inconsistent with the decision in *Union Steamship Co. of New Zealand* v. *Commonwealth* (2) and that it is inconsistent with the decision in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (3), and on general grounds (see *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (4); *Read* v. *Bishop of Lincoln* (5)).

[KNOX C.J. The Court thinks that counsel should be allowed to argue that the decision in *Commonwealth* v. *Limerick Steamship Co.* (1) is inconsistent with *Union Steamship Co of New Zealand* v. *Commonwealth* (2) and with *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (3). Beyond that, we are not prepared to go. We expect you to establish that inconsistency by an examination of those cases and not by general argument.]

In *Baxter's Case* (3) it was determined that the effect of the decision of the Privy Council in *Webb* v. *Outrim* (6) was that sec. 39 (2) (*a*) was invalid so far as it purported to prevent an appeal from the Supreme Court of a State to the Privy Council as of right; and the reasoning in the former case was confirmed by *Lorenzo* v. *Carey* (7). If sec. 39 (2) (*a*) is otherwise valid and has the effect of taking away the right of appeal to the Privy Council as of right, it is, within the meaning of the *Colonial Laws Validity Act*, repugnant to the Order in Council of 23rd January 1911, which was made after the decision in *Webb* v. *Outrim*, and which gives a right of appeal from any final judgment of the Supreme Court, that is, applying the decision in that case, from *every* final judgment of that Court. That there is a repugnancy is established by the *Union Steamship Co.'s Case* (2), the facts in that case being indistinguishable from those in this case. In that case the conflict was between the *Navigation Act*, passed under the power conferred by secs. 51 (I.) and 98 of the Constitution, and the *Merchant Shipping Acts*. Here the conflict is between sec. 39 (2) (*a*) of the *Judiciary Act*, passed under the power conferred by sec. 77 (II.) and (III.) of the Constitution,

(1) (1924) 35 C.L.R. 69.
(2) (1925) 36 C.L.R. 130.
(3) (1907) 4 C.L.R. 1087.
(4) (1920) 28 C.L.R. 129, at p. 142.
(5) (1892) A.C. 644, at p. 655.
(6) (1907) A.C. 81; 4 C.L.R. 356.
(7) (1921) 29 C.L.R. 243.

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and the Order in Council, which has all the force and authority of the *Privy Council Appeal Act* 1844, under which it was made. No distinction in this respect can be drawn between the power given by secs. 51 (I.) and 98 of the Constitution and that given by sec. 77 (II.) and (III.). There is nothing in the Constitution which can be construed as a repeal of the *Privy Council Appeal Act* or as giving a power to enact laws inconsistent with Orders in Council made under it. No question as to the constitutional powers *inter se* of the Commonwealth and the State arose either on the appeal from the judgment of *Cussen* J. or on the application for leave to appeal to the Privy Council. The question whether sec. 39 (2) (*a*) prevented an appeal from the judgment of *Cussen* J. to the Full Court was not an *inter se* question; for upon its proper construction that section does not in a matter of Federal jurisdiction prevent an appeal from a primary Judge to the Full Court (*Ah Yick* v. *Lehmert* (1)). Nor on the application for leave to appeal to the Privy Council was the question whether sec. 39 (2) (*a*) prevented an appeal to the Privy Council an *inter se* question. The conflict was not between the constitutional power of the Commonwealth and the constitutional power of the State, but was between the constitutional power of the Commonwealth and the power conferred by the Order in Council. The exercise by the Supreme Court of the judicial function conferred by the Order in Council is not the exercise of a constitutional power of the State. Although the Supreme Court decided that an *inter se* question did arise on the appeal from *Cussen* J., that is not conclusive. An *inter se* question does not arise if as a matter of law there are independent grounds upon which the Supreme Court can and ought to decide the case (*Miller* v. *Haweis* (2); *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (3)). In this case the Supreme Court could and should have decided that on its proper construction sec. 39 (2) (*a*) did not take away the right of appeal to the Full Court. Secs. 38A and 40A did not take away that right of appeal, since no *inter se* question arose. Those sections apply only to such cases as, when removed, the High Court would have jurisdiction to deal with on the merits; and therefore they could not apply to

(1) (1905) 2 C.L.R. 593. (2) (1907) 5 C.L.R. 89.
(3) (1919) 27 C.L.R. 249.

the application for leave to appeal to the Privy Council, since the High Court has no authority under the Order in Council to grant the application. [Counsel also referred to *Cuvillier* v. *Aylwin* (1); *Modee Kaikhooscrow Hormusjee* v. *Cooverbhaee* (2); *Parkin* v. *James* (3); *In re Initiative and Referendum Act* (4); *Richelieu and Ontario Navigation Co.* v. *Owners of s.s. Cape Breton* (5).]

Owen Dixon K.C., in reply. An *inter se* question arises whenever the question is how much Federal power there is and the answer to that question necessarily imports that there is either more or less absolute power in the State than there otherwise would be. Applying that to this case, if the State, having power to legislate on the question whether there shall be a right of appeal to the Privy Council, grants such a right, the answer to the question has the Federal Parliament power to say that there shall not be such an appeal must, if the answer is in the affirmative, involve the reduction of the State power to legislate on the subject. The "absolute power" of the State means the power which the State can exercise without possibility of interference by Federal legislation. The question may arise in any manner, and is not necessarily one of the issues between the parties; it is a legal question to be solved. It must be a question logically involved as a matter of law in the determination of the case. There is not any necessity for a conflict between Commonwealth and State or between Commonwealth legislation and State legislation. [Counsel referred to *Cameron's Canadian Constitution and the Judicial Committee*, p. 37; *R.* v. *Eduljee Byramjee* (6); *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (7).]

Cur. adv. vult.

April 20.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND POWERS JJ. *The Commonwealth and Others v. Bardsley.*—This was an appeal by special leave from an order of the Full Court of the Supreme Court of Victoria giving

(1) (1832) 2 Knapp 72.
(2) (1856) 6 Moo. Ind. App. 448.
(3) (1905) 2 C.L.R. 315.
(4) (1919) A.C. 935, at p. 944.
(5) (1907) A.C. 112.
(6) (1846) 5 Moo. P.C.C. 276, at pp. 294-295.
(7) (1915) 20 C.L.R. 148, at p. 177.

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leave to the respondent Bardsley to appeal to the Privy Council from a judgment of the Full Court of the Supreme Court of Victoria dismissing his appeal from the judgment of the trial Judge—*Cussen* J.—dismissing the action.

The action was brought in the Supreme Court to recover a share in certain money alleged to have been received by the Commonwealth or by some or one of the other defendants, upon trust for the persons who had supplied skin wool under the Wool and Sheepskin Regulations. The action was dismissed mainly on the ground that the matter in issue was concluded by the decisions of this Court and of the Judicial Committee in *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (1). The plaintiff — the present respondent — appealed from the judgment of *Cussen* J. to the Full Court of the Supreme Court of Victoria. The right of appeal from a single Judge of the Supreme Court to the Full Court is given by sec. 30 of the Victorian *Supreme Court Act* 1915, and depends on this statutory provision.

On the hearing of the appeal counsel for the present appellants contended that the Full Court had no jurisdiction to entertain the appeal because the jurisdiction exercised by *Cussen* J. was Federal jurisdiction conferred by sec. 39 of the Commonwealth *Judiciary Act* 1903-1920, and sub-sec. 2 (*a*) of that section provided that the only right of appeal was to the High Court, the decision of the trial Judge being a decision of the Supreme Court within the meaning of that sub-section. It was not denied that *Cussen* J. in entertaining and deciding the cause was exercising Federal jurisdiction with which the Supreme Court was invested by sec. 39 (2) of the *Judiciary Act*, but it was said that sec. 39 (2) (*a*) did not operate to take away the right of appeal to the Full Court from his decision for the following reasons, namely: (1) that on its true construction the sub-section did not apply to the judgment pronounced on the trial of the action; (2) that if the sub-section did so apply it was rendered ineffective by the operation of the *Colonial Laws Validity Act*, and (3) that the sub-section was beyond the legislative competence of the Commonwealth Parliament.

The Full Court rejected the first and second of these contentions, and it therefore became necessary, in order to determine whether

(1) (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

the appeal was competent, to decide whether sec. 39 (2) (*a*) was a valid exercise of the legislative power of the Commonwealth. In other words, the question whether the enactment was valid was a question "arising," within the meaning of that word as used in secs. 38A and 40A of the *Judiciary Act*. It follows that, if that question was one as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State, the Supreme Court had no jurisdiction to decide it, and that on the question arising the duty of that Court was to proceed no further in the cause, which was by force of sec. 40A of the *Judiciary Act* removed into this Court. The validity of secs. 38A and 40A is established by the decision of this Court in *Pirrie* v. *McFarlane* (1). We entertain no doubt that the question which thus arose for decision was a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of Victoria. The question was whether the Commonwealth enactment or the *Supreme Court Act* of Victoria should prevail, the former, on the construction adopted by the Full Court, denying the right of appeal from *Cussen* J. to the Full Court which was conferred by the *Supreme Court Act*. The one enactment was an exercise of the constitutional legislative power of the Commonwealth, the other an exercise of the constitutional legislative power of the State of Victoria. If authority be needed for the proposition that the question whether the Federal enactment was valid was a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State, it will be found in the opinion of the Judicial Committee in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2) and in the decision of this Court in *Pirrie* v. *McFarlane*.

Although the cause was at that stage removed into this Court and the jurisdiction of the Supreme Court to deal with it was superseded, leaving nothing to be done by that Court except the ministerial duty of the proper officer imposed by sec. 40A (2) of the *Judiciary Act*, neither party took any steps to obtain a decision of this Court on the merits of the appeal. The Full Court of the Supreme Court proceeded with the hearing of the appeal and dismissed it, the provisions of secs. 38A and 40A of the *Judiciary Act* having

(1) (1925) 36 C.L.R. 170.

(2) (1917) A.C. 528; 24 C.L.R. 396.

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apparently not been sufficiently brought under the notice of the Court. The appeal having been dismissed, the plaintiff applied for and obtained leave to appeal to the Judicial Committee from that judgment, the Full Court which heard the application for leave to appeal accepting as binding on it the decision of the Full Court which heard the appeal, that sec. 39 (2) (*a*) was invalid. The defendants then obtained special leave to appeal to this Court from the order giving leave to appeal; and it is that appeal and that alone which is now before this Court for decision.

In the circumstances it is clear that the Full Court of the Supreme Court had no jurisdiction to entertain the appeal from *Cussen* J. or to pronounce judgment upon it. By force of the statute the whole cause was at that stage removed from the Supreme Court into this Court, and it follows that the order granting leave to appeal to the Privy Council was made without jurisdiction.

In the circumstances we think the order to be made by this Court should be as follows:—A majority of the Court being of opinion that the matter of the appeal from the judgment of *Cussen* J., pronounced on 26th March 1925, to the Full Court of the Supreme Court of Victoria involved a question which arose as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of Victoria, the Court orders as follows, namely:—(1) Declare that by virtue of sec. 38A of the *Judiciary Act* 1903-1920 the Full Court of the Supreme Court of Victoria had no jurisdiction to determine the matter of the said appeal. (2) Declare that upon the said question arising before the said Full Court it was the duty of that Court to proceed no further in the cause in which the said judgment of *Cussen* J. was pronounced, and that such cause was by virtue of sec. 40A of the said *Judiciary Act* removed to this Court. (3) Order that the present appellants or any of them and the present respondent are to be at liberty to apply to this Court in the said cause as they or it may be advised. (4) Discharge the order of the Full Court of the Supreme Court of Victoria dated 4th December 1925 whereby leave was granted to the present respondent to appeal to His Majesty in Council. Costs of this appeal reserved.

The Commonwealth and Others v. Kreglinger & Fernau Ltd. and Another.—The same reasoning leads us to the same conclusion in this appeal.

Isaacs J. I agree with what is said in the judgment of the Chief Justice, *Gavan Duffy* and *Powers* JJ., as to these cases falling within sec. 38A of the *Judiciary Act* and as to the competency of the Commonwealth Parliament to enact that section. But I defer the statement of my reasons for that opinion until I have dealt with the other branch of the cases as argued before us. I refer to the question of the validity of sub-sec. 2 (*a*) of sec. 39 of the *Judiciary Act* as that sub-section stands. Both branches of these cases are highly important to the constitutional power of the Commonwealth; but precedence in importance must unquestionably be given to that concerning sec. 39 (2) (*a*). It means reviewing the *Limerick Case* (1) at the two most sensitive points of its contact with Imperial control, namely, the effect on local tribunals of a standing decision of the Judicial Committee and the control of future appeals to His Majesty in Council. I therefore place it first in order of consideration. The question is: Has the Commonwealth Parliament the power under the Constitution so to regulate the exercise of Federal jurisdiction by a State Supreme Court that appeals from that Court, exercising that jurisdiction, shall be brought only to the High Court of Australia; thus eliminating whatever appeals from the State Court to the Privy Council might otherwise exist? I should first state the concrete controversy that has arisen.

(1) *The Controversy.*—The immediate matter before us is whether the two orders of the Full Court of Victoria, made on 4th December 1925, granting leave to appeal to His Majesty in Council under the Order in Council of 23rd January 1911 should stand or be set aside. That, however, depends on the proper solution of one or both of two problems in debate, constituting the separate branches I have referred to. The first problem is this: Assuming there were in December judgments of the Full Court of the Supreme Court in these two causes, which were valid and operative unless and until reversed or modified on appeal, did sec. 39 (2) (*a*) of the *Judiciary Act* 1903-1920 validly operate so as to make an appeal to this Court

(1) (1924) 35 C.L.R. 69.

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the only appeal legally permissible ? The second may be stated thus : Were there in law in the Supreme Court of Victoria at the time the December orders were made, judgments of the Full Court of 12th November 1925—that is, judgments of which the law would take cognizance and which fell within the Order in Council as judgments in and under the control of the Supreme Court ? The argument for the respondents on the first problem was nominally limited to two points.

Taking the *Limerick Case* (1) as otherwise governing the matter, the Court permitted reconsideration on two grounds only, namely, (1) that it was inconsistent with the prior decision in *Baxter's Case* (2), and (2) that it was inconsistent with the later case of *Union Steamship Co. of New Zealand* v. *Commonwealth* (3). On this, two observations must be made. Sir *Edward Mitchell* clearly stated that he wished to contest the accuracy of the *Limerick Case* generally, and claimed the right to do so. The limitation mentioned was imposed on him *contra voluntatem*, not because his general right to raise any point of law was denied, but because, the matter having been so recently considered at length and determined, the Court thought it useless to reopen it generally. The two points referred to presenting special features were made exceptions. That is the first observation. The second is this : that Mr. *Gregory*, who followed Sir *Edward Mitchell* for the respondents, did in fact cover very much more ground than was strictly limited by the two points referred to. In effect his argument ranged over many of the aspects which were dealt with by the Court in the *Limerick Case* and therefore may properly and, as I think, may desirably be again mentioned here as they have appeared on reconsideration.

(2) *Appeal in Federal Jurisdiction.*—The *Limerick Case* (which did not touch the prerogative right of appeal (4)) admittedly covers the ground of the present cases, however they are regarded. Even if, as was contended, no question arose in December as to the limits *inter se* of the constitutional powers of the Commonwealth and of a State (which I shall for brevity call a question

(1) (1924) 35 C.L.R. 69.
(2) (1907) 4 C.L.R. 1087.
(3) (1925) 36 C.L.R. 130.
(4) (1924) 35 C.L.R., see p. 83.

of limits *inter se*), they are, by concession, cases of Federal jurisdiction, and to such cases the *Limerick* decision applies. For the respondent to succeed, therefore, the *Limerick Case* (1) must be shown to be wrong, even if on the other branch no question of limits *inter se* arose. I shall therefore deal with the matter as if all depended on the broadest way in which the question could arise, though I shall subsequently point out that there are, in my opinion, two other fatal obstacles in the way of the respondents, namely, the scope of the Order in Council itself and a question of limits *inter se* arising in December. The first of the two permitted grounds of attack on the *Limerick Case* was, as stated, the prior decision in *Baxter's Case* (2). That is not a happy standing ground for the respondents. It is true that in that case the Court recognized that the Privy Council had decided the invalidity of par. (*a*) of sub-sec. 2 of sec. 39. But, in the first place, that was in relation to a matter *precisely identical* with that before the Court—a matter in which the State Court had primarily State jurisdiction, a jurisdiction taken away and reconferred, it was said, minus one of its attributes, namely, appeal to His Majesty in Council. The present is not a case of that character, nor was the *Limerick Case*. In the *Limerick Case*, as in this, there was no jurisdiction over the Commonwealth apart from Federal jurisdiction. That was the reason why, in the *Limerick Case*, so much trouble was taken to distinguish the case of *Webb* v. *Outrim* (3). The distinction made it unnecessary to determine the second point in *Baxter's Case*, to which I shall now refer. It was that, in the declared opinion of four of the Justices out of five, even conceding the decision of the Privy Council to be that the enactment dealt with was invalid, this Court was bound, having regard to sec. 74 of the Constitution to form and act upon its own opinion on such a question. All five Justices held that the mere divergence of opinion actually arrived at in such a case afforded no valid reason for granting a certificate. *Baxter's Case*, consequently, offers but little aid to the respondents in this case. The second ground of attack, based on the *Union Steamship Co.'s Case* (4), is really without foundation. It

(1) (1924) 35 C.L.R. 69.
(2) (1907) 4 C.L.R. 1087.
(3) (1907) A.C. 81; 4 C.L.R. 356.
(4) (1925) 36 C.L.R. 130.

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overlooks two considerations. One is on the surface; the other goes to the root of the matter and involves the question of inter-Imperial relations. The surface consideration is so plain that I wonder it was ever overlooked. It was argued that in the *Limerick Case* (1) a mistaken view was held of the effect of the *Colonial Laws Validity Act*, and that this was corrected in the *Union Steamship Co.'s Case* (2). The suggestion was that the majority of the Court in the earlier case thought that, if only the Constitution gave affirmative power to pass any law, that would necessarily establish inconsistency with a prior Imperial Act dealing with the subject matter of that law and applying it to the Dominions. That is a complete misapprehension. The view taken and acted on was indicated in the *Limerick Case* (3) in the words "assuming two Imperial enactments conflict, the later must prevail." The whole inquiry on this point was whether on the true construction of the Commonwealth Constitution the power given to define the Federal jurisdiction of a State Supreme Court was such as, if exercised, would be *quoad hoc* in conflict with the earlier Imperial Act—the *Judicial Committee Act*. The result of construing the Constitution was to lead the majority to the result that the later Imperial Act overrode the earlier in this respect. There will not fail to be observed the clear difference between such a subject and that dealt with in the *Union Steamship Co.'s Case*. It is true that in each case there is an Imperial Act dealing with a matter from an Empire point of view. But still there are inherent and obvious distinctions. The first is that the shipping regulations dealt with in the *Merchant Shipping Act* 1894 and held to prevail concerned themselves with non-Australian ships, and the substantive rights of other parts of the Empire were involved. The Order in Council in question here is wholly concerned with Australian affairs, the local administration of justice. This is a vital distinction, and is a material factor in attracting an opposite conclusion. Having disposed of those two surface grounds of attack, there remain some fundamental considerations which are brought into view by the more general arguments by which the grounds themselves were sought to be supported. To make the

(1) (1924) 35 C.L.R. 69. (2) (1925) 36 C.L.R. 130.
(3) (1924) 35 C.L.R., at p. 96.

process of reasoning clear, I approach the matter by two steps: (*a*) the power to define the Federal jurisdiction of the Supreme Court given by the Constitution, and (*b*) the repugnancy of sec. 39 (2) (*a*) to the *Judicial Committee Act* 1844. The first step is on entirely familiar lines of jurisprudence; the second must take account of the vital processes of constitutional life and involves the action of responsible government in the constituent elements of the British Empire.

(*a*) *Defining Federal Jurisdiction.*—On the supposition that the Order in Council includes Federal jurisdiction, the quest is what is comprised within the legislative power conferred by sec. 77 (II.) of the Constitution. I do not see how it can be denied that on a given subject of Federal jurisdiction the Commonwealth Parliament might competently make the jurisdiction *completely* exclusive in the High Court. It might—and perhaps, if by means of appeals under an Order in Council the object of sec. 74 could, contrary to the expressed will of the Commonwealth Parliament, be frustrated, it would be compelled to—exclude the Supreme Court entirely from all Federal jurisdiction. And see the *Limerick Case* (1). But if the Parliament may completely exclude Supreme Courts by leaving matters entirely from first to last in the Federal Court, why cannot the Parliament do as it has done, namely, leave Federal jurisdiction in the High Court with limited exceptions? One of those exceptions is up to the point of judgment delivered and enforced. But if at any point a specified event happens, be it a question *inter se* as in sec. 38A or a challenge of the judgment as in sec. 39 (2) (*a*), the Parliament at once terminates the exception to the exclusiveness and restores the cause as it then stands to the exclusive jurisdiction of the High Court, the exclusiveness of which primarily is "defined" in sub-sec. 1 of sec. 39 and limited only by what follows. To "define" the extent of the exclusiveness of jurisdiction is to mark out the boundaries.

I have, with *Rich* J., in the *Limerick Case* (2), on the authority of Lord *Westbury's* judgment, stated that a right of appeal "is in effect a limitation of the jurisdiction of one Court, and an extension of the

(1) (1924) 35 C.L.R., at p. 90.

(2) (1924) 35 C.L.R. 69.

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jurisdiction of another" (*Attorney-General* v. *Sillem* (1)—a case touching rules of Court, not legislation). This was referred to as "well settled" by *Kennedy* L.J. in *National Telephone Co.* v. *Postmaster-General* (2). The process is effected by the creation of a civil right on the subject, by the competent law of the territory (see the *Limerick Case* (3)). The principle follows from the nature of jurisdiction, so far at least as regards the territory over which the legislator's authority extends. Judicial jurisdiction, unless specially limited, connotes the legal power of enforcement, though the apparatus necessary for actual enforcement in the shape of officials may be withheld by the Legislature or the Executive.

In *Virginia* v. *West Virginia* (4) *White* C.J., speaking for the whole Court, said "that judicial power essentially involves the right to enforce the results of its exertion is elementary." Several prior authorities are there quoted. It is in essence what *Kindersley* V.C. said in *Bond* v. *Bell* (5). In *Erskine's Institute of the Law of Scotland* (edition of 1871), at p. 26, it is said: "Jurisdiction is a power conferred on a Judge or magistrate to take cognizance of and determine debatable questions according to law, and to carry his sentences into execution." A sheriff is always held strictly to his duty in executing writs, because, as *Coltman* J. said for the Court in *Howden* v. *Standish* (6), "it is a disgrace to the Crown and the administration of justice, if the King's writs remain unexecuted." It is, therefore, an undue limitation of the word "jurisdiction" to confine it to the mere decision as to the rights of the parties. A right of appeal is a right to intercept or prevent sooner or later the execution of the judgment by reversal or modification or other appellate order. It is, of course, quite true that the local Dominion law cannot coerce or thrust jurisdiction on any tribunal beyond the local limits of the Dominion itself, unless so authorized by clear Imperial legislative enactment. Nevertheless, appeals to the Privy Council by force of local law have long been recognized and heard by the Judicial Committee. Under Victorian law, now represented by secs. 232 to 234 of the *Supreme Court Act* 1915, many appeals have been permitted and

(1) (1864) 10 H.L.C. 704, at p. 720.
(2) (1913) 2 K.B. 614, at p. 621.
(3) (1924) 35 C.L.R., at pp. 90-93, 109.
(4) (1918) 246 U.S. 565, at p. 591.
(5) (1857) 4 Drew. 157.
(6) (1848) 6 C.B. 504, at p. 520.

have been heard. So in Canada under the local *Code of Civil Procedure* (see *Goldring* v. *La Banque d'Hochelaga* (1) and *E. W. Gillett & Co.* v. *Lumsden* (2)). The full significance and extent of this recognition I am neither required nor in a position to determine. But there certainly appears to be an appreciable, if still indefinable, growth of Dominion authority with reference to the grant of appeals from the local territory to His Majesty in Council. So far as that process is material to this case, I shall refer to it, and no further. It concerns the relation the Constitution, with respect to the matter in hand, bears to the *Judicial Committee Act* (7 & 8 Vict. c. 69), and therefore concerns the application to this case of the *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 63). The last-mentioned Act, as has so often been stated, enacts that to the extent of "repugnancy" a colonial law repugnant to an Imperial Act or order or regulation made under an Imperial Act shall "be and remain absolutely void and inoperative."

(*b*) *Repugnancy to Judicial Committee Appeal Act and Order.*—The word "repugnancy" was once more the subject of discussion, though I do not think its signification admits of any doubt. The word "repugnant," and its corresponding substantival form "repugnancy," are the constant expressions in English legislation and its official equivalent. I have, in an earlier case, considered the word as to its origin in colonial administration, and there arrived at the conclusion that "inconsistency," "repugnancy" and "contrariety" are interchangeable terms in this connection (see *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (3), and see also *Union Steamship Co.'s Case* (4)).

The question then is whether the provision made by par. 2 (*a*) of sec. 39 of the *Judiciary Act* is repugnant to the *Judicial Committee Act* in the sense mentioned. To make my meaning quite clear—and in view of the discussion in this case I think it ought to be made altogether clear—I repeat it is not sufficient in order to avoid repugnancy to say in every case that the Constitution taken by itself would authorize the local Act. There may, at the time the local Act is passed, be in existence another Imperial Act dealing

(1) (1880) 5 App. Cas. 371.
(2) (1905) A.C. 601.
(3) (1915) 20 C.L.R., at pp. 166-168.
(4) (1925) 36 C.L.R. 130.

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with the subject matter and so applying to the Dominion that the power contained in the Constitution must be read as subject to the provisions of the Imperial Act. If that is the case, a local statute which looks only to the affirmative power appearing in the Constitution and disregards the other Imperial Act by transgressing its limitations would be repugnant to the last-mentioned Act, and so fall within the operation of sec. 2 of the *Colonial Laws Validity Act*. In that case the other Imperial Act would, on the assumption made, if anterior, be still in force and, if posterior, be overriding, in relation to the Constitution. This position is clearly stated in *McCawley* v. *The King* (1).

But that all depends on the result of the necessary preliminary inquiry whether the other Imperial Act does or does not control the power contained in the Constitution. We must always first find the power relied on as prima facie contained in the Constitution on its true construction: otherwise the question of repugnancy cannot arise. It would otherwise be at the very threshold simply *ultra vires* of the local legislature from the standpoint of the Constitution alone. Supposing either by reason of an anterior but still limiting Imperial Act or of a later limiting Imperial Act the prima facie power contained in the Constitution is less than it appears on its own language taken alone, the local Act which exceeds the limitation is by reason of its repugnancy *ultra vires*, but only to the extent of the repugnancy. The opinion of Sir *Roundell Palmer* and Sir *Robert Collier*, to which I referred at some considerable length in *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (2) and *McCawley* v. *The King* (3), was that the effect of repugnancy at common law was that "the subject matter of the invalid part of the legislation is wholly *ultra vires*." Unless separable, that would bring to naught the whole of the legislation containing the invalid part. To save this total invalidity sec. 2 of the *Colonial Laws Validity Act* was passed. The section is, to my mind, rather a saving than a destructive provision. The effect of sec. 3 in this respect has, perhaps, not been fully recognized, and the two sections must be read together. If the result of comparing two

(1) (1918) 26 C.L.R. 9, at pp. 50, 51. (2) (1915) 20 C.L.R., at p. 167.
(3) (1918) 26 C.L.R. 9.

Imperial enactments, whichever is first, is that one cuts down the other, then, whatever legislation is passed under the assumed authority of that other, but transgresses the limits to which it is reduced, is necessarily *ultra vires*. It does not need sec. 2 of the *Colonial Laws Validity Act* to destroy it. That section really says that so far as *Imperial Law* is concerned the local Act (apart from the repugnant portions) may remain valid. Whether after excluding the repugnant portions the local Act operates as the will of the local legislature is another question. But the converse position is important. Supposing on a comparison of the two Imperial Acts the Constitution is found on proper construction to be unaffected and unlimited in the relevant respect by the *Judicial Committee Act*; in other words, if the Constitution not only affirmatively gives the requisite power but also gives it free from any limitation of the earlier Act, that is (as said in the *Limerick Case* (1)) "assuming" the "two Imperial enactments conflict," the later—the Constitution —must prevail.

I have already shown that the affirmative power of limiting the Federal jurisdiction of the Supreme Court at any point of that jurisdiction is contained in the Constitution. That in itself is, in my opinion, sufficient to establish the dominance of the Constitution in relation to the *status*, so to speak, of the "cause," by which I mean whether it remains a Supreme Court cause or becomes by force of law a High Court cause. But beyond that feature, which is one of verbal construction, there is another of paramount importance to Australia as a self-governing community and which has not, I fear, received the specific weight to which it is entitled. It has, as I conceive, tacitly influenced the practical recognition by the Judicial Committee of the grants by colonial Courts of leave to appeal under colonial Acts of Parliament to which I have already referred. That feature, specifically stated, is the presence of the principle of responsible government which must, in my opinion, be taken into account by a Court of law in construing every modern Constitution of a self-governing British community.

I apprehend, therefore, that it is the duty of this Court, as the chief judicial organ of the Commonwealth, to take judicial notice, in

(1) (1924) 35 C.L.R., at p. 96.

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interpreting the Australian Constitution, of every fundamental constitutional doctrine existing and fully recognized at the time the Constitution was passed, and therefore to be taken as influencing the meaning in which its words were used by the Imperial Legislature. This Court is necessarily as well acquainted with the advance of constitutional rules and practice, which largely make constitutional law, as the rest of the community. As a living co-ordinate branch of the Government it cannot stand still and refuse in interpreting the law to recognize the advancing frontiers of public thought and public activity, and above all of constitutional doctrines within the Empire. I speak with special reference to the influence of the introduction of responsible government and its development in creating the now well recognized inter-Imperial status of the great self-governing Dominions. Unless the constitutions granted by Imperial authority are to be read by the full light of responsible government, the effective development of the principle itself would be arrested and the basic purpose of the grant frustrated. The principle, however, as applied to self-governing communities within the Empire is recent, and this is a pregnant fact in relation to the alleged repugnancy.

Responsible government applied to the colonies might almost as regards its inception be described as the product of a single day. On 14th October 1839 Lord John Russell, when Secretary of State for the Colonies, wrote a despatch to Lord Sydenham in Canada point-blank refusing to apply the doctrine of local responsible government to Canada, and in effect declaring its incompatibility with Imperial constitutional practice. Two days afterwards, 16th October 1839, he wrote another despatch to Lord Sydenham giving instructions as to the tenure of administrative heads; and this, says Mr. *Mills* in his work on *Colonial Constitutions* at p. 29, has been "regarded as the charter of 'responsible government.'" Mr. *Mills* wrote in 1856, and adds: "This principle is now not only established and acknowledged in the North American provinces, but partially introduced in Jamaica, and prospectively adopted throughout the five chief colonies of the Australasian group." In 1844, when the *Judicial Committee Act* was passed, the doctrine was still in its infancy and had not attained any firm hold in the overseas Dominions.

The Act was apparently the outcome of the position as disclosed in such cases as *In re Cambridge* (1). In 1855, when New South Wales and Victoria obtained their modern constitutions (18 & 19 Vict. chs. 54 and 55), it was novel in Australia. Lord John Russell, in his despatch dated 20th July 1855 to Governor Hotham of Victoria, spoke of "the introduction of responsible government," and referred to the Victorian Constitution as a "grant of self-government in more ample measure than has as yet been established in any colony of Great Britain." We know, and all the world knows, and we cannot in interpreting modern constitutions of the Empire ignore, the tremendous advance in status of the Dominions within the Empire even before 1900. That is only another mode of expressing the advance of local responsible government. Constitutions made, not for a single occasion, but for the continued life and progress of the community may and, indeed, must be affected in their general meaning and effect by what Lord *Watson* in *Cooper* v. *Stuart* (2) calls "the silent operation of constitutional principles." "Responsible government," said Lord *Haldane* on an occasion referred to in the *Engineers' Case* (3), is "the greatest institution which exists in the Empire, and . . . pertains to every constitution established within the Empire." And it was to this Constitution that Lord *Haldane* was specially directing his words. It is part of the fabric on which the written words of the Constitution are superimposed. Its influence upon the actual working of the letter of local constitutions has been the acceptance of a doctrine, amounting almost to a principle in itself, that the great self-governing Dominions are not any longer in tutelage but are constituent units of the British Commonwealth of Nations. The doctrine cannot be ignored in construing a recent written instrument of constitutional powers. It is now more than a high-sounding phrase or a statesman's aspiration. It is an acknowledged working thesis of the unwritten constitution of the Empire. Perhaps, since the Act 12 Geo. V. c. 4, the *Irish Free State* (*Agreement*) *Act*, and in view of the terms of the first and fourth articles of the agreement which by Imperial law is given "the force of law," it would be more correct to say that *the*

(1) (1841) 3 Moo. P.C.C. 175. (2) (1889) 14 App. Cas. 286, at p. 293.
(3) (1920) 28 C.L.R., at p. 147.

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Constitution of the Empire is now so far written. That Act may, in my opinion, be judicially said to have placed the seal of formal legal recognition on the actual character which the separate written constitutions of the great self-governing Dominions by force of general constitutional development already possessed. It is a conscious step in the legal evolution of the Empire. Taking those great and commanding principles in hand and applying them to the interpretation of the Australian Constitution, I cannot doubt that it is well within the power of the Australian Parliament, notwithstanding any existing Imperial legislation prior to the Constitution, when investing a State Supreme Court with Federal jurisdiction so to limit that investiture as to direct the stream of judicial power at any given point into the High Court. Whatever subsequent course that stream may take depends in that case on secs. 73 and 74 of the Constitution and on any step by certificate or legislation which may follow by authority of those sections. In relation to the present matter the Australian Constitution is not subordinate to, but is *pro tanto* superior to, the earlier Act, the *Judicial Committee Act,* passed at an earlier stage of constitutional development. The significance of that fact is apprehended when it is remembered that the *Order in Council is an Executive act* to which statutory force is given by the Act under which it is made. But it is an Executive act on the advice of Imperial Ministers responsible only to the Imperial Parliament and yet controlling the civil rights of Australian citizens in Australia to appeal on (assumedly) Federal questions. Though the Order in Council is, for purposes of repugnancy to colonial Acts and consequent invalidity, placed on the same footing as the Act under which it is made, yet it is not on the same footing for all purposes. It is not, for instance, in the same position as the direct regulative provisions of Parliament in the *Merchant Shipping Act* 1894. It needs the intermediate operation of responsible administration ; and when that is a factor, it may entirely alter the emphasis to be placed on the later instrument of self-government. That instrument in this case must, in my opinion, be read as modifying the earlier enactment, at least to the extent of leaving the will of the Australian national Parliament on the subject of civil rights in Australia, in relation to Federal matters specifically

enumerated in the Constitution, free from the control of Imperial ministerial discretion. For that reason, even if it were the only reason, the *Colonial Laws Validity Act* has no application to this case. But, as already indicated, there are other reasons pertinent to this branch of the case. They are the scope of the Order in Council itself, and the *inter se* question that arose in December.

(c) *The Order in Council.*—At p. 105 of the report of the *Limerick Case* (1) it is said: "The ambit of the Order in Council of 1909 does not extend to embrace Federal jurisdiction." In the judgment referred to, it was made as clear as possible that the Colonial Office opinion, for reasons given, was that the Orders in Council applied both to Federal and State jurisdiction. Nevertheless, the construction of the Order in Council of 1909 for New South Wales and the patent provisions of the Constitution did not appear to *Rich* J. and myself on judicial construction to bear out either the opinion or the reasons. Reading the Order in Council of 1911 applying to Victoria, I come to the same conclusion and on the same grounds. The Order in Council is one of a series throughout a great part of the Dominions, and its origin, as one of a uniform series applying to the several communities of the Empire named in each number of the series, can be found in the report of the Colonial Conference of 1907 in the chapter relating to an Imperial Court of Appeal. This Order in Council recited: "Whereas the Colony of Victoria is now a State of the Commonwealth of Australia" &c. That implies, primarily at all events, that *Victoria* is being legislated for as that political organism called a *State*. In other words, it is "Victoria" that is the dominant feature as the particular and distinct self-governing community under consideration. Comparison with the former Order in Council of June 1860 will make this conspicuously clear. It is "Victoria" apart from New South Wales and other Australian States, and not in conjunction with the other States, for which appellate rules are about to be made. Then comes the passage which I regard as the governing operative clause of the Order in Council to which subsequent words, however wide, must be referred. It is as follows: "It is hereby ordered by the King's Most Excellent

(1) (1924) 35 C.L.R. 69.

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Majesty, by and with the advice of His Privy Council, . . . that . . . the Rules hereunder set out shall regulate all appeals to His Majesty in Council from *the said State of Victoria.*" Subsequently we find numbered rules; but they are all of them "the Rules" referred to in the governing operative provision quoted. Some of those Rules, I venture to say, if inclusive of Federal jurisdiction are inconsistent with adherence to sec. 74 of the Constitution, except perhaps in the barest form of literalism: for instance, the concluding words of rule 2 conferring on the Supreme Court discretion to allow an appeal to His Majesty in Council in any matter which, not reaching the standard set in the first paragraph of the rule, is such as *in the opinion of the Court*, "by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision." I am of opinion that those words are not intended to enable the Supreme Court to send on for appeal to the Privy Council a case in Federal jurisdiction in which the Supreme Court has followed a prior decision of the High Court as to the constitutional powers *inter se* of the Commonwealth and the State. That would be giving the rule a subterranean effect which I decline to attribute to it. But if not, the consequence is that Federal jurisdiction is not within its ambit. Then as to rule 6. That rule seems to me altogether inconsistent with Federal jurisdiction. For instance, suppose in this case the judgment of *Cussen* J. and the Full Court in November were that the Commonwealth should pay £1,000,000 or some other sum out of the Treasury; I cannot think that the Order in Council meant that the Supreme Court and no other tribunal in Australia was empowered by Imperial authority to enforce execution, even though a constitutional question were the test, leaving ultimate restitution in case of reversal to be secured as the Supreme Court thought expedient. As the highest State judicial organ, that can well be understood; but as the judicial agent of the Commonwealth subject to appeal to the highest Commonwealth Court, it is beyond my comprehension. Rules 11, 12, 13 and 24 contemplate the record and case being printed either in England or in *Victoria*. The Commonwealth Government, if the appellant, could not consistently with the Order in Council have the record printed in Canberra or Sydney. Why not, if Federal

cases are included? And particularly when, as in Nova Scotia (Order in Council, 5th July 1911), Alberta (Order in Council of 10th January 1910, rr. 10 and 11, 12, and 13), British Columbia (Order in Council of 23rd January 1911), Manitoba (Order in Council of 28th November 1910) and New Brunswick (Order in Council of 7th November 1910), the record may be printed in England or *Canada*. In truth, one cannot fail to see in sec. 73 of the Constitution a very clear distinction between the Supreme Court as the judicial organ of the State, and a State Court as a judicial organ of the Commonwealth. The "High Court," "any other Federal Court" (that is, one created by the Parliament) and a "Court exercising Federal jurisdiction" (that is, any State Court invested or acting as invested with Federal jurisdiction) form one class of tribunals. In relation to these the High Court is a Federal Court of Appeal. Then "the Supreme Court of any State" to which, in my view, as I shall later more particularly show, the Order in Council applies, is the highest State Court *as such* exercising State jurisdiction and in relation to which the High Court is an appellate Court in a different, that is, non-Federal, character. For these reasons, as well as for others stated in the *Limerick Case* (1), relevant to this branch of the subject, particularly at pp. 104-105, I hold that the Order in Council is extraneous to the cause with which we are dealing. That in itself would be a sufficient reason to allow the appeal, since it leaves the order under appeal without foundation.

(*d*) *Inter se Question in December.*—I assume, contrary to my view, that the question in November was not one of an *inter se* nature, but merely one of general Federal jurisdiction. That is to say, that the exclusion of State jurisdiction is accompanied by a complete investiture of Federal jurisdiction original and appellate according to the ordinary *cursus* of the Supreme Court. The question in November then would have been, not as to conflict between Commonwealth and State powers, but as to the Commonwealth's constitutional power either *simpliciter* or *vis-à-vis* some Imperial law. As the Commonwealth law stands at present, that question would be within the Federal jurisdiction of the Supreme Court to entertain and determine, subject to whatever right of

(1) (1924) 35 C.L.R. 69.

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appeal to the Privy Council or to this Court that might lawfully exist. The Court in December would, in that view, have had before it an existing Supreme Court cause with an existing Supreme Court judgment lawfully pronounced, that is, with jurisdiction to pronounce it, whether erroneous for any reason or not.

Then, what was the nature of the question that presented itself in December when learned counsel for the Commonwealth objected to an order for leave to appeal to the Privy Council on the ground that sec. 39 (2) (*a*) of the Commonwealth *Judiciary Act* excluded it? If we limit our vision to conflict of rival legislative powers, it is at once evident that in this case sec. 38A of the *Judiciary Act* would not apply. This, for the reason that no legislative power of the State came into the arena, since the Supreme Court was proceeding solely under the Imperial Order in Council. But so to limit our vision is to contract it. Sec. 38A, like sec. 74 of the Constitution that it is enacted to serve, is not limited to the *legislative* powers of any of the political organisms—Commonwealth and States—therein mentioned. The "powers" are all or any of the powers of the political organism functioning in any of its governmental capacities. Theoretically it is His Majesty the King acting in any of his great capacities—as legislator, administrator or judge—and in each capacity by his appropriate constitutional agent. The constitutional powers of the State mean only the constitutional authority of the *King in right of the State* to act in any of those capacities. Sec. 74 of the Constitution of Australia says nothing as to the immediate *source* of the contested power; it is the *existence* of the power that is material. That depends on a survey of all relevant constitutional law, which, as stated in *Halsbury's Laws of England*, vol. VI., par. 454, "may be said to embrace all rules which directly or indirectly affect the distribution or exercise of the sovereign power in the State, and the relations which the component parts of the sovereign power bear toward each other and to the subject." This point was really at the root of *McCawley's Case* (1), and was explicitly dealt with by *Rich* J. and myself at pp. 52 and 53 of the earlier report, to which I refer without repeating. One of the suggested competing constitutional rules is that created by the Order in Council. A very

(1) (1918) 26 C.L.R. 9; (1920) A.C. 691; 28 C.L.R. 106.

instructive illustration of the concept is found in the *British North America Act* 1867 (30 & 31 Vict. c. 3), sec. 64, stating (*inter alia*) that "the Constitution of the Executive Authority in . . . Nova Scotia . . . shall, subject to the provisions of this Act, continue as it exists at the Union until altered under the authority of this Act." Now, as pointed out in *Clement on the Canadian Constitution*, 1st ed., at p. 40, the Constitution of Nova Scotia consisted then of nothing but Royal Commissions and Instructions (and see 2nd ed., p. 2). The King's power in Victoria of granting by his Supreme Court of Victoria to his Victorian subjects leave to appeal to himself in Privy Council is a power to act judicially in right of his State of Victoria, and is properly called in law a constitutional power of that State. It is part of the law of the land relative to the subject matter. If it is not part of the constitutional power of the State, neither is the King's power by his High Court of Australia to do the same thing by certificate under sec. 74 of the Australian Constitution a constitutional power of the Commonwealth. There can be no distinction in this respect between judicial power and legislative power. Therefore the legislative aspect does not exhaust the situation, and the matter cannot be disposed of summarily by saying: "It is a contest between the Imperial Act sustaining the Order in Council on the one hand and the Commonwealth Act denying the efficacy of the Order in Council on the other; therefore there is no Australian question *inter se*." There was a distinct question *inter se*. The objection taken in December was that the Supreme Court, that is, the *judicial organ* of the State, has no power in face of the Commonwealth *legislation* to make such an order. There was a question of conflict whether one power of the State, namely, its *judicial power*, or one power of the Commonwealth, namely, its legislative power, should prevail. The contest was which of these two Australian powers of the Crown—the State judiciary power or the Commonwealth parliamentary power—dominated in the case before the Court. This was clearly indicated in the *Limerick Case* (1) (and see *Pirrie* v. *McFarlane* (2)). It is nothing to the point to say an Imperial Act was behind the State

(1) (1924) 35 C.L.R., at p. 102, last 8 lines.
(2) (1925) 36 C.L.R., at pp. 194-195.

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Court. So is there an Imperial Act behind the Commonwealth legislation. Imperial Acts stand mediately or immediately behind every governmental function in Australia. We have to get closer to the matter than that; and it comes down at last to power of the State as Judge (by virtue, no doubt, of Imperial legislation) as opposed to the power of the Commonwealth as *legislator* (by virtue also of Imperial legislation). Otherwise it is always a conflict between Imperial Acts; for it is not consistent to regard the Commonwealth's legislative capacity as one competitive factor, regardless of the Imperial authority behind it, and to ignore the State's judicial capacity and look only to the Imperial authority behind it. To do that would form an easy way through sec. 74 of the Constitution. In my opinion, therefore, the moment there arose in December the question *inter se*, the "matter," that is, the whole controversy between the parties, took on the character described in sec. 38A, and with the consequences provided by that section and sec. 40A. These sections I shall presently more closely deal with. The cause as it then stood was removed into this Court, not for the purpose of exercising any of the powers of the Supreme Court under the Order in Council, but for the purpose of determining whether sec. 39 (2) (*a*) was operative or not in insisting that no appeal lay except to this Court. If yes, then the application must be dismissed as incompetent. If no, then "the cause" could be fairly said to be one that should be remitted to the Supreme Court to be dealt with. I have said so much in deference to Mr. *Gregory's* very earnest argument as to the applicability of sec. 38A to the case, in view of the language of sec. 40A.

That consideration again suffices to end the matter. There are other reasons for this conclusion; and, so far as I am concerned, they are to be found generally in the judgment of *Rich* J. and myself in the *Limerick Case* (1). That brings me to the second branch of the case in which, as stated, I am in entire accord with the Chief Justice.

(3) *Secs.* 38A *and* 40A.—The validity of these sections is not disputed, and is, indeed, indisputable. They are an exercise of the legislative power conferred by sec. 77 (II.) and sec. 51 (XXXIX.) of the

(1) (1924) 35 C.L.R. 69.

Constitution (see *Ex parte Walsh and Johnson* (1)). Sec. 38A marks, as the terminus *ad quem* of the jurisdiction of the Supreme Court of a State to entertain any matter, the moment it involves "any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State" &c. In such a matter the section prescribes the High Court shall have exclusive jurisdiction and the Supreme Court shall have no jurisdiction "to entertain or determine" any such matter, either originally or on appeal. Then sec. 40A, consequentially and *proprio vigore*, removes the matter (if a "cause") instantly into this Court, where in contemplation of law it awaits determination. The physical act of transmitting the proceedings from the Court where the cause previously was to the Court where it henceforth is, unless remitted under sec. 42, is a mere ministerial and administrative act, and is not an essential factor in the loss or acquisition of jurisdiction. If, therefore, before the application in December for leave to appeal under the Order in Council, the cause had already, by force of secs. 38A and 40A, been "removed" from the Supreme Court to this Court, it is manifest that the order of December was an order based on nothing, there being no such cause in the Supreme Court. Further, if that removal took place, not only before the application in December, but also before the pronouncement of the judgment of November, it follows equally that that judgment was based on a non-existent proceeding so far as the Supreme Court was concerned. The cause had already disappeared from the Court, and was resident in this Court. That it had so disappeared is beyond question when the reasons for the judgment of November are read.

The reasons of the majority (*Irvine* C.J. and *Mann* J.) make it clear that a question of conflict of powers necessarily arose in the Court as soon as sub-sec. 2 (*a*) of sec. 39 was construed as intending to prevent an appeal to the Full Court of Victoria from the decision of *Cussen* J. sitting in original jurisdiction. The position cannot be stated more clearly than in the following words of *Mann* J. (2): "It would appear therefore that in any matter falling within the opening words of sec. 39 (1) the right of appeal from a single Judge of this Court to the Full Court is taken away by sub-sec. 2 (*a*), and

(1) (1925) 37 C.L.R. 36.

(2) (1925) 47 A.L.T., at p. 187.

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that *we have perforce to consider the question of the validity of sec.* 39 in the light of the decisions of two Courts of binding authority." Their Honors then did consider that question, and determined it on their own independent view of what the earlier case, namely, *Webb* v. *Outrim* (1), actually decided. In so doing, there are some observations which seem to regard what I said in the *Limerick Case* (2) as supporting an obligation to do so. I desire to clear this up. Nothing was further from my intention, and when my words are examined I do not think they can bear that interpretation. The Privy Council case had been previously examined by *this* Court, but, not having been so precisely passed upon as to govern the case then before us, the judgment, I thought, had to speak for itself. There was no question of our choosing between two Courts of binding authority in relation to this Court. If, for instance, this case had arisen in the Supreme Court of New South Wales instead of the Supreme Court of Victoria, there is nothing either in my words or in the nature of the case which would have supported the view that the Supreme Court of New South Wales could have considered the matter afresh for itself so as in effect to overrule the previous decision of this Court. And what is true of one State Court is true of all State Courts. As well might a County Court of Victoria or a District Court of New South Wales apply its own mind to determine whether, in a case exactly in point, the Supreme Court of the State was right or wrong in its previous determination as to the scope and effect of a prior judgment of the Privy Council or of this Court in State jurisdiction. If the matter had fallen within the jurisdiction of the Supreme Court to decide the constitutional question, I entertain no doubt that the simple duty of the Supreme Court—and this is in accordance with the opinion of *Macfarlan* J.—was to follow the deliberate and considered judgment of this Court in the *Limerick Case*. But the position having arisen, as I have stated, the moment the necessity for deciding the validity of sec. 39 (2) (*a*) arose, the matter involved a question as to the limits *inter se* of the Commonwealth and the State of Victoria. That a constitutional question in Federal jurisdiction arose no one can reasonably deny.

(1) (1907) A.C. 81 ; 4 C.L.R. 356.

(2) (1924) 35 C.L.R., at p. 93.

In my opinion also, it was a constitutional question of the nature predicated. Some difference of opinion may arise as to that giving rise to the first problem stated earlier. But the reason I think the question is of the *inter se* nature is this:—Under the Victorian *Supreme Court Act* 1915, sec. 38, the general jurisdiction of a single Judge to hear causes is "subject to appeal . . . to the Full Court." Sec. 39 (2) of the *Judiciary Act* proceeds to confer Federal jurisdiction on State Courts including the Supreme Court in terms which include appellate jurisdiction as in State matters if not otherwise excluded. On the construction of sub-sec. 2 (*a*) adopted by the Supreme Court the appellate jurisdiction under sec. 38 of the State Act is excluded. Then arose the question of validity of sub-sec. 2 (*a*)—which, for this purpose, may be put in the form stated at the beginning of this judgment. That was the question as it appears to have presented itself to the Supreme Court also, and, in my opinion, it was a question of the nature required by sec. 38A. In the result, the cause instantly stood removed to this Court *prior to the judgment of November* and there was no jurisdiction to further entertain it and none to determine it. The judgment of November was a nullity (*Attorney-General* v. *Hotham* (1)). The case at that point resembled the third class of cases mentioned in *Colonial Bank of Australasia* v. *Willan* (2). The Court was "bound to hold its hand," and *eo instanti* sec. 40A operated and removed the cause to this Court. The order of December was consequently in respect of a non-existent cause so far as the Supreme Court was concerned. The inapplicability of the Order in Council to such a state of affairs will be even more fully appreciated when, for instance, rules 6 and 27 of the Order in Council are read. The decision in the *Limerick Case* (3) was, in my opinion on reconsideration, a correct one.

The result is that, from whichever of the two aspects the case is viewed, the appeal should be allowed, and the proper order is that which has already been pronounced. It is scarcely necessary to add that, if the substantive appeal from *Cussen* J. be proceeded with before this Court, the construction given by the Full Court of Victoria to par. (*a*) of sub-sec. 2 of sec. 39, as to the application of *Parkin* v. *James* (4) to that paragraph, will be open for consideration.

(1) (1823) Turn. & R. 209, at p. 219.
(2) (1874) L.R. 5 P.C. 417, at p. 444.
(3) (1924) 35 C.L.R. 69.
(4) (1905) 2 C.L.R. 315.

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HIGGINS J. In each of these appeals an order which satisfies the majority of the Court has been already pronounced; but the reasons have been postponed. It is my unpleasant duty to express dissent from the order.

Each appeal is against an order of the Full Supreme Court of Victoria, 4th December 1925, which gave leave to the plaintiff to appeal to the Privy Council in pursuance of the Order of His Majesty in Council, 23rd January 1911. No appeal has been brought against any previous judgment or order of the Supreme Court—for any previous judgment or order was in favour of the appellant; yet, under the form of order pronounced by this Court, it is, on the one hand, declared that a previous order of the Full Supreme Court, 12th November 1925, dismissing an appeal from the judgment of *Cussen* J. as trial Judge, was made without jurisdiction; and, on the other hand, the order giving leave to the plaintiffs to appeal to the Privy Council from the order, so made without jurisdiction, is "discharged." I confess that I cannot understand how this Court has even jurisdiction to make such an order as pronounced.

But this point has not been argued; and, putting it aside, I propose to examine the ground on which it is alleged that the order of the Full Court dismissing the appeal from *Cussen* J. was made without jurisdiction. The ground is that the decision of this appeal involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of Victoria; then, under sec. 38A of the *Judiciary Act* 1903-1920, the Full Supreme Court had no jurisdiction to entertain the appeal; that under sec. 40A the appeal forthwith stood removed to the High Court; and that therefore the Full Supreme Court made its order as to a cause which was not before it.

In my opinion, the decision of the appeal from *Cussen* J. to the Full Court did not involve, either logically or actually, any question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State. It is true that there was involved a question as to the powers of the Commonwealth Parliament under the Constitution Act—the question whether sec. 39 (2) (*a*) of the *Judiciary Act* was valid. But such a question is radically different from the kind of question referred to in sec. 38A (following sec. 74

of the Constitution). It seems to me that the full force of the words "limits *inter se*" and "constitutional" has been overlooked.

The position is that in 1903, by the *Judiciary Act*, the several Courts of the States were invested with Federal jurisdiction "*within the limits of their several jurisdictions*," but subject to this condition or restriction (sec. 39 (2) (*a*)): "(*a*) Every decision of the Supreme Court of a State . . . shall be final and conclusive except so far as an appeal may be brought to the High Court." At that time, 1903, questions as to limits *inter se* were included in the grant of Federal jurisdiction to the State Courts; but in 1907, in consequence of the decision of the Privy Council in *Webb* v. *Outrim* (1), sec. 38A was inserted, which deprived the State Courts of jurisdiction over matters involving questions as to limits *inter se*. Afterwards, in 1911, an Order in Council was made by the King, following the decision in *Webb* v. *Outrim*, and providing, as to Victoria, that "an appeal shall lie as of right from any final judgment of the" Supreme "Court, where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards." In the appeal to the Full Supreme Court from *Cussen* J., one side urged that sec. 39 (2) (*a*) was valid; and the other side urged that it was not. If it were valid, then appeals from a single Judge to the Full Court, and also appeals from the Supreme Court to the Privy Council, were effectively prohibited. But no question arose as to the validity of the *Supreme Court Act* 1915 (of Victoria), which, by secs. 30 and 38, allows a single Judge to decide an action subject to an appeal to the Full Court. One side urged that under the power in sec. 77 (III.) of the Constitution for the Federal Parliament to "invest any Court of a State with Federal jurisdiction" there was power to divest the Full Supreme Court and to divest the Privy Council of right to entertain an appeal from a Court of the State; the other side urged that the power to invest a Court of the State with Federal jurisdiction was confined to matters internal to the State Court—that it did not extend to the jurisdiction of other tribunals to entertain appeals from that Court.

It is not contended now, as I understand, that there is here any conflict between Federal powers of legislation and State powers of

(1) (1907) A.C. 81; 4 C.L.R. 356.

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legislation; but it is said that the powers of "the State as judge" are in conflict with the powers of the Commonwealth as legislator. I must say, first of all, that I cannot recognize the propriety of the expression "the State as judge"—the State has not the function of judging any more than the Commonwealth has the function of arbitrating (under sec. 51 (xxxv.) of the Constitution). The State has the power of appointing officers to be the King's Judges in the State, to fulfil the King's judicial functions for his subjects. But, apart from this, even if it be conceded that "constitutional powers" are not confined to legislative powers, the power of the Full Supreme Court to entertain an appeal from a single Judge is not a *constitutional* power of *the State*; nor is the power of the Supreme Court to grant leave to appeal from its own judgment to the Privy Council, in pursuance of the Act 7 & 8 Vict. c. 69 and the Order in Council thereunder, a constitutional power of the State. It is a power granted to the Supreme Court, not under the State Constitution, but by the King and the Imperial Parliament. As regards appeals to the Full Supreme Court, the power of the State Parliament to enact secs. 30 and 38 of the *Supreme Court Act* 1915 was not impugned by anyone; nor is it impugned now. This is simply a case of a Federal Act being attacked as being *ultra vires*.

Sec. 74 of the Constitution, from which the words used in sec. 38A of the *Judiciary Act* are taken, is, so far as I know, unique in Constitutions, and must be strictly construed because it reduces the power of the King. It bears the impress of a diplomatic formula devised to disguise a failure to reach a true agreement. It occurs in a British Act creating a Federation—a Federation in which the legislative and other constitutional powers over Australia were to be divided between the States on one side and the Commonwealth on the other. The Commonwealth was to have certain express powers of legislation (secs. 51, 52, 122, &c.), and the States were to have the residuary powers; and Commonwealth as well as States were to have corresponding powers as to the Executive and Judiciary (secs. 61, 71). Then, under sec. 74, decisions of the High Court as to the boundaries of these powers, their *relative* limits, were not to be subjected to appeals from the High Court to the distant Privy Council (unless the High Court gave leave). But sec. 74 does not

apply to mere questions as to the limits of the constitutional powers of the Commonwealth under the Imperial Act, or as to the limits of the constitutional powers of the Commonwealth as between it and the Imperial Parliament.

The Imperial Parliament, through its Act and the Order in Council thereunder, says that there may be an appeal (to the Privy Council); the Federal Parliament says that there may not: can it be reasonably said that a question is involved as to the limits *inter se* of the constitutional powers of the State and the Commonwealth? Surely we ought not, without very express words, to treat sec. 74 of the Constitution as making the High Court the final exponent of the relations between an Imperial Act and a Commonwealth Act.

The fact is that on the appeal to the Full Supreme Court from the judgment of *Cussen* J. there were no rival claims of the State and of the Commonwealth as to the possession of any constitutional power (I do not say that for the application of sec. 38A the State must be a party to the cause). There was a claim that the Commonwealth Parliament has power to take away a litigant's right to appeal to the Full Supreme Court or to the Privy Council; and this claim was denied: that is all. The fact that the conflict was as to the Commonwealth legislative powers in *relation to a State Court* does not bring the conflict within the meaning of sec. 74 of the Constitution; and yet this fact is the cause of the confusion.

A proper *inter se* question arose in the Steel Rail Case (*Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (1)), where the power of the State to make and execute laws for railways came into conflict with the power of the Commonwealth to impose duties of Customs; and the Judicial Committee of the Privy Council obeyed sec. 74. An *inter se* question was also found to arise in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2), where the State had power to legislate as to labour, and the Commonwealth had a power also—indirectly, through the Court of Conciliation; and sec. 74 was obeyed. But in each case the *relative* powers of State and Federation were in question.

Certainly, the learned Judges of the Supreme Court, in deciding the appeal from *Cussen* J., were not conscious that they were, or

(1) (1909) A.C. 345.

(2) (1917) A.C. 528; 24 C.L.R. 396.

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might be, treading on the sacred, forbidden, territory of sec. 38A. In particular, *Irvine* C.J. spoke of the matter as being a matter within sec. 39 and not within sec. 38A. No one suggested, from Bar or from Bench, that a question as to the limits *inter se* was involved. Sec. 38A is so unprecedented that I do not like to pronounce confidently as to its effect—without argument thereon; but at present I am strongly inclined to think that the question as to the limits *inter se* must *actually* arise—must at least be mentioned—in order that sec. 38A may be applicable. The words "however arising" attached to the word "question" surely imply that the question must somehow arise. If it does not arise, there is no danger of wrong law being laid down as to it. If, however, the section means merely that the question must *logically* arise, one cannot but foresee confusion and injustice in the future years. A judgment may be pronounced in 1910, in innocent ignorance of any *inter se* question; on the strength of that judgment titles may pass to successive purchasers; but in 1960 some ingenious lawyer may discover that there was some *inter se* question logically involved in the judgment of 1910: is that judgment to be treated as having been made without jurisdiction, and nugatory?

Several difficult points were raised before us in the argument, and I had drawn up a judgment dealing with them, to the best of my power. On finding, however, that my learned brethren pronounced the order on the single point of sec. 38A, I have withdrawn that judgment. The points have become unnecessary to the decision now that the order has been made on the single ground of sec. 38A; and I do not want to add to the bulk of the law reports by my obiter dicta. I had something to say, in particular, as to previous judgments of this Court in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1); *Lorenzo* v. *Carey* (2); *Commonwealth* v. *Limerick Steamship Co.* (3); *Union Steamship Co. of New Zealand* v. *Commonwealth* (4). But none of these cases lay down the meaning of sec. 74 of the Constitution, and of sec. 38A of the Act, for the purposes of this case. In the *Limerick Case* I observe that counsel for the appellant argued that the judgment of the New

(1) (1907) 4 C.L.R. 1087.
(2) (1921) 29 C.L.R. 243.
(3) (1924) 35 C.L.R. 69.
(4) (1925) 36 C.L.R. 130.

South Wales Supreme Court involved an *inter se* question. The minority of the Bench held that there was no *inter se* question; and the majority did not rely on the point, did not express any conclusion on the subject. It is, therefore, impossible, to my mind, to regard this case as concluded by the decision in the *Limerick Case* (1).

But I must not forbear from calling attention to the embarrassing position in which I was placed as to these previous cases. My brother *Powers* and myself were the only members of the Court who did not sit at the hearing of the *Limerick Case* (1); and counsel for the plaintiffs here expressed a wish, as that case was a decision of three Judges as against two, and as the Full Bench of seven was now sitting, that he should be allowed to attempt to show that the decision was wrong; but his request was refused. He was allowed, however, to argue that the *Limerick Case* was inconsistent with *Baxter's Case* (2) and with the *Union Steamship Co.'s Case* (3). I can understand the duty of a Judge to follow a previous decision that has not been impugned; but what is his duty when it has been allowed to be *partly* impugned? Is he bound by the limitation put upon counsel? I postpone a definitive conclusion until it become absolutely necessary.

RICH J. In this case we have been asked to reverse our decision in *Commonwealth* v. *Limerick Steamship Co.* (1), for reasons which were, as contended, shown to be both substantial and right by *Baxter's Case* (2) and *Union Steamship Co.* v. *Commonwealth* (3). The *Limerick Case* dealt with many propositions. Down to a certain point it was unchallenged on this appeal—I mean that it established the appealability to this Court of an order of the Supreme Court of a State granting leave to appeal to the Privy Council. How such a question should be decided by this Court was also determined in that case, but that is a separate and distinct proposition, and it is only from that point we have been asked to review the case. As to that, this case has been argued from two points of view, namely, as raising *inter se* questions and as raising

(1) (1924) 35 C.L.R. 69. (2) (1907) 4 C.L.R. 1087.
(3) (1925) 36 C.L.R. 130.

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Federal questions not *inter se*. I agree that this case is really of an *inter se* complexion both as regards the principal judgment of the Supreme Court of Victoria when *Irvine* C.J. presided and the later judgment of that Court giving leave to appeal when *Cussen* J. presided. I agree, therefore, that before the cause reached the latter tribunal it was removed to this Court and still remains in this Court pursuant to sec. 40A of the *Judiciary Act*. The argument founded on the two cases mentioned is therefore irrelevant; but, as I was a party to the majority judgment in the *Limerick Case* (1), I wish to be understood as adhering definitely to that decision in its entirety. I do not think that either *Baxter's Case* (2) or the *Union Steamship Co.'s Case* (3) is in any way inconsistent with what was said in the *Limerick Case*. I adhere to the reasons I there gave, and agree with the further reasons now stated in the judgment of my brother *Isaacs*.

In my opinion the appeal should be allowed.

STARKE J. These cases raise again the constitutional validity of the provisions of sec. 39, sub-sec. 2 (*a*), of the *Judiciary Act*. In the *Limerick and Kidman Cases* (1), a majority of this Court upheld their validity, and endeavoured to expound the true basis of the decision of the Judicial Committee in *Webb* v. *Outrim* (4). But the Supreme Court of Victoria, in Full Court, presided over by its learned Chief Justice, refused to accept the view of this Court, and insisted upon acting on its own view of the decision in *Webb* v. *Outrim*. *Macfarlan* J., though differing from the view of the majority of this Court, said—wisely, I think—that it would only "make the present confusion worse confounded" if the Supreme Court declined to follow the decision of this Court (5). And I would add that the course pursued tends to impede the orderly administration of justice. The result has been unfortunate; for, in the opinion of a majority of this Court, the Supreme Court entered upon a matter which it had no jurisdiction to determine, and its final judgment in the proceedings before it, is therefore null and void. But in the Supreme Court the judgment was necessarily

(1) (1924) 35 C.L.R. 69.
(2) (1907) 4 C.L.R. 1087.
(3) (1925) 36 C.L.R. 130.
(4) (1907) A.C. 81; 4 C.L.R. 356.
(5) (1925) 47 A.L.T., at p. 190.

treated as binding and effective by other members of the Court, and upon an application for leave to appeal to His Majesty in Council, another Court—presided over by *Cussen* J.—following the judgment, granted leave to appeal as of right. It is from this order that an appeal has been brought to this Court. The judgment delivered by the Court presided over by the learned Chief Justice has not been appealed to this Court, and I do not feel called upon to discuss its validity. It is enough for me to say that the order giving leave to appeal to His Majesty in Council is directly contrary to the decision of this Court in the *Limerick and Kidman Cases* (1), and should consequently be reversed.

I recognize, with unfeigned respect, the force of the criticisms of those cases by the learned Judges of the Supreme Court, but all were presented to this Court when the cases were argued before it. The constitutional tribunal for the review of the *Limerick and Kidman Cases* (1) is His Majesty in Council—always, of course, within the limits prescribed by sec. 74 of the Constitution.

Order as stated in judgment of Knox C.J., Gavan Duffy and Powers JJ.

Solicitors for the appellants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth; *Blake & Riggall*; *Whiting & Byrne*; *Aitken, Walker & Strachan.*

Solicitors for the respondents, *A. Robinson & Co.*

B. L.

(1) (1924) 35 C.L.R. 69.