[HIGH COURT OF AUSTRALIA.]

Ex Parte NELSON [No. 2].

H. C. of A. 1929.

Sydney, *Mar.* 28.

Melbourne, *May* 31.

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

Appeal—Appeal to Privy Council—Limits inter se of constitutional powers of Commonwealth and States—Applications to High Court for certificates—No special reasons — Freedom of inter-State trade and commerce — Questions as to limits inter se—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 74, 92, 109 *—Judiciary Act* 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *secs.* 30, 38A, 40A *—Stock Act* 1901 (*N.S.W.*) (*No.* 27 *of* 1901), *secs.* 154, 158 (*j*).

On applications to the High Court for certificates under sec. 74 of the Constitution that questions of law as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales involved in the decision in *Ex parte Nelson* [*No.* 1], *ante*, 209, were questions which ought to be determined by His Majesty in Council,

Held, by the whole Court, that the applications should be refused:

By *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ., on the ground that no special reasons within the meaning of sec. 74 why certificates should be granted existed;

By *Rich* and *Dixon* JJ. (*contra*, by *Isaacs* and *Starke* JJ.), on the ground that the decision of the Court under sec. 92 did not involve a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of a State.

Per Isaacs J.: The Commonwealth should be represented in applications under sec. 74.

Jones v. *Commonwealth Court of Conciliation and Arbitration*, (1917) A.C. 528; 24 C.L.R. 396, referred to.

Motions.

George Nelson was convicted by a Police Magistrate, on the information of Samuel Rutherford Scott, a New South Wales inspector of stock, for an offence against the provisions of sec. 154 of the *Stock Act* 1901 (N.S.W.), which provides that the Governor

may by proclamation restrict or absolutely prohibit for any specified time, the importation or introduction into New South Wales of any stock, fodder, or fittings from any other State or country, and, on the information of Oscar Ernest Edward Couch, also a New South Wales inspector of stock, for an offence against the provisions of sec. 158 (*j*) of that Act, which enacts that if a person does not when required give an inspector full information with respect to any imported stock, fodder, fittings, or effects he shall be liable to imprisonment for any period not exceeding six months or to a fine not exceeding £200. Nelson obtained rules nisi from the Supreme Court of New South Wales for writs of prohibition directed to the magistrate and the informants restraining further proceedings in respect of the convictions. On the return of the rules nisi the Supreme Court formed the opinion that questions arose as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales and proceeded no further with the matters, which thereupon became removed to the High Court by virtue of the provisions of secs. 38A and 40A of the *Judiciary Act* 1903-1927. The matters were heard by the Full Court of the High Court, and on 22nd October 1928 that Court discharged the rules nisi: *Ex parte Nelson* [*No.* 1] (1).

Applications were now made to the High Court on behalf of Nelson for certificates under sec. 74 of the Constitution that the questions of law as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales involved in these matters were questions which ought to be determined by His Majesty in Council, for the following reasons: (a) the division of opinion in the High Court on the questions of law involved and the past decisions of the Court; (b) the importance of such questions and of the trade affected by the regulations, which delay and hinder the free importation of Queensland cattle into the State of New South Wales and are applied to cattle which are free of any disease, thus causing considerable loss, inconvenience and expense to the importers of such cattle; and (c) the likelihood of the same questions being again raised before the High Court in respect of proceedings instituted by the New South Wales Department of

(1) *Ante*, 209.

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Agriculture against one White regarding cattle brought into New South Wales from Queensland, and in respect of which he was convicted.

Both motions were heard together.

H. V. Evatt, for the applicant. The determinations of the Court as to the validity of secs. 154 and 158 (*j*) of the *Stock Act* 1901 (N.S.W.) were determinations of questions arising as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales. The Commonwealth Parliament has power to legislate with respect to trade and commerce between States by virtue of sec. 51 (I.) of the Constitution. The prohibition contained in sec. 92 of the Constitution does not prevent the State of New South Wales from legislating on the subject of trade and commerce between that State and other States. Where a Court determines whether a State has or has not a certain legislative power, that is a determination within sec. 74 of the Constitution (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1)). Here the Court dealt with powers of legislation divided between two authorities, the Commonwealth and a State, and the Court determined that the State did have the power claimed. A certificate under sec. 74 should be granted where the judgment in question was of a Court which was equally divided in opinion (*Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (2)). This feature was not present in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (3). The question is obviously one of great importance, as it affects a large number of people.

Brissenden K.C. (with him *J. R. Nield*), for the respondents. The legislation concerned affects a portion only of the State of New South Wales, that is to say, the borders; and does not in any way attack any legislation of the Commonwealth Parliament. The mere fact that the Court differed as to the application of sec. 92 of the Constitution is not sufficient to constitute a matter within sec. 74. The *inter se* question was whether a State had power

(1) (1917) A.C. 528; 24 C.L.R. 396. (2) (1912) 15 C.L.R. 182, at p. 234.
(3) (1921) 29 C.L.R. 406.

under the guise of quarantine law to prohibit the entry of cattle into the State. The decision of the Court was a decision under sec. 92, but only on the particular case before it. As to whether the Court will regard the division of opinion as a special reason within the meaning of sec. 74, see *Deakin* v. *Webb* (1), especially the judgment of *Barton* J. at p. 627. A special reason must be something which involves Australian interests or the interests of the Commonwealth generally (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (2)); here the matter is purely local. The real reason why a certificate was granted in *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (3) was because the question in that case was one of very great importance concerning as it did the whole of the Commonwealth. Although the question at issue in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (4) was of far greater importance than the question involved in this case, a certificate under sec. 74 was refused.

H. V. Evatt, in reply. The matters became removed from the Supreme Court of New South Wales to the High Court by virtue of the provisions of sec. 40A of the *Judiciary Act* 1903-1927, as being *inter se* questions, and no suggestion was made during the hearing that they were not properly removed. If the matters were not properly removed, the judgments of the Court should be vacated. The division of opinion of the Court in this case should cause the Court to say that a special reason exists for granting the certificate. The questions at issue are much more important than the questions involved in *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (3), and, no doubt, the fact that there was a division of opinion in that case largely influenced the Court to grant a certificate.

Cur. adv. vult.

May 31.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In our opinion it is neither necessary nor expedient for this Court to determine on these applications whether the decisions in respect of which certificates

(1) (1904) 1 C.L.R. 585.
(2) (1907) 4 C.L.R. 1087, at p. 1148.
(3) (1912) 15 C.L.R. 182.
(4) (1921) 29 C.L.R. 406.

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are sought under sec. 74 of the Constitution were decisions upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State or States. If either decision was a decision upon such a question, we think that no special circumstances are shown to exist which would justify this Court in granting a certificate. The question whether in any given case a certificate is necessary in order to enable the Judicial Committee to entertain an appeal is essentially one to be determined by that tribunal. In the *Builders' Labourers' Case* (1) this Court refused the application for a certificate without deciding whether a certificate was necessary under sec. 74. An application for leave to appeal was then made to the Judicial Committee and refused in the absence of a certificate, the Board being of opinion that the decision was upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State or States (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2)). In these circumstances we think the proper course is to refuse the applications, leaving the parties free if so advised to apply to the Judicial Committee for leave to appeal notwithstanding the absence of a certificate. We may add that on the argument before this Court upon the return of the rules nisi it was assumed throughout that the questions arising for decision were questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State of New South Wales.

In our opinion the applications for certificates should be refused.

ISAACS J. The appellant applies in each case for a certificate under sec. 74 of the Constitution to enable him to appeal to the Privy Council against the decision of this Court. Both sides agree that the decision was as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. Nevertheless, and particularly as that has been seriously questioned, this Court, before granting such a certificate, must examine the matter for itself. It must take care to avoid, so far as it can, trespassing on territory that appertains solely to His Majesty in Council. There are cases where perhaps the Court may properly refuse the certificate without

(1) (1914) 18 C.L.R. 224.

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

determining the question of jurisdiction to grant it. Here, however, both sides insist on the jurisdiction, the Court has treated the main case as within the class, and on the whole I do not feel at liberty to express an opinion on the propriety of granting or refusing a certificate without ascertaining to the best of my ability my right to do so.

I am of opinion the decision was of the nature stated. The case of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) seems to me to place the matter on a basis both authoritative and convincing. In that case this Court had held that the President was validly empowered by Commonwealth legislation to make an award in an inter-State dispute, and therefore to bind persons notwithstanding the Constitutions and laws of the States concerned. This, said the Privy Council, was a decision "that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any, power in this case" (2). The passage quoted, by the words "in this case" recognizes that a "decision" is always with reference to a concrete case, a specific enactment, or a specific judicial or executive act. Their Lordships also in the course of their judgment indicate that the element of conflict is not necessary.

In the present instance—adapting the language quoted—this Court has conversely held that the frontier of the State legislative power reached in this case as far into inter-State trade and commerce as it purports to go, and it therefore follows that the Commonwealth has not exclusive power (if any) in this case. There is no doubt the stock the subject matter of the prosecutions were commodities in fact passing from one State to another in a way ordinarily understood to constitute inter-State trade and commerce. I assume in favour of the application that the Court regarded the State legislation as legislation on the subject of inter-State trade and commerce, to some extent at all events. If not, the decision was even more clearly within sec. 74 because it would limit the Commonwealth's legislative power by excluding from it such regulations. I am led to those observations because I am not at

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1917) A.C., at p. 533; 24 C.L.R., at p. 398.

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all sure how far the expression in the majority judgment, introduced from American cases, that State regulations of the relevant nature "are aids to and not restrictions upon the freedom of inter-State commerce" may be understood to go. But, making the assumption mentioned, it is still clear to me that the decision is one affecting limits *inter se*.

The Commonwealth's power of legislation in respect of inter-State trade and commerce under sec. 51 (1) of the Constitution is admitted, notwithstanding sec. 92. Sec. 92 is held to be "no more than an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed" (*James* v. *South Australia* (1)). Apart from other questions arising upon that decision, there is one which arose in the present case, namely, the extent of "the freedom prescribed." Let us visualize a circle enclosing the area of inter-State trade and commerce. Admittedly the Commonwealth power extends over the whole of that area, whatever "trade and commerce" includes. If the assumption above mentioned is wrong, the line of circumference is the frontier line of delimitation between Commonwealth and State legislative powers, and it becomes a question in each case whether the given State Act deals with inter-State trade and commerce at all or falls on one side or the other. If, however, the assumption is right the State legislative power always extends into the circumscribed area to an indefinite extent. It becomes a question in each case whether the State Act exceeds the legitimate extent of protrusion. The test approved appears to be really the same in both alternatives. The Court has to consider the specific State Act in its true light and determine whether it is in its opinion—not in the opinion of the Legislature—"an aid to or no restriction on the freedom of inter-State commerce." Naturally this can only be done by taking into account all relevant considerations, commercial, economic, industrial, hygienic, moral, social and scientific—usually a legislative function—and, after balancing these, then forming the necessary opinion. That leaves the terminal line (if any) of legitimate incursion into the circumscribed area variable for each case. Nevertheless, whatever be the decision come to, it is that in the supposed case before

(1) (1927) 40 C.L.R. 1, at p. 41.

the Court, the line of circumference was not passed, or that it was not excessively passed, or that it was excessively passed. In each case constitutional powers in respect of the matter in hand are delimited *inter se*. In practical language Australians are told whether, in relation to that matter, they are bound to obey Federal or State authorities, and not necessarily as a matter of conflict. In *Jones's Case* (1) it was Federal authority, in this it was State authority. The decision in these two cases now before the Court was, shortly, that the Commonwealth power in relation to the matters covered by the State Act was either not exclusive or non-existent, and in principle, though conversely, it is the same as in *Jones's Case*. The case, therefore, falls within sec. 74 and we have jurisdiction to grant or refuse the certificate.

Passing to the question whether the certificate should be granted, I am very distinctly of the opinion it should not. I adhere to the views I expressed in *Flint* v. *Webb* (2). They were practically the same with regard to all the then five Justices of this Court. The circumstances of the present case are much weaker than were those of *Flint* v. *Webb* in several respects, so far as they favour the granting of a certificate. The decision was not that of a numerical majority, there is still another Justice of this Court whose opinion has not been taken, and this Court has the power to reconsider the matter, without in reality invading the rule of *stare decisis*, even if that were of greater importance than it is. The question of distributing—either concurrently or exclusively—the totality of legislative authority in Australia is naturally an Australian question appertaining to self-government. The Constitution recognizes that circumstances may render it proper to refer a particular decision to the Privy Council.

But I consider it of the utmost importance before any certificate is given, that the Commonwealth Government should be represented in order to offer to this Court such considerations as it thinks necessary in the interests of the self-government of Australia. I am not in such a state of doubt as to make it desirable to hear the Commonwealth Government on the point.

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1907) 4 C.L.R. 1178, at pp. 1189 *et seqq.*

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I do not for a moment conceal from myself the importance of the decision challenged; as to this, I adhere to what I said in the main case. But that is a circumstance necessarily present in every case of this nature, and cannot be regarded as a special feature (see *Flint* v. *Webb* (1)).

In my opinion the applications should be refused.

RICH J. The rules nisi out of which these applications for a certificate arise appear to have raised at least four questions. The parties seem to have thought that one or more of these questions involved a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the State or States. Accordingly the Supreme Court of New South Wales treated them as falling within sec. 38A of the *Judiciary Act* 1903-1927 and proceeded no further in the causes which were set down for hearing in this Court in purported pursuance of sec. 40A of the same Act. This Court was not concerned at that stage, as I imagine, to examine the correctness of this method of invoking its jurisdiction under sec. 30, but proceeded to exercise that jurisdiction and discharged the rules nisi. The one matter which seems to have occasioned any difficulty was whether the legislation under which the defendant, who now applies for a certificate, was convicted was obnoxious to sec. 92 of the Constitution. The applications for certificates now render it necessary to consider *in limine* whether this issue does involve a question as to the limits *inter se* of the constitutional powers of State and Commonwealth. The judgment of *Knox* C.J., *Gavan Duffy* and *Starke* JJ., which prevailed against the dissenting opinions of *Isaacs*, *Higgins* and *Powers* JJ., simply decided that the provisions of the New South Wales *Stock Act* 1901 under which the defendant was convicted did not impair or detract from the freedom of trade, commerce and intercourse amongst the States which is established by sec. 92 of the Constitution. Prima facie, therefore, the decision of the Court relates only to the competence of the State to pass this legislation. That competence was challenged upon the ground that sec. 92 had withdrawn from the States the power to hinder freedom of inter-State trade and that this legislation

(1) (1907) 4 C.L.R., at p. 1191.

constituted such a hindrance. It follows that the real question was as to the extent and application of the prohibition laid upon the States. If that prohibition applied also to the Commonwealth the decision would incidentally determine what the Commonwealth could do. The limit of power to interfere with freedom of inter-State trade would then be the same for the Commonwealth and States. But it would not be a limit *inter se* because there would be no reciprocal relation between the two powers. The Commonwealth power and the State power would alike recede as the limitation upon them was advanced. The Commonwealth power would not be enlarged as the State power receded or vice versa. It has, however, been decided in *W. & A. McArthur Ltd.* v. *Queensland* (1) that sec. 92 of the Constitution has no application to the Commonwealth. It therefore follows that the decision upon sec. 92 can have no effect either in enlarging or diminishing Commonwealth power. The sole question was whether the power was withdrawn from the State irrespective of the extent or existence of the Commonwealth power. It would seem, therefore, to be a necessary consequence that no limits *inter se* were in question as to the respective powers of the Commonwealth and States. It is, however, the fact that sec. 51 (I.) of the Constitution confers an ample paramount power upon the Commonwealth to deal with the whole subject of trade and commerce among the States. And it is suggested, as I understand it, that because the subordinate power which the States would otherwise enjoy of interfering with a part of that subject, *videlicet*, freedom of inter-State trade, is withdrawn from the States by sec. 92 of the Constitution, therefore the Commonwealth power upon that subject is itself affected. It is said that it is *pro tanto* thus rendered exclusive. This is only another and more impressive way of saying that the State power does not exist although the power of the Commonwealth does. It establishes no new limit to the Commonwealth power : its limits remain precisely as before. By converting the negative statement that the State has no power over freedom of inter-State trade into the positive statement that so much of the Commonwealth power over inter-State trade as relates to freedom is exclusive, a phrase is used which appears to

(1) (1920) 28 C.L.R. 530, at pp. 556-558.

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attribute a new quality to part of the Commonwealth power. The quality is illusory and consists only in the lack of State power, but even if it were a real quality it would be nothing to the point. The question is whether there is any mutuality in the extent or operation of the Commonwealth and State power respectively, whether they are distributed or defined so as to have limits *inter se* between the powers themselves. The somewhat metaphysical idea of attributes or qualities of powers is not a subject dealt with by the language of sec. 74 of the Constitution.

I have had the advantage of reading the judgment of my brother *Dixon* and agree with it, but, as the matter is of very great importance, I think it right to state my reasons without, I hope, reiterating those expressed in that judgment.

I therefore consider that the applications are ill-founded and the certificates should be refused.

STARKE J. These cases involved, in my opinion, the determination of two questions of law: firstly, that sec. 92 of the Constitution bound the States and not the Commonwealth; secondly, that the *Stock Act* 1901 of New South Wales did not violate the provisions of sec. 92, and was a lawful exercise of the constitutional power of the State. The determination of the first question is not particularly mentioned in the opinions of the Judges because the question had been already decided (*W. & A. McArthur Ltd.* v. *Queensland* (1)) but it is necessarily involved in the judgment of the Court. In a later case, *James* v. *South Australia* (2), it may be noted, this Court held that the restriction imposed upon the States by sec. 92 was no more than an inhibition to the Parliaments of the States, preventing them from legislating so as to interfere with the freedom prescribed. The decision of the Court in the cases now before us was that the *Stock Act* 1901 was not an infringement of the provisions of sec. 92, and did not trespass upon the freedom of inter-State trade.

An application has now been made to this Court, pursuant to sec. 74 of the Constitution, for certificates that the questions involved in the decision of the High Court ought to be determined by His Majesty in Council. But before the Court grants a certificate,

(1) (1920) 28 C.L.R. 530.

(2) (1927) 40 C.L.R. 1.

it must be satisfied that the question is of the nature contemplated by sec. 74, namely, a question arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States. The decision, it appears to me, affects the distribution of constitutional power as between the Commonwealth and the States: it affirms certain constitutional power in the Commonwealth which it denies to the States: it measures out the area over which the Commonwealth and the States can respectively operate. That, in my opinion, is a decision as to the limits *inter se* of the constitutional power of the Commonwealth and the States, and falls within the principle of *Jones's Case* (1). But I see no special reason for granting certificates in these cases, and the applications ought, in my opinion, to be refused.

DIXON J. The defendant, Nelson, was convicted upon two informations under the New South Wales *Stock Act* 1901, and these convictions were affirmed by this Court, which discharged rules nisi for statutory prohibition obtained by the defendant from the Supreme Court of New South Wales (2). Of the four contentions upon which he relied three seem to have lacked substance, but in deciding the question raised by the fourth the Court was equally divided, judgment being given according to the opinion of the Chief Justice. This question was whether sec. 92 of the Commonwealth Constitution, in prescribing that trade, commerce and intercourse among the States shall be absolutely free, withdrew from the State Legislature power to enact the provisions creating the offences of which the defendant was convicted.

The defendant now applies under sec. 74 of the Constitution for certificates that the question is one which ought to be determined by His Majesty in Council. Sec. 74 forbids an appeal to the Sovereign in Council from a decision of the High Court upon any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States unless this Court shall certify that the question is one which ought to be determined by His Majesty in Council. It authorizes the

(1) (1917) A.C. 528; 24 C.L.R. 396. (2) *Ante*, 209.

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Court so to certify if satisfied that for any special reason the certificate should be granted, and it provides that thereupon an appeal shall lie without further leave. The discretion to allow an appeal is given to this Court, and is denied to the Privy Council, only when a question has been decided of the class described; and in that case it is exercisable upon grounds which must include the precise nature, characteristics and incidents of such questions. For this reason, apart from others, it appears desirable in dealing with these applications for certificates to determine whether the substantial question which has been decided in the case answers the description contained in sec. 74.

For some time in this Court it was considered that sec. 92 of the Constitution bound States and Commonwealth alike. (See *Fox* v. *Robbins* (1); *R.* v. *Smithers*; *Ex parte Benson* (2); *New South Wales* v. *Commonwealth* (3); *Foggitt, Jones & Co.* v. *New South Wales* (4); *Duncan* v. *Queensland* (5).) But the view was afterwards taken that sec. 92 had no application to the Commonwealth. (See *W. & A. McArthur Ltd.* v. *Queensland* (6).) And in its application to the States it has been held to be "no more than an inhibition addressed to the Parliaments of the States preventing them from legislating so as to interfere with the freedom prescribed" (*James* v. *South Australia* (7)).

While the opinion prevailed that State and Commonwealth alike were forbidden by sec. 92 to hinder trade, commerce and intercourse among the States, it seems to have been taken for granted that an attack upon a statute for repugnancy to that section raised no question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State or States. (See, e.g., per *Isaacs* J. (dissenting) in *Duncan* v. *Queensland* (8).)

This assumption appears plainly to have been correct. The expression "limits *inter se*" refers to some mutual relation between

(1) (1909) 8 C.L.R. 115, at p. 128, *per Isaacs* J.

(2) (1912) 16 C.L.R. 99, at p. 117, per *Isaacs* J.

(3) (1915) 20 C.L.R. 54, at p. 66, per *Griffith* C.J.; at p. 79, per *Barton* J.; at pp. 95 and 100, per *Isaacs* J.; at p. 105, per *Gavan Duffy* J.

(4) (1916) 21 C.L.R. 357, at p. 365, per *Isaacs* J.

(5) (1916) 22 C.L.R. 556, at pp. 572-573, per *Griffith* C.J.; at pp. 593-594, per *Barton* J.; at pp. 616 and 620, per *Isaacs* J.

(6) (1920) 28 C.L.R., at pp. 556-558, per *Knox* C.J., *Isaacs* and *Starke* JJ., and, at p. 563, per *Higgins* J.

(7) (1927) 40 C.L.R., at p. 41, per *Gavan Duffy*, *Rich* and *Starke* JJ.

(8) (1916) 22 C.L.R., at pp. 605-606.

the powers belonging to the respective Governments of the Federal system. The required relation has been found in the effect which the process of defining the specific and paramount powers of the Commonwealth Parliament must have upon the ascertainment or determination of the amount of plenary power retained by the legislatures of the States. (See *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1).) For in the process of defining the Commonwealth legislative power a line is ascertained. Upon one side of it is the undefined residue of absolute and uncontrolled power remaining to the States. Upon the other is the legislative power vested in the Commonwealth, made supreme by sec. 109. Upon that side of the line State legislative power, if any there be, is subordinate. It is a boundary at which the supreme power of the State begins, and that of the Commonwealth ends, a limit *inter se* of these plenary powers. The necessary relation has also been found in other forms of antinomy. When the independence of the executive power of the Commonwealth has been secured by assigning a limit to the legislative power of the States, this has been considered to be a decision upon a question as to the limits *inter se* of State and Commonwealth power. (See *Baxter* v. *Commissioners of Taxation for New South Wales* (2).) In the same way a claim that the State legislative power could not be used to regulate the conduct of an officer of the Commonwealth Executive was held to raise such a question. (See *Pirrie* v. *Macfarlane* (3).) Another example was probably afforded by the question whether the Commonwealth's legislative power over customs was so restricted by sec. 114 that the executive power of the State still included the right of free importation of goods. (See *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (4).) There the claim made was, in effect, that a power of one Government, its executive power, obtained an independence and freedom from control at the expense of a different power of another Government, its legislative power, which was so restrained in order to bring about this result. So it has been considered that a question

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1907) 4 C.L.R., at pp. 1118-1119, per *Griffith* C.J., *Barton* and *O'Connor* JJ., and, at pp. 1154-1155, per *Isaacs* J.
(3) (1925) 36 C.L.R. 170, per *Isaacs* J. at pp. 194-195.
(4) (1909) A.C. 345; 5 C.L.R. 818.

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whether the judicial power belonging to a State Court could be diminished or affected by the exercise of the legislative power of the Commonwealth depended upon a mutual relation between these two constitutional powers which satisfied the terms of sec. 74. (See *Commonwealth* v. *Kreglinger & Fernau Ltd.*, per *Isaacs* J.; *secus* per *Higgins* J. (1).)

The essential feature in all these instances is a mutuality in the relation of the constitutional powers: a reciprocal effect in the determination or ascertainment of the extent or the constitutional supremacy of either of them. This feature is quite absent when the question is about the meaning or application of a check or restraint to which all the governments are subject. Accordingly when it was believed that sec. 92 imposed a restriction upon the Commonwealth and the States alike, it was not doubted that a question under that section fell outside the provisions of sec. 74. But it is by no means easy to see why any different consequence should be produced by the contrary view, namely, the view that sec. 92 operates to impose a restraint upon the State power alone. Why should it follow from this interpretation of sec. 92 that any relation exists between the State power which it restricts and a Commonwealth power? And what mutuality can there be? If the Commonwealth is not bound by sec. 92 how can its powers be affected by the meaning or application given to the provisions of the section? Whether these provisions deny much or little power to the States must be immaterial as well for the purpose of defining the subject matter of Commonwealth power as for the purpose of determining its supremacy, of measuring its constitutional strength.

An answer to this conclusion was sought in the operation attributed to sec. 51 (I.) and sec. 92 when considered in combination. By sec. 51 (I.) the Parliament of the Commonwealth is authorized to legislate with respect to trade and commerce among the States. This power (subject to some qualifications not presently material) extends to every sort of legislation upon that subject matter, and so includes a power to make laws which diminish or altogether destroy the freedom of inter-State trade, the freedom interference with which is forbidden to the Parliaments of the States by sec. 92.

(1) (1926) 37 C.L.R. 393, at pp. 417-420, 426.

Thus it is said that sec. 51 (I.) and sec. 92 together operate to give to the Parliament of the Commonwealth an exclusive power to make laws with respect to the freedom of trade and commerce among the States. There is nothing incorrect in this compendious method of expressing the truths that sec. 51 (I.) gives the Commonwealth a power to make laws with respect to a subject which includes the freedom of inter-State trade and that sec. 92 withdraws a power over such freedom from the States. But the phrase should not be allowed to obscure the fact that two very distinct propositions are contained in the assertion that the Commonwealth has an exclusive power over the freedom of inter-State trade, namely, first, that the Commonwealth has a power over it and, second, that the States have none; and it should be remembered that the first proposition depends upon sec. 51 (I.), and not at all upon sec. 92, and the second upon sec. 92, and not at all upon sec. 51 (I.).

Commencing, however, with the proposition that by means of sec. 92 and sec. 51 (I.) operating together, an exclusive power over the freedom of inter-State trade is given to the Commonwealth, the argument proceeds to the consequence that sec. 92 therefore fixes a dividing line, a common limit, between the exclusive power of the Commonwealth and the power of the State, and that for this reason its interpretation involves a question as to the limits *inter se* of the State and Commonwealth power.

But the simple fact is that sec. 92 gives no power. It is a restraint upon power. Whether an interpretation is placed upon it which deprives the States of much or little power in respect of trade and commerce, the commerce power of the Commonwealth remains precisely the same. It has the same ambit or extent and the same operation or effectiveness. The ambit of the commerce power is the same because sec. 51 (I.) defines it, not sec. 92. Indeed it is hard to see how a decision upon sec. 92 could even provide a judicial precedent which, if followed, would determine a question upon sec. 51 (I.). For the power which is conferred upon the Commonwealth Parliament by sec. 51 (I.) is not coextensive with that denied to the States by sec. 92. It is much greater: its limits reach far beyond the bounds of that commercial freedom upon which the States may not encroach. At any rate the decision

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actually given in this case by the majority of the Court has no bearing upon the meaning or application of sec. 51 (I.). The operation or effectiveness of the Commonwealth commerce power is the same because sec. 109 makes it plenary and supreme. Laws made as an exercise of Commonwealth power are paramount and absolute and prevail whether the States have or have not a power upon all or part only of the same subject.

When it is said that some portion of the Commonwealth legislative power is exclusive, the statement expresses and implies no more than that the States have no similar power. No difference is attributed to the operation or constitutional strength of the Commonwealth power. When, on the other hand, the same expression is used of a power of a State, it attributes to it an authority of a different nature and degree. For since the Commonwealth Legislature has no power on the same subject, the State power is not subordinate but is supreme. The absence of Commonwealth power means that no Commonwealth law can occupy any part of the field and so withdraw it from the State or hinder or defeat any exercise of State power. Such a power is not controlled, but plenary: not conditional, but absolute.

When, therefore, in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) Earl *Loreburn* says "the High Court decided that the frontier of the Commonwealth power reaches in this case into the State and it therefore followed that the State has not exclusive, if any, power in this case," his meaning seems clearly enough to be that because the frontier or limits of the Commonwealth power had been advanced, such power, within the area of the advance, as the States would otherwise have possessed was not plenary and absolute, but was either annihilated or made subordinate to the paramount power of the Commonwealth. But if in this statement "Commonwealth" and "State" are interchanged it has no such significance. The proposition is not convertible. It cannot follow from the existence of a State power upon a given subject that such legislative power as otherwise the Commonwealth would have possessed is not plenary and absolute, but is either annihilated or made subordinate.

(1) (1917) A.C., at p. 533; 24 C.L.R., at p. 398.

It may well be that where, as in the case of freedom of inter-State trade, the legislative power of the States is restricted and that of the Commonwealth is not, the Parliament of the latter may think fit to exercise or refrain from exercising its power on occasions or in ways other than it might, if it were open to the Parliaments of the States to deal with the subject. But this is not because the relevant powers are so distributed that they have limits *inter se*, a common boundary or some other mutual relation which causes the determination of the extent or supremacy of one of them to involve a complementary ascertainment of the existence content or efficacy of the other. It arises simply from the circumstance that the State has no power at all.

The absence of a mutual, or, indeed, any relation between such a restriction as that contained in sec. 92, and the delimitation of Commonwealth power is characteristic of most constitutional checks and restraints, because they are not designed to accomplish that distribution of powers among the respective governments of the Federal system which gives rise to the questions described by sec. 74, but to serve some other end as, for instance, to give a unity to Australia for purposes of commercial and civil intercourse and common citizenship. Such a check or restraint is to be found in sec. 117. In principle it would seem that unless a decision upon its meaning and application was a decision upon a question as to the constitutional powers of the Commonwealth and those of a State or States no decision upon the interpretation of sec. 92 could answer that description. But in *Lee Fay* v. *Vincent* (1) it was held by this Court that a controversy upon sec. 117 fell plainly outside the category.

These reasons lead to the conclusion that the question whether sec. 92 disabled the Parliament of New South Wales from enacting the laws under which the defendant was convicted is not in itself, and does not involve, a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States. It is clear that no question arose as to the limits *inter se* of the constitutional powers of any two or more States. It follows that the substantial question in this case does

(1) (1908) 7 C.L.R. 389.

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not fall within sec. 74. It is objected, however, that the Court ought not to give effect to such a conclusion, because of the manner in which the rules nisi came before it. It appears that upon the return of the rules nisi before the Supreme Court the parties concurred in the view that a question or questions arose as to the constitutional powers *inter se* of State and Commonwealth, so that by reason of sec. 38A of the *Judiciary Act* 1903-1927 the Supreme Court lost jurisdiction over the causes. The Supreme Court proceeded no further upon the rules nisi which came into this Court as under sec. 40A. Here no question, either of jurisdiction or of procedure, was raised. The matter did, of course, involve the interpretation of the Constitution and therefore in point of law the Court was given jurisdiction over it by sec. 30, whether it did or did not come within sec. 38A, which affects only the jurisdiction of the Supreme Court, and within sec. 40A, which relates only to the procedure of transfer. In this case the procedure laid down by sec. 40 or that laid down by sec. 18 might have been used for the purpose of bringing the rules nisi before this Court, and in strictness all that has occurred is that the parties have concurred in invoking the undeniable jurisdiction of the Court in a manner which may be inappropriate to their case. Such a course creates no *res judicata* between the parties and involves no issue of estoppel between them on the question whether a decision was given which answers the description transcribed from sec. 74 into secs. 38A and 40A of the *Judiciary Act* 1903-1927. If it were otherwise, there are many reasons for the view that the Court ought not to be affected by such considerations in dealing with an application under sec. 74.

These applications for certificates should accordingly be refused.

Applications for certificates refused.

Solicitor for the applicant, *E. R. Abigail.*

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

J. B.