[HIGH COURT OF AUSTRALIA.]

THE VICTORIAN STEVEDORING AND GENERAL CONTRACTING COMPANY PROPRIETARY LIMITED . . . APPELLANT;
DEFENDANT,

AND

DIGNAN . . . . . RESPONDENT.
INFORMANT,

MEAKES . . . . . APPELLANT;
DEFENDANT,

AND

DIGNAN . . . . . RESPONDENT.
INFORMANT,

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SYDNEY, *Aug.* 11, 12, 13.

MELBOURNE, *Nov.* 2.

Gavan Duffy C.J., Rich, Starke, Dixon and Evatt JJ.

Constitutional Law—Delegation of legislative power—Validity—Trade and commerce with other countries and among the States—Act relating to waterside workers—Regulations thereunder—Validity—Conviction for breach of regulations—Subsequent disallowance of regulations—"Shall thereupon cease to have effect"—Appeal to High Court—Whether rehearing—Convictions sustained—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (I.), 61, 71, 73—*Transport Workers Act* 1928-1929 (*No.* 37 *of* 1928—*No.* 3 *of* 1929), *sec.* 3*—*Acts Interpretation Act* 1904-1930 (*No.* 1 *of* 1904—*No.* 23 *of* 1930), *sec.* 10—*Waterside Employment Regulations* (*S.R.* 1931, *No.* 77).

Sec. 3 of the *Transport Workers Act* 1928-1929 purports to confer a power upon the Governor-General of making regulations not inconsistent with that Act with respect to the employment of transport workers, and in particular

* The *Transport Workers Act* 1928-1929 provides: "3. The Governor-General may make regulations not inconsistent with this Act, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901-1918 and the *Acts Interpretation Act* 1904-1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service, and discharge of transport workers, and the licensing of persons as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

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for regulating the engagement, service and discharge of such workers, and the licensing of persons engaged as transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. Regulations so made were to have the force of law notwithstanding anything in any other Act except the *Acts Interpretation Acts* 1901-1918 and 1904-1916.

Held, that it is within the legislative power of the Commonwealth Parliament to confer upon the Governor-General the power to make such regulations.

Roche v. *Kronheimer*, (1921) 29 C.L.R. 329, followed.

Held, also, that regulations made in exercise of such power, although they restricted the loading and unloading of inter-State and overseas vessels to members of a specified industrial union, and to returned sailors and soldiers, and may have been made in pursuance of the industrial policy of the Executive, were, nevertheless, within the trade and commerce power conferred by sec. 51 (I.) of the Constitution, and did not exceed the power given by sec. 3 of the *Transport Workers Act* 1928-1929, and were, therefore, valid.

Huddart Parker Ltd. v. *Commonwealth*, (1931) 44 C.L.R. 492, and *Dignan* v. *Australian Steamships Pty. Ltd.*, (1931) 45 C.L.R. 188, followed.

The regulations were, in some respects, inconsistent with an award of the Commonwealth Court of Conciliation and Arbitration made in relation to the industry.

Held, that by virtue of the provisions of sec. 3 of the *Transport Workers Act* 1928-1929 the regulations prevailed over the *Commonwealth Conciliation and Arbitration Act* and awards made thereunder.

After the conviction of the appellants for an offence against the regulations, and before the hearing of appeals from such convictions, the regulations were disallowed by the Senate, and by virtue of sec. 10 of the *Acts Interpretation Act* 1904-1930 they "thereupon ceased to have effect."

Held, that the fact that the regulations were subsequently disallowed did not enable the Court to set aside the convictions, the question under the appellate power being whether such convictions were, on the evidence before the Magistrate, in accordance with the law as then existing.

ORDERS NISI to review.

The Victorian Stevedoring and General Contracting Co. Pty. Ltd. was charged on the information of Cecil Joseph Dignan, an inspector in the service of the Navigation Department, Melbourne, for that "it was, on 17th July 1931, at Melbourne," in the State of Victoria, "guilty of an offence against the *Waterside Employment Regulations* in that it did, in contravention of sub-regulation 1 of regulation 3 of the said Regulations, at Melbourne, a port to which Part III.

of the *Transport Workers Act* 1928-1929 applies, give priority in employment for work as a waterside worker to one Aubrey Campbell, a person not being a member of the Waterside Workers Federation of Australia, or a returned soldier or sailor within the meaning of the said Regulations, while transport workers (being waterside workers) who were members of the said Federation were available for employment for the said work at the said Port."

An information, founded upon the facts alleged in the information set out above, was also laid by Dignan against Charles Meakes charging him with being guilty of an offence against the sub-regulation referred to, in that he gave priority in picking-up for work as a waterside worker to Campbell while members of the Federation were available for picking-up for such work.

Both informations came on for hearing before a Police Magistrate, and, the facts alleged having been proved, each defendant was convicted and fined £1, together with £1 8s. 6d. costs. A stay of four weeks was allowed in each case in order that the validity of the Regulations might be determined by the High Court.

The evidence showed that Campbell was licensed under the *Transport Workers Act* 1928-1929 as a waterside worker, the licence, being current until June 1932, and that he had been "picked-up" by Meakes for work which the other defendant required to be done.

Statutory Rule No. 77 of 1931, in which the *Waterside Employment Regulations* in question were published on 26th June 1931, contained a statement by the Governor-General that, acting with the advice of the Federal Executive Council, he made the said Regulations under the *Transport Workers Act* 1928-1929, and that they were to come into operation forthwith. So far as material the Regulations provided as follows:—"3. (1) Transport workers (being waterside workers) who—(*a*) are available for employment, engagement or picking-up for work as waterside workers at ports in the Commonwealth to which Part III. of the Act applies; and (*b*) are members of the organization known as the Waterside Workers Federation of Australia, an organization bound by an award of the Commonwealth Court of Conciliation and Arbitration applicable to employment for that work, shall be given priority in employment, engagement or picking-up in or for that work: Provided that returned soldiers

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or returned sailors may be employed, engaged or picked-up in or for that work in priority to the persons specified in this sub-regulation. (2) Any person who gives priority in employment, engagement or picking-up in or for that work except in accordance with the last preceding sub-regulation shall be guilty of an offence. . . . 4. (1) Before the commencement of any picking-up proposed to be effected at a picking-up place on private property at any port to which Part III. of the Act applies, the person proposing to effect the picking-up shall, not less than half an hour before such commencement, post in a conspicuous position outside that place a notice of the picking-up." Non-compliance with these provisions was made an offence. Reg. 5 provided that when a notice had been posted up in accordance with reg. 4 (1), any person to whom priority was required to be given under reg. 3, or who was a returned soldier or sailor was, for the purpose of being " picked-up," to be allowed to enter into and remain on the place indicated in the notice until the conclusion of the picking-up, an offence being committed by any person who prevented or hindered such entry, &c. By a notice appearing in the *Gazette* of 18th February 1931, and purporting to be given by the Minister of State for Transport, Part III. of the *Transport Workers Act* 1928-1929 was made to apply (*inter alia*) to the port of Melbourne.

Both the defendant Company and the Federation were parties to an award of the Commonwealth Court of Conciliation and Arbitration, made on 21st August 1928 under the provisions of the *Commonwealth Conciliation and Arbitration Act*, which, in prescribing (*inter alia*) conditions of labour of waterside workers throughout the Commonwealth, provided that the " picking-up " for employment should take place at certain specified places only—being premises occupied by the Federation, certain defined places at the various wharves, and other places more or less public in nature—there being no reference in the award to a notice as required by the Regulations, and no reference in general terms to " picking-up " places on private property. Clause 19 of the award was as follows: " Employers having undertaken to continue the present practice of giving preference of employment to members of the Waterside Workers Federation, with certain exceptions arising from circumstances

created by actions of the Federation, no order for preference is made." This clause was suspended by an order made on 24th September 1928 by the Commonwealth Court of Conciliation and Arbitration, and by a further order of that Court made on 5th November 1928 it was omitted from the award. On 5th May 1930 an application by the Federation for a variation of the award to the extent that preference for employment be given to its members was dismissed by the Court. The award was in force at all dates material herein.

Against the respective convictions by the Magistrate both defendants now, by way of orders nisi to review, appealed to the High Court.

During the hearing of the appeals, which were heard together, the Court, by a majority, permitted the appellants to file an affidavit which showed that *Statutory Rule* No. 77 of 1931 and the Regulations therein were disallowed by the Senate on 29th July 1931, and also that neither of the appellants had paid the fine or costs imposed by the Magistrate.

Ham K.C. and *Menzies* K.C. (with them *Nicholas*), for the appellants. Sec. 3 of the *Transport Workers Act* 1928-1929 is *ultra vires* and void in so far as it purports to authorize the Governor-General to make regulations which, "notwithstanding anything in any other Act," shall have the force of law, if and so far as it purports to delegate to such subordinate law-making authority the power to make regulations inconsistent with an award of the Commonwealth Court of Conciliation and Arbitration made in respect of the subject industry, and with the *Commonwealth Conciliation and Arbitration Act* and other Federal Acts. Regulations so made cannot override the laws of the sovereign body (*Clyde Engineering Co.* v. *Cowburn* (1)). The decision in *Huddart Parker Ltd.* v. *Commonwealth* (2) is distinguishable because (a) the chief point argued in that case was whether the regulation there in question was within the Commonwealth power; and (b) circumstances which exist in the present case did not exist in that case, and for the latter reason *Dignan* v. *Australian Steamships Pty. Ltd.* (3) also is distinguishable.

(1) (1926) 37 C.L.R. 466. (2) (1931) 44 C.L.R. 492.
(3) (1931) 45 C.L.R. 188.

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The purpose of the Regulations here under review was absolutely to exclude a class of licensed persons from employment; read with the declared policy of members of the Executive, these Regulations show that it was not a scheme merely to exercise some power of trade and commerce but was an attempt to prefer members of a particular body to the exclusion of others who are licensed and under the protection of the *Transport Workers Act*. This law of the Commonwealth, instead of being enforced as required by sec. 61 of the Constitution, is being openly used for a purpose other than that for which it was intended (*Attorney-General for Ontario* v. *Reciprocal Insurers* (1)). The *Transport Workers Act*, from which the power to make these Regulations is derived, provides that they are to be made subject to the *Acts Interpretation Act* to maintain the control of each House of Parliament. The repeated promulgation of new regulations in much the same language as, and practically contemporaneous with the disallowance by the Senate of, previous regulations, shows a clear intimation on the part of the Executive to exercise the power away from the control of the *Acts Interpretation Act*. To give real effect to that Act, regulations made in exactly the same terms as regulations previously disallowed are null and void. The Regulations were not made in the lawful exercise of the discretion granted to the Governor-General by the *Transport Workers Act* and, consequently, are unconstitutional, *ultra vires* and void. The power granted was exercised for a purpose and with an intention beyond the scope of and not authorized by such Act; therefore, the making of the Regulations was in fraud of the power. The Regulations are *ultra vires* and void, either wholly or in so far as they authorize and/or require the "picking-up" of members of the Waterside Workers Federation at places on private property other than those prescribed by the relevant award, because such provisions are inconsistent with the award in question and with the adjustment of the industrial dispute thereby settled upon a claim as to what "picking-up" places should be prescribed, and they are also inconsistent with the *Commonwealth Conciliation and Arbitration Act* (*Clyde Engineering Co.* v. *Cowburn* (2)). If the Regulations conflict with the law, not merely the Act under which they are made

(1) (1924) A.C. 328, at pp. 332, 337.

(2) (1926) 37 C.L.R., at p. 491.

but any statutory law, they are prima facie *ultra vires* (see *Ex parte McLean* (1) and *Chester* v. *Bateson* (2)). In *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3) it was held that any attempt to vest the judiciary power in any body other than the High Court and other Courts as provided by sec. 71 of the Constitution is *ultra vires*, and the same principle should be applied to the construction of sec. 61, which is the relevant section here. If the promulgation of the Regulations in question here is an attempt to vest the legislative power in some body other than Parliament, such attempt is contrary to the actual wording of the Constitution itself. (See also *New South Wales* v. *Commonwealth* (4); *In re Judiciary and Navigation Acts* (5).) The decision in *Roche* v. *Kronheimer* (6), which followed the decisions in *R.* v. *Burah* (7) and *Hodge* v. *The Queen* (8), is distinguishable because it is an example only of the wide construction of the power of the Executive to make regulations; there was no argument that the regulation there in question was *ultra vires*. (See also *Cooley* on *Constitutional Limitations*, 8th ed., vol. I., pp. 229-233.) So far as the decision in *Roche* v. *Kronheimer* affects, if at all, this case, it was incorrectly decided. In any event that decision, which has been regarded as the extreme limit of the power of the Executive to make the law, should not be extended, as would result if this action of the Executive, in all the circumstances of this case, were upheld. In *Baxter* v. *Ah Way* (9) the Court accepted the position that the Legislature could not delegate power to make the law. The fact that sec. 61 of the Constitution delimits the power of the Executive is laid down in *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (10). On the proper construction of the Constitution, read as a whole, the threefold division of powers indicates the intention of the Imperial Parliament that the legislative power was to be exercised only by the body which was composed of representatives of the people. The purpose of the threefold division and the provision

(1) (1930) 43 C.L.R. 472, at pp. 479, 480, 483.
(2) (1920) 1 K.B. 829, at pp. 836, 837.
(3) (1918) 25 C.L.R. 434.
(4) (1915) 20 C.L.R. 54.
(5) (1921) 29 C.L.R. 257.
(6) (1921) 29 C.L.R. 329.
(7) (1878) 3 App. Cas. 889.
(8) (1883) 9 App. Cas. 117.
(9) (1909) 8 C.L.R. 626.
(10) (1922) 31 C.L.R. 421, at pp. 431 *et seq.*

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of checks upon the power is to prevent tyranny (*Chester* v. *Bateson* (1)). If sec. 3 of the *Transport Workers Act* 1928-1929 purports to empower the Executive to repeal laws of the sovereign body it is *ultra vires*. The words " not inconsistent with this Act " appearing in sec. 3 mean " not inconsistent with any other legislative enactment of the Commonwealth (*Jones* v. *Metropolitan Meat Industry Board* (2)). As to the powers conferred by certain statutes upon various bodies and persons to make regulations thereunder, and the force and effect of such regulations, see *Institute of Patent Agents* v. *Lockwood* (3) and *King* v. *Henderson* (4). A regulation cannot make anything unlawful if the relevant Act makes it lawful (*Toronto Municipal Corporation* v. *Virgo* (5)). The Regulations are *ultra vires* because, to the extent that they purport to apply against persons licensed under Part III. of the *Transport Workers Act*, they are inconsistent with such Act, which impliedly entitles the holder of a licence thereunder to offer himself for employment and to be employed without the restrictions imposed by the Regulations. There are no substantial differences between the subject regulations and those previously disallowed by the Senate except that the subject regulations include places of " picking-up." The decision in *Huddart Parker Ltd.* v. *Commonwealth* (6) is based upon the view that, there being no evidence except the existence of the particular regulation, the regulation should be construed as having the real intent and purpose of being law within the commerce power; here the true purpose of the regulation was to shut out a certain body of men from a lawful occupation, which purpose is inconsistent with the provisions of the Act itself, and not within the commerce power at all. Secs. 6, 7, 9 and 12 (3), (5), of the *Transport Workers Act* indicate that a person licensed under that Act is to be entitled to work if it is offered to him without being precluded by the regulations, and it is the function of the Executive, under sec. 61 of the Constitution, to enforce and maintain that law. The subject Regulations, instead of enforcing and maintaining the law, are a direct attempt to avoid it. In *Huddart Parker Ltd.* v. *Commonwealth*

(1) (1920) 1 K.B., at pp. 836, 837.
(2) (1925) 37 C.L.R. 252, at pp. 258, 259.
(3) (1894) A.C. 347.
(4) (1898) A.C. 720.
(5) (1896) A.C. 88.
(6) (1931) 44 C.L.R. 492.

the Court said that although the principal regulations were matters which raised doubts as to how much of the motive was industrial, still the provisions were within "trade and commerce." The principles which should guide the Executive when making regulations are shown in *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (1). Although seemingly a certain power is vested in a particular person or body, the real reason which prompts the exercise of that power must be looked at (*Council of the Shire of Werribee* v. *Kerr* (2)). The *Transport Workers Act* only confers power to make regulations not inconsistent with the *Acts Interpretation Act*, which Act requires them to be subject to both Houses of Parliament. Here the Executive assumed to pass the Regulations so as to avoid the control of the Senate (*Lorenzo* v. *Carey* (3)).

[EVATT J. referred to *In re a Petition of Right* (4).]

In making new regulations in substantially the same terms and in respect of the same subject matter immediately after the disallowance by the Senate of the previous regulations, the Executive has either ignored or has not given proper regard to the words "shall thereupon cease to have effect" which appear in sec. 10 of the *Acts Interpretation Act* 1904-1930. In any event, in the circumstances of this case, the penalty should be remitted and the fine set aside.

Gorman K.C. (with him *Herring*), for the respondent. This matter is concluded by the decision in *Roche* v. *Kronheimer* (5), where all the arguments put forward and all the authorities cited in this case were put to and considered by the Court. The validity of sec. 3 of the *Transport Workers Act* and the Regulations made thereunder was decided in the affirmative in *Huddart Parker Ltd.* v. *Commonwealth* (6). There is nothing which expressly prevents or prohibits the Executive from introducing regulations substantially the same as previous regulations. The whole procedure is a matter of policy with which the Court will not interfere. Questions of motive are quite irrelevant, the sole question being Is there a power to make this regulation? The Court should not consider the regulations which preceded the regulations now under review.

(1) (1922) 31 C.L.R. 421.
(2) (1928) 42 C.L.R. 1.
(3) (1921) 29 C.L.R. 243, at p. 256.
(4) (1915) 3 K.B. 649.
(5) (1921) 29 C.L.R. 329.
(6) (1931) 44 C.L.R. 492.

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[EVATT J. referred to *Theodore* v. *Duncan* (1).]

Both the award of the Commonwealth Court of Conciliation and Arbitration and the Regulations in question have force as laws of the Commonwealth, and the Regulations being later in date must prevail (*Goodwin* v. *Phillips* (2)). The Court should not interfere with the penalty imposed by the Magistrate. The completion of the matter depends not upon payment of the fine, but upon the termination of the matter by judgment. If the disallowance by the Senate of the subject Regulations had preceded judgment, then the position on this point would have been entirely different. As to the meaning and effect of the words "shall thereupon cease" which appear in sec. 10 of the *Acts Interpretation Act* 1904-1930, see *Craies* on *Statute Law*, 3rd ed., p. 291, and *Lemm* v. *Mitchell* (3). The effect of a repeal on pending proceedings is dealt with in *Archbold's Criminal Pleading, Evidence and Practice*, 27th ed., p. 6; and the effect of the repeal of statutes creating offences is dealt with in *Russell* on *Crimes and Misdemeanours*, 6th ed., vol. I., p. 205; 7th ed., vol. I., p. 7.

Ham K.C., in reply. The Regulations were disallowed by the Senate subsequent to the Magistrate's decision; therefore on the application for orders nisi it was not possible to raise the question as to penalty and fine. In the circumstances the conviction should be set aside (*Watson* v. *Winch* (4)). The transaction cannot be said to be finally concluded until the party affected had exhausted his right of appeal or the time limited for appeal had expired without an appeal having been brought. The matter should be regarded as if the Regulations had never been promulgated.

Cur. adv. vult.

Nov. 2. The following written judgments were delivered:—

GAVAN DUFFY C.J. AND STARKE J. The appellants were separately informed against for that they were guilty of an offence against the *Waterside Employment Regulations*, in that they respectively did, in contravention of sub-reg. 1 of reg. 3 of the said Regulations at

(1) (1919) A.C. 696; 26 C.L.R. 276.
(2) (1908) 7 C.L.R. 1.
(3) (1912) A.C. 400.
(4) (1916) 1 K.B. 688.

Melbourne, a port to which Part III. of the *Transport Workers Act* 1928-1929 applies, give priority in picking-up for work as a waterside worker to one Aubrey Campbell, a person not being a member of the Waterside Workers Federation of Australia or a returned soldier or sailor within the meaning of the said Regulations, while transport workers (being waterside workers) who were members of the said Federation were available for picking-up for the said work at the said port. The appellants were convicted of the offences charged against them respectively. In each case an appeal was brought to this Court by means of an order to review, and the grounds stated were (1) that sec. 3 of the *Transport Workers Act* 1928-1929 is *ultra vires* and void; (2) that the *Waterside Employment Regulations, Statutory Rule* No. 77 of 1931, are unconstitutional, *ultra vires* and void; and (3) that the said *Waterside Employment Regulations* are of no effect.

Various reasons were assigned in the orders nisi for these contentions, which it is unnecessary to set forth at length. The attack upon the Act itself—the subject of the first ground of the orders to review—was based upon the American constitutional doctrine that "no legislative body can delegate to another department of the Government, or to any other authority, the power, either generally or specially, to enact laws. The reason is found in the very existence of its own powers. This high prerogative has been entrusted to its own wisdom, judgment, and patriotism, and not to those of other persons, and it will act *ultra vires* if it undertakes to delegate the trust, instead of executing it" (*Cooley, Principles of Constitutional Law*, 3rd ed., p. 111). Even in America, this principle does not preclude conferring local powers of government upon local authorities, nor the giving to the Territories a general authority to legislate on their own affairs (*ibid.*, p. 111). It was denied that the *Transport Workers Act* 1928-1929 impinged upon the doctrine, because in that Act the Parliament confined the regulating power to certain specific matters within the ambit of the trade and commerce power, and accordingly merely exercised its own legislative power within that ambit, and did not delegate any part of it. Assuming, however, that the Act does impinge upon the doctrine, still such a restriction has never been implied in English law from the division of powers between

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the several departments of government. As *Higgins* J. said in *Baxter* v. *Ah Way* (1), "the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace, order, and good government" of the Commonwealth. And the decisions of this Court have been uniformly to the same effect (*Roche* v. *Kronheimer* (2) and cases there cited). It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power. Indeed, unless this view is correct, and if there has been a delegation of legislative power, the judgments in the *Huddart Parker Case* (3) and in *Dignan's Case* (4) overlooked an obvious point, and the cases were wrongly decided.

The minor points taken under the first ground may be disposed of in a few words. The *Transport Workers Act* 1928-1929 is later in point of time than the *Commonwealth Conciliation and Arbitration Acts*, and the provisions of the earlier Acts must give way. This is sufficient to dispose of the first ground.

The attack upon the Regulations—the subject of the second and third grounds of the orders nisi to review—was decided in principle against the appellants in the *Huddart Parker Case* (3) and *Dignan's Case* (4). All that is new in these grounds is the suggestion that the Regulations were an abuse of power, and so *ultra vires*. If Parliament, however, placed in the hands of the Executive the power of making the Regulations the subject of attack in these proceedings, and that power has been abused or misused, the only remedy is by political action, and not by appeal to the Courts of law (see *Attorney-General for Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (5)). The only question for the Courts of law in these circumstances

(1) (1909) 8 C.L.R., at p. 646.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 44 C.L.R. 492.
(4) (1931) 45 C.L.R. 188.
(5) (1898) A.C. 700, at p. 713.

is whether the Regulations are within the power conferred upon the Executive Government by the *Transport Workers Act* 1928-1929. And the *Huddart Parker Case* (1) and *Dignan's Case* (2) have resolved this question in favour of the Regulations. This disposes of the second and third grounds of the orders nisi.

During the argument it was stated that the Regulations on which the prosecution was founded had been disallowed by the Senate after the convictions had been recorded, but before the appeals were heard, and the Court allowed this fact to be proved. It is unnecessary, in our view, to determine whether the Regulations so disallowed cease to have effect from the beginning, that is, as if they had never existed, rather than from the point of time when they were disallowed. Assume, however, that they ceased to have effect from the beginning, still the disallowance could not affect transactions that were passed and closed. (Cf. *Surtees* v. *Ellison* (3); *Barrow* v. *Arnaud* (4).) Here, convictions had taken place, and, if no appeal had been brought, the transaction, undoubtedly, would have been passed and closed. The question then is whether a right of appeal to this Court, and an appeal brought pursuant to that right, prevent the transaction being treated as passed and closed. In our opinion they do not, in the present case. "Appeal" is used in more senses than one: it is a process which may subject (1) the whole matter for rehearing; (2) a question of law only, for review; (3) the facts as well as the law for review—that is, whether the order of the tribunal from which the appeal is brought was right, on the materials which it had before it. Orders nisi to review belong to the third type or description of appeals. Consequently the only question for this Court is whether the convictions or adjudications were, on the materials before the tribunal from which this appeal is brought, in accordance with the law as then existing. If they were—as we think was the case—the transaction was closed and adjudicated upon, and the subsequent disallowance of the Regulations by the Senate cannot affect the matter.

In the result, the orders nisi should be discharged.

(1) (1931) 44 C.L.R. 492.
(2) (1931) 45 C.L.R. 188.
(3) (1829) 9 B. & C. 750; 109 E.R. 278.
(4) (1846) 8 Q.B. 604; 115 E.R. 1004.

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Rich J.

RICH J. Reg. 3 (1) of *Statutory Rule* No. 77 of 1931, under which the appellants were charged differs but little from that which was upheld in this Court in *Huddart Parker* v. *Commonwealth* (1). Mr. *Ham*, however, attacked the validity both of the regulation and of the statute under which it was made—sec. 3 of the *Transport Workers Act* 1928-1929—upon grounds chosen, doubtless with a view to avoid the reasons of that decision so far as he might. The re-examination of the matter which his able argument called forth has not caused me to depart either from the result of that decision or from the reasons which lead to it. Sec. 3 of the *Transport Workers Act* 1928-1929 appears to me to be a law with respect to trade and commerce with other countries and among the States, at least so far as it purports to authorize the regulation of work in loading and unloading inter-State cargo, and sec. 15A of the *Acts Interpretation Act* 1901-1930 relieves us from considering the validity of sec. 3 so far as it extends beyond the authorization of the regulation now in question. I agree with Mr. *Ham* that the repeated promulgation by the Executive of similar regulations re-enforces the conclusion that the policy by which the Regulations are inspired is industrial. But this was not denied in the former judgment, which proceeded upon the view, to which I adhere, that although an industrial policy actuated the law-makers, such a motive could not vitiate the Regulations if their object or effect as it appeared *ex facie* were within the power. It is now contended, however, that the actual motives of the Executive should be inquired into for the purpose of invalidating the Regulations. The power given to the Governor-General in Council is not, in my opinion, of an order which makes the validity of its exercise depend upon the grounds taken into consideration by the donee of the power (see *Jones* v. *Metropolitan Meat Industry Board* (2); *Narma* v. *Bombay Municipal Commissioner* (3)).

Roche v. *Kronheimer* (4) is an authority for the proposition that an authority of subordinate law-making may be invested in the Executive. Whatever may be said for or against that decision, I think we should not now depart from it. I have read the judgment

(1) (1931) 44 C.L.R. 492.
(2) (1925) 37 C.L.R. 252, particularly at pp. 262-264.
(3) (1918) L.R. 45 Ind. App. 125, at p. 129.
(4) (1921) 29 C.L.R. 329.

of my brother *Dixon*, and agree with the view of that authority which he has expressed. It follows in my opinion not only that the delegation of power is open to no objection, but the power given by the delegation is so akin to that of legislation that the reasons and motives of the donee, whether appearing *ex facie* the Regulations or *aliunde*, cannot affect their validity. It appears to me also to follow that the argument based upon inconsistency with the alleged determination of the Arbitration Court must fail. Sec. 3 of the *Transport Workers Act* 1928-1929 authorized the Regulations notwithstanding anything in any other Act, and the entire efficacy of the determinations of that Court depends upon the provisions of the *Commonwealth Conciliation and Arbitration Act* 1904-1930. A new and serious question arises out of the disallowance by the Senate of *Statutory Rule* No. 77 of 1931 after the conviction of the appellants and before the hearing of this appeal. I agree with my brother *Dixon* that after disallowance a regulation must be treated in the same way as formerly a repealed statute would have been, and that, therefore, if the function of this Court in its appellate jurisdiction is to reconsider the liability of the party as it exists at the time of the hearing of the appeal, the convictions could not be affirmed.

The question whether we must thus reconsider the present liability of the appellants to conviction depends not upon the nature of the Victorian order to review but upon our own appellate power. The order to review is the vehicle which Section IV. of the *Appeal Rules* prescribes for bringing the appeals before the Court. When here they must be dealt with like other appeals (see *Bell* v. *Stewart* (1)). I have no doubt that our powers are of the widest character which true appellate jurisdiction may possess. On an appeal we should re-examine fact and law as, indeed, we have always done, freely and without fetter or restriction. But I cannot think the reconsideration of the rights and liabilities of the parties, not as they were when the Court appealed from acted but as they have come to be when the appeal is heard, is a function of true appellate jurisdiction. In my opinion we are confined to the time when the judgment complained of was given, and ought not to set aside a judgment rightly given, because of matters subsequently occurring.

The appeals should be dismissed and with costs.

(1) (1920) 28 C.L.R. 419.

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DIXON J. These two appeals are brought under sec. 39 (2) of the *Judiciary Act* 1903-1927 from a Court of Petty Sessions exercising Federal jurisdiction, which convicted the appellants severally upon informations for offences against sub-reg. 1 of reg. 3 of the *Waterside Employment Regulations* made as under sec. 3 of the *Transport Workers Act* 1928-1929 by the Governor-General in Council on 26th June 1931 (S.R. No. 77 of 1931).

Sec. 3 of the *Transport Workers Act* 1928-1929 provides that the Governor-General may make regulations, not inconsistent with that Act, which, notwithstanding anything in any other Act but subject to the *Acts Interpretation Act* 1901-1918 and the *Acts Interpretation Act* 1904-1916, shall have the force of law, with respect to the employment of transport workers, and in particular for regulating the engagement, service and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers. The expression "transport worker" is defined to mean a person offering for or engaged in work in or in connection with the provision of services in the transport of persons or goods in relation to trade or commerce by sea with other countries or among the States. A transport worker is called a "waterside worker" if he offers or is engaged for work in the loading or unloading of ships as to cargo, coal or oil fuel, and the expression includes a person working in or alongside the ship in connection with the direction or checking of the work of other waterside workers (sec. 2). In substance, sub-reg. 1 of clause 3 of the regulation under which the defendants were convicted provides that at the ports in which the provisions of the Act for the licensing of waterside workers are in force priority shall be given in employment, engagement or picking-up for work as a waterside worker to those waterside workers who are available and are members of an organization known as the Waterside Workers Federation of Australia—an organization bound by an award of the Commonwealth Court of Conciliation and Arbitration applicable to employment for that work. Sub-reg. 2 provides that any person who gives priority in employment, engagement or picking-up in or for that work except in accordance with the previous sub-regulation shall be guilty of an offence. Sec. 3 of the *Transport*

Workers Act assumes to commit to the Executive Government an extensive power to make regulations which, notwithstanding anything in any other Act of Parliament, shall have the force of law. The validity of this provision is now attacked upon the ground that it is an attempt to grant to the Executive a portion of the legislative power vested by the Constitution in the Parliament, which is inconsistent with the distribution made by the Constitution of legislative, executive and judicial powers. Sec. 1 of the Constitution provides that the legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Sovereign, a Senate, and a House of Representatives; sec. 61, that the executive power of the Commonwealth is vested in the Sovereign and is exercisable by the Governor-General as the Sovereign's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth; sec. 71, that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with Federal jurisdiction. These provisions, both in substance and in arrangement, closely follow the American model upon which they were framed. The Constitution of the United States provides:—Art. I., sec. 1: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Art. II., sec. 1: "The executive power shall be vested in a President of the United States"; sec. 3: "he shall take care that the laws be faithfully executed." Art. III., sec. 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

In adopting this division of the functions of government, the members of the Convention of 1787 meant that the theory of the separation of powers should be embodied in the fundamental law which they were framing. They shared Gibbon's delight "in the frequent perusal of Montesquieu, whose energy of style and boldness of hypothesis were powerful to awaken and stimulate the genius of the age." To Madison he was "The oracle who is always consulted

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and cited on this subject" (*The Federalist*, No. 47). "No political truth," said Madison, "is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny" (*ibid.*).

The Constitution had been in operation hardly two years before the Judges took their stand upon this separation of powers and firmly declined to execute an act of Congress regulating claims to invalid pensions which, in their opinion, sought to give them duties outside judicial power. *Iredell* J., in his remonstrance to the President, submitted: "That the legislative, executive and judicial departments, are each formed in a separate and independent manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority." *Jay* C.J., *Cushing*, *Wilson* and *Blair* JJ. relied upon the same doctrine in their addresses to the President (*Hayburn's Case* (1)). From this time the distribution of powers always received in the Supreme Court of the United States an interpretation which has ascribed to each department of government an incapacity to receive or to exert any power which according to its essential character was vested by the Constitution in another. "The different classes of power have been apportioned to different departments; and as all derive their authority from the same instrument, there is an implied exclusion of each department from exercising the functions conferred upon the others" (*Cooley's Constitutional Limitations*, 7th ed., ch. v., p. 126). Thus *Miller* J., in *Kilbourn* v. *Thompson* (2), speaking for the Supreme Court, said:—"It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of

(1) (1792) 2 Dallas 410-414; 1 Law. Ed., 436-437; note to *Hayburn's Case*.

(2) (1880) 103 U.S. 168, at pp. 190-191; 26 Law. Ed. 377, at p. 387.

the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

In delivering the judgment of the Supreme Court in *Springer* v. *Government of the Phillipine Islands* (1), *Sutherland* J. said :—"Some of our State constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments (see *Kilbourn* v. *Thompson* (2)). And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. . . . It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the Legislature cannot exercise either executive or judicial power; the Executive cannot exercise either legislative or judicial power; the Judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubts upon, the generally inviolate character of this basic rule."

But it is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome the logical difficulties of defining the power of each organ of government, and the practical and political consequences of an inflexible application of their delimitation. In the first place it was apparent that many things might be

(1) (1928) 277 U.S. 189, at pp. 201-202; 72 Law. Ed. 845, at p. 849.

(2) (1880) 103 U.S., at pp. 190, 191; 26 Law. Ed., at pp. 386, 387.

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done in the course of, or as ancillary to, the execution of one power which might also be done in virtue of another. For instance, the ascertainment of a state of facts upon testimony of witnesses may be incident to some executive action and is not confined to the judicial power (*Willoughby* on the *Constitution of the United States*, 2nd ed., vol. III., p. 1653). Again the power to make rules of procedure may be reposed in the Judiciary or exercised by the Legislature (*Wayman* v. *Southard* (1)). Further, although it may be true that the formulation of enforceable rules of conduct for the subject or the citizen, because they are considered expedient, is the very characteristic of law-making, yet it has always been found difficult or impossible to deny to the Executive, as a proper incident of its functions, authority to require the subject or the citizen to pursue a course of action which has been determined for him by the exercise of an administrative discretion. But in what does the distinction lie between a law of Congress requiring compliance with directions upon some specified subject which the administration thinks proper to give, and a law investing the administration with authority to legislate upon the same subject? The answer which the decisions of the Supreme Court of the United States supply to this question is formulated in the opinion of that Court delivered by *Taft* C.J. in *Hampton & Co.* v. *United States* (2) :—"It is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination. The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently

(1) (1825) 10 Wheat. 1, at p. 42; 6 Law. Ed. 253, at p. 262.

(2) (1928) 276 U.S. 394, at pp. 406-407; 72 Law. Ed. 624, at p. 629.

necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. . . . Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of State legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation." He then quotes an often cited passage of another judgment:—"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

In *Mutual Film Corporation* v. *Industrial Commission of Ohio* (1) the vagueness of the principle is acknowledged, but its limits are restated thus:—"While administration and legislation are quite distinct powers, the line which separates . . . their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the Legislature must declare the policy of the law and fix the legal principles which are to control in given cases: but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution."

The latitude of application which such doctrines allow is evident. Indeed, one speculative writer has said: "The Courts have never had any criterion of validity except that of reasonableness, the common refuge of thought and expression in the face of undeveloped or unascertainable standards" (*Freund, Administrative Powers over Persons and Property*, p. 219). And *Holmes* J., in a dissenting

(1) (1915) 236 U.S. 230, at p. 245; 59 Law. Ed. 552, at p. 560.

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opinion in *Springer* v. *Government of the Phillipine Islands* (1), has doubtless lent support to the notion that many of the consequences of the separation of powers are avoided in substance, although acknowledged in form. But another speculative writer finds in the doctrine, as it is now applied, a very real and important limitation upon the powers of the Legislature. "The fundamental limitation," he says, "has to do with the scope of the discretion that may be delegated. All students of the subject will admit that Congress could not, if it would, transfer *in toto* to the President or any other agency all or any of its enumerated powers. Thus a statute in general terms that the President be given authority to pass regulations regarding inter-State or foreign commerce, would without doubt be held invalid. Nor can Congress delegate the power to regulate even one whole field of inter-State commerce. Surely it would not be legitimate for it to authorize the President to pass reasonable regulations with reference to the inter-State railroad problem. Yet Congress has granted the Inter-State Commerce Commission the power to fix maximum railroad rates, provided they be reasonable; and all admit that this is constitutional. What is the distinction? Essentially the quantitative one of the scope of the discretion." (*James Hart, The Ordinance Making Powers of the President of the United States*," p. 146).

But in any case no decision of the Supreme Court of the United States, of which I am aware, allows Congress to empower the Executive to make regulations or ordinances which may overreach existing statutes.

In support of the rule that Congress cannot invest another organ of government with legislative power, a second doctrine is relied upon in America, but it has no application to the Australian Constitution. Because the powers of government are considered to be derived from the authority of the people of the Union, no agency to whom the people have confided a power may delegate its exercise. "The well-known maxim '*Delegata potestas non potest delegari*,' applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our Federal and State Constitutions than it has in private laws" (per

(1) (1928) 277 U.S. 189; 72 Law. Ed. 845.

Taft C.J. in *Hampton & Co.* v. *United States* (1)). No similar doctrine has existed in respect of British Colonial Legislatures whether erected in virtue of the prerogative or by Imperial statute. "A confirmed act of the local Legislature . . . whether in a settled or a conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament" (per *Willes* J. delivering the judgment of the Exchequer Chamber in *Phillips* v. *Eyre* (2)). It is true that the Latin maxim has sometimes been relied upon in support of attempts to invalidate legislation which have come before the Privy Council, and their Lordships have felt it necessary to emphasize the plenitude and supremacy of the powers with which the Legislatures of the Dominions of the Crown were invested. *R.* v. *Burah* (3), *Hodge* v. *The Queen* (4) and *Powell* v. *Apollo Candle Co.* (5) are authorities frequently cited in this Court in insisting, as its members repeatedly have done, upon the plenary and absolute nature of the power of the Parliament of the Commonwealth upon the subjects assigned to it. It is important to observe that in America the intrusion of the doctrines of agency into constitutional interpretation has in no way obscured the operation of the separation of powers. The prohibition of delegation which arises from the conception of agency, on the one hand disables the Legislatures from granting legislative power not only to the Executive but to bodies outside the Federal government, e.g., State governments, and, on the other hand, is in no way responsible for the incapacity of Congress, under the guise of legislation, to exercise judicial power, or to confer it upon any bodies outside the judicial system or, as has lately been decided, to fetter the discretion to remove officers of State which is contained in the executive power of the President (*Myers* v. *United States* (6)). These are all consequences of the separation of powers and do not derive any additional support from the American principle of non-delegation. It should also be noticed that, in the opinion of the Judicial Committee, a general power of legislation belonging to a legislature constituted

(1) (1928) 276 U.S., at pp. 405-406; 72 Law. Ed., at p. 629.
(2) (1870) L.R. 6 Q.B. 1, at p. 20.
(3) (1878) 3 App. Cas. 889.
(4) (1883) 9 App. Cas. 117.
(5) (1885) 10 App. Cas. 282.
(6) (1926) 272 U.S. 52; 71 Law. Ed. 160.

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under a rigid constitution does not enable it by any form of enactment to create and arm with general legislative authority a new legislative power not created or authorized by the instrument by which it is established. (*R.* v. *Burah* (1); see also *In re Initiative and Referendum Act* (2)).

When they adopted the distribution of powers which they found in the Constitution of the United States, the framers of the Constitution of the Commonwealth of Australia were, of course, by no means unaware of the significance given to the distribution and of the consequences flowing from it. But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution, the doing of that which can be done in virtue only of the possession of such a power. The arrangement of the Constitution and the emphatic words in which the three powers are vested by secs. 1, 61 and 71 combine with the careful and elaborate provisions constituting or defining the respositories of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described. In *New South Wales* v. *Commonwealth* (3) an enactment purporting to constitute the Inter-State Commission a Court with judicial powers was held invalid, notwithstanding sec. 102 of the Constitution, because it amounted to an attempt to confer part of the judicial power of the Commonwealth upon a body not within sec. 71. *Isaacs* J., as he then was, said (4):—"When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity." After referring to and considering the provisions of Chapter II. and of Chapter III., which he described as exhausting the Judicature and containing a distinct command that whatever judicial power is to be exerted in the name of the Commonwealth must be exercised by the Courts it defines, he concluded that it would require, in view of the careful delimitation he had mentioned, very explicit and unmistakable words to undo the effect of the dominant principle of

(1) (1878) 3 App. Cas., at p. 905.
(2) (1919) A.C. 935, at p. 945.
(3) (1915) 20 C.L.R. 54.
(4) (1915) 20 C.L.R., at p. 88.

demarcation. *Rich* J. said (1) :—" The Constitution draws a clear distinction—well known in all British communities—between the legislative, executive and judicial functions of government of the Commonwealth. The legislative power is, by sec. 1, vested in Parliament, the constitution and powers of which are carefully defined in Chapter I. Chapter II. deals with the Executive Government, and the executive power is vested in the Queen, and is made exercisable by the Governor-General as provided by sec. 61 and extends 'to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.' Chapter III. deals with the Judiciary, and contains the most ample and meticulous provisions as to the tribunals which shall exercise such judicial powers and as to the subject matter of their jurisdiction." *Powers* J. agreed (2) with the reasons of *Isaacs* J. as well as those of *Griffith* C.J., who dwelt rather upon the provisions of Chapter III. In *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (3) the members of the Court all either assumed or decided that no judicial power could be given except to Courts within Chapter III., but no express reference was made to the general distribution of powers. In *In re Judiciary and Navigation Acts* (4) it was decided that no judicial function can be imposed upon the High Court which falls outside the jurisdiction described in Chapter III. In the course of their judgment, *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. said (5) :—" The Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes—legislative, executive and judicial (*New South Wales* v. *Commonwealth* (6)). In each case the Constitution first grants the power and then delimits " its exercise (*Alexander's Case* (7)). In *British Imperial Oil Co.* v. *Federal Commissioner of Taxation* (8) authority was again denied to the Parliament to invest any part of the judicial power in anything but a Court within Chapter III.

From these authorities it appears that, because of the distribution of the functions of government and of the manner in which the

(1) (1915) 20 C.L.R., at p. 108.
(2) (1915) 20 C.L.R., at p. 106.
(3) (1918) 25 C.L.R. 434.
(4) (1921) 29 C.L.R. 257.
(5) (1921) 29 C.L.R., at p. 264.
(6) (1915) 20 C.L.R., at p. 88.
(7) (1918) 25 C.L.R., at p. 441.
(8) (1925) 35 C.L.R. 422.

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Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained both from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals. The same or analogous considerations apply to the provisions which vest the legislative power of the Commonwealth in the Parliament, describe the constitution of the Legislature and define the legislative power. Does it follow that in the exercise of that power the Parliament is restrained from reposing any power essentially legislative in another organ or body ? In *Baxter* v. *Ah Way* (1) legislation of the Parliament was upheld conferring upon the Executive authority by proclamation to include goods in the category of prohibited imports. The maxim *Delegatus non potest delegare* was held to afford no ground of objection, and the plenary nature of the legislative power was emphasized. The separation of powers was not expressly mentioned unless in a reference to sec. 1 of the Constitution by *Griffith* C.J., who described it (2) as merely an introductory paragraph to the provisions of the Constitution which deal with the Legislature. *O'Connor* J. (3) and *Isaacs* J. (4), however, each justified the law as conditional legislation, the latter describing the proclamation as a mere fact having certain consequences described by Parliament itself, and the former citing *Field* v. *Clark* (5).

No further opportunity of dealing with the question seems to have occurred in this Court until a succession of cases arising out of regulations made under sec. 4 of the *War Precautions Act* 1914-1916 were decided. But in none of them does the objection appear to have been raised that a legislative power had been given to the Executive which was not permitted because of the distribution of powers contained in the Constitution. Soon afterwards, however, a case was decided in which reliance was placed on the objection.

In *Roche* v. *Kronheimer* (6) the Court upheld the validity of sec. 2 of the *Treaty of Peace Act* 1919, which empowered the Executive to make such regulations as appeared to it to be necessary for

(1) (1909) 8 C.L.R. 626.
(2) (1909) 8 C.L.R., at p. 634.
(3) (1909) 8 C.L.R., at p. 638.
(4) (1909) 8 C.L.R., at p. 641.
(5) (1892) 143 U.S. 649, at p. 694.
(6) (1921) 29 C.L.R. 329.

carrying out or giving effect to the economic clauses of the Treaty of Versailles. In answer to an attack upon the regulation based upon the constitutional distribution of powers, the judgment of the Court, except *Higgins* J., said (1):—"It is enough to say that the validity of legislation in this form has been upheld in *Farey* v. *Burvett* (2); *Pankhurst* v. *Kiernan* (3); *Ferrando* v. *Pearce* (4); and *Sickerdick* v. *Ashton* (5)." In none of these cases was the effect of the distribution of powers raised for consideration, although in three of them, which arose under sec. 4 or sec. 5 of the *War Precautions Act* 1914-1916, an argument raising it would have been relevant, and in two of these some difficulty might have been felt in treating the authority which had been exercised by the Executive as anything less than legislative. But the strength in time of war of the defence power, the exceptional nature of which had been much enlarged upon in *Farey* v. *Burvett*, might conceivably have enabled the Court to confess and avoid an argument based upon the general doctrine of the separation of powers. For it might be considered that the exigencies which must be dealt with under the defence power are so many, so great and so urgent and are so much the proper concern of the Executive, that from its very nature the power appears by necessary intendment to authorize a delegation otherwise generally forbidden to the Legislature. (Compare *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (6) and *Toronto Electric Commissioners* v. *Snider* (7).)

The decision in *Kronheimer's Case* (8) itself might also be reached without any denial of a constitutional rule confining to the Parliament any exercise of power which, apart from its subordinate character, would be essentially legislative. It might well be thought that no infringement of such a rule had been attempted by the enactment then in question, which left to the Executive the task of imposing upon the subject the legal duty of acting in conformity with an arrangement elaborately formulated in the Treaty. I think it certain that such a provision would be supported in America, and the passage in *Burah's Case* (9) appears to apply to it, in which

(1) (1921) 29 C.L.R., at p. 337.
(2) (1916) 21 C.L.R. 433.
(3) (1917) 24 C.L.R. 120.
(4) (1918) 25 C.L.R. 241.
(5) (1918) 25 C.L.R. 506.
(6) (1923) A.C. 695.
(7) (1925) A.C. 396, at p. 412.
(8) (1921) 29 C.L.R. 329.
(9) (1878) 3 App. Cas., at p. 906.

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the Judicial Committee deny that in fact any delegation there took place. But sec. 3 of the *Transport Workers Act* cannot, in my opinion, be regarded as doing less than authorizing the Executive to perform a function which, if not subordinate, would be essentially legislative. It gives the Governor-General in Council a complete, although, of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden.

When, at the beginning of this year, a regulation made under sec. 3 of the *Transport Workers Act* came before us in *Huddart Parker Ltd.* v. *Commonwealth* (1), the attack upon the validity of the section was based rather upon the scope of the commerce power, and but little reliance was placed upon the legislative character of the power conferred upon the Executive. But in the judgments of *Starke* J. and of *Evatt* J., and in my own judgment, with which *Rich* J. expressed his agreement, the question was stated whether it was within the power of the Parliament to make a law which, in the language of *Starke* J. (2) "prescribes no rule in relation to such employment: it remits the whole matter to the regulation of the Governor in Council"; and the answer given by each of us was that *Roche* v. *Kronheimer* (3) decided that it is within the power of Parliament to do so. A reconsideration of the matter has confirmed my opinion that the judgment of the Court in that case does so mean to decide. It may be true that the nature of the case and the authorities cited as the ground of the decision are consistent with the explanation that it did no more than illustrate the potency of the defence power. But I think the judgment really meant that the time had passed for assigning to the constitutional distribution of powers among the separate organs of government, an operation which confined the legislative power to the Parliament

(1) (1931) 44 C.L.R. 492.
(2) (1931) 44 C.L.R., at p. 506.
(3) (1921) 29 C.L.R. 329.

so as to restrain it from reposing in the Executive an authority of an essentially legislative character. I, therefore, retain the opinion which I expressed in the earlier case (1) that *Roche* v. *Kronheimer* (2) did decide that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of the Parliament to make such a law. This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power. There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power. Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority. For instance, its relevance is undeniable to the particular problem suggested in *In re Initiative and Referendum Act* (3). The interpretation by this Court of Chapter III. of the Constitution and that of Chapters I. and II. which has now been adopted in view of *Roche* v. *Kronheimer*, may appear to involve an inconsistency or, at least, an asymmetry, and there are not wanting those who think a course of judicial decision no sufficient warrant for anything so unsatisfactory. But the explanation should be sought not in a want of uniformity in the application to the different organs of government of the consequences of the division of powers among them, but in the ascertainment of the nature of the power which that division prevents the Legislature from handing over. It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repositary of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis

(1) (1931) 44 C.L.R. 492. (2) (1921) 29 C.L.R. 329.
(3) (1919) A.C., at p. 945.

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and perhaps more upon the history and usages of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature. Minor consequences of such a doctrine are found in the rule that offences against subordinate regulation are offences against the statute (*Willingale* v. *Norris* (1)) and the rule that upon the repeal of the statute, the regulation fails (*Watson* v. *Winch* (2)). Major consequences are suggested by the emphasis laid in *Powell's Case* (3) and in *Hodge's Case* (4) upon the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands. After the long history of parliamentary delegation in Britain and the British colonies, it may be right to treat subordinate legislation which remains under parliamentary control as lacking the independent and unqualified authority which is an attribute of true legislative power, at any rate when there has been an attempt to confer any very general legislative capacity. But, whatever may be its rationale, we should now adhere to the interpretation which results from the decision of *Roche* v. *Kronheimer* (5).

The conclusion that the Constitution does not forbid the statutory authorization of the Executive to make a law provides an answer to another of the arguments relied upon by the appellants. Let it be assumed that the *Commonwealth Conciliation and Arbitration Act* did, as they assert, operate upon a determination of the Court of Conciliation and Arbitration so as to establish rights in the appellants or any of them, which the *Waterside Employment Regulations* would override or annul. Sec. 3 of the *Transport Workers Act* gives a regulation the force of law notwithstanding anything in any other law, and, if otherwise valid, it must prevail over the rights so established. The validity otherwise of the regulation is in fact impeached upon three grounds, namely, that sec. 3 is not a law with respect

(1) (1909) 1 K.B. 57, at p. 66.
(2) (1916) 1 K.B. 688.
(3) (1885) 10 App. Cas., at p. 291.
(4) (1883) 9 App. Cas., at p. 132.
(5) (1921) 29 C.L.R. 329.

to inter-State and external commerce; that even if it is, the regulation is not a regulation with respect to such commerce; and that those who made it actually had no purpose connected with such commerce in view. In *Huddart Parker Ltd.* v. *Commonwealth* (1) I gave my reasons for thinking that sec. 15A of the *Acts Interpretation Act* 1901-1930 made it unnecessary to consider the validity of more of sec. 3 than would authorize the regulation of the choice of persons who might do the work of loading and discharging inter-State and overseas ships; and to this opinion I adhere. So much of the section as would authorize the regulation of the choice of such persons appeared to me to be within the commerce power, because the determination of the persons who should take part in work forming part of inter-State and external commerce seemed to me to be directly within the subject matter of sec. 51 (I.) of the Constitution. The fact that the determination of persons who should do such work was accomplished by means of a control exercised over their employment or engagement did not, in my view, deprive the law of its character, although the circumstance that it affected the relations of intending employer and employee did not strengthen its relevance to the commerce power. I have seen no reason to alter these opinions. The regulation then under consideration had, I think, no greater and no less relation to trade and commerce with other countries and among the States than that now under consideration. The terms of each provide unmistakable evidence of the industrial consequences which their operation was meant to bring about. The fact that the Executive has made another similar regulation as often as the Senate has disallowed that which preceded it, was relied upon as confirming the inference that it was not the regulation of trade and commerce but of industrial relations that was aimed at. No confirmation of the motives animating the makers of the regulation was or is necessary. The only question was whether, notwithstanding the nature of these motives, the regulation did operate upon a matter forming an actual part of inter-State and overseas commerce. I think an enactment which does operate directly upon an activity or transaction forming a part of such commerce does not cease to be a law in respect to trade and commerce with other countries and among the States

(1) (1931) 44 C.L.R., at pp. 512, 513.

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because it may equally be referred to some other legislative category. The difficulty must always be great in deciding whether such an enactment is a law with respect to such commerce when it appears from its very terms that the motives which guided the lawgivers were connected with matters belonging to the other category. But I do not think the words " with respect to " in sec. 51 are directed so much to the purpose of the law as to its relevance and operation. Perhaps in this case the real question turns upon the application of the criterion they describe. I remain of the opinion that the regulation " directly controls the selection of agents for the doing of work forming part of such commerce," and that, for this reason, it is a law with respect to such commerce (1). But it is now suggested that in fact the actual exercise of the discretion by the Executive was clearly not directed to the subject of trade and commerce. This contention too is answered, I think, by the legislative character of the function entrusted to the Governor-General in Council. His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are, therefore, immaterial.

The repeated disallowance by the Senate of regulations to the same effect does not appear to me to make the Regulations No. 77 of 1931 *ultra vires*.

For these reasons I think reg. 3 of the Regulations was valid when it was made.

The defendants were convicted before the Court of Petty Sessions on 24th July 1931. Afterwards, but before the commencement of this appeal, namely, on 29th July 1931, the regulation creating the offence of which the defendants were so convicted, was disallowed by a resolution of the Senate passed in pursuance of the proviso of sec. 10 of the *Acts Interpretation Act* 1904-1930. That proviso enacts that " if either House of the Parliament passes a resolution . . . disallowing any regulation such regulation shall thereupon cease to have effect." The question arises whether the conviction can be supported after the regulation " has ceased to have effect " ? The proviso is a qualification of the main enactment contained in sec. 10, which provides that, where an Act confers power to make

(1) (1931) 44 C.L.R., at p. 516.

regulations, they shall be notified in the *Gazette* and take effect from the date of notification, or from a later date specified in the Regulation. An immediate operation is thus allowed to subordinate legislation terminable or defeasible by the subsequent dissent of either of the Chambers of the Legislature, which must both have concurred if the legislation had been direct. Do the words "such regulation shall . . . cease to have effect" express an intention that it shall no longer receive any force as a law, or do they mean that, although the legal consequences shall remain of any failure before its disallowance to comply with the regulation, it shall not otherwise continue in force? Before the introduction of the provisions which stand in the Commonwealth statutes as sec. 8 of the *Acts Interpretation Act* 1901-1930, the repeal of an Act of Parliament put an end to it as a source of liability, whether arising out of acts or omissions, before or after its repeal.

"The general rule of law is that a repealed statute cannot be acted upon after its repeal, although all matters that have taken place under it before its repeal are valid and cannot be called in question" (per Lord *Campbell* C.J., *R.* v. *Inhabitants of Denton* (1)). "What has been perfected under operation of the statute is not to be disturbed; but if the statute be necessary for any farther step, it must be in force at the time of taking that farther step" (per *Coleridge* J. (1)). "I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law" (per *Tindal* C.J., *Kay* v. *Goodwin* (2)). "It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed" (per Lord *Tenterden* C.J., *Surtees* v. *Ellison* (3)).

Thus a liability to punishment for contravention of a penal statute did not continue after the repeal of the enactment which imposed it unless expressly saved by the repealing statute.

(1) (1852) Dears. 3, at p. 8; 169 E.R. 612, at p. 614; 18 Q.B. 761, at p. 770; 118 E.R. 287, at p. 291.

(2) (1830) 6 Bing. 576, at pp. 582-583; 130 E.R. 1403, at p. 1405.

(3) (1829) 9 B. & C., at p. 752; 109 E.R., at p. 279.

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"The offences committed before such repeal, and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal" (*Hale, History of the Pleas of the Crown*, vol. I., p. 291). The doctrine of the common law is that a right conferred and a duty imposed by statute subsisted only while the statute remained in operation as a law. This doctrine appears to be applicable to subordinate legislation. When the regulation "ceases to have effect" how can a liability which arises under it, and depends upon it alike for its origin and continuance remain enforceable? It is only because the regulation had "effect" as a law that the liability could continue. The power to make regulations is not a mere discretionary authority to determine when and how the statute itself shall operate. It is not as if the Act of Parliament alone imposed a liability for failure to conform to an executive or administrative direction. The regulation is a real exercise of subordinate legislative authority. In my opinion, the result is that upon the disallowance of the regulation it can no longer be relied upon as a source of liability. Thus, after a regulation has been disallowed, no one is liable to conviction for an offence committed while it was in force. His liability ceases when the law is revoked that imposed it. But if he has already been convicted, then because his liability has merged in the conviction, it no longer depends upon the law under which it arose, and it does not lapse with the revocation of the law. The conviction has become the source of his liability for his offence, and the conviction continues in force because its operation does not depend upon the law creating the offence, but upon the authority belonging to a judgment or sentence of a competent Court.

But what is to be done in such a case as this, where the decision that the defendants should be convicted is brought up by appeal to be considered at a time when they no longer would be liable to conviction? If the informations preferred against the defendants came on now to be heard for the first time, the charge must fail. Does the appeal to this Court bring up the proceedings so that the charge may be enquired into anew and it may be determined here whether now, at the time of dealing with the appeal, the defendants are under a present liability to conviction; or does the appeal entitle the defendants to no more

than a reconsideration of the question whether, at the time of their conviction, they were actually under the liability to which they were adjudged? The appeal to this Court is given by sec. 73 of the Constitution, which provides that "the High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences . . . (ii) Of any . . . Court exercising Federal jurisdiction." It is governed by the provisions of sec. 39 (2) (*b*) of the *Judiciary Act* 1903-1927 and Section IV. of the *Appeal Rules*. The procedure which determines the mode of appeal does not affect the nature of the appeal itself. It is established that upon such an appeal, it is for the Court to form its own judgment of the facts so far as it is able to do so (*Bell* v. *Stewart* (1)). For this reason an appeal to this Court is often said to be by way of rehearing. "On an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance" (per *Jessel* M.R., *Quilter* v. *Mapleson* (2)). In the English Court of Appeal "all appeals are by way of rehearing, that is by trial over again, on the evidence used in the Court below; but there is special power to receive further evidence" (per *Jessel* M.R., *In re Chennell*; *Jones* v. *Chennell* (3)). Accordingly, that Court must decide an appeal by applying to the circumstances as they exist, when the appeal is dealt with, the law which then operates to determine the rights and liabilities of the parties (*Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (4); *Ex parte Thomas* (5); and compare *Borthwick* v. *Elderslie Steamship Co.* [*No.* 2] (6); *Robinson & Co.* v. *The King* (7)). If, by a retrospective change in the law, the rights and obligations of the parties come to depend upon facts which have not been ascertained, the Court of Appeal takes the necessary steps to have the dispute between the parties decided according to the law presently in force, and it may

(1) (1920) 28 C.L.R. 419.
(2) (1882) 9 Q.B.D. 672, at p. 676.
(3) (1878) 8 Ch. D. 492, at p. 505.
(4) (1912) A.C. 788, at pp. 801-802.
(5) (1889) 60 L.T. 728; 5 T.L.R. 234.
(6) (1905) 2 K.B. 516, at p. 521, per *Romer* L.J.
(7) (1921) 3 K.B. 183, at p. 194, per *Bankes* L.J.

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set aside the order appealed against, and remit the cause to be reheard so that the rights of the parties may be determined as at the date of rehearing (*Stovin* v. *Fairbrass* (1)).

When the Court of Appeal was constituted by the *Supreme Court of Judicature Act* 1873, it was given appellate jurisdiction, with such original jurisdiction as therein mentioned as might be incident to the determination of any appeal (sec. 4). To it were transferred all jurisdiction and powers of the Lord Chancellor and of the Court of Appeal in Chancery in the exercise of his and its appellate jurisdiction (sec. 18 (1)). For all the purposes of and incidental to the hearing and determination of any appeal within its jurisdiction, it was given all the power, authority and jurisdiction vested by the statute in the High Court of Justice (sec. 19). The Rules of Procedure contained in the Schedule to the statute of 1875 provided that all appeals to the Court of Appeal should be brought by way of rehearing, and conferred extensive powers, including that of taking fresh evidence (Order LVIII., rr. 2 and 5). The Lord Chancellor and the Court of Appeal in Chancery, which was established by 14 & 15 Vict. c. 83, exercised a jurisdiction to rehear cases determined in Chancery. Appeal as distinguished from error was not a process of the common law. " Of course, for the purpose of founding any proceeding by way of appeal against the judgment of one of the superior Courts of law at Westminster, it is necessary to produce statutory authority " (per *Willes* J., *Attorney-General* v. *Sillem* (2)). No appeal lay from a judgment or rule of any of the Courts of law before the *Common Law Procedure Act* 1854, and the appeal to the Exchequer Chamber given by secs. 34 and 35 of that statute from a rule to enter a nonsuit or verdict on a point reserved at the trial, and from a refusal of a new trial, was plainly not a rehearing: the Exchequer Chamber was required to give the judgment which ought to have been given in the Court below. (Sec. 41.)

When " the Courts which were manifold " were united " in divers divisions of one," and the judgments of the one Court were made subject to the same review whether the obligations they enforced were legal or equitable, the jurisdiction and the power of the new

(1) (1919) 121 L.T. 172; 88 L.J. K.B. 1004; 35 T.L.R. 659.

(2) (1864) 2 H. & C., 581, at pp. 608-609; 159 E.R. 242, at p. 253.

Court of Appeal were conferred upon it in terms derived from Chancery. The provisions by which its functions were defined and described could scarcely be mistaken. The remedy they gave to the unsuccessful litigant was a rehearing of his cause of the kind illustrated by the cases since decided. But such a remedy is not an appeal in the proper sense. "An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below" (per Lord *Westbury* L.C., *Attorney-General* v. *Sillem* (1)). Upon an appeal to the Privy Council, the question considered is whether the judgment complained of was right when given (*Ponnamma* v. *Arumogam* (2); *Donegani* v. *Donegani* (3)). "Without limiting the extent of His Majesty's prerogative, their Lordships can safely say that it is not the practice of this Board to enter any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it" (per Lord *Davey* in *Ponnamma* v. *Arumogam* (4)). The analogy of the English Court of Appeal is therefore not a sufficient foundation for holding that the appeal to this Court involves a rehearing of the cause as at the date of the appeal. In conferring jurisdiction upon this Court, the Constitution clearly discriminates between original and appellate jurisdiction. The simple language in which the appellate power is conferred, although implying the fullest authority to ascertain whether the judgment below ought, or ought not, to have been given, contains nothing to suggest that this Court is to go beyond the jurisdiction or capacity of the Court appealed from. To do complete justice between the parties litigant, as, according to Lord *Atkinson*, the Court of Appeal ought to do even though it should involve the making of an order which the Court below had not jurisdiction or power to make, smacks rather of original jurisdiction (*Banbury* v. *Bank of Montreal* (5)). The course of authority in this Court tends rather against such a wide view of the nature of the appeal. The Court has always refused to hear fresh evidence, and the power to do so was questioned early

(1) (1864) 10 H.L.C. 704, at p. 724; 11 E.R. 1200, at p. 1209.
(2) (1905) A.C. 383, at p. 388.
(3) (1835) 3 Knapp 63, at p. 88; 12 E.R. 571, at p. 581.
(4) (1905) A.C., at p. 390.
(5) (1918) A.C. 626, at p. 676.

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(*New Lambton Land and Coal Co.* v. *London Bank of Australia Ltd.* (1)). In *Ronald* v. *Harper* (2), upon an appeal from the refusal by a Supreme Court of a new trial motion, the appellant sought to rely upon the fact that since the refusal it had been established that the verdict had been fraudulently obtained by false evidence. He was not permitted to do so, and *O'Connor* J. said (3) :—"It is abundantly clear from sec. 73 of the Constitution that the High Court can review a judgment of a State Court only by way of appeal. Acting on that view the Commonwealth Legislature, in equipping this Court for the discharge of its duty, has recognized its authority to act in respect of the judgments of State Courts exercising State jurisdiction in no other way than by appeal. To determine as a Court of first instance the fact upon which these new grounds of appeal rest would be obviously to exceed the jurisdiction vested in this Court by the Constitution."

In *Commonwealth* v. *Brisbane Milling Co.* (4) an application for a new trial after a verdict of a jury upon a trial in a Court of a State exercising Federal jurisdiction was held to be outside the appellate jurisdiction of this Court, and an appeal from the judgment founded upon the verdict was held useless, because this Court could no more go behind the verdict or impeach it than the Court below.

In the course of his dissenting judgment in *Council of the Shire of Werribee* v. *Kerr* (5) *Isaacs* J., as he then was, expressed the opinion that no appeal from a State Court exercising State jurisdiction could be a rehearing, because, if it were so, this Court would be exercising original jurisdiction as a State judicial power. No attempt has been made in the case of State Courts exercising Federal jurisdiction to give this Court an additional power as original jurisdiction in virtue of secs. 75 and 76 and 51 (xxxix.) of the Constitution, and the question whether this could be done does not need consideration; but see per *Isaacs* J. in *Commonwealth* v. *Brisbane Milling Co.* (6).

On the whole, I am of opinion that the appellate power does not enable or require this Court to deal with the rights and liabilities or immunities of the parties which have been acquired, incurred, or

(1) (1904) 1 C.L.R. 524.
(2) (1910) 11 C.L.R. 63.
(3) (1910) 11 C.L.R., at p. 84.
(4) (1916) 21 C.L.R. 559.
(5) (1928) 42 C.L.R., at p. 20.
(6) (1916) 21 C.L.R., at pp. 575-576.

secured after the judgment appealed from, and that it is confined to the position of the parties at the time the judgment complained of was given.

I think, therefore, that the appeals should be dismissed.

Evatt J. On June 26th, 1931, the Governor-General of the Commonwealth made certain regulations (under the *Transport Workers Act* 1928-1929), and these were duly notified in the *Gazette* upon the same day (S.R. No. 77 of 1931). If they were validly made, they commenced to operate from the date of such notification (*Acts Interpretation Act* 1904-1930, sec. 10 (*b*)).

The Regulations provided in substance that, without prejudice to the right of employing returned soldiers and sailors, preference should be given in the employment of waterside workers for the purpose of loading or unloading vessels engaged in the oversea or inter-State trade, to those who were members of the Waterside Workers' Federation of Australia, an organization registered under the *Commonwealth Conciliation and Arbitration Act*. Their general effect is not distinguishable from those which this Court had under consideration very recently in *Huddart Parker Ltd.* v. *Commonwealth* (1) and *Dignan* v. *Australian Steamships Pty. Ltd.* (2).

On July 17th last the two appellants disobeyed the express terms of the Regulations, and on July 20th they were summoned to appear on July 24th at the Court of Petty Sessions, Melbourne, to answer informations alleging the breaches which occurred on July 17th. At the hearing on July 24th it was not disputed that, subject to certain contentions of law, the appellants had disobeyed the Regulations, and proof of the facts was facilitated in order to obtain a decision upon the legal arguments.

On the same day (July 24th) the Magistrate convicted both appellants and fixed a small penalty. The latter course is easily understood because the proceedings were, in a sense, test cases. What is impossible to understand is the Magistrate's statement that in fixing the penalty he took into consideration the fact "that in all probability my decision may be reversed by the High Court." The Magistrate then said: "I allow a stay of four weeks in order that the matter may be finally determined."

(1) (1931) 44 C.L.R. 492. (2) (1931) 45 C.L.R. 188.

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On August 3rd a Justice of the High Court granted orders nisi for the purposes of reviewing the two decisions of the Magistrate, and the application to make the orders absolute is now before the Full Court for determination. I shall deal in order with the various grounds upon which the decisions of the Magistrate have been attacked.

I. During the hearing of the appeal the Court, by majority, allowed the appellants to read an affidavit which showed, first, that neither fine nor costs have yet been paid, and further, that the regulations contained in *Statutory Rule* No. 77 had on 29th July 1931 been disallowed by the Commonwealth Senate, and had "thereupon ceased to have effect" (*Acts Interpretation Act* 1904-1930, sec. 10). It was then suggested that the convictions and orders of the Magistrate must be discharged because the law on which the prosecution had been founded was no longer operative.

The jurisdiction which the Magistrate exercised in hearing and determining the informations was federal in character. His judgments and orders were those of a "Court exercising Federal jurisdiction" within the meaning of sec. 73 of the Constitution. Subject to the power of Parliament to make exceptions and regulations, the High Court is given jurisdiction by that section to hear and determine "appeals" from the tribunals therein specified. The relevant enactment of the Commonwealth Parliament is contained in sec. 39 (2) (*b*) of the *Judiciary Act*, which allows an "appeal" to the High Court from the "decision" of a Court of a State exercising Federal jurisdiction where State law provides for an appeal from the State Court in question to the State Supreme Court. From the decision of the Magistrate in the present case an appeal lay to the Victorian Supreme Court by means of an order of review (Victorian *Justices Act*, sec. 150). Each of the matters which is now before us is therefore an "appeal" from the "decision" of the Magistrate.

In my opinion the "appeal" mentioned in sec. 73 of the Constitution and in sec. 39 (2) (*b*) of the *Judiciary Act* is an appeal strictly so called. If so, it is not competent for this Court to take into consideration, for the purposes of exercising its appellate jurisdiction, matters which have occurred since the decision of the Magistrate. On the contrary, the Court "is required to examine

the merits and correct any error in the decision," as was pointed out by *Griffith* C.J. in the *Tramways Case* [No. 1] (1). The distinction between an appeal in its strict sense, and one which is in the nature of a rehearing has often been emphasized, and I need only refer to the case of *Quilter* v. *Mapleson* (2) and to the judgment of Lord *Davey* for the Judicial Committee of the Privy Council in *Ponnamma* v. *Arumogam* (3). Of course there may be appeals in which it is proper to bring to the notice of this Court facts which have occurred after the pronouncement of the decision appealed against. Occasionally, the Court may think it proper to refrain from exercising its appellate jurisdiction because of such facts. If, however, the jurisdiction is to be exercised at all, it must be for the purpose of determining whether the decision of the inferior tribunal was right or wrong when it was pronounced.

It follows that it is not within the jurisdiction of this Court to decide on the present appeal whether the Magistrate would have been bound to acquit the appellants had the Senate's disallowance of the Regulations occurred prior to his decision, and been duly brought to his notice. Accordingly I express no opinion on the point.

II. It is said that sec. 3 of the *Transport Workers Act* 1928-1929, under which the Regulations were made, was invalid because the power it confers upon the Governor-General to make enactments is not consistent with the constitutional separation of the legislative from the executive power of the Commonwealth. Sec. 3 purports to confer upon the Executive an authority to make regulations which "shall have the force of law" subject to the two *Acts Interpretation Acts* and to the *Transport Workers Act* itself, but "notwithstanding anything in any other Act" contained. The argument is put in a slightly different form by saying that the legislative power of the Commonwealth Parliament to authorize the making of rules and regulations by the Executive Government does not extend to such a delegation as is authorized by sec. 3, and this, not because the Commonwealth Parliament is itself a depositary of delegated powers, but because the Australian Constitution requires that all legislative power shall be exercised exclusively by Parliament.

(1) (1914) 18 C.L.R. 54, at p. 61. (2) (1882) 9 Q.B.D. 672.
(3) (1905) A.C., at p. 390.

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In putting forward this contention the appellants undertook an almost impossible task. The point made did not escape attention in *Huddart Parker's Case* (1), decided in February last, where *Starke* J., *Dixon* J. and I all referred to it, but regarded *Roche* v. *Kronheimer* (2) as sufficient authority for holding that sec. 3 could not be impeached upon this ground. When *Dignan's Case* (3) was debated before us, the contention was as much open to the respondent as in the present case, but it was not mentioned.

The appellants were, therefore, driven to contend that *Roche* v. *Kronheimer* (2) was wrongly decided. It was the unanimous decision of five Justices of this Court, three of whom sat on the present appeal. The ruling upon the present point was based upon a line of cases commencing with *Farey* v. *Burvett* (4) ; and four of the five Justices of the Court said that they did not propose to enter into any inquiry as to the correctness of those earlier decisions.

In dealing with the doctrine of " separation " of legislative and executive powers, it must be remembered that, underlying the Commonwealth frame of government, there is the notion of the British system of an Executive which is responsible to Parliament. That system is not in operation under the United States Constitution. Nor, indeed, had it been fully developed in England itself at the time when Montesquieu first elaborated the doctrine or theory of separation of governmental powers. But, prior to the establishment of the Commonwealth of Australia in 1901, responsible government had become one of the central characteristics of our polity. Over and over again, its existence in the constitutional scheme of the Commonwealth has been recognized by this Court.

This close relationship between the legislative and executive agencies of the Commonwealth must be kept in mind in examining the contention that it is the Legislature of the Commonwealth, and it alone, which may lawfully exercise legislative power. " It is the duty of the Judiciary," said *Isaacs* J. (as he then was) in the case of *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (5), " to recognize the development of the Nation and to apply established

(1) (1931) 44 C.L.R. 492.
(2) (1921) 29 C.L.R. 329.
(3) (1931) 45 C.L.R. 188.
(4) (1916) 21 C.L.R. 433.
(5) (1922) 31 C.L.R., at pp. 438-439.

principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter. It is only when those common law principles are exhausted that legislation is necessary."

Much the same method of approach to the solution of constitutional questions is adopted by the Judicial Committee of the Privy Council. In *Edwards* v. *Attorney-General for Canada* (1) Lord *Sankey* L.C., speaking of the Canadian Constitution, said that it "planted in Canada a living tree capable of growth and expansion within its natural limits," and noted with approval Sir *Robert Borden's* statement that, "like all written constitutions it has been subject to development through usage and convention." The Australian Constitution should receive the same "large and liberal interpretation" as that accorded by the Privy Council to the *British North America Act*.

The Constitution of the Commonwealth vests, or treats as vested, the legislative power in the Parliament, the executive power in the Crown, and the judicial power in certain Courts referred to in Chapter III. (secs. 1, 61 and 71). This classification relates solely to the powers of the Commonwealth as such, and is not concerned with the division of the powers of legislation between the Commonwealth and State Parliaments. Now it is often said that the result of the classification is to set up a "separation" of Commonwealth powers, mutually exclusive in character, with each power exercisable by its own appropriate organ and by no other authority whatever. But it is not possible to predicate of all lawful Commonwealth action that it must be an exercise either of legislative, or judicial or executive functions. The British tradition that judicial functionaries are or should be free from any interference on the part of the Legislature or the Executive, has resulted in a special tendency to resist any serious encroachment upon the field of judicial action by agencies of the Executive Government. None the less, it has been finally determined that, under the Australian Constitution, duties and functions resembling those of a strictly judicial character may lawfully

(1) (1930) A.C. 124, at p. 136.

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be vested in administrative tribunals (*Shell Co. of Australia* v. *Federal Commissioner of Taxation* (1)). In that case *Isaacs* J. (as he then was) closely examined certain aspects of the general question now before us. He referred to the fact that there are "many functions which are either inconsistent with strict judicial action . . . or are consistent with either strict judicial or executive action" (*Federal Commissioner of Taxation* v. *Munro* (2)). He said (3) that "the very same process may thus, in some instances, be either judicial or executive"; and, dealing in more general terms with the doctrine of separation of powers, he said (4) :—"The Constitution, it is true, has broadly and, to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution."

On the other hand, a catena of cases decided by this Court has enforced the principle that the judicial power of the Commonwealth cannot lawfully be conferred upon organs other than the High Court, the Judges of the Federal Courts created by Parliament, and the Courts of a State. This principle has prevented the attempts of the Federal Parliament either (*a*) to vest what is strictly judicial power upon Commonwealth authorities without creating those authorities as a Federal Court consisting of Judges appointed pursuant to sec. 72 of the Constitution, or (*b*) to compel the High Court to exercise jurisdiction beyond the limits of secs. 75 and 76 of the Constitution. The cases are *New South Wales* v. *Commonwealth* (5), *Alexander's Case* (6) and *In re Judiciary and Navigation Acts* (7).

But it does not follow from these decisions that the only function which may lawfully be assigned by the Commonwealth Parliament to the three kinds of tribunals mentioned in sec. 71 is the exercise of the judicial power of the Commonwealth. For instance, there is a Federal Court created by the *Commonwealth Conciliation and Arbitration Act*. Such Court has for some years performed functions

(1) (1931) A.C. 275.
(2) (1926) 38 C.L.R. 153, at p. 175.
(3) (1926) 38 C.L.R., at p. 176.
(4) (1926) 38 C.L.R., at p. 178.
(5) (1915) 20 C.L.R. 54.
(6) (1918) 25 C.L.R. 434.
(7) (1921) 29 C.L.R. 257.

which are not the exercise of judicial power at all. So much was decided by this Court in *Alexander's Case* (1). The exercise of "arbitral" functions in relation to industrial disputes is lawful because the Commonwealth Parliament has made a valid law in the exercise of its power under sec. 51 (xxxv.) of the Constitution.

This also shows that it is not possible to infer from the fact that an organ for the exercise of one of the three Commonwealth powers is lawfully acting, that it must be exercising the power associated with it as an organ in secs. 1, 61 or 71, of the Constitution. In particular it does not follow, because one of the three agencies by which the judicial power of the Commonwealth is exercised is lawfully acting, that it must be exercising either judicial power or even judicial functions. Neither does it follow from the fact that the Executive Government of the Commonwealth is lawfully acting, that it must be exercising the executive power of the Commonwealth or even executive functions.

The observation of *Isaacs* J. (as he then was) (2) that there is a "separation" of powers only "to a certain extent" has a special application when the question concerns the exercise of legislative functions and powers by executive bodies. Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of judicial power but because of the elaborate provisions of Chapter III. As Sir *W. Harrison Moore* has pointed out in his well known work on the Australian Constitution "between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage" (*Commonwealth of Australia*, 2nd ed., p. 101).

It is very difficult to maintain the view that the Commonwealth Parliament has no power, in the exercise of its legislative power, to vest executive or other authorities with some power to pass regulations, statutory rules, and by-laws which, when passed, shall have full force and effect. Unless the legislative power of the Parliament extends this far, effective government would be impossible.

The statesmen and lawyers concerned in the framing of the Australian Constitution, when they treated of "legislative power" in relation to the self-governing colonies, had in view an authority

(1) (1918) 25 C.L.R. 434. (2) (1926) 38 C.L.R., at p. 178.

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which, over a limited area or subject matter, resembled that of the British Parliament. Such authority always extended beyond the issue by Parliament itself of binding commands. Parliament could also authorize the issue of such commands by any person or authority it chose to select or create. "Legislative power" connoted the power to deposit or delegate legislative power because this was implied in the idea of parliamentary sovereignty itself. It was, of course, always understood that the power of the delegate or depositary could be withdrawn by the Parliament that had created it, and in this sense Parliament had to preserve "its own capacity intact" (*In re Initiative and Referendum Act* (1)).

But this preservation or reservation of ultimate authority in the Legislature itself was implicit, and was sufficiently evidenced by the continued existence and activity of Parliament. No one conversant with British Parliamentary history ever supposed that the supremacy of the Legislature was affected in the slightest degree either by the actual creation of new law-making authorities, or by the vesting in existing authorities of the power to make laws.

In truth the full theory of "Separation of Powers" cannot apply under our Constitution. Take the case of an enactment of the Commonwealth Parliament which gives to a subordinate authority other than the Executive, a power to make by-laws. To such an instance the theory of a hard and fast division and sub-division of powers between and among the three authorities of government cannot apply without absurd results. It is clear that the regulation-making power conferred in such a case upon the subordinate authority is not judicial power. If it is a "power" of the Commonwealth at all, it must, according to the theory, be either legislative or executive power. But, if the former, the statute granting power would be invalid because the Legislature itself was not exercising the power; and if the latter, the statute would be bad because an authority other than the Executive Government of the Commonwealth was vested with executive power in defiance of sec. 61 of the Constitution. It is no longer disputed that, if Parliament passes a law within its powers, it may, as part of its legislation, endow a subordinate body, not necessarily the Executive Government, with power to make

(1) (1919) A.C., at p. 945.

regulations for the carrying out of the scheme described in the statute. Does the Constitution impliedly prohibit Parliament from enlarging the extent of the powers to be conferred on subordinate authorities?

In my opinion every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power. The true nature and quality of the legislative power of the Commonwealth Parliament involves, as part of its content, power to confer law-making powers upon authorities other than Parliament itself. If such power to issue binding commands may lawfully be granted by Parliament to the Executive or other agencies, an increase in the extent of such power cannot of itself invalidate the grant. It is true that the extent of the power granted will often be a very material circumstance in the examination of the validity of the legislation conferring the grant. But this is for a reason quite different and distinct from the absolute restriction upon parliamentary action which is supposed to result from the theory of separation of powers.

The matter may be illustrated by an example. Assume that the Commonwealth Parliament passes an enactment to the following effect: "The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States." Such a law would confer part of the legislative power of the Commonwealth upon the Executive Government, and those who adhere to the strict doctrine of separation of powers, would contend that the law was *ultra vires* because of the implied prohibition contained in secs. 1, 61 and 71 of the Constitution. For the reasons mentioned such a view cannot be accepted.

At the same time, I think that in ordinary circumstances a law in the terms described would be held to be beyond the competence of the Commonwealth Parliament. The nature of the legislative power of the Commonwealth authority is plenary, but it must be possible to predicate of every law passed by the Parliament that it is a law with respect to one or other of the specific subject matters mentioned in secs. 51 and 52 of the Constitution. The only ground

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upon which the validity of such a law as I have stated could be affirmed, is that it is a law with respect to trade and commerce with other countries or among the States. But it is, in substance and operation, not such a law, but a law with respect to the legislative power to deal with the subject of trade and commerce with other countries or among the States. Thus, sec. 51 (1) of the Constitution operates as a grant of power to the Commonwealth Parliament to regulate the subject of inter-State trade and commerce, but the grant itself would not be truly described as being a law with respect to inter-State trade and commerce. Sec. 51 (1) is, however, correctly described as a law with respect to the powers of Parliament, and it finds its proper and natural place in a Constitution Act.

The following matters would appear to be material in examining the question of the validity of an Act of the Parliament of the Commonwealth Parliament which purports to give power to the Executive or some other agency to make regulations or by-laws :—

1. The fact that the grant of power is made to the Executive Government rather than to an authority which is not responsible to Parliament, may be a circumstance which assists the validity of the legislation. The further removed the law-making authority is from continuous contact with Parliament, the less likely is it that the law will be a law with respect to any of the subject matters enumerated in secs. 51 and 52 of the Constitution.

2. The scope and extent of the power of regulation-making conferred will, of course, be very important circumstances. The greater the extent of law-making power conferred, the less likely is it that the enactment will be a law with respect to any subject matter assigned to the Commonwealth Parliament.

3. The fact that Parliament can repeal or amend legislation conferring legislative power will not be a relevant matter because parliamentary power of repeal or amendment applies equally to all enactments. But all other restrictions placed by Parliament upon the exercise of power by the subordinate law-making authority will be important.

4. The circumstances existing at the time when the law conferring power is passed or is intended to operate, may be very relevant upon the question of validity. A law conferring power to regulate,

in time of war or national emergency or under circumstances where it is essential to retain in some authority a continuous power of alteration or amendment of regulations, although clearly a law with respect to legislative power, might also be truly described as a law with respect to the subject matter of naval and military defence, or external affairs or another subject matter.

5. The fact that a Commonwealth statute confers power to make regulations merely for the purpose of carrying out a scheme contained in the statute itself, will not prevent the section conferring power to make regulations from being a law with respect to legislative power. But ordinarily it will also retain the character of a law with respect to the subject matter dealt with in the statute.

6. As is assumed in 5, *supra*, a Commonwealth enactment is valid if it is a law with respect to a granted subject matter, although it is also a law with respect to the exercise of legislative power.

7. The fact that the regulations made by the subordinate authority are themselves laws with respect to a subject matter enumerated in secs. 51 and 52, does not conclude the question whether the statute or enactment of the Commonwealth Parliament conferring power is valid. A regulation will not bind as a Commonwealth law unless both it and the statute conferring power to regulate are laws with respect to a subject matter enumerated in sec. 51 or 52. As a rule, no doubt, the regulation will answer the required description, if the statute conferring power to regulate is valid, and the regulation is not inconsistent with such statute.

On final analysis therefore, the Parliament of the Commonwealth is not competent to "abdicate" its powers of legislation. This is not because Parliament is bound to perform any or all of its legislative powers or functions, for it may elect not to do so; and not because the doctrine of separation of powers prevents Parliament from granting authority to other bodies to make laws or by-laws and thereby exercise legislative power, for it does so in almost every statute; but because each and every one of the laws passed by Parliament must answer the description of a law upon one or more of the subject matters stated in the Constitution. A law by which Parliament gave all its law-making authority to another body would be bad merely because it would fail to pass the test last mentioned.

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Reference may now be made to *Roche* v. *Kronheimer* (1). The *Treaty of Peace Act* 1919 conferred power upon the Executive Government to make regulations for the purpose of carrying out the economic provisions of the Treaty of Peace, which had already been made by international persons, including His Majesty the King in right of the Commonwealth of Australia and acting upon the advice of His Commonwealth Ministers of State. It cannot be doubted that sec. 2 of the Act in question, in giving the Governor-General power to make regulations, did enable an authority other than the Legislature to exercise the power of legislation. But for the reasons already expressed, such fact could not destroy the constitutional validity of the section.

But was the enactment a law with respect to any of the enumerated subject matters which can be dealt with by the Commonwealth Legislature ? Although a law with respect to legislative power, was it also a law with respect to naval and military defence, or with respect to external affairs ?

Having regard to the peculiar prerogative rights of the Crown in respect to the declaration of war and the making of peace, the special relationship of the Executive Government of the Commonwealth to the Treaty of Peace itself, the difficulty of the subject of " external affairs " being dealt with by an authority other than the Executive, the plenary nature of the defence power in time of war, including the time of terminating the war, the complexity of the arrangements required for the purpose of carrying out the economic provisions of the Treaty, and the necessity of a continuous exercise of authority to change the terms of such arrangements from time to time, the *Treaty of Peace Act* was also a law with respect to naval and military defence and with respect to external affairs.

Roche v. *Kronheimer* (1) is a clear authority that invalidity does not attach to Commonwealth legislation, merely because it commits legislative power to authorities other than Parliament. The law in question in that case could not have been upheld if the rigid doctrine of separation of powers had been regarded as contained or implied in the Commonwealth Constitution. I am of opinion that in this respect *Roche* v. *Kronheimer* was correctly decided.

(1) (1921) 29 C.L.R. 329

In *Huddart Parker's Case* (1) the only suggestion made with regard to the validity of sec. 3 of the *Transport Workers Act* was that Parliament was incompetent to grant so wide a regulation-making power to the Executive Government. The suggestion was rejected because of the decision in *Roche* v. *Kronheimer* (2), the matter not having been further debated at the Bar. It was implicit in the judgments of the majority of the Court that the actual Statutory Rule made under sec. 3 was an exercise of true legislative power, because the argument in the case centred around the question whether the Statutory Rule was a law with respect to trade and commerce. The assumption that the regulation was not valid unless it was a law with respect to one of the subject matters enumerated in secs. 51 and 52 of the Constitution was right, because the regulation was an exercise of the legislative power of the Commonwealth.

All that remains necessary is to re-examine sec. 3 to see whether it can itself be described as a law with respect to trade and commerce with other countries or among the States. It cannot be denied that the section is a law with respect to the legislative power of the Commonwealth and, if that were the only description it answered, it would not be valid.

What sec. 3 committed to regulation by the Executive Government was not the whole but a small though important part of the subject matter of inter-State and foreign trade. The Commonwealth Parliament had before its consideration the necessity of securing continuity of operations in sea-going trade and commerce. Apparently it believed that interruption of services might occur by reason of trouble and disturbance in connection with the work of loading and unloading trading vessels. It did not consider itself able to lay down a rigid or general rule which could not be altered to meet the changing circumstances of the particular work. But it expressly reserved to each House of Parliament the right, under certain circumstances, of disallowing any regulations. It also had the knowledge that the body entrusted with the regulation-making power would exercise that power upon the advice of Ministers directly responsible to Parliament. It must be taken as considering

(1) (1931) 44 C.L.R. 492. (2) (1921) 29 C.L.R. 329

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that, if an emergency threatened the smooth and regular working of vessels, rules which had been made might require immediate modification or repeal, or new rules might have to be made upon the subject. One of the subject matters mentioned in sec. 3 was the "protection" of transport workers. The degree of protection required would vary not only from time to time, but from place to place throughout the Commonwealth. The services of Parliament might not be available for the purpose of considering the repeal or alteration of a regulation which was obstructing the free movement of vessels in the described trade and commerce, and a lapse of hours might be disastrous. All these considerations support the view that the subject matter described in sec. 3 was one peculiarly adapted for the exercise of rule-making power by the Executive rather than by the Legislature itself.

I am, therefore, of opinion that sec. 3 was also a law with respect to trade and commerce with other countries and among the States, and its validity should be reaffirmed.

III. It was further argued on behalf of the appellants that the Regulations are *ultra vires* and void, because the preference they confer upon members of the Waterside Workers' Federation is inconsistent with a certain award made by the Commonwealth Court of Conciliation and Arbitration and with a certain order made by that Court. The *Conciliation and Arbitration Act* of the Commonwealth Parliament enables an industrial dispute extending beyond the limits of one State to be settled by an award, and makes the arbitrator's award binding on the parties to the dispute. If it is inaccurate to speak of an award as a "law" of the Commonwealth, it is not inaccurate to say that the sanction or binding force of the award is derived, mediately or immediately, from the Commonwealth statute. The stream cannot rise higher than its source.

It may, therefore, be assumed that the award is as effective in respect of the parties bound by it, as a statute of the Commonwealth Parliament. It is then contended by the appellants that the industrial dispute settled by the award included a claim of preference to members of the Waterside Workers' Federation, and that, when preference was denied by the Commonwealth Court, the sanction of the award extended to what was denied, as much as to what was

granted. The argument then proceeds as follows:—The Commonwealth Arbitrator has said to the Union "you shall not have preference"; but the *Waterside Workers Regulations* say in substance "you are entitled to the preference denied you by the Arbitrator." When the matter is put in this way, there is at once apparent a very strong case of inconsistency between the award and orders of the Arbitration Court to which the appellant Company was a party, and the present *Waterside Workers Regulations*.

The answer to the argument is that regulations under sec. 3 of the *Transport Workers Act* take effect notwithstanding any Commonwealth law to the contrary. Regulations validly made by a Commonwealth authority other than Parliament itself, acquire the character of laws of the Commonwealth. Whether they supplant any previous Commonwealth law, depends upon the circumstances of the particular case. But if the express will of the Commonwealth Parliament is that the regulations shall prevail over statutes passed by Parliament itself, then prevail they do. Sec. 3 clearly expresses such an intention on the part of Parliament. It follows that if regulations which are otherwise valid, operate so as to override Commonwealth statutes, they may also override awards or orders which themselves take their force and sanction from a Commonwealth statute.

IV. Next it was said that the present Regulations are inconsistent with the *Transport Workers Act*, because Part III. of that Act impliedly entitles the holder of a licence thereunder to offer himself for employment and to be employed free from the restrictions as to preference laid down in the Regulations.

This argument was submitted in *Huddart Parker's Case* (1), and was rejected by four of the five Justices then sitting. I expressed my opinion (2) in the following terms:—"The licensing system is not trenched upon by the preference scheme . . . The subject matter dealt with by the preference regulations is different and distinct from the licensing system itself." It is not necessary that I should add anything further.

V. It was also contended on behalf of the appellants that the Regulations are *ultra vires* because they were made "with the object of benefiting persons not the object of the power, namely,

(1) (1931) 44 C.L.R. 492. (2) (1931) 44 C.L.R., at p. 522.

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the members of a particular union whose interests the Executive is engaged in promoting." It was said that the Regulations were "not made bona fide in the exercise of the discretion delegated by the Legislature," and that the making of the Regulations was "in fraud of" the power vested in the Executive.

In support of this contention, Mr. *Ham* pointed to the fact that *Statutory Rule* No. 76 of 1931 requires an applicant for a licence to state whether he is or is not a member of the Waterside Workers' Federation or a returned soldier or a returned sailor. He said it was now clear that the Executive Government was attempting by regulation, to prevent licensed persons, not members of the three specified classes, from obtaining any employment whatever on the waterfront, and to secure a monopoly of employment to members of the Waterside Workers' Federation. He relied also on the fact that, although a large number of regulations having the same operative effect as those enforced in the present prosecutions had been disallowed by the Senate, they were immediately re-enacted by the Governor-General. In the proceedings before the Magistrate, the appellants also put in evidence a number of speeches made by the Prime Minister, the Attorney-General, and the representative of the Government in the Senate, which indicated that the Government was determined to re-issue regulations, notwithstanding repeated disallowance by the Senate.

The admissibility of those speeches is open to many serious objections, not the least of which is the fact that the Regulations are made, not by the King's Ministers, but by the King's representative himself. Even if they can be looked at, they prove no more than that the Executive Government was determined to carry out a policy of regulating employment on the waterfront, which was opposed to the opinion of a majority of the Senate.

It is a little difficult to appreciate the precise legal quality sought to be impressed upon the Regulations by the facts which have been mentioned. I pass by for the moment the suggestion that, once the Senate has disallowed a regulation, the Governor-General is not entitled to make a new one in identical terms. That is a separate matter and will be separately considered. But how can the several

matters which have been stressed convert regulations otherwise authorized by the Constitution and by the Act, into regulations which do not possess such authority ?

Mr. *Ham* referred to the case of the *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) as an authority for the proposition that prior attempts to exercise a legislative power can be examined, in order to discover the "true character" of legislation subsequently passed by the same authority. That proposition cannot, in a general sense, be disputed. But the crucial fact in the *Reciprocal Insurers' Case* was this:—It had previously been determined by the Privy Council that it was not competent to the Parliament of the Dominion of Canada to pass a certain law, because it regulated civil rights in the Provinces, and therefore came within the exclusive jurisdiction conferred upon Provincial Legislatures by sec. 92 of the *British North America Act*. Subsequently, the Parliament of Canada attempted to pass a law not substantially differing in operation from that previously held to be *ultra vires*. The method adopted was to give compulsory force to the old enactments, not directly, but indirectly, by ascribing the sanctions of the criminal law to disobedience. The legislators then relied on the exclusive jurisdiction of the Dominion Parliament to regulate criminal law. But the Judicial Committee held that the new piece of legislation was still, in purpose and effect, a measure regulating civil rights, and that the colour of criminal law given to the enactment did not alter its substantial nature.

In *Huddart Parker's Case* (2) I had occasion to point out what I consider to be a vital distinction between the Canadian and Australian Constitutions. In Canada, a large number of subjects of legislation is committed to the exclusive jurisdiction of the Dominion, and a large number is also committed to the exclusive jurisdiction of the Provinces. It follows that the question for decision in many cases may have to be solved by ascertaining the substance of the disputed legislation, for the purpose of seeing if it can be included in the classification either of sec. 91 or of sec. 92 of the *British North America Act*. The full list of subject matters enumerated in secs. 91 and 92 covers a very large part of the total content of the self-governing powers of Canada. The position is quite different under

(1) (1924) A.C. 328.

(2) (1931) 44 C.L.R., at p. 526.

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the Australian Constitution, in that the powers vested in the Commonwealth Parliament logically precede and necessarily determine the existence of any alleged exclusive power of the Legislatures of the States. In Canada a disputed enactment of the Dominion Parliament must always be examined in the light of the fact that upon certain subjects the jurisdiction of the Provinces is exclusive. In Australia the validity of Commonwealth enactments cannot be challenged upon the ground that any part of the field of legislative power is *already* reserved or occupied by the States. It is, of course, necessary under both Constitutions to examine every enactment which is challenged for the purpose of ascertaining its real operative effect.

In the present case it is not denied that the substantial effect of all the regulations passed from time to time by the Executive Government of the Commonwealth under sec. 3 of the *Transport Workers Act*, is the same. It is not as though this Court had determined that the Regulations under review in *Huddart Parker's Case* (1) exceeded the limits of Commonwealth jurisdiction, and, subsequently, it was sought by the Executive to give a different colour to the Regulations so as to bring them within Commonwealth jurisdiction. On the contrary, the Court decided that the first preference Regulations were validly enacted, and it may be added that it also held in *Dignan's Case* (2) that another set of preference Regulations, not substantially differing from those considered in *Huddart Parker's Case*, were also valid when made by the Governor-General.

In the latter case (1) the Court decided that the Regulations were not only authorized by sec. 3 of the *Transport Workers Act* but were enactments in respect of trade and commerce with other countries or among the States. It was urged that they now stand revealed as laws with respect to employment. In my opinion the first set of Regulations bore that aspect as much as those now attacked. The Parliaments of the States have not exclusive jurisdiction over the subject matter of employment, and the suggestion therefore overlooks the important difference mentioned between the Constitutions of Canada and Australia. If a law is a law with respect to trade and commerce, inter-State or oversea, and also a

(1) (1931) 44 C.L.R. 492. (2) (1931) 45 C.L.R. 188.

law with respect to employment in such trade and commerce, or with respect to workers' or seamen's compensation in such trade and commerce (*Australian Steamships Ltd.* v. *Malcolm* (1)), or with respect to methods of carrying, delivering or selling goods in the course of such commerce, it still remains within the power of the Commonwealth authority.

In a controversy such as the present one, it is very easy to use words of praise or blame. But it is of no assistance to speak of "bureaucratic methods," of a "fraud on a power," of "absence of bona fides," of "subversive proceedings"—there is no limit to the vocabulary. What is called firmness and courage by one, is denounced as obstinacy and despotism by another. It is reassuring to be told that actual bad faith is not imputed to those responsible for the reissuance of the regulations. Indeed, such a suggestion would give rise to a very grave constitutional question as to whether it is possible to impute want of good faith to the King's representative or the King's advisers, for the purpose of nullifying executive acts performed in the name of the King or his representative.

I am of opinion that the Regulations, like those considered in *Huddart Parker's* (2) and *Dignan's Cases* (3), were authorized by the Constitution and the *Transport Workers Act*.

VI. The last contention of the appellants is that regulations in substantially the same terms having been previously disallowed by the Senate during the same session of Parliament, it was not competent to the Governor-General to make the present Regulations.

This argument involves consideration of the meaning of sec. 10 of the *Acts Interpretation Act* 1904-1930 and sec. 33 (1) of the *Acts Interpretation Act* 1901-1930.

Sec. 10 of the *Acts Interpretation Act* 1904 was examined by this Court in *Dignan's Case* (3), and it was held that it was competent to either House of Parliament to disallow regulations not later than fifteen sitting days after they had been laid before that House. The section provides that regulations are to take effect from the date of notification in the *Gazette*, or from a later date specified in the regulations, and, if disallowance by either House takes place, "such

(1) (1914) 19 C.L.R. 298. (2) (1931) 44 C.L.R. 492.
(3) (1931) 45 C.L.R. 188.

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regulations shall thereupon cease to have effect." It is clear that regulations made under the *Transport Workers Act*, after taking effect, continue to be effective unless a resolution of disallowance subsequently comes into existence. Disallowance by either House of a regulation or a series of regulations operates so as to bring to an end the regulations as from the time of disallowance. But disallowance has no other result, and, in particular, it has no relation whatever to regulations which do not come into existence until a later moment of time.

Although the general power of the Governor-General to make the present Regulations is derived from the *Transport Workers Act*, sec. 33 (1) of the *Acts Interpretation Act* 1901-1930 shows that the power may be exercised from time to time as occasion may require. The Governor-General is the sole judge of the time and occasion, and his statutory powers and their exercise remain unaffected by the termination of a regulation previously made. It would be quite impossible for any Court to say for what period a disallowance of regulation A should operate, so as to prevent the Executive Government from making a new regulation, B, to operate in substantially the same way as A. Indeed, the argument on this part of the case overlooks the fact that the power conferred on the Governor-General to make regulations is a continuing authority, which will endure until the statutes mentioned are repealed or amended.

I am of opinion that all the contentions of the appellants have failed, that the Magistrate's decisions were correct, and that the appeals should be dismissed with costs.

Appeals dismissed. Orders nisi to review discharged with costs.

Solicitors for the appellants, *Blake & Riggall.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.