[HIGH COURT OF AUSTRALIA.]

CARTER AND OTHERS . . . . . PLAINTIFFS;

AND

THE EGG AND EGG PULP MARKETING BOARD FOR THE STATE OF VICTORIA } DEFENDANT.

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MELBOURNE, *Oct.* 12, 13, 14.

SYDNEY, *Nov.* 26.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Constitutional Law—Defence—Exclusiveness of Commonwealth power—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (*vi.*), 52 (*ii.*), 69, 114, 119.

Constitutional Law—Inconsistency of laws of Commonwealth and State—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 109—*National Security Act* 1939-1940 (*No.* 15 *of* 1939—*No.* 44 *of* 1940), *secs.* 5, 18—*Wheat Acquisition Regulations* (*S.R.* 1939 *No.* 96)—*Egg Control Regulations* (*S.R.* 1939 *No.* 144—1941 *No.* 73)—*Marketing of Primary Products Acts* (*Vict.*) (*No.* 4337—*No.* 4750)—*Egg and Egg Pulp Marketing Board Regulations* 1941 (*Vict.*).

By-laws—Validity—Reasonableness—Egg and Egg Pulp Marketing Board Regulations 1941 (*Vict.*), *reg.* 37.

High Court—Original jurisdiction—Extent of jurisdiction—Joinder of claim not attracting jurisdiction of Court with claims involving interpretation of Constitution—Separate and distinct cause of action—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 73-78—*Judiciary Act* 1903-1940 (*No.* 6 *of* 1903—*No.* 50 *of* 1940), *sec.* 30 (*a*).

The defence power of the Commonwealth is not exclusive of the powers of the States as to all matters within its ambit. The extent to which the Commonwealth's powers with respect to matters relating to defence are exclusive considered.

There is no inconsistency between the *Marketing of Primary Products Acts* and the *Egg and Egg Pulp Marketing Board Regulations* made thereunder, of the State of Victoria, and the *National Security Act* 1939-1940 and the *Egg Control Regulations* made thereunder, while the powers conferred by the last-mentioned Regulations remain unexercised.

Reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* made under the *Marketing of Primary Products Acts* (Vict.) is not unreasonable in the sense relevant to the invalidity of delegated legislation on the ground of unreasonableness.

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A matter not otherwise within the jurisdiction of the High Court is not brought within such jurisdiction by its being joined in the same action with a distinct and severable matter which is within jurisdiction.

DEMURRER.

Walter Carter and James Carter (trading as Carter Brothers), John Carter and Rowland Carter brought an action in the High Court of Australia against The Egg and Egg Pulp Marketing Board for the State of Victoria.

The statement of claim, as amended, was, in substance, as follows :

1. The plaintiffs are and have been and each of them (the plaintiff firm being for the purpose of this pleading treated as an individual) is and has been at all material times carrying on the business of poultry farming at Werribee in the State of Victoria and each of them is and at all material times has been the owner of more than twenty-five adult female fowls.

2. On 2nd December 1935 the *Marketing of Primary Products Act* 1935 (No. 4337) of the State of Victoria came into operation by proclamation.

3. In the said Act it was provided (*inter alia*)—(*a*) By secs. 4 (2) and 6 (1) that the Governor in Council might by proclamation declare that any product (other than wool fresh fruit not being pears or apples or citrus fruit and hay) of agriculture horticulture viticulture grazing poultry farming bee-keeping or fishing operations and any dairy produce (including bacon and pork) and any other article of commerce prepared (otherwise than by any process of manufacture) from the produce of agriculture horticulture viticulture grazing poultry farming bee-keeping or fishing operations which should be declared to be a product for the purposes of the said Act or any specified variety or grade thereof should be a commodity under and for the purpose of the said Act. (*b*) By sec. 7, that the Governor in Council after the application of the said Act to a commodity might appoint a marketing board in relation to the said commodity. (*c*) By sec. 19, that where a product had been declared a commodity and a board appointed in relation thereto the Governor in Council might by proclamation provide and declare that the commodity should be divested from the producers of the commodity and become vested in and be the absolute property of the board as the owner thereof and that upon any of the commodity coming into existence within a time specified in the same or subsequent proclamation it should by virtue of the Act become vested in and be the absolute property of the board as the owner thereof; and further might make provision to enable the board effectively to obtain

possession of the commodity as such owner and to deal with the same; and thereafter the commodity should become the absolute property of the board freed from (*inter alia*) all interests and contracts affecting the same and the rights and interests of every person in the commodity should be converted into a claim for payment in accordance with the said Act. (*d*) By sec. 18, that subject to the Act a board appointed under the said Act might sell or arrange for the sale of any commodity in relation to which the board was constituted and which is vested in or delivered to it or to be delivered to it and might make such arrangements as it deemed necessary with regard to sales of the commodity for export or for consignment to other States or countries and with respect to the transport treatment grading processing branding labelling storage packing or preparing for marketing and the marketing of the commodity. (*e*) By sec. 19 (*c*), that where a product had been declared a commodity and a board constituted in relation thereto every producer who except in the course of trade commerce or intercourse between the States and save as prescribed should sell or deliver any of the commodity to any person other than the board and every person (other than the board) who save as prescribed should buy or receive any of the commodity from a producer should be liable to a penalty. (*f*) By sec. 43 (1), that the Governor in Council might make regulations providing for all or any purposes necessary or expedient for the administration of the Act or for carrying out the objects of the Act and in particular (*inter alia*) for prescribing a quality for any commodity under the Act and for an increase or decrease in the amount otherwise payable to any producer according to the quality of the commodity and regulating the transport treatment manufacture grading processing branding labelling packing storage marketing selling exporting and delivery of the commodity or the packages containing such commodity and also for prescribing periods of time in respect of which the computation of or accounting for the net proceeds of the sale of any of the commodity might be made.

4. By proclamation made under the said Act the Governor in Council has proclaimed various products and commodities under the said Act and in particular the Governor in Council by a proclamation dated 9th December 1935 declared eggs a product under the said Act and by a proclamation dated 16th June 1936 declared eggs a commodity thereunder.

5. By proclamations made under the said Act the Governor in Council has appointed and constituted various boards under the said Act and in particular by a proclamation dated 8th February 1937 the Governor in Council appointed and constituted or purported

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to appoint and constitute The Egg and Egg Pulp Marketing Board the defendant herein.

6. Sec. 8 of the said Act purported to constitute the defendant a body corporate.

7. By proclamations made under the said Act the Governor in Council has declared that various commodities should become vested in the said boards and in particular by proclamation dated 2nd August 1937 declared that from and after 16th August 1937 all eggs should subject to and in accordance with the said Act be divested from the producers thereof and become vested in and be the absolute property of the said Board as the owner thereof and that upon any eggs coming into existence within two years from 16th August 1937 the same should likewise become vested in and be the absolute property of the Board and that all such eggs should be delivered by the producers thereof to the said Board as required.

8. The Governor in Council has from time to time purported to make and has published in the *Government Gazette* regulations under the authority of the said Act in relation to various products including eggs and requiring the plaintiffs and other producers of such products to make various returns and do other acts and things in relation to the said Board and in particular by the *Egg and Egg Pulp Marketing Board Regulations* 1937 and 1941 prescribed or purported to prescribe certain quality standards and grades of eggs of the domesticated fowl and by reg. 37 of the said *Egg and Egg Pulp Marketing Board Regulations* 1941 prescribed or purported to prescribe as follows :—" 37. (1) (*a*) Any officer, servant, or employee of the Board duly authorized by the Board in that behalf may from time to time and at any time by notice in writing order any producer who owns or controls, or has upon his premises more than 25 fowls to furnish to him a return in or to the effect of Form 5 of the Schedule setting out the number of eggs produced during such period or periods as may be specified in such notice by fowls which during such period specified in the notice were owned or controlled by the producer notified or which during such period specified were upon his premises, and setting out the manner in which and the names and addresses of the person or persons to whom such eggs were disposed. (*b*) Any officer, servant or employee of the Board duly authorized by the Board in that behalf may from time to time and at any time by notice in writing order any producer who has at any time within twelve months immediately preceding such notice owned or controlled or had upon his premises more than 25 fowls to furnish to him a return in or to the effect of Form 5 of the Schedule setting out the number of eggs produced during such period or periods as may be

specified in such notice by fowls which during such period specified in the notice were upon his premises and setting out the manner in which and the names and addresses of the person or persons to whom such eggs were disposed of. (*c*) No notice pursuant to this Regulation shall relate to or embrace any return as to eggs produced more than two years prior to the date of the giving of such notice. (2) Such return shall be signed by the producer so ordered, whose signature thereto must be duly attested by a justice of the peace. (3) Any producer who omits to furnish such return to such person so authorized within the time specified in the notice, and any producer who furnishes a return which is incorrect in any particular, shall be guilty of a contravention of these Regulations."

9. By proclamation published in the *Commonwealth Gazette* on 3rd September 1939 the existence of war between Great Britain and Germany was proclaimed.

10. On 9th September 1939 the *National Security Act* 1939 of the Commonwealth of Australia being an Act to make provision for the safety and defence of the Commonwealth and its territories during any war in which His Majesty is or may be engaged came into operation.

11. By sec. 5 of the *National Security Act* it was provided that the Governor-General might make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth and in particular (*inter alia*) for authorizing the taking of possession or control on behalf of the Commonwealth of any property or undertaking or the acquisition on behalf of the Commonwealth of any property other than land and for prescribing the conditions (including the times places and prices) of the disposal or use of any property goods articles or things of any kind.

12. The Governor-General in Council has from time to time on and after 21st September 1939 made and published in the *Commonwealth Gazette* various regulations under the authority of the *National Security Act* in order to secure the public safety and the defence of the Commonwealth and the efficient prosecution of the war and to maintain supplies and services essential to the life of the community in relation to the acquisition of various products of agriculture grazing poultry farming and dairy produce including eggs and in particular by the *Egg Control Regulations* made on 9th November 1939, 2nd April 1941 and 30th April 1941 provided for the control of dealings in eggs and by regs. 11 and 12 prohibited the export of eggs except under licence from the Minister for Commerce and the conditions of which should require the licensee to furnish such returns as might be required and by reg. 14 thereof provided that the Minister

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from time to time might declare that any eggs have been acquired by the Commonwealth and that such eggs should thereupon become the absolute property of the Commonwealth freed from (*inter alia*) all interests and trusts affecting those eggs and that the rights and interests of every person in those eggs would thereby be converted into claims for compensation and further that any person duly authorized might take possession of the eggs therein described or arrange with the previous owner or the person having the disposal or control of those eggs for their delivery to the Commonwealth at an appointed place and by reg. 20 that the Commonwealth might purchase any eggs and use sell export or otherwise dispose of them.

13. On 19th September 1938 in an action in the Supreme Court of the State of Victoria numbered 472 of 1938 in which the above-named defendant The Egg and Egg Pulp Marketing Board was plaintiff and the above-named plaintiffs Walter Carter and James Carter were defendants such defendants pleaded that the purported appointment of the Board was invalid and void and judgment was delivered by the Court to the effect that the Board had not been and was not then validly constituted and had no valid existence and judgment was thereupon entered for such defendants and such judgment remains valid and unaffected except for the enactment of Act No. 4658 referred to in par. 14 hereof.

14. On 9th October 1939 the Parliament of the State of Victoria purported to pass and bring into operation Act No. 4658 called the *Marketing of Primary Products* (*Validation*) *Act* 1939 whereby it purported to declare that The Egg and Egg Pulp Marketing Board was and always had been validly constituted.

14A. On 15th October 1940 the Parliament of the State of Victoria purported to pass and bring into operation Act No. 4750 called the *Marketing of Primary Products Act* 1940 whereby it purported, *inter alia*, to amend Act No. 4337.

15. Since 3rd September 1939 at all material times the defendant Board has purported and still purports to exercise the authority which the Acts Nos. 4337 and 4658 and 4750 of Victoria and the regulations thereunder purport to bestow upon it and has called upon the plaintiffs to furnish returns of eggs pursuant to the regulations.

16. By virtue of the matters alleged in pars. 9 to 12 hereof—(*a*) the Act of Victoria No. 4337 has since 9th September 1939 or alternatively since 21st September 1939 become and is invalid inoperative and of no effect; and (*b*) the Act No. 4658 was at the date it purported to come into operation or alternatively since 9th November 1939 has become and is invalid inoperative and of no

effect; (*bb*) the Act No. 4750 was at the date it purported to come into operation invalid inoperative and of no effect; and (*c*) the regulations made or purported to be made under the Acts or either of them alternatively the *Egg and Egg Pulp Marketing Board Regulations* have since 9th September 1939 or alternatively 9th November 1939 become and are invalid inoperative and of no effect.

17. Alternatively reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* 1941 or par. *a* of clause 1 thereof is unreasonable and by reason thereof invalid inoperative and of no effect.

18. By sec. 23 of the *Marketing of Primary Products Act* 1935 (No. 4337) it was further provided:—"(1) Subject to this Act every board shall, out of the proceeds of any commodity disposed of by the board under this Act and out of any other moneys (excepting the proceeds of a levy under this Act) received by the board under this Act, make payments to each producer of the commodity delivered to the board or (as the case may be) to the other person by or for whom the commodity was delivered to the board under this Act, in respect of the commodity so delivered by him, on the basis of the net proceeds of the sale of all the commodity of the same quality or standard delivered to the board during or covering such periods of time as are prescribed and the proportion of the commodity so delivered by such producer or other person aforesaid during each such period and regard being had to the other circumstances (if any) that affect the amount of the payments. (2) The board may deduct from the proceeds of sale of the commodity the expenditure incurred in and about the marketing treatment or (in the case of a board constituted in relation to potatoes) manufacture of the commodity, the costs charges and expenses of the administration by the board of this Act and any sums necessary to repay any advances made to the board and interest thereon. (3) The board may deduct from the payment to be made to a producer or other person aforesaid the freight charges incurred in the conveyance of the commodity from the station or other place of delivery to such other place or places in Victoria as is or are prescribed. (4) For the purposes of ascertaining the amount of the payment to be paid to a producer of any of the commodity delivered to the board or to any person interested therein, and generally for the purposes of this Act, the decision of the board as to—(*a*) quality standard or grade of any of the commodity delivered to the Board (whether quality standard or grade is prescribed or not); (*b*) the method of determining the dockages and deductions to be made and the amounts thereof respectively; (*c*) cost of freight insurance and other charges; and

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(*d*) the amounts to be deducted under this section shall be final and conclusive."

19. The plaintiffs have delivered to the defendant Board or disposed of through the Board large quantities of eggs of each of the prescribed qualities and grades in connection with the pools or marketing schemes conducted by it in respect of eggs for the years 1938-1940 and 1940-1941.

20. The defendant has disposed of the eggs delivered as aforesaid and has received the proceeds thereof and has retained and is retaining from the plaintiffs and from other producers of eggs large sums of money so received by it.

21. Alternatively to par. 16 hereof if the Acts Nos. 4337 and 4658 are valid and operative the defendant Board has failed to comply with the requirements of sub-sec. 1 of sec. 23 of Act No. 4337. Particulars: It has failed to make to the plaintiffs or any of them as producers of eggs delivered to the defendant Board in respect of the eggs so delivered in connection with the said pools or schemes and out of moneys received by the Board payments on the basis of the net proceeds of the sale of all eggs of the same quality or standard delivered to the Board and the proportion of such eggs so delivered by the plaintiffs or to account to them for such payments.

22. The plaintiffs have and each of them has demanded from the defendant an account of the moneys received by the defendant Board in respect of eggs disposed of by the plaintiffs through the Board or its authorized agents setting out separately the sum received in respect of each of the grades and quality standards referred to in the *Egg and Egg Pulp Marketing Board Regulations* and the manner of disposal of such sum by the Board and payment of such moneys in the manner set out in sec. 23 and the defendant Board has refused to comply with such demand.

The plaintiffs and each of them claimed:—

(1) A declaration that having regard to the terms and the interpretation of the Constitution of the Commonwealth and in the events that had happened the *Marketing of Primary Products Act* (No. 4337) of Victoria had since 9th September 1939 or alternatively 21st September 1939 been and was invalid inoperative and of no effect. (2) A declaration that having regard to the terms and true interpretation of the Constitution of the Commonwealth the *Marketing of Primary Products Act* (No. 4658) of Victoria was at the date it purported to come into operation or alternatively since 9th November 1939 had become and was invalid inoperative and of no effect. (2A) A declaration that having regard to the terms and true interpretation of the Constitution of the Commonwealth the *Marketing of Primary*

Products Act 1940 of Victoria was at the date it purported to come into operation invalid inoperative and of no effect. (3) A declaration that the regulations made or purported to be made under the said Acts or either of them or alternatively the *Egg and Egg Pulp Marketing Board Regulations* had since 9th September 1939 or alternatively since 21st September 1939 or alternatively since 9th November 1939 become and were invalid inoperative and of no effect. (4) Alternatively with claim 3 a declaration that reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* 1941 or alternatively par. *a* of clause 1 thereof was unreasonable or invalid inoperative and of no effect. (5) Alternatively with claims 1 and 2 a declaration that the defendant had not made to the plaintiffs or any of them or accounted to them or any of them for the payments referred to in sub-sec. 1 of sec. 23 of the Act No. 4337 in respect of eggs delivered by each of them to the defendant in the period between 13th June 1938 and 1st July 1941 or any part thereof and had thereby failed to comply with the provisions of the section. (6) All such accounts and inquiries as might be necessary to ascertain the amount properly payable upon the true interpretation and operation of sec. 23 of Act No. 4337 to each of the plaintiffs in respect of eggs and/or the several qualities standards and grades thereof produced by such plaintiffs and delivered to the defendant during the period between 13th June 1938 and 1st July 1941. (7) Payment to each of the plaintiffs of the several amounts found on the taking of such accounts and on the making of such inquiries to be properly payable.

The defendant demurred to the statement of claim as follows:—

1. It demurs to pars. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 and clauses 1, 2 and 3 of the claims thereof upon the grounds—(*a*) that Act No. 4337 of the State of Victoria was not at any time and is not now invalid inoperative or of no effect by reason of the provisions of the *National Security Act* 1939 of the Commonwealth of Australia or of any regulation made pursuant to such Act referred to or included in par. 12 of the statement of claim; (*b*) that Act No. 4658 of the State of Victoria was not at any time and is not now invalid inoperative or of no effect by reason of the provisions of the *National Security Act* 1939 or of any regulation made pursuant to such Act referred to or included in par. 12 of the statement of claim; (*c*) that the regulations made by the Governor in Council of the State of Victoria pursuant to the Acts Nos. 4337 and 4658, and *The Egg and Egg Pulp Marketing Board Regulations* were not at any time and are not now invalid inoperative or of no effect by reason of the provisions of the *National Security Act* 1939 or of any regulation made pursuant to such Act referred to or included in par. 12 of the statement of claim.

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2. It demurs to par. 17 of the statement of claim and clause 4 of the claims thereof upon the ground that reg. 37 of *The Egg and Egg Pulp Marketing Board Regulations* 1941 or par. *a* of clause 1 thereof is not unreasonable and by reason thereof invalid inoperative and of no effect.

3. It demurs to pars. 18, 19 and 21 and clauses 4 and 5 of the claims in the statement of claim upon the ground that by reason of the provisions of sec. 5 of Act No. 4750 of the State of Victoria being the *Marketing of Primary Products Act* 1940, no such obligation as is alleged in the portions of the statement of claim hereinbefore in this paragraph referred to is imposed upon the defendant or was at any time imposed upon it.

4. It demurs to the portions of the statement of claim not hereinbefore specifically referred to upon the grounds that such portions do not apart from those portions specifically hereinbefore referred to disclose any cause of action.

Fullagar K.C. (with him *Dean*), for the defendant. The State legislation is not inconsistent with that of the Commonwealth, so as to bring into operation sec. 109. The Commonwealth and State provisions can operate without conflict. State Wages Board determinations may be superseded by awards of the Arbitration Court: in that case the State awards are rendered inoperative (*Victoria* v. *The Commonwealth* (1); *Ex parte McLean* (2); *Clyde Engineering Co. Ltd.* v. *Cowburn* (3); *H. V. McKay Pty. Ltd.* v. *Hunt* (4); *Tasmanian Steamships Pty. Ltd.* v. *Lang* (5)). There is no allegation that the Commonwealth has acquired any eggs. There will be no conflict until some steps are taken by the Commonwealth which conflict with the State provisions. As to the suggestion that the legislation is an exercise of the defence power, and therefore excludes the States, see secs. 51 (vi.), 52 (ii.), 69, 114, 119. The defence power is not an exclusive power (*Farey* v. *Burvett* (6); *Pirrie* v. *McFarlane* (7); *Australian Workers' Union* v. *Adelaide Milling Co. Ltd.* (8); *Commissioners of Taxation* (*N.S.W.*) v. *Baxter* (9); *R.* v. *Brislan*; *Ex parte Williams* (10)). Reg. 37 is not unreasonable in requiring returns of eggs produced (*Williams* v. *Melbourne Corporation* (11)). As to the failure to comply with sec. 23 (1) of Act No. 4337, the later Act

(1) (1937) 58 C.L.R. 618, at pp. 625, 627, 634, 639.
(2) (1930) 43 C.L.R. 472, at p. 487.
(3) (1926) 37 C.L.R. 466.
(4) (1926) 38 C.L.R. 308.
(5) (1938) 60 C.L.R. 111.
(6) (1916) 21 C.L.R. 433, at pp. 445, 451, 454.
(7) (1925) 36 C.L.R. 170, at p. 191.
(8) (1919) 26 C.L.R. 460, at p. 474.
(9) (1907) 4 C.L.R. 1087, at p. 1126.
(10) (1935) 54 C.L.R. 262, at p. 274.
(11) (1933) 49 C.L.R. 142, at p. 155.

(No. 4750), sec. 5, relieved the defendant of the obligation. Moreover, it is not alleged that the period prescribed for delivery of eggs has elapsed.

Menzies K.C. (with him *Mulvany*), for the plaintiffs. The defendant has not performed the obligation imposed by sec. 23 of the Act No. 4337. Act No. 4750 does not repeal the obligation, but the Board is offered thereby an alternative means of discharging its obligation. It is for the defendant to plead and to bring itself within Act No. 4750. The defence power is an exclusive power. If that is so, then the regulations are valid and no question arises of inconsistency under sec. 109 of the Constitution. As to the exclusiveness of the defence power, see *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (1); *Pirrie* v. *McFarlane* (2), and sec. 114 of the Constitution, and cf. *Commissioners of Taxation* (*N.S.W.*) v. *Baxter* (3). The scope of the defence power is defined in *Farey* v. *Burvett* (4) and *Andrews* v. *Howell* (5). The consequence of the exclusiveness of the Commonwealth power is that all matters upon which the Commonwealth may pass legislation under the defence power are withdrawn from the States. At any rate, the Commonwealth power is exclusive in respect of all matters within its scope upon which the Commonwealth legislates. The Commonwealth legislation, as also does the State legislation, covers the whole field of egg production in Australia. The State legislation became invalid either on the passing of the *National Security Act* 1939 authorizing the marketing of primary produce by the Commonwealth, or when the *Wheat Acquisition Regulations* were put into operation, or when the *Egg Control Regulations* came into force. Alternatively the State Acts and regulations are inconsistent with the Commonwealth regulations and are therefore inoperative by virtue of sec. 109 of the Constitution (*Ex parte McLean* (6); *Clyde Engineering Co. Ltd.* v. *Cowburn* (7)). Reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* is capricious and unreasonable (*Jones* v. *Metropolitan Meat Industry Board* (8); *R.* v. *Bevan*; *Ex parte Elias and Gordon* (9)).

Fullagar K.C., in reply. So far as the principal question is concerned, the defendant's answers may be summed up as follows:— (1) The law of the State is not a law with respect to defence. (2) It did not become a law with respect to defence on the outbreak of war. (3) It did not become a law with respect to defence when the

(1) (1918) 25 C.L.R. 32.
(2) (1925) 36 C.L.R., at pp. 184, 185, 191, 192.
(3) (1907) 4 C.L.R. 1087, at p. 1127.
(4) (1916) 21 C.L.R. 433.
(5) (1941) 65 C.L.R. 255.
(6) (1930) 43 C.L.R. 472.
(7) (1926) 37 C.L.R. 466.
(8) (1927) 37 C.L.R. 252, at p. 261.
(9) *Ante*, p. 542.

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Commonwealth made a law with respect to the same subject matter. So far as the claim for accounts is concerned, that is not within the jurisdiction of the Court. [Counsel referred to *R.* v. *Bevan* (1); *R.* v. *Carter*; *Ex parte Kisch* (2); *Hopper* v. *Egg and Egg Pulp Marketing Board* (*Vict.*) (3); *Tasmania* v. *Victoria* (4); *In re Judiciary and Navigation Acts* (5); *H. V. McKay Pty. Ltd.* v. *Hunt* (6).]

Cur. adv. vult.

NOV. 26.

The following written judgments were delivered :—

LATHAM C.J. This is a demurrer by the defendant The Egg and Egg Pulp Marketing Board for the State of Victoria to a statement of claim in an action in which Walter Carter and others are plaintiffs. The plaintiffs claim, first, a declaration that three Acts of the Parliament of Victoria are invalid ; secondly, a declaration that a particular regulation (No. 37) made under those Acts is invalid ; and, thirdly, an account of the defendant Board's dealings with large quantities of eggs delivered to the Board by the plaintiffs and payment of any amount found due upon the taking of such account.

The statutes the validity of which is challenged are—the *Marketing of Primary Products Act* 1935 (Vict.) (No. 4337), the *Marketing of Primary Products* (*Validation*) *Act* 1939 (Vict.) (No. 4658), and the *Marketing of Primary Products Act* 1940 (Vict.) (No. 4750). Act No. 4658 cured a defect in the appointment of the defendant Board and gave it express authority to deal with egg pulp as well as with eggs. The precise terms of Act No. 4750 are important only in connection with the third claim made by the plaintiffs.

The principal Act (No. 4337) deals with the marketing of primary products. The provisions of the Act have already been set out in some detail in the case of *Matthews* v. *The Chicory Marketing Board* (*Vict.*) (7), where it was held that the Act was not invalid as infringing sec. 92 of the Constitution of the Commonwealth, but that a particular provision, sec. 32, was invalid as imposing a duty of excise contrary to sec. 90 of the Constitution. The Act has been applied to eggs and to egg pulp and the defendant Board has been appointed under the Acts (as amended by Act No. 4658) in relation to these commodities. (It will be unnecessary to refer separately to egg pulp, which is in the same position as eggs.) Therefore, upon a proclamation being made by the Governor in Council, eggs can be compulsorily

(1) *Ante*, p. 542.
(2) (1934) 52 C.L.R. 221.
(3) (1939) 61 C.L.R. 665.
(4) (1935) 52 C.L.R. 157.
(5) (1921) 29 C.L.R. 257, at p. 265.
(6) (1926) 38 C.L.R., at p. 311.
(7) (1938) 60 C.L.R. 263.

acquired by the Board (Act No. 4337, sec. 16 (1) (*a*)) and the Board may take possession of eggs so acquired (sec. 16 (1) (*b*)). The Board may sell acquired eggs and arrange for their export (sec. 18). Sales and deliveries of a declared commodity by a producer otherwise than to the Board are (with certain exceptions) penalized (sec. 19 (*c*)). Regulations may be made and have been made prescribing qualities for eggs and grading &c. (sec. 43). The relevant regulations are the *Egg and Egg Pulp Marketing Board Regulations* 1941. The regulations also provide that producers should make certain returns when required (reg. 37).

It is contended for the plaintiffs that these Acts and Regulations are invalid; first, because they are laws with respect to defence, which, it is said, is a matter within the exclusive legislative power of the Commonwealth Parliament; secondly, because they are inconsistent with the *National Security Act* 1939-1940 of the Commonwealth; and, thirdly, because they are inconsistent with regulations made under that Act, particularly with the *Egg Control Regulations* —Statutory Rules 1939 No. 144 as subsequently amended. Though the first objection must be determined without any reference to the laws which the Commonwealth Parliament has chosen to enact, it will be convenient first to refer to the Commonwealth statutes and regulations which must be considered.

The *National Security Act* 1939-1940, sec. 5, confers upon the Governor-General a wide power to make regulations for securing the public safety and the defence of the Commonwealth and the territories of the Commonwealth and, more particularly, for authorizing the acquisition on behalf of the Commonwealth of any property other than land and for prescribing the conditions of the disposal or use of any property, goods, articles or things.

The first regulations authorizing the acquisition of a primary product were the *Wheat Acquisition Regulations* (Statutory Rules 1939 No. 96) made on 21st September 1939.

The *Egg Control Regulations* were made on 9th November 1939. These Regulations have been amended from time to time, but at all times they have provided for the control of dealings in eggs, for the prohibition of the export of eggs except under licence from the Minister for Commerce, for the compulsory acquisition of eggs by the Commonwealth, and for the taking possession of acquired eggs on behalf of the Commonwealth. The Regulations also provide that the Committee appointed under the Regulations may take action to facilitate the performance of any contract between the Government of the United Kingdom and the Commonwealth for the sale and export of eggs.

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The Governor in Council (Victoria) has made proclamations under Act No. 4337 declaring that eggs described in the proclamations shall become vested in the defendant Board. It is not alleged that the Commonwealth Minister has taken action to acquire eggs for the Commonwealth or that the Commonwealth has taken possession, or sought to take possession, of any eggs by virtue of powers created by the *Egg Control Regulations*. The case therefore does not directly involve the questions which would be raised if the Commonwealth and the State of Victoria purported to acquire or take possession of the same eggs. The fact that such questions may arise is, however, relied upon by the plaintiffs as relevant to the validity of the State Acts and Regulations.

The defendant demurs to the statement of claim, contending that all the challenged Acts and Regulations are valid, so that the statement of claim discloses no cause of action in relation to them. The demurrer to the claim for an account stands upon a different basis and must be dealt with separately.

The plaintiffs do not challenge the validity of any of the Commonwealth legislation which has been mentioned. Indeed, the first argument of the plaintiffs is based upon the proposition that this legislation is authorized by the provisions of the Commonwealth Constitution (sec. 51 (vi.)) conferring power upon the Commonwealth Parliament to make laws with respect to: "The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." The State Acts and Regulations, if enacted by the Commonwealth Parliament, would (it is said) have been authorized by this provision of the Constitution. It is contended that the power to make laws with respect to defence is an exclusive power of the Commonwealth Parliament, so that this State legislation (being "defence legislation") must be invalid.

In order to determine the character of the legislative power of the Commonwealth and of the States with reference to defence it is necessary to consider not only sec. 51 (vi.) of the Constitution, but also secs. 52, 69 and 114. Sec. 52 provides that the Parliament shall, subject to the Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—"(ii.) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth." Sec. 69 provides that on a proclaimed date "the following departments of the public service in each State shall become transferred to the Commonwealth:— . . . Naval and military defence . . ." Sec.

114 provides that " a State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force." Sec. 119 should also be mentioned. It provides that " the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence."

Sec. 51 (vi.) is not exclusive in terms. It confers a power affirmatively upon the Commonwealth Parliament, but it contains no words which can be used in support of an argument that the States are completely or in any degree excluded from dealing with the subject of defence. There is no reason arising from the nature of the subject matter why a State should not, subject to such control as the Commonwealth Parliament may think proper to be exercised, assist the Commonwealth to the maximum in the defence of the country. Sec. 114 does not deny, or involve any denial of, the power of a State even to raise or maintain military or naval forces, but, conceding the existence of such a power, makes its exercise subject to the consent of the Commonwealth. It is therefore only in a modified sense that even the power to raise or maintain naval and military forces can be said to be exclusive to the Commonwealth.

Sec. 52 (ii.) relates to the control of matters relating to transferred departments. The transferred departments are (sec. 69)—Posts, telegraphs, and telephones; Naval and military defence; Lighthouses, lightships, beacons, and buoys; Quarantine. Power to legislate with respect to the subject matters with which such departments deal is conferred, in my opinion, not by sec. 52 (ii.) but by sec. 51 (v.)—posts, &c., sec. 51 (vi.)—defence, sec. 51 (vii.)—lighthouses &c., and sec. 51 (ix.)—quarantine. These provisions would be quite unnecessary if sec. 52 (ii.) conferred exclusive, and therefore complete, legislative power in relation to these subject matters. I venture to refer to what I said as to the meaning of sec. 52 (ii.) in *R.* v. *Brislan*; *Ex parte Williams* (1). It may further be observed that sec. 69 relates to the transfer of " departments of the public service in each State "—i.e., to State public services. When the Commonwealth constitutes a department of its own, e.g., defence, the provisions of sec. 51 are sufficient to give the Commonwealth complete control of that department. Any State legislation professing to control a Commonwealth department would be invalid, because no State Parliament has or ever has had any power to legislate upon such a subject. Sec. 52 (ii.), as I said in *R.* v. *Brislan* (2), is directed to establishing Commonwealth control of certain State servants and

(1) (1935) 54 C.L.R. 262, at pp. 274, 275. (2) (1935) 54 C.L.R. 262.

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State property, subject to conditions stated in secs. 84 and 85: Cf. *Pemberton* v. *The Commonwealth* (1).

For these reasons I am of opinion that the power of the Commonwealth Parliament in relation to defence is not exclusive, though it is paramount by reason of sec. 109, to which reference will be made hereafter.

It is urged, however, that the Court should follow and apply certain statements that the defence power is exclusive to the Commonwealth which are to be found in decisions of this Court. In *Commissioners of Taxation* (*N.S.W.*) v. *Baxter* (2) there is a suggestion that the defence power is exclusive, but, upon examination, it will be seen that this statement relates only to what I have called the exclusive power, in a modified sense, to raise and maintain forces. Further, the statement is *obiter*, as, indeed, are all the statements which were relied upon in this connection. In *Farey* v. *Burvett* (3) *Isaacs* J. said that "to make defence adequate and successful full power must be within the grasp of one hand." But "full power" is not the same thing as "exclusive power," and the learned judge explicitly stated that "the States may, in directions not contravening express prohibitions, most advantageously act by means of their own constitutional powers in aid of the common object"—i.e., the defence of the Commonwealth. (Sec. 114 is an example of the "express prohibitions" to which reference is made.) In *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (4), there is a statement that the defence power is exclusive to the Commonwealth. But this statement in its full generality was not necessary to the decision of the case, and should be limited to the aspect of the defence power which was in question, namely, the exercise by the Executive Government of the royal war prerogative. The statement in the (dissenting) judgment of *Higgins* J. in *Australian Workers' Union* v. *Adelaide Milling Co. Ltd.* (5) that "the State of Victoria has not the war power" in its strict sense means no more than that the power to declare or make war does not belong to the States. It was not, I think, intended to mean that a State Parliament cannot pass any Act to assist in the defence of the Commonwealth. For reasons which I have already stated I find myself unable to agree with the statements of *Knox* C.J. and *Isaacs* J. in *Pirrie* v. *McFarlane* (6) that the defence power is exclusive. These statements were admittedly *obiter dicta*.

(1) (1933) 49 C.L.R. 382.
(2) (1907) 4 C.L.R. 1087, at pp. 1126, 1127.
(3) (1916) 21 C.L.R. 433, at p. 451.
(4) (1918) 25 C.L.R. 32, at pp. 46, 47.
(5) (1919) 26 C.L.R. 460, at p. 475.
(6) (1925) 36 C.L.R. 170, at pp. 191, 192.

It was further argued that the defence power was exclusive in the Commonwealth at least in relation to matters as to which the Commonwealth had decided to exercise its power—in this case by the *National Security Act* 1939-1940—in relation to the acquisition of goods generally, or by the *Wheat Acquisition Regulations* in relation to primary products, or by the *Egg Control Regulations* in relation to eggs. This is not really an argument that the Commonwealth power is exclusive as a matter of constitutional law. It is a contention that, under a power which is not exclusive, the Commonwealth Parliament has so legislated as to show an intention to exclude State legislation with respect to a particular subject matter—an intention " to cover the field " (*Clyde Engineering Co. Ltd.* v. *Cowburn* (1)). In order to determine whether such a contention is well founded it is necessary to examine the relevant Federal and State legislation in order to ascertain whether there is inconsistency between them.

I come therefore to arguments based upon sec. 109 of the Constitution. That section is as follows :—" When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." This section applies only in cases where, apart from the operation of the section, both the Commonwealth and the State laws which are in question would be valid. If either is invalid *ab initio* by reason of lack of power, no question can arise under the section. The word " invalid " in this section cannot be interpreted as meaning that a State law which is affected by the section becomes *ultra vires* in whole or in part. If the Commonwealth law were repealed, the State law would again become operative (*R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (2), per *Higgins* J.)—cf. *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3) and *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (4). Thus the word " invalid " should be interpreted as meaning " inoperative." This is, I think, made clear by the provision that the Commonwealth law " shall prevail "—that is, the Commonwealth law has superior authority and takes effect to the exclusion of the inconsistent State law.

Federal and State laws, each within the powers of the respective enacting legislatures, may be inconsistent in terms in the sense that there is a direct conflict between them so that it is impossible to give effect to both laws. A clear example of such inconsistency is

(1) (1926) 37 C.L.R. 466.
(2) (1920) 28 C.L.R. 23, at p. 33.
(3) (1896) A.C. 348.
(4) (1920) 28 C.L.R. 129, at p. 154.

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to be found in *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (1). A State statute provided that a State vote on liquor licensing should be taken on the same day as that fixed for a poll at an election for the Senate of the Commonwealth. A Commonwealth statute provided that no vote of electors of a State should be taken under the law of a State on any day appointed for an election of the Senate. There was a direct conflict between the two statutes and the State law was therefore inoperative.

But, when there is no inconsistency in the actual terms of the competing statutes, the Commonwealth Parliament may have shown an intention to make its legislation upon a particular subject exhaustive, so as to exclude *any* State legislation upon that subject. In such a case any State law upon the subject will be inoperative by reason of sec. 109 (*Clyde Engineering Co. Ltd.* v. *Cowburn* (2); *Hume* v. *Palmer* (3), where State legislation was held to be invalid under sec. 109; *Stock Motor Ploughs Ltd.* v. *Forsyth* (4), where State legislation was held to be valid, there being no intention of the Commonwealth Parliament to exclude State laws upon certain subjects).

The exercise of a power conferred by a Federal statute may result in State legislation becoming inoperative. Thus if a State law is inconsistent with an award of the Commonwealth Conciliation and Arbitration Court either because there is a direct conflict or because the award is intended to be a complete and exhaustive code in relation to particular matters, the State law is inoperative *pro tanto*: "the State legislation must give way" (*Engineers' Case* (5); *Clyde Engineering Co. Ltd.* v. *Cowburn* (6); *H. V. McKay Pty. Ltd.* v. *Hunt* (7); *Ex parte McLean* (8)).

The co-existence in Commonwealth and States of constitutional powers to make laws with respect to the same subject matter does not involve the extinction of State powers. If it were otherwise, all Commonwealth legislative powers would be exclusive and sec. 109 would be unnecessary. So also the co-existence of similar or even identical powers in Federal and State authorities does not in itself involve inconsistency between statutes creating the authorities or conferring powers upon them (*Victoria* v. *The Commonwealth* (9) —a case dealing with Commonwealth and State powers to remove wrecks). There would be such inconsistency if it appeared that the Commonwealth Parliament intended to exclude *any* operation of the State power.

(1) (1920) 28 C.L.R. 23.
(2) (1926) 37 C.L.R. 466.
(3) (1926) 38 C.L.R. 441.
(4) (1932) 48 C.L.R. 128.
(5) (1920) 28 C.L.R. 129, at p. 154.
(6) (1926) 37 C.L.R. 466.
(7) (1926) 38 C.L.R. 308.
(8) (1930) 43 C.L.R. 472.
(9) (1937) 58 C.L.R. 618.

But, even in the absence of such an intention, a question under sec. 109 may arise in the case of such statutes. If each authority should exercise its powers a conflict may be created, e.g., if both Commonwealth and State authorities sought to take possession of the same wreck. The question would then be, in the case last cited, whether "the Commonwealth law upon its true interpretation gave power to remove a wreck superior to and exclusive of the power of the State" (per *Starke* J. (1)) or, to put the same question in other words, whether upon the true interpretation of the Commonwealth statute, it appeared that it was intended that the Commonwealth authority should have power to remove a wreck "without interference from any other public authority" (per *Dixon* J. (2)). If this question is answered in the affirmative then the Commonwealth law "prevails," and the State authority is superseded by the Commonwealth authority. The State law is accordingly inoperative to the extent to which exercise of powers under it would interfere with the exercise of Commonwealth powers. The State law is "invalid" to that extent, i.e., the law does not become *ultra vires*, but it does not operate in relation to the matters in respect of which the Commonwealth power is being exercised.

In the present case there is no inconsistency in terms between the Commonwealth laws relating to national security or to primary products or to eggs on the one hand and, on the other hand, the State Acts and Regulations mentioned. There is no indication in any of the Commonwealth provisions of an intention to exclude State legislation with respect to any of these subjects. The Commonwealth *Egg Control Regulations* and the State *Egg and Egg Pulp Marketing Board Regulations* deal to a large extent with substantially the same subject matter. Both sets of Regulations, for example, deal with the export of eggs. But no conflict arises if the State Board obtains a Federal licence to export eggs. Again, both sets of Regulations deal with the acquisition of eggs. If the Commonwealth exercised its power to acquire a particular lot of eggs, the eggs would become the absolute property of the Commonwealth under reg. 14 of the *Egg Control Regulations* freed from all other rights, interests, &c., affecting those eggs. If the State Board sought to exercise its authority to acquire the same eggs, then, according to the State Act (No. 4337, sec. 16) the eggs would become the property of the Egg and Egg Pulp Marketing Board. In that case—as also if Commonwealth and State each sought to take possession of the same eggs—there would be a conflict between the two sets of laws in their operation.

(1) (1937) 58 C.L.R., at p. 628. (2) (1937) 58 C.L.R., at p. 631.

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How is such a conflict to be resolved ? By interpreting the Commonwealth Regulations, in accordance with their plain terms, as meaning, in relation to the acquisition and possession of eggs, that the Commonwealth authority was to supersede any State or other authority so as effectively to vest property or possession in the Commonwealth to the exclusion of all other persons, including State authorities. The State legislation would be inconsistent with the Commonwealth legislation so interpreted, because it would, if operative, prevent the Commonwealth law from taking effect. Therefore, under sec. 109, the Commonwealth law would prevail and as a result the Commonwealth title to the property and the Commonwealth right to possession would prevail. But, for the reasons stated, such a possibility provides no ground for a declaration, such as is sought in the present case, that the State legislation is invalid.

There is no allegation in the statement of claim of any facts showing any conflict in the exercise of powers. The Commonwealth and State laws in question are not, in my opinion, inconsistent in their provisions, there has been no conflict in their operation, and therefore the main claim of the plaintiffs must fail.

The plaintiffs claim a declaration that reg. 37 of the State Regulations is invalid as being unreasonable. Mr. *Menzies* for the plaintiffs admitted that he assumed a heavy onus in seeking to have the regulation declared invalid upon this ground and he referred to the case of *Jones* v. *Metropolitan Meat Industry Board* (1)—see also *Williams* v. *Melbourne Corporation* (2). Par. 1 (*a*) of the regulation is as follows : " Any officer, servant, or employee of the Board duly authorized by the Board in that behalf may from time to time and at any time by notice in writing order any producer who owns or controls, or has upon his premises more than 25 fowls to furnish to him a return in or to the effect of Form 5 of the Schedule setting out the number of eggs produced during such period or periods as may be specified in such notice by fowls which during such period specified in the notice were owned or controlled by the producer notified or which during such period specified were upon his premises, and setting out the manner in which and the names and addresses of the person or persons to whom such eggs were disposed."

Par. 1 (*b*) gives similar powers in the case of a producer who at any time within twelve months immediately preceding the notice owned or controlled or had on his premises more than twenty-five fowls. The period specified in a return may extend to two years prior to the date of notice given (par. 1 (*c*)). If the regulation meant that a

(1) (1925) 37 C.L.R. 252, at p. 261. (2) (1933) 49 C.L.R. 142, at pp. 150, 155.

return could be required of all eggs laid in any place by fowls which during the specified period had at any time been upon the producer's premises, I would agree that the regulation was quite unreasonable from every point of view. But I think that the regulation may be read as limited to eggs laid on the premises of the producer. So construed, this regulation is a reasonable means of acquiring useful information and preventing evasion of the Act. Accordingly I am of opinion that the demurrer to this claim of the plaintiffs should also be allowed.

The claims of the plaintiffs which I have hitherto considered are based upon the contention that the State Acts or Regulations are invalid. The claim which must now be considered rests upon the basis that the State Acts are valid. Act No. 4337, sec. 23, requires that a board appointed under the Act shall make payments to producers in respect of commodities delivered by them to the board "on the basis of the net proceeds of the sale of all the commodity of the same quality or standard delivered to the board" during prescribed periods and the proportion of the commodity delivered by each producer during each such period. The plaintiffs allege that the Board has not made payments in accordance with this provision and seek an account in respect of eggs delivered by the plaintiffs to the Board. The defendant demurs to this claim upon two grounds: first, that this Court has no jurisdiction to deal with it; secondly, that by reason of sec. 5 of Act No. 4750 the Board is not bound to make payments upon the basis set forth in Act No. 4337 but that it may make payments upon another basis as set out in that section, and that the plaintiffs have not alleged that the Board has not made payments upon this alternative basis.

The first question is whether the Court has jurisdiction to deal with this claim. The claim is based entirely upon State legislation. It does not involve any question of the interpretation of the Commonwealth Constitution. It could have been made the subject of a separate proceeding. If it had been made the subject of a separate proceeding it could not have been suggested that this Court had any jurisdiction in relation to it. But it has been joined in a single proceeding with other claims which do involve the interpretation of the Constitution and which therefore do fall within the jurisdiction of the High Court (*Judiciary Act* 1903-1940, sec. 30 (*a*)). Does this circumstance bring within the jurisdiction a claim which, being completely severable from claims which are within the jurisdiction, would otherwise not have been within the jurisdiction?

Sec. 30 (*a*) of the *Judiciary Act* gives to the High Court original jurisdiction "in all matters arising under the Constitution or involving its interpretation." This phrase repeats the words of sec. 76 (i.)

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of the Constitution, which provides that the Parliament may make laws conferring original jurisdiction on the High Court in such matters. Sec. 30 of the *Judiciary Act* is such a law. The *Judiciary Act*, sec. 2, provides that unless the contrary intention appears "matter" includes any proceeding in a court. But no statutory provision can either fix or extend the meaning of the word "matter" in the Constitution, and it is clear that the intention of Parliament in inserting sec. 30 of the Act was to exercise the power conferred by sec. 76 of the Constitution: Cf. *The Commonwealth* v. *Brisbane Milling Co. Ltd.* (1); *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co. Ltd.* (2).

It was contended for the plaintiffs that "matters" in sec. 30 of the Act and in sec. 76 of the Constitution included any proceedings in a court. This action is a proceeding in a court; that proceeding involves (in relation to some claims in the action) the interpretation of the Constitution; therefore, it is said, the whole action, including all claims made therein, is a matter which involves the interpretation of the Constitution.

All matters which come before a court involve legal proceedings of some kind. But it does not follow that, in a particular connection, the term "matter" is used as descriptive of the legal proceeding itself. A single legal proceeding may involve several matters in an ordinary sense of that word—as when several claims are joined in one action.

The word "matter" appears in the Judicature Chapter of the Constitution in secs. 73, 74, 75, 76, 77 and 78. Secs. 75 to 78 relate to the original jurisdiction of the High Court. It was said in *In re Judiciary and Navigation Acts* (3), that in secs. 73 to 77 the word "matter" was used with the same meaning and that it did not mean "a legal proceeding, but rather the subject matter for determination in a legal proceeding" (4). (Secs. 73 and 74 were not directly in question in that case, and possibly the word may have a wider meaning so as to include, in sec. 73, the whole of any legal proceeding whatever the subject matter or subject matters of the proceeding may be; and, if the question arose in relation to sec. 74, the references to "decision," "question" and "matters" would require careful consideration.) Sec. 75 provides that the High Court shall have original jurisdiction in certain matters and sec. 76 provides that the Parliament may make laws conferring original jurisdiction on the High Court in certain other matters. Sec. 77 provides that

(1) (1916) 21 C.L.R. 559, at pp. 565, 568, 579.
(2) (1919) 27 C.L.R. 249, at p. 253.
(3) (1921) 29 C.L.R. 257, at p. 266.
(4) (1921) 29 C.L.R., at p. 265.

" with respect to any of the matters mentioned " in secs. 75 and 76 the Parliament may make certain laws. Plainly, therefore, the word " matter " must be used in the same sense at least in these three sections.

But the meaning of a word with so many possible meanings must be affected by the context in each case where it is used. Thus, in sec. 75 (i.) a " matter arising under a treaty " is described by reference to the character of the controversy between the parties, whoever they may be. The nature of the questions involved in a proceeding would determine whether the High Court had jurisdiction under this provision. But sec. 75 also applies to " matters . . . (ii.) Affecting consuls or other representatives of other countries: (iii.) In which the Commonwealth, or any person suing or being sued on behalf of the Commonwealth, is a party: (iv.) Between States, or between residents of different States, or between a State and a resident of another State: (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth." In these cases the nature of the " matter " is determined, not by the character of the controversy, but in (ii.), (iii.) and (iv.) entirely and in (v.) partly by the identity of a party or of the parties to the controversy. Thus the High Court has original jurisdiction, for example, whenever the Commonwealth sues or is being sued. In such a case the Court has jurisdiction in the legal proceeding, whatever the nature of the claim made or of the defence raised, simply because the Commonwealth is a party to the proceeding. The important provision in the present case is sec. 76 (i.): " any matter arising under this Constitution, or involving its interpretation." In this instance, the significant element is that the matter in controversy between the parties, whoever they may be, must itself arise under the Constitution or involve its interpretation. It is only in respect to such a matter that the Court will have jurisdiction under sec. 76 (i.).

Under sec. 77 (iii.) the Parliament may make laws with respect to " any of the matters mentioned " in secs. 75 and 76 " investing any court of a State with Federal jurisdiction." For this purpose " matters " must, not in any general way, but in relation severally to each of the nine distinct classes of matters mentioned in secs. 75 and 76, be given the same interpretation. In the case of matters falling within sec. 76 (i.) the application of sec. 77 will produce the result that the Parliament may invest a State court with Federal jurisdiction in any matter arising under or involving the interpretation of the Constitution. If " matter " were interpreted in this instance to mean " a legal proceeding " including all claims made in

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that legal proceeding, this provision would become absurd. A claim involving the interpretation of the Constitution may be joined with all kinds of other claims against the same defendant which has nothing to do with the Constitution—e.g., with claims based upon breach of contract or upon tort. The provision cannot be interpreted to mean that the Commonwealth Parliament may, for this reason, not only invest State Courts with jurisdiction in cases of contract and tort (a jurisdiction which they possess quite independently of and prior to the Constitution), but also may confer such jurisdiction as "federal jurisdiction"—which would be an absurd provision.

I have not been able to discover any case dealing with the precise point which arises in the present case. There are decisions upon sec. 40 and sec. 40A of the *Judiciary Act* which, holding those sections to be valid, support the view that the Court can adjudicate in a case from which all questions of constitutional significance have been eliminated by the rejection of contentions based upon the Constitution, the whole cause, and not merely the cause so far as its decision depends upon such contentions, having been removed into this Court under one or other of those sections: See *George Hudson Ltd.* v. *Australian Timber Workers' Union* (1); *Pirrie* v. *McFarlane* (2); *Ex parte Walsh and Johnson*; *In re Yates* (3)—and cf. *Ruhamah Property Co. Ltd.* v. *Federal Commissioner of Taxation* (4). But the cause is so removed only if a decision upon the Constitution was necessary for the determination of the case (*R.* v. *Maryborough Licensing Court* (5); *Miller* v. *Haweis* (6)). *R.* v. *Carter*; *Ex parte Kisch* (7) applies the same rule (as to the removal of the whole cause) to a case coming into the Court under sec. 30 of the *Judiciary Act*. These cases were approved in *Hopper* v. *Egg and Egg Pulp Marketing Board (Vict.)* (8) and *R.* v. *Bevan* (9). But in each of these cases a single claim or charge or a defence thereto was supported upon several grounds, one or more of which involved the interpretation of the Constitution. None of the cases mentioned presented the feature which is to be found in this case, namely, an entirely severable claim having no relation whatever to another claim or claims made in the same proceeding which other claim or claims alone involved the interpretation of the Constitution.

For the reasons stated I am of opinion that the claim for an account, not being in itself a matter in which this Court has jurisdiction,

(1) (1923) 32 C.L.R. 413, at p. 431.
(2) (1925) 36 C.L.R. 170.
(3) (1925) 37 C.L.R. 36, at pp. 57, 58, 129, 130.
(4) (1928) 41 C.L.R. 148, at p. 151.
(5) (1919) 27 C.L.R. 249.
(6) (1907) 5 C.L.R. 89.
(7) (1934) 52 C.L.R. 221, at pp. 223, 224.
(8) (1939) 61 C.L.R. 665.
(9) *Ante*, p. 452.

does not become such a matter by being associated with other claims in relation to which the Court has jurisdiction. The demurrer to the part of the statement of claim which relates to this cause of action should therefore also be allowed. It accordingly becomes unnecessary to deal with the other grounds of demurrer based upon the provisions of Act No. 4750.

Under Order XXIV., rule 10, of the Rules of Court the demurrer of the defendant to the statement of claim should be allowed with costs. In my opinion judgment should be given for the defendant with costs upon the causes of action in respect of which the claims numbered 1, 2, 3 and 4 are made. No judgment should be given by this Court upon the claim as to which the Court has no jurisdiction. The defendant will be at liberty to apply that the whole statement of claim should be struck out for want of jurisdiction.

RICH J. I have had the opportunity of reading the judgment of my brother *Williams* and agree with it.

In my opinion the demurrer should be allowed with costs.

STARKE J. The plaintiffs in this action claim declarations:— 1. That the *Marketing of Primary Products Acts* Nos. 4337, 4658 and 4750 of Victoria are invalid, inoperative, and of no effect. 2. That the *Egg and Egg Pulp Marketing Board Regulations* 1941 made by the Governor in Council in pursuance of the powers conferred upon him by the *Marketing of Primary Products Acts* and all other powers enabling him in that behalf are invalid, inoperative, and of no effect. 3. Alternatively with claim 2, that reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* 1941 is wholly, or as to clause 1 (*a*) thereof, unreasonable, invalid and of no effect. 4. Alternatively, if the *Marketing of Primary Products Acts* are valid and operative, that the defendant had failed to comply with the requirements of sec. 23 (1) of the Act No. 4337 in that the payments required by the section have not been paid or accounted for to the plaintiffs. And ancillary relief and payment of any amount properly payable to the plaintiffs is also claimed. The defendant demurred to the statement of claim and this demurrer now falls for decision.

The *Marketing of Primary Products Acts* enable the Governor in Council to declare commodities for the purposes of the Act, appoint marketing boards in relation to the commodities declared, vest the declared commodities in boards as the absolute owner thereof, convert the rights and interests of every person in the commodities so vested into a claim for payment in accordance with the Acts,

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and also enable the boards to sell and market the commodities and to do all things necessary or expedient in that behalf.

Eggs have been declared a commodity under these Acts and egg pulp is deemed to be a commodity by force of the Act No. 4658. A board known as the Egg and Egg Pulp Marketing Board has been constituted and appointed under the Acts. And on 13th May 1941 the Governor in Council made certain regulations called the *Egg and Egg Pulp Marketing Board Regulations* 1941 pursuant to the powers contained in the Acts. The Acts and the Regulations and the acts done pursuant to the Regulations all appear, on their face, to be within the constitutional powers conferred upon the State of Victoria by its Constitution.

The Commonwealth Parliament has no authority to repeal laws passed by the States within the limits of their constitutional powers, though the Commonwealth *Constitution Act* and various of its provisions may render those laws inoperative wholly or in part: See *Roughley* v. *New South Wales* ; *Ex parte Beavis* (1). And it has been argued, on various grounds, that the *Constitution Act* does so operate in respect of the *Marketing of Primary Products Acts* of Victoria and the Regulations made thereunder.

1. That the defence power of the Commonwealth is exclusive.

The argument freely rendered is that the decisions of this Court so magnify the defence power that any measure that might conceivably, even incidentally, aid the effectuation of the power of defence, is authorized by the Constitution, and the Court must hold its hand and leave the rest to the judgment, wisdom, and discretion of the Parliament and the Executive it controls, even to depriving the States of their executive departments of government: See *South Australia* v. *The Commonwealth* (2). Such a power, it is asserted, is in its nature exclusive, and that conclusion is reinforced by the provisions of secs. 52, 69, 114, and 119 of the Constitution.

The marketing of commodities such as wheat, meat, or eggs, &c., might conceivably aid, it was said, the defence of the Commonwealth, and consequently the regulation thereof by legislation falls within the legislative, and the exclusive legislative, domain of the Commonwealth. The argument goes far toward the destruction of the federal system established by the *Constitution Act*, but perhaps not much farther than the recent decisions of this Court. The broad principle of this federal system is to be found, as regards the States, in the provision of the *Constitution Act*, that their powers are left unaffected except in so far as the contrary is provided (*James* v. *The Commonwealth* (3)).

(1) (1928) 42 C.L.R. 162, at p. 207. (2) (1942) 65 C.L.R. 373.
(3) (1936) A.C. 578, at p. 611.

The Constitution, by sec. 52 thereof, gives the Commonwealth exclusive power to make laws with respect to matters relating to any department of the public service, the control of which is, by the Constitution, transferred to the Executive Government, and by sec. 69 the departments of naval and military defence in each State were transferred to the Commonwealth. But this does not extend to any matter, as was contended, which is dealt with by the department of naval and military defence. It relates to the administrative control of the department. Again, sec. 114 prohibits the States from raising naval or military forces and sec. 119 requires the Commonwealth to protect the States against invasion and, on application of the Executive Government of a State, against domestic violence. Again, the legislative power of the Commonwealth can be exercised beyond the territorial limits of a State; it is not confined within the boundary of a State. But except as provided, as already mentioned, the Constitution does not make the legislative power of the Commonwealth in respect of naval and military defence exclusive of the power of the States (See *James* v. *The Commonwealth* (1)), though if a law of a State is inconsistent with a law of the Commonwealth the latter prevails (Constitution, sec. 109).

2. That at all events the defence power of the Commonwealth is exclusive in respect of all matters within its ambit upon which the Commonwealth legislates, for the Commonwealth then occupies that field to the exclusion of the States.

Thus the *National Security Act* 1939-1940 (No. 15 of 1939 and No. 44 of 1940) empowers the Governor-General in Council to make regulations for securing the public safety and defence of the Commonwealth, authorizing the acquisition, on behalf of the Commonwealth, of any property other than land; and that power, it was pointed out, had been exercised by the Governor-General in Council in the *Wheat Acquisition Regulations*, the *Egg Control Regulations*, and other regulations as well. The exclusive legislative authority of the Commonwealth over the subject matters dealt with in these regulations is not thereby established, though the laws of the State may be inconsistent with the legislative provisions made by the Commonwealth, which will then prevail (Constitution, sec. 109).

3. That the *Marketing of Primary Products Acts* of the State of Victoria and the Regulations thereunder were inconsistent with the law of the Commonwealth, namely, the *National Security Act* 1939-1940 and the *Egg Control Regulations* made thereunder (See *National Security Act*, sec. 18) and are consequently by force of the Constitution invalid, to the extent of the inconsistency.

(1) (1936) A.C. 578.

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It is unnecessary for me to discuss over again what is a law of the Commonwealth for the purposes of sec. 109, or what makes the law of a State inconsistent with a law of the Commonwealth, and I merely refer to my own view of the matter in *Clyde Engineering Co. Ltd.* v. *Cowburn* (1); *Ex parte McLean* (2). The mere imposition of a tax involves no inconsistency (*In re Silver Bros. Ltd.* (3)), and still less does the existence of legislative powers over the same subject matter in both the Commonwealth and the States. The inconsistency, if it exists, must arise out of the exercise of those powers.

By reg. 14 (1) of the Commonwealth *Egg Control Regulations* it is provided:—"The Minister, from time to time, by order published in the *Gazette*, may declare that any eggs described in the order are acquired by the Commonwealth and those eggs shall thereupon become the absolute property of the Commonwealth freed from all mortgages, charges, liens, pledges, interests and trusts affecting those eggs and the rights and interests of every person in those eggs are hereby converted into claims for compensation."

But the Minister has never exercised this power and no declaration has ever been made that all or any eggs are acquired by the Commonwealth. It was said, however, that the Commonwealth Act and regulations disclose an intention to deal with the subject matter and prescribe the law in relation to the acquisition and marketing of eggs and egg pulp. The argument breaks down, however, at the threshold, for the Commonwealth discloses no intention to acquire or market any eggs or egg pulp and does not prescribe the law in relation to the acquisition and marketing of eggs and egg pulp unless and until a declaration is made. Consequently no inconsistency at present arises with the *Marketing of Primary Products Acts* of the State of Victoria.

4. Another contention is that reg. 37, or at all events reg. 37 (1) (*a*), is unreasonable and therefore inoperative.

But "unreasonable" in this connection means that the regulation is so oppressive and capricious that no reasonable mind can justify it (*Widgee Shire Council* v. *Bonney* (4); *Brunswick Corporation* v. *Stewart* (5)). The *Marketing of Primary Products Acts* gives power to the Governor in Council to make regulations providing for all or any purposes necessary or expedient for the administration of the Act or carrying out the objects of the Act and in particular and without affecting the generality of the foregoing, prescribing the form in which returns and statistics shall be made and furnished in

(1) (1926) 37 C.L.R. 466, at pp. 524 et seq.
(2) (1930) 43 C.L.R. 472, at p. 479.
(3) (1932) A.C. 514, at p. 521.
(4) (1907) 4 C.L.R. 977.
(5) (1941) 65 C.L.R. 88, at p. 97.

accordance with the Act, and the particulars to be supplied therein and the persons (whether producers or not) by whom the same shall be made and the time and mode of making and furnishing same. The regulations must be published in the *Gazette* and laid before both Houses of Parliament, which may disallow the same: See Act No. 4337, sec. 43.

The Acts, it will be remembered, vest the eggs and egg pulp in the Marketing Board and provide for compensation to producers during prescribed periods of time: See Acts Nos. 4337, sec. 23, and 4750, sec. 5. The periods of time for the purpose of computing payments are annual periods: See reg. 28. The regulation 37 prescribes that the Marketing Board may by notice in writing from time to time and at any time order any producer who owns or controls or has on his premises more than twenty-five fowls or who has at any time within twelve months immediately preceding such notice owned or controlled or had upon his premises more than twenty-five fowls, to furnish a return in a prescribed form setting out the number of eggs produced during such period or periods, as may be specified in such notice, by fowls which during such period specified in the notice were owned or controlled by the producer notified or which during such period specified were upon his premises, and setting out the manner in which and the names and addresses of the person or persons to whom such eggs were disposed.

In *Jacobs* v. *Gray* (1) in this Court the validity of the regulation does not appear to have been doubted and in *Taylor* v. *Anstis* (2) the regulation was upheld. But it is now attacked on the ground that it extends not only to fowls owned or controlled by the producer but to fowls during the period specified in the notice upon his premises. It was suggested that these latter words would cover the case of fowls laying eggs on the producer's premises without his knowledge. But that is quite contrary to ordinary principles of construction and to the frame of the Regulations themselves. They assume that the producer knows that fowls are laying eggs upon his premises and are part of his production. The regulation is expressed in wide general words so as to prevent evasion. In my opinion, it is not unreasonable in any relevant sense.

5. Lastly, there remains for consideration the demurrer so far as it affects the alternative claim for compensation under the *Marketing of Primary Products Acts*. It is to the jurisdiction of this Court and also to the sufficiency in substance of the allegations in the statement of claim. The Constitution gave original jurisdiction to this Court in certain matters (sec. 75), and

(1) Unreported; noted 14 A.L.J. 434.

(2) (1940) V.L.R. 300.

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enabled Parliament to make laws conferring original jurisdiction on this Court in any matter arising under the Constitution or involving its interpretation (sec. 76). And original jurisdiction was conferred by Parliament on this Court in all matters arising under the Constitution or involving its interpretation (*Judiciary Act* 1903-1940, sec. 30). *Knox* C.J. said in *R.* v. *Maryborough Licensing Court* (1): "The matters in respect of which original jurisdiction is or may be conferred on the High Court are limited to those set out in secs. 75 and 76 of the Constitution, and it is, in my opinion, clear from the language used in the relevant sections of the *Judiciary Act* that Parliament did not intend by that Act to attempt to confer on the High Court original jurisdiction in respect of any matter not covered by secs. 75 and 76 of the Constitution. Any attempt to confer on the High Court original jurisdiction in respect of any matter beyond these limits would, of course, be unconstitutional, and therefore ineffective, and it is the duty of this Court in construing sec. 40A (of the *Judiciary Act*) to place upon its words, if possible, a meaning which will not offend against the limitations imposed by the Constitution on the power of Parliament to confer original jurisdiction on the High Court." *Isaacs* J. added (2):—"As to the interpretation of sec. 40A, reading it as a whole and in conjunction with the other sections with which it is associated, I construe its language as going no further than the Constitution itself. Its language is certainly capable of that construction, and therefore, in conformity with a well-established principle, that construction should be adopted."

Again, in *In re Judiciary and Navigation Acts* (3) it was said by five members of this Court: "It was suggested in argument that 'matter' meant no more than legal proceeding, and that Parliament might at its discretion create or invent a legal proceeding in which this Court might be called on to interpret the Constitution by a declaration at large. We do not accept this contention; we do not think that the word 'matter' in sec. 76 means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court": See *South Australia* v. *Victoria* (4).

Consequently a matter involving the interpretation of the Constitution is a subject for judicial determination in which some right

(1) (1919) 27 C.L.R. 249, at pp. 253, 254.
(2) (1919) 27 C.L.R., at p. 256.
(3) (1921) 29 C.L.R. 257, at p. 265.
(4) (1911) 12 C.L.R. 667.

duty or liability of a party is to be established which may involve the interpretation of the Constitution. If there be such a matter then, as I said in *R.* v. *Bevan* (1), the jurisdiction of this Court is attracted and it has full authority for the complete adjudication of the matter and not merely the interpretation of the Constitution. And once that jurisdiction is acquired it is not lost by reason of the rejection of the constitutional point. But there must be a matter, a cause of action, in the sense indicated, and not merely a legal proceeding in which the interpretation of the Constitution arises in respect of some matters or causes of action. The jurisdiction of this Court is not attracted to matters or causes of action arising in a legal proceeding which cannot involve the interpretation of the Constitution. The definition of "matter" in the *Judiciary Act*, sec. 2, and the *High Court Procedure Act* 1903-1937, sec. 2, includes "unless the contrary intention appears— . . . any proceeding in a Court whether between parties or not, and also any incidental proceeding in a cause or matter", but these definitions cannot transcend the Constitution or enable Parliament to confer a jurisdiction upon this Court which the Constitution does not allow.

The statement of claim in the present case alleges two distinct matters or causes of action, one based upon the invalidity of the *Marketing of Primary Products Acts* and the Regulations made thereunder, which involves the interpretation of the Constitution; the other based upon the validity of the Acts and Regulations and the non-performance of their provisions, which does not involve the interpretation of the Constitution. In the former case this Court has jurisdiction to adjudicate upon it completely, including the reasonableness of reg. 37 and not merely the interpretation of the Constitution. In the latter case this Court has no original jurisdiction whatever to adjudicate upon the matter. The application of these propositions to secs. 38A, 40, and 40A of the *Judiciary Act* are stated in *Re Drew* (2); *R.* v. *Maryborough Licensing Court* (3).

It is unnecessary in this view to consider the demurrer so far as it affects the sufficiency in substance of the alternative claim based on the validity of the State Acts and Regulations. But as the point was argued perhaps I may state my conclusion. The statement of claim alleges that the defendant failed to comply with the provisions of sec. 23 (1) of Act No. 4337 that subject to the Act the Board "shall" make payments to each producer in respect of the commodity delivered to the Board. But the Act No. 4750, sec. 5, prescribes that notwithstanding anything in sec. 23 of the Act the Board "may"

(1) *Ante*, at p. 465.
(2) (1919) V.L.R. 600.
(3) (1919) 27 C.L.R. 249.

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make payment in the manner prescribed in that Act. The statement of claim does not exclude payment to the plaintiffs in the manner prescribed by the later Act. The duty imposed upon the Board is in substance in the alternative either to comply with the provisions of sec. 23 (1) or those contained in sec. 5 of Act No. 4750. But if the obligation of the Board be alternative and not absolute, then strictly the pleading should so allege or there would have been a fatal variance under the common law system of pleading and even now a variance curable by amendment: See *Bullen and Leake, Pleadings*, 3rd ed. (1868), vol. 1, p. 60; *Chitty* on *Pleadings*, 7th ed. (1844), vol. II., pp. 315-318; *Penny* v. *Porter* (1); *Tate* v. *Wellings* (2). Strictly, therefore, the cause of action based on the *Marketing of Primary Products Acts* omits a material allegation and consequently is also demurrable on this ground.

The result is that the demurrer in this action on the part of the defendant should be allowed.

McTIERNAN J. The submissions by which the plaintiffs support the statement of claim, the subject of this demurrer, involve questions arising under the Constitution.

The first submission is that the Constitution of the Commonwealth gives to the Parliament of the Commonwealth exclusive power to make laws with respect to defence. It is then submitted that, as the existence of a state of war and the emergencies growing out of it have drawn within the field to which this power extends the subject matter of many provisions of the *Marketing of Primary Products Acts* of Victoria, including those which have been brought into operation for the purpose of regulating the marketing of eggs and egg pulp, those provisions of these Acts are invading a field of power which belongs exclusively to the Commonwealth. The submission that the Parliament of the Commonwealth alone has power to make laws with respect to defence is based mainly on sec. 52 (ii.) of the Constitution, and reliance is also placed on observations regarding the defence power in the cases cited in argument in support of this submission. Neither sec. 52 (ii.) nor any other provision of the Constitution expressly says that the power conferred on the Parliament by sec. 51 (vi.) is an exclusive power of the Parliament of the Commonwealth. Sec. 52 (ii.) provides that the Parliament shall have exclusive power to make laws with respect to, among other things, matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth. It is provided by sec. 69

(1) (1801) 2 East. 2 [102 E.R. 268]. (2) (1790) 3 T.R. 531 [100 E.R. 716].

that on a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth certain departments of the public service in each State, including naval and military defence, "shall become transferred to the Commonwealth." The result of secs. 52 (ii.) and 69 is that the Parliament of the Commonwealth has exclusive power to make laws with respect to matters relating to the department of naval and military defence. It is contended that this exclusive power extends to all matters which are within the ambit of the defence power in time of peace or war. This contention concentrates on secs. 52 (ii.) and 69 as the source of the legislative power with respect to defence. If these sections were the source of that power, sec. 51 (vi.) would appear to be otiose, and this could be said of this placitum if the power conferred by sec. 52 (ii.) to make laws with respect to matters relating to the department of naval and military defence were as wide as that conferred by sec. 51 (vi.). But a comparison of the language of sec. 51 (vi.) and sec. 52 (ii.) makes it impossible to say that each covers the same ground. The former is clearly not otiose, and these considerations are sufficient to destroy the contention that sec. 52 (ii.) combined with sec. 69 defines the defence power of the Parliament of the Commonwealth. Its power to make laws covering the field to which the *Marketing of Primary Products Acts* extend could not, in my opinion, be rested on sec. 52 (ii.). That power is derived from sec. 51 (vi.). There is not any identity between the things to which those Acts apply and things which could be properly described as matters relating to the department of naval and military defence. The powers conferred by sec. 51 (vi.) are not, as has been observed, declared by the Constitution to be exclusive powers of the Parliament of the Commonwealth. The words of sec. 51 (vi.) do not imply any prohibition against a State making laws with respect to defence within its own territorial jurisdiction. Indeed, its power to maintain a naval or military force would be saved by sec. 107 if sec. 114 did not impose a prohibition against the raising or maintaining such a force without the consent of the Parliament of the Commonwealth. Sec. 119 imposes a duty on the Commonwealth to protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence. The core of the power conferred by sec. 51 (vi.) is the defence of the Commonwealth and the States by force and the control of the forces. But this does not exhaust the content of the power conferred by sec. 51 (vi.). Subject to sec. 114 every State has power to make laws for its own peace, welfare and good government operating within the field to which sec. 51 (vi.) extends. Any such State law would

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not prevail and would be void to the extent to which it was inconsistent with a valid Commonwealth law, but it would not be void as an unlawful invasion of an exclusive field of Commonwealth power. Neither sec. 52 (ii.) nor any other provision of the Constitution supports the submission that no other Parliament but that of the Commonwealth has power to make laws with respect to any subject which falls within the ambit of the power of the Parliament of the Commonwealth to legislate with respect to defence. The observations from the cases which were relied upon to support the submission are not authority for so wide a submission as the plaintiffs make and need to make to bring about the invalidity of the *Marketing of Primary Products Acts*. In any case it was not contended that these observations had any authority except as *obiter dicta*.

The second submission on behalf of the plaintiffs is made on the footing that the *Marketing of Primary Products Acts* are within the legislative powers of the State. According to this submission these Acts and the Regulations made under them are, within the meaning of sec. 109 of the Constitution, inconsistent with Commonwealth law, with the result that this law prevails and the State Acts and Regulations are invalid. The Commonwealth law with which it is submitted that the State Acts and Regulations are inconsistent is, first, the *National Security Act* and, secondly, the law contained in that Act and the *Egg Control Regulations*. The Act gives power to the Governor-General in Council to make regulations which will operate substantially in the same way as the State Acts in relation to any product that is within their scope. But this consideration is not sufficient to justify the conclusion that there is inconsistency between the State Acts and Regulations and the Commonwealth Act (*Victoria* v. *The Commonwealth* (1)). The *Egg Control Regulations* were made pursuant to the power to make regulations conferred on the Governor-General in Council by the *National Security Act*. These Regulations confer power on the Minister to expropriate eggs on behalf of the Commonwealth. They empower the Minister to expropriate substantially in the same field as that to which the State Acts apply. The Minister has not exercised the power of expropriation conferred on him by the Commonwealth Regulations. So long as the power is not exercised, inconsistency between the Commonwealth law and the State law cannot be deduced from the provisions of the Commonwealth law authorizing the Minister to expropriate (*Victoria* v. *The Commonwealth* (2)). There are, however, self-executing regulations. Reg. 11 provides that after the

(1) (1937) 58 C.L.R. 618.

(2) (1937) 58 C.L.R. 618.

commencement of these Regulations, no person shall export any eggs unless licensed so to do under these Regulations and in accordance with the terms and conditions of the licence. Reg. 12 gives power to the Minister to issue licences to export eggs and egg pulp and to cancel or suspend any such licence. Reg. 13 prescribes the terms and conditions of the licence. Sub-sec. 1 (*d*) of sec. 18 of the *Marketing of Primary Products Act* 1935 provides that a marketing board may make such arrangements as it deems necessary with regard to the sale of the commodity for export or for consignment to other States or countries, and for the purpose of this provision sales of the commodities for oversea ship's stores shall be deemed to be sales for export. The State Regulations, which are known as the *Egg and Egg Pulp Marketing Board Regulations*, prescribe the standards of quality and grades of eggs which are for export. It may be that there would be inconsistency between State and Commonwealth law if the Commonwealth licence also prescribed terms and conditions relating to the quality and grade of the product to which it referred, but it would not follow that the *Marketing of Primary Products Acts* are wholly invalid. In my opinion the second submission made on behalf of the plaintiffs should also fail.

The plaintiffs also claim that reg. 37 of the State Regulations or par. *a* of clause 1 of this regulation is invalid on the ground that it is unreasonable. This claim does not raise a question under the Constitution or involving its interpretation. But it is consistent with the practice which the Court adopts in applying sec. 30 of the *Judiciary Act* 1903-1940 to decide the question whether the regulation or that part of it is invalid on that ground because it is involved in a matter over which the Court is given jurisdiction by that section.

In *Widgee Shire Council* v. *Bonney* (1) *Griffith* C.J. said :—" With regard to the objection that the by-law is unreasonable, I think that since the cases of *Slattery* v. *Naylor* (2) and *Kruse* v. *Johnson* (3) it is very difficult to make a successful attack on a by-law on this ground. In my opinion, the intention of the legislature, as evidenced by the section to which I have referred, was to leave to the local authority in the first instance, and to the Governor in Council in the second, the decision of the question of the expediency of exercising the powers conferred on them. The existence of a power and the expediency of its exercise are quite different matters. The question of the existence of the power can always be determined by a court of law. But, in my opinion, the expediency of the exercise of a power is not a matter for determination by a court. What might

(1) (1907) 4 C.L.R. 977, at pp. 982, 983.
(2) (1888) 13 App. Cas. 446.
(3) (1898) 2 Q.B. 91.

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be regarded by everyone as a reasonable and proper by-law to make in a city or in a large country town might in the case of a small country township or sparsely-settled district (to all of which the Act in question applied) be regarded by some persons as unreasonable. But it is obvious that the question whether the circumstances of the locality warrant the exercise of a power is one of expediency and not of competency. Otherwise the validity of a by-law would have to be determined upon extrinsic evidence as to the circumstances of the particular locality. I do not know of any instance in which such a doctrine has ever been suggested. In my opinion, the legislature has deliberately and intentionally made the local authority, subject to the approval of the Governor in Council, the sole judge of such matters, subject only to this qualification, that, if a by-law is such that no reasonable man, exercising in good faith the powers conferred by the statute, could under any circumstances pass such a by-law, it might be held invalid on that ground as being an abuse of the power, and therefore not within it. This view is in accord with the accepted rule that the exercise of discretion by local authorities will not be reviewed by a court of law in cases where they are authorized to execute such works as may be necessary." In *Williams* v. *Melbourne Corporation* (1), it was decided that in the High Court the unreasonableness of a by-law made under statutory power is not treated as a separate ground of invalidity: See the report (2). The Court, however, decided that although a by-law on its face relates to the subject matter of the power of which it professes to be an exercise yet it might be declared to be unauthorized by the grant of power because of its unreasonableness. "To determine whether a by-law is an exercise of a power, it is not always enough to ascertain the subject matter of the power and consider whether the by-law appears on its face to relate to that subject. The true nature and purpose of the power must be determined, and it must often be necessary to examine the operation of the by-law in the local circumstances to which it is intended to apply. Notwithstanding that *ex facie* there seemed a sufficient connection between the subject of the power and that of the by-law, the true character of the by-law may then appear to be such that it could not reasonably have been adopted as a means of attaining the ends of the power. In such a case the by-law will be invalid, not because it is inexpedient or misguided, but because it is not a real exercise of the power" (per *Dixon* J. (3)). The attack on the regulation is based on the

(1) (1933) 49 C.L.R. 142.
(2) (1933) 49 C.L.R., at pp. 150, 154, 155, 158, 159.
(3) (1933) 49 C.L.R., at p. 155.

view that it purports to give the person authorized by the Board power to require the person, to whom he may give notice, to furnish information which he could not reasonably be expected to supply and for that reason it exceeds the powers which it is to be presumed that the legislature entrusted to the Executive. Upon the face of the regulation there is a connection between it and the power conferred by sec. 43 (1) (*a*) (iv.). The subject matter of the power includes returns and statistics. The question whether it would be unreasonable to require a person to whom a notice might be addressed to supply the information mentioned in the regulation depends upon the circumstances. It may well be that the keeping of twenty-five fowls or more is a fair criterion of whether the keeper is engaged in such business and that a person who was conducting poultry keeping as a business would put his fowls in pens or other enclosures and have records of their produce which would enable him to furnish the particulars to be supplied in conformity with the regulation. There is no evidence of the circumstances to which the regulation applies, but every intendment should be made in favour of the reasonableness of the regulation. It was made by the Governor in Council and Parliament has not seen fit to disallow it: See *Marketing of Primary Products Act* 1935, sec. 43. Speaking of a by-law made even by a local authority, *Channell* J. in *Salt* v. *Scott Hall* (1) said: "The Court does not readily interfere to set aside as unreasonable and void by-laws which a local authority has deliberately adopted, for it recognizes that the local authority is itself the best judge as to whether" (it) "is required . . . or not." There is, in my opinion, nothing before the Court which would warrant it in deciding that the operation of the regulation is such that parliament never intended to give authority to the Governor in Council to make it.

Another and diverse claim is made in the action. It does not involve any question arising under the Constitution or involving its interpretation or any other question attracting the original jurisdiction of this Court. The claim is for an account. It is based on the allegation that the defendant was bound by sec. 23 of the *Marketing of Primary Products Act* 1935 to account to the plaintiffs, but did not fulfil its obligation under that section. Sec. 5 of the *Marketing of Primary Products Act* 1940 provides that notwithstanding anything contained in sec. 23 the Board may discharge its obligation to the producer in accordance with the provisions of sec. 5. One ground on which the defendant Board demurs to this claim is that the obligation is not pleaded according to the provisions

(1) (1903) 2 K.B. 245, at p. 248.

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by which it is created, that is in the alternative : Compare *Penny* v. *Porter* (1) ; *Tate* v. *Wellings* (2) ; *White* v. *Wilson* (3). The contrary argument on behalf of the plaintiffs is that sec. 5 was added by way of a proviso to sec. 23, and for that reason there is no need for the plaintiffs to notice it in their statement of claim ; but it is for the defendant to plead sec. 5 if it relies on it. This argument should succeed if sec. 5 came into the legislation by way of a proviso to sec. 23 : See *Thibault* v. *Gibson* (4) ; *R.* v. *James* (5), and the other cases cited in that case : *Pye* v. *Metropolitan Coal Co. Ltd.* (6). In my opinion sec. 5 is not a proviso to sec. 23. The effect of the two Acts is that there is a duty on the Board to act in conformity with sec. 23 or sec. 5. In my opinion the ground, which has been mentioned, of this demurrer is good in principle.

But the claim for this account contains no element that would attract the original jurisdiction of this Court. It is also argued on behalf of the defendant that the statement of claim, in so far as it claims this account, is demurrable because it contains no element that attracts the original jurisdiction of the Court and alleges a cause of action which is separate from and has no element in common with any other cause of action alleged in the statement of claim which does attract the original jurisdiction of the Court. In my opinion this is a good ground of demurrer. I agree with the Chief Justice that there is no lawful authority for joining the claim for the account in this action.

In my opinion the demurrer should be allowed and there should be judgment in the action for the defendant.

WILLIAMS J. The amended statement of claim in this action, in which the plaintiffs, who carry on the business of poultry farmers at Werribee in the State of Victoria, are suing the Egg and Egg Pulp Marketing Board of Victoria, a body which is incorporated and operates under three Victorian Acts, Nos. 4337 of 1935, 4658 of 1939 and 4750 of 1940, combines three causes of action.

In the first cause of action the plaintiffs are seeking declarations that Act No. 4337 was invalidated by the coming into force of the *National Security Act* 1939 on 9th September 1939 or of the first regulations (Wheat Acquisition) passed to implement the powers conferred by sec. 5 of that Act on 21st September 1939 or of the *Egg Control Regulations* on 9th November 1939 ; that Act No.

(1) (1801) 2 East. 2 [102 E.R. 268].
(2) (1790) 3 T.R. 531 [100 E.R. 716].
(3) (1800) 2 Bos. & Pul. 116 [126 E.R. 1188].
(4) (1843) 12 M. & W. 88, at p. 94 [152 E.R. 1122, at p. 1125].
(5) (1902) 1 K.B. 540.
(6) (1934) 50 C.L.R. 614 ; (1936) A.C. 343 ; 55 C.L.R. 138

4658, which came into force on a date subsequent to those of the *National Security Act* and the *Wheat Acquisition Regulations* but prior to that of the *Egg Control Regulations*, was invalidated either *ab initio* or on the last-mentioned date; and that Act No. 4750, which came into force subsequently to all three dates, was invalid *ab initio*. They contend that on one of these dates the Commonwealth Parliament propounded a law relating to the acquisition and disposal of eggs pursuant to its power under the Constitution to make laws relating to naval and military defence, that this power is an exclusive power, and that when it is exercised with respect to any particular subject matter, this subject matter becomes one of the matters placed by the Constitution within the exclusive jurisdiction of the Commonwealth Parliament, so that any State legislation on the subject becomes invalid.

The powers and duties of the Commonwealth Parliament relating to defence are contained in secs. 51 (vi.) and (xxxix.), 52 (ii.), 69, 114 and 119 of the Constitution. Sec. 51 (vi.) and (xxxix.) confers upon the Commonwealth Parliament power to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth and matters incidental thereto. There are many analogies between this power and the powers contained in the Constitution to levy customs and excise duties and grant bounties. Sec. 90 provides that on the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise and to grant bounties on the production or export of goods shall become exclusive. Sec. 91 preserves the rights of the States to grant bounties on mining for gold, silver or other metals and to grant any bounty on the production of goods with the consent of both Houses of the Parliament expressed by resolution. Sec. 114 provides that a State shall not without the consent of the Parliament of the Commonwealth raise or maintain any naval or military force. This section does not provide for the consent being given by resolution of both Houses, so that it would have to be authorized by an Act of the Commonwealth Parliament. This consent could extend to one or more States, but unless and until the requisite authority was conferred upon a State or States by the Commonwealth no State would have any power to legislate on this subject. The power to legislate with respect to raising and maintaining naval and military forces is therefore withdrawn from the States within the meaning of sec. 107 and is as exclusive to the Commonwealth as the power to grant bounties on the production or export of goods. Sec. 69 provides that the departments of naval

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and military defence, just like the department of customs and excise, are to be transferred to the Commonwealth. Sec. 52 provides that the Commonwealth shall have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to (ii.) matters relating to any department of the public service the control of which is by the Constitution transferred to the Executive Government of the Commonwealth, and (iii.) other matters declared by the Constitution to be within the exclusive power of the Parliament. The matters included in (ii.) would not be confined to laws relating to the internal organization of the transferred departments but would extend to any subject matters which such departments would ordinarily administer. Matters in (iii.) would, for the reasons already given, include legislation with respect to raising and maintaining naval and military forces in the Commonwealth. Sec. 61 vests the exercise of the executive power of the Commonwealth in the Governor-General and this power extends to the execution and maintenance of the laws of the Commonwealth. Sec. 70 provides that in respect to matters which under the Constitution pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Government of a Colony shall vest in the Governor-General. The Constitution provides therefore for the transfer of the departments of naval and military defence to the Commonwealth, for the withdrawal from the States of any power to legislate with respect to raising and maintaining naval or military forces without the consent of the Commonwealth, for the conferring of exclusive power to legislate on these matters upon the Commonwealth Parliament, and for the transfer to the Executive Government of the Commonwealth of the sole executive power relating to naval and military defence. The power contained in sec. 51 (vi.) is not expressly made exclusive by sec. 51. But the section does not expressly make any of the powers it contains exclusive, although from the content alone of some of the powers it is plain that they are exclusive. For instance, placita (iv.), (xxx.), and the first limb of placitum (xxxi.) are exclusive powers, while other powers derive their exclusiveness from other parts of the Constitution. The content of the defence power is probably sufficient by itself to show that it was intended to be an exclusive power. It includes in one comprehensive phrase power to make laws for the naval and military defence of the Commonwealth (a matter beyond the legislative powers of any State), for the defence of the several States (so that if the States could also make such laws there would be two Parliaments with power to make laws for each individual State) and with respect to the control of the forces to execute and maintain

the laws of the Commonwealth. But any doubt on the point is removed when it is read in conjunction with the other sections of the Constitution to which I have referred and compared with the analogous provisions relating to customs, excise and bounties. It is the duty of the Commonwealth to be ready at all times to protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence. The defence power is, therefore, unlike many of the powers in sec. 51 which lie dormant until the Commonwealth Parliament legislates on a particular subject matter, a power which the Commonwealth Executive and Parliament must actively exercise at all times, whether the Commonwealth is at peace, or war, if the Commonwealth is to be always ready to discharge its obligations. Even if the power is concurrent there would probably be a continuing implication that the defence legislation passed by the Commonwealth Parliament was intended fully to occupy the field of any measures required for defence having regard to the danger of invasion or domestic violence existing from time to time, so that under sec. 109 any State legislation on the subject of defence would be invalidated at birth. But the sounder view is that the defence power is an exclusive power. It would not be conducive to the security of the Commonwealth for seven legislatures in the time of war to be able to legislate on the subject of defence and for this Court to have to determine in each case to what extent the Acts of the States were invalid under sec. 109. This is the view which has previously been taken by most of the Justices of this Court. It was held in *Joseph* v. *Colonial Treasurer* (*N.S.W.*) (1) that, because the Commonwealth is the sole defence authority, only the Executive Government of the Commonwealth can exercise the Royal war prerogative. It was said in the joint judgment of *Isaacs*, *Powers* and *Rich* JJ. (2) that "in the allocation and distribution of powers effected by the Constitution of the Commonwealth the defence power is exclusively assigned to the Commonwealth." In *Pirrie* v. *McFarlane* (3) *Knox* C.J. said: "The Commonwealth has exclusive power to make laws with respect to matters relating to naval and military defence." *Isaacs* J. (4) reiterated *in extenso* the view already succinctly expressed in the joint judgment in *Joseph's Case* (1). *Rich* J. (5) also expressed views in accordance with this judgment.

It follows that in my opinion the Commonwealth Parliament alone can legislate on subjects which relate exclusively to defence, such as the raising, maintaining, and control of the armed forces of the Commonwealth.

(1) (1918) 25 C.L.R. 32.
(2) (1918) 25 C.L.R., at p. 46.
(3) (1925) 36 C.L.R. 170, at p. 184.
(4) (1925) 36 C.L.R., at pp. 191, 192, 199, 212.
(5) (1925) 36 C.L.R., at pp. 220, 221.

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But the ambit of the defence power is wide enough, especially in war-time, to embrace many subjects which do not appertain exclusively to defence. The meaning of the power does not change, but its application depends upon circumstances, so that as circumstances change so may its operation as a power enabling the legislature to make a particular law (per *Dixon* J. in *Andrews* v. *Howell* (1)). In war-time the power confers upon the Commonwealth Parliament and the Executive which it controls authority to take any action which can conceivably aid in the defence of the Commonwealth having regard to the magnitude of the danger which has to be met. The emergency justifies measures being taken which entrench upon subject matters which are normally within the exclusive domain of the States. All kinds of economic measures such as price fixing, rationing of goods and services, acquisition of property, and restrictions upon buying and selling, may be required to organize the nation for modern total war. Legislation on these subjects is legislation with respect to matters upon which the States are entitled to legislate not to defend themselves but to carry out the civil policy of the government, and to do so in times of war as well as in times of peace. There is no suggestion in *Joseph's Case* (2) or in *Farey* v. *Burvett* (3) that, in the absence of Commonwealth action, the State of New South Wales could not in the former case have passed legislation acquiring the wheat, or that the State of Victoria could not in the latter case have fixed the price of bread in Victoria. The mere existence of a state of war would not prevent the Victorian Parliament passing legislation establishing the defendant Board or empowering it to acquire and dispose of eggs produced in Victoria under its power to make laws for the peace, order and good government of Victoria.

But the Commonwealth Parliament would have a concurrent power to legislate on this subject if such legislation could conceivably assist in the defence of the Commonwealth, and, if and when the Commonwealth Parliament did so, its legislation would prevail over the State legislation by virtue of sec. 109 of the Constitution to the extent to which the State law was inconsistent with the Commonwealth law. This extent must be determined by ascertaining from a comparison of the two competing laws the degree to which the Commonwealth Parliament intends its law to occupy the field to the exclusion of the operation of the State law. The *National Security Act*, sec. 5, merely authorizes the Governor-General to make regulations for securing the public safety and the

(1) (1941) 65 C.L.R. 255, at p. 278. (2) (1918) 25 C.L.R. 32.
(3) (1916) 21 C.L.R. 433.

defence of the Commonwealth with respect to the matters therein mentioned, which include the acquisition on behalf of the Commonwealth of any property other than land. The *Wheat Acquisition Regulations* have nothing to do with the acquisition of eggs. The *Egg Control Regulations*, apart from regs. 11 to 13 which relate to the export of eggs (including egg pulp), merely create the necessary machinery to enable the Minister to acquire certain eggs. Nothing in sec. 5 of the Act or in the Regulations can be construed as an entry by the Commonwealth into the field occupied by the Victorian Acts. This entry will only take place, and it will only be possible to judge the extent of the intrusion, if and when an order is made under reg. 14 acquiring the eggs therein specified. If these eggs are eggs subject to the Victorian legislation a condition of inconsistency may arise between the two laws. But it is possible that any inconsistency may be avoided even when an order is made, because the order may provide for the acquisition of the eggs from the Board after the Board has acquired them from the producer under State legislation, or it may not apply to eggs in Victoria at all. The law of the Commonwealth applicable under sec. 109 is sec. 5 of the Act and the *Egg Control Regulations* made thereunder, and not the order. But it is the order which will identify the eggs which are to become subject to the law of the Commonwealth embodied in the Act and the Regulations (*Clyde Engineering Co. Ltd.* v. *Cowburn* (1); *Ex parte McLean* (2); *Tasmanian Steamers Pty. Ltd.* v. *Lang* (3)). If there is any inconsistency between the rights of the Commonwealth and of the Board with respect to these eggs, the two laws will then come into collision and the Commonwealth law will prevail. This will not effect a repeal of the Victorian Acts. They could only be repealed by the Victorian Parliament. But so long as the inconsistency exists the Victorian Acts will be inoperative. The action therefore fails so far as it seeks declarations that the Acts Nos. 4337 and 4658 became invalid on any of the three dates or that Acts Nos. 4658 and 4750 were invalid *ab initio*.

In the second cause of action the plaintiffs seek a declaration that reg. 37 of the *Egg and Egg Pulp Marketing Board Regulations* 1941 was invalid *ab initio* on the same constitutional grounds, or alternatively on the ground that it is unreasonable. The regulation is not the same as that which this Court held to be invalid in *Jacobs* v. *Gray* (4). The meaning of unreasonable is explained in the cases collected in *Brunswick Corporation* v. *Stewart* (5). For the reasons already given the constitutional ground fails, and

(1) (1926) 37 C.L.R. 466.
(2) (1930) 43 C.L.R 472.
(3) (1938) 60 C.L.R. 111.
(4) Unreported; noted 14 A.L.J. 434.
(5) (1941) 65 C.L.R. 88, at pp. 97, 99.

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I agree for the reasons given in the preceding judgments that the regulation is not unreasonable.

In the third cause of action the plaintiffs claim an account and payment of the amount payable to them by the Board under sec. 23 of the Act No. 4337 in respect of eggs delivered by them to the Board between 30th June 1938 and 1st July 1941. In popular language a cause of action is the act on the part of the defendant which gives the plaintiff his cause of complaint (*Jackson* v. *Spittall* (1)). It has been defined more explicitly as every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court (*Read* v. *Brown* (2) ; *Halsbury*, 2nd ed., vol. 1, p. 8). "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. 'The principal consideration,' says *De Grey* C.J., in *Hitchin* v. *Campbell* (3) 'is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case.' 'And one great criterion,' he adds, 'of this identity is that the same evidence will maintain both actions' " (per *Bowen* L.J., *Brunsden* v. *Humphrey* (4)).

In order to establish the first cause of action the facts which the plaintiffs would have to prove, if traversed, would be that during the period subsequent to 9th November 1939 the Board had deprived them of the possession of and had sold their eggs. There could be counts for trespass to goods and trover alleging that the plaintiffs had suffered damage from these acts of the Board, or the plaintiffs could elect to waive the tort and sue for the proceeds of sale as moneys had and received to their use (*United Australia Ltd.* v. *Barclays Bank Ltd.* (5)). But the statement of claim only asks for declarations that the Victorian Acts are invalid, and does not seek any consequential relief. Presumably the plaintiffs still desire to recover the value of their eggs if the Acts are invalid. If so, the statement of claim would have to be amended, because they would not be entitled to bring a fresh action asking for damages which they could have claimed but omitted to claim in the present action (*Conquer* v. *Boot* (6)). The plaintiffs have simply pleaded a third alternative cause of action asking that, if the Victorian Acts are valid, they may have an account of the amount payable to them

(1) (1870) L.R. 5 C.P. 542, at p. 552.
(2) (1888) 22 Q.B.D. 128, at p. 131.
(3) (1771) 2 Black. W. 827 [96 E.R. 487].
(4) (1884) 14 Q.B.D. 141, at p. 147.
(5) (1941) A.C. 1.
(6) (1928) 2 K.B. 336, at p. 345.

under the Act No. 4337, sec. 23. It is a claim for compensation made by residents of Victoria against a Victorian corporation arising out of transactions wholly occurring in Victoria. Sec. 23 prescribes periods for determining the amount payable to producers (the statement of claim refers to two pools, 1938 to 1940 and 1940 to 1941), defines the deductions the Board is entitled to make, and provides that the decision of the Board upon certain matters shall be final and conclusive. The third cause of action relates to two distinct periods. Neither of these periods is conterminous with the period subsequent to any date upon which the Victorian Acts could have been invalidated. Indeed, the first period commences approximately fifteen months before the earliest of the three dates. The facts required to prove damage (if the plaintiffs amend their statement of claim and allege that if the Victorian Acts are invalid they are entitled to recover damages in tort) would be essentially different from those required to prove the amount of compensation to which the plaintiffs would be entitled under sec. 23. If the plaintiffs waive the tort and sue for moneys had and received, the position would be the same because they would be seeking to recover the amount received from the sale of their own eggs less such deductions as the Court thought proper, whereas under sec. 23 their claim would be for their share of the proceeds of sale of the two pools for particular periods less certain statutory deductions and subject to the decision of the Board on certain matters being final and conclusive. So that, to borrow the words of *Sargant* J. in *Goldrei, Foucard & Son* v. *Sinclair & Russian Chamber of Commerce in London* (1), "this alternative claim constitutes, in my judgment, a separate and distinct cause of action resting on a different foundation and involving very different remedies." As Lord *Moulton*, in delivering the judgment of the Privy Council, said in *Payana Reena Saminathan* v. *Pana Lana Palaniappa* (2), the first and third causes of action "are in truth inconsistent and mutually exclusive causes of action."

By sec. 76 (i.) of the Constitution the Commonwealth Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the Constitution or involving its interpretation. By sec. 77 (ii.) the Parliament may define the extent to which the jurisdiction of the High Court shall be exclusive of that which belongs to or is invested in the Courts of the States. The *Judiciary Act* 1903-1940, sec. 30, confers this original jurisdiction on the High Court and, by sec. 38A, makes it exclusive in matters (other than trials for indictable offences) involving any

(1) (1918) 1 K.B. 180, at p. 192. (2) (1914) A.C. 618, at p. 625.

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question however arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States. The first two causes of action in the statement of claim are matters which fall within sec. 30 (*a*). Previous decisions of this Court, several of which are referred to in *R.* v. *Bevan* (1), have established that a constitutional question arises when its determination becomes necessary upon the ascertained or asserted facts of the case. In other words, whenever there is woven across the warp of the facts constituting a cause of action the woof of a constitutional question, this Court has original jurisdiction to determine the whole of that cause of action. Secs. 40 and 40A of the *Judiciary Act* are complementary to secs. 30 (*a*) and 38A, and it would be strange if this Court did not have the same jurisdiction under the latter sections where the proceedings originate in the Court as it has under the former sections when the cause is removed into this Court. "Matters" in secs. 30 and 38A and "causes" in secs. 40 and 40A do not apply to the whole proceeding, but only to those claims or causes of action which raise a constitutional question. If the Commonwealth Parliament, by defining in sec. 2 "Suit" to include any action or original proceeding between parties, "Cause" any suit, and "Matter" any proceeding in a court, intended to give a wider meaning to matter and cause, the sections would be beyond the power to confer original jurisdiction on this Court granted by the Constitution and they would have to be read down in accordance with sec. 15A of the *Acts Interpretation Act* 1931-1941 to preserve their validity. But the sections themselves on their proper construction appear to me to be limited in this way.

For these reasons the third cause of action is not a matter in which this Court has original jurisdiction. It is unnecessary, therefore, to determine the demurrer that by reason of the provisions of sec. 5 of the Act No. 4750 the defendant could discharge its obligation to pay compensation to the plaintiffs under sec. 23 or alternatively under sec. 5, so that the third cause of action is defective because the plaintiff should have alleged that he had not received compensation under either section.

I agree that the demurrer should be allowed with costs.

Demurrer allowed with costs.

Solicitor for the plaintiffs, *Joan Rosanove.*
Solicitors for the defendant, *Henderson & Ball.*

B. B. M.

(1) *Ante*, p. 452.