[PRIVY COUNCIL.]

NELUNGALOO PROPRIETARY LIMITED . APPELLANT;
PLAINTIFF—APPELLANT,

AND

THE COMMONWEALTH AND OTHERS . RESPONDENTS.
DEFENDANTS—RESPONDENTS,

PRIVY COUNCIL.
1950.
June 8, 12-15, 19-21; *July* 27.

Lords Simonds, Normand, Morton of Henryton, MacDermott and Reid.

Constitutional Law (Cth.)—Privy Council—Jurisdiction—Appeal from High Court—Question as to limits inter se of constitutional powers of Commonwealth and States—Wheat—Compulsory acquisition by Commonwealth—Compensation to grower—Just terms—Validity of regulations—Certificate of High Court—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxi.*), 74—*Acts Interpretation Act* 1901-1948 (*No.* 2 *of* 1901—*No.* 79 *of* 1948), *s.* 46 (*b*)—*National Security* (*Wheat Acquisition*) *Regulations* (*S.R.* 1939 *No.* 96—1945 *No.* 9), *regs.* 14, 19.

Any question whether the Commonwealth has exceeded the powers conferred on it by s. 51 of the Constitution is a question as to the limits *inter se* of the powers of the Commonwealth and the State or States.

An appellant attacked the validity of reg. 19 of the *National Security* (*Wheat Acquisition*) *Regulations* on the ground that it did not provide just terms within the meaning of s. 51 (xxxi.) of the Constitution for wheat compulsorily acquired by the Commonwealth from growers.

Held that a question as to the limits *inter se* of the powers of the Commonwealth and of the States was thereby raised and as the appellant had not obtained from the High Court a certificate under s. 74 of the Constitution, His Majesty in Council had no jurisdiction to hear the appeal.

Appeal from the decision of the High Court: *Nelungaloo Pty. Ltd.* v. *The Commonwealth*, (1948) 75 C.L.R. 495, dismissed.

APPEAL from the High Court to the Privy Council.

This was an appeal by special leave from the decision of the High Court dismissing an appeal by the appellant in an action brought by it in the original jurisdiction of the High Court against the respondents to recover compensation or, alternatively, damages for the expropriation of wheat by the Commonwealth by virtue

of the *National Security* (*Wheat Acquisition*) *Regulations* and the order of the Minister of State for Commerce made thereunder (*Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1)).

The relevant facts, statutory provisions and regulations are sufficiently set forth in the judgment hereunder.

G. E. Barwick K.C. and *B. P. Macfarlan*, for the appellant.

D. N. Pritt K.C., *A. R. Taylor* K.C., *F. Gahan* and *R. Else Mitchell*, for the respondents.

Their Lordships took time to consider the advice which they would tender to His Majesty.

July 27.

LORD NORMAND delivered the judgment of their Lordships as follows:—This is an appeal by special leave from an order of the High Court of Australia dismissing an appeal by the appellant company in an action brought by it against the respondents to recover certain moneys as compensation or alternatively as damages for the expropriation of wheat by the Commonwealth by virtue of the *National Security* (*Wheat Acquisition*) *Regulations* and the order of the Minister of State for Commerce made thereunder.

The respondents at the outset of the proceedings in this appeal tabled a plea that the appeal did not lie without a certificate of the High Court. The right to take this preliminary plea had not been reserved, as it was in the *Banks' Case* (*Commonwealth* v. *Bank of New South Wales*) (2), in the order granting special leave. But it is not in doubt that their Lordships are bound to entertain it, since it is a plea to jurisdiction and no certificate has been sought or granted by the High Court of Australia. The procedure followed in the appeal was similar to that followed in the *Banks' Case* and counsel have been heard on the merits as well as on the preliminary plea.

The foundation of the plea is s. 74 of the Constitution. It is in the following terms:

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

(1) (1948) 75 C.L.R. 495.

(2) (1950) A.C. 235; 79 C.L.R. 497.

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The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

Section 74 has been considered in appeals to His Majesty in Council, notably in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) and in the *Banks' Case* (2), and it will be necessary in due course to discuss the effect of these cases. But it is first necessary, before considering what is meant by a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State and whether the provisions of s. 74 apply, to describe the circumstances which gave rise to the litigation and the course of procedure which has been followed. Attention may be confined to those matters which are relevant to the present issue and much that is material to other questions which would arise only if the appeal is competently before their Lordships may be omitted.

On 21st September 1939, Wheat Acquisition Regulations were made under the *National Security Act* 1939. The validity of the Act itself is not questioned by the appellant. The regulations incorporated the Australian Wheat Board, and provide *inter alia* as follows :—

" 14. For securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, and for maintaining supplies and services essential to the life of the community, the Minister " (being the Minister of State for Commerce) " may, from time to time, by order published in the Gazette make provision for the acquisition by the Commonwealth of any wheat described in the order, and that wheat shall, by force of and in accordance with the provisions of the order become the absolute property of the Commonwealth freed from all mortgages, charges, liens, pledges, interests and trusts affecting that wheat and the rights and interests of every person in that wheat (including any rights or interests arising in respect of any moneys advanced in respect of that wheat) are hereby converted into claims for compensation.

(1) (1917) A.C. 528 ; 24 C.L.R. 396. (2) (1950) A.C. 235 ; 79 C.L.R. 497.

15. All persons having wheat acquired by the Commonwealth in their possession control or disposal on the date of the publication of an order describing that wheat shall, within fourteen days of that publication, furnish to the Board a return in accordance with Form A in the schedule to these regulations.

16.—(1) Any person having wheat acquired by the Commonwealth in his possession, control or disposal may deliver or consign that wheat to a licensed receiver or, on receipt of a notice in writing from the Board (or from the chairman of a committee authorised in that behalf by the Board) requiring him to deliver or consign that wheat to a licensed receiver specified in the notice, shall deliver or consign (as the case may be) the wheat to that licensed receiver within the time specified in the notice;

(2) Notwithstanding anything contained in sub-regulation (1) of this regulation, no person shall, on or after the date of the commencement of this sub-regulation, deliver any wheat acquired by the Commonwealth which was harvested prior to the first day of September 1939, and which is stored on a farm on the date of the commencement of this sub-regulation, to a licensed receiver or to any other person whomsoever except in accordance with instructions from the Board or with the approval of the Board and in either case in accordance with such terms and conditions as the Board may impose;

(3) Any person who, on the date of the commencement of this sub-regulation, has in his possession control or disposal any wheat acquired by the Commonwealth which is stored on a farm and which was harvested prior to the 1st day of September 1939 shall, within fourteen days from the commencement of this sub-regulation, forward to the Board a return in accordance with Form AA in the schedule to these regulations.

17. Except as provided in Regulation 16 of these regulations, or with the consent of the Board, no person shall—

(*a*) part with the possession of any wheat acquired by the Commonwealth which is held in his possession;

(*b*) take into his possession any wheat which has been acquired by the Commonwealth other than wheat which he purchases from the Commonwealth; or

(*c*) purport to sell or offer for sale, or purport to buy or offer to buy (otherwise than from the Commonwealth) any wheat which is the property of the Commonwealth.

19.—(1) Upon delivery or consignment of any wheat in accordance with Regulation 16 of these regulations (or in the case of wheat acquired by the Commonwealth to which sub-regulation (2) of

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Regulation 16 of these regulations applies, after the date of the commencement of that sub-regulation) every person having any right or interest in that wheat may forward to the Board a claim for compensation in accordance with Form B in the schedule to these regulations and shall be entitled to be paid such amount of compensation as the Minister, on the recommendation of the Board, determines:

(2) It shall not be necessary for the Minister to make a determination in pursuance of sub-regulation (1) of this regulation until, in his opinion, a sufficient quantity of any wheat acquired by the Commonwealth has been disposed of to enable the Board to make a just recommendation, but the Minister may, in his absolute discretion, make any payment on account of any claim notwithstanding that no determination in respect of that claim has been made;

(2A) The basis of the compensation to be recommended by the Board shall be the rate or rates per bushel arrived at by reference to the surplus proceeds from the disposal of wheat, but from the compensation determined by the Minister, the Board may make deductions on account of any or all of the following:—

(*a*) the price or value of corn sacks (including freight thereon) supplied to the wheatgrower or which, in the opinion of the Board, form a proper charge against the proceeds of the wheat;

(*b*) railway freight from the country siding to the terminal port, and

(*c*) dockages or deductions as fixed by the Board on account of the quality or condition of the wheat or corn sacks.

25. The Commonwealth may purchase any wheat and may use or sell or otherwise dispose of any wheat acquired or purchased by it as it deems necessary for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, for the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community.

26. On behalf of the Commonwealth and subject to any directions of the Minister, the Board may:—

(*a*) purchase any wheat, wheat products or corn sacks;

(*b*) sell or dispose of any wheat, wheat products or corn sacks acquired or purchased by the Commonwealth;

(*c*) grist or arrange for the gristing of any wheat into flour and sell or otherwise dispose of that flour;

(*d*) manage and control all matters connected with the handling, storage, protection, treatment, transfer or shipment of any

wheat acquired by the Commonwealth or of any wheat or flour sold or disposed of by the Commonwealth or by the Board on behalf of the Commonwealth;

(*da*) carry, in any ship chartered by it for the carriage of wheat or flour, any other commodity at such rates of freight as the Board, subject to any directions of the Minister, determines; and

(*e*) do all matters which it is required by these regulations to do or which are necessary or convenient for giving effect to these regulations.

27.—(1) The Board shall open and maintain an account at the Commonwealth Bank of Australia into which it shall pay all moneys received in respect of sales of wheat or wheat products or otherwise, and any moneys appropriated by the Parliament or borrowed by the Minister for use by the Board on behalf of the Commonwealth.

(2) Out of moneys standing to the credit of the account the Board shall defray all costs and expenses of administering these regulations and make all payments in respect of compensation and any other payments authorized to be made by these regulations.

(3) The accounts of the Board shall be subject to audit by the Auditor-General."

On 16th November 1939 the then Minister of State for Commerce, purporting to act pursuant to the regulations, by order published in the Commonwealth Government *Gazette*, declared that the following wheat was acquired by the Commonwealth, namely:—

"(*a*) all wheat harvested on or before the eighth day of October, One thousand nine hundred and thirty-nine which, on the date of the publication of this Order in the Gazette, is situate in Australia; and

(*b*) all wheat which is harvested in Australia on or after the date of the publication of this Order in the Gazette,

except—

(*c*) wheat stored by the grower thereof on his farm for his own use (other than gristing) and which is not for sale;

(*d*) wheat, to the extent to which it does not exceed one hundred bushels, stored by or on behalf of the grower thereof for the purpose of gristing the wheat into products to be used by the grower;

(*e*) wheat stored by the grower thereof which has been sold to another grower for use as seed wheat; and

(*f*) in such cases as the Australian Wheat Board approves, wheat which has been sold by the grower thereof to any

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person for use as seed wheat either by that person or by a purchaser from that person."

The validity of this order is not now disputed.

The appellant owns property in New South Wales, a large part of which is used for growing wheat. On the footing that the regulations and order were valid the wheat grown by the appellant in the cereal year beginning 1st December 1945 and ending 30th November 1946, became, on harvesting, the property of the Australian Wheat Board, and the appellant delivered in that cereal year 14,284 bushels of wheat to the Board. Upon delivery the appellant claimed compensation "in accordance with the Wheat Acquisition Regulations", and it subsequently received from the Australian Wheat Board certain sums as advances towards the compensation claimed.

On 24th July 1946 the appellant began proceedings against the respondents claiming (1) a declaration that the *National Security (Wheat Acquisition) Regulations* were invalid; (2) a declaration that reg. 19 of these regulations was invalid; (3) a declaration that the order of 16th November, 1939, was invalid; (4) compensation for the acquisition by the Commonwealth of the appellant's 1945-1946 wheat crop; (5) a claim for interest. To the fourth claim there was, (6) an alternative claim for damages on the basis of conversion of the wheat; and (7) a further alternative claim on the basis of an agreement by the Wheat Board to purchase the appellant's wheat at a price to be ascertained in accordance with its fair market value. Of these claims the first, third and fifth have been abandoned; and the sixth and seventh are not material to the present issue.

The fourth claim is a claim for the value of the wheat to the appellant at the date of acquisition. It is a claim under reg. 14. Logically there are two alternative bases for it. One is that regs. 14 and 19 each provide a separate mode of assessing compensation; reg. 14 by converting the appellant's property into a claim for compensation based on the general principle of payment of the value at the date of acquisition, and reg. 19 by providing for payments by the Board based on a rate per bushel arrived at by reference to the surplus proceeds from the disposal of wheat by the Board and subject to the other provisions of reg. 19. So far there is no attack on the validity of this regulation and no *inter se* question. The other alternative needs more detailed explanation. It presupposes that regs. 14 and 19, on a sound construction of their terms, do not each provide a separate mode of assessing compensation, but that there is only one mode, that provided by reg. 19.

It also presupposes that reg. 19 is invalid as in excess of the Commonwealth Parliament's power under s. 51 placitum (xxxi.) of the Constitution "to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." And, thirdly, it presupposes that reg. 19, by virtue of s. 46 (*b*) of the *Acts Interpretation Act* 1901-1948, may be treated as severable from the other regulations, with the consequence that the acquisition would be valid and that compensation under reg. 14 would be assessed on the basis of value at the date of acquisition. The respondents contend that the question whether reg. 19 is invalid as being *ultra vires* of placitum (xxxi.) is an *inter se* question. In the statement of defence it should be noted that they alleged that the appellant's conduct in claiming compensation under the regulations at the date when the wheat was delivered and in subsequently accepting the advances to which reference has been made amounted to an election to accept compensation under the provisions of reg. 19.

The action was heard by *Williams* J., who held, on the authority of *Andrews* v. *Howell* (1) and *Australian Apple and Pear Marketing Board* v. *Tonking* (2), that regs. 14 and 19 each provided a separate means of assessing compensation, but that the sum at which he would have assessed the appellant's claim under reg. 14 was less than the sum which the respondents were willing to pay under reg. 19. He dismissed the action. The validity of reg. 19 was not called in question in argument before him.

The appeal from his decision was heard before the Full Court of the High Court of Australia. It is clear from the judgment of the Chief Justice that no argument was presented against the validity of reg. 19. He therefore assumed its validity and he was for dismissing the appeal on the ground, *inter alia*, that the appellant had elected to take the compensation provided by reg. 19. *McTiernan* and *Webb* JJ. were in substantial agreement with the Chief Justice. *Rich* J. agreed with the reasons and conclusions of the trial judge, except on points not material to the present issue, one of which involved the allowance of the appeal on the technical ground that the appellant was entitled to a decree for the amount of compensation as assessed under reg. 14 by the trial judge. *Starke* J. held that reg. 19 contravened the constitutional limitation contained in placitum (xxxi.) and that reg. 14

(1) (1941) 65 C.L.R. 255. (2) (1942) 66 C.L.R. 77.

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was severable. The acquisition was therefore valid, and compensation fell to be assessed under reg. 14 on general principles. He therefore would have given effect substantially to the fourth claim. *Dixon* J. said that if he had been free so to decide he would have held that the meaning of the Wheat Acquisition Regulations was that every grower should be compensated by payments under reg. 19 and not otherwise, and further that reg. 19 was not necessarily inconsistent with just terms and therefore not in excess of the Commonwealth powers conferred by s. 51 placitum (xxxi.). But in view of the refusal of counsel for the Commonwealth to distinguish the instant case from the previous decisions of the High Court in *Tonking's Case* (1) and *Andrews* v. *Howell* (2) he dealt with the case on the footing that the wheat was validly acquired and that the appellant was entitled to compensation under reg. 14 on ordinary principles, viz., payment of the value of the wheat acquired. On this basis he sustained, subject to minor modifications, the appellant's fourth claim.

As the learned judges of the High Court were evenly divided on the question whether the appeal should be allowed, the appeal was dismissed by virtue of the provisions of s. 23 (2) (*a*) of the *Judiciary Act* 1903-1947.

It is apparent from the foregoing summary of the judgments in the High Court that the question of the validity of reg. 19 was a matter which obtruded itself on judicial attention, though it was not argued by counsel, and that the issue of validity might well become prominent in any subsequent appeal to His Majesty in Council. And so it proved, for one of the Reasons in the appellant's Case is :—" because compensation should not be assessed under Regulation 19 of the Wheat Acquisition Regulations by reason of the fact that such Regulation was invalid as not providing for just terms under section 51 of the *Commonwealth of Australia Constitution Act*, 1900". In the body of the appellant's Case it is narrated that the appellant had formally submitted to the High Court of Australia that the regulations were invalid, but did not argue the point, having regard to the decision in *Tonking's Case* (1). It was, moreover, submitted in the Case that in so far as the question of the validity of the *National Security* (*Wheat Acquisition*) *Regulations* and in particular the validity of reg. 19 might become material in the consideration of the appeal, reg. 19 was invalid. One reason for stating this submission in this conditional form is that it might be possible

(1) (1942) 66 C.L.R. 77. (2) (1941) 65 C.L.R. 255.

for the appellant to succeed in the appeal without attacking the validity of reg. 19, if it could obtain a decision that regs. 14 and 19 on a true construction of their terms provided alternative modes of assessing compensation. It must further be noticed that the finding by the Chief Justice and *McTiernan* and *Webb* JJ. that the appellant had elected to take compensation under reg. 19 brought the question of its validity into the foreground of the appeal. For that finding was based on the assumption that the regulation was valid. The finding might be shown to be unjustified on the evidence, but another obvious answer to the defence of election is that reg. 19 was null and void and that there was therefore no scope for election.

To sum up, the position is that the appellant might succeed in this appeal if it abandoned its attack on the validity of reg. 19, and obtained a decision that regs. 14 and 19 provided alternative modes of compensation and that the appellant's conduct did not amount to an election. But the appellant did not abandon the attack on the validity of reg. 19 and in his argument at the hearing of the appeal the appellant's counsel contended that reg. 19 did not provide just terms, because *inter alia* the Board was not bound to obtain the best possible price for the wheat handled by it and was subject to ministerial control both as regards the use and disposal of the wheat and as regards the payments to be made to wheat growers. Their Lordships need not, for the purpose of deciding the question of their jurisdiction, say more than that the argument against the validity of reg. 19 was formidable and that it could not have been disposed of without the most serious consideration.

These then are the circumstances relevant to the question of the jurisdiction of His Majesty in Council which has now to be determined.

The appellant denies that the question whether reg. 19 provides for acquisition on just terms is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State and it submits also that the appeal is not an appeal upon any such question nor an appeal from a decision on any such question. The respondents maintain that all questions whether the Commonwealth has exceeded a power conferred on it by s. 51 of the Constitution are *inter se* questions, and that the question whether just terms are provided by reg. 19 is one upon which their Lordships are invited by the appellant to determine and is in any event one which their Lordships would find it necessary to determine if the appeal were permitted to proceed to a final

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conclusion on the merits. These are the broad contentions of the parties and they involve two logically separate issues which depend on the construction of s. 51 and of s. 74 of the Constitution.

Their Lordships in approaching these issues deem it expedient to recall certain broad considerations which are more than prolegomena since they bear upon the construction of s. 51 of the Constitution and are relevant to every dispute affecting the limits of the powers of the States and the Commonwealth. Before the Australian Commonwealth Constitution was framed the States enjoyed sovereign powers of legislature. The sovereign powers of the States were not abrogated, though they were in some respects limited, by the Constitution of the Commonwealth. Thus s. 107 of the Constitution provides that every power of the Parliaments of the member States continues as it was at the establishment of the Commonwealth unless it is by the Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliaments of the States. Sections 52 and 69 may be referred to as examples of powers exclusively vested in the Commonwealth Parliament, and s. 92 as an example of a power withdrawn from the Parliaments of the States and equally denied to the Parliament of the Commonwealth. This saving of the States' powers was the foundation of the agreement narrated in the preamble to the Constitution by which the people of the States agreed to unite in one indissoluble Federal Commonwealth. But it was also part of the agreement to federate that the Constitution should grant to the Commonwealth Parliament powers to make laws for the peace order and good government of the Commonwealth without declaring them to be exclusive. Section 51 grants such powers, subdividing them according to subject matter in the thirty-nine placita comprised in it. Where the Constitution has declared that neither the Commonwealth nor the States shall have power to make laws of a certain effect and it is alleged that the Commonwealth or a State has trespassed against the prohibition there can be no question as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State, and the only question for judicial decision is whether a particular enactment or administrative proceeding has trespassed against the prohibition. This principle has been firmly established and it was in accordance with it that in the *Banks' Case* (1) it was accepted that no *inter se* question could arise under s. 92. Equally, when a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and

(1) (1950) A.C. 235; 79 C.L.R. 497.

those of any State, and on this point the reasoning of *Dixon* J. in *Ex parte Nelson* [*No.* 2] (1) appears to their Lordships to be conclusive. But s. 51 does not expressly divest the States of any power, and it falls to the courts to determine where the limits of the States' powers and the limits of the Commonwealth powers are fixed. These questions of the limits of power spring from the Constitution and they are questions as to the limits *inter se* of the powers of the Commonwealth and the States. If there were doubt that this must be so in principle, it would be settled by the authority of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2), where the appellants challenged the validity of an award by the President of a Court constituted by the Commonwealth Parliament under placitum (xxxv.), for " conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ". The award dealt with hours of work, wages, payment for overtime and work done on holidays, compensation for accidents and other terms and conditions of the employment of building employees throughout Australia. One of the grounds of challenge was that there was no industrial dispute extending beyond the limits of any one State. The High Court of Australia had found against the appellants on this issue of fact. The appellants then applied to the High Court for a certificate under s. 74. The application was refused but the Judicial Committee granted special leave to appeal reserving liberty to the respondents to contend at the hearing that the appeal was incompetent. At the hearing the jurisdiction of His Majesty in Council was challenged by the respondents. The argument was that s. 51 is not one of the sections conferring exclusive powers on the Commonwealth and that any decision as to the meaning of placitum (xxxv.) and the extent of the powers thereby conferred was in effect a decision as to the limits *inter se* of the powers of the Commonwealth and the States. This contention was sustained. Their Lordships declined to express any opinion as to the power of the States under their own Constitutions to settle industrial disputes within their own borders, even though they had extended into other States, because that itself was a question for the High Court to determine. The judgment then proceeded : " Whatever may be the power of the Commonwealth in regard to industrial disputes, whether or not that power must be exerted in harmony with State laws or State awards, it is at all events clear that the field of legislation and of consequent determination in obedience to laws so

(1) (1929) 42 C.L.R. 258, at p. 272. (2) (1917) A.C. 528 ; 24 C.L.R. 396.

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made is divided between State and Commonwealth, and these are constitutional powers because they spring from constitutional sources. The able but necessarily difficult arguments of Mr. *Lawrence* and Mr. *Romer* were directed to show that the decision of the High Court on the present case was not upon a question as to the limits *inter se* of Commonwealth and State powers. They said that it did not decide any conflict of powers and could not impair the power of the State, and therefore was not concerned with limits *inter se*, laying emphasis upon the two Latin words. Let it be supposed that no conflict has arisen and that the powers of the State could not be so impaired. These considerations do not, in their Lordships' opinion, furnish the test. Their Lordships consider that the High Court decided, first, that the dispute before them was one extending beyond the limits of one State; and secondly that the President had jurisdiction to make his award under the legislation of the Commonwealth passed pursuant to their constitutional powers. The High Court decided that the frontier of the Commonwealth power reaches in this case into the State, and it therefore followed that the State has not exclusive, if any, power in this case. This appears to their Lordships to be a question as to the limits *inter se* of the several powers, however much or little the Commonwealth may be required to conform to State laws or State awards, and however much or little the State may impose laws upon its own subjects" (1).

The far-reaching effect of this decision has been recognized in the High Court of Australia. In *Australian National Airways Pty. Ltd.* v. *The Commonwealth* [*No.* 2] (2), *Dixon* J. referred to it and said: "The settled interpretation of the crucial words of s. 74 . . . is that they cover any decision upon the extent of a paramount power of the Commonwealth", and he pointed out that the only logical alternative would be to treat them as covering the demarcation of the boundary between the exclusive powers of the Commonwealth and the powers of the States and perhaps the relation between the constitutional powers of one organ of the Federal system and the immunities of another organ and the exercise of its powers.

The appellant, while not admitting the broad principle thus stated, submitted that in any event placitum (xxxi.) should on account of its special subject matter be treated as exceptional. It is therefore necessary now to consider the meaning and effect of the placitum. On this their Lordships find no substantial doubt

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

(2) (1946) 71 C.L.R. 115, at pp. 122-123.

or difficulty. The placitum creates a power to acquire property for Commonwealth purposes: but it is a power *sub modo* for it is a power to acquire on just terms and not otherwise. In this sense it is, as *Dixon* J. said in the present case, a power to make laws with respect to a compound conception, namely, "acquisition-on-just-terms". So far the Commonwealth is authorized, beyond that it has no authority to acquire property in any State. The exercise of the power is conditional upon the observance of the constitutional limitation, just as under placitum (xxxv.) the exercise of the power is conditional on the existence of the constitutional limitation that there should be a dispute extending beyond the bounds of any one State. Under either placitum the question whether the constitutional limitation of the Commonwealth power had been exceeded raises the question how far the constitutional power of the Commonwealth reaches into the State and how far, if at all, the States' power has been affected by the Commonwealth power. Each of these questions requires the Court to determine, on a construction of the Constitution, the limitations of the powers of the Commonwealth and of the States *inter se*.

The appellant's argument that no *inter se* question arises unless a decision that the impugned exercise of a Commonwealth power was valid would result either in the annihilation of a State power or in the subordination of a State power, by virtue of s. 109 of the Constitution, to the impugned enactment, is inconsistent with the *ratio decidendi* of *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1). Their Lordships in that case refused to consider what the power of the State was, because that was itself a question for the High Court, and because the question whether the powers of the State would be impaired was not the test.

The appellant then submitted that the validity of reg. 19 was not truly the issue. The only question, it said, was one of construction aided by s. 46 (*b*) of the *Acts Interpretation Act*, 1901-1948. According to the argument the regulations had a primary and secondary intention: an intention at all events to acquire the wheat, and an intention if possible to acquire it on the terms provided by reg. 19. If these terms were not just terms then by construction the regulations were an enactment to acquire subject to rights of compensation assessed on general principles. The fallacy of this argument is transparent. Section 46 (*b*) has no application save in a case where the regulations "would but for the section have been construed as being in excess of the power".

(1) (1917) A.C. 528; 24 C.L.R. 396.

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Next it was said that since reg. 19 was admittedly severable and the acquisition of the wheat was admittedly valid under the regulations excluding reg. 19, there had never been from the date of the order of 16th November any wheat on which a State power of acquisition could operate, and therefore no possibility of conflict between the exercise of the Commonwealth power and any exercise of a State power. These are, in their Lordships' view, irrelevant circumstances. What is reserved to the jurisdiction of the High Court, and, subject to the granting of a certificate, excluded from the jurisdiction of His Majesty in Council, is a question of powers, and a constitutional power may exist though there is no present intention or opportunity to use it.

It was also said that the question of the validity of a regulation made by the Governor-General under powers conferred by the *National Security Act* (the validity of which was not challenged) was not a constitutional question involving the power of the Commonwealth Parliament, but only a question whether the Governor-General had exceeded the power delegated to him. The answer to this is, first, that s. 74 is concerned with the constitutional powers of the Commonwealth and its agencies and those of the States and their agencies, and is not confined to legislative powers; second, that the legislation of the Commonwealth whether enacted by the Commonwealth Parliament itself or by the Governor-General under its delegation must not exceed the powers conferred by the Commonwealth Constitution; and third, that the argument is inconsistent with the decision in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1), where the issue of the validity of an award of the Court set up under Commonwealth legislation was held to be an *inter se* question.

Their Lordships therefore conclude that the attack on the validity of reg. 19 on the ground that it does not provide just terms within the meaning of s. 51 placitum (xxxi.) raises an *inter se* question.

On that hypothesis, it was nevertheless maintained for the appellant that the provisions of s. 74 did not apply. The argument was that s. 74 concerned the jurisdiction of His Majesty in Council and that their Lordships were bound to entertain the appeal unless it was apparent *in limine* that they must necessarily determine an *inter se* question if the appeal were to proceed. As has been already explained, the appellant might succeed in obtaining a favourable decision of the appeal without a determination upon the validity of reg. 19. From this the appellant's argument advanced to the second proposition, that if their Lordships, having in accordance

(1) (1917) A.C. 528; 24 C.L.R. 396.

with the first proposition entertained the appeal, found at a later stage that the appeal could not be decided without determining the validity of reg. 19, they must determine that question and go on to dispose of the appeal.

Their Lordships are of opinion that neither of these propositions can be sustained. In the *Banks' Case* their Lordships took occasion to emphasize that " in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike " (1). Section 74 in fact was part of that bargain to which the members of the Federation gave their consent when they entered the Federation, and it ought to be construed, as it was construed in the *Banks' Case* (2), broadly and so as to give effect to the purpose for which it was enacted. Their Lordships are not disposed to allow exceptions to the broad construction which they have already adopted, that an appeal involving the determination of any *inter se* question is excluded from the jurisdiction of His Majesty in Council unless the appellant has obtained a certificate from the High Court. In the *Banks' Case* (2) the appellants did not seek the reversal of any determination by the High Court on an *inter se* question. But the respondents did, and they maintained that the appellants could only succeed in their appeal if they obtained a favourable decision on the *inter se* questions. It therefore became necessary to consider whether the determination of the *inter se* questions was necessarily involved in the appeal. It was held that it was, and that the appeal could not proceed without the certificate of the High Court. But it is a misconception of that decision to suppose that their Lordships, if the necessity for determining the *inter se* questions had appeared not at the outset, but only after they had decided other antecedent questions adversely to the appellants, would have gone on to determine the *inter se* questions which were then seen to be necessary for the decision of the appeal. The plea to jurisdiction is open at all stages of an appeal, and jurisdiction cannot be conferred by an accident of pleading. At whatever stage the plea arises it must be entertained unless it is seen to be frivolous, and if it is sustained the result must be to dismiss the appeal with the effect of affirming the judgment appealed against, even though that judgment may have proceeded upon a determination of antecedent questions on which their Lordships have differed from the High

(1) (1950) A.C., at p. 293 ; 79 C.L.R. at p. 624.

(2) (1950) A.C. 235 ; 79 C.L.R. 497.

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Court. The logic of the Constitution may sometimes impose this apparent contradiction between the reasoning and the conclusion of the judgment in the appeal. In this appeal however it is the appellant who invites a decision on an *inter se* question. The rule applicable was thus laid down by the Board in the *Banks' Case* (1) : the appellant may accept the determination of the High Court on the *inter se* question and present a petition for special leave to appeal on other questions only. But if he insists in his appeal on raising an *inter se* question, whether as part of his main ground of appeal or as part of an alternative ground of appeal, he must obtain a certificate from the High Court under s. 74.

Their Lordships have therefore no jurisdiction and they will humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed. Appellant to pay costs of the appeal.

On 30th November 1950, the Board, Lords *Simonds*, *Normand*, *Morton of Henryton*, and *MacDermott* being present, having heard further argument relating to costs, varied its previous order to the extent that the appellant was ordered to pay to the respondents one-half of their costs of the appeal.

Solicitors for the appellant : *J. W. Maund & Kelynack*, by *Barlow, Lyde & Gilbert.*

Solicitors for the respondents : *K. C. Waugh*, Crown Solicitor for the Commonwealth, by *Coward, Chance & Co.*

J. B.

(1) (1950) A.C. 235 ; 79 C.L.R. 497.