[HIGH COURT OF AUSTRALIA.]

COCKLE . . . . . APPELLANT;
INFORMANT,

AND

ISAKSEN . . . . . RESPONDENT.
DEFENDANT,

COCKLE . . . . . APPELLANT;
INFORMANT,

AND

MUNRO . . . . . RESPONDENT.
DEFENDANT,

H. C. OF A. 1957.

SYDNEY, *Aug.* 27; *Dec.* 3.

Dixon C.J., McTiernan, Williams, Webb, Kitto and Taylor JJ.

Constitutional Law—Industrial law—Validity—Tribunal—High Court—Jurisdiction—Appeal—Competency—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 61, 71, 73, 75-78—*Conciliation and Arbitration Act* 1904-1956, *ss.* 4 (1), 113 (1), (3), 138 (1) (*a*) (*iii*)—*Judiciary Act* 1903-1955, *s.* 39 (2) (*b*) (*c*)—*Acts Interpretation Act* 1901-1950, *ss.* 15A, 44.

Section 113 of the *Conciliation and Arbitration Act* 1904-1956 (Cth.) provides:—"(1.) The Court" (i.e. the Commonwealth Industrial Court) "has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; . . . (3.) An appeal does not lie to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under sub-section (1.) of this section. . . ."

Held, that sub-s. (3) of s. 113 is a valid exercise of the legislative power to prescribe exceptions to the appellate jurisdiction of the High Court contained in s. 73 of the Constitution.

Accordingly, where informations charging offences under s. 138 of the *Conciliation and Arbitration Act* 1904-1956 were dismissed by a stipendiary magistrate and the informant appealed as of right to the High Court,

Held, that by virtue of s. 113 (3) of such Act the High Court had no jurisdiction to entertain the appeals.

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APPEALS.

Upon separate informations laid on 23rd November 1956, at Sydney, by John Simon Cockle, shipping association secretary, Neville Isaksen, a vigilance officer of the Sydney branch of the Waterside Workers' Federation of Australia, was, before the chief stipendiary magistrate, charged that, on 1st November 1956, he being an officer of a branch of an organisation within the meaning of the *Conciliation and Arbitration Act* 1904-1956 during the currency of an award advised members of an organisation which was bound by the award, to wit, S. Field, P. Ryan, G. Dimick and R. Law respectively, to refrain from working with Macquarie Stevedoring Co. Pty. Ltd., an employer bound by the award, contrary to the provisions of the said Act.

Upon a similar information by John Simon Cockle, one Matthew Munro, likewise a vigilance officer of the said Sydney branch, was similarly charged that on 9th November 1956, being an officer of a branch of an organisation within the meaning of the said Act during the currency of an award advised members of an organisation which was bound by the award, to wit, men of the hatches Nos. 2, 3 and 5 of the vessel *River Clarence* respectively to refrain from working with the said Macquarie Stevedoring Co. Pty. Ltd., an employer bound by the award, contrary to the provisions of the said Act.

The chief stipendiary magistrate found that none of the informations had been proved and dismissed each of them. In his reasons for decision the chief stipendiary magistrate said the proceedings had been taken under s. 138 of the *Conciliation and Arbitration Act* 1904-1956 and he referred to the consideration given in *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (1) to the two suggested interpretations contained in the judgment of *Dixon* C.J. (2) and said the first interpretation seemed the better one and he adopted that meaning.

From those decisions the informant appealed to the High Court as of right pursuant to s. 39 of the *Judiciary Act* 1903-1955.

The relevant statutory provisions and further facts appear in the judgments hereunder.

Sir *Garfield Barwick* Q.C. (with him *E. A. Lusher*), for the appellant. There is an appeal under s. 113 (1) from the decision of the magistrate to the federal court because it is a judgment arising out of a matter under the Act; it fairly falls under s. 113 (3), if sub-s. (3) be valid. That sub-section can be valid only if it

(1) (1954) 90 C.L.R. 24. (2) (1954) 90 C.L.R., at p. 37.

amounts to an exception under s. 73 of the Constitution. There are really three relevant considerations in relation to the appellate jurisdiction of the Court under s. 73 : (1) the nature of the judgment itself ; (2) the subject matter of the judgment ; and (3) the court in which it has been dealt with and with respect to which the matter has been determined. " The exceptions " under s. 73 are merely a qualification on the judgments and not a qualification on the matters or the courts. The precursor of this section was before this Court in *Collins* v. *Charles Marshall Pty. Ltd.* (1). The conclusions of *Taylor* J. (2) are respectfully adopted. The words " exception " and " regulation " are very difficult words. A combination of s. 113 (3) and s. 114 (2) is not merely a regulation of the right of appeal to this Court. Those provisions are not regulations. If s. 114 (2) had provided that no appeal shall lie to the High Court from any judgment, order or sentence of the federal court, then s. 113 (3) would be just as good or just as bad. Section 113 really says an appeal does not lie to the High Court in a matter in respect to which an appeal might be brought to this Court. The reference to a judgment there is, perhaps, likely to suggest that this is merely an exception of certain judgments from the expression " all judgments " but in reality it is an exception of a class of matter. With the adoption of the above-mentioned conclusions it would be very easy to get rid of substantially the greater part of the appellate jurisdiction of this Court. There is a difficulty with respect to the Supreme Courts of the States because of the words in the second last paragraph of the section. With respect to all the other courts, including the other federal courts, there would be no great difficulty either in excepting at one fell swoop all the matters in which judgment may be given, or in doing it progressively. So, on the narrowest view of s. 73 and the words " with such exceptions " it falls within it. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration* ; *Ex parte Whybrow & Co.* (3) ; *The Tramways' Case* [*No.* 1] (4) ; *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (5) and *R.* v. *Murray and Cormie* ; *Ex parte The Commonwealth* (6).] Section 113 (3) is treated as really describing a group of matters, not describing judgments as such or attempting to except judgments of some particular quality or circumstance, but is an attempt to remove the appeal with respect

(1) (1955) 92 C.L.R. 529, at pp. 538, 544, 557, 558.
(2) (1955) 92 C.L.R., at pp. 557, 558.
(3) (1910) 11 C.L.R. 1, at p. 47.
(4) (1914) 18 C.L.R. 54, at p. 76.
(5) (1916) 22 C.L.R. 103, at p. 117.
(6) (1916) 22 C.L.R. 437, at p. 441.

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to a given number of matters. The Court can say that the exceptions that can be made are limited to the exception of judgments because of some quality or circumstance of the judgment, or the Court can go wider, substantially the greater part of the appellate jurisdiction can be destroyed by that means. The power to regulate does not empower the raising of the appealable amount to the point of absurdity. There is a very limited scope for limiting the amount. It has got to be directed to the insubstantial nature of the judgment itself. There is a limitation in s. 73 on how far one can go with the Supreme Court of a State and that, no doubt, is the reason why there has been an exclusion under s. 113 (1). This Act does not seem, on the face of it, to be an attempt to amend the *Judiciary Act* although, inevitably, sub-s. (3) quite clearly must work that way. Section 39 (2) of the *Judiciary Act* could not sit with s. 113 (3) nor would it be wrong to agree that s. 113 (4) must be an amendment to some extent of s. 39. It does not follow that if sub-s. (4) of s. 113 is accepted with some amendment there is necessarily a disappearance of the investment of the jurisdiction because of the condition or restriction. Sub-section (4) adds to s. 39 (2) (*b*) that whenever an appeal lies from the decision of any court to the Supreme Court of any State an appeal shall not be brought to the Supreme Court of the State nor to the High Court but only to the new federal court. That is a compound of the impact of sub-s. (4) on s. 39 (2) (*b*). They should be read together. If that is acceptable, the question of not having a court with invested jurisdiction with respect to s. 73 would disappear. It is not right to read sub-s. (4) by itself from the remainder of s. 113. Section 113 (4) should be read with s. 39 (2) as a moulding of it rather than a complete displacement of s. 39 (2) (*b*); and so read, what is put as possible difficulty disappears. It is conceded that the appeal would not be as of right but by leave.

R. M. Eggleston Q.C. (with him *F. W. Paterson*), for the respondents. The respondents adopt what has been submitted to the Court on behalf of the appellant and do not desire to add anything in support of what was so submitted.

B. P. Macfarlan Q.C. (with him *A. F. Mason*), intervening, by leave, for the Attorney-General of the Commonwealth. The restriction which sub-s. (3) of s. 113 imposes upon appeals to this Court is an exception within the meaning of s. 73 of the Constitution. Section 113 deals with judgments, decrees, orders or sentences of particular courts. Basically, it is not correct to say that the

contents of that section relate to or deal with the subject matter of proceedings which may be in courts made subject to the appellate jurisdiction of the Commonwealth Industrial Court. The right of appeal conferred upon that Court is in respect of judgments, decrees, orders or sentences, and what is excepted in sub-s. (3) from the jurisdiction of the High Court is itself a matter of judgments, decrees, orders or sentences. This is a case of limited exception and is limited to matters arising under this Act and of a particular description only according to the particular court. The Attorney-General is concerned to show that primarily, as a matter of construction, the section deals with a limited class of judgments, decrees, orders and sentences. It is desired to keep open the situation of how much wider could the exclusion be than is the exclusion by construction as attempted to be made in this case. There is here simply an exclusion of certain judgments as defined by reference to subject matter. The two views disclosed in the judgments of the court are (a) that the power to exclude is a power to exclude any class of judgment, defined by reference to subject matter, and a judgment of a particular court or particular courts and (b) that it is a power to exclude only by reference to the characteristic of the judgment of the lower court e.g. the interlocutory character of a particular judgment or order. The first view is the correct one. There is a strong body of authority in this Court in favour of it: see *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1) and *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (2). The opinion of members of the majority in the latter case was not based upon any misconception of *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (3). The same elements are present in s. 113 (3) as were present in the legislation considered in *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (4). This case makes it plain that if Parliament defines the class of judgment which it desires to exclude and uses sufficiently clear words to make that definition apparent, then it is legislating and excepting within the meaning of s. 73 of the Constitution. The same point came before this Court in *Watson* v. *Federal Commissioner of Taxation* (5), s. 196 (3) of the *Income Tax and Social Services Contribution*

(1) (1910) 11 C.L.R., at p. 47.
(2) (1916) 22 C.L.R., at pp. 117, 118, 120, 122.
(3) (1916) 22 C.L.R., at p. 441.
(4) (1916) 22 C.L.R. 103.
(5) (1953) 87 C.L.R. 353, at pp. 370-372.

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Assessment Act 1936-1952 was treated as an exception within the legislative power.

[WILLIAMS J. referred to *Watson* v. *Federal Commissioner of Taxation* (1).]

That passage strongly supports the argument now put. [He referred to *Jacka* v. *Lewis* (2).] Such argument is consistent with the joint judgment in *Collins* v. *Charles Marshall Pty. Ltd.* (3). There is no attempt in this legislation to exclude all the judgments of courts invested with federal jurisdiction or all judgments of a particular court. The exclusion is limited specifically to one class defined as those arising from " this Act ". [He referred to art. 3, cl. 2 of the American Constitution.] The American authorities support the proposition that the word " exceptions " does justify the exclusion of all judgments of a particular description. In respect of the matters which are required by s. 113 to go to the Commonwealth Industrial Court, there is nothing in either s. 113 or s. 114 which excludes an appeal to this Court. Superimposed upon an appeal to this Court there are two conditions: (1) that there must be a first appeal to the Commonwealth Industrial Court; and (2) that there must be the leave of this Court obtained before the appeal may be instituted in this Court. That is the real effect of s. 113 (3) taken in conjunction with s. 114. Stipulating that it must come through an Industrial Court constitutes regulating. The channelling of the course which an appeal may take or must take lies within the character of the word " regulation ", regulation being something much less than the exception referred to in s. 73: see *Wishart* v. *Fraser* (4). The construction expressed in that case attributes to s. 39 of the *Judiciary Act* 1903-1940 a regulatory character. Sections 114 and 113 (3) of the *Conciliation and Arbitration Act* are really doing the same thing in character although the means adopted are very different.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Dec. 3.

The following written judgments were delivered:—

DIXON C.J., MCTIERNAN AND KITTO JJ. The proceedings before us consist of four appeals by an informant against the dismissal of four respective informations laid by him for offences against s. 138 (1) (*a*) (iii) of the *Conciliation and Arbitration Act* 1904-1956. They were dismissed by a stipendiary magistrate

(1) (1953) 87 C.L.R., at p. 372.
(2) (1944) 68 C.L.R. 455, at p. 463.
(3) (1955) 92 C.L.R., at p. 544.
(4) (1941) 64 C.L.R. 470, at p. 480.

forming a Court of Petty Sessions at Sydney. The decision dismissing the informations was based, so we were told, on an interpretation of the provision adopted by the magistrate from a statement made by *Dixon* C.J. which is reported in the *Australian Boot Trade Employees' Federation* v. *The Commonwealth* (1). While the appellant proposed to support the appeal on the ground that the interpretation was erroneous, the respondents, it seemed, would attack the validity of the provision.

The informations were doubtless brought before the Court of Petty Sessions on the footing that s. 138 imposes pecuniary penalties which, by reason of s. 44 of the *Acts Interpretation Act* 1901-1950 may, unless a contrary intention appears, be recovered in a court of summary jurisdiction as defined by s. 26 (*d*) of that Act and that no contrary intention appears in the *Conciliation and Arbitration Act* 1904-1956, s. 191 of the latter Act being construed not as appointing *the* method of enforcing penal sanctions but as providing an alternative proceeding before the Commonwealth Industrial Court. On this footing s. 39 of the *Judiciary Act* 1903-1955 was treated as applying and, by par. (*b*) of sub-s. (2), as operating to give the informant an appeal as of right to this Court.

The respondents showed no more desire than did the appellant to question the Court's jurisdiction to entertain the appeals. But for ourselves we were unable to perceive how, in view of s. 113 (3) of the *Conciliation and Arbitration Act* 1904-1956, an appeal in any of the present cases could lie to this Court, that is to say, unless that provision were considered invalid. In these circumstances we were not prepared to entertain the appeal simply because the parties wished us to do so. Neither party denied that s. 113 (3) covered in terms the appeals in the present cases, but the appellant's counsel proceeded to attack its validity and the respondent's counsel was not prepared to submit any argument to the contrary. In these circumstances we allowed counsel for the Commonwealth to intervene in the argument as to the validity of s. 113, the Commonwealth not of course thereby becoming a party to the cause.

Sub-section (3) of s. 113 provides that an appeal does not lie to the High Court from a judgment decree order or sentence from which an appeal may be brought to the Court under sub-s. (1) of the section. It seems evident that the words " does not lie " mean that the appeal shall not lie as of right or by special leave. If this provision be within the legislative power of the Parliament, part of its operation must be to exclude cases within sub-s. (1) from the application of pars. (*b*) and (*c*) of s. 39 (2) of the *Judiciary Act* 1903-1955. These

(1) (1954) 90 C.L.R., at p. 37.

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form " conditions " " subject to " which federal jurisdiction is expressed to be conferred by sub-s. (2) upon State courts. But it would seem that the intention of sub-s. (3) of s. 113 of the *Conciliation and Arbitration Act* 1904-1956 is impliedly to repeal *pro tanto* the " conditions " and not to extend the implied repeal into the affirmative investment of federal jurisdiction accomplished, as was decided in *Lorenzo* v. *Carey* (1), by the body of sub-s. (2) of s. 39 of the *Judiciary Act*. If it were otherwise the operation of sub-s. (1) of s. 113 of the *Conciliation and Arbitration Act* 1904-1956 might be much restricted. For but for s. 39 (2) State courts would not exercise federal jurisdiction in many cases in which they entertained a matter arising under the *Conciliation and Arbitration Act*. It will be seen from the text of sub-s. (3) that its scope is coextensive with sub-s. (1), that is to say there is to be no appeal to this Court " from a judgment decree order or sentence from which an appeal may be brought to the Commonwealth Industrial Court under sub-s. (1) of this section ". It is therefore necessary to turn to sub-s. (1). That sub-section provides that the Commonwealth Industrial Court has jurisdiction to hear and determine an appeal from a judgment decree order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made given or pronounced in a matter arising under (*a*) the *Conciliation and Arbitration Act*; or (*b*) the *Public Service Arbitration Act*. It is convenient in what follows to disregard par. (*b*) which does not affect the matter. We may put aside the reference to a court of a Territory. Presumably that part of sub-s. (1) is based on the doctrine of *Porter* v. *The King*; *Ex parte Yee* (2) and depends on the application of that doctrine to the Commonwealth Industrial Court. The doctrine is discussed in the case of *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (3). There may be a different basis for the Capital Territory but for present purposes that too can be put on one side. These are not matters which can affect the portion of the sub-section which here matters. It is there expressed to confer on the Commonwealth Industrial Court jurisdiction to hear and determine appeals from an order of a State court. The legislative power authorising this must be found in s. 77 of the Constitution. Section 71 no doubt authorises the creation of a federal court, but in spite of occasional judicial observations that may possibly suggest the contrary the jurisdiction which a federal court so created may exercise cannot

(1) (1921) 29 C.L.R. 243.
(2) (1926) 37 C.L.R. 432, at p. 441.
(3) (1956) 94 C.L.R. 254, at pp. 290-292; (1957) A.C. 288, at p. 320; 95 C.L.R. 529, at p. 545.

come from s. 71 alone. It must be conferred and defined by the exercise of further legislative power. When s. 1, s. 61 and s. 71 of the Constitution say the legislative executive and judicial powers of the Commonwealth shall be vested in the respective repositories of those powers they mean in accordance with the provisions that follow. When you turn to s. 77 and read it with ss. 75 and 76, the impression that s. 77 is dealing with original jurisdiction is very strong. The legislative power it confers is confined to the matters which are actual or possible subjects of original jurisdiction in the High Court, they are described by reference to ss. 75 and 76 and in the very next section, s. 78, they seem again to be referred to under the description " matters within the limits of the judicial power ". The appellate power conferred by s. 73 is not concerned with " matters " but with judgments decrees orders and sentences of the courts and the commission which it identifies. But the view that s. 77 relates to original jurisdiction only was rejected by this Court early in its history : *Ah Yick* v. *Lehmert* (1) ; see the discussion by *Taylor* J. in *Collins* v. *Charles Marshall Pty. Ltd.* (2). It is true that the court in rejecting that view was concerned only with s. 77 (iii.). But if it be true of that paragraph of s. 77 it must be true of the whole section. The decision in *Ah Yick* v. *Lehmert* (1) gave an operation to s. 39 (2) which has been acted upon very often indeed and whatever difficulty one may feel about finding a justification for it in the text of ss. 75 to 78 it should be accepted in its application to s. 113 (1) of the *Conciliation and Arbitration Act*. But as was pointed out in *Collins* v. *Charles Marshall Pty. Ltd.* (3) when you come to apply s. 77 with reference to appellate jurisdiction it is important to notice that, on the very terms of the section, the legislative power it confers must be exercised " with respect to any of the matters mentioned in " ss. 75 and 76. The validity of sub-s. (1) of s. 113 of the *Conciliation and Arbitration Act*, if it is to be sustained at all must be sustained under par. (i.) of s. 77 in relation to s. 76 (ii.) of the Constitution. That means that s. 113 (1) must amount to an exercise of a power, with respect to a matter or matters arising under a law made by the Parliament (namely the *Conciliation and Arbitration Act*), to make laws defining the jurisdiction of a federal court, that is to say of the Commonwealth Industrial Court. Section 113 (1) does not go directly to the " matter ". It does not say that if the decision of the court below involves a matter arising under the *Conciliation and Arbitration Act*,

(1) (1905) 2 C.L.R. 593.
(2) (1955) 92 C.L.R., at pp. 559-563.
(3) (1955) 92 C.L.R., at p. 541.

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there may be an appeal. It defines the jurisdiction by reference to judgments orders etc. but it defines the judgments orders etc. in terms requiring that they should be given in a matter arising under the Act. Is that the same thing? The answer must be that usually it will be the same thing but that cases may occur where it is not. Take as an example this very case. Suppose the magistrate had dismissed the informations on the ground that s. 138 was void, that it was no part of the Act. Would an appeal against such a dismissal be a matter arising under the *Conciliation and Arbitration Act*? Again, suppose that there is a proceeding under s. 123 in a State court on a count of work and labour done for the recovery of wages to which the defendant pleads by way of confession and avoidance, for example a plea of payment. If his defence is unsuccessful and he appeals against the finding that his plea is not made out, is that in itself a "matter arising under" the *Conciliation and Arbitration Act*? Take still another example. Suppose that upon an information in a State court for an offence under a provision of the *Conciliation and Arbitration Act* the magistrate considers that it is not proved that the defendant was himself a principal offender but convicts him on the strength of s. 5 of the *Crimes Act* 1914-1955, or convicts him of an attempt under s. 7 of that Act. Is an appeal from that conviction itself a matter arising under the *Conciliation and Arbitration Act*? It seems clear enough in the case of each of these examples that the order was made or the judgment given by the court below "in a matter arising under" that Act. But does the appeal involve such a "matter"? The distinction between an appeal which itself involves a matter arising under a given federal statute and an appeal from a judgment or order pronounced or made in such a matter may seem neither wide nor frequent in its practical applications, but its existence can scarcely be denied. Perhaps the fact is that, for the very reason that s. 77 really relates only to original jurisdiction, the conception of an appeal *per se* involving any of the matters mentioned in ss. 75 and 76, as distinguished from the proceeding in the court below doing so, is foreign to the constitutional provision. But when it was decided that s. 77 applied to appellate jurisdiction it necessarily followed that the appellate jurisdiction conferred under s. 77 (i.) must be defined by reference to one or other or more of the matters set out in ss. 75 and 76. Does it follow that s. 113 (1) is framed in such a way that it cannot be sustained? With some misgiving we have come to the conclusion that the sub-section can be sustained as a law substantially with respect to matters arising under a federal

law (namely the *Conciliation and Arbitration Act*) conferring jurisdiction in respect of such matters. At the same time it cannot be denied that the law is one going, or possibly going, beyond that category. The provision however is distributable and s. 15A of the *Acts Interpretation Act* will operate to confine its operation to appeals which themselves come within s. 77 (i.) of the Constitution. The central point is whether the section sufficiently manifests an intention to legislate with respect to a matter within s. 76 (ii.) and, on the whole we think that it does so, although owing to the form in which the sub-section is cast it may include cases outside the required description. Accepting the validity in substance of sub-s. (1) of s. 113, a basis is provided for the operation of sub-s. (3). If an appeal is of the class properly falling within sub-s. (1) then according to sub-s. (3) it is not an appeal that lies to this Court. The provision must rest for its validity upon the words in s. 73 of the Constitution which authorise exceptions. Section 73 begins—"The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences"; then follow the descriptions of judgments etc. from which an appeal is to lie. It is upon the legislative power to prescribe exceptions that sub-s. (3) rests. An exception assumes a general rule or proposition and specifies a particular case or description of case which would be subsumed under the rule or proposition but which, because it possesses special features or characteristics, is to be excluded from the application of the rule or proposition. It is not a conception that can be defined in the abstract with exactness or applied with precision; it must depend very much upon context. Section 73 defines the appellate jurisdiction of this Court by reference to the judgments decrees orders and sentences from which there are to be appeals. In every case the judgments decrees orders and sentences are defined by reference to the courts or tribunals by which they are given made or pronounced. In the case of each description of court or tribunal the intention of s. 73 doubtless is that the general rule shall be that the High Court has jurisdiction to hear and determine appeals from its judgments decrees orders or sentences. From that general rule the legislation is empowered to prescribe exceptions. In the present case there is no attempt to use the power to prescribe exceptions so as to destroy the general rule, in relation to any court or tribunal or class of courts or tribunals comprised within s. 73, that an appeal shall lie from its judgments decrees orders or sentences. The class of judgments etc. with which s. 113 (3) is concerned is included within that part of par. (ii.) of

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s. 73 which relates to the judgments decrees orders or sentences of any court exercising federal jurisdiction. It concerns State courts exercising federal jurisdiction; but the judgments decrees orders or sentences of these courts which are to be excepted are those which involve a matter arising under the *Conciliation and Arbitration Act*. What that means is a question dealt with in the earlier part of this judgment in the course of the discussion of the validity of sub-s. (1) of s. 113. Does that amount to prescribing an exception or exceptions under s. 73 ? It will be noted that the judgments etc. to be excepted are described not by reference to the courts giving them save that *ex hypothesi* they must be State courts exercising federal jurisdiction and must not be Supreme Courts. From what has been said about sub-s. (1) of s. 113 it will be seen that upon analysis the judgments etc. are really defined by reference to the matter involved in the appeal, that is to say by reference to the fact that a matter arising under the *Conciliation and Arbitration Act* is involved in the appeal from the judgment etc. It is difficult to see why that should be an inadmissible ground of exception. The ground relates directly to the judgment etc. as something either actually inherent in it or alleged by the appellant to be inherent in it. It is true that it relates rather to its legal basis than its operative effect as between the parties, its pecuniary significance, its finality or its interlocutory character. But familiar as these are as grounds for restricting or regulating appeals from judgments orders etc. they are not exhaustive. It is not desirable to go beyond the precise ground of exception which s. 113 (3) appears to take. It is enough to say that it fixes upon a description of judgment decree order or sentence of State courts exercising federal jurisdiction, it does not eat up or destroy the general rule laid down by the Constitution that appeals shall lie to this Court from judgments decrees orders and sentences of courts of a State exercising federal jurisdiction, and the description upon which it fixes, though it relates to the " matter " involved in the appeal, goes to the basis or alleged basis of the judgment decree order or sentence and forms a ground of exception within the power of prescribing exceptions which the Parliament obtains under s. 73.

For the foregoing reasons the validity of s. 113 (3) should be sustained and the appeals struck out as incompetent.

WILLIAMS J. These are appeals from two decisions of the chief stipendiary magistrate sitting as the Central Court of Petty Sessions, Sydney, dismissing informations laid by the appellant against the respondents under the provisions of s. 138 of the *Conciliation*

and Arbitration Act 1904-1956. In hearing the information the magistrate was exercising federal jurisdiction conferred upon him pursuant to s. 77 (iii.) of the Constitution and the appeals have been instituted as of right pursuant to s. 39 (2) (*b*) of the *Judiciary Act* 1903-1955. But the preliminary question has arisen whether this Court is precluded from hearing the appeals by s. 113 of the *Conciliation and Arbitration Act* 1904-1956. This section is in the following terms "(1.) The Court has jurisdiction to hear and determine an appeal from a judgment, decree, order or sentence of a State court (not being a Supreme Court) or of a court of a Territory of the Commonwealth made, given or pronounced in a matter arising under—(*a*) this Act; or (*b*) the *Public Service Arbitration Act* 1920-1956. (2.) It is not necessary to obtain the leave either of the Court or of the court appealed from in respect of an appeal under the last preceding sub-section. (3.) An appeal does not lie to the High Court from a judgment, decree, order or sentence from which an appeal may be brought to the Court under sub-section (1.) of this section. (4.) The jurisdiction of the Court under sub-section (1.) of this section is exclusive of the jurisdiction of a State court or court of a Territory of the Commonwealth to hear and determine an appeal from a judgment, decree, order or sentence from which an appeal may be brought to the Court under that sub-section."

The present appeals are within the meaning of sub-s. (1) (*a*) of this section appeals from orders of a State court (not being a Supreme Court) in a matter arising under the *Conciliation and Arbitration Act*. Accordingly, if sub-s. (3) of this section is a valid exercise of constitutional power, this Court has no jurisdiction to entertain them and they must be dismissed as incompetent. The validity of sub-s. (3) depends upon whether it is an "exception" within the meaning of s. 73 of the Constitution. The appellate jurisdiction conferred upon the High Court by this section is, "with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—(i.) of any Justice or Justices exercising the original jurisdiction of the High Court: (ii.) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council: (iii.) of the Inter-State Commission, but as to questions of law only." The section also provides that no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the

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Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay from such Supreme Court to the Queen in Council. The words " subject to such regulations as the Parliament prescribes " are not apt to deprive this Court of any jurisdiction to hear appeals from the judgments, decrees, orders and sentences mentioned in s. 73 but only to regulate the procedure by which such appeals may be brought to this Court. But the jurisdiction is also granted " with such exceptions as the Parliament prescribes " and an " exception " in the words of *Buckley* J. in *Savill Bros. Ltd.* v. *Bethell* (1) " is a taking out, a subtraction from, that which has previously been expressed to be granted of some part of the thing granted " (2). It is a particular thing or things excepted out of the general thing granted. In *Doe d. Douglas* v. *Lock* (3) in the judgment of Lord *Denman* C.J. passages are cited from Lord *Coke* in his *Commentary* on *Littleton* and from *Sheppard's Touchstone* relating to the distinction between a reservation and an exception. Lord *Coke* said " Note a diversity between an exception (which is ever of part of the thing granted, and of a thing in esse), for which, exceptis, salvo, praeter, and the like, be apt words ; and a reservation which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised " (47a). In *Sheppard's Touchstone* it is said, referring to a reservation: " This doth differ from an exception, which is ever of part of the thing granted, and of a thing in esse at the time " (p. 80).

The Parliament of the Commonwealth is therefore empowered by s. 73 of the Constitution to except altogether from the appellate jurisdiction of this Court part of the judgments, decrees, orders and sentences of the courts mentioned in the first two paragraphs and of the Inter-State Commission. But it is not thereby empowered to take away completely the whole of its jurisdiction to hear any appeal from these judgments, decrees, orders and sentences. The appeals that can be taken away are at most exceptions from such appeals. The judgments, decrees, orders and sentences referred to in s. 73 (omitting those of the Inter-State Commission as to which no question can arise, there being at present no such Commission) seem really to fall into five classes (1) appeals from the judgments etc. of a Justice or Justices exercising the original jurisdiction of the High Court (2) appeals from the judgments, etc., of any other federal court (3) appeals from the judgments, etc., of any court exercising federal jurisdiction (4) appeals from the judgments, etc., of the Supreme Courts of the States and (5) appeals from the

(1) (1902) 2 Ch. 523.
(2) (1902) 2 Ch., at p. 532.
(3) (1835) 2 Ad. & E. 705, at pp. 743, 744 [111 E.R. 271, at p. 287].

judgments etc., of any other court of any State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council. Accordingly it would appear that the power to except does not extend beyond the power to except appeals from part of the judgments, decrees, orders and sentences in each of those classes. And in *Collins* v. *Charles Marshall Pty. Ltd.* (1) it is said in the joint judgment of *Dixon* C.J., *McTiernan*, *Williams*, *Webb*, *Fullagar* and *Kitto* JJ.; "It is true that the Parliament has a power of making exceptions from the subject matter of the appellate jurisdiction of the High Court, but the power is limited in the case of Supreme Courts in the manner already described and moreover after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s. 73. For example if the Inter-State Commission were established the power could hardly extend to excepting all judgments decrees orders and sentences of that body from the appellate jurisdiction of the Court" (2).

Section 113 of the *Conciliation and Arbitration Act* excepts from the jurisdiction of this Court appeals from the judgments, decrees, orders and sentences of State courts (not being a Supreme Court) made, given or pronounced in matters arising under two Commonwealth Acts. It therefore excepts from such jurisdiction part only of the appeals from judgments, decrees, orders and sentences of State courts (other than a Supreme Court) exercising federal jurisdiction. Apart from authority I would be of opinion that this would be a valid exception within the meaning of s. 73 of the Constitution. But the point is concluded by authority. Sections of two Commonwealth Acts depriving this Court of jurisdiction to hear an appeal from an order of a justice exercising the original jurisdiction of this Court have been held to be valid. In *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (3) it was held by a majority that the provision in sub-s. (4) of s. 21AA of the *Commonwealth Conciliation and Arbitration Act* 1904-1915 that the decision of the Justice is not to be subject to any appeal to the High Court in its appellate jurisdiction was an exception from that jurisdiction within the meaning of s. 73 of the Constitution. In the joint judgment of *Isaacs* J., *Gavan Duffy* J. and *Rich* J., it is said: "As to the power of the Parliament to except this order from the appellate power, it is beyond serious question. The relevant words were referred to

(1) (1955) 92 C.L.R. 529.
(2) (1955) 92 C.L.R., at p. 544.
(3) (1916) 22 C.L.R. 103.

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in the *Tramways' Case* [*No.* 1] (1), where some English and American authorities are also cited. In fact, since the argument in this case, the point has been actually decided unanimously by the Court in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (2) in relation to article 2 of the second schedule to the *Commonwealth Workmen's Compensation Act* (No. 29 of 1912)" (3). *Higgins* J. said: "But I entertain no doubt as to the validity of cl. 4. Under s. 73 of the Constitution, Parliament has power to make exceptions from the jurisdiction of the High Court to hear appeals from judgments or orders; and it has made an exception in this case" (4). *Powers* J. (5) expressed a similar opinion. In *Watson* v. *Federal Commissioner of Taxation* (6) it was held unanimously that the single Justice was the High Court within the meaning of s. 196 (3) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, therefore his decision was final and conclusive and an appeal therefrom was not competent. In the joint judgment of *Dixon* C.J., *McTiernan*, *Williams*, *Fullagar* and *Kitto* JJ., it is said: "It is true that s. 34 of the *Judiciary Act* provides that the High Court shall, except as provided by that Act, have jurisdiction to hear and determine appeals from all judgments whatsoever of any justice or justices, exercising the original jurisdiction of the High Court whether in Court or Chambers. The section does not add to s. 73 (i.) of the Constitution. Section 73, of course, contains the words 'with such exceptions and subject to such regulations as the Parliament prescribes'. The real function of s. 196 (3) appears to be to make such an exception in order to protect the taxpayer from further litigation and to that end to prevent an appeal from the decision of the High Court, if the matter has been treated as one proper to be referred to a Board of Review" (7). In *Collins* v. *Charles Marshall Pty. Ltd.* (8) *Taylor* J. discussed the meaning of the words "with such exceptions and subject to such regulations" in s. 73 of the Constitution and said: "These observations express a view of Parliament's authority to prescribe exceptions which is much narrower than that entertained by *Isaacs* J. (the *Tramways' Case* [*No.* 1] (9)) and to which *Gavan Duffy* and *Rich* JJ. subscribed in *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (3)" (10). His Honour did not refer to *Watson* v. *Federal Commissioner of Taxation* (6), but he

(1) (1914) 18 C.L.R., at p. 76.
(2) (1916) 22 C.L.R. 437.
(3) (1916) 22 C.L.R., at p. 117, 118.
(4) (1916) 22 C.L.R., at pp. 120, 121.
(5) (1916) 22 C.L.R., at p. 123.
(6) (1953) 87 C.L.R. 353.
(7) (1953) 87 C.L.R., at p. 372.
(8) (1955) 92 C.L.R., at pp. 557-559.
(9) (1914) 18 C.L.R., at p. 76.
(10) (1955) 92 C.L.R., at p. 558.

did refer to the *Federated Engine Drivers' Case* (1) and said " in this case it was assumed that the decision of the Court in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (2) concluded the point which they were called upon to consider. In the latter case, however, the ' exception ' under consideration bore no relation to the nature of the proceedings in the lower court but was solely concerned with the period of time within which an appeal to the High Court should be instituted. Even if such a provision could not be justified as ' regulation ' it would be justifiable as an exception on the views which I have expressed " (3). Previously he had said that to him " the language of s. 73 is more appropriate to authorize the prescription of exceptions by reference to specified characteristics of judgments or orders of courts exercising Federal jurisdiction rather than by reference to some feature of the proceedings, incidental or otherwise, in which any such judgment or order has been given or made " (4). But with regret, I am unable to give the word " exception " such a restricted meaning. It is in my opinion wide enough to empower the Parliament to except in the case of State courts exercising federal jurisdiction (not being a Supreme Court), as it has sought to do in s. 113 of the *Conciliation and Arbitration Act*, judgments, decrees, orders or sentences made, given or pronounced in matters arising under two particular Commonwealth Acts. The majority of this Court in the *Federated Engine Drivers' Case* (1) were in my opinion entitled to consider that the point had been actually decided in *R.* v. *Murray and Cormie*; *Ex parte The Commonwealth* (2). If the word " exception " in s. 73 be insufficient to empower the Parliament to deprive this Court of jurisdiction to hear appeals from judgments, etc., in certain matters, how could it suffice to deprive this Court of jurisdiction to grant at least special leave to appeal in such matters simply because an appeal had not been instituted within a prescribed time ? The Parliament must have power to except appeals in such matters from the jurisdiction of this Court altogether if it can prohibit such appeals simply because they are not brought within a specified time. It could no doubt regulate such appeals by providing that they could only be brought as of right within a specified time. But it could not destroy such appeals altogether. The proviso in s. 73 of the Constitution that no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court

(1) (1916) 22 C.L.R. 103.
(2) (1916) 22 C.L.R. 437.
(3) (1955) 92 C.L.R., at pp. 558, 559
(4) (1955) 92 C.L.R., at p. 558.

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of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council supports this conclusion, because it is implicit in the language of this proviso that but for its presence the Parliament could under its power to prescribe exceptions remove from the appellate jurisdiction of this Court judgments, etc., of the Supreme Courts in some of the matters in which at the establishment of the Commonwealth an appeal lay from such Supreme Court to the Queen in Council.

Federated Engine Drivers' and Firemen's Association of Australasia v. *Colonial Sugar Refining Co. Ltd.* (1) and *Watson* v. *Federal Commissioner of Taxation* (2) are in my opinion express decisions that the Parliament can except altogether from the appellate jurisdiction of this Court appeals from part of the judgments, decrees, orders and sentences of a Justice or Justices exercising the original jurisdiction of the High Court. If the Parliament has this power, it must clearly have the same power with respect to appeals from part of the judgments, decrees, orders and sentences of other courts subject to the express exception in the case of appeals from the Supreme Courts in matters in which at the establishment of the Commonwealth an appeal lay to the Queen in Council. For these reasons I am of opinion that s. 113, sub-s. (3) of the *Conciliation and Arbitration Act* 1904-1956 is a valid exercise of power and that both appeals should be dismissed as incompetent.

WEBB J. These are appeals against the dismissal by a stipendiary magistrate in the Central Court of Petty Sessions in Sydney of informations for breaches of s. 138 of the *Commonwealth Conciliation and Arbitration Act* 1904-1956. At the outset the question was raised by the Bench as to whether this Court had jurisdiction to entertain the appeals in view of s. 113 of the Act which provides *inter alia* that the Commonwealth Industrial Court has jurisdiction to hear such appeals and that they do not lie to this Court.

For the appellants it was submitted that s. 73 of the Commonwealth Constitution authorised these appeals, and that s. 113 did not provide a valid exception within s. 73 of the Constitution, as the exception to be valid must be based on some characteristic of the judgment or order itself, e.g., the amount involved or the interlocutory nature of the judgment or order, and not, as here, on the subject matter of the judgment or order, e.g., industrial arbitration or taxation.

(1) (1916) 22 C.L.R. 103. (2) (1953) 87 C.L.R. 353.

In *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Whybrow & Co.* (1) *Isaacs* J. said that he entertained no doubt that by appropriate language Parliament could, if it was so minded, completely except the decisions of the Arbitration Court from all appellate control of this Court (2). Again in the *Tramways Case* [*No.* 1] (3) his Honour said that " exceptions " meant what it said and that the grant of power to this Court by s. 73 was made by the Imperial Parliament general in the first instance, leaving it to the Commonwealth Parliament to make what exceptions from the grant it thought necessary or desirable (4). In *Federated Engine Drivers' and Firemen's Association of Australasia* v. *Colonial Sugar Refining Co. Ltd.* (5) *Isaacs*, *Gavan Duffy* and *Rich* JJ., said that the power of the Parliament to except from this Court's appellate power a decision of a High Court Justice that an inter-State industrial dispute existed was beyond serious question. And in *Watson* v. *Federal Commissioner of Taxation* (6) it was held that this Court had no jurisdiction to entertain an appeal from a Justice of this Court reversing a decision of the Board of Review under the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 because s. 196 (1) of that Act made the decision of the Justice final and conclusive. It is true that in *Collins* v. *Charles Marshall Pty. Ltd.* (7), this Court as at present constituted suggested that there were limitations on the " exceptions " that could validly be made under s. 73. Six members of the Court said it would be surprising if the power to make " exceptions " extended to excluding altogether one of the heads specifically mentioned in s. 73 and the other member *Taylor* J., suggested that the " exceptions " might even be restricted to those based on characteristics of the judgment or order itself. Section 113 of the *Commonwealth Conciliation and Arbitration Act* does not go so far as to exclude all appeals from judgments or orders made by a court exercising federal jurisdiction under the Act; but the exceptions are not limited to judgments or orders according to their characteristics as distinct from their subject matter, but extend also to their subject matter.

Having regard to what must have been a main purpose of the power in s. 73 to make " exceptions " i.e., the purpose of preventing this Court from being inundated with trivial appeals and thus to enable it to continue to discharge efficiently those important functions for which we may assume it was created, it would be too narrow a view to take of the power to make exceptions to hold

(1) (1910) 11 C.L.R. 1.
(2) (1910) 11 C.L.R., at p. 47.
(3) (1914) 18 C.L.R. 54.
(4) (1914) 18 C.L.R., at p. 76.
(5) (1916) 22 C.L.R., at p. 117.
(6) (1953) 87 C.L.R. 353.
(7) (1955) 92 C.L.R., at pp. 544, 558.

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that it did not extend to the subject matter as well as to the characteristics of judgments or orders. Recently this Court entertained an appeal from the Supreme Court of Queensland which had imposed on it by the State Parliament the duty of fully reviewing the orders of the Literature Board of that State banning certain publications as objectionable. See *Transport Publishing Co. Pty. Ltd.* v. *Literature Board of Review* (1). This is a sample of a new jurisdiction that a State might see fit to give to its Supreme Court from which s. 73 gives a right of appeal to this Court. It can readily be appreciated that one or more of the States might yet see fit to give additional jurisdiction to the Supreme Court on such a scale that the need would arise to make further exceptions under s. 73 which, to be effective, could not be restricted to the characteristics as distinct from subject matter of the judgments or orders of the Supreme Court exercising the additional jurisdiction.

But apart from such considerations I think that the language of s. 73 does not warrant the narrow view of the power to make exceptions that would prevent the exercise of that power from being based on the subject matter of the judgments or orders. The emphasis in s. 73 is on appeals not on judgments or orders. No doubt the excepted appeals must be described with reference to the judgments or orders but not necessarily with reference to their characteristics as distinct from their subject matter.

In construing the Commonwealth Constitution we must be careful to avoid giving its words a narrower meaning than they naturally bear.

In my opinion s. 113 is valid and this Court has no jurisdiction to entertain these appeals.

TAYLOR J. In *Collins* v. *Charles Marshall Pty. Ltd.* (2) it was contended that s. 31 (2) of the *Conciliation and Arbitration Act* 1904-1952 operated to except from the appellate jurisdiction of this Court appeals from judgments or orders of any other court in proceedings of the description specified in the section. The proceedings described were proceedings arising under the Act or involving its interpretation and proceedings arising under an order or award or involving the interpretation of an order or award. There was, as appears from the observations made in that case, more than one reason why the section could not be regarded as a valid legislative provision. But in the course of discussing the provision I pointed out (3) that s. 31 purported to except from the jurisdiction

(1) (1956) 98 C.L.R. 111.
(2) (1955) 92 C.L.R. 529.
(3) (1955) 92 C.L.R., at p. 557.

of the High Court appeals from judgments and orders given or made in *proceedings* concerned with the matters specified and that the condition for the operation of the excepting words was to be found in some feature of the proceedings in which a judgment or order had been given or made and not in any characteristic of the subject matter of the suit or in the relevant judgment or order itself. At a later stage I expressed the view that the language of s. 73 of the Constitution is more appropriate to authorise the prescription of exceptions by reference to specified characteristics of judgments or orders of courts exercising federal jurisdiction rather than by reference to some feature of the proceedings, incidental or otherwise, in which any such judgment or order has been given or made and that to conclude otherwise would be to entertain the view that appeals in specified types of matters, or indeed in any and every class of matter, might be made the subject or subjects of exception. Such a view, I thought, was inconsistent with the substance of the section. Upon further consideration I am satisfied that these observations express a view which is unduly restrictive of the power under s. 73 to prescribe exceptions.

These observations were made in the course of considering a section which purported to exclude from the jurisdiction of this Court appeals from judgments and orders, which by reason of the descriptions employed, could not be regarded as constituting a specific class or classes of judgments or orders. It was sufficient, if in the proceedings in which a judgment or order had been given or made, there had arisen a question concerning the interpretation of some provision of the Act or of an order or award and neither the nature of the judgment nor the character of the matter involved was necessarily of any consequence. Whatever the nature of the judgment or the character of the matter or, indeed, from whatever court the appeal was brought, it was sufficient if even incidentally to the determination of the proceedings a question of interpretation of the requisite character had arisen.

The distinction between s. 31 of the Act in its earlier form and s. 113 of the present Act is readily apparent. The latter section does not range over such a wide and indeterminate field ; so far as is material to the present case it is, in terms, restricted to appeals from judgments, decrees, orders or sentences of State courts (not being a Supreme Court) given or pronounced in matters arising under the Act. Such matters constitute a more or less readily recognisable category of matters ; they present features of a very special and limited character and, once it is conceded that Parliament may invest the Commonwealth Industrial Court with appellate

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jurisdiction in such matters, there can, I feel, be little reason to doubt that they may be made the subject of a valid exception under s. 73.

It may be that, for reasons which appear in the judgment of the Chief Justice, *McTiernan* and *Kitto* JJ. s. 113 should be understood as conferring jurisdiction upon the Commonwealth Industrial Court only where the appeal, as distinct from the original proceedings, involves a specified matter. Indeed it is possible that this is the literal meaning of the section. But it will, I should think, be rarely that an original proceeding will involve such a matter and an appeal from the judgment or order will not. In any event this is not a circumstance which can tell against the prosecutor, and, since there is, as far as I can see, no other ground upon which it may be urged that s. 113 is invalid, I agree that the appeals should be struck out as incompetent.

Appeals struck out as incompetent.

Solicitors for the appellant, *Nicholl & Hicks.*

Solicitor for the respondents, *Aidan J. Devereux.*

Solicitor for the intervener, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

J. B.