[HIGH COURT OF AUSTRALIA.]

MOORE . . . . . PLAINTIFF;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

H. C. OF A. 1958.

SYDNEY, *Nov.* 24.

Dixon C.J., Fullagar, Taylor, Menzies and Windeyer JJ.

Constitutional Law (Cth.)—Action brought in State court against Commonwealth—Allegation that plaintiff injured in factory occupied by Commonwealth as employer—Demurrer—Commonwealth and State—Constitutional powers—Limits inter se—Question—Statutory interpretation—Proceeding removed into High Court—Extent of power of Commonwealth or of State—Quaere, involved—Proceeding remitted by High Court to State court—Factories and Shops Act 1912-1954 *(N.S.W.), ss.* 25 (2) *(a),* 56*—Judiciary Act* 1903-1955, *Pt.* IX, *ss.* 18, 38A, 40A, 41, 42, 64, 79.

In an action for damages for personal injuries brought against the Commonwealth in the Supreme Court of New South Wales the plaintiff sought by his declaration to recover on three counts, the first two of which were based on alleged breaches of s. 25 (2) (a) of the *Factories and Shops Act* 1912-1954 (N.S.W.). To these counts the Commonwealth demurred upon the substantial ground that those provisions did not extend to or bind it. On the hearing of the demurrer the Full Court of the Supreme Court was of the opinion that the demurrer raised questions as to the limits *inter se* of the constitutional powers of the Commonwealth and of the States and declined to proceed further, the demurrer being removed into the High Court by virtue of s. 40A of the *Judiciary Act* 1903-1955.

Held, that since the question to be argued on the demurrer was confined to whether or not the provisions of the *Factories and Shops Act,* taken in conjunction with Pt. IX and s. 79 of the *Judiciary Act,* applied in terms to the Commonwealth, no question arose, at least at this stage in the action, as to the limits *inter se* of the constitutional powers of the Commonwealth and the State; for the answer to the question raised by the demurrer depended entirely on interpretation of the statutes involved.

CAUSE removed into the High Court from the Full Court of the Supreme Court of New South Wales pursuant to s. 40A of the *Judiciary Act* 1903-1955.

On 13th April 1955 Patrick Herbert Freyne Moore commenced an action against the Commonwealth of Australia to recover

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damages for personal injuries sustained by him whilst employed in a factory occupied by the Commonwealth. The declaration filed contained three counts, the first two being based upon alleged breaches of s. 25 (2) (a) of the *Factories and Shops Act* 1912-1954 (N.S.W.) and the third being a common law count in negligence. The first two counts only are material to this report.

Section 25 (2) (a) of the *Factories and Shops Act*, so far as here material, provides:—"Where in connection with any process carried on in a factory dust, fumes or other impurities are generated or given off, of such a character or to such an extent that the inhalation thereof would be likely to be injurious or offensive to the persons employed therein, effective measures shall be taken by the occupier to prevent the accumulation in any workroom of such dust, fumes, or impurities and to protect such persons against the inhalation of such dust, fumes or impurities. Where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust, fumes or impurities, so as to prevent the same entering the air of any workroom."

To the first two counts aforesaid the defendant Commonwealth demurred, the matters of law intended to be argued on the hearing of the demurrer being stated as follows:—"(1.) The provisions of the *Factories and Shops Act* 1912-1954 in the said counts referred to do not extend to and bind the defendant. (2.) The said provisions of the said Act do not create any of the causes of action in the said courts sued upon." It is with the first of such matters only that this report is concerned.

A joinder in demurrer was filed by the plaintiff and the demurrer came on for hearing before the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Maguire* JJ.). The Supreme Court being of opinion upon the argument that the first of the matters relied upon in support of the demurrer gave rise to a question as to the limits *inter se* of the constitutional power of the Commonwealth and of the State of New South Wales declined to proceed further with the hearing and the demurrer was accordingly by force of s. 40A of the *Judiciary Act* 1903-1955 removed into the High Court.

Further relevant facts appear in the judgment of *Dixon* C.J. hereunder.

B. P. Macfarlan Q.C. (with him *A. R. Moffitt* Q.C., *A. F. Mason* and *J. B. Sinclair*), for the defendant in support of the demurrer. The demurrer is the only proceeding before the Court. The argument submitted in the court below on the part of the defendant was

that upon its true construction the said Act did not purport or intend to bind the Commonwealth, and that, *in limine*, therefore, the Commonwealth was not an occupier and that, therefore, s. 25 of that Act did not impose a duty on the Commonwealth and the basis of the plaintiff's cause of action was not there. Sections 56 and 64 of the *Judiciary Act* 1903-1955 did not operate to make the *Factories and Shops Act* 1912-1954 applicable to the Commonwealth —to make the Commonwealth an occupier and create a duty which the Commonwealth was alleged to have broken in this case. Sections 56 and 64 of the *Judiciary Act* 1903-1955 do not apply to the case of a State statute where, by construction the Commonwealth is not named in it at all. Alternatively, if that submission be wrong, then ss. 56 and 64 do not extend to every case ; they do not extend to make binding or susceptible to causes of action laws which had the effect of imposing duties upon the Commonwealth as to the manner in which it used its property. The defendant consistently took the view that a constitutional point had not been reached. Undoubtedly there was a factory on property which was in the occupation of the Commonwealth, and to that extent it was submitted that that was Commonwealth property. In ascertaining the operation of s. 56 of the *Judiciary Act* 1903, as amended, the extent of its operation should be measured by the extent to which the State Parliament could enact a law interfering with the use of Commonwealth property. [He referred to *Washington* v. *The Commonwealth* (1) ; *Nelungaloo Pty. Ltd.* v. *The Commonwealth* [*No.* 4] (2) and *The Commonwealth* v. *Bogle* (3).] The court below said that on the various points there referred to it was either essential or at least relevant to consider the legislative powers of the State in relation to the Commonwealth property. The reference there was to what was said by the Court in the judgments in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* [*No.* 4] (4). The Supreme Court was of the opinion that the *inter se* question had arisen.

DIXON C.J. As at present advised none of the members of this Court thinks that the Court has jurisdiction in the particular proceeding now before us. If the Supreme Court wishes to bring it before this Court under s. 18 it can refer the demurrer, or whatever it wishes to refer.

L. K. Murphy, for the plaintiff. The basis of liability was put to the Supreme Court as arising out of the Constitution as well as the sections of the *Judiciary Act* 1903-1955. The court was referred

(1) (1939) 39 S.R. (N.S.W.) 133 ; 56 W.N. 60.
(2) (1953) 88 C.L.R. 529.
(3) (1953) 89 C.L.R. 229.
(4) (1953) 88 C.L.R., at p. 541.

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to the cases which sought to find the source of liability in the Constitution. The case for the plaintiff was conducted on the basis that substantially the source lay in the *Judiciary Act* 1903-1955. That Act can be linked with s. 75 by saying that s. 75 provides the source of liability in an action in the High Court, so that if there were no *Judiciary Act* one could still have the action against the Commonwealth in the High Court, the laws of the States being applicable. Section 56 is ancillary, on one approach to it, when it provides an alternative forum in the Supreme Court and exactly the same law is applicable as would be applied in an action in the High Court.

B. P. Macfarlan Q.C., in reply. During the argument in the Supreme Court reference was made to *Washington* v. *The Commonwealth* (1) and *Nelungaloo Pty. Ltd.* v. *The Commonwealth* [*No.* 4] (2). It is probable that the court below acted on the view which it took of the decision of this Court in the *Nelungaloo Case* (3). [He referred to *The Commonwealth* v. *Colonial Ammunition Co. Ltd.* (4); *Davidson* v. *Walker* (5); *Gibson* v. *Young* (6) and *Asiatic Steam Navigation Co. Ltd.* v. *The Commonwealth* (7).] The Act does not impose a duty on the Commonwealth.

The following oral judgments were delivered:—

DIXON C.J. The proceeding before us consists in a demurrer to two counts contained in a declaration in an action brought in the Supreme Court of New South Wales against the Commonwealth. There is a third count in the declaration to which there is no demurrer. The plaintiff alleges that he was injured in a factory occupied by the Commonwealth. The action is, of course, brought under Pt. IX of the *Judiciary Act* 1903-1955.

The two counts in the declaration to which the defendant Commonwealth demurs are based upon s. 25 (2) (a) of the *Factories and Shops Act* 1912-1954 (N.S.W.). Paragraph (2) (a) falls into two limbs. The first count is based on the first limb and the second count on the second limb of s. 25 (2) (a). The purpose of the demurrers on behalf of the Commonwealth was to raise the question whether any liability rested upon the Commonwealth in consequence of the provisions of s. 25 (2) (a). Whether such a liability did so rest upon the Commonwealth must depend upon the operation of

(1) (1939) 39 S.R. (N.S.W.) 133; 56 W.N. 60.
(2) (1953) 88 C.L.R., at pp. 538 to 541.
(3) (1953) 88 C.L.R. 529.
(4) (1924) 34 C.L.R. 198.
(5) (1901) 1 S.R. (N.S.W.) 196; 18 W.N. 276.
(6) (1900) 21 L.R. (N.S.W.) 7; 16 W.N. 158.
(7) (1956) 96 C.L.R. 397, at pp. 417, 423, 424.

Pt. IX of the *Judiciary Act* considered in combination with s. 79 of that Act. During the course of the argument of the demurrer in the Full Court of the Supreme Court of New South Wales the argument took a form which led their Honours to the view that a question or questions as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State arose. If that were so the consequence necessarily was that s. 38A of the *Judiciary Act* operated to deprive the Supreme Court of jurisdiction and s. 40A of the *Judiciary Act* accomplished the transfer of the cause to this Court. It is on this footing that the demurrer comes before us. It is perhaps desirable to add that in such a case s. 41 of the *Judiciary Act* makes provision for the continuation of proceedings before this Court. Section 42 of the *Judiciary Act* was enacted before ss. 38A and 40A. It enables the High Court to remit a proceeding which has been removed into the High Court if it appears that the cause does not really and substantially arise under the Constitution or its interpretation. The provision does not directly apply in terms to a removal under s. 40A but the Court has proceeded by analogy when it has appeared that a supposed removal under s. 40A has not really occurred because the matter does not involve a question *inter se*. We have formed the opinion that the arguments addressed to the Supreme Court did not raise what was in truth a question of the limits *inter se* of the constitutional powers of the Commonwealth and of the State and we do not think that such a question is intrinsic in the cause. We have had the advantage of hearing both Mr. *Macfarlan* and Mr. *Murphy* as to the course of the proceedings before the Full Court of the Supreme Court. Both counsel have had access to the transcript and shorthand notes of the argument. We have, of course, ourselves considered the pleadings and the *Factories and Shops Act* 1912-1954. Anxious as we are that there should be no delay in the action and that what after all is a jurisdictional or procedural matter should not be the occasion of embarrassment, we nevertheless are impelled to the conclusion that we have no jurisdiction over the cause or, in the old-fashioned phrase, seisin of the matter. We think that the demurrer does not in fact and did not raise a question of the limits *inter se* between the constitutional powers of the Commonwealth and the State. The question which the demurrer does raise appears to us to be entirely one of statutory interpretation in which the delimitation of statutory power can play no real part. Sub-section (2) (a) of s. 25 of the *Factories and Shops Act* 1912-1954 (N.S.W.), as I have said, falls into two limbs. The first limb provides that where in connexion with any process carried on in a factory dust, fumes or

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other impurities are generated or given off, of such a character or to such an extent that the inhalation thereof would be likely to be injurious or offensive to the persons employed therein, effective measures shall be taken by the occupier to prevent the accumulation in any workroom of such dust, fumes, or impurities and to protect such persons against the inhalation of such dust, fumes or impurities. The first count of the declaration alleges that the plaintiff was employed in a factory in connexion with a process of the kind described by this provision and that the Commonwealth was the occupier and ought to have taken effective measures to prevent the accumulation of such dust, fumes, etc. in order to protect the plaintiff against the inhalation thereof. The count then alleges breach. The second limb to par. (a) of sub-s. (2) of s. 25 provides that where the nature of the process makes it practicable exhaust appliances shall be provided and maintained as near as possible to the point of origin of the dust, fumes and impurities, so as to prevent the dust entering the air of any workroom. The paragraph provides that a factory in which there is a contravention of the subsection should be deemed not to be kept in conformity with the material part or the Act. Section 56 then provides in effect for the imposition of penalties on persons responsible if a factory or shop is not kept in conformity with the Act.

The third count of the declaration, to which there is no demurrer, is based on common law liability as between master and servant.

The first two counts are based upon the supposition that by virtue of s. 79 and Pt. IX, in particular, s. 64, of the *Judiciary Act* the provisions of s. 25 (2) of the *Factories and Shops Act* are given an operation which will result in the imposition upon the Commonwealth of a tortious liability. It is not contested by the Commonwealth that ss. 64 and 79 have an ambulatory operation so that they are capable of including legislative changes made in State law after the *Judiciary Act* was enacted. The plaintiff maintains that s. 25 (2) (a) implies as between subject and subject that the employer occupier of the factory is civilly liable for damages to an employee who suffers injury by reason of a breach of the provisions. The plaintiff treats ss. 64 and 79 of the *Judiciary Act* as, so to speak, lifting this provision or consequence of a provision of State law and making it applicable to the Commonwealth in so far as it imposes a tortious liability. To us all this appears to be a question of statutory interpretation. We do not see how it involves a question as to the extent of the power of the Commonwealth or of the power of the State, nor do we see how any inter-action between the definition of powers *inter se*, whether they be powers both legislative or one

legislative and the other executive, can affect the question. It is only when you encounter a limitation of the power to legislate or a limitation of the executive power (we leave out of account any question of judicial power as immaterial to this case) and you find the definition or application of the one affects the definition or application of the other that you get a question *inter se*. We have been unable to see how in this case any such question can exist. What is suggested is that it may arise from some attempt to interpret either the sections of the *Factories and Shops Act* to which I have referred, to interpret it in the light of the extent of State constitutional power, or on the other hand, to interpret s. 79 or s. 64 of the *Judiciary Act* in the light of the extent of the constitutional powers of the Commonwealth. The suggestion appears to us to be far fetched. We cannot see how from a consideration of the extent of the State constitutional power in relation to the Commonwealth or of the Commonwealth constitutional power in relation to the State any light upon the interpretation of any of the provisions to which I have referred can be obtained. The legislative provisions are there to be construed and their respective purposes are ascertainable as a matter of construction and to that construction the extent of constitutional powers behind them has no materiality. In the same way their mutual inter-action is dependent upon nothing but statutory construction.

We have given some time in the course of the argument to considering the possibility of pursuing some course which would enable us to give a decision of more practical assistance to the parties. For that purpose we have asked a number of questions concerning matters which lie strictly outside the scope of the demurrer; the result, however, has been to leave us with the impression that no very useful attempt to obtain our opinion upon the questions of law which the case may contain could be made unless by resort to s. 18 of the *Judiciary Act*. What bearing these questions will have on the ultimate result having regard to the existence of the third count is a matter upon which one may be sceptical. Section 18, however, does enable a judge of the Supreme Court in any case in which he is exercising federal jurisdiction to refer a case or any questions therein to this Court. It may be done by the statement of a case, or the reservation of a question for our consideration, or by directing a case or question to be argued before us. It is not for us to say what should be done in the circumstances of this case. Primarily it is a matter for the parties and if they or one of them make an application to the Supreme Court it will then be for the Supreme Court to say. But if the matter is to come here at all it does appear

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to us that some of the questions we have raised in the course of the argument might be suitably dealt with in any case that is stated or any reference that is made. For the practical purpose of who wins the action, however, one cannot help being alive to the fact that upon a trial much might be said under the third count to a jury which would make otiose some of the argument addressed to us on the first and second counts. As matters stand we must simply exercise the power to remit this matter to the Supreme Court.

FULLAGAR J. There is just one word or two that I would wish to add, and that is with reference to the sentence in which the learned judges of the Supreme Court give their reasons for taking the view that this case raised a 40A point. Their Honours said: "The remaining matters argued before us lead to a consideration of the question whether the *Factories and Shops Act* binds or can bind the Crown in right of the Commonwealth."

If that question actually did arise, I should think the question of whether the Crown in right of the Commonwealth could be so bound would be an *inter se* question, but, as far as we have been able to gather, Mr. *Murphy* disclaims any suggestion that the State could of its own independent force bind the Commonwealth by the *Factories and Shops Act*, and says that he rests his case entirely on the construction of those sections of the *Judiciary Act* to which his Honour the Chief Justice has referred. That being so, I do not think it can be said that such a question has arisen as yet.

TAYLOR J. I agree that the matter is not properly before us and should be remitted.

MENZIES J. I agree.

WINDEYER J. I agree.

Cause remitted to the Supreme Court of New South Wales to be dealt with according to law.

Solicitors for the plaintiff, *J. J. Carroll, Cecil O'Dea & Co.*

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

J. B.