THE HIGH COURT'S JURISDICTION IN CONSTITUTIONAL CASES.

WHAT IS AN *Inter Se* CONSTITUTIONAL QUESTION?

By K. H. Bailey, M.A., B.C.L. (Oxon.), LL.M. (Melb.), Professor of Public Law in the University of Melbourne.

IN this article I propose for myself a narrow and technical aim: to examine, in principle and (so far as space will allow) upon authority, what it is that brings a question into the class described, in Section 74 of the Commonwealth Constitution and in Section 38A of the Commonwealth Judiciary Act, as questions: "as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States." The importance of questions of this category arises, of course, from the fact that in substance the High Court of Australia is the only superior court competent to determine them. Section 74 of the Constitution precludes appeal to the Privy Council, even by an exercise of the royal prerogative, from a decision of the High Court upon any such question, unless the High Court itself certifies that the question should be determined by the Privy Council. Section 38A of the Judiciary Act precludes the Supreme Court of a State from giving judgment in any cause involving such a question. Each of these sections has an interesting history, but it has often been told,[1] and need not concern us here, since it does not affect the construction of the phrase taken for discussion.

The Constitution (by Section 76) authorizes the Commonwealth Parliament to make laws conferring on the High Court original jurisdiction in "any matter arising under the Constitution or involving its interpretation." This power has been exercised in full by the Judiciary Act (Section 30). The Parliament may also, under Section 77 of the Constitution, make the jurisdiction of the High Court exclusive of the jurisdiction of any State Court. This power was exercised by Section 38A of the Judiciary Act (in 1907) with respect to *inter se* constitutional questions. But this latter category is plainly different from, and presumably less extensive than, that of "matters arising under the Constitution or involving its interpretation." The early commentators on the Constitution, though very much at variance on what does fall within Section 74, were at one in drawing pointed attention to this difference.[2] More recently, however, it was possible to contend that the difference was not really material: that the combined operation of Section 74 and Section 38A was to make the High Court practically the sole interpreter of the Commonwealth Constitution.[3] A series of cases in the last few years—culminating in the decision that cases arising under Section 92 of the Constitution, and involving the freedom of inter-State trade predicated therein, do

1. See Quick & Garran, *Annotated Constitution of the Commonwealth* (1901), pp. 228 *sqq.*; Moore, *Commonwealth of Australia* (1910) pp. 237-40.
2. Moore, op. cit., pp. 240-1; Inglis Clark, *Australian Constitutional Law* (1905), pp. 171-2; Quick & Garran, op. cit., pp. 756-9.
3. See e.g. Holman, *The Australian Constitution: Its Interpretation and Amendment* (1928), p. 7; Latham, *Australia and the British Commonwealth* (1929), p. 115.

not raise an *inter se* question—has focussed attention afresh on what the category does contain.

At the outset, it is plain that only questions involving a determination of the limits of the *powers* (of Commonwealth or of States) can fall within the sections. The mere question whether a public authority, of the Commonwealth or of a State, has exceeded its powers under the relevant statute, will not be an *inter se* question.[4] Nor would the question whether a State law is invalid under Section 109 of the Constitution, as inconsistent with a law of the Commonwealth. For Section 109 presupposes the existence of two laws, each within the powers of the relevant legislature. If either law is *ultra vires,* no question of inconsistency can arise.[5] Hence cases involving mere inconsistency between State and Commonwealth law will not be withdrawn automatically from the Supreme Court of a State by virtue of Section 38A of the Judiciary Act, though they may (as arising under the Constitution, or involving its interpretation) be removed into the High Court by means of an order under Section 40 of the Act.[6] In effect, therefore, the first principle to be derived from our text is negative: that a constitutional question is not a question as to limits *inter se* unless the question is one of *ultra vires.*

But it does not follow that every *ultra vires* question will fall within the section. So to interpret it would be to give no operation whatever to the words *inter se.* It is not enough to show that the question involved is one as to the "limits" of the constitutional powers of the Commonwealth or of a State; the question must concern the limits *inter se* of such powers—their mutual or reciprocal limits, their limits between (or among) themselves. Thus it has now been established that no *inter se* question is raised when a Commonwealth or a State law is challenged as offending against a constitutional prohibition, such as those contained in Sections 115-7 or in Section 92. A decision for example, that a State law does (or does not) impose a forbidden burden on a resident of another State does not in any way affect the constitutional powers of the Commonwealth.[7] Again, no question of Commonwealth power is involved when the question is whether a State law infringes Section 92. The determination of the scope of the constitutional prohibition in that instance merely delimits what is withdrawn from Commonwealth and States alike, and does not deal in any way with the mutual limits of Commonwealth and State powers.[8]

4. The case of *R.* v. *Young* (1919) 27 C.L.R. 100, may seem to decide that it will be —else how did the case come to the High Court? But this point "escaped the observation of the Court"; see per Knox C.J. in *R.* v. *Maryborough Licensing Court* (1919) 27 C.L.R. 249, 255.

5. *Baxter* v. *Commissioner of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087, 1118-9, 1154-6. In *R.* v. *Maryborough Licensing Court* (*supra*) it may appear on first impression that the *inter se* question was whether the State law was inconsistent with the Commonwealth Electoral Act. The *inter se* issue, however, was the validity of the Commonwealth Act: see per Knox C.J. at p. 255. The validity of the Commonwealth law was decided by the High Court in *R.* v. *Licensing Court of Brisbane,* (1920) 28 C.L.R. 23.

6. *Ex p. McLean* (1930) 43 C.L.R. 472; *O'Keefe* v. *Country Roads Board* (1931) 45 C.L.R. 27.

7. *Lee Fay* v. *Vincent* (1908) 7 C.L.R. 389.

8. *Ex p. Nelson* (No. 2), (1929) 42 C.L.R., 258, 272 *sqq.* (Dixon J.); *James* v. *Cowan* (1932) A.C. 542, 560.

But this notion of "mutual or reciprocal limits" is difficult, and requires careful analysis. Its implications have been most fully considered by Mr. Justice Dixon, in a penetrating and exhaustive discussion in 1929, to which the debt of this article is overwhelming.[9] Clearly enough, the notion is derived from the general (but not entirely accurate) conception of the Constitution as distributing between Commonwealth and States the totality of governmental powers in Australia. But on examination the formula actually used seems to cover only a small proportion of the questions that arise as to this distribution. "Limits" appears to be the equivalent of "boundaries." Can the powers of Commonwealth and States be said to have a common or reciprocal boundary unless the decision of the question in issue between them will result in attributing a disputed power to the one, and correlatively denying it to the other? Dicta are to be found in some of the cases suggesting strongly that this is so. But on this view, *inter se* questions would be few and far between. In the distribution of powers between Commonwealth and States it is only the legislative powers *exclusively* vested in the Commonwealth which the States actually lose. The mere attribution of a power to the Commonwealth does not *eo ipso* deny it to the States, and *vice versa*. Only the question whether a matter fell within one of the heads of exclusive Commonwealth power would thus seem to be an *inter se* question. The decision on such a question, one way or the other, would trace a common boundary.

In the headnote to the Royal Commissions case[10] there are expressions which suggest that this view has been adopted by the Judicial Committee. But in that case (in which the High Court granted a certificate under Section 74), and in the Builders' Labourers' case[11] (in which the Privy Council held that there could be no appeal without a certificate, the questions thus held to be *inter se* questions both concerned the extent of concurrent, not exclusive, Commonwealth powers. We are driven by authority, therefore, to seek a wider meaning for the phrase "limits *inter se*." But on principle, also, the interpretation suggested above is so restrictive of the position of the High Court that the section should not be so interpreted, *in dubio*, if the words are equally capable of another and wider meaning. The submission is that they are, and that the metaphor of a "boundary" represents an over-simplification of the position.

In tracing the constitutional distribution of powers between Commonwealth and States, the fundamental question always is whether or not a disputed matter falls within a power vested in the Commonwealth. If it does not, then the State alone has plenary power. If it does, then *either* the State has concurrent power, not plenary, but

9. 42 C.L.R., pp. 269 *sqq.*; see also the substantially similar view, lucidly expressed by Sir George Rich, *ibid* pp. 266 *sqq.* I wish further to acknowledge gratefully the stimulus and assistance I have derived from a number of challenging discussions on these points with Mr. Geoffrey Sawer, LL.M., of Ormond College.

10. (1914) A.C. 237; "The (Royal Commissions) Acts . . . . cannot be brought within the powers which are . . . . *exclusively* vested in the (Commonwealth) Parliament." Lord Haldane later explained that the insertion of "exclusively" was an error. See (1917) A.C. at p. 531.

11. (1917) A.C. 528.

liable to be overridden by the operation of Commonwealth law, *or* the State has no power at all. The "limits" of a governmental power under the Commonwealth Constitution may thus be regarded as involving three elements: (i) the subject-matter with respect to which it may operate; (ii) the persons upon which it may operate[12]; (iii) its relation to other governmental powers operating in the same field. Thus a decision on the validity of the Commonwealth Royal Commissions Acts could not be said either to have added or to have taken away any power to or from the States. But a decision in favour of the Commonwealth would have transferred the State power from the category of exclusive into the category of concurrent powers. To determine the "limits *inter se*" of two powers may thus involve questions not only of their existence, but of their nature. In this sense, "limits *inter se*" would seem to mean "mutual scope," or "mutual extent," rather than "common boundary." As has already been pointed out, this view is consistent with the authority of decided cases. It may be summed up, in Mr. Justice Dixon's words, by saying that an *inter se* question may arise whenever the relevant powers have "some mutual relation which causes the determination of the extent or supremacy of one of them to involve a complementary ascertainment of the existence content or efficacy of the other."[13] In particular, this means that Section 74 is wide enough to include *ultra vires* questions in relation to concurrent as well as to exclusive powers of the Commonwealth.[14]

12. As in the "immunity of instrumentalities" cases: see also the view of Isaacs J., in *Pirrie* v. *McFarlane* (1925) 36 C.L.R. 170, 199-200, that a State could not bind the Crown in right of the Commonwealth in its exercise of any exclusive Commonwealth function.

13. 42 C.L.R. at p. 275.

14. Considerations of space require the omission of some formidable questions: e.g. (i) whether a question as to the validity of a Commonwealth law purporting to vest powers of determination in an administrative tribunal: see, answering *semble* in the negative, Quick & Garran, op. cit., pp. 758-9; (ii) what is the "mutual relation" between the scope of Commonwealth *legislative* power and State *judicial* power, in such a case as *Commonwealth* v. *Bardsley*, (1926) 37 C.L.R. 393?