INTER SE QUESTIONS—A REPLY TO THE ABOVE NOTE

Among his remarks on the above case, Mr. C. McPherson has made some interesting and provocative comments on the passage from the judgment of Evatt J. where His Honour says: "It is plain that the question is one as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of New South Wales."[1] The question referred to was whether a matter involving the interpretation of Section 90 of the Constitution was an *inter se* question. I feel some hesitation in discussing this problem as to what are *inter se* questions, with the knowledge that there exist the admirable expositions of Dixon J. in *Nelson's* case,[2] and Professor K. H. Bailey in the last issue of this magazine.[3] I feel justified, however, both by the fact that the point has since been raised in a decision of the High Court, and that the view there expressed has been challenged.

My submission is that the view of Evatt J. is consistent with and the logical consequence of the decisions on this question. Statements in general terms as to what are *inter se* questions have been made both by the Privy Council and the High Court. Lord Atkin, delivering the judgment in *James v. Cowan*, concludes that an *inter se* question does not arise on the application of Section 92 to a State law, even on the assumption that Section 92 applies to the States, and not to the Commonwealth, because "there are no boundaries between the one and the other which come into question."[4] Dixon J., during the course of his judgment in *Nelson's* case, after referring to decisions of the Courts which had involved *inter se* questions, enunciates his test as follows: "The essential feature in all these instances is a mutuality in the relation of the constitutional powers, a reciprocal effect in the determination, and ascertainment of the extent or the constitutional supremacy of either of them."[5] Professor Bailey points out that these tests, at the very least, mean that an *inter se* question arises whenever there is a decision involving the "common or reciprocal boundary" of the powers of the Commonwealth and States, and as the Professor goes on to conclude, the very best and possibly only example of the type of case which determines a common boundary is the case involving the interpretation of the exclusive power of the Commonwealth.[6] For such a case at the same time determines the point at which Commonwealth power begins and State power ends. Accordingly, as Section 90 grants to the Commonwealth the exclusive power over Customs and Excise, an *inter se* question is involved in its interpretation.

But it is said—and this is Mr. McPherson's line of attack—if that be so, then their Lordships in *James v. Cowan*, and Rich and Dixon JJ. in *Nelson's* case, wrongly applied the principles they expounded, because the Courts assumed at that time, for the purpose of their deci-

1. (1937) 56 C.L.R. 414.
2. (1929) 42 C.L.R. 269-276.
3. *Res Judicatae*, 1936, pp. 81-84.
4. (1932) 47 C.L.R. 398.
5. (1929) 42 C.L.R. 272.
6. *Res Judicatae*, 1936, p. 83.

sions, that Section 92 bound only the States, and as the Commonwealth had power over interstate trade and commerce by Section 51 (i), its power over that subject-matter became exclusive, and accordingly a decision on the application of Section 92 determined the boundary at which State power ended and Commonwealth power began.

The fallacy in this chain of reasoning is to be found, it is suggested, upon an examination of the words of the two Sections. Section 92 in itself is merely a prohibition of power. However much the Court may search the Constitution to decide what Section 92 means, and however much help may be gained from other Sections on the problem of *interpretation,* once the meaning of the Section is decided it becomes possible to *apply* it without reference to any other Section or Sections in the Constitution which grant or withdraw power. Whatever the powers of the Commonwealth or the States may be, the Section directs that the States shall leave interstate trade, commerce and intercourse absolutely free. This determination in itself tells one nothing whatsoever about Commonwealth powers—as to whether they exist or not. It is necessary to look elsewhere—to Section 51 (i)—to determine this question. Dixon J. suggests one reason for this conclusion in the following passage: "For the power which is conferred upon the Commonwealth Parliament by Section 51 (i) is not co-extensive with that denied to the States by Section 92. It is much greater; its limits reach far beyond the bounds of that commercial freedom upon which the States may not encroach."[7] I tender the suggestion that, even if this were not so, the result would be in no manner different—that is, even if the power of the Commonwealth Parliament had been considered co-extensive with that denied to the States. For the position would still have been that a decision on Section 92 would in itself have involved no reference to any Commonwealth power—no reference to Section 51 (i), and accordingly no reciprocal relationship. All that Section 92 says is that the State shall have no power—the boundary of State power is defined. As Dixon J. points out in *Nelson's* case,[8] to say that a State has no power does not in itself give any information as to either the nature or extent of Commonwealth power. If the Commonwealth had power apart from this negation of State power, the Commonwealth power was supreme in any case, because of Section 109, and if the Commonwealth did not have power, then the prohibition of State power does not in any manner affect the powers of the Commonwealth.

How then is a determination under Section 90 different? It is submitted that Section 90 is more than a mere constitutional prohibition. Whereas Section 92 (on the assumption that is being made for the purposes of this note that it applies only to the States) provides that interstate trade, commerce and intercourse shall be absolutely free from State laws, Section 90 enacts that the power of the Parliament to impose duties of Customs and Excise, and to grant bounties on the production and export of goods, shall become exclusive. The essential

7. (1929) 42 C.L.R. 273.
8. *Ibid.*, p. 274.

feature which distinguishes the Sections is the presence in Section 90 of the expression, "the power of the Parliament." Paraphrased, Section 90 means—whatever power the Commonwealth Parliament may have under this Constitution (and before any further steps can be taken those powers must be defined) are both vested in the Commonwealth and divested out of the States. Accordingly, to interpret and apply Section 90, two processes are inevitable—first the process of discovering what the Commonwealth powers are, and next the process of depriving the States of those powers. It is accordingly impossible to interpret Section 90 without discovering whether the Commonwealth has any power at all—that is, by examining Section 51 (ii) and (iii). In the process, then, of defining what a State cannot do, what the Commonwealth can do is necessarily determined. This involves defining a common boundary, and it is this essential reference to Commonwealth power which distinguishes the Section from Section 92. It is suggested that Dixon J. had this distinction in mind in *Nelson's* case when he said: "When it is said that some portion of the Commonwealth legislative power is exclusive, the statement expresses and implies no more than that the States have no similar power. No difference is attributed to the operation or constitutional strength of the Commonwealth power."[9] He was there contemplating the type of exclusiveness given by Section 92, and it was implicit in the expressions he used that the mere determination of exclusiveness did not involve any examination of the extent of Commonwealth powers.

But, it will probably be said by way of criticism, in so distinguishing Sections 90 and 92, the basis on which it has been decided that questions involving the interpretation of the concurrent powers of the Commonwealth are *inter se* questions completely collapses. Though questions as to the limits of the Commonwealth Parliament's powers do not involve common boundaries, but rather what Professor Bailey terms "mutual scope or common extent,"[10] yet, even on this view, to interpret the Commonwealth powers in Section 51 in itself only involves deferring the extent of Commonwealth power. To decide whether an otherwise exclusive power of a State is thus made concurrent, it is necessary to first decide whether a State has any power at all, and to do this it is necessary to look elsewhere in the Constitution for sources of power—to Section 107. But, the criticism would proceed, there is no *necessity* to look elsewhere to interpret the Commonwealth power, and it is precisely this distinction between the *necessity* to look elsewhere or not which is used as the basis of the distinction between Sections 90 and 92.

To this it might well be said in defence that the powers of the States would have existed independently of Section 107, that whatever is not taken away is presumed to remain, and that the Courts would have been obliged to give effect to the powers of the States except in so far as they were expressly taken away by the Constitution

9. (1929) 42 C.L.R. 274.
10. *Res Judicatae*, 1936, pp. 83-4.

or overridden by the operation of Section 109, and that the States have full and unlimited powers, apart from the Commonwealth Constitution.

The reply to this view would probably be that the Court would have to find some source for the powers of the States, if not in Section 107, then elsewhere, that those powers exist, by reason of the Constitutions of the States, which, after all, have as their basis Imperial legislation, and that there is no real difference between examining one Section of the same statute and another Section of a different statute passed by the same legislative authority. Further, it could be said that it is incorrect to state that, except as limited by the Commonwealth Constitution, the States have full and unlimited powers. Should the Commonwealth Parliament apply the Statute of Westminster to Australia, legislation could be enacted inconsistent with Imperial legislation, applying expressly to the Dominions and Colonies, if the matter fell within the ambit of one of the Commonwealth Parliament's powers. The determination as to whether such a matter fell within the Commonwealth Parliament's powers, it might be said, would not involve an *inter se* question, because in itself to determine that the Commonwealth had power would not affect the powers of the States, even to make them concurrent, because the States would have no power over the subject-matter in any event. And, further, it would in this case be necessary to look to the State Constitutions, read in conjunction with the Colonial Laws Validity Act, to determine the question.

To answer these views it is necessary to join issue on the facts. For the truth of the matter is that it is unnecessary to look at any source of power other than the power of the Commonwealth which is being interpreted, and yet still to determine an *inter se* question. For, in deciding whether the Commonwealth has or has not power, it is necessarily decided (whether the States have power or not) that, should the States happen to have power, then, in so far as the Commonwealth is found to have power, any power the States may have is converted from exclusive into concurrent power. And for the purpose of reaching this consideration it is unnecessary to examine or discover what the State powers are, and yet a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States is involved.[11]

11. It is not without some considerable doubts that the above conclusion is reached. However, I feel that it is implicit in the views of Dixon J. in *Nelson's* case, and fortified by the reasoning of Professor Bailey.

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LIMITATIONS OF ACTIONS

The Lord Chancellor's Law Revision Committee was appointed on January 10, 1934, to consider and report (*inter alia*) "whether the statutes and rules of law relating to the limitation of actions require amendment or unification, and in particular to consider