WHAT IS AN *INTER SE* QUESTION?

By S. E. K. HULME, LL.B.

I. Introduction

IN recent years the Privy Council has been much concerned in deciding just when the presence of an *inter se* question in an appeal from the High Court of Australia prevents the appeal being heard by it without a Certificate of the High Court under s. 74 of the Constitution that "the question is one which ought to be determined by Her Majesty in Council".[1] The effect of these decisions is that "the question whether s. 74 applies seems to depend much less upon what the parties choose to raise than upon what is inherent in a decision of the matter, in point of law and logic".[2] In other words, "appeals are not divisible, and . . . if an *inter se* point is involved in an appeal, s. 74 applies and the appeal cannot be brought to the Privy Council without the High Court's Certificate".[3]

At no time during these discussions, and indeed at no time since Federation, has the Privy Council ventured far into the other problem raised by s. 74, that of defining an *inter se* question. And even in the Australian cases there are only two at all extensive surveys of this problem.[4] Unfortunately, the Privy Council has in its recent judgments made statements "off the hip" on this question, without the benefit of full argument. And some of these statements cause considerable difficulty.

II. The Privy Council's Approach

Nothing was said on the definition question in the *Bank Nationalization* case,[5] where the nature of the questions raised was admitted. The validity of the Banking Bill 1947 was challenged in the High Court on several grounds, some of which raised *inter se* questions. The plaintiffs in those proceedings lost (or at the least did not win) on those grounds, but did succeed in establishing that the Act contravened s. 92 of the Constitution. The Commonwealth sought leave

[1] *The Commonwealth of Australia and ors. v. Bank of New South Wales and ors.* [1950] A.C. 235, (1948) 76 C.L.R. 1; *Nelungaloo Pty. Ltd. v. The Commonwealth of Australia* [1951] A.C. 34, (1950) 81 C.L.R. 144; *Grace Brothers Pty. Ltd. v. The Commonwealth of Australia* [1951] A.C. 357, (1951) 82 C.L.R. 53.

[2] Dixon J. (as he then was) in *Nelungaloo Pty. Ltd. v. The Commonwealth* (1951) 85 C.L.R. 545, 567.

[3] Professor K. H. Bailey, Commonwealth Solicitor-General, *"Fifty Years of the Australian Constitution"*, (1951) 25 *A.L.J.* 314, 353.

[4] Both from Dixon J., in *Ex parte Nelson* (No. 2) (1929), 42 C.L.R. 258 and in *Nelungaloo Pty. Ltd. v. The Commonwealth* (1951) 85 C.L.R. 545.

[5] [1950] A.C. 235.

to appeal on that issue alone, which does not, as will be shown, raise an *inter se* question. The Board then laid down its rule, that since the determination of what were admittedly *inter se* questions in favour of the appellants had been "a necessary condition of the successful defence of the impugned Act in the High Court", and it remained "a necessary condition of obtaining the relief sought on the appeal to His Majesty in Council",[6] a Certificate was necessary.

The trouble, if one may say so, started when that litigious serial, *Nelungaloo Pty. Ltd. v. The Commonwealth*[7] reached the Privy Council.

The Commonwealth Government compulsorily acquired wheat belonging to the plaintiff, under the National Security (Wheat Acquisition) Regulations. Regulation 14 stated that the rights and interest of every person in the wheat acquired were converted into claims for compensation. Regulation 19 prescribed the compensation to which the growers would be entitled. The plaintiff claimed that Regulation 19 was invalid as contravening the constitutional requirement that terms of acquisition must be "just", and that Regulation 14 therefore entitled it to claim compensation according to the normal principles of the law of compensation.

The first step in the plaintiff's argument was therefore to show that Regulation 19 was invalid, and this step depended upon s. 51 (xxxi) of the Constitution, laying down the power of the Commonwealth for "the acquisition of property on just terms". The Board held with little discussion that this was an *inter se* question, and the ground of the decision was that it was a question arising under a power conferred by s. 51:[8]

> ". . . where a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any States. . . . But s. 51 does not expressly divest the States of any power, and it falls to the Courts to determine where the limits of the States' power and the limits of the Commonwealth powers are fixed."

In a later case, the Board has reaffirmed this criterion of the *inter se* question.[9] A dispute arose as to whether s. 29 (1) of the Lands Acquisition Act 1906-36 laid down just terms of compensation. Thus the point again depended on the consideration of those terms in the light of s. 51 (xxxi). And the Board's decision was equally swift:[10]

[6] *ibid.* at 292. [7] [1951] A.C. 34, (1950) 81 C.L.R. 144. [8] [1951] A.C. 34, 48
[9] *Grace Brothers Pty Ltd. v. The Commonwealth*, (1951) 82 C.L.R. 357.
[10] *ibid.* at 363.

"The question for decision is the same as that dealt with by their Lordships in the *Nelungaloo Case*. It was there decided that any question whether the Commonwealth had exceeded the powers conferred on it by s. 51 was an *inter se* question."

From these statements, the following principles emerge:

(a) Powers derived under s. 51 are concurrent powers.
(b) Questions as to the limits of powers derived under s. 51 are *inter se* questions.
(c) Powers derived elsewhere than under s. 51 are exclusive powers.
(d) Questions as to the limits of those powers derived elsewhere than under s. 51 are not *inter se* questions.

In other words, the derivation or otherwise of the power from s. 51 answers the questions: (i) Is the power exclusive or concurrent? and (ii) Is the question as to its limit an *inter se* question?

The present argument is that, failing of course a clear decision to this effect from the Board, after argument of the point before it, derivation of the power answers neither of these questions. Further, High Court authorities to the contrary have been approved by the Board, and there still stands a decision of the Board itself which goes the other way.

III. Derivation under s. 51 and "Exclusive or Concurrent?"

The first thing to do on this topic is to read the judgment of Dixon J. (as he then was) in *Nelungaloo Pty. Ltd. v. The Commonwealth*,[11] when that case was brought a second time before the High Court, in an endeavour to obtain the Certificate which the Privy Council had declared necessary. His Honour there points out that powers conferred by s. 51 *may or may not* be concurrent: "Thus the power with respect to bounties conferred by pl. (iii) is made exclusive by s. 90."[12]

It is true that s. 51 makes no power exclusive in terms, as do certain other power-giving clauses – e.g., s. 52. But two classes of power derived under s. 51 are nevertheless clearly exclusive:

(i) Powers given to the Commonwealth by s. 51, and removed from the States by another section. The Chief Justice's example is one of this class. Others are *coinage* (given to the Commonwealth by s. 51 (xii) and taken from the States by s. 115), *defence forces* (s. 51 (vi) and s. 114), *lighthouses* (s. 51 (vii) and s. 69), and *posts and telegraphs* (s. 51 (v) and s. 69). This list could be extended.
(ii) Powers in their very nature exclusive to the Commonwealth – e.g., that under s. 51 (xxx), "the relations of the Commonwealth with the islands of the Pacific".

[11] (1952) 85 C.L.R. 545, esp. 562-5. [12] *ibid.* at 564.

The conclusion is inescapable, that derivation under s. 51 is no criterion by which to distinguish exclusive and concurrent powers. In each case it must be a matter of examining the Constitution to see if the particular power be exclusive or concurrent. Certainly no simple formula to replace the "derived under s. 51" criterion is here suggested.

IV. The Rules for Exclusive and Concurrent Powers

If the argument to date is accepted, that derivation under s. 51 or otherwise does not separate exclusive from concurrent powers, then it follows that the test of derivation will not tell us whether the question is a question *inter se*.

But the Board's statements have gone further, and have indicated that exclusive powers, however they may be distinguished from concurrent powers, do not raise *inter se* questions: ". . . where a power is declared to be exclusively vested in the Commonwealth no question can arise as to the limits *inter se* of the powers of the Commonwealth and those of any States."[13]

This means that a decision that a certain action is within the Commonwealth's exclusive power, and therefore in a sphere denied to the States, could not raise an *inter se* question. The problem is to reconcile with this the principle of "mutual correlation" expounded by Dixon J. in *Ex parte Nelson*,[14] and approved by the Privy Council in the *Nelungaloo* case.[15] His Honour stated:

> "The expression 'limits *inter se*' refers to some mutual relation between the powers belonging to the respective Governments of the Federal system."[16]
>
> "The essential feature in all these instances is a mutuality in the relation of the constitutional powers."[17]

Consider in the light of this principle the point raised in *R. v. Brislan*:[18] "Is wireless telegraphy within the power over 'postal, telegraphic, telephonic and other like services' conferred upon the Commonwealth by s. 51 (v) and expressly made an exclusive power by s. 69?" If the answer was "yes", then the Commonwealth had exclusive power over wireless telegraphy; if "No," then the States had exclusive power in this field. Was this not clearly an *inter se* question, although arising under an exclusive power?

And indeed, the Privy Council thirty years ago gave a decision, still quoted by it with approval, which was quite wrong if exclusive powers do not raise *inter se* questions. The power of "Conciliation and arbitration for the prevention and settlement of industrial dis-

[13] [1951] A.C. 34, 48. [14] (1929) 42 C.L.R. 258. [15] [1951] A.C. 34.
[16] (1929) 42 C.L.R. 258, 270-1. [17] *ibid.* at 272. [18] (1934) 54 C.L.R. 262.

putes extending beyond the limits of any one State" conferred on the Commonwealth by s. 51 (xxxv) is shared by no State; yet in *Jones v. Commonwealth Court of Conciliation and Arbitration*,[19] an extremely powerful Board[20] held that an *inter se* question was raised on a dispute as to the limit of that power.

The opinion of the Chief Justice has now been stated on this problem. His Honour's support can with some assurance be claimed for the view that the recent statements of the Board represent new law, if "exclusive" is given what had been thought to be its normal constitutional meaning:

> "It certainly states new doctrine if it means that no question *inter se* can exist where the legislative power of the Commonwealth over a subject-matter is exclusive up to the exact limits of the power so that the very boundary line of Federal exclusive power is necessarily the boundary line of State legislative power."

But it may be, His Honour asserts, that the Privy Council did not use the word "exclusive" in that sense:

> "But the judgment of the Privy Council may very well refer to another type of exclusive power. If a Federal legislative power is conferred over a subject-matter, and the power over part only of the subject-matter is made exclusive, then *the definition of the exclusive power does not give a common boundary between State and Federal power.* The boundary of Federal legislative power extends beyond the boundary of so much as is exclusive. The boundary of the exclusive power tells you nothing about the extent of Federal power. It tells you only that within the boundary there is no State power."[21]

One may be forgiven for taking this suggestion as a sincere and subtle attempt to avoid saying that a superior court has erred. And yet if it be such an attempt, the attempt fails; for referring to the portion of the passage which I have italicized, is it not clear that a common boundary between State and Federal power is what such a decision would give? Even if a State's power is only concurrent, the line where it ends marks a boundary between it and Commonwealth power, just as the line where its power changes from exclusive to concurrent, from plenary to controlled, from absolute to conditional, marks another such boundary.

The Chief Justice posits as an example of his theory a case set in the days when s. 92 was held applicable only to States. At that time a question as to that section's limits was not, we are told, an

[19] (1917) 24 C.L.R. 396.
[20] Earl Loreburn, Viscount Haldane, Lord Atkinson, Lord Sumner, Lord Parmoor.
[21] (1952) 85 C.L.R. 545, 573.

inter se question. True, but because such a question did not touch Commonwealth power at all, not because it only defined a sphere of Commonwealth exclusive as against concurrent power. A decision whether the State had validly exercised its powers could not, because of s. 109, in any way affect Commonwealth power. (Contrast the position which would have arisen if s. 92 had applied only to the Commonwealth; a decision as to that section's limit would have been an *inter se* question, because the power thus denied to the Commonwealth would have fallen within the States' residuary power.)

His Honour's attempt to define an "exclusive" power to which the Privy Council's statements can apply seems to run counter to his own "mutual correlation" theory so ably expounded is *Nelson's* case. For, as indicated above, a line marking exclusive from concurrent power, is also a line marking States' "no-power" from their concurrent power; it marks the line where the State orbit ends and the Commonwealth's sole control begins. And one had expected that this was an *inter se* question, even though from the Commonwealth's standpoint it marks only the limit between where it walks alone, and where it walks, though unequally, yet supposedly in step.

Whatever be the true answer to the Chief Justice's suggestion, it is, with respect, plain that the Privy Council did give "exclusive" its normal constitutional connotation. If this be so, we have then to face clearly the dilemma: Either these statements of the Privy Council, made *per incuriam* and without argument, are not to be taken as the last word on the subject, or a long line of constitutional authority, including a previous decision of the Board, and other decisions and reasoning approved by the Board, is wrong. It is felt that the former horn provides the more comfortable resting point.

One presents diagrammatical arguments to the lawyer with reluctance, for he justifiably distrusts them. Yet it may be that the present argument really can be made clearer in diagrams.

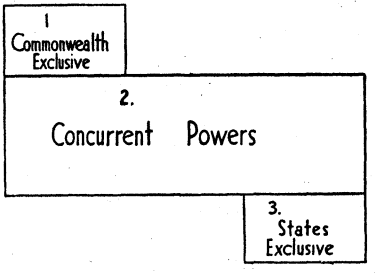

Fig. 1

The Privy Council has visualized governmental powers in Australia as set out in Fig. 1, with correlation possible only in concurrent powers. A decision on an exclusive Commonwealth power has no effect on what is in the States' power. (And yet the very name "States' residuary power" would make

us expect some correlation.)

The true view, it is submitted, is that the powers are best imagined as set out in Fig. 2. On this basis the cases fit easily.

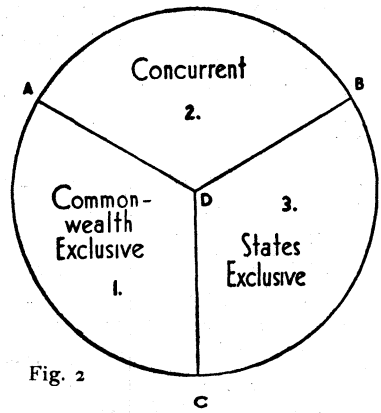

Fig. 2

(i) Laws prohibited by constitutional prohibitions affecting all governments —e.g., s. 92—are altogether outside the power of Australian governments. The decision whether a law is one so prohibited is therefore a question regarding the circumference of the circle, which is not a limit *inter se*. The question is not a question *inter se*. See *Ex parte Nelson*.

(ii) *R. v. Brislan* was on the point whether wireless telegraphy was in field 1 or 3. Clearly this question involved an *inter se* limit.

(iii) The question whether a Commonwealth law can be justified as being to do with the Commonwealth's relations with the islands of the Pacific may or may not be *inter se*. If the law *could* be passed by a State, then the question is whether the law falls in field 1, or in field 3, and it is a question *inter se*. If, because of the constitutional limits on the powers of States, no State *has power* to pass such a law, then the law falls either in field 1, or altogether outside the power of Australian governments (as are laws contravening s. 92). Hence a decision as to the validity of the Commonwealth law will not in such a case raise an *inter se* question.

(iv) *Jones'* case concerned the line DC, and was clearly an *inter se* question.

V. Conclusion

So far we have reached this position, that an *inter se* question can be raised by decisions as to the limits of either concurrent or exclusive powers. Which decisions?

For concurrent powers, the answer seems simple. In their very nature they raise *inter se* questions. This now has the authority of the Chief Justice:

> "To advance or retract Federal legislative power by interpretation, where by virtue of s. 109 it is a paramount concurrent power,

> is therefore to diminish or enlarge the area of State absolute or exclusive power. . . . The very general statement has been thought warranted that the interpretation of any paramount concurrent legislative power of the Commonwealth always involves a question of the limits *inter se* of State and Federal constitutional power."[22]

Questions as to exclusive Commonwealth powers are more difficult, for, as pointed out above, there are two alternative possibilities: (i) that the power claimed by the Commonwealth would otherwise be within the States' residuary powers, and (ii) that either the Commonwealth has the power, or no Australian government has it. Whatever the power, the approach must be the same. The test is the pragmatic one – does the decision affect State power? Does the State power increase if the power is denied to the Commonwealth? On the answer to this question, it seems, will depend the answer to the question – Is it an *inter se* question?

The foregoing propositions may be summed up:

(i) "Derived under s. 51" is not synonymous with "concurrent", and is a wholly misleading criterion on this subject.
(ii) The question "concurrent or exclusive?" can be answered in any particular case only by an examination of the whole Constitution.
(iii) The Privy Council has indicated that concurrent powers do give rise to *inter se* questions, and this is clearly correct.
(iv) The Privy Council has stated that exclusive powers do not give rise to *inter se* questions.
(v) Failing a direct decision, this cannot be accepted as good law.
(vi) The Privy Council has already given a decision which is contrary to its more recent statements on exclusive powers.
(vii) Some questions as to the limits of exclusive powers do raise questions *inter se*.
(viii) The question "which ones?", if (vii) be correct, can be answered only by an examination of the facts of the particular case. No *a priori* test has been evolved.
(ix) The principle to proceed upon in (viii) is that of "mutual correlation".

[22] (1951) 85 C.L.R. 545, 563-4.