# LEGAL LANDMARKS OF 1951-1952.

## CONSTITUTIONAL AND ADMINISTRATIVE LAW.

*Inter Se Questions. Refusal of Certificate for Appeal from High Court to Privy Council.*

The comments made in the last number of this Journal[1] on the interpretation given by the Privy Council in *Nelungaloo Pty. Ltd.* v. *The Commonwealth*[2] to the concept of questions " as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States "[3], are now supported by the judgment of Dixon J. (with whom Fullagar J. agreed) on the application made by Nelungaloo Pty. Ltd. to the High Court[4] for its certificate under s. 74 for an appeal to the Privy Council, consequent upon the Privy Council's refusal of leave to appeal on the ground that an *inter se* question was involved. In spite of certain difficulties in the Privy Council's judgment, it was said in the course of those comments that that judgment did not alter the understanding of the meaning of an *inter se* question accepted in earlier High Court cases, namely, that " an *inter se* question is raised whenever a court is faced with choosing between different interpretations of a provision in the Constitution where one interpretation would make Commonwealth power relatively smaller and State power correspondingly larger while another interpretation would make Commonwealth power relatively larger and State power correspondingly smaller."

It was submitted that this test is equally applicable to the interpretation of the extent of Commonwealth *exclusive* powers as to the interpretation of the extent of *concurrent* Commonwealth and State powers, and that the Privy Council's *dictum* that " when 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 State " was wrong. While not openly saying that the Privy Council was wrong, Dixon J. reaffirmed his adherence to the contrary view, but showed that there were some circumstances in which the *dictum* would be correct and read the *dictum* as being applicable only to those circumstances. These arise when the power which is *exclusively* vested in the Commonwealth is only part of a wider Commonwealth power, the remainder of which is *concurrent* with State power. This is the case, for example, with the Commonwealth's exclusive power to impose customs and excise duties, a power which is only part of the Commonwealth's general taxing power, which except for customs and excise is concurrent with State taxing powers. It is the extent of the Commonwealth's general taxing power which marks the boundary line

1. 1 U.Q.L.J. No. 3, p. 44.
2. [1951] A.C. 34; 81 C.L.R. 144.
3. Constitution, s. 74.
4. *Nelungaloo Pty. Ltd.* v. *The Commonwealth* [1952] A.L.R. 205.

between Commonwealth and State powers and thus raises an *inter se* question, since up to that point State power is liable to be excluded through the operation of s. 109.[5] A question as to the extent of the power to impose customs and excise duties is certainly a question as to the limits of *State* power, since such forms of taxation are denied to the States, but it is not a question as to the limits of *Commonwealth* power, since the Commonwealth has a general paramount taxing power: therefore it is not an *inter se* question.

The reference made on page 46 of No. 3 of volume one of this Journal to *Parton* v. *The Milk Board*[6] as an example of a decision on an exclusive Commonwealth power involving an *inter se* question is thus seen to be a bad reference, since the question there was whether a levy on milk distributors was an excise. Otherwise the comments there made on *inter se* questions in relation to exclusive Commonwealth powers are, it is submitted, in harmony with Dixon J.'s analysis in the *Nelungaloo Case*.

The High Court's judgment is also worth noting for the way in which the Court treated an argument addressed to it in support of the application for a certificate for an appeal. It was argued that, in view of the very broad interpretation given to the concept of an *inter se* question by the Privy Council in the *Banks Case*[7] and the *Nelungaloo Case*, and the consequent confinement within very narrow limits of the cases in which an appeal may be made to the Privy Council from the High Court without the High Court's certificate, the Court ought to be more ready to grant a certificate than it had been in the past. The Court, however, rejected this argument as a consideration to be taken into account, and a certificate was refused. The result would seem to be that in future there will be very few constitutional cases which will come before the Privy Council.

*Freedom of Interstate Trade and Commerce: Marketing Schemes.*

During the period under review there has been a crop of cases concerned with the validity of organised marketing schemes in the face of s. 92 of the Constitution.[8] The most important was *Wilcox Mofflin Ltd.* v. *New South Wales*,[9] where the joint Commonwealth-State marketing scheme for hides [10] was held valid, except in one particular.

5. " When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
6. (1949) 80 C.L.R. 229.
7. *The Commonwealth* v. *Bank of N.S.W.* [1950] A.C. 235; 79 C.L.R. 497; reviewed in 1 U.Q.L.J. No. 2, p. 67.
8. " On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."
9. [1952] A.L.R. 281.
10. *Hide and Leather Industries Act* 1948 (Cwth.) and complementary State Acts.

Under this scheme all trade in hides produced in Australia is controlled by the Australian Hide and Leather Industries Board, established by the Commonwealth and invested with powers by the States so far as hides produced within the State are concerned. All hides must be submitted for appraisement by officers of the Board within a specified time after their production, appraisement being a process of classification and grading and fixing the price at which they will be bought or acquired by the Board. On appraisement hides become the property of the Board unless they are already the subject of interstate trade or are intended by the owners for that trade. Sales or offers of sale of unappraised hides are prohibited except to dealers licensed by the Board. All exports from Australia must go through the Board, which determines the relative quantities of the various types of hides to be exported and to be retained in Australia, and allocates the hides retained to tanners on a quota system. The only part of this scheme held invalid was the prohibition against sales of unappraised hides so far as it prevented interstate sales.

Although this case shows that the Commonwealth and States, acting together, can establish a valid compulsory marketing scheme for an export industry, which they had been denied the power to do before the last war in the case of dried fruit[11], and although the central feature of the scheme is expropriation of the commodity, which was held *ultra vires* in the case of pre-war marketing schemes,[12] the *Wilcox Mofflin Case* in no way shakes the authority of the *James Cases* or the *Peanut Case.* This is because in this case, unlike those cases, there is an express exception from the expropriation provision of goods the subject of interstate trade or intended by the owners for that trade, an exception held sufficient to satisfy the requirements of s. 92 in *Matthews* v. *Chicory Marketing Board (Vic.).*[13] The significance of the case lies in demonstrating that even with such an exception a compulsory marketing scheme can be made to work, where there is a considerable demand for the commodity in export markets and through co-ordinated State price control policy the home price is kept below the export price, with the result that there is an inducement to producers to put as much of their product into export channels as possible in preference to private interstate trade. In the case of the pre-war marketing schemes the state of the markets was reversed, the home price being substantially higher than the export price, producers thus being anxious to dispose of their produce on the home market which includes interstate trade, the field protected by s. 92 from governmental control.

The precise extent of the protection afforded by s. 92 to particular transactions was not made quite clear in the *Wilcox Mofflin Case.* Dixon, McTiernan, and Fullagar JJ.[14] suggested that the exception of hides intended for interstate trade requires *some overt act* manifesting the

11. *James* v. *The Commonwealth* [1936] A.C. 578.
12. *James* v. *Cowan* [1932] A.C. 542; *Peanut Case* (1933) 48 C.L.R. 266.
13. (1938) 60 C.L.R. 263.
14. [1952] A.L.R. at 293.

intention in respect of particular hides. It is established that in order to qualify for the protection of s. 92 the actual contract of sale need not be made with a buyer in another State, provided that it is stamped with some interstate character, *e.g.*, by its being a condition of the sale that the goods should be sent to another State: *R.* v. *Wilkinson, ex parte Brazell.*[15] On the other hand, the mere fact that the parties to the contract are in different States does not entitle the transaction to the protection of s. 92 if otherwise it has no interstate element: *Carter* v. *Potato Marketing Board (Qld.).*[16] Or, as the High Court put it in this last case, [17] s. 92 cannot be given " an operation which goes beyond the protection of transactions of interstate trade and commerce . . . and of acts and transactions antecedent to interstate trade but inseparably connected with it, and extends the constitutional protection to acts which may or may not lead to transactions of interstate trade and at best can only be preparatory to transactions which may or may not prove to have an interstate character."

Another important aspect of the *Wilcox Mofflin Case* was the decision by the majority (Williams J. and Webb J. dissenting) that the requirement that all hides must be submitted for appraisement within a specified time, including hides destined for interstate trade, did not constitute an infringement of s. 92. And although they held that the prohibition of sales of unappraised hides was invalid so far as it affected interstate trade, this was mainly because one of the results of appraisement was the vesting of the property in the hides in the Board (*i.e.*, expropriation) unless the hides were required for interstate trade. The prohibition against sales before appraisement thus prevented the owner from using one of the commonest methods of committing his goods to interstate trade, and so constituted a serious impediment to his right to dispose of them interstate. If appraisement had not been followed automatically by expropriation, it seems that Dixon, McTiernan, and Fullagar JJ., at least, would have held the prohibition of sales pending appraisement valid. They said:[18] " But to prohibit sale pending performance by the owner of some duty or the doing of some act is not necessarily an impairment of the freedom of interstate commerce. It depends upon the reality and operation of the impediment which it may place in the way of interstate transactions." This suggests that many of the familiar features of organised marketing schemes, *e.g.*, proper grading and packing, may be validly achieved even in relation to interstate transactions.[19] The owner's right of ultimate sale interstate, however, must be preserved: *Cam and Sons Pty. Ltd.* v. *Chief Secretary.*[20]

It is worth noting that the majority of the Court in the *Wilcox Mofflin Case* showed some impatience with arguments against the validity

15. [1952] A.L.R. 117. *Cf. Field Peas Case* (1947) 76 C.L.R. 414.
16. [1951] A.L.R. 869. 17. At pp. 877-8. 18. [1952] A.L.R. at 295.
19. *Cf. Hartley* v. *Walsh* (1937) 57 C.L.R. 372.
20. [1951] A.L.R. 930.

of the scheme based on mere possibilities of abuse of powers, such as the power to appoint persons and places for appraisement purposes, in such a way as deliberately to hamper interstate trade. Particular excesses of power beyond the limits permitted by s. 92, they said, are to be controlled by the ordinary remedies for abuse or excess of executive power, *e.g.*, *mandamus* and injunction, without destroying the validity of the legislation itself. Dixon, McTiernan, and Fullagar JJ.[21] even went so far as to say: " There is much to be said for the view that s. 92 should be applied only for the protection of transactions actually existing which come within it and not to imaginary cases." If this view gains general judicial acceptance, it is likely to have a most important effect on the application of s. 92 and to assist materially in sustaining the validity of legislation. It may also raise the question whether the principle should not be extended to constitutional validity issues generally quite apart from s. 92.

Finally, two other aspects of the Court's approach to the *Wilcox Mofflin Case* should be noted. Firstly, although it was the validity of the New South Wales Act which was in issue, in construing its meaning and effect the Court considered it throughout as part of a Commonwealth-State legislative scheme. Secondly, there was a firm insistence, especially by Dixon, McTiernan, and Fullagar JJ. on the importance of evidence of the actual operation of the legislation on the trade in hides as a necessary aid to interpretation and the determination of validity or invalidity.[22]

*Certiorari to Quash Decisions for Errors on the Record.*

The judgment of the King's Bench Division of the English High Court in *R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw*,[23] establishing the availability of *certiorari* for the purpose of quashing the decisions of all inferior tribunals where the record of the proceedings discloses on its face an error of law, and discussed in the last number of this Journal,[24] has been upheld by the Court of Appeal.[25] Denning L.J., like Lord Goddard C.J. in the King's Bench Division, made an admirable historical survey of the nature and function of the writ of *certiorari*. Only Denning L.J. discussed the question, what is meant by " the record " of a tribunal's proceedings? He said[26]: " I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons, unless the tribunal chooses to incorporate them.

21. [1952] A.L.R. at 293.
22. For a more extensive discussion of the significance of the *Wilcox Mofflin Case* in relation to organised marketing schemes and s. 92 generally, see an article by Ross Anderson entitled *The Main Frustrations of the Economic Functions of Government caused by Section* 92 *and Possible Escapes therefrom*, to be published in the *Australian Law Journal*.
23. [1951] 1 K.B. 711.
24. 1 U.Q.L.J. No. 3, p.50.
25. [1952] 1 K.B. 338.
26. At p. 352.

If the tribunal does state its reasons, and those reasons are wrong in law, *certiorari* lies to quash the decision."

If this is a correct statement of the law, it will be necessary to reconsider the decision of the Supreme Court of Queensland in *R.* v. *Southern Division Railway Appeal Board, ex parte Noonan*,[27] where the Court held that written reasons given by the Board for its order did not form part of the record and were not subject to review on the ground of manifest error in proceedings for *certiorari*.

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## CONTRACT.

*Common (or Mutual) Mistake.*

An outstanding contribution to the law on the subject of mutual mistake (or as Cheshire and Fifoot more accurately call it, "common" mistake) as a ground of avoidance of contract was made by Fullagar J. in *McRae* v. *The Commonwealth Disposals Commission*,[1] in a judgment in which Dixon J. joined and with which McTiernan J. concurred. The facts of the case had a fantastic *Alice in Wonderland* quality about them, but briefly they amounted to a contract whereby the plaintiffs agreed to buy and the Disposals Commission to sell a wrecked oil tanker stated to be lying on a certain reef off the New Guinea coast, tenders for the purchase having been publicly called by the Commission. The plaintiffs fitted up a salvage ship and spent a considerable sum before they discovered that there was not and never had been any oil tanker wrecked anywhere near the stated location. They sued for damages for breach of contract. Fraud on the part of the Commission's officers was negatived, but they were found to be "reckless and irresponsible."

The defence, which was upheld by the trial judge, Webb J., was that the contract was void *ab initio* owing to the common mistake by both parties as to the existence of the subject matter. This has been widely recognised in text-books and judicial *dicta* as a ground of avoidance *ab initio*, and is usually said to rest on the authority of *Couturier* v. *Hastie*.[2] Fullagar J. accordingly made a close examination of that case and come to the conclusion that it did not support the proposition stated. Pointing out that that case was in substance an action by a seller for the price of goods which he was unable to deliver, he argued very convincingly that the judgment merely turned on a question of construction of the contract: was the seller entitled to payment on delivery of the shipping documents relating to the goods in any event, or only if

27. [1930] St. R. Qd. 10; discussed in 1 U.Q.L.J. No. 3, pp. 51-52.

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1. [1951] A.L.R. 771.

2. (1856) 5 H.L.C. 673.