CASE NOTES

DENNIS HOTELS PTY LTD v. THE STATE OF VICTORIA[1]

Appeal to Privy Council—Jurisdiction—Nature of inter se question

One of the matters that caused the most controversy during the Convention Debates at the end of the last century was the question of appeals to the Privy Council. When at last the Australian disputants found a compromise, it was discovered to be unacceptable to Great Britain, and it was only after more negotiation that the present Section 74 of the Constitution was decided upon. The main part of that section states that:

> No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States . . .

unless the certificate of the High Court be procured.

Thus, to be within the purview of Section 74, not only must the powers of Commonwealth and States be affected; they must further be affected *inter se*. The issue must be susceptible of giving rise to a conflict. This has often been expressed by saying that there must be a 'reciprocal effect' or a 'mutuality in the relation',[2] these being phrases of the present Chief Justice that have been given the approval of the Privy Council. Yet if there must be a 'reciprocal effect' there has been by no means unanimity as to what constitutes this requisite mutuality or reciprocity, and it can be argued that the phrase does little more than to put forward the rough concept underlying the words *'inter se'* without providing any adequate criterion.

Can the interpretation of an exclusive power involve an *inter se* question? It might have been thought that this was an obvious example; for as the power of the Commonwealth increases so must that of the States diminish, and as that of the States is diminished that of the Commonwealth is increased. On any view there would seem to be 'reciprocity' here. Yet recently the Privy Council stated *obiter* in *Nelungaloo Pty Ltd v. The Commonwealth*[3] that under these circumstances there is no *inter se* question. When the same case came before the High Court at a later stage,[4] Dixon J. dissented from this view, and it must also be regarded as rejected in the present case. However, in the *Nelungaloo* case, whilst rejecting this broad statement, Dixon J. said:

> 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

[1] [1961] 3 W.L.R. 268; [1961] Argus L.R. 904; (1961) 35 A.L.J.R. 119. Judicial Committee of the Privy Council; Viscount Simonds, Lord Reid, Lord Radcliffe, Lord Tucker, Lord Hodson. The advice of their Lordships was delivered by Lord Radcliffe.

[2] *E.g.* Dixon J. in *Ex parte Nelson (No. 2)* (1929) 42 C.L.R. 258, 272; approved by Privy Council in [1961] 3 W.L.R. 268, 274. There is a discussion of this approach by K. H. Bailey, 'The High Court's Jurisdiction in Constitutional Cases' (1935) 1 *Res Judicatae* 81.

[3] (1950) 81 C.L.R. 144. Also *Grace Brothers v. Commonwealth* [1951] A.C. 53.

[4] *Nelungaloo Pty Ltd v. The Commonwealth* (1952) 85 C.L.R. 545, 573-574.

> the definition of the exclusive power does not give a common boundary between State power and Federal power.[5]

The result is that in such cases an *inter se* question cannot be involved. This would be so because the extent of the exclusive power only answers the question where State powers are limited; the question where Federal powers are limited are already fixed, for they are measured by the wider non-exclusive power. This view has not always obtained full support: often the criticism has been that there is in fact a change in the quality of the Federal power, that there is a change from the absolute to the conditional.[6] It has also been suggested that the remarks of the present Chief Justice constituted an attempt to reconcile the new *dicta* of the Privy Council with what had been the commonly accepted view,[7] but it is difficult to accept this suggestion in view of the judgments of Dixon J. and Rich J. in *Ex parte Nelson (No. 2)*,[8] where a similar approach was taken many years before the Privy Council *dicta*.

In the present case not only did the Privy Council reject its earlier *dicta*[9] but it also rejected the modification of Dixon J. Their Lordships advised that even in the case where the exclusive power was part of a wider concurrent power the issue as to the extent of the exclusive power could involve an *inter se* question. The authority against this view was dealt with carefully. First, it was pointed out that the *dicta* of the Privy Council in earlier cases did not foreclose the matter; these *dicta* were not relevant to the issues in the cases concerned[10] and furthermore, when scrutinized at close quarters, the 'very generality is sufficient to raise doubts as to its correctness'.[11] Next the quoted explanation of the Chief Justice in the *Nelungaloo* case was taken and examined,[12] their Lordships saying that it would not

> be a satisfactory development to adopt his explanation. It is not one which proceeds by any necessity of reasoning from the observations made in the *Nelson* case[13] and the distinction between an exclusive power that forms part of a defined subject of a section 51 *placitum* and one that is co-extensive with such a subject seems to them [*i.e.* to their Lordships] to be somewhat too refined for a useful application of the words of section 74.[14]

Furthermore, the authorities on these two issues were by no means wholly against the Privy Council. If it were alleged that no exclusive power could give rise to an *inter se* question, then the contrary *dicta* of Sir Owen Dixon had to be overcome, as well as such decisions as *Attorney-General for New South Wales v. Collector of Customs for New South Wales*.[15] At the same time the *dicta* of the present Chief Justice in *Nelungaloo Pty Ltd v. The Commonwealth*[16] must be weighed against

[5] *Ibid.* 574.
[6] *E.g.* S. E. K. Hulme, 'What is an *Inter Se* Question' (1954). 6 *Res Judicatae* 337, 341. [7] *Ibid.* Also [1961] 3 W.L.R. 268, 279.
[8] (1929) 42 C.L.R. 258. [9] [1961] 3 W.L.R. 268, 274-275. [10] *Ibid.* [11] *Ibid.*
[12] [1961] 3 W.L.R. 268, 279. [13] (1929) 42 C.L.R. 258. [14] [1961] 3 W.L.R. 268, 279.
[15] [1909] A.C. 345; noted by Lord Radcliffe [1961] 3 W.L.R. 268, 274. Also *Baxter v. Commissioners of Taxation, N.S.W.* (1907) 4 C.L.R. 1087, noted by their Lordships: [1961] 3 W.L.R. 268, 274. [16] (1952) 85 C.L.R. 545, 574.

the exactly contrary conclusion come to by Evatt J. in *Hopper v. Egg and Egg Pulp Marketing Board (Vict.).*[17] In that case Evatt J. regarded the ambit of Section 90 as raising an *inter se* question.

Their Lordships considered that the *Ex parte Nelson (No. 2)*[18] case had no bearing on the present case, as that decision involved section 92; the reason why section 92 could not give rise to *inter se* problems was that no question of powers was raised in any form. Section 92 was a prohibition. The issue always was whether there had been the breach of a prohibition—the issue was never as to the extent of a power. Accordingly their Lordships considered that the decision in *Ex parte Nelson (No. 2)*[19] was not in point.[20]

Dealing thus with the relevant authorities, their Lordships preferred to consider the matter in the light of principle. They noted that there were two generally accepted descriptions of what constituted an *inter se* question. First, the general purpose of the section was to reserve to the High Court questions which arise in connection with the Federal distribution of power questions characteristic of federalism.[21] In the words of Lord Radcliffe:

> It would be a strange departure from this general conception if a case was not to be treated as raising an inter se question, although the single proposition that it put in issue was that a State had no power to make a particular enactment because under the Constitution the power to pass such legislation had been allotted to the Commonwealth alone.[22]

Secondly, if one were to ask, as did the present Chief Justice in *Ex parte Nelson (No. 2),* whether there was a 'reciprocal effect', then their Lordships considered that:

> Here again it seems that in any ordinary sense of language there is plainly a reciprocal effect upon the extent or supremacy of Commonwealth and State powers. . . .[23]

In finally deciding that an *inter se* question was involved in the present case the test was put forward in an important new form, by adhering to

> . . . the simpler conception that any decision that directly bears upon the constitutional distribution of powers between State and Commonwealth and so has a reciprocal effect on their delimitation is an inter se question.[24]

Whilst it is difficult to gauge this with any certainty, it is possible that

[17] (1939) 61 C.L.R. 665, 681.
[18] (1929) 42 C.L.R. 258.
[19] *Supra.*
[20] [1961] 3 W.L.R. 268, 277-278. The similar conclusion of Evatt J. is cited with approval: [1961] 3 W.L.R. 268, 278.
[21] Their Lordships cited Quick and Garran, *Annotated Constitution of the Australian Commonwealth* (1901) 757; Isaacs J., *Pirrie v. McFarlane* (1925) 36 C.L.R. 170, 196; Dixon J., *Nelungaloo Pty Ltd v. The Commonwealth* (1952) 85 C.L.R. 545, 570.
[22] [1961] 3 W.L.R. 268, 273-274. [23] *Ibid.* 274. [24] *Ibid.* 280.

this way of phrasing the matter may lead to a wider concept of the range of *inter se* questions.

The result of this case is that the Privy Council is denied jurisdiction in a class of case which, on the whole, was previously regarded to be within its competence. As early as 1907, Griffith C.J., speaking for a majority of the High Court, said:

> In our opinion, the intention of the British legislature was to substitute for a distant Court, of uncertain composition, imperfectly acquainted with Australian conditions, unlikely to be assisted by counsel familiar with those conditions, and whose decisions would be rendered many months, perhaps years, after its judgment has been invoked, an Australian Court, immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies, and whose judgments, rendered as the occasion arose, would form a working code for the guidance of the Commonwealth.[25]

In the light of this commonly held view the *Dennis Hotels* case would be welcome. Others have not always been of this opinion; but the main criticisms of the present case have not been on this ground, but rather, first, that the decision is not in accord with the previously held views on the law (due to the weight attached to the opinions of the present Chief Justice in the *Nelungaloo* case), and secondly, that if the earlier *dicta* must be overruled it would be a suitable occasion to rationalize the law in this difficult field. This, it is argued, the Privy Council has not done, but has been content to deal with the particular situations before them taking pains only to distinguish cases dealing with section 92 of the Constitution. On the other hand, there is very great difficulty in analysing the sub-sections of section 51 to see whether *inter se* questions can be involved, and it is understandable after their experience with unnecessary *dicta* that their Lordships should leave these intricacies alone until they come directly in point.

At the same time, however, their Lordships stated that if the sole question was whether a prohibition (such as section 92) had been contravened, then an *inter se* issue was not involved, for although the ultimate effect might be to make certain legislation impossible, yet there was no actual measurement of powers.[26] It seems then that even if a prohibition unlike section 92 affects States alone and not both States and Commonwealth there can nonetheless be no *inter se* questions raised. Supporting this their Lordships stated that the Constitution was:

> ... shaped as a whole and the structure that it assumed and the phrases and forms of expression that were adopted cannot be treated as of no importance in relation to each other, merely because it is thought that in substance a form that was not chosen might as well have been used in place of one that was.[27]

[25] *Baxter v. Commissioners of Taxation (N.S.W.)* (1907) 4 C.L.R. 1087, 1118.
[26] [1961] 3 W.L.R. 268, 277; also *Ex parte Nelson (No. 2)* (1929) 42 C.L.R. 258, 272-273, *per* Dixon J.
[27] [1961] 3 W.L.R. 268, 279.

However, it should be remembered that if this was the view of Dixon and Rich JJ. in *Ex parte Nelson (No. 2)*, the contrary was maintained by Isaacs and Starke JJ., so that it is not yet possible to regard all doubts as having been resolved.[28]

I. C. F. SPRY

CAFFOOR v. INCOME TAX COMMISSIONER[1]

Estoppel—Per rem judicatum—Issue estoppel—Income tax

This case came before the Judicial Committee of Privy Council on an appeal from the Supreme Court of Ceylon. The appeal was against assessments of income tax upon the income of a trust of which the appellants were trustees.

The respondent Commissioner had made five assessments for the revenue years 1950-1951 to 1954-1955 on the income of the trust. The appellants claimed that the trust was exempted from liability to tax as being an 'institution of a public character established solely for charitable purposes' within the meaning of the Ceylon Income Tax Ordinance of 1932. This question had in fact been decided in their favour by the Board of Review, constituted under the Ordinance on an appeal by the appellants in respect of an assessment for the previous year 1949-1950. The appellants, therefore, sought to treat this decision of the Board of Review as setting up an estoppel on the question of the exemption from tax of the trust income. Their plea was rejected in turn by the Commissioner of Income Tax, the Board of Review, the Supreme Court of Ceylon and finally by the Judicial Committee of the Privy Council. The Judicial Committee held that the decision of the Board of Review did not raise an estoppel *per rem judicatum*. (They further held that, on a construction of the trust in question, it was a family trust and not a trust of a public character established solely for charitable purposes.) The trust income was, therefore, not entitled to the exemption claimed.

On the question of estoppel, the arguments before the Judicial Committee were largely concerned with the status of the Board of Review, as to whether or not it was a judicial court of competent jurisdiction determining a dispute *inter partes*. It was argued by the appellants that *res judicata* applied because the status and the functions of the Board were not merely those of an estimating authority or other administrative tribunal, but were of a judicial nature and it made final decisions subject only to the dissatisfied party's right to appeal on questions of law. The respondent argued that no question of *res judicata* arose as, until the

[28] One writer takes the view that prohibition affecting the Commonwealth alone or the States alone should be regarded as capable of raising *inter se* questions, on the basis that whether the limits are phrased by way of definition of a power or by a prohibition the same thing is involved, that is, the point of demarcation of authority between Commonwealth and States: see Z. Cowen, 'Inter Se Questions and Commonwealth Exclusive Powers' (1961) 35 *Australian Law Journal* 239.

[1] [1961] 2 W.L.R. 794; [1961] A.C. 584; [1961] 2 All E.R. 436. Judicial Committee of Privy Council; Lord Morton of Henryton, Lord Radcliffe, Lord Morris of Borth-y-Gest and the Rt. Hon. L. M. D. de Silva. The judgment of the Committee was read by Lord Radcliffe.