[HIGH COURT OF AUSTRALIA.]

THE AMALGAMATED SOCIETY OF ENGINEERS . . . . . } CLAIMANT;

AND

THE ADELAIDE STEAMSHIP COMPANY LIMITED AND OTHERS . . . } RESPONDENTS.

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SYDNEY, *July* 28, 29; *Aug.* 1.

KNOX C.J., HIGGINS, GAVAN DUFFY, POWERS, RICH AND STARKE JJ.

High Court—Appeal to Privy Council—Decision as to limits inter se of constitutional powers of Commonwealth and States—Certificate—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 74.

Sec. 74 of the Constitution provides that no appeal shall be permitted to the King in Council from a decision of the High Court upon any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States unless the High Court shall certify that the question is one which ought to be determined by the King in Council, and that the High Court may so certify if satisfied that for any special reason the certificate should be granted.

Held, by *Knox* C.J., *Higgins*, *Rich* and *Starke* JJ. (*Gavan Duffy* and *Powers* JJ. dissenting) that a certificate under sec. 74 of the Constitution should not be granted in respect of the questions decided by the High Court in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.*, 28 C.L.R., 129.

MOTIONS.

A plaint was, on 19th September 1919, filed by the Amalgamated Society of Engineers in the Commonwealth Court of Conciliation and Arbitration to which the Adelaide Steamship Co. Ltd. and a large number of other employers, including the Minister for Trading Concerns, Western Australia, were made respondents.

On a summons taken out in the High Court by the claimant organization for an order under sec. 21AA of the *Commonwealth*

Conciliation and Arbitration Act, *Higgins* J. on 1st March 1920 found and decided that an industrial dispute within the meaning of the Constitution and of the *Commonwealth Conciliation and Arbitration Act* existed between the claimant and a large number of the respondents, and he reserved for further consideration the application so far as it concerned other respondents, including the Minister for Trading Concerns, Western Australia; and on the application of the claimant he stated a special case for the opinion of the Full Court of the High Court as to whether an industrial dispute could exist between an organization of employees and the Minister for Trading Concerns, Western Australia. The case was heard by the Full Court, which on 31st August 1920 gave certain answers to the questions asked: *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1). Subsequently the summons again came on for hearing before *Higgins* J., who on 11th May 1921 made an order by which he found and decided that an industrial dispute existed between the claimant and the Minister for Trading Concerns, Western Australia.

A further log or demand having been served by the Amalgamated Society of Engineers upon a large number of employers in the several States of the Commonwealth including as respondents the Minister of Public Works of New South Wales and the Minister for Trading Concerns, Western Australia, on 23rd August 1920, after a conference which did not result in an agreement, the President of the Commonwealth Court of Conciliation and Arbitration, pursuant to sec. 19 (*d*) of the *Commonwealth Conciliation and Arbitration Act*, referred into that Court an alleged dispute between the organization and the persons or bodies who had been served with the log. On 11th May 1921, in the Commonwealth Court of Conciliation and Arbitration—there being doubt as to the Ministers being the proper respondents as employers, and counsel for New South Wales admitting that the facts existed which were necessary to constitute a dispute (within the meaning of the Constitution) with that State as a respondent if the State were subject to the powers and jurisdiction of that Court—the President, at the request of the claimant organization and without any objection on the part of the State other than

(1) 28 C.L.R., 129.

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an objection to the jurisdiction of the Court, added as respondents His Majesty the King in right of the State of New South Wales and the State of New South Wales. On the same day, in the High Court, upon a summons taken out by the organization on 11th November 1920 for an order under sec. 21AA of the *Commonwealth Conciliation and Arbitration Act*, *Higgins* J. made an order by which he found and decided that a dispute existed between the organization and the parties named as respondents, including His Majesty the King in right of the State of New South Wales, the State of New South Wales and the Minister for Trading Concerns, Western Australia.

A motion was now made to the High Court on behalf of the Minister for Trading Concerns, Western Australia, for a certificate under sec. 74 of the Constitution that the question involved in the making of the order by *Higgins* J. of 11th May 1921 first above mentioned, in so far as it related to the Minister for Trading Concerns, Western Australia, was a question that ought to be determined by His Majesty the King in Council, or, alternatively, that such questions of law as came within sec. 74 and as were involved in the making of such order were questions which ought to be determined by His Majesty the King in Council; and for a certificate under sec. 74 that the questions involved in the answers given by the Full Court of the High Court on 31st August 1920 to the questions asked by the special case stated by *Higgins* J. were questions that ought to be determined by His Majesty the King in Council, or, alternatively, that such questions of law as came within sec. 74 and were involved in such answers were questions that ought to be determined by His Majesty the King in Council.

A motion was also made to the High Court on behalf of His Majesty the King in right of the State of New South Wales, the State of New South Wales and the Minister for Trading Concerns, Western Australia, for a certificate under sec. 74 that the question involved in the making of the other order by *Higgins* J. of 11th May 1921 in the High Court, in so far as it related to the moving respondents, was a question that ought to be determined by His Majesty the King in Council, or, in the alternative, that such questions of law as came within sec. 74 and as were involved in the

making of such order were questions that ought to be determined by His Majesty the King in Council.

Both motions were heard together.

Sir Edward Mitchell K.C. (with him *Owen Dixon*) applied for leave to intervene on behalf of the State of New South Wales in respect of the first motion, and on behalf of the States of Victoria, Tasmania, South Australia and Western Australia in respect of both motions.

KNOX C.J. (for the majority of the Court). You may take leave.

HIGGINS J. I dissent.

STARKE J. I also dissent. I think not only that the intervention is unnecessary but also that the application is for a purpose which is not legitimate.

Sir Edward Mitchell K.C. and *Owen Dixon*, for the Minister for Trading Concerns, Western Australia, and the States of New South Wales, Victoria, Tasmania, South Australia and Western Australia, in support of the motions. The questions involved in the decisions as to which a certificate under sec. 74 of the Constitution is asked are: (1) whether the rule laid down in *D'Emden* v. *Pedder* (1), which is stated in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employees' Association* (2) to be reciprocal, has any reciprocal operation, and, if not, what is the rule which applies to attempts by the Commonwealth Parliament to interfere with the exercise of the legislative or executive power of the States; (2) whether the alternative ground for the decision in the latter case, which is based on the maxim *Expressio unius est exclusio alterius*, supports that decision; (3) whether the King in right of a State is or is not subject to the process or jurisdiction of the Commonwealth Court of Conciliation and Arbitration; (4) whether, in view of the fact that the power of legislation conferred by pl. xxxv. of

(1) 1 C.L.R., 91, at p. 111. (2) 4 C.L.R., 488.

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sec. 51 of the Constitution is expressly granted subject to the Constitution, the affirmative provision in sec. 106 does not imply a prohibition against the Constitution of a State being affected by any legislation of the Commonwealth Parliament as distinct from any provision of the Constitution itself; (5) whether the principles of law involved in holding that *D'Emden* v. *Pedder* (1) may be supported under sec. 109 of the Constitution, but that *Deakin* v. *Webb* (2) and *Baxter* v. *Commissioners of Taxation (N.S.W.)* (3) were wrongly decided, are right; (6) whether, upon the proper construction of the *Commonwealth Conciliation and Arbitration Act*, if it cannot apply to the King in right of a State the whole of it is invalid; (7) whether a dispute between the Crown in right of a State and its servants can be an industrial dispute within the meaning of sec. 51 (xxxv.) of the Constitution; (8) whether the decision is correct in respect of the principles upon which the decision in *Chaplin* v. *Commissioners of Taxes (S.A.)* (4) is said to be upheld. As to some of these questions an appeal would lie to the Privy Council without a certificate, and one of the reasons why a certificate should be granted is that all the questions may be determined together. The great importance of the questions is also a reason for granting a certificate. Before the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (5) was given, the position was that there had been an equal number of Justices in favour of each of the views there put forward. In view of the decision that *D'Emden* v. *Pedder* was upheld and *Deakin* v. *Webb* was overruled, the law is left in a state of doubt. The result is that there is a stronger reason for granting a certificate than there was in *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (6). The reversal of principles which have stood for so many years in this Court is even a stronger reason for granting a certificate than the fact that there was in the latter case an equal division of opinion. The fact that this Court purported to follow the principles laid down by the Privy Council in *Webb* v. *Outrim* (7) is a reason for allowing the

(1) 1 C.L.R., 91.
(2) 1 C.L.R., 585.
(3) 4 C.L.R., 1087.
(4) 12 C.L.R., 375.
(5) 28 C.L.R., 129.
(6) 15 C.L.R., 182, at p. 234.
(7) (1907) A.C., 81; 4 C.L.R., 356.

Privy Council to say whether this decision is within those principles. The "special reason" referred to in sec. 74 of the Constitution is any reason upon which the High Court thinks fit to act, so long as there is something which takes the case out of the ordinary run of High Court matters. The decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1) is fundamental, in that it applies to all the legislative powers in sec. 51 of the Constitution which delimit the spheres of the Commonwealth and the States, and it is in flat opposition to the doctrines which had been laid down and acted upon by this Court until 1918, and in that year a proposed attack upon them in *Federated Municipal and Shire Council Employees' Union of Australia* v. *Melbourne Corporation* (2) was stopped by the Court.

[HIGGINS J. Personally, I should be glad of any guidance from the Judicial Committee on this question; but the question is as to our duty as members of this Court under sec. 74.]

Robert Menzies, for the Amalgamated Society of Engineers. The question is not whether the Privy Council is a fit body to determine the matter but whether this Court is not a fit body to determine it. The onus is upon those who desire to appeal to the Privy Council to show special reasons. The decision of the Privy Council in *Webb* v. *Outrim* (3) was not acted upon in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1) as covering and concluding the matter, but the majority of the Justices came to an independent decision. The Court should follow the principles laid down in *Deakin* v. *Webb* (4) as to the granting of a certificate. The reasons which existed in *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General for the Commonwealth* (5) for granting a certificate do not exist in this case. There the Court was equally divided in opinion and thought that under those circumstances the decision would not have the authority which a decision of the High Court should have. The opinions of Justices who had taken part in prior decisions but not in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1) should not be taken into consideration. This Court has full

(1) 28 C.L.R., 129.
(2) 26 C.L.R., 508.
(3) (1907) A.C., 81; 4 C.L.R., 356.
(4) 1 C.L.R., at p. 621.
(5) 15 C.L.R., 182.

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power to overrule its previous decisions, and the Justices are bound to give effect to their own views of the law (*Australian Agricultural Co.* v. *Federated Engine-Drivers' and Firemen's Association of Australasia* (1)). The decision was not given with any doubt, and therefore cannot be said to be of slight authority. This Court should not abdicate its responsibility unless it feels that it cannot with satisfaction to itself express a final opinion on the matter (*Deakin* v. *Webb* (2) ; *Municipal Council of Sydney* v. *The Commonwealth* (3) ; *Flint* v. *Webb* (4)). [Counsel also referred to *Tramways Case* [*No.* 1] (5).]

Leverrier K.C. (with him *H. E. Manning*), for the Commonwealth. A certificate should not be granted in this case. When the case of *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (6) first came before this Court it thought that in the then state of the authorities the whole matter should be reviewed. The Court itself took the step of inviting the Commonwealth and the States to be represented on the argument, and announced that the whole matter would be open for consideration, and that counsel might dispute the correctness of any prior decision. The Court set itself out to attain finality, having pointed out the impossibility of reconciling a number of previous authorities. The Court arrived at its decision by a large majority, that decision was clear and definite, and the matter was not left in doubt in the minds of the majority. The Court should not grant a certificate where by a large majority the Court is clear as to the proper decision to be given and there does not exist any special reason, such as that the decision affects other parts of the Empire, for saying that the Privy Council should determine the matter. The importance of the matter is not a reason for granting a certificate, for sec. 74 only deals with matters which are important (*Deakin* v. *Webb* (7)).

Sir Edward Mitchell K.C., in reply, referred to *In re Wi Matua's*

(1) 17 C.L.R., 261, at p. 275.
(2) 1 C.L.R., at p. 621.
(3) 1 C.L.R., 208, at p. 242.
(4) 4 C.L.R., 1178.
(5) 18 C.L.R., 54.
(6) 28 C.L.R., 129.
(7) 1 C.L.R., at p. 626.

Will (1); *Attorney-General for New South Wales* v. *Collector of Customs for New South Wales* (2); *R.* v. *Sutton* (3).

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Cur. adv. vult.

KNOX C.J. In this case the majority of the Court are of opinion that the application for a certificate under sec. 74 of the Constitution should be refused. My brothers *Gavan Duffy* and *Powers* dissent from this decision.

Motions dismissed.

Solicitor for the applicants, *F. L. Stow*, Crown Solicitor for Western Australia.

Solicitor for the organization, *H. H. Hoare.*

Solicitors for the interveners, *J. V. Tillett*, Crown Solicitor for New South Wales; *E. J. D. Guinness*, Crown Solicitor for Victoria; *A. Banks-Smith*, Crown Solicitor for Tasmania; *F. W. Richards*, Crown Solicitor for South Australia; *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) (1908) A.C., 448.
(2) 5 C.L.R., 818.
(3) 5 C.L.R.,789.