Solicitor for the State of New South Wales, *J. E. Clark*, Crown Solicitor for the State of New South Wales.

Solicitor for the Commonwealth, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitor for the State of Victoria, *F. G. Menzies*, Crown Solicitor for the State of Victoria.

Solicitor for the State of Tasmania, *A. Banks-Smith*, Crown Solicitor for the State of Tasmania.

H. D. W.

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NEW SOUTH WALES v. THE COMMONWEALTH [No. 1].

[HIGH COURT OF AUSTRALIA.]

THE STATE OF NEW SOUTH WALES . . APPLICANT; PLAINTIFF,

AND

THE COMMONWEALTH AND OTHERS . RESPONDENTS. DEFENDANTS,

[No. 2.]

H. C. OF A. 1932.

SYDNEY, *April* 18, 22.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Appeal—Appeal to Privy Council—Limits inter se of constitutional powers of Commonwealth and States—Application to High Court for certificate—Special reasons—Appropriation by Commonwealth of State revenues—Division of opinion of Court—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 74, 105A—*Constitution Alteration* (*State Debts*) 1928 (*No.* 1 *of* 1929), *sec.* 2—*Financial Agreement Act* 1928 (*No.* 5 *of* 1928)—*Financial Agreement Validation Act* 1929 (*No.* 4 *of* 1929)—*Financial Agreements Enforcement Act* 1932 (*No.* 3 *of* 1932)—*Financial Agreements* (*Commonwealth Liability*) *Act* 1932 (*No.* 2 *of* 1932).

On an application to the High Court for a certificate under sec. 74 of the Constitution that questions of law as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales involved in the case of *New South Wales* v. *The Commonwealth* [*No.* 1], *ante*, 155, were questions which ought to be determined by His Majesty in Council,

Held, by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the application should be refused.

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NEW SOUTH WALES v. THE COMMONWEALTH [No. 2].

MOTION.

In an action brought by the State of New South Wales against the Commonwealth and others, the plaintiff claimed a declaration that the whole of the *Financial Agreements (Commonwealth Liability) Act* 1932 and the whole of the *Financial Agreements Enforcement Act* 1932 were *ultra vires* the Parliament of the Commonwealth and were invalid, and an order restraining the Commonwealth from enforcing or causing to be enforced the provisions of those Acts. After issuing the writ the plaintiff applied for an interlocutory injunction against the defendants, and the matter (which was treated as the trial of the action) was heard by the Full Court of the High Court on 22nd, 23rd, 24th, 28th and 29th March 1932. On the last mentioned date judgment was reserved. During the hearing leave was given by the Court to the States of Tasmania and Victoria to intervene, and such States were heard by the Court in support of the application. On 6th April 1932 *Gavan Duffy* C.J. made the following announcement: —" The Court has considered this case and has reached a conclusion which I shall now state. The members of the Court will give their reasons on a later date. *Evatt* J. and I are of opinion that Part II. (Enforcement against State Revenue) of the *Financial Agreements Enforcement Act* 1932 is invalid. *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. are of opinion that Part II. (Enforcement against State Revenue) of the *Financial Agreements Enforcement Act* 1932 is a valid law of the Commonwealth and that no declaration of invalidity should be made as claimed by the writ." On 21st April 1932 the reasons of the members of the Court for their respective judgments were published: See *New South Wales* v. *The Commonwealth* [*No.* 1] (1).

On 18th April an application was made to the High Court on behalf of the State of New South Wales for a certificate under sec. 74 of the Constitution that the questions as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of New South Wales involved in the matter were questions which ought to be determined by His Majesty in Council for the following special reasons: (*a*) the division of opinion in the Court on the questions of law involved; (*b*) the dicta of certain Justices of the Court in *Australian Railways Union* v. *Victorian Railways Commissioners* (2); (*c*) the transcendent importance of such questions to the States; (*d*) the circumstances that the decision of the Court in this matter (i.) stripped the plaintiff State of the power to appropriate,

(1) *Ante*, 155.

(2) (1930) 44 C.L.R. 319.

control and expend its own revenue, (ii.) enabled the Commonwealth to appropriate revenue of the State contrary to the will of the Parliament of the State, (iii.) impaired the officers of the plaintiff State in discharging the powers and functions imposed on them by the legislation of the State, (iv.) enabled the Commonwealth to destroy the capacity of officials lawfully appointed by the State, (v.) enabled the Commonwealth to deprive the said State of the power to discharge its functions including its exclusive functions, and (VI.) affected the other States of Australia and enabled the Commonwealth to seize the revenues of the States of Australia contrary to the will of their Parliaments in satisfaction of its claims under the Agreements made between the Commonwealth and the States under sec. 105A of the Constitution (*Constitution Alteration (State Debts)* 1928 (No. 1 of 1929), sec. 2) while the States were, in respect of any claims they might have under the said Agreements, limited to such money or relief as the Commonwealth Parliament provided in that behalf.

Browne K.C. (with him *Berne*), for the applicant. The questions are such as ought to be determined by His Majesty in Council. Division of opinion amongst the members of the Court is a good reason for the granting of a certificate under sec. 74 (*Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (1)). The decision sought to be appealed from is in effect the decision of a single Justice, because had a member of the majority decided the other way the decision of the Court would have been that the Acts in question were invalid. The question whether a State is to be in the position of having its revenue seized by the Commonwealth and deprived of the right to deal with its own affairs should not rest on the decision of any single Justice. State revenue should be protected from interference by the Commonwealth (*Municipal Council of Sydney* v. *The Commonwealth* (2)).

[STARKE J. referred to *Baxter* v. *Commissioners of Taxation (N.S.W.)* (3).]

Sec. 105A of the Constitution, under which the *Financial Agreements Enforcement Act* is purported to have been made, was never intended

(1) (1912) 15 C.L.R. 182.
(2) (1904) 1 C.L.R. 208, at p. 234.
(3) (1907) 4 C.L.R. 1087.

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to be a means of taking away from the States of the Commonwealth the right of responsible government. The State of New South Wales desires the opportunity of having the matter dealt with by a higher tribunal. If the Court's interpretation of the section be the correct one, the States would be placed in a very serious position as regards the carrying out of their functions.

E. M. Mitchell K.C. (with him *Ham* K.C. and *Nicholas*), for the respondents. The reasons advanced in support of the application are not sufficient to justify the granting of a certificate (*Deakin and Lyne* v. *Webb* (1)). The importance of the case is not in any sense a ground for granting the application (*Deakin and Lyne* v. *Webb* (2); *Flint* v. *Webb* (3)). The High Court should be the final tribunal on constitutional matters unless the applicant discharges the onus of showing special reasons (*Flint* v. *Webb* (4)). The fact that there was a difference of opinion of the Justices is not a reason why a certificate should be granted (*Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (5), *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (6) and *Ex parte Nelson* [*No.* 2] (7)). As to whether the refusal to grant the certificate would operate to inconvenience the community should not be considered by the Court. If it is considered, it is a reason which operates in favour of refusing to grant a certificate (*Deakin and Lyne* v. *Webb* (8)). This Court has the right, and should exercise it, of finally determining the interpretation of sec. 105A of the Constitution, a section upon which the people of the Commonwealth voted, and which has no counterpart in any other part of the world. The only question involved has reference to a dispute between the Commonwealth Government and a State Government as to the obligation to make payment or provision for the payment of certain sums of money. Such question comes within the category of "local affairs" in respect of which the High Court should be the final arbiter. Whether considered separately or collectively, the reasons urged in support of the application are not adequate reasons.

(1) (1904) 1 C.L.R. 585, at p. 622.
(2) (1904) 1 C.L.R., at pp. 628-629, per *Barton* J.
(3) (1907) 4 C.L.R. 1178.
(4) (1907) 4 C.L.R., at p. 1190, per *Isaacs* J
(5) (1907) 4 C.L.R. 1087; (1908) 5 C.L.R. 398.
(6) (1921) 29 C.L.R. 406.
(7) (1929) 42 C.L.R. 258.
(8) (1904) 1 C.L.R., at p. 628, per *Barton* J.

Browne K.C., in reply. Even if separately they are insufficient, the reasons taken together constitute ample grounds for the granting of the certificate. If the State is not carrying out its obligations under the Financial Agreements it is because of its inability to do so without wrecking its own public services. A State is its own judge as to how the public revenues of the State should be appropriated.

Cur. adv. vult.

April 22.

The following written judgments were delivered :—

GAVAN DUFFY C.J., RICH, STARKE AND DIXON JJ. Sec. 74 of the Constitution provides that no appeal shall be permitted 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 any State unless for any special reasons the High Court shall certify that the question is one which ought to be determined by the Privy Council.

A constitutional rule is thus established by which conflicts between the State and the Federal power are to be decided finally in this Court, but in special circumstances an exception may be allowed if this Court is of opinion that an appeal should be brought to the Privy Council. It is not possible to formulate in advance a definition of the cases which call for the special exercise of this Court's discretion, but they must be rare.

In the present case the issue between the parties raised important constitutional questions, and immediate answers to those questions were necessary in order to determine whether the revenues of the State may be intercepted by the Commonwealth, and applied in satisfaction of a liability which the State has undoubtedly assumed and which, the defendants allege, it has failed to discharge. The Commonwealth was already exercising the power which it claims to possess; the State was actually resisting the exercise of the power. This issue is by its very nature one which cannot be allowed to remain in uncertainty but requires an immediate and a final decision, and we consider that by the Constitution the responsibility of deciding it once for all has been cast upon this Court.

The application for a certificate under sec. 74 of the Constitution should be refused.

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EVATT J. This Court is asked to certify, under sec. 74 of the Constitution, that certain questions as to the validity of the main parts of the *Financial Agreements Enforcement Act* are questions "which ought to be determined" by His Majesty in Council. The Court may certify "if satisfied that for any special reason" the certificate should be granted.

Has "any" special reason been shown for granting the certificate?

The main question in the action was whether Part II. of the Act was valid. It was adjudged to be valid by a majority of four Justices to two. But the Chief Justice was one of the minority, so that a decision in the opposite sense by any one of the majority would have resulted in the Act being declared *ultra vires*. In a sense, therefore, the interpretation of the Constitution in relation to the question, depended upon the decision of a single Justice. The division of opinion is a matter to which importance attaches.

I next turn to the nature of the questions involved. They were obviously of the very greatest importance. Leave was granted to the States of Victoria and Tasmania to intervene in order to support the legal contentions advanced on behalf of the State of New South Wales. For the first time, the meaning of sec. 105A of the Constitution had to be investigated. The scope and application of sec. 51 (XXXIX.) in its relation to the judicial and executive organs of the Commonwealth, had to be determined.

It was submitted by the State of New South Wales that the Commonwealth Act of Parliament declared to be valid by the majority of the Court, does five things, namely,

(1) strips the plaintiff State of the power to appropriate, control and expend its own revenue;

(2) enables the Commonwealth to appropriate revenues of the State contrary to the will of the Parliament of the State;

(3) impairs the officers of the plaintiff State in discharging the powers and functions imposed on them by the legislation of the State;

(4) enables the Commonwealth to destroy the capacity of officials lawfully appointed by the State;

(5) enables the Commonwealth to deprive the said State of the power to discharge its functions including its exclusive functions.

In my opinion these submissions are substantially correct. No further comment is necessary to indicate how the State of New South Wales is being, and how any State of the Commonwealth in like position may be, placed by the statute.

The action taken against the State of New South Wales has not been preceded by any declaration of this, or any Court of law, that that State is in default. But it is authorized by sec. 6 of the Act, which enables the revenues of the State to be seized before the pronouncement of any judicial decision that any money is owing. For sec. 6 has also been held by the majority to be valid, although for somewhat differing reasons.

The Court has decided that the King's State revenues, collected by His State Parliaments for the express purpose of exercising many functions which belong exclusively to the King in right of the State, are liable to seizure by the Executive Government of the Commonwealth. It has been pointed out in the applicant's affidavit, by way of illustration, that moneys belonging to the Unemployment Relief Fund, established for the prevention and relief of unemployment in the State of New South Wales, are liable to seizure by the Commonwealth Parliament under the Act of Parliament and the resolution of the Federal House. Yet the State Parliament can, and the Commonwealth Parliament cannot, legislate in respect to the subject matter of unemployment.

No one can deny that the situation between Commonwealth and State created by the full application of the challenged legislation is one of the utmost seriousness. "Sec. 74," said *Higgins* J. in *Flint* v. *Webb* (1),

> "seems to indicate that the question of giving a certificate should turn on the character of the question. For instance, if extra-Australian rights were incidentally involved, or, perhaps, if there were signs of dangerous disturbance between States, or between a State and Commonwealth, such as the decision of the High Court would not allay, it would probably be well to certify 'that the question is one which ought to be determined by His Majesty in Council.'"

The application of the Act to the State of New South Wales of itself shows the presence of violently conflicting aims and policies of the Governments (and therefore the Legislatures) of the two authorities.

On one previous occasion a certificate was granted. There the High Court was equally divided in opinion but the question involved did not compare in importance with those we are now considering.

If this Court is satisfied that *any* special reason exists for certifying

(1) (1907) 4 C.L.R., at pp. 1192-1193.

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that a question should be determined by the Privy Council, it may and should certify. In the present case the reasons are not one but several. It is said that inconvenience would be caused by the delay involved in obtaining the Privy Council's decision. That is true enough. But this is more than balanced by the inconvenience to which the State is being put under the authority of the challenged enactment. It may be that the opinion of the Privy Council would pronounce the action taken to be, not merely inconvenient but unlawful. There is no reason whatever why the appeal could not be expedited and disposed of by the Privy Council within a very short time.

In my opinion this Court should not be astute to refuse a certificate when such a great issue arises as the present one. No case in which a certificate was refused resembles the present case in its importance.

Having reached the conclusion that the present case not only justifies, but imperatively calls for, a decision from the highest legal tribunal in the Empire, it is my duty to say so.

In my opinion a certificate should be granted.

McTIERNAN J. The State of New South Wales has, in this proceeding, applied for a certificate under sec. 74, so that it may appeal to His Majesty in Council against the judgment of this Court by which it dismissed an action in which the State claimed a declaration that the *Financial Agreements Enforcement Act* 1932 is *ultra vires* the Parliament of the Commonwealth of Australia and invalid.

It is firmly established by the decisions that an application for a certificate under sec. 74 cannot succeed unless a special reason is shown why the certificate should be granted. In this application the two main reasons which were relied upon were that the members of this Court were divided in their opinions as to the validity of Part II. of the above-mentioned Act, and that the issues raised by the challenge made by the State to the validity of the Act, and the consequence of the failure of that challenge, were of transcendent importance to the applicant and to the other States of the Commonwealth. In this case I do not think that either of these reasons is, in itself, a special reason for granting a certificate; and I am

also of opinion that the two reasons in combination should not, in this case, be regarded as a special reason for acceding to the application. So far as regards the reason depending upon the division of the Court, it was stated by counsel for the applicant that in effect the action was dismissed on the opinion of one Justice amongst the majority, because if one of the four Justices who were of opinion that the action had failed had been of the contrary opinion, the Court would have been evenly divided and the action would have succeeded. This submission is too supposititious in character to have any substance. In the applications which were made under sec. 74 in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1), *Flint* v. *Webb* (2), *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (3) and *Ex parte Nelson* [*No.* 2] (4) respectively, the Court declined to accede to the view that division of opinion was a special reason for granting a certificate. So far as regards the reason founded on the importance of the case, it is obvious that the issues of law and the consequences of the decision are of very great importance. But it does not necessarily follow that the unsuccessful party should be allowed to appeal to His Majesty in Council against the Court's decision on those issues. The framers of the Constitution must have foreseen that questions of transcendent importance to the States and the Commonwealth would arise as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States. Nevertheless, the Constitution prohibits an appeal to His Majesty in Council from the decision of this Court on any such question, unless this Court certifies that the question is one which ought to be determined by His Majesty in Council. The special functions and responsibilities which are entrusted to the Court are described in *The Commonwealth* v. *New South Wales* (5) in these words :—" It " (the High Court) " is the tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court. It has very special functions in relation to the powers, rights and

(1) (1907) 4 C.L.R. 1087 ; (1908) 5 C.L.R. 398.
(2) (1907) 4 C.L.R. 1178 ; (1908) 5 C.L.R. 398.
(3) (1921) 29 C.L.R. 406.
(4) (1929) 42 C.L.R. 258.
(5) (1923) 32 C.L.R. 200, at p. 209.

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obligations springing from the Constitution and the laws made under it—matters which concern the Commonwealth as the organization of the whole population of this Continent, the States in their relations to the Commonwealth and to each other, and the people in their relation to the Commonwealth and to the States regarded as constituent parts of the Commonwealth." Reference may also be made to *Deakin and Lyne* v. *Webb* (1) and to *Flint* v. *Webb* (2). It should be noted that the Court refused an application for a certificate to appeal against the judgment in the *Engineers' Case* (3). The vast importance of that case to the States is obvious upon a perusal of the judgment of the Court, and does not need to be explained. Since the foundation of the Court a certificate has been granted in one case only—*Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (4).

In the present case there are strong countervailing reasons against granting a certificate, even if the importance of the matter were a special reason for granting it. In the action the Court became aware that it was alleged by the Commonwealth that the applicant is indebted to the Commonwealth for moneys due and payable under and by virtue of the Financial Agreement which was validated on the part of the Commonwealth by the *Financial Agreement Validation Act* 1929, and on the part of New South Wales by the *Financial Agreement Ratification Act* 1928. A perusal of the Agreement shows the supreme importance of the prompt and final determination of any dispute between the Commonwealth and any State as to the liability to pay moneys under the Agreement. Moreover, the nature of the measures which the *Financial Agreements Enforcement Act* authorizes to be taken are such that delay in arriving at finality as to the validity of the Act would have the most serious consequences. For example, pending the hearing of the appeal, unless the Commonwealth is to be restrained from taking any action whatever under the Act for the recovery of moneys due under the Agreement until and unless the Privy Council decides that the Act is valid, the debtors of the State would be gravely embarrassed. The attendant suspense and uncertainty would be likely to cause

(1) (1904) 1 C.L.R., at pp. 622, 628.
(2) (1907) 4 C.L.R., at p. 1191.
(3) (1921) 29 C.L.R. 406.
(4) (1912) 15 C.L.R. 182.

the most serious embarrassment to the Commonwealth and also to the States. If it were sought to avert these consequences by staying any action by the Commonwealth to recover moneys due under the Agreement, the Commonwealth would be seriously embarrassed also by that action. It is, therefore, necessary that finality in the determination of the question of the validity of the Act should not be delayed by granting a certificate. This, indeed, appears to be a case of the kind which the Constitution intended should be finally determined in Australia and in respect of which the principle of the maxim *sit finis litium* appears to be very much in point. The Act, moreover, with respect to which a declaration of invalidity is sought, is expressed to have a duration of two years only. It has been stated, on behalf of the applicant, that the enforcement of Part II. of the Act against it will paralyze the State because it is unable to pay the moneys which are alleged to be due and payable by it to the Commonwealth, and hence a certificate should be granted to challenge the judgment which determines that part of the Act to be valid. Whether the State is able or unable to pay the moneys, which it agreed to pay, is a question which cannot be decided by this Court. But assuming that the consequences to the State from the enforcement of the Act are very serious, that fact cannot be considered apart from the serious consequences of non-payment by the State to the Commonwealth and also the embarrassment and uncertainty already mentioned, in which the Commonwealth and the State would be engulfed pending the hearing of the appeal if a certificate were granted.

The application should be refused.

Application for a certificate under sec. 74 of the Constitution refused.

Solicitor for the applicant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitor for the respondents, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.