[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN NATIONAL AIRWAYS PROPRIETARY LIMITED . . . . Applicant;
Plaintiff,

AND

THE COMMONWEALTH AND OTHERS . Respondents.
Defendants,

[No. 2.]

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MELBOURNE, *March* 14.

SYDNEY, *April* 17.

Latham C.J., Starke, Dixon and Williams JJ.

High Court—Appeal to Privy Council—Decision as to limits inter se of constitutional powers of Commonwealth and States—What constitutes—Certificate that question ought to be determined by Privy Council—Grounds for granting—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*i.*) (*xxxix.*), 74, 92, 122—*Australian National Airlines Act* 1945 (*No.* 31 *of* 1945).

The plaintiff company, desiring to appeal to the Privy Council from the decision of the High Court (*ante*, p. 29) in so far as it did not accede to the plaintiff's claim that the *Australian National Airlines Act* 1945 was wholly invalid, applied to the High Court for a certificate under s. 74 of the Constitution that, so far as it was a question as to the limits *inter se* of the powers of the Commonwealth and the States, the question whether the provisions of the Act which had not been declared invalid were within the legislative power of the Commonwealth Parliament under s. 51 (i.) and (xxxix.) of the Constitution was one which ought to be determined by His Majesty in Council. In support of the application the company contended, first, that the decision was one of great importance, and second, that if their Lordships of the Privy Council should see fit to grant special leave to appeal it would be very desirable that all the issues in the case should be open for decision.

Held (1) that the question for which the certificate was sought raised a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States within the meaning of s. 74 of the Constitution; (2) that the application should be refused.

Jones v. *Commonwealth Court of Conciliation and Arbitration*, (1917) A.C. 528; 24 C.L.R. 396, applied.

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MOTION.

Australian National Airways Pty. Ltd. desired to appeal to His Majesty in Council from the decision of the High Court (1) in so far as it did not declare that the *Australian National Airlines Act* 1945 was wholly invalid. It now applied to the High Court for an order " certifying under section 74 of the Constitution . . . that the following question so far as it is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States is one which ought to be determined by His Majesty in Council, namely :—' Whether the provisions of the *Australian National Airlines Act* 1945 (so far as the same have not already been declared by the judgment of this court dated the 14th day of December 1945 to be invalid) are within the legislative power of the Parliament of the Commonwealth under section 51 (i.) and (xxxix.) of the Constitution.' "

Coppel K.C. (with him *Sholl*), for the applicant. The order made on the demurrer in the action in which the present applicant was plaintiff was a final judgment completely disposing of the action by granting in express terms part of the relief sought in the statement of claim and, by implication, refusing the rest of the relief sought. There is, therefore, an appealable judgment refusing certain relief. The applicant desires to contend before the Privy Council that the Commonwealth has no power under s. 51 (i.) of the Constitution to create a corporation with power to engage in inter-State trade. This goes to the validity of s. 6 of the *Airlines Act*, and, indeed, to the whole structure of the Act. The Privy Council could—without inconsistency with any existing decision—determine that this does not raise any question of the limits *inter se* of the powers of the Commonwealth and the States and could grant leave to appeal on that basis. If it is so decided, it would have full jurisdiction over the matters which the applicant desires to argue. But, if it decides otherwise, the applicant will—in the absence of a certificate of this Court—not be able to argue this point. There are other grounds on which the Privy Council could grant the applicant leave to appeal ; for instance, the argument is open to the applicant, without a certificate, that the Act, being in part invalid, is inseverable and must, therefore, be declared wholly invalid. A similar argument may be presented by the other plaintiffs who were concerned in the demurrers. It is undesirable that the Privy Council should be asked to determine this matter without being in a position to pass upon the validity

(1) *Ante*, p. 29.

of the other provisions of the Act. This is relied on as a special circumstance which would justify this Court in granting the present application. The far-reaching importance of the questions raised, if not in itself such a special circumstance, has at least this significance, that the Court would not be justified in refusing the application on the ground that no matter of importance is involved. Whether the contention mentioned does or does not raise any "*inter se*" question is debatable. It may be suggested that the question whether the Commonwealth has power to create a trading corporation is one the answer to which will not enlarge or diminish the powers of the States. This Court could, without deciding this question, grant a certificate that the question, if and in so far as it is an *inter se* question, is proper to be determined by the Privy Council: See *Colonial Sugar Refining Co. Ltd.* v. *Attorney-General (Cth.)* (1).

Tait K.C. (with him *Phillips* K.C. and *T. W. Smith*), for the respondents. The applicant's contention raises an *inter se* question, and the Court should so determine before it considers whether a certificate should be granted. This is of importance on the question whether any special circumstances have been shown to justify the granting of the certificate, because those circumstances should be such as bear upon the conflict of powers as between Commonwealth and States. The applicant's contention, though it raises an *inter se* question, is not directly concerned with any conflict of powers, and no special reason for granting a certificate has been shown. Whether the Privy Council will grant the applicant or the plaintiffs in the other actions leave to appeal on other points is problematical, and, in any event, it is irrelevant to the question whether the certificate should be granted. As the Court was unanimous on the matters raised, this case is not one in which a division of opinion would make it desirable to have a question settled by the Privy Council. [He referred to *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2); *Ex parte Nelson* [*No.* 2] (3); *Joyce* v. *Australasian United Steam Navigation Co. Ltd.* (4).]

Coppel K.C., in reply.

Cur. adv. vult.

(1) (1912) 15 C.L.R. 182, at pp. 233-235.
(2) (1917) A.C. 528, at p. 533; 24 C.L.R. 396, at p. 398.
(3) (1929) 42 C.L.R. 258, at pp. 261-263, 269, 270, 271.
(4) (1939) 62 C.L.R. 160, at p. 165.

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April 17.

The following written judgments were delivered :—

LATHAM C.J. This is an application by Australian National Airways Pty. Ltd., the plaintiff in an action against the Commonwealth of Australia and others, for a certificate under s. 74 of the Constitution of the Commonwealth of Australia that the following question is one which ought to be determined by His Majesty in Council, namely " whether the provisions of the *Australian National Airlines Act* 1945 (so far as the same have not already been declared by the judgment of this Court dated the 14th day of December 1945 to be invalid) are within the legislative power of the Parliament of the Commonwealth under Section 51 (i.) and (xxxix.) of the Constitution of the Commonwealth."

The Commonwealth Constitution, s. 74, provides 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, or as to the limits *inter se* of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave. . . ."

By the statement of claim in the action the plaintiff claimed a declaration that the *Australian National Airlines Act* 1945 and certain regulations were invalid as being beyond the powers of the Parliament of the Commonwealth. The Act established a corporation for the purpose of conducting air services, and contained provisions designed to secure a monopoly of air services for that corporation when certain conditions were fulfilled. The Court held that under s. 51 (i.) of the Constitution the Commonwealth had power to create the corporation and to empower it to conduct the business of establishing and managing air services, but that the provisions intended to exclude competitors in the provision of such services were invalid as infringing s. 92 of the Constitution. It was held that these invalid provisions were severable from the rest of the Act.

An Air Navigation regulation was also held to be invalid.

The plaintiff proposes to apply to the Judicial Committee of the Privy Council for special leave to appeal from this decision so far as it is unfavourable. If special leave were granted the plaintiff would challenge the decision of the Court as to the extent of the legislative power conferred by s. 51 (i.), and doubtless would also contend that

the invalidity of the monopoly provisions resulted in the failure of the whole Act on the ground that those provisions were not severable from the rest of the Act. No application has yet been made to the Privy Council for special leave to appeal.

This application is made upon the basis that the question mentioned is a question of the limits *inter se* of the constitutional powers of the Commonwealth and those of the States. In *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1), it was held that where a decision of the Court was in favour of the existence of a power in the Commonwealth with the result that the Commonwealth power was held to extend over the area of State power (whatever that area might be) as a paramount power, the effect was to extend the boundary of Commonwealth power as compared with State power, and that therefore such a decision involved a question of the limits *inter se* of the constitutional powers of Commonwealth and State. In my opinion the application of the rule laid down in that case shows that the question as to which a certificate is sought is a question as to limits *inter se*.

The application was supported by two arguments. It was first contended that the decision was one of great importance. This is the case, but any decision as to the limits *inter se* of the constitutional powers of the Commonwealth and the States is a decision upon an important matter, and from the early days of Federation it has been held that the fact that a decision as to limits *inter se* is important is not in itself a sufficient ground for granting a certificate: See *Deakin and Lyne* v. *Webb* (2); *New South Wales* v. *The Commonwealth* [*No.* 2] (3). I mention that the decision of the Court in this case was unanimous.

The second reason urged in support of the application was that if their Lordships of the Privy Council should see fit to grant special leave to appeal from the decision of this Court it would be very desirable that all the issues in the case should be open for decision. Whatever may be said in support of this contention depends upon an unfulfilled hypothesis, special leave to appeal not having been granted by the Judicial Committee. The present position may be changed by a successful application for special leave to appeal. In that event the matter could be the subject of further consideration if the application should be renewed.

Starke J. Motion on the part of the Australian National Airways Pty. Ltd. for a certificate that the following question is one which ought to be determined by His Majesty in Council: "Whether the

(1) (1917) A.C. 528; 24 C.L.R. 396.
(2) (1904) 1 C.L.R. 585.
(3) (1932) 46 C.L.R. 235.

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provisions of the *Australian National Airlines Act* 1945 (so far as the same have not already been declared by the judgment of this Court dated the 14th day of December 1945 to be invalid) are within the legislative power of the Parliament of the Commonwealth under section 51 (i.) and (xxxix.) of the Constitution of the Commonwealth."

By the Constitution, s. 74, it is provided 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 those of any State or States . . . unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

The meaning of the expression " a decision of the High Court upon any question " &c. in s. 74 has been the subject of some difference of opinion in this Court. One view is that it means the declaration of the law as affirmed by the Court: what the Court decides to be the law with regard to the question (*Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (1)). The other that it means the judgment —the actual order affecting the parties (2)—And see the argument in *Flint* v. *Webb* (3). If the former view be correct there is no doubt that this Court in the action brought by Australian National Airways Pty. Ltd. against the Commonwealth affirmed and declared that the provisions of the *Australian National Airlines Act* 1945 (so far as the same were not declared by the Court by the judgment to be invalid) were within the legislative powers of the Parliament of the Commonwealth (4). If the latter view be correct the formal judgment of the Court was :—" This Court doth order that the demurrer be and the same is hereby overruled and This Court doth order that judgment be entered for the Plaintiff with costs and This Court doth declare that in Part IV. of the *Australian National Airlines Act* 1945, sub-section (1) of Section 46, so much of Section 47 (including paragraph (*a*)) and so much of Section 49 as refer to inter-State airline services are invalid and that Statutory Rules 1940 No. 25 are invalid."

The demurrer went to the whole declaration or statement of claim of the plaintiff and was overruled because it was too large. Judgment was entered for the plaintiff with costs. But this is said to mean judgment in demurrer for the plaintiff with costs and that judgment in the action is for the plaintiff for so much of the declaration or statement of claim as is sufficient. But there is no affirmative

(1) (1907) 4 C.L.R. 1087, at pp. 1116, 1150, 1151.
(2) (1907) 4 C.L.R., at pp. 1171, 1172.
(3) (1907) 4 C.L.R. 1178, at p. 1182.
(4) *Ante*, p. 29.

judgment against the plaintiff for the residue: Cf. *Bullen and Leake's Pleading*, 3rd ed., p. 823.

The meaning and operation of the formal judgment is said to be judgment otherwise against the plaintiff and for the defendant. Unless this be the meaning and operation of the judgment then, according to one view of the meaning of s. 74, there is no decision of the High Court upon any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States which requires a certificate.

The application of s. 92 of the Constitution does not raise an *inter se* question (*James* v. *Cowan* (1)).

The judgment might have been more artistically framed but perhaps what I have said is rather meticulous in these informal days.

In any case a certificate should be refused.

The question for which the certificate is sought does, I think, raise a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States according to the formula propounded in *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2). But it is a question of purely Australian concern which is the special function and responsibility of this Court to determine: See *Flint* v. *Webb* (3).

It was said that there were other cases decided under the provisions of s. 122 of the Constitution which would raise the question of the validity of the whole of the *Australian National Airlines Act* 1945 because of the inseverability of its provisions. But that depends to some extent upon the meaning given to the expression " decision of the High Court " &c. in s. 74 and in any case is no sound reason for this Court abdicating the special functions assigned to it under the Constitution.

The certificate, as already stated, should be refused.

DIXON J. This is an application by Australian National Airways Pty. Ltd., the plaintiff in the suit, for a certificate under s. 74 of the Constitution.

The object of the suit was to obtain declarations of the invalidity of a regulation made under the *Air Navigation Act* 1920-1936, and of the *Australian National Airlines Act* 1945, or, alternatively, of certain provisions of that statute. The chief ground for claiming that the whole of the *Australian National Airlines Act* is invalid was that the power conferred upon the Parliament by s. 51 (i.) of the Constitution is not ample enough to sustain it, and that

(1) (1932) A.C. 542; 47 C.L.R. 386.
(2) (1917) A.C. 528; 24 C.L.R. 396.
(3) (1907) 4 C.L.R. 1178.

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no other legislative power could be invoked for the purpose. Another ground for the claim was that s. 92 was infringed upon by provisions contained in Part IV. of the Act and that they were inseparable from the rest of the statute, which accordingly failed as a whole.

The Court decided against the first ground, placing upon s. 51 (i.) an interpretation ample enough, apart from the effect of s. 92, to warrant the whole enactment, except those parts relating to airline services with Territories of the Commonwealth. On the other hand, the Court upheld the contention that Part IV. contains provisions obnoxious to s. 92 and declared them invalid accordingly, and for a like reason it declared the impugned Air Navigation regulation to be invalid. But the Court held the invalid provisions were not inseverable, and that the entire Act was not vitiated. Two other cases were argued with that of the Australian National Airways Pty. Ltd., suits the plaintiffs in which conducted air services with Territories. They argued unsuccessfully that the provisions of the Act relating to airline services with Territories were not justified by s. 122 of the Constitution. If the argument had been accepted, it would have been necessary to say whether those provisions were inseverable or the whole Act fell with them.

The plaintiff Australian National Airways Pty. Ltd., not being content with the declarations it obtained declaring three specific provisions bad as contrary to s. 92, desires to appeal to the Privy Council, but recognizes that, in so far as the case depends upon the interpretation of s. 51 (i.), the decision may be considered to be one upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States. The plaintiff is prepared to contend that this is not so, but rather than depend upon the contention, would prefer, not unnaturally, to be armed with a certificate under s. 74.

The settled interpretation of the crucial words of s. 74, which are of course transcribed in ss. 38A and 40A of the *Judiciary Act*, is that they cover any decision upon the extent of a paramount power of the Commonwealth, paramount over the concurrent powers of the States. The reason is that the advance, by interpretation, of a paramount power of the Commonwealth, would mean that the area of State legislative power which is absolute would recede, absolute in the sense that its exercise is not liable to be defeated or rendered inoperative by an inconsistent exercise of Commonwealth legislative power. Correspondingly, any reduction of a paramount power of the Commonwealth would mean an increase of the area of State power, the exercise of which is free from possible

invalidation by the exercise of Commonwealth power. There is therefore a boundary between the paramount legislative power of the Commonwealth and the absolute power of the States, limits *inter se* : See *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1) ; *Ex parte Nelson* [*No.* 2] (2) ; and cf. *James* v. *Cowan* (3). Not to adopt this interpretation would have been to confine the operation of s. 74 to a very small and insignificant subject matter. For the only logical alternative would be to treat it as covering the demarcation of the boundary between the exclusive powers of the Commonwealth and the States and perhaps the relations between the constitutional powers of one organ of the Federal system and the immunities of another organ and the exercise of its powers.

In the present case we placed an interpretation upon s. 51 (i.) extensive enough to enable that power to sustain the greater part of the *National Airlines Act*. Indeed, subject to the operation of s. 92, the interpretation would sustain the whole, except in so far as the provisions with reference to Territorial airline services need the support of s. 122. It is not easy to see why this does not mean a decision concerning the delimitation of Commonwealth power, which necessarily implies a decision as to the extent of State power which is subordinate, that is, which is subject to the paramountcy of the legislative power of the Commonwealth. The only answer suggested on the part of the plaintiff is that the provisions of the *National Airlines Act* are but facultative, that our decision means no more than that the Commonwealth Parliament may create a corporate agent and arm it with a capacity to carry on air services, and that this involves no impairment of State power ; for the States may do the same. But even if this were all the Act did, and all our decision justified, still it would mean that the State legislatures could pass no law conflicting with the possession or exertion of the capacity thus bestowed. But it is not all the Act does, as a perusal of its provisions, particularly Parts III., VI. and VII., will show.

It therefore becomes necessary for us to consider whether a certificate should be granted.

The Court has always treated s. 74 as placing upon it the general responsibility for resolving conflicts between Federal and State power and as meaning that unless there is something exceptional about a question as to the limits *inter se* which it has decided, the Court's interpretation of the Constitution shall be final. The section itself is so expressed as to give the Court a discretion to grant a certificate if it is satisfied that for any special reason it should be

(1) (1917) A.C. 528 ; 24 C.L.R. 396.
(2) (1929) 42 C.L.R. 258, particularly at pp. 267, 271-274.
(3) (1932) A.C. 542, at p. 560 ; 47 C.L.R. 386, at pp. 397, 398.

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granted. From their very nature, all or nearly all such cases involve matters of gravity and importance. The mere importance, therefore, of the question or of a case can hardly provide the requisite special reason. Yet there is little else upon which the plaintiff can rely in support of its application. However, the plaintiff does make one point demanding consideration. The point is that it is open to His Majesty in Council to grant to the respective plaintiffs special leave to appeal from our decision, in the two suits which depend on the validity or invalidity of the provisions relating to Territorial airline services, and in the suit in which this application is made so far as it depends upon the severability from the rest of the Act of the provisions we have held invalid under s. 92. It is said that we should therefore exercise our discretion under s. 74 so that the whole case would be open in the Privy Council.

Whether the assumption in relation to the provisions governing Territorial airlines from which this argument proceeds is correct perhaps depends upon the question whether it is possible to decide their validity or invalidity without affirming or denying an interpretation of s. 122 of the Constitution which would authorize legislation having, in some respects, the force of a paramount law in a State or States. But be that as it may, the contention assumes that the case is one which in the normal course would come by special leave before the Privy Council, and that the constitutional question falling within s. 74 is but an incidental matter the barrier to dealing with which should be removed by what amounts to no more than a consequential or ancillary order. In other words, the matter covered by s. 74 is treated as if it were not one of the most substantial questions in the case. It is not possible to take this view. To make such an order in anticipation of a possible grant of special leave, made for the purpose of dealing with a question or questions that s. 74 does not cover, would be a substantive and procedural inversion.

The application should be refused.

WILLIAMS J. I have read the judgment of *Dixon* J. and agree with his reasons and conclusions.

The application should in my opinion be refused.

Motion dismissed with costs.

Solicitors for the applicant, *Malleson, Stewart & Co.*

Solicitor for the respondents, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.