[HIGH COURT OF AUSTRALIA.]

POULTON . . . . . APPLICANT;
PLAINTIFF-APPELLANT,

AND

THE COMMONWEALTH AND OTHERS. . RESPONDENTS.
DEFENDANTS-RESPONDENTS,

[No. 2]

H. C. OF A. 1956.

SYDNEY, *Aug.* 13;

MELBOURNE, *Oct.* 11.

McTiernan, Williams, Webb, Fullagar and Kitto JJ.

Constitutional Law (Cth.)—Privy Council—Appeal from High Court—Question as to limits inter se of constitutional powers of Commonwealth and States—Wool—Acquisition by Commonwealth—Disposal of wool—Distribution of profits—Persons entitled—Alienation of share of profits—Statutory impediments to alienation—Validity of statute—Legislative powers of Commonwealth—Wool Realization (Distribution of Profits) Act 1948-1952 (*No.* 87 *of* 1948—*No.* 76 *of* 1952), *ss.* 8 (3), 29—*The Constitution* (63 & 64 *Vict.*, *c.* 12), *s.* 74.

The High Court having held that ss. 8 (3) and 29 of the *Wool Realization (Distribution of Profits) Act* 1948-1952 were valid exercises of the legislative power of the Commonwealth an application was made for an order certifying under s. 74 of the Constitution that the question of the legislative validity those sections ought to be determined by Her Majesty in Council.

Held, that the application should be refused, (a) by the whole Court, upon the ground that the question which it was sought to have determined was an essentially federal question and no special reasons existed for obtaining a decision from the Privy Council thereon; and (b) by *Fullagar* and *Kitto* JJ., upon the particular ground that the question was not one of such doubt and difficulty as to require the decision of the Privy Council thereon.

MOTION ON NOTICE.

Malcolm Coote Poulton, the appellant in *Poulton* v. *The Commonwealth* (1), moved the High Court on notice to the respondents to that appeal for an order " certifying under s. 74 of the Constitution that the following questions ought to be determined by Her Majesty in Council:—1. Whether ss. 8 (3) and 29 of the *Wool Realization (Distribution of Profits) Act* 1948-1952 are a valid exercise of the

(1) (1953) 89 C.L.R. 540.

H. C. OF A. 1956.

POULTON v. THE COMMONWEALTH. [No. 2].

legislative power of the Parliament of the Commonwealth. 2. Whether the *National Security* (*Wool*) *Regulations* (S.R. 1939 No. 108—S.R. 1943 No. 88) were *ultra vires* the Commonwealth Parliament and were null and void *ab initio*."

Upon the hearing of the motion only the first ground was pressed.

Sir *Garfield Barwick* Q.C. (with him *T. R. Morling*), for the applicant. In the earlier proceedings (1) the attack made upon ss. 8 (3) and 29 of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952 was not an attack on the main Act or the power which would have supported the main Act but was this, that it could not be said to be incidental to the power itself or to the execution of the Act under the power to destroy rights which had independently arisen and which, according to the general law, would have resulted in the donee of the money having to meet his anterior obligation out of the money passing to him from the Commonwealth and after it had become part of his general fund of property. The view so put was rejected: *Poulton* v. *The Commonwealth* (2). [He referred to *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (3).] In relation to ss. 8 (3) and 29 and the difference in view between the submissions made and the decision of the Court there is nothing federal or peculiarly Australian about the problem, which is whether, if a power to give is conceded, a power is thereby conceded to destroy antecedent dealings unconnected with the subject matter that has caused the giving and to make the money handed over have the peculiar quality of not answering the description of the anterior transaction. It is not without significance that this Court in deciding the question (4) did not rely upon anything of a federal or Australian character but on general reasoning. Then, too, there is a large sum involved in the case, which is a test case and involves some two and one-half million pounds, and the Court in hearing it was unable to sit in full strength. It would be possible for the applicant to succeed on an appeal on questions of construction of the sections alone but in any appeal brought on that narrow ground he would seek the assistance of a certificate which would enable the point above-mentioned to be decided if the question of construction was decided as it was in this Court. No separate argument is addressed with respect to a certificate as to the Regulations because of the reasons of the Court in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (5).

(1) (1953) 89 C.L.R. 540.
(2) (1953) 89 C.L.R., at pp. 569, 597-599.
(3) (1952) 85 C.L.R. 545, at pp. 573, 600.
(4) (1953) 89 C.L.R., at pp. 597-599.
(5) (1952) 85 C.L.R. 545.

W. J. V. Windeyer Q. C. (with him *K. A. Aickin*), for the respondents, the Commonwealth of Australia and the Australian Wool Realization Commission. This case raises distinctly federal questions.

[McTiernan J. What you say, I suppose does not apply to questions that arise under ss. 92 and 109 of the Constitution ?]

The grant of a certificate must throw open all the questions of the validity of the Wool Regulations and the right of the Commonwealth to distribute funds coming to it in this way. It is impossible to isolate the question sought to be raised by the applicant from the broader questions which this Court has said in the *Nelungaloo Case* (1) are essentially for it to determine. Even if the matter is taken on the narrower basis the question is still a distinctly federal one, relating to the ambit of the defence power and the incidental power. If it were a mere question of the construction of ss. 8 (3) and 29 no certificate would be needed. The question of the ambit of the defence power must arise and that is an essentially federal question which ought to be determined finally by this Court. The present argument in favour of the certificate was one of many put forward initially when the validity of these sections was challenged and their validity was held to be found in the defence power. [He referred to *Poulton* v. *The Commonwealth* (2).] No reason has been advanced why this matter should now be isolated for the purpose of acquiring a certificate which would open up the whole question of the winding-up legislation and, incidentally, of the initial acquisition. Four Justices of this Court, a majority, came to a unanimous decision in favour of the respondent on this question. The delay in bringing this application is a factor for consideration, for the respondent has proceeded on the basis that the scheme was valid and so have many persons in the community. All the reasons for refusing a certificate in cases of any attack on legislation on the basis that does not provide for acquisition on just terms are here directly present because that question must necessarily be opened up and indirectly because they apply with almost equal force to questions of the ambit of the defence power in the winding-up of large defence undertakings. No grounds for the grant of a certificate have been shown.

Sir *Garfield Barwick* Q.C., in reply.

There was no appearance for or on behalf of the individual respondents.

Cur. adv. vult.

(1) (1952) 85 C.L.R. 545.

(2) (1953) 89 C.L.R., at pp. 577, 578.

H. C. OF A. 1956.

POULTON v. THE COMMONWEALTH. [No. 2].

Oct. 11.

The following written judgments were delivered :—

McTIERNAN J. The question for decision is whether the Court should grant the applicant a certificate under s. 74 of the Constitution of the Commonwealth. The applicant asks the Court to grant the certificate to enable him to appeal to the Privy Council against the judgment of the High Court in the appeal : *Poulton* v. *The Commonwealth* (1). The certificate is sought in respect of two questions : first, whether ss. 8 (3) and 29 of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952 are within the legislative power of the Commonwealth ; secondly, whether the *National Security* (*Wool*) *Regulations* (S.R. 1939 No. 108—S.R. 1943 No. 88) were within that power. Both questions were decided adversely to the applicant in original and appellate jurisdiction. They are questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States. Section 74 prevents an appeal to the Privy Council against the decision of the High Court upon any such question unless the High Court certifies that the question ought to be determined by the Privy Council. The High Court is given a discretion by s. 74 so to certify, if it is satisfied that for any special reason the certificate should be granted. Section 74 further provides that upon the grant of the certificate an appeal shall lie to the Privy Council on the question without further leave.

The applicant urged more strongly that a certificate should be granted in respect of the first question than the second question. The regulations were made during the second world war. Their constitutional validity depends upon the defence power of the Commonwealth in as much as the validity of such of the regulations as were directed to acquisition of property needed to be connected with a purpose in respect of which the Commonwealth had power to make laws. The connexion of those regulations with the defence power was not called in question by the applicant. The only attack made upon them was that they did not provide " just terms " of acquisition. Consistently with the principles applied by the High Court in the motion under s. 74, *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (2), I think the present application so far as it relates to the *National Security* (*Wool*) *Regulations* ought to be refused.

The *Wool Realization* (*Distribution of Profits*) *Act*, unlike the regulations, is a post-war measure. But this Act is dependent for its constitutional validity upon the defence power. It is entitled " An Act to provide for the Distribution of any ultimate Profit accruing to the Commonwealth under the Wool Disposals Plan and

(1) (1953) 89 C.L.R. 540. (2) (1952) 85 C.L.R. 545.

for other purposes". The validity of the Act is supported by a doctrine developed by the High Court in a line of cases on the defence power beginning with *Farey* v. *Burvett* (1). By this doctrine, s. 51 (vi.) (the defence power), notwithstanding its literal limitations, has been accommodated to economic, as well as military emergencies, resulting from changing methods of war, and authorises the winding-up during the post-war period of the wartime economic order including business affairs that formed part of the nation's wartime organisation. The applicant disclaimed any intention to attack in the Privy Council any doctrine of the defence power developed by this Court, or, of course, the sufficiency of the powers of the Commonwealth to provide for the distribution of the profit mentioned in the title to the Act. His complaint is that ss. 8 (3) and 29 are extraneous to the objects of the Act and necessarily fall outside the legislative power relied upon by the Commonwealth to provide for this distribution of moneys. Conceding that the attack upon the sections raises a question under s. 74 of the Constitution, the applicant maintains that the investigation of the constitutional validity of ss. 8 (3) and 29 involves no examination of purely constitutional doctrine, but involves only the question whether ss. 8 (3) and 29 have a reasonable relation to the scheme of distribution provided in the Act. The applicant contends that the validity of the sections rests only upon that relation. It is submitted on his behalf that the Court ought therefore to be less restrained by the policy of s. 74 than it usually is. The rights of many persons, "dealers", like the applicant, within the meaning of s. 4 of the Act, are shown by the affidavit of the applicant to be affected by the decision of the High Court as to the validity and construction of ss. 8 (3) and 29. It is stated that the total value of those rights is estimated to be £2,500,000. Because this large amount is at issue, and the question whether ss. 8 (3) and 29 are valid, does not, so the applicant contends, vitally touch the limits of constitutional powers, it is urged on his behalf that here a special reason is to be found for granting a certificate under s. 74. Legislative Acts often have far-reaching financial consequences and *inter se* questions are naturally questions of general importance. The responsibility vested, by s. 74, in the High Court for the solution of *inter se* questions would be in danger of being abandoned if either of these considerations was held to afford a special reason for granting a certificate. There remains only the question whether if the nexus between the impugned sections and legislative power could be nothing more than what the applicant contends it is, the Court

(1) (1916) 21 C.L.R. 433.

H. C. OF A. 1956.

POULTON v. THE COMMONWEALTH. [No. 2].

McTiernan J.

should, having regard to the large amount of money at stake, grant this application. The applicant contends that the disabilities imposed by ss. 8 (3) and 29 upon dealers and others were arbitrary and extraneous to the scheme of distribution in question. There is nothing in the contention itself which provides a special reason why the Privy Council ought to rule upon the question whether these sections are invalid. In my opinion it accords truly with the intention of s. 74 to hold that the question whether the insertion of such provisions in the Act in favour of the wool growers could reasonably be appropriate and relevant to the scheme of the Act, is one upon which the High Court should finally decide. In my opinion the application should be refused with costs.

WILLIAMS J. This is a motion by the plaintiff in *Poulton* v. *The Commonwealth* (1) for an order certifying under s. 74 of the Constitution that the following questions ought to be determined by Her Majesty in Council: "(1) Whether ss. 8 (3) and 29 of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952, are a valid exercise of the legislative power of the Parliament of the Commonwealth? (2) Whether the *National Security* (*Wool*) *Regulations* (S.R. 1939 No. 108—S.R. 1943 No. 88) were *ultra vires* the Commonwealth Parliament and were null and void *ab initio*?" But, in the end, if I correctly understood Sir *Garfield Barwick*, who appeared for the appellant, the application was only pressed in respect of the first question. Sections 8 (3) and 29 of the *Wool Realization* (*Distribution of Profits*) *Act* 1948-1952, have been set out so often that I shall not set them out again. It is sufficient to say that their effect as interpreted in this Court, both by *Fullagar* J. in the first instance (2) and by the Full Court on appeal (3), was to deprive the plaintiff of the right he would otherwise have had under the document of 4th November 1942 to recover from Donlon Bros. any moneys payable to them in respect of their "participating wool" and to entitle them to receive and to retain all such moneys. It was also held both by *Fullagar* J. and the Full Court that the Act including these provisions is a valid exercise of the legislative power conferred upon the Parliament of the Commonwealth by s. 51 (vi.) and (xxxix.) of the Constitution. The applicant desires to appeal to the Privy Council both from the interpretation placed upon the document of 4th November 1942 by this Court and from the decision of this Court that ss. 8 (3) and 29 of the Act are a valid exercise of constitutional power. He concedes that the second of these

(1) (1953) 89 C.L.R. 540.
(2) (1952) 89 C.L.R., at pp. 549-578.
(3) (1953) 89 C.L.R., at pp. 593-607.

questions raises an *inter se* question within the meaning of s. 74 of the Constitution and it is for this reason that he applies for a certificate under that section.

The attitude of this Court to such an application is not in doubt. It has been exhaustively examined in many cases, of which the two most recent are *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (1) and *O'Sullivan* v. *Noarlunga Meat Ltd.* [*No.* 2] (2). It is said in the joint judgment in the second of these cases: "At bottom the policy of s. 74 is to confine the decision of essentially federal questions to this Court" (that is, the High Court) ", but at the same time to confide to the Court a discretion which will make it possible to obtain the decision of the Privy Council in a case the features of which make it desirable to do so for some special reason" (3). Sir *Garfield* conceded, I thought, that if the present question were an essentially federal question it would be very difficult for him to succeed. But he submitted that a certificate should be granted because the question whether ss. 8 (3) and 29 of the *Wool Realization* (*Distribution of Profits*) *Act* were a valid exercise of constitutional power was a question of far-reaching importance of a somewhat special nature in as much as it related to the extent to which the Parliament of the Commonwealth could abrogate by its legislation the ordinary rules of the common law relating to contracts and property. He also sought to call in aid as special reasons the fact that the case was a test case relating to claims amounting to about two and one-half million pounds and the fact, said to be unfortunate, that it was impossible to constitute a Full Court of more than three judges to hear the appeal. The contention that these facts create special reasons within the meaning of s. 74 of the Constitution can, I think, be shortly disposed of. This Court should never be daunted from accepting the final responsibility for deciding questions at issue between litigants however large the amounts at stake may be, and there is nothing unusual for the Full Court, on an appeal from a single Justice, to be constituted by three Justices. In the instant case there was unanimity between *Fullagar* J. and the Full Court so that both questions the plaintiff wishes to export overseas have been unanimously decided against him by four Justices, that is, by a majority of the members of this Court.

The constitutional question the plaintiff seeks to have decided by the Privy Council is, in my opinion, an essentially federal question. The moneys for the distribution of which the Act provides are moneys which the Parliament of the Commonwealth is under no legal

(1) (1952) 85 C.L.R. 545.
(2) (1956) 94 C.L.R. 367.
(3) (1956) 94 C.L.R., at p. 375.

H. C. OF A. 1956.

POULTON v. THE COMMONWEALTH. [No. 2].

Williams J.

obligation to distribute. On this point the five Justices of this Court who sat in *Squatting Investment Co. Ltd* v. *Federal Commissioner of Taxation* (1) and the Privy Council on appeal (2) were unanimous. To take one statement, that of Lord *Morton of Henryton* delivering the opinion of their Lordships: "Undoubtedly the Commonwealth was not bound to pay this sum to the suppliers. The payment was a voluntary one, though it fulfilled a well-founded hope or expectation on the part of the suppliers" (3). The essentially federal question is whether the Parliament of the Commonwealth can as incidental to the distribution of money that is the property of the Commonwealth provide for the terms and conditions upon which this money shall be paid to the recipients. In the present case the legislation provides in effect by ss. 8 (3) and 29 that it shall be received by them free from any antecedent fetters. In the case of a Parliament of completely untrammelled powers such as the Parliament at Westminster the constitutional validity of such a provision could not possibly arise. That Parliament could distribute the money on any terms and conditions it thought fit. The question could only arise in the case of a Parliament like that of the Commonwealth the constitutional powers of which are circumscribed. Thus the question is an essentially federal question. It is not a question which could arise but for the Constitution and its solution depends upon the interpretation of the Constitution. It is not a question the solution of which appears to be difficult. The legislative powers of the Parliament of the Commonwealth are within the limits of the grant plenary powers in the fullest sense. If the defence power is wide enough to authorise the distribution of the profits, it must surely be incidental to the distribution to provide for the terms on which they are to be received. The applicant naturally does not wish to challenge the constitutional validity of the *Wool Realization (Distribution of Profits) Act* so far as it provides for the distribution of the moneys. He only desires to challenge its validity so far as it prevents him receiving those moneys from the recipients. This question it may be said is only on the fringe of the defence power. But, in order to decide it, it might be necessary to examine the whole of the extent of the defence power, and the extent of the defence power in all its exemplifications, perhaps more than in the case of any other power, is essentially a federal question. No question is more important to the Commonwealth in time of war or even in time of peace. It matters not how the question of that extent arises.

(1) (1953) 86 C.L.R. 570.
(2) (1954) A.C. 182; (1954) 88 C.L.R. 413.
(3) (1954) A.C., at p. 212; (1954) 88 C.L.R., at p. 430.

It is still one to which the words of Lord *Porter* delivering the opinion of the Privy Council in *The Commonwealth* v. *Bank of New South Wales* (1) are appropriate. His Lordship said: "It is, in the first place, clear that in the establishment of the Federal Constitution of the Commonwealth of Australia it was a matter of high policy to reserve for the jurisdiction of her own High Court the solution of those *inter se* questions which were of such vital importance to Commonwealth and States alike" (2).

For these reasons I would refuse the application.

WEBB J. I would dismiss this application for a certificate under s. 74 of the Commonwealth Constitution, substantially for the reasons I gave for dismissing a similar application in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (3).

Sir *Garfield Barwick* Q.C. for the applicant submits that, while every question of the construction of the Commonwealth Constitution is Australian, still the determination of these particular questions, i.e. the validity or otherwise of ss. 8 (3) and 29 of the *Wool Realization (Distribution of Profits) Act* 1948-1952 does not involve any consideration of Australian conditions, and that it does not involve "federalism", and could as easily arise under a unitary system. But, as observed by Sir *Owen Dixon* on the occasion of his swearing-in as Chief Justice of this Court, "Federalism means a demarcation of powers and this casts upon the court a responsibility of deciding whether legislation is within the boundaries of the allotted powers" (4).

Although the argument before the Judicial Committee would, no doubt, be restricted, as Sir *Garfield* says, still, as I observed in *Nelungaloo Pty. Ltd.* v. *The Commonwealth* (5), it is impossible to anticipate the reasons of the Judicial Committee for deciding against the validity of the legislation in question, if their Lordships did so decide, and in that event this Court, having granted the certificate, would be bound to respect not only the decision but also the reasons given for it, which would not necessarily be limited by the argument, and so in that way there might well be a departure from the high policy to reserve to the jurisdiction of this Court the solution of *inter se* questions which are of vital importance to the Commonwealth and States alike, and of no concern to other parts of the British Commonwealth.

(1) (1950) A.C. 235; (1949) 79 C.L.R. 497.
(2) (1950) A.C., at p. 293; (1949) 79 C.L.R., at p. 624.
(3) (1952) 85 C.L.R. 545, at p. 589 et seq.
(4) (1952) 85 C.L.R. xi, at p. xiii.
(5) (1952) 85 C.L.R., at p. 591.

H. C. OF A. 1956. POULTON v. THE COMMONWEALTH. [No. 2]. Webb J.

It is true that, in this Court as well as in all courts of the British Commonwealth, the meaning and effect of legislation of any kind must always be determined according to the meaning of words, the rules of syntax, and the canons of construction of statutes. It could happen, though rarely perhaps, that a word or phrase in an Australian statute would have a special significance in Australia, or that the mischief sought to be remedied by an Australian statute would call for a consideration of conditions peculiar to Australia and for a full understanding of those conditions, independently of what counsel might succeed in conveying in argument. But the fact that no special knowledge of Australian usage or conditions was relied upon by any Justice of this Court who took part in *Poulton* v. *The Commonwealth* (1) is not conclusive in favour of this application : the high policy referred to by the Judicial Committee still prevails, and prevents a certificate from being granted so that these questions might be decided by the Judicial Committee, as there are no special reasons warranting the certificate. To be special the reasons would have to be positive, at all events not purely negative such as the absence of any need of a special knowledge of Australian usages and conditions in order properly to solve the *inter se* questions.

Fullagar J. In this matter I agree with the judgment of *Williams* J. which I have had the advantage of reading. I only wish to add that I should myself be prepared to dismiss this motion on a narrow ground, which does not involve the general policy of which s. 74 of the Constitution has always been regarded as an expression. That policy is that prima facie all questions which concern the constitutional delimitation of powers—legislative, executive or judicial—as between the Commonwealth and the States of Australia ought to be finally decided by an Australian Court. Apart altogether from that policy, before a certificate under s. 74 is to be granted, it ought surely at least to appear that the question to be determined is one of some doubt and difficulty. I am unable to see that any doubt whatever, or any difficulty whatever, attaches to any constitutional question raised in this case. There is, in my opinion, no foundation for any attack on the validity of any relevant statutory provision.

The motion should be dismissed.

Kitto J. This application was ultimately pressed in respect of one very limited question only. That was a question as to the constitutional validity of ss. 8 (3) and 29 of the *Wool Realization (Distribution of Profits) Act* 1948-1952 (Cth.).

(1) (1953) 89 C.L.R. 540.

Section 8 (3) is a provision disentitling a dealer, notwithstanding the terms of any contract, from recovering from another person the whole or any part of any moneys paid to that other person under the Act. Section 29 provides that, subject to the Act and the regulations a share in a distribution under the Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share.

The applicant was prepared to concede that a provision similar to s. 8 (3) would be valid if limited to precluding the enforcement of a right created specifically in respect of moneys paid under the Act; and he was also prepared to concede that a provision similar to s. 29 would be valid if it applied only to specific alienations of shares or possibilities of shares as distinguished from alienations thereof by means of transactions relating to more general descriptions of property within which such a share or possibility happens to be comprehended. It was said that such provisions might be upheld under par. (vi.) or par. (xxxix.) of s. 51 of the Constitution on the ground that their enactment would be fairly incidental to the creation by the Act of the right to participate in distributions under it. But it was contended that neither paragraph of s. 51 would support s. 8 (3) or s. 29. What is suggested (if I understand the argument correctly) is that the question whether, in respect of a statutory right to receive a payment of money, the enactment of a provision that neither the right nor the money shall be caught by a contract or assignment made by the payee before he receives the payment is fairly incidental to the creation of the right is to be answered 'Yes' in respect of contracts and assignments which apply to the right or the money by virtue of a specific description of it, but is to be answered 'No' in respect of contracts and assignments which catch the right or the money by virtue only of its falling within some more general class of the payee's property.

It seems that the soundness or unsoundness of the distinction thus drawn between the two kinds of contracts and assignments is all that there is to be considered in the question we are asked to certify as one which ought to be determined by Her Majesty in Council. The point did not present itself as one of difficulty either to *Fullagar* J. or to the Full Court. It has not provoked any difference of judicial opinion in this case, and it appears never to have been put forward in any other. I am bound to say that I have not been able to see in it a problem of real substance. That alone would be sufficient ground for refusing the desired certificate. But, in any case, the topic which the granting of the certificate would open up for examination before the Privy Council is not one as to

H. C. OF A. 1956.

POULTON v. THE COMMONWEALTH. [No. 2].

which any such situation has developed in this country that a special reason exists for holding that a decision of their Lordships ought to be obtained.

In my opinion the application should be refused.

Application dismissed with costs.

Solicitor for the applicant, *A. W. M. Dickinson.*

Solicitor for the respondents the Commonwealth of Australia and the Australian Wool Realization Commission, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. A. H.