[HIGH COURT OF AUSTRALIA.]

FLINT . . . . . APPELLANT;
DEFENDANT,

AND

WEBB . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 21, 22, 23, 24; *June* 7, 8.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

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

The fact that a decision of the Privy Council, on a question of law as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, is contrary to a previous decision of the High Court as to which a certificate under sec. 74 of the Constitution has been asked and refused, *held* not to be of itself a sufficient special reason for granting a certificate as to another decision of the High Court following its previous decision.

The inconvenience caused by the existence of those contrary decisions *held* not to be a sufficient reason.

Per Griffith C.J., *O'Connor* J. and *Isaacs* J.—That inconvenience can be removed by the Commonwealth Parliament exercising its powers under sec. 77 (II.) of the Constitution.

Per Griffith C.J.—That inconvenience can also be removed by the Commonwealth Parliament making its grants to its servants subject to the right of the States to tax them.

Per Higgins J.—*Quære*, whether, if a State income tax on salaries of federal servants is invalid under the Constitution, the Commonwealth Parliament can validate such a tax.

APPEAL from a Court of Petty Sessions of Victoria.

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On the complaint of Thomas Prout Webb, Commissioner of Taxes of Victoria, an order was made against Arthur Loftus Flint, for the payment of £2 11s. 3d., for income tax for the year 1904, with 14s. interest thereon, and £2 2s. costs. It appeared that Flint was an officer in the Department of the Postmaster-General of Victoria employed as a telegraph operator, and he therefore put in a special defence that he was a public servant in the employ of the Commonwealth of Australia, and was not within the jurisdiction of the State of Victoria for taxation purposes so far as the tax sued for was concerned.

Flint, by special leave, obtained on 19th April 1907, now appealed to the High Court.

Mitchell K.C. (with him *Joseph*), for the appellant. There is nothing in the reasoning of the Privy Council in *Webb* v. *Outtrim* (1) which affects the reasoning of this Court in *Deakin* v. *Webb* (2) and *D'Emden* v. *Pedder* (3). The intention is clearly indicated in sec. 74 of the Constitution, that in matters there mentioned the High Court is to be the final arbiter—that the decision of the High Court should be final and conclusive in the sense that there should be no appeal to the King in Council by the exercise of the prerogative except in cases where the High Court gave its certificate. The difficulty which it is suggested may arise from conflicting decisions of the Privy Council and of the High Court may be prevented by legislation by the Parliament of the Commonwealth under sec. 77 (II.) of the Constitution. The object of sec. 74 is, not to put an end to a particular piece of litigation, but to secure an authoritative decision of the High Court upon certain matters of purely Australian concern. Finality is given by sec. 74 to a decision of the High Court on a "question," and not to a judgment of the High Court. That is to say, if in a particular matter coming before the High Court, that Court decides a question as to the limits *inter se* of the Commonwealth and a State, an appeal may be brought to the Privy Council from the judgment of the High Court, but on that appeal the decision of the High Court as to that question may not be challenged unless the High

(1) (1907) A.C., 81 ; 4 C.L.R., 356. (2) 1 C.L.R., 585.
(3) 1 C.L.R., 91.

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Court has given its certificate. An appeal lies in this case to the High Court under sec. 39 of the *Judiciary Act* 1903. The Court of Petty Sessions was exercising federal jurisdiction, for this was a matter involving the interpretation of the Constitution within the meaning of sec. 76 of the Constitution and sec. 30 of the *Judiciary Act* 1903.

[*Irvine* K.C.—It is not disputed that this case involves the interpretation of the Constitution.]

[Counsel referred to *Safford and Wheeler's Privy Council Practice*, p. 548; *Healey* v. *Bank of New South Wales* (No. 2) (1); *Read* v. *Bishop of Lincoln* (2).]

Irvine K.C. and *Pigott* (*Harrison Moore* with them), for the respondent. The appeal is not competent. If the Court of Petty Sessions was not exercising federal jurisdiction no appeal lay to the Queen in Council at the inception of the Commonwealth within the meaning of sec. 73 (II.) of the Constitution, and therefore no appeal lies to this Court. See, however, *Parkin* v. *James* (3). If the Court of Petty Sessions were exercising federal jurisdiction, the appeal would lie to this Court under sec. 73 (II.) of the Constitution. Federal jurisdiction must be conferred upon a Court either by the Constitution or by Commonwealth legislation. The mere fact that a Court is dealing with a matter involving the interpretation of the Constitution does not constitute federal jurisdiction. Sec. 39 of the *Judiciary Act* 1903, which purports to invest State Courts with federal jurisdiction, is *ultra vires*. Sub-sec. (2) (*a*) of sec. 39 attempts to take away the right of appeal to the Privy Council, and is therefore invalid, and the rest of the section is so inextricably mixed up with sub-sec. (2) (*a*) that the whole section must fall. *Cooley's Constitutional Limitations*, 6th ed., pp. 210, 212 (*n*); *Ah Yick* v. *Lehmert* (4); *Roberts* v. *Ahern* (5).

[ISAACS J. referred to *Colonial Laws Validity Act* 1865, sec. 2.]

This Court is bound to accept the law as laid down by the Privy Council in all matters, including those referred to in sec. 74 of the Constitution, using the word "bound" in the sense that this

(1) 24 V.L.R., 694; 20 A.L.T., 200.
(2) (1892) A.C., 644, at p. 654.
(3) 2 C.L.R., 315, a p. 331.
(4) 2 C.L.R., 593, at p. 602.
(5) 1 C.L.R., 406, at p. 417.

Court is bound to give its decisions according to law, and the law must be capable of determination. There must be a Court which ultimately can declare what the law is: *Quick and Garran's Australian Constitution*, p. 758. There cannot be two conflicting laws as to the same facts operating over the same area. If the appellant's view were correct, the Privy Council might place a certain interpretation on a section of the Constitution in a matter properly coming before it, and to which sec. 74 did not relate; in another matter which was within sec. 74, the High Court might place an opposite construction on the same section of the Constitution. Then, if that section came before the High Court for construction in a matter not within sec. 74, the High Court would be bound to follow the previous decision of the Privy Council. So that there might be two opposite constructions by the High Court of the same section of the Constitution, one binding in cases within sec. 74, and the other binding in cases not within sec. 74. There is no doubt that the Privy Council is a Court of appeal with regard to the High Court, and therefore the High Court is bound by the decisions of the Privy Council although in a particular class of cases the right of appeal is taken away. Similar provisions taking away the right of appeal are found in many Acts, but the decision of the superior Court has always been held to be binding on the inferior Court.

[HIGGINS J. referred to *Trimble* v. *Hill* (1); "*The City of Chester*" (2).

ISAACS J.—The reason for taking away the right of appeal in those cases was to prevent frivolous appeals. That is not the object in this case. See *Lane* v. *Esdaile* (3); *Ex parte Stevenson* (4). He also referred to *London Tramways Co. Ltd.* v. *London County Council* (5); *Leask* v. *Scott* (6); *North British Railway Co.* v. *Wauchope* (7).]

In interpreting sec. 74 of the Constitution the Court is entitled to look at the history of the section. That does not entitle the Court to look at the various forms in which the bill appeared before it came up for consideration in the Imperial Parliament.

(1) 5 App. Cas., 342.
(2) 9 P.D., 182, at p. 207.
(3) (1891) A.C., 210, at p. 212.
(4) (1892) 1 Q.B., 609, at p. 612.
(5) (1898) A.C., 375, at p. 379.
(6) 2 Q.B.D., 376.
(7) 4 Macq. H.L. Cas., 352.

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At most it entitles the Court to look at the different forms which the bill assumed in its passage through the Imperial Parliament. The same rules of interpretation should be applied to the Constitution as to any other Act of Parliament. *Hardcastle on Statutory Law*, 4th ed., pp. 121, 465; *Green* v. *The Queen* (1).

[HIGGINS J. referred to *Holme* v. *Guy* (2).

ISAACS J. referred to *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (3); *Caledonian Railway Co.* v. *Greenock and Wemyss Bay Railway Co.* (4); *Inglis* v. *Buttery* (5).]

The word "decision" in sec. 74 of the Constitution means the judgment—the actual order affecting the parties. If it meant a decision upon a point of law arising in a particular case, then, if a judgment of the High Court were based partly on a determination of a question of law as to the limits *inter se*, and partly on a determination as to something else, there might be an appeal to the Privy Council from the judgment, but on that appeal the Privy Council could not interfere with the determination of the High Court as to the question of law. Sec. 74 prevents an appeal, and, as no appeal could be brought to the Privy Council from a determination of a question of law but only from a judgment, the appeal which is prevented is an appeal from a judgment. A question of the limits *inter se* of the powers of the Commonwealth and a State means nothing more than a question as to the distribution of those powers—a question whether a certain power is possessed by the Commonwealth or by the State. The only case in which such a question can arise in regard to legislative powers is where the power granted to the Commonwealth is exclusive of that of the States, that is, where the legislative powers of the Commonwealth and of the States are mutually exclusive. It is not a question of a conflict of powers but of the limits of powers. There must be a field in which the Commonwealth can legislate and a field in which the States can legislate, and the question must be what are the limits of those fields. The question of the limits *inter se* is not one of a conflict of powers because that is

(1) 1 App. Cas., 513.
(2) 5 Ch. D., 901, at p. 905.
(3) (1892) A.C., 498, at p. 501.
(4) L.R. 2 H.L. Sc., 347, at p. 348.
(5) 3 App. Cas., 552, at p. 576.

provided for by sec. 109 of the Constitution. The Income Tax Acts may give rise to a question of conflict of powers, but not to a question of the limits *inter se*. This Court is not the final arbiter as to whether this is a question of the limits *inter se*.

The doctrine of implied prohibitions is not applicable to the Constitution. The necessity for it is to a very great extent removed by sec. 109, the object of which was to avoid a clashing of authorities. Assuming that the principle of non-interference with Commonwealth instrumentalities applies to the fullest extent to which it has been applied in the United States, the facts in the present case do not bring it within that principle. It cannot be asserted that the services of a telegraph operator are affected in any way by the imposition of an income tax which simply makes him take his burden as an ordinary citizen of Victoria, and which is proportioned to his ability to earn income. The question whether a particular Act is within the principle must in every case turn on a question of fact, even if the view in *Deakin* v. *Webb* (1) is right. That is borne out in the American decisions: *Railroad Co.* v. *Peniston* (2); *Hibernia Savings and Loan Society* v. *San Francisco* (3); *Murray* v. *Charleston* (4).

[GRIFFITH C.J. referred to *Crandall* v. *State of Nevada* (5).

BARTON J. referred to *Dobbins* v. *Commissioners of Erie County* (6).

ISAACS J. referred to *Central Pacific Railroad Co.* v. *California* (7); *Hibernia Savings and Loan Society* v. *San Francisco* (8); *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (9).]

[Counsel also referred to *Sir Frederick Pollock's Essays in Jurisprudence and Ethics*, p. 329; *Dicey's English Law and Opinion in the 19th Century*, p. 364; *Sir F. Pollock's First Book of Jurisprudence*, 1st ed., p. 323; *Trial of Earl Russell* (10); *Encyclopædia of Laws of England*, tit. "Appeal"; *Bankruptcy Act* 1883 (46 & 47 Vict. c. 52), sec. 104; *Agricultural Holdings Act* 1900 (63 & 64 Vict. c. 50); *Jones* v. *Mersey Docks Trustees*

(1) 1 C.L.R., 585.
(2) 18 Wall., 5.
(3) 200 U.S., 310.
(4) 96 U.S., 432, at p. 445.
(5) 6 Wall., 35.
(6) 16 Peters, 435.
(7) 162 U.S., 91.
(8) 96 Amer. St. Rep., 100.
(9) (1897) A.C., 231, at p. 237.
(10) (1901) A.C., 446.

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(1); *Castle on Rating*, 4th ed., p. 501; *R.* v. *Corporation of Oldham* (2).

Mitchell K.C. in reply. An appeal lies to this Court in this case either under sec. 73 (II.) of the Constitution or under sec. 39 of the *Judiciary Act* 1903. The Court of Petty Sessions was exercising federal jurisdiction, which sec. 77 (II.) of the Constitution recognizes a Court of a State may have without being invested with it, because it was dealing with one of the matters included in secs. 75 and 76 of the Constitution, and an appeal therefore lies under sec. 73 (II). If the Court of Petty Sessions was exercising State jurisdiction, then it was a Court from which an appeal lay to the King in Council, and again an appeal would lie to this Court under sec. 73 (II.) of the Constitution. Apart from this, an appeal lies under sec. 39 of the *Judiciary Act* 1903. No part of that section is *ultra vires*, and, even if that part which is said to purport to take away the right of appeal to the Privy Council were *ultra vires*, the rest of the section will stand: *Colonial Laws Validity Act* 1865, sec. 2. In interpreting the Constitution the Court may look at the State Acts dealing with the proposed Constitution and at the Schedules to those Acts containing that Constitution. The object of looking at them is to see that there were negotiations and what was the subject matter of those negotiations. The word "decision" in sec. 74 of the Constitution means a decision upon a point of law, and it is thus used in *London Tramways Co.* v. *London County Council* (3). That decision, if embodied in a judgment of the High Court, might contain other matters decided by the Court. As to these other matters there might be an appeal to the Privy Council from the judgment without a certificate of the High Court, but as to the decision on the point of law there could be no such appeal without a certificate. Sec. 74 is not ambiguous, the language is most appropriate for securing that the High Court shall be the final arbiter as to certain constitutional questions. The High Court is also the final arbiter as to whether a particular question is one within sec. 74. The doctrine enunciated in *M'Culloch* v.

(1) 11 H.L.C., 443.
(2) L.R. 3 Q.B., 474.
(3) (1898) A.C., 375.

Maryland (1), has not been modified by later decisions in the United States. In *South Carolina* v. *United States* (2), all the earlier cases dealing with that doctrine were referred to with approval.

He also referred to *Stevenson* v. *James* (3); *Leask* v. *Scott* (4).

Cur. adv. vult.

June 7. For the reasons given in *Baxter* v. *Commissioners of Taxation* (5), the appeal was allowed.

June 8. An application was now made for a certificate of the High Court under sec. 74 of the Constitution.

Irvine K.C. The questions as to which a certificate is asked are:—(1) Whether the principle laid down in *M'Culloch* v. *Maryland* (1) applies to the Australian Constitution? (2) Whether the Victorian Income Tax Acts in so far as they apply to Commonwealth officers are an infringement of that principle? (3) Whether the Victorian income tax, being collected after the salaries are paid, is an interference with federal instrumentalities? (4) Whether the Victorian Income Tax Acts, so far as they assume to tax the salaries of federal officers, are a valid and enforceable exercise of State legislative power? The main ground for asking for the certificate is that without it it is impossible within the Constitution to obtain a final and uniform settlement of the law on these points. As strengthening that ground there is the fact that not only is the judgment of this Court opposed to judgments of the Victorian Judges, but there is a marked difference of opinions between the Judges of this Court. Under the Constitution the granting of a certificate is the only mode of putting an end to an intolerable position, viz., the existence of two interpretations of the Constitution differing vitally and fundamentally from one another.

The only other methods of putting an end to that position are by an amendment of the Constitution or by the exercise by the Imperial Parliament of its paramount power of legislation.

(1) 4 Wheat., 316.
(2) 199 U.S., 437, at p. 464.
(3) 15 V.L.R., 711; 11 A.L.T., 109.
(4) 2 Q.B.D., 376, at p. 380.
(5) 4 C.L.R., 1087.

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[ISAACS J.—The federal Parliament could put an end to the position by enacting that in cases within sec. 74 the jurisdiction of the High Court should be exclusive of that of the State Courts.] That would not be of any effect unless the State Courts were deprived of jurisdiction in all cases in which a plea of a question of the limits *inter se* was raised by either party.

No stronger case for a certificate can be conceived than this. The fact that another part of the Empire may be affected cannot now be a ground for asking for a certificate, for no other part of the Empire can be affected by a decision on a question of law as to the limits *inter se*. If the Court had held that the word "decision" in sec. 74 meant judgment in a particular case, other parts of the Empire might have been affected by a judgment, and that might then have been a ground for asking for a certificate.

Mitchell K.C. was not called on.

GRIFFITH C.J. In my opinion the motion made for a certificate in this case should be refused. The reasons for coming to that conclusion are apparent in the judgment I delivered yesterday from this Bench, and I will not occupy time by referring to them again. I will only say a word with reference to the argument used by *Mr. Irvine* as to what he called the "intolerable position" existing because of there being conflicting judgments of this Court and the Privy Council on the same subject. I do not think the position is intolerable. I do not think that is the correct epithet. It may be called an inconvenient position. But, whatever it is called, he says the strong reason why a certificate should be granted is that there is no other way of escape from that position. If it were true that there is no way of escape from that position unless we give a certificate, still, in the public interest and for the future welfare of the Commonwealth, I think it would be better that the position should continue, however inconvenient, than that escape should be made from it in that manner.

But it is not correct to say that there is no other way of escape. There are two ways of escape, quite easy and both open. One is the exercise by the federal Parliament of its power

under sec. 77 (II.) of the Constitution, which can be done in various ways. One way would be by making the appellate jurisdiction of this Court exclusive of the appellate jurisdiction of the State Supreme Courts in some or all of the matters which together are called federal jurisdiction. They may exercise that power in full or limit it to any class of those matters. The other way in which the inconvenience can be remedied is one which was pointed out in the judgment of the majority of this Court delivered yesterday. The federal Parliament can, if it pleases, make its grants to its servants subject to the right of the States to tax them. As was then pointed out *quilibet potest renunciare juri pro se introducto.* This argument, which is the only novel one in addition to those used in *Deakin* v. *Webb* (1), therefore fails, and I think the certificate should be refused.

BARTON J. On a similar application in the case of *Deakin* v. *Webb* (1) I joined in the unanimous opinion of the Court as then constituted that no certificate should in that case be granted. In concurring in the judgment of the Court in the present case I have nothing to add to what I then said except that I cannot see in what way the reasons then advanced in support of the application, and which seemed to the Court to be insufficient, have been strengthened, and I think nothing has happened in the meantime to strengthen them, but rather that they have been weakened. Therefore I think the certificate should be refused.

O'CONNOR J. I am of the same opinion. Circumstances might arise which would make it right in the public interests that the final interpretation of the Constitution on some question involving the constitutional powers *inter se* of the Commonwealth and a State or of State and State should be left to the Privy Council. When those circumstances arise they will be considered. They have not arisen in this case. The question which has been argued so long and so strenuously before us is merely a question of what are the limits of the constitutional powers of the Commonwealth and the States under their respective Constitutions in a matter which concerns only the people of Australia. *Mr. Irvine* has

(1) 1 C.L.R., 585.

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urged that the fact that there is a conflict as to the interpretation of the same constitutional document between the Privy Council and this Court is a circumstance which ought to weigh with us in determining that the question involved ought to be decided by the Privy Council. That conflict arises from the condition of the law, and it is for the legislature, and not for this Court, to bring it to an end. All possibility of conflict could be removed by the legislature if the Parliament of the Commonwealth exercised its rights under the Constitution, as has already been suggested during the argument, but I can give no countenance to the doctrine that it should be determined by sending this case to the Privy Council in order that an interpretation may be put upon the Constitution, which I believe to be contrary to its spirit and to its letter, and which would render the working out of the daily relations of State and Commonwealth under its provisions impossible. To take the course suggested would be to depart from the duty which the Constitution has placed upon this Court. In determining a similar application in *Deakin* v. *Webb* (1) I said :—" The will of the people as represented in the Constitution is that we, and we alone, shall have the responsibility of determining the cases under sec. 74 which ought to be finally decided by us, and the cases which ought to be decided finally by the Privy Council. In that sense we have been made, not only the interpreters, but the guardians of the Constitution. That is to say, the duty has been placed upon us, not only to see that we interpret the Constitution according to our best judgment, but to take care, also, that, except under very exceptional circumstances, we do not allow the interpretation to fall into any other hands. So strongly do I feel that that duty has been cast on myself as a member of this Court, that I have no hesitation in saying, if we found that by a current of authority in England, it was likely that, should a case go to the Privy Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the Constitution as we believed it to be, it would be our duty not to allow the case to go to the Privy Council, and thus to save this Constitution from the risk of what we would consider a misinterpretation of its fundamental

(1) 1 C.L.R., 585, at p. 630.

principles." What has happened since has to my mind strengthened that view. The decision of the Privy Council in *Webb* v. *Outtrim* (1) has made it clear that the interpretation placed upon the Constitution in that case would be placed upon it in this, for we must assume that that case had as full and careful consideration at the hands of the Privy Council as any other case coming from Australian Courts would have. Under these circumstances I think it to be the clear duty of this Court to say that the question involved ought not to be determined by the Privy Council, particularly now we know that the Privy Council is likely to interpret the Constitution in respect of the matter under consideration in a way which the majority of this Court has decided to be wrong in principle. For these reasons in my judgment the application must be refused.

ISAACS J. For the purpose of this application it is, of course, admitted that the decision, whatever it may be, against which it is desired to appeal is a decision upon a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the State of Victoria.

That is the basis on which the application is made, and therefore the precise form of stating the question is immaterial. The actual decision was in fact of that nature because the question was whether the Victorian *Income Tax Act* is, so far as it applies to the salaries of federal public servants, in conflict with Commonwealth power, or, in other words, as to the limits *inter se* of the constitutional power of the State of Victoria to pass such an Act affecting those salaries, and the constitutional power of the Commonwealth in respect of its public servants and their salaries, as being or affecting the means of carrying on the operations of government.

The special reason alleged here is that there is a decision of the Privy Council opposed to that of this Court; and it is alleged that there arises thereby what is termed an "intolerable position."

In order to properly arrive at the proper judgment to be given on this question, because it is really a judicial question to be determined on both the law and the facts of the situation as they

(1) (1907) A.C., 81; 4 C.L.R., 356.

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present themselves to us, it is necessary to recall one or two considerations already dealt with in our judgments of yesterday.

I have already held in entire concurrence with three of my learned colleagues, in addition to our view on the 39th section of the *Judiciary Act*, and the inclusion of this case in the class pointed to by sec. 74, that on such a question the Privy Council is not, and cannot be regarded as an appellate tribunal from this Court unless and until the certificate is given such as is now asked for.

I pointed out that this class of question was, by a constitutional provision that finds no parallel, severed from all others and subjected to exceptional judicial treatment. It follows that where decisions of the High Court are thus, in the absence of a certificate, severed from the jurisdiction of the Privy Council, the jurisdiction of the Privy Council is equally severed from them.

Those who maintain that the Privy Council is still to be looked upon as of appellate authority in regard to such decisions are called upon to give some intelligible meaning to sec. 74 consistent with their arguments. So far, none has been given, though repeatedly asked for, and I take it that as none has been offered in the course of two elaborate arguments lasting over a fortnight, none can be fashioned that will stand the test of reason.

This is important with regard to the present application, because it must not be assumed that the same considerations are to be applied by this Court in granting a certificate as are laid down for itself by the Privy Council in granting special leave to appeal.

Indeed, sufficient weight has not been given to the fact that the certificate is to be given by this Court, and not by the Privy Council itself.

Why was it enacted, not merely that no appeal of right should exist, but that even the power of giving special leave should be taken away from the Privy Council and entrusted to this Court alone? What effect is given to that eloquent circumstance by those who still maintain that the Privy Council must still be looked upon as the Court of Appeal on these matters? That tribunal could as well judge of the general importance of the question as this Court, the facts would speak as strongly to them

as to us with regard to the amount involved or as to the substantial character of the dispute, and it could form an equally valuable opinion as to how far it touches purely Imperial interests. The importance of the question cannot constitute a special reason, because every such question is of immense importance as affecting for all time the relative power of the respective legislatures of the communities concerned.

If, then, the previously universal rule of allowing appeals to the Privy Council by leave of that body, given either by itself or its delegates, was reversed, some great reason must have impelled the change. As the Imperial Parliament deprived the Privy Council of this power, and conferred it upon an Australian Court—a power not merely to permit but practically to compel the Privy Council to entertain the cause, because, being statutory, leave, once the certificate is granted, that tribunal cannot revoke or rescind it—what does that point to? It must be because Australian considerations were to have a weighty, perhaps a dominant, force in guiding the judgment of the Court in acceding to or refusing the application.

How then should Australian interests, which certainly are to have some consideration, be regarded? Turn to the Constitution for guidance. By that instrument a national Government was constructed—legislative, executive and judicial.

A special federal Court was insisted on. State Courts might or might not be utilised. In the construction of the Constitution these powers of adjudication might, at the will and discretion of the national Parliament, be excluded wholly or in part.

But the national tribunal was placed in the position of inalienable right and corresponding duty to determine these matters.

I pointed out yesterday that the Imperial Parliament indicated by the Constitution itself that it expected—perhaps I should have said hoped—that there would be uniformity of decision, but it made provision within the four corners of the Constitution in case a difference arose. That provision is that the federal Parliament, viewing the situation as a Parliament is entitled to view it—in addition to making a just deduction from federal officers' salaries—has also authority, if in its wisdom and discretion it thought right, to end the divergence by exercising the

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power of total or partial exclusion of State Courts from the interpretation of the Constitution, and leave the function of interpreting the national Constitution to the Supreme Australian Court.

But—because of a difference of opinion that has arisen between the national Court in the exercise of federal jurisdiction for which it was specially created, and the Courts under the supervision of the Privy Council which was in these matters expressly cut off from the national Court unless a certificate were given—it would be a total reversal of all the federal principles embodied in the Constitution if this national tribunal were to abdicate its special functions and practically repeal the 74th section by virtually, if not in form, taking a course which amounts to imprinting for all time upon this Constitution a meaning which the Court considers wrong, and which would, under present circumstances, be a foregone conclusion.

HIGGINS J. As to this application I am happy to be able to concur with my colleagues, and without hesitation; but, inasmuch as I have differed from them on the main question, I should like to explain my position. This power to refuse a certificate for appeal to the King in Council we undoubtedly have. It is a privilege, and in my view, the only privilege, which the High Court has as to constitutional points. But it is a responsibility also; and I think that we should be guilty of a breach of duty if we were to pass on to another tribunal a question within the ambit of sec. 74 of the Constitution without good cause shown. It has to be assumed, for the purpose of this application, that the question is one within the ambit of sec. 74. This assumption may be right, or may be wrong; but except on such an assumption, there is no ground for making this application. I cannot find any good cause shown in this case. Sec. 74 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." But I agree with my colleagues that, where it is a matter of purely Australian concern, such as the payment by federal officers of State income tax, we should not, without very exceptional reasons, pass on the responsibility to the Privy Council. This question—as to the duty of federal officers to pay income tax—is the question, and the only question, under sec. 74, or as to which a certificate is now required. The higher question, as to the duty of this Court to follow the decision of the King in Council, as being the decision of the ultimate exponent of law for the Empire, does not come within the ambit of sec. 74; and counsel for the Commissioner of taxation, accepting for the present purposes the ruling of the majority of this Court as to the meaning of sec. 74, asks for the certificate only as to the question of liability to income tax, not as to the question of the relations of the High Court towards the King in Council. The fact that I happen to differ from my colleagues on both points is not, in my opinion, a sufficient reason for giving my voice in favour of a certificate to the effect stated in sec. 74, as to the question of liability to income tax.

However, I must say that I agree with *Mr. Irvine* that the position is intolerable and pregnant with mischief. But this argument, that the position is intolerable, is an argument in favour of following the decision of the Privy Council, as the appellate Court, and the final Court of all the Colonies, rather than an argument for giving a certificate on this question under sec. 74. That decision of the Privy Council will stand on the records of the Privy Council, that the income tax is payable; and, whatever may happen, it is pretty certain that the Privy Council will not overrule its decision upon the mere ground that the High Court has given a contrary decision. The question may arise not only on appeal from a Supreme Court, but also, as I have said during the argument, in a number of ways incidentally in English and other Courts; and any English Court that happens to deal with the question will treat the Privy Council as having the final power to declare the law for Australia upon all questions on which it has declared that law. It is said that the federal Parliament can exercise its power under sec. 77 (II.), so as to deprive all the State Courts of all federal appellate jurisdiction. I do not

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think that we are entitled to reckon on the Parliament taking any such extreme step—a step which would deprive the Commonwealth of the assistance of the very efficient State Courts, would lead to the raising of sham federal issues in order to delay decisions in the State Courts, would cause delay and expense to suitors, and would saddle the Commonwealth with many new federal Courts and functionaries. But even if the federal Parliament acted on this suggestion, it could not reverse the decision, which will stand, of the King in Council.

As to the other suggestion, that the federal Parliament may make its grants of salary subject to the rights of the States to tax them, I merely refer to it, because I do not at present want to be committed to any definitive view on the subject. At present I cannot see how, if an income tax upon the salary of a federal servant is made invalid by the Constitution, the federal Parliament can alter the Constitution by making the income tax payable. However, I do not wish to make any final pronouncement on the suggestion, which, as far as my memory serves me, has not been mentioned before in this Court.

Certificate refused.

Solicitors, for appellant, *Strongman & Crouch*, Melbourne.
Solicitor, for respondent, *Guinness*, State Crown Solicitor.

B. L.