

## CASE NOTES

### COMMONWEALTH OF AUSTRALIA AND ANOTHER v. CIGAMATIC PTY LTD AND ANOTHER<sup>1</sup>

*Constitutional Law—Commonwealth and States—Crown Debts—Power of State to restrict prerogative right of Commonwealth to priority*

The broad issue in this case was whether it was within the constitutional competence of the Parliament of a State to restrict or abolish a prerogative right of the Crown in right of the Commonwealth. It arose in this way.

The defendant Company was in the course of being wound up under the New South Wales Companies Act. The plaintiffs, the Commonwealth and the Commissioner of Taxation, were creditors of that company in respect of certain amounts for postal charges and sales tax. They claimed that, by virtue of the common law prerogative, they were entitled to be paid these amounts in priority to all the unsecured creditors of the company. This claim was denied on the ground that by force of the Companies Act (N.S.W.) the priority was excluded. The question was whether it was competent for a State Parliament to exclude the Commonwealth prerogative right to priority in the payment of debts.

This question had, in fact, been decided in favour of the States by the High Court in an earlier case: *Uther v. Federal Commissioner of Taxation*.<sup>2</sup> However, the High Court, in the present case, by a majority,<sup>3</sup> declined to follow that case and held that it was not within the constitutional competence of a State Parliament to deprive the Crown in right of the Commonwealth of its prerogative rights. Accordingly, the Commonwealth right to priority was not affected by the Companies Act (N.S.W.).

Prior to *Uther's* case the constitutional principles involved in the interaction of Commonwealth and State legislation and instrumentalities were far from settled. Because the Constitution predicated the continued existence of Commonwealth and States as separate Governments, the High Court found it necessary to imply some restraints on the use of Commonwealth and State legislative powers. But the judges differed as to the actual restraints that should be implied. Dixon J. took the view that neither the Commonwealth nor the States could discriminate against the operations or activities of the other.<sup>4</sup> Other judges, notably Rich, Starke and Williams JJ. in *Melbourne Corporation v. The Commonwealth (State Banking Case)*<sup>5</sup> seemed to favour the broader view that neither the Commonwealth nor the States could interfere with the essential governmental

<sup>1</sup> (1962) 36 A.L.J.R. 97. High Court of Australia; Dixon C.J., McTiernan, Kitto, Taylor, Menzies, Windeyer and Owen JJ.

<sup>2</sup> (1947) 74 C.L.R. 508.

<sup>3</sup> Dixon C.J., Kitto, Menzies, Windeyer and Owen JJ.; McTiernan and Taylor JJ. dissenting.

<sup>4</sup> As to the Commonwealth see *Melbourne Corporation v. The Commonwealth* (1947) 74 C.L.R. 31, 79; as to States, see *West v. Commissioner of Taxation (N.S.W.)* (1936-37) 56 C.L.R. 657, 681. Dixon J. also took the view that the Commonwealth and State could not tax the operations or activities of the other. See *Melbourne Corporation v. The Commonwealth* (1947) 74 C.L.R. 31, 81 and *Essendon Corporation v. Criterion Theatres Ltd* (1947) 74 C.L.R. 1, 18, 22. <sup>5</sup> (1947) 74 C.L.R. 31, 66, 70, 99.

functions or rights of the other.<sup>6</sup> The *Engineers Case*,<sup>7</sup> it was said, did not decide that, in interpreting the Constitution, no implications could be made. All that it did decide was that, *prima facie*, 'a power to legislate with respect to a given subject enables the Parliament to make laws, which, upon that subject, affect the operations of the States and their agencies'.<sup>8</sup>

In *Uther's case*, it was sought to apply these principles in favour of the Commonwealth. It was argued that the prerogative right of the Commonwealth to priority in the payment of debts due to the Commonwealth was a governmental right or function with respect to which a State Parliament has no power to make laws. The Court rejected this argument, but for different reasons.<sup>9</sup> Latham C.J. took the view that the principle of the *State Banking Case* did not apply in favour of the Commonwealth in the same way as it may be properly applied in favour of a State because the Commonwealth could always protect itself under section 109 of the Constitution. Williams J. said that the application of the *State Banking Case* varied with the circumstances and the law here was not one intended to interfere with essential governmental functions. Starke J. considered that this was a prerogative right which related to procedural matters and not substantive rights and was therefore governed by the *lex fori*. Rich J. said that the State Parliament has power to abolish a Commonwealth prerogative right of this sort.

Dixon J. who dissented, did not apply the principles of the *State Banking Case* for another reason. For the conflict in the case was not between State and Commonwealth but between Commonwealth and its own subjects. The question was not whether the State was legislating upon an essential governmental right of the Commonwealth, but whether it had any power at all to legislate as to the rights of the Commonwealth in relation to its subjects. And, in the view of Dixon J. it could not be said that the State has such a power. The States did not have this power at the establishment of the Commonwealth, nor were they given it by the Federal Constitution. It was a question of the fiscal and governmental rights of the Commonwealth, and, as such, as one over which the States had no power.<sup>10</sup>

This judgment was adopted by the majority in the present case. In a judgment in which Kitto and Windeyer JJ. concurred Dixon C.J. stated the general principle that the States have no power to control the legal rights of the Commonwealth with respect to its people. He preferred to describe the nature of the priority in question as a fiscal right belonging to the Government and affecting its Treasury, rather than as a prerogative right of the Crown in right of the Commonwealth. It was then a question

<sup>6</sup> Latham C.J. in that case, said that the Commonwealth could not discriminate against State functions on the ground that the Commonwealth had been granted no power in respect of such subjects: (1947) 74 C.L.R. 31, 61. <sup>7</sup> (1920) 28 C.L.R. 129.

<sup>8</sup> Per Dixon J. in *State Banking Case* (1947) 74 C.L.R. 31, 78.

<sup>9</sup> McTiernan J. did not advert to this argument but decided the case on another ground.

<sup>10</sup> This point had been stressed by Dixon J. in the earlier case of *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd* (1940) 63 C.L.R. 278, 308.

of whether the State could be said to have power to control or abolish a federal fiscal right. The State could have no such power.

As for the remaining members of the Court, Menzies J. (with whom Kitto J. agreed) simply adopted the dissenting judgment of Dixon J. in *Uther's* case and said that the 'Commonwealth Constitution does not permit a State Parliament to deprive the Crown in right of the Commonwealth of its prerogative rights'.<sup>11</sup> But had the matter not been one of 'vital constitutional importance' he would have been disposed to accept the plea of *stare decisis*. McTiernan and Taylor JJ. who dissented, did accept the plea of *stare decisis*, and refused to overrule *Uther's* case. They relied on practical considerations. The decision in *Uther's* case had stood for some fifteen years during which period it had regulated the winding up of companies in N.S.W. and the new Uniform Companies Act had been enacted on the basis that it was correct. McTiernan J. added the further consideration that the Commonwealth could always enact legislation giving it priority over payment of debts which would prevail under section 109, while Taylor J. stressed that to overrule *Uther's* case would merely add to the confusion of the state of the law with respect to winding up administrations. Neither judge expressly disagreed in principle with the majority although McTiernan J. would not assent to the broad proposition that the Commonwealth enjoyed under the Constitution immunity from State legislation on a matter within the States, 'residual legislative power'. Both judges preferred not to interfere with an earlier decision of the High Court on constitutional principle.

It may be noticed that the principle of this case is expressed in different terms by Dixon C.J. and Menzies J. Dixon C.J. said that the States have no power to control the legal rights of the Commonwealth in relation to its people, while Menzies J. said that the States have no power to deprive the Commonwealth of its prerogative rights. But both mean the same thing. For by 'legal rights' Dixon C.J. does not mean those which 'are the immediate product of federal statute and so are protected by section 109 of the Constitution'.<sup>12</sup> What he is referring to are no doubt those rights which arise at common law, the prerogative rights. Whichever way it is expressed, the principle thus involved is, it is submitted, the correct one. The private rights of the Commonwealth in relation to its subjects are matters over which the States should have no power at all, irrespective of the principles of the *State Banking Case*.

This does not mean that the State Parliament has no power at all to bind the Crown in right of the Commonwealth. Fullagar J. held this view in an earlier case: *Commonwealth v. Bogle*.<sup>13</sup> Although his judgment was concurred in by Dixon C.J., Webb and Kitto JJ. in that case, the view, as widely expressed, has not since received the express assent of other members of the Court.<sup>14</sup> Indeed, Dixon C.J. has pointed out on several

<sup>11</sup> (1962) 36 A.L.J.R. 97, 102.

<sup>12</sup> *Ibid.* 98.

<sup>13</sup> (1953) 89 C.L.R. 222, 259. He repeated this view in *Asiatic Steam Navigation Co. Ltd v. Commonwealth* (1956) 96 C.L.R. 397, 424 and in *Commonwealth v. Anderson* (1960) 34 A.L.J.R. 323.

<sup>14</sup> Dixon C.J. referred to it in *Deputy Commissioner of Taxation v. Brown* (1957-1958) 100 C.L.R. 32, 41 but did not expressly approve of it.

occasions<sup>15</sup> that the State Parliament may incidentally bind the Crown in right of the Commonwealth. It may enact general laws affixing legal consequences to given descriptions of transactions, such as the sale of goods, and if the Commonwealth enters into such a transaction it may be bound by the rule laid down. What the court decided in the present case was that a State could not control the legal relations of its subjects with respect to the Commonwealth.

It would appear that this principle does not apply in converse—the Commonwealth may have power to control the legal rights of the States in respect to its subjects. This is due to the nature of the Federal system. It is a dual system, with supremacy, where it exists, belonging to the Commonwealth and not to the States. The power of the Federal legislature was specific and paramount; the powers of the State legislature are residual and subordinate. Because of the affirmative nature of its powers, the Commonwealth could, for example enact laws excluding or reducing the priority of the States in bankruptcy.<sup>16</sup> But the States could have no such power. This may appear to be an odd result, but is one which necessarily arises out of the nature of the Federal system. It does not detract in any way from the principle of the present case, but is merely a consequence of having a dual system of government.

D. J. BEATTIE

#### HAQUE v. HAQUE<sup>1</sup>

*Private International Law—Change of Domicile—Tests Applied; Contract—Settlement in contemplation of polygamous marriage—its effect*

The deceased Abdul born a Moslem in India in 1912, was married there in 1927 in accordance with Moslem rites to a Moslem named Bibi. He moved with his father to Western Australia to establish a business there, leaving Bibi behind in India where he visited her and their two children from time to time.

In 1951 in Western Australia Abdul took unto himself a second wife, Azra, another Moslem who had just arrived from India for the purpose of marrying him. This union was effected in accordance with Moslem rites and did not satisfy the Western Australian Marriage Act.<sup>2</sup> At this date too, a settlement was executed between Abdul and Azra, whereby in consideration of the proposed marriage, a matrimonial regime was established in all respects identical to that which would have been created by Moslem law had the marriage between Indian domiciliaries taken place in India. The provisions of this settlement were expressed to apply notwithstanding a contrary testamentary intention. This second marriage was subsequently dissolved in India by the Moslem triple talaknama. The fact that he went through a second ceremony of marriage with

<sup>15</sup> *Farley's case* (1940) 63 C.L.R. 278, 308; *Uther's case* (1947) 74 C.L.R. 508, 528.

<sup>16</sup> See decision of Dixon and Evatt JJ. in *Farley's case* (1940) 63 C.L.R. 278, 313, 322 and Dixon J. in *Uther's case* (1947) 74 C.L.R. 509, 529. See also *Commonwealth v. New South Wales (Royal Metals Case)* (1923) 33 C.L.R. 1.

<sup>1</sup> (1962) 36 A.L.J.R. 179. High Court of Australia; Dixon C.J., Kitto, Menzies and Owen JJ.

<sup>2</sup> 58 Vict. No. 11 Pt III (W.A.) (1894).