COMMENT

THE QUEEN v. KIRBY, EX PARTE THE BOILERMAKERS' SOCIETY OF AUSTRALIA[1]

'When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty . . .

'Again, there is no liberty if the judiciary power be not separated from the legislative and the executive. . . .

'There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these powers.'

Montesquieu (1748) (trans. Nugent)

'Nor for any one man, or any Assembly, Court or Corporation of men . . . to usurp these three powers . . . unto themselves, is to make themselves the highest Tyrants, and the people the basest slaves in the world. . . .'

Clement Walker (1648)

PART I. THE DOCTRINE OF THE SEPARATION OF POWERS IN AUSTRALIA PRIOR TO THE BOILERMAKERS' CASE

The object of this comment will be to examine the extent to which it may be said that the Commonwealth Constitution, in its creation of the Australian governmental system, introduced into that system the doctrine of the separations of powers.

I

The first proposition that can be stated with some certainty is that we are entitled to assume that the framers of our Constitution did intend to introduce into our political system some form of the doctrine of the separation of powers.[2] The separation of the three

[1] [1956] A.L.R. 163; High Court of Australia; Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

[2] This fact has been recognized at all times by the High Court. In addition to later references, see especially *Victorian Stevedoring and General Contracting Co. Pty Ltd. and Another v. Dignan* (1931) 46 C.L.R. 73, 89-90, 96 per Dixon J.; *New South Wales v. Commonwealth* (1915) 20 C.L.R. 54, 88 per Isaacs J., *'When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed . . .'*; and *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 264 per Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ., *'The Constitution of the Commonwealth is based on a separation of the functions of government.'* My italics. However, it would seem that the High Court has been more confident in discovering the intention in the Founding Fathers to so introduce the doctrine than were the framers themselves; see *National Australasian Convention Debates* (1891 Official Report) p. 407 per Sir Samuel Griffith, p. 472 per Sir John Dower and *passim* per Mr Inglis Clark; *Debates,* Adelaide (1897 Official Report) pp. 1174-5; *Debates,* Melbourne (1898 Official Report) p. 356 per Sir John Forrest, pp. 356-7 per Mr O'Connor.

major functions of government, the declaration of separate organs in whom the power to exercise these functions is vested and the detailed delimitation both of the form in which these organs are constituted and of the character of those powers they may exercise, follow closely those found in the American Constitution, into which this same structure was inserted in order to make the teachings of Montesquieu the basis of the system of government of the United States.[3]

In its logically ideal form the doctrine of the separation of powers, considered in the light of the most strict interpretation of such Constitutions as those of America and the Commonwealth, results in the following propositions:

1. The legislative organ can exercise only such legislative power as is permitted to it by the terms of the Constitution, and can exercise no other powers whether or not vested by the Constitution in any other organ. A similar rule governs the executive and judicial organs.

2. The only legislative power that is competent to the federal body is that which the Constitution sets forth. Such federal legislative power may only be exercised by that organ in which it is vested. A similar rule governs the executive and judical power.

3. No one or more organs may control the exercise by any other organ of those powers with which that other organ is invested.

It remains to be seen what limitations on this strict form of the doctrine of the separation of powers in a written Constitution exist in our own governmental system, either by virtue of the express terms of the Constitution, or by the judicial recognition of some legal fact existing in that system powerful enough to displace the doctrine.

[3] Commonwealth Constitution:
S. 1: 'The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives . . .'
S. 61: 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative.'
S. 71: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.'
Constitution of the United States of America:
Art. I. Sec. 1: 'All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.'
Art. II. Sec. 1: 'The executive power shall be vested in a President of the United States of America . . .'
Art. III. Sec. 1: 'The judicial power of the United States shall be vested in one Supreme Court, and in such other inferior courts as the Congress from time to time may ordain or establish.'

II

There can be no doubt that a flexible and co-ordinated system of government cannot exist unless each separate department is permitted to exercise certain powers, strictly falling outside its governmental function, but essential in order that the function for which it was set up may be carried out with any degree of competence at all. These auxiliary or ancillary functions, born of political necessity, may be said to be the only *essential* limitation on the strict doctrine of separation of powers.

Having the advantage of viewing the difficulties that had arisen in the 110 years' history of the United States Constitution on this point,[4] the Founding Fathers determined to circumvent similar problems in Australia and introduced placitum (xxxix) into s. 51:

> 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature. . . .'[5]

Although there can be no question that these ancillary powers do exist under our Constitution, doubts have been felt whether their introduction stems not so much from s. 51 (xxxix) as from the introduction of a British political tradition.[6]

III

When the framers of our Constitution introduced the doctrine of the separation of powers by implication from the method by which they laid out the governmental system of the Commonwealth, they were faced with the cold fact that a strict separation of powers is a denial of the traditional British principle of responsible government. This principle, by which the executive had been under the

[4] Dean Pound, 'The Rule Making Power', 12 *American Bar Association Journal* 599, considering Art. I, s. 8 (18), which, limited as it is, is the closest approximation to our s. 51 (xxxix).

[5] *G. C. Crespin & Son v. Colac Co-operative Farming Ltd.* (1916) 21 C.L.R. 205, 214, per Barton J.; *Dignan's* case, *supra*, n. 2, 92, per Dixon J.; *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144, 151 per *Curiam; The Queen v. Davison* (1954) 90 C.L.R. 353, 368, per Dixon C.J. and McTiernan J.; *Collins v. Charles Marshall Pty. Ltd.* [1955] A.L.R. 715, 720-1, per *Curiam*. Cf. what is submitted to be misunderstanding by Powers J. in *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434, 485. See also suggested limitations on the operation of s. 51 (xxxix) by the Judicial Committee in *Colonial Sugar Refining Co. Ltd. v. Attorney-General for The Commonwealth* [1914] A.C. 237, 257.

[6] See Knox C.J., Rich and Dixon JJ. in *Le Mesurier v. Connor* (1929) 42 C.L.R. 481, 497.

control of the legislature by means of the Queen's Ministers of State being themselves members of the legislature and responsible to that branch of government for acts performed in their capacity as heads of the executive department, had long been revered in Britain as a bulwark against bureaucracy. And since the principle had in Britain never shown any sign of opening the door to Walker's 'tyranny', the ties of tradition therefore prevailed in 1901 over the desire for a symmetrical purity and s. 64 was inserted into the Constitution: 'No minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.' The Royal Commissioners expressed the result as follows: 'Responsible government has existed, inasmuch as Ministers have been members of Parliament, the existence of Ministers has been sustained by a majority in Parliament, and the Governor-General has acted on the advice of his Ministers.'[7]

It has thus been shown that the Founding Fathers, while undoubtedly introducing the doctrine of the separation of powers, tempered its operation, by the very terms of their Constitution, in two ways, the one founded on necessity and the other based on the respect which they held for the British political system. What remains to be seen is the extent to which the doctrine of the separation of powers, as introduced into Australia in a limited form by the terms of the Constitution, is yet subject in certain Constitutional areas to facts existing as a basis even more fundamental to our Constitution, and also the degree of strictness with which the doctrine is deemed to operate in Constitutional areas not subject to these overriding presumptions.

IV

One result of the increased complexity of an advanced political system and the ever-widening regulation of various fields of action which have always been revered as strongholds of individual freedom has been the necessity of giving a law-making power to the executive, so that the latter can frame detailed rules in order that the broad policies of the legislature might be put into practical effect. Exigencies of parliamentary time and the lack of expertise in the members of the legislature have resulted, in many countries, in the phenomenon of delegated legislation, which, although it remains in theory ever subject to the legislature, has had in practice a great,

[7] *Report of the Royal Commission on the Constitution* (1929), 50. See also the remarks of Lord Haldane to the House of Commons considering the Commonwealth of Australia Constitution Act, quoted by four members of the majority in the *Engineers'* case (1920) 28 C.L.R. 129, 146.

and often an extraordinary, degree of factual independence. It need scarcely be said that the theory of the delegation of certain law-making powers from the legislature to the executive strikes at the very root of the doctrine of the separation of powers, and, although this fact is of little consequence in Britain (where indeed the doctrine is honoured more in the breach than in the observance), its problematical nature loomed large in Australia, giving rise to the question whether our Constitution, in its acceptance of a limited form of the doctrine of Montesquieu, precluded such an exercise of the function of the legislature by the executive.

In a series of cases from *Baxter v. Ah Way*[8] to *Roche v. Kronheimer*[9] particular examples of delegation had, in the circumstances in which they arose, been held valid, but in *Victorian Stevedoring and General Contracting Co. Ltd. and Another v. Dignan,*[10] the point was taken that, generally, delegation of law-making powers was invalid as being a violation of the doctrine of the separation of powers in the Constitution. It was held that in the context of delegated legislation the doctrine must be deemed to be abrogated, the basis of the decision being that 'the existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law.'[11]

V

After the decision in *Dignan's* case (and it is obvious twenty-five years later that that decision was essential for the flexible operation of government), the doctrine of the separation of powers with regard to the legislature and the executive in this country had been breached at two vital points. Section 64 of the Constitution had itself introduced responsible government and *Dignan's* case had upheld the exercise by the executive of legislative functions delegated to it by the legislature. And these limitations had been held to exist not by sophistic arguments which would leave the doctrine in theory untouched, but by the recognition of fundamental provisos to it. So Isaacs J. could say in *Federal Commissioner of Taxation v. Munro,*[12] 'There is a separation of powers only to a certain

[8] (1909) 8 C.L.R. 626; *Farey v. Burvett* (1916) 21 C.L.R. 433; *Pankhurst v. Kiernan* (1917) 24 C.L.R. 120; *Ferrando v. Pearce* (1918) 25 C.L.R. 241; *Sickerdick v. Ashton* (1918) 25 C.L.R. 506.

[9] (1921) 29 C.L.R. 329.

[10] (1931) 46 C.L.R. 73, but see also Dixon *arguendo* in *Roche v. Kronheimer, supra,* n. 9.

[11] *Ibid.* 101-2, per Dixon J. Cf. the suggested proviso by Evatt J. at 121.

[12] (1926) 38 C.L.R. 153, 178.

extent', and later 'But the Constitution is for the advantage of representative government, and contains no word to alter the fundamental features of that institution.' Again Latham C.J., in *The King v. Federal Court of Bankruptcy, ex parte Lowenstein*[13] said, 'It cannot be said that there is involved in the Constitution a strict doctrine of the separation of powers.'[14]

It is submitted that it would not be going too far to say that the doctrine has been so extensively limited in the legislative and executive field that its existence there, assuming it does still exist, is a matter for observation rather than an established rule of law. It remains to be seen whether this fact can be construed as constituting a weakening of the fibre of the doctrine throughout the whole Constitution, or whether the doctrine is, for the purpose of the degree of severity of its operation, severable between the separate branches of the governmental system. That is, will the recognition of the acceptance of British tradition justify a commingling of judicial and non-judicial power in the judicial organ, and will it justify the exercise of the judicial power by some other branch of government?

VI

'Between legislative and executive powers on the one hand,' said Sir William Harrison Moore, speaking of the Australian Constitution, 'and judicial power on the other, there is a great cleavage.'[15] It is submitted that that principle must always be borne in mind when considering the doctrine of the separation of powers in the context of the judiciary and of the judicial power. For just as the Constitution 'has two aspects and serves a two-fold purpose . . . [it] is the fact of union and an instrument of government,'[16] so is the judiciary 'the special guardian of the Constitution . . . with the authority to declare invalid any laws deemed in conflict therewith.'[17]

This proposition was recognized as early as 1901 when Quick and Garran laid down the principle that 'executive power is so intimately connected with legislative that it is not easy to draw a line of separation; but the grant of the judicial power to the department created for the purpose must be regarded as an exclusive grant covering the whole power'.[18] Thus the basic fact that could prevent the

[13] (1938) 59 C.L.R. 556.

[14] *Ibid.*, 565. See also *Dignan's* case, *supra*, n. 2, 118, per Evatt J. and also the adoption by Evatt J. of the dictum of Isaacs J. in *Munro's* case, *supra*, n. 12.

[15] *The Commonwealth of Australia* (2nd ed., 1910), 101.

[16] *Report of the Royal Commission on the Constitution* (1929), 17.

[17] Haines, *The American Doctrine of Judicial Supremacy* (2nd ed., 1932), 27.

[18] *The Annotated Constitution of the Commonwealth of Australia* (1901), 720, quoting from Baker, *Annotated Constitution of the United States*, 121.

subjection of the doctrine of the separation of powers to the traditional laxity of the British system, would be that, whereas the legislative and executive organs of government are, so far as their interrelation is concerned, similar in Britain and in Australia, the judiciary is in Britain both closely bound up with the legislature (in the House of Lords) and the executive (in the person of the Lord Chancellor) and subject to the will of the legislature, and in Australia it is given the duty of declaring void any violation of the Constitution by these other departments.[19]

VII

In the light of a strict reading of Chapter III of the Constitution both as part of the governmental system under a written constitution of this kind, and as evidence of the introduction of the doctrine of separation of powers, a series of logical propositions arise, and we must now see the extent to which the courts have recognized that these logical propositions form, as rules of law, a part of our constitutional law. It is essential however that these propositions be separated in accordance with the sources from which they spring.

(A) Propositions arising from the very terms of Chapter III, with special emphasis on the positive aspects of ss. 71 and 72:

1. *That any body set up in order to exercise the judicial power of the Commonwealth must be constituted in accordance with the provisions of Chapter III.*

It has been repeatedly emphasized by the High Court that this proposition is a rule of law and that any such body must conform with the requirements as to form of Chapter III. It is at this stage that the courts have encountered the difficulty of laying down a general principle which will give an *a priori* basis for a decision whether the power being exercised by a body is judicial or non-judicial.[20]

[19] See on this point *New South Wales v. The Commonwealth* (1915) 20 C.L.R. 54, 108, per Rich J.

[20] *Huddart Parker & Co. Pty. Ltd. v. Moorehead* (1908) 8 C.L.R. 330, esp. 357, per Griffith C.J. See the approval of the definition there laid down by the Chief Justice, by the Judicial Committee in *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* [1931] A.C. 275, 295-6; *New South Wales v. The Commonwealth* (1915) 20 C.L.R. 54; *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434; *Waterside Workers' Federation of Australia v. Gilchrist, Watt and Sanderson Ltd.* (1924) 34 C.L.R. 482, esp. 512, per Isaacs and Rich JJ.; *British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation* (1925) 35 C.L.R. 422; *Dignan's* case, *supra*, n. 2, 116 per Evatt J.; *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation, supra,* approving the decision of the High Court reported *sub nom.*

2. *That any body which, duly constituted in accordance with Chapter III, exercises the judicial power of the Commonwealth, must exercise such power according to the requirements laid down in Chapter III.*[21]

The only reason that no express judicial pronouncement has ever been handed down for this proposition is that its obvious and basic nature precludes any argument challenging its validity as a general established rule of law.

(B) Proposition arising from the nature of a governmental system under an initially rigid Constitution delimiting areas of power:

Chapter III of the Constitution provides for the exercise of the judicial power of the Commonwealth, and there is no judicial in the Commonwealth apart from that laid down in Chapter III.

In the context of an attempted grant of jurisdiction to the High Court to deliver, under s. 88 of the Judiciary Act, advisory opinions, this proposition was considered by the High Court and the principle laid down in *In re Judiciary and Navigation Acts*[22] was that 'This express statement [the grants of original jurisdiction in Chapter III] of the matters in respect of which and the courts by which the judicial power of the Commonwealth may be exercised, is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.'[23] The rule laid down in *In re Judiciary and Navigation Acts* has been repeated many times since

British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation (1926) 38 C.L.R. 153; *Rola Co. (Aust.) Pty. Ltd. v. The Commonwealth* (1944) 69 C.L.R. 185; *The Queen v. Davison* (1954) 90 C.L.R. 353; Sawer, 'The Judicial Power of the Commonwealth', (1949) 1 *University of Western Australia Annual Law Review* 29.

[21] E.g. The High Court could not refuse to exercise any jurisdiction expressly conferred on it by the Constitution: *Heimann v. The Commonwealth* (1935) 54 C.L.R. 126; *Musgrave v. The Commonwealth* (1937) 57 C.L.R. 514; *Werrin v. The Commonwealth* (1938) 59 C.L.R. 150. But cf. the problems of *forum non conveniens*, of *Fausett v. Carroll* (14 August 1917) XV N.S.W.W.N. (covers) No. 12, where the High Court, although accepting its diversity jurisdiction, expressed its disinclination to hear such matters by declining to allow costs to a successful plaintiff, and of s. 45 of the Judiciary Act 1903-56.

[22] (1921) 29 C.L.R. 257. See also *New South Wales v. The Commonwealth, supra*, n. 20.

[23] *Ibid.* 264, per Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. The Court went on to add that the handing down of advisory judgments was not a 'matter' within s. 76, and so the attempted conferring of jurisdiction was *ultra vires* the Commonwealth, and void as a violation of the Constitution.

by the members of the High Court.[24] In the Report of the Royal Commission the case of *In re Judiciary and Navigation Acts* was used to support the proposition that 'The Parliament cannot . . . assign to the High Court any duty which is not judicial.'[25] It is submitted with respect that the *ratio decidendi,* of that case can only be regarded as authority for the proposition stated above and that the Commissioners were unjustified in using the decision as they did.

(C) Propositions arising from the introduction by the Constitution of the doctrine of the separation of powers into the governmental system of the Commonwealth it created:

1. *The functions of the organ exercising the judicial power of the Commonwealth cannot be controlled by any other organ of government.*

With the exception of the exercise of certain of the powers vested in it by Chapter III, the legislature in Australia has never, unlike its counterpart in England, attempted to control the functions of the judiciary, so this problem has never arisen.[26]

2. *That any duly constituted body which is set up in order to exercise the judicial power of the Commonwealth can exercise no other power in the Commonwealth, save those reserved to it as a necessary ancillary to its judicial function.*

It is at this point that, for the first time, a serious divergence is found in the views of the High Court. In *In re Judiciary and Navigation Acts,* five justices said, 'It is not within our province in this case to enquire whether Parliament can impose on this court or on its members any duties other than judicial duties, and we refrain from expressing any opinion on the point.'[27] In his dissenting judg-

[24] *Dignan's* case, *supra,* n. 2, 116, per Evatt J.; *The King v. Federal Court of Bankruptcy, ex parte Lowenstein, supra* n. 13, 565, per Latham C.J.

[25] p. 7.

[26] An example would be if the Commonwealth Parliament were to regard as still valid a law declared *ultra vires* by the High Court. A theoretical problem arises with regard to the corollary to this proposition, which is that the organ exercising the judicial power of the Commonwealth cannot control the actions of any other organ of government. But since this is the essential function of the judiciary in both the American and Australian federal systems, it would seem that on a pedantic view the fundamental fact underlying the judicial function is a direct denial of the doctrine of the separation of powers. On the corollary point see Mr Justice Inglis Clark, 'The Supremacy of the Judiciary' (1903) 17 *Harvard Law Review* 1, *passim; Eakin v. Raub* (1825) 12 Serg. & Rawle 330, the dissent of Gibson C.J.; *Kingston v. Gadd* (1901) 27 V.L.R. 417, in which it was held that s. 5 of the Commonwealth of Australia Constitution Act vested the power in even the Supreme Court to declare invalid an *ultra vires* Commonwealth Act.

[27] *Supra,* n. 22.

ment Higgins J. went further and said that 'there is nothing in the Constitution to prohibit Parliament from giving other functions to the High Court than the exercise of the judicial power referred to in Chapter III.'[28] Isaacs J. in *British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation* said '. . . the power invested in the High Court is necessarily judicial.'[29] The Royal Commissioners said 'The Parliament cannot assign to the High Court any duty *which is not judicial.*'[30] The Chief Justice of the United States said in *Postum Cereal Co. v. California Fig Nut Co.* 'Such legislative or administrative jurisdiction, it is well settled, can not be conferred upon this court either directly or by appeal. The principle . . . is that the jurisdiction of this court . . . is limited to cases and controversies in such form that the judicial power is capable of acting on them; and does not extend . . . to administrative or legislative issues or controversies.'[31] The most recent opinion was given by Dixon C.J. and McTiernan J. in *The Queen v. Davison* where they said 'Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say, which considered independently might belong to an administrator. But that is *because they are not independent functions* but form incidents in the exercise of strictly judicial powers.'[32]

However, in *The King v. Federal Court of Bankruptcy, ex parte Lowenstein*[33] Latham C.J. in a carefully reasoned judgment came to the conclusion, based on an examination of the judgments in *In re Judiciary and Navigation Acts*, and on the weight to be attached to certain points which went by default in *Alexander's* case,[34] including the fact that a High Court judge could hold office as the head of an industrial arbitration (i.e. quasi-legislative) tribunal, that it was competent for the legislature to commit to the judiciary certain functions not judicial in their nature. The Chief Justice said, 'It is not possible to rely upon any doctrine of absolute separation of powers for the purpose of establishing a universal proposition that no court or person who discharges a Federal judicial function can lawfully discharge any other function which has been

[28] *Ibid.* 276.

[29] (1925) 35 C.L.R. 422, 426. But since His Honour cited *In re Judiciary and Navigation Acts* for this proposition see the discussion above.

[30] P. 7. See discussion above. My italics.

[31] (1926) 272 U.S. 694, 700-701, per Taft C.J.

[32] (1954) 90 C.L.R. 353, 368, quoting the Full Court in *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144, 151. My italics.

[33] *Supra*, n. 13.

[34] *Supra*, n. 20. It is submitted that these points should not carry as much weight as was attached to them by the Chief Justice.

entrusted to him by statute.'[35] His Honour went on, however, to add a proviso: 'If a power or duty were in its nature such as to be inconsistent with the coexistence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it.'[36] Starke, Rich and McTiernan JJ. concurred with the decision of the Chief Justice, but it is submitted that Starke and McTiernan JJ. did so on different grounds.[37] Rich J. delivered no reasoned judgment and was content to express his agreement with the opinion of the Chief Justice.

So the problem whether proposition 2 above is a rule of law in our Constitution would, especially before 1956, probably still be open to decision. It is doubtful whether the *ratio* of *Lowenstein's* case would be deemed to conclude the matter, and if it does not, then we are left with only a series of *obiter dicta* by no means unanimous in their opinion. However in the light of the opinion of the present High Court expressed in *Queen Victoria Memorial Hospital v. Thornton* and *The Queen v. Davison,* it might be said that the opinions of Latham C.J. would possibly be not adopted.

3. *The judicial power of the Commonwealth cannot be exercised by any body, even if that body be constituted in accordance with the requirements of Chapter III, if the character of that body, determined by an examination of its primary function, is such that it must be deemed to function as an organ of government distinct from the judicial organ. Such judicial power may, however, be exercised by that body as is ancillary to its functions as an organ of government distinct from the judicial organ.*

As has been seen it had been assumed in the past that this proposition did not constitute a legal fact, e.g. in *Alexander's* case it was not objected that what was held to be a legislative body was precluded from exercising the judicial power of the Commonwealth. In addition, so much confusion surrounds the question of the legal validity of proposition 2 above, that no conclusion, based on an implication that propositions 2 and 3 constitute such a precise corollary that their legal validity or invalidity may not differ, can be drawn as to the legal validity of proposition 3.

From 1952 to 1956 occasional phrases by the High Court might have been construed as expressing a desire to hear argument on

[35] *Ibid.* 566. [36] *Ibid.* 567.

[37] I.e., that the relevant power under consideration *was* judicial in its nature; see 577 per Starke J. and 591 per McTiernan J.

this point[38] and in *Collins v. Charles Marshall Pty. Ltd.*, in a joint judgment, Dixon C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ. said 'The Solicitor-General of Victoria . . . was prepared . . . to advance a further argument, which he has described as far-reaching. The argument was that constitutionally the Court of Conciliation and Arbitration could not be regarded as created under Section 71. . . . This argument was not heard.'[39] However the whole problem ranging back from a consideration of proposition 3 through the position of the judiciary in a federal system such as ours to the general nature of the doctrine of the separation of powers in Australia, arose in *The Queen v. Kirby, ex parte The Boilermakers' Society of Australia.*[40]

Part II. The Decision in the Boilermakers' Case

The facts of the *Boilermakers'* case[41] are fairly simple but, as will be seen, the constitutional questions raised are anything but easily resolved and are fundamental to the Australian concept of federalism. The decision in this case will be discussed in view of the above observations.

The Boilermakers' Society applied to the High Court for a Writ of Prohibition to prohibit the Commonwealth Court of Conciliation and Arbitration (the Arbitration Court) from enforcing (a) an order made requiring the Boilermakers' Society to comply with an arbitration award, (b) an order enjoining breach or non-observance thereof, and (c) an order fining the Society for contempt of the Arbitration Court. These orders were made pursuant to ss. 29 (1) (b), 29 (1) (c) and 29A[42] of the Conciliation and Arbitration Act 1904-1952, purporting to give the Arbitration Court the power to make such orders. An order *nisi* for prohibition, returnable to the Full Court, was directed to the judges of the Arbitration Court.

[38] *The Queen v. Foster, ex parte The Commonwealth Life (Amalgamated) Assurances Ltd.* (1952) 85 C.L.R. 138, 155; *The Queen v. Commonwealth Steamship Owners Association* [1955] A.L.R. 654, 659.

[39] [1955] A.L.R. 715, 723.

[40] [1956] A.L.R. 163.

[41] *Supra*, n. 40.

[42] S. 29 (1) The Court shall have power—

(b) to order compliance with an order or award proved to the satisfaction of the Court to have been broken or not observed;

(c) by order, to enjoin an organization or person from committing of continuing a contravention of this Act or a breach or non-observance of an order or award;

S. 29A (1). The Court has the same power to punish contempts of its power and authority, whether in relation to its judicial powers and function or otherwise, as is possessed by the High Court in respect of contempts of the High Court.

Two arguments were advanced by the prosecutor, the Boilermakers' Society, to attempt to show the invalidity of the pertinent sections of the Arbitration Act. One argument contended that a doctrine of a separation of powers, a fundamental part of the Australian Constitutional framework, prevented the legislature placing mixed functions, judicial and non-judicial, in one organ of government; and the second argument contended that Chapter III of the Constitution and the text of the Constitution, itself, were so written that judicial power is the only power exercisable by the federal Courts.[43] The majority judgment resolves these two arguments into one contention, viz.:

> The attack upon the jurisdiction to make these orders is based upon the ground that they could be made only in the exercise of the judicial power of the Commonwealth and that the Constitution does not authorize the legislature to establish a tribunal which at once performs the function of industrial arbitration and exercises part of the judicial power of the Commonwealth.[44]

The majority of the Court,[45] in a joint judgment held that the sections were invalid on the ground that a body deriving its main functions and powers from some grant of power other than Chapter III could not exercise a part of the judicial power of the Commonwealth.[46] Three judges,[47] in separate judgments, dissented. There are a number of observations which may be made concerning the majority judgment.

Whilst attempting to clothe the reasoning of the result with the garb of well-woven legal logic, it can be seen that the design is one based on implications arising from a judicial notion of federalism. The majority judgment, in an introductory paragraph, recognizes this and attempts to express the *a priori* logic upon which Chapter III of the Constitution is based.

> In a federal form of government a part is necessarily assigned to the Judicature . . . A federal constitution must be rigid . . . The conception of independent governments existing in one area and exercising powers . . . carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits . . . were placed in the federal Judicature . . . The powers of the federal Judicature must therefore be at once para-

[43] *Ibid.* 210-11, per Taylor J.
[44] *Ibid.* 164, per Dixon C.J., McTiernan, Fullagar and Kitto JJ.
[45] Dixon C.J., McTiernan, Fullagar, and Kitto JJ.
[46] *Ibid.* 184.
[47] Williams, Webb and Taylor JJ.

mount and limited. The organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained.[48]

The basis of the majority's decision rests in a number of considerations which they felt led to the conclusion that, 'The Constitution does not allow the use of Courts established under Chapter III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto.'[49]

The text of Chapter III itself, defining exclusively the powers and functions of the federal Courts, demanded that they have *only* these functions. The power in Parliament to legislate for the Courts must therefore be discovered in Chapter III, with the exception of the incidental power of s. 51 (xxxix).[50]

The Constitution itself, with its arrangement and the well-known ss. 1, 61 and 71,[51] creates three departments of government with specified and enumerated powers and functions. And as to the judiciary, the true contrast, the majority pointed out, is between judicial power within Chapter III (which can be conferred upon a federal court) and other powers (whether or not judicial, which cannot).[52]

And, of course, another consideration was provided by previous case authority and judicial dicta indicating the inability to increase the Chapter III functions of federal courts.[53]

A final consideration was the American experience, previous cases, judicial dicta and other writings which had asserted in one form or another that the doctrine of the separation of powers was part of a federal system of government.[54]

The Court was not without difficulty in arriving at the conclusion that federal courts can exercise only Chapter III judicial power. A number of logical and non-logical arguments of varying pressure were considered by the majority judgment which seemed to indicate that the contrary might be true of the Australian system.

Perhaps the easiest hurdle to surmount was that erected by dicta in any cases which avowed that there was no separation of powers in Australian government because, for example, of the introduction

[48] *Ibid.* 165.
[49] *Ibid.* 168.
[50] *Supra.*
[51] See *supra,* n. 3.
[52] *Boilermakers'* case, *supra,* n. 40.
[53] E.g., *In re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.
[54] *Boilermakers'* case, 171-2.

of the British concept of responsible government into the Australian Constitution. This was rebutted by the proposition that the doctrine does not necessitate a strict and complete separation of powers for all purposes.[55]

The fact that it was held in *Alexander's* case[56] that the powers of the Arbitration Court, as then constituted, to arbitrate were valid presented a further difficulty as Mr Justice Higgins was at that time President of the Arbitration Court as well as a member of the High Court. It was contended that this holding indicated that one exercising judicial powers might also exercise arbitral powers. Without stating whether this holding was correct, the majority simply said that even if so, it meant only that the 'office of President was not incompatible with the exercise of his duties as a Judge,'[57] and in any event, that is not the case here.

However, in the words of the majority:

> Perhaps the most serious difficulty in the case arises from *dicta* of a like tendency (tempering the doctrine of the separation of powers) which have fallen from other Judges in the Court or on other occasions and from the great length of time which has elapsed since it first became possible for a litigant to raise the contention upon which the Boilermakers' Society now relies.[58]

The decision in *Alexander's* case, which said that judicial functions could not be exercised except in conformity with the requirements of Chapter III, was given in 1918. In 1926, the Act was amended so that the Arbitration Court should consist of judges appointed pursuant to those requirements. Many cases during the last thirty years, without actually having the point now contested argued, have appeared to proceed on the assumption that the Arbitration Court was a federal court validly exercising judicial power.[59] Appeals from that Court have been allowed to the High Court and in the case of *Rex v. Taylor,*[60] it was held that the Arbitration Court had the common law power to punish for contempts of its judicial authority.

The majority admitted the strength of such dicta and long assumptions made as raising a presumption of validity, but nothing more.[61] The text of the Constitution, particularly Chapter III, and

[55] *Ibid.* 172-4, and discussion in Part I, *supra.*
[56] (1918) 25 C.L.R. 434.
[57] *Boilermakers'* case, 174.
[58] *Ibid.* 174.
[59] See cases listed by Williams J., *ibid.* 198.
[60] (1951) 82 C.L.R. 587; and see Williams J., in the instant case, 198.
[61] *Ibid.* 194.

the necessity in a federal government of creating a supreme and distinct judiciary irresistibly led the majority to demand a pure judiciary.

The foregoing considerations were those upon which the majority of the Court came to the conclusion that a federal court created under Chapter III could exercise no other powers except those found in Chapter III or ancillary or incidental to their exercise. However, the case does not logically end there, as there is still the alternative argument that the Arbitration Court is created not under Chapter III, but under s. 51 (xxxv)[62] and therefore might validly exercise incidental functions even though their nature be judicial. This the majority would not allow. The majority did hold, for various reasons, that the main functions of the Arbitration Court were arbitral and therefore legislative in nature.[63] This is a significant holding for if the Court had held that the Arbitration Court were created as a federal court, it would have had to declare the arbitral functions of the Arbitration Court to be invalid.[64]

However, having said the Court was not a federal court, the majority also held that as such it could not exercise the judicial power of the Commonwealth in the manner provided for in the contested provisions. They relied basically on the same reasoning which led them to hold that a federal court could not exercise non-judicial powers. They admitted there was:

> A wide difference . . . between a denial on the one hand of the possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose, and, on the other hand, a denial of the possibility of adding to the judicial powers of a Court set up as part of the national Judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose.[65]

but went on to add that if 'the latter cannot be done clearly the former must be then completely out of the question.[66] The logic of this *a fortiori* argument may not be, at first reading, as obvious as the writer seems to indicate, but it is vital to an understanding of the

[62] 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.'

[63] *Ibid.* 179.

[64] Williams J. in his dissenting judgment reached the conclusion that the Arbitration Court was a federal court even though he felt that all the provisions of the Act were a valid exercise of power.

[65] *Ibid.* 167.

[66] *Ibid.* 168.

holding in the case and if the considerations and *a priori* reasoning which precede the result that the judiciary must be independent are considered, it will be seen more clearly that the rest must undeniably follow.

The resultant effect of the holding in the *Boilermakers'* case, therefore, is that no constitutionally created body or tribunal may at the same time exercise both Chapter III and non-Chapter III powers and functions unless one or the other of the types of powers are ancillary or incidental to the exercise of the main or predominant powers.

In examining the contested sections of the Act (i.e. s. 29 (1) (b), (1) (c) and s. 29A), the Court felt that clearly s. 29A was an exercise of judicial power, while not being so positive as to the sub-sections of s. 29(1).[67] As to the latter two provisions, the judgment admitted that they might be incidental to the exercise of the arbitration power. But because of the context, the fact that an order for compliance rested upon a judicially determined finding of a breach and that the sub-sections seemed to be 'powers of enforcement for the protection of rights arising from the award',[68] the powers did not appear to be of a purely arbitral character. The manner in which the legislature dealt with the provisions indicated that it was providing for the exercise of judicial power.[69] Consequently, the sub-sections, too, were bad.

Of the dissenting judgments, that of Williams J. appears to warrant the greatest attention. He was prepared to dissent from the majority, in that (a) he saw no express provision(s) in the Constitution for an exclusive judiciary or a sharp separation of powers, (b) he felt that the Arbitration Court was validly constituted as a federal court, consistent with the clearly expressed intention of Parliament, and that as such the functions of arbitration, which he described as 'quasi-judicial administrative' functions, might be therein vested. The incidental power of s. 51 (xxxix) could support other than strictly judicial powers in a federal court so long as 'nothing [is] done which is likely to detract from their complete ability to perform their judicial functions.'[70]

Part III. Comment on the Decision

'It is difficult to avoid the conclusion that the members of the Court who adopted this principle [of modified immunity of instrumentalities] were really basing it on a conception of the nature of

[67] *Ibid.* 186.
[68] *Ibid.* 186.
[69] *Ibid.* 186.
[70] *Ibid.* 197.

federalism no more confined to the actual provisions of the Commonwealth Constitution than were the principles which gave rise to the early doctrine of immunity of instrumentalities.'

Mr Ross Anderson was referring to the *State Banking* case[71] when he made the suggestion quoted,[72] but his words are probably apposite *mutatis mutandis* to the majority judgment of the *Boilermakers'* case. It is the aim of this part to speculate on the extent to which that judgment represents a deduction from an *a priori* concept of federalism rather than an application of the specific provisions of the Constitution, and to examine the relation of the case to previous authority.

Counsel for the Boilermakers' Society, no doubt embarrassed in basing his argument on a pure theory of the separation of powers by the existence of *Dignan's* case,[73] made an alternative submission based purely on a construction of Chapter III of the Constitution,[74] to the effect that the affirmative words of that Chapter had a negative force the effect of which was to forbid the use of courts established under Chapter III for the discharge of functions foreign to the judicial power.

Since judicial powers must be derived from Chapter III, the result is that judicial powers and non-judicial powers cannot be mixed or combined. 'This result is said to flow from a consideration of the provisions of the Constitution itself, and in particular those of Chapter III, and quite independently of the political theory of the separation of powers.[75] Quite clearly any espousal of the doctrine of the separation of powers would have been inelegant, in view of *Dignan's* case, in view of the number of dicta to the effect that no such doctrine had been embodied in the Australian Constitution, and in view of s. 64 of the Constitution.[76] Such a doctrine would lack symmetry, for it cannot be said that there is a 'dominant principle of demarcation' in relation to the legislative or executive organ. The effect of these observations is that the Court might have reached the result of denying the possibility of mixing judicial and

[71] *City of Melbourne v. Commonwealth* (1947), 74 C.L.R. 31.

[72] In *Essays on the Constitution* (ed. Else-Mitchell), 104.

[73] *Supra*, n. 10. The difficulty is best expressed in the argument of counsel for the respondent judges: 'as sec. 61 of the Constitution permitted non-executive power to be given to the Executive, so sec. 71 in Chapter III permitted non-judicial power to be given to federal Courts' per Webb J. [1956] A.L.R. 163, 207. The non-executive power held to be validly delegated in *Dignan's* case was the power to legislate, by passing regulations which would be effective 'notwithstanding anything in any other Act'.

[74] Cf. n. 43.

[75] *Boilermakers'* case, 211, per Taylor J.

[76] See Section III of Part I, *supra*.

non-judicial powers by simply accepting the second argument of statutory construction (*supra*), but if the result was to be reached *via* a separation of powers doctrine, it would be necessary to emphasize the peculiar nature of the judicial organ in a federal system. The majority employ *both* approaches.

On the one hand they point to the careful delineation of power in Chapter III, from which it is to be concluded that that Chapter is intended to represent an exhaustive statement of Parliament's legislative authority to confer judicial power: 'Indeed to study Chapter III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested.'[77] It is to be noted that the point that 'no resort can be made to judicial power except under or in conformity with secs. 71-80'[78] is a different one from that, also supposed to flow from the careful delimitation of judicial power in Chapter III, that the Legislature cannot impose 'upon the same Judicature authorities or responsibilities of a description wholly unconnected with judicial power.'[79] Taylor J. accepts the former deduction,[80] but not the latter.[81]

On the other hand the majority 'feel the strength of the logical inferences from Chapters I, II and III and the form and contents of secs. 1, 61 and 71',[82] while, to overcome the difficulty of *Dignan's* case, they stress that 'the separation of the judicial powers from other powers is affected by different considerations.'[83] A similar suggestion had indeed been made in *Dignan's* case itself:

> It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts, therefore the granting or conferring of regulative powers upon bodies other than Parliament itself is prohibited. Legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power.[84]

[77] *Boilermakers'* case, 166-7. [78] *Ibid.* 166.

[79] *Ibid.* 168.

[80] *Ibid.* 214: 'It cannot, of course, be doubted that no part of the judicial power of the Commonwealth can be vested in a body which is not a Court constituted in accordance with Chapter III.'

[81] *Ibid.* 216: 'whilst I see in Chapter III of the Constitution an exhaustive declaration of the judicial power with which Federal Courts may be invested, I see nothing to prohibit Parliament absolutely from conferring other powers or imposing other duties upon them under sec. 51.'

[82] *Ibid.* 170. [83] *Ibid.*

[84] (1931) 46 C.L.R. 73, 84; per Gavan Duffy C.J. and Starke J.

The different considerations which affect the judicial power rest in the power of judicial review, by which the judicial arm in a federal system determines the constitutionality of legislation: 'The conception of independent governments existing in one area and exercising powers in different fields of action carefully defined by law could not be carried into practical effect unless the ultimate responsibility of deciding upon the limits of the respective powers of Governments were placed in the federal Judicature.'[85]

Accordingly the Australian doctrine of separation of powers is unsymmetrical, but the majority have no doubt that it exists, for 'it would be difficult to treat' the structure of the Constitution 'as a mere draftsman's arrangement. . . . This cannot all be treated as meaningless and of no legal consequence' (*Boilermakers'* case, 170). One might observe that it had frequently been so treated by previous High Courts, and the opinion of Williams J. represents that view: 'The three organs of government are (therefore) created by separate Chapters of the Constitution. But the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the Constitution of the United States as a guide, its authors were almost bound to frame it in this way' (*ibid.* 188).

It does seem however that the majority lay greater emphasis on the approach by which Chapter III is construed as an exhaustive statement of judicial power. Since basically this approach is no more than an application of the maxim *expressio unius est exclusio alterius,*[86] it may be instructive to examine the extent to which the maxim is applicable in constitutional interpretation. The maxim was applied by the Privy Council in *Webb v. Outtrim*[87] – a case generally acknowledged to represent unsound constitutional reasoning. In that case the Board rejected the American implication – of which *McCulloch v. Maryland* is the *locus classicus* – that the States cannot tax federal instrumentalities, saying that the Australian Constitution did 'not seem to leave any room for implied prohibition. "*Expressum*

[85] Instant case, 165. That the function of defining the limits of constitutional powers resides in the judicature has always been assumed in Australia; the matter was not formally questioned here as it had been in the United States: See *Marbury v. Maddison* (1803). The assertion by their Honours that it must be the courts' function to police the limits is surprising in the light of the Swiss expedient of referring problems back to the legislature.

[86] 'The fact that affirmative words appointing or limiting an order or form of things may have also a negative force and forbid the doing of the thing otherwise was noted very early in the principles of interpretation: I Plowden 113. In Chapter III we have a notable but very evident example,' instant case, 167.

[87] [1907] A.C. 81.

facit cessare tacitum." '[88] Thus when, within the same year, the case of *Baxter v. Commissioner of Taxation (N.S.W.)*[89] came to be argued, counsel for the Commissioner of Taxation must have felt confident in putting the following argument:

> In the United States' Constitution the maxim *expressio unius est exclusio alterius* was excluded by Art. IX, as amended, but here the maxim applies, and when secs. 106-109 provide for the preservation of all rights to the States that are not taken away by the Constitution, and sec. 114 expressly prohibits taxation of Commonwealth property, it must be presumed that the States' powers of taxation are otherwise unimpaired, and are not to be cut down by implication.[90]

But this argument was rejected, it being observed that 'The maxim *expressum facit &c.* has been often invoked in vain in English Courts. See for instance *Colquhoun v. Brooks* where Lopes L.J. called it 'a valuable servant, but a dangerous master'.[91]

Similarly the maxim was ignored by the present Chief Justice in *Essendon v. Criterion Theatres,*[92] where one might have thought that s. 114 of the Constitution carried a negative implication that taxation other than on property was permissible.[93] Nor was the maxim employed in *City of Melbourne v. The Commonwealth;*[94] in that case the express provision of s. 51(xiii) was treated as insufficient protection for the States against Commonwealth control of their banking activities.

In view of the foregoing cases, and of the nature of the process of drafting a constitution, one would have thought that the maxim *expressio unius est exclusio alterius,* which is applied only with great caution in private law, had no valid application in the interpretation of constitutions. Moreover, it is possible to postulate alternative explanations for the framework of Chapter III to that advanced by the majority. The majority draw support for their reasoning from the decision in *In re Judiciary and Navigation Acts,*[95] which decided that the only *judicial* functions which could be exercised by the High Court were those contained in Chapter III. The question whether non-judicial functions could be conferred on Federal Courts was expressly left open, but the majority in the instant case

[88] *Ibid.* 89.
[89] (1907) 4 C.L.R. 1087.
[90] *Ibid.* 1097.
[91] *Ibid.* 1128-9.
[92] (1947) 74 C.L.R. 1.
[93] This comment is not applicable to the reasoning of all of the members of the Court. It is not applicable, for example, to the reasoning of Latham C.J., who considered that the Commonwealth's occupation was sufficient 'property' for the purposes of s. 114; accordingly his Honour held that the section applied.
[94] (1947) 74 C.L.R. 31.
[95] (1921) 29 C.L.R. 257.

assert that: 'It hardly seems a reasonable hypothesis that in respect of the very kind of power that the Judicature was designed to exercise its functions were carefully limited, but as to the exercise of functions foreign to the character and purpose of the Judicature it was meant to leave the matter at large.'[96] The answer provided by Williams J. is convincing: 'The reason why, apart from s. 122 of the Constitution, Courts cannot be invested with any form of judicial power outside that created or authorized by Chapter III of the Constitution is because there is no other source of authority in the Constitution.'[97] This reconciles the possibility of conferring an arbitral function on a court – for s. 51(xxxv) would provide the authority to do this – with the impossibility of investing a federal Court with the power to make an authoritative declaration of the law where that declaration is not required for the determination of a litigated issue. His Honour goes on to say: 'The reason why, under Chapter III, Courts can only be invested with the judicial power of the Commonwealth may lie in the circumstance that under that Chapter State Courts as well as federal Courts can be invested with judicial power and it is necessary strictly to limit the extent to which State Courts can have duties imposed on them by federal law.'[98] While there are alternative explanations for the careful statement of judicial power in Chapter III, and when it is considered that the Arbitration Court had remained so long unchallenged, the majority's dogmatic statements are surprising.

For phrases such as 'the existence in the Constitution of Chapter III and the nature of the provisions it contains *makes it clear* . . .',[99] 'to study Chapter III is to see *at once* . . .'[1] and 'It would seem a matter of course . . .'[2] occur frequently in the judgment of the majority. One might be pardoned for questioning the obviousness of their reasoning when one of the Founding Fathers took exactly the opposite view:

> These considerations bring me to say something as to Chapter III of the Constitution – 'The Judicature'. It is said that this Court, as a Court, is forbidden by the Constitution to perform any functions which are not within the 'the judicial power of the Commonwealth', and that the function of determining the validity of an Act except between litigating parties is not within that judicial power. I cannot accept either proposition. To say that Blackacre shall be vested in A (and in A only) does not carry as a corollary that Whiteacre shall *not* be vested in A; to say that the

[96] *Boilermakers'* case, 168.
[97] *Ibid.* 197-8.
[98] *Ibid.* 198.
[99] *Ibid.* 166; my italics.
[1] *Ibid.* my italics.
[2] *Ibid.*, 168.

> judicial power of the Commonwealth shall be vested in the High Court (and other Federal Courts and such other Courts as Parliament invests with Federal jurisdiction – s. 71 of the Constitution) does not imply that no other jurisdiction, or power, shall be vested in the High Court or in other Courts. This is surely obvious, on the mere form of words.[3]

Since the maxim *expressio unius est exclusio alterius* is simply a rule of interpretation, it should bow to any express provision. This was in fact argued: 'One suggestion made in support of the validity of the provisions impugned in this case is that, conceding the conclusion just stated, it can be no more than a principle the application of which must be subject to any special provision of the Constitution qualifying its operation by express words or necessary intendment, and that in s. 51(xxxv) such a special provision is to be found.'[4] Williams J. expressed the same idea as follows:

> But the Constitution like any other written instrument must be construed as a whole and it appears to me that, far from any implication arising from its provisions as a whole that this Court and other federal Courts that the Parliament creates cannot be invested with other than judicial powers, the implication in the case of some of the powers conferred on the Parliament by s. 51 of the Constitution, arising from their character and language, if implication be needed, is to the contrary . . . [for some of these powers] would appear to require a mixture of administrative and judicial functions for their effective exercise.[5]

And it would seem impossible to maintain that Chapter III constitutes the sole source of the Judicature's powers consistently with the concession that s. 51(xxxix) enables Parliament to confer non-judicial powers on a federal Court if they are incidental to its ordinary functions.[6] Taylor J. expresses it well when he says:

> There is, of course, no express provision in Chapter III to justify legislation investing Courts with subordinate legislative authority and to suggest, as was done during the course of argument, that such legislation may be justified under sec. 51(xxxix) is immediately to depart, to this extent at least, from the notion that the legislative authority to confer powers upon Courts is to be sought exclusively, in Chapter III. And if the prosecutor's main contention is correct there is nothing in sec. 51(xxxix) to authorize any exception from it . . . if sec. 51(xxxix) may be relied upon to

[3] *In re Judiciary and Navigation Acts*, (1921) 29 C.L.R. 257, 271; per Higgins J.
[4] *Boilermakers'* case, 184-5. [5] *Ibid.* 192.
[6] The concession is made at p. 183.

> enable the Legislature to confer upon Courts authorities incidental to the performance of their strictly judicial functions it constitutes a real and not merely an apparent exception to the proposition that Chapter III is the exclusive measure of legislative authority to invest Courts with powers and functions.[7]

If it is permissible to make this departure in the case of s. 51(xxxix), why should it not also be permissible in the case of s. 51(xxxv)? To say that it is not is to give greater weight to an implication than to an express provision of the Constitution. Rich J. stressed in *City of Melbourne v. The Commonwealth*[8] that the doctrine he was applying was a result of express provisions of the Constitution in order, no doubt, to forestall an attack that the doctrine was so much mysticism. The same cannot be said for a doctrine which purports to result from the provisions of the Constitution, yet does not give equal weight to each portion of that instrument. Even the old rule of *D'Emden v. Pedder,*[9] exploded in the *Engineers'* case,[10] was subject to such considerations: 'It is manifest that, since the rule is founded on the necessity of the implication, the implication is excluded if it appears upon consideration of the whole Constitution that the Commonwealth, or, conversely, the States, was intended to have power to do the act the validity of which is impeached.'[11] Indeed such an interpretation of the Constitution as made by the majority, in so far as it fails to take into account express provisions of the Constitution, exposes itself to the very criticism made in the *Engineers'* case of the doctrine of *D'Emden v. Pedder,* namely, that it is based 'on an implication which is formed on a vague, individual conception of the spirit of the compact, which is not the result of interpreting any specific language . . .'[12]

But the majority dismiss the argument[13] with the cavalier observation: 'The argument no doubt presents a simple solution of the embarrassments of the problem raised by this litigation but unfortunately it has no material basis.'[14]

PETER R. JORDAN
NEIL O. LITTLEFIELD
GRAHAM L. FRICKE

[7] *Ibid.* 214.
[8] *Supra,* n. 94.
[9] (1904) 1 C.L.R. 91.
[10] *Amalgamated Society of Engineers v. The Adelaide Steamship Co. Ltd. and others* (1920) 28 C.L.R. 129.
[11] *A.G. (Qld) v. A.G. (Commonwealth),* (1915) 20 C.L.R. 148, 163, per Griffith C.J.
[12] (1920) 28 C.L.R. 129, 145.
[13] See especially *supra,* n. 33.
[14] *Boilermakers'* case, 185.