comments on this issue seem to indicate a slight leaning towards the views of Windeyer, J. This is found particularly in his discussion of the case of *Hunter* v. *Rice*.[61] In that case, an award given under a submission to arbitration required that one party give up certain property to the other on payment of a certain sum. The sum was tendered but refused. In these circumstances it was held that property did not pass, or, as Dixon, C.J. puts it, "The tender of the money which was rejected was not given the force of payment".[62] Dixon, C.J. does, however, suggest that a contract of sale may be distinguishable from an arbitration award on a point of this sort, and it is suggested that the quotation he supplies from Lord Ellenborough's judgment in the case ("if indeed Sharpe had accepted the money tendered, that would have been a ratification of the award and an assent on his part of the transfer of the property; but without that I cannot conceive that the property was transferred by the mere force of the award")[63] indicates that it is with the nature of an award, and its particular requirements of "assent" and "ratification", that the judgment is concerned. These considerations, therefore, do not seem to apply in the present case.

*Conclusion*

If Dixon, C.J.'s views on the appropriateness of a writ of delivery and Kitto, J.'s opinion as to the effect of the purchaser's tender do in fact represent the law, the position of the prospective purchaser may be summed up as follows:—

(1) Although property in the goods has not vested in him, he is a bailee and his immediate right to possession will support an action against his vendor in the event of repossession contrary to the terms of the contract.

(2) If such repossession takes place, the purchaser may, by suing in detinue and obtaining a writ of delivery or a corresponding remedy, regain possession without further payment on his own part and, in effect, by insisting on his right to retain possession, compel the vendor to complete the sale.

(3) Repudiation of the original agreement by the vendor will not prevent the purchaser from obtaining property in the goods by tendering so much of the purchase-price as remains unpaid.

These rules will, of course, give way to any special condition agreed upon between the parties. But it will be seen that *prima facie* the purchaser receives favourable treatment on account of his position as bailee. Dealers in motor vehicles and similar articles would do well to remember this before they enter upon informal preliminary agreements with their customers.

*M. R. CHESTERMAN, B.A., Case Editor—Third Year Student*

## THE NATURE AND OPERATION OF PREROGATIVE POWERS IN THE FEDERAL SYSTEM

### *THE COMMONWEALTH OF AUSTRALIA* v. *CIGAMATIC PTY. LTD.*

In *The Commonwealth of Australia* v. *Cigamatic Pty. Ltd.*[1] the High Court by a majority held that the States cannot restrict or abolish the prerogative rights of the Commonwealth Crown as they affect the relations of that Crown with its subjects. It is beyond the power of the States to legislate so as to detract from the right of the Commonwealth Crown to preference when, in any

[61] (1812) 15 East. 100.
[62] (1961) 35 A.L.J.R. 206 at 209.
[63] *Id.* at 209.
[1] (1962) 108 C.L.R. 372.

administration of assets, there is competition between debts of equal degree due both to the Crown and also to its people. Hence, in the winding up of an insolvent company pursuant to the Companies Act, 1936 (N.S.W.), provisions of that Act,[2] although intended to bind both Commonwealth and State,[3] were ineffective to postpone the Crown in the right of the Commonwealth. Sales tax and postal charges owing to it were to be satisfied before debts owing to other unsecured creditors. The Companies Act, 1961 (N.S.W.) includes provisions parallel with those of the former Act:[4] the disruption of the order of priorities prescribed by the new legislation will be a consequence of the decision.

The Chief Justice delivered the leading judgment, Kitto, Windeyer and Owen, JJ. expressing their full agreement in it. Menzies, J. gave a short concurring judgment. McTiernan and Taylor, JJ. dissented.

The decision in *Cigamatic* involved the overruling of *Uther's Case*.[5] In that case the same issues had been raised and the majority of the Court had held in favour of the validity of the State legislation.[6] In *Uther's Case* Dixon, J. (as he then was) dissented, developing opinions adumbrated in *dicta* in *Farley's Case*.[7] *Cigamatic* marks the vindication of those *dicta* and that dissent. Indeed, the reasons given by the minority in *Cigamatic* show no vigorous support for the decision in *Uther's Case*. McTiernan, J. conceded that that decision was "debatable", but would deem it "a sound exercise of the Court's discretion not to review *Uther's Case*" on "practical" grounds.[8] These concerned the disturbing effect that might be had on business circles by reversal of a decision which had been acted upon for fifteen years, and the threat of disruption of the priorities arrangements in the new Act. Taylor, J. expressed similar sentiments but added, "I do not subscribe to a number of general observations made in that case concerning the interaction of federal and State laws and functions".[9]

The majority was moved to reject the previous decision as decisive authority by the consideration that "the doctrine involved (in *Uther's Case*) is a fundamental error in constitutional principle that spreads far beyond the mere preference of debts owing to the Commonwealth".[10] It is proposed to examine the nature and constitution of this "fundamental error" and to consider possible implications of the decision to rectify it.

Although in *Cigamatic* the Chief Justice tended to leave as tacit what was declared in his earlier dissent, his Honour's attitude throughout has shown influence by some four factors militating against the validity of the State law. Each of these factors shall be discussed in turn.

First, the State legislature may be said to have no power over the topic in question either by virtue of s.107 of the Commonwealth Constitution or by s.5 of the New South Wales Constitution Act of 1902. This point was taken by Dixon, J. in *Uther's Case* and now has viability with the approval in *Cigamatic* of that dissent. As Menzies, J. said, "In justification for this conclusion (the majority holding) I cannot do more than express my assent to

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[2] Ss. 199(3), 282 and 297 (1)(d).

[3] The court in *Uther's Case* had no doubt that this was the intention. See (1947) 74 C.L.R. 508 at 515 *per* Latham, C.J., 527 *per* Dixon, J., 535 *per* McTiernan, J. and 538-539 *per* Williams, J.

[4] Ss. 217, 292.

[5] (1947) 74 C.L.R. 508.

[6] The majority comprised Latham, C.J., Rich, Starke and Williams, JJ. Dixon and McTiernan, JJ. dissented—the latter on the ground that the State legislation was inconsistent with s.31 of the Sales Tax Assessment Act (No. 1), 1939-1942 (Cth.) and s.28 of the Payroll Tax Assessment Act, 1941-1942 (Cth.).

[7] (1940) 63 C.L.R. 278. See also *Deputy Commissioner of Taxation* v. *Brown* (1957-58) 100 C.L.R. 32 at 41 *per* Dixon, C.J.

[8] (1962) 108 C.L.R. 372 at 380-381.

[9] *Id.* at 385.

[10] *Id.* at 377 *per* Dixon, C.J.

the dissenting judgment of Dixon, J.".[11]

Secondly, the doctrine in the *Melbourne Corporation Case*[12] may be prayed in aid to protect reciprocally the Commonwealth from burdensome State legislation.

Thirdly, great stress may be placed upon the right claimed for the Commonwealth as being one stemming from the prerogative, "The king by his prerogative regularly is to be preferred in payment of his duty or debt before any subject, although the king's debt or duty be the latter . . ."[13] Such right may be modified or relinquished by legislation and the question arose "whether the legislative powers of the States could extend over one of the prerogatives of the Crown in the right of the Commonwealth".[14]

Fourthly, there is the corollary which takes as a consequence of federation the establishment of a relationship between the Commonwealth and its subjects. This relationship involves rights and duties to which the States are not privy and from which they cannot derogate.

In conclusion, it will be noted that the effects of *Cigamatic* may not be confined to the Commonwealth prerogative. The validity of federal laws, such as those in the *Bankruptcy Act*, 1924-60, curtailing the operation of the prerogative in the States, calls for consideration.

## I

In *Uther's Case*, Latham, C.J., Starke, J. and Williams, J. agreed that the legislation in dispute was within the mandate given the New South Wales Parliament.[15] This was so because the legislature had been dealing with that remainder of power left to the States by s.107. On the other hand, Dixon, J. deplored this holding as the commission of a "basic error".[16] The States, having in 1901 no power over the then non-existent Commonwealth prerogative, it is to his Honour a tautology that there was no power over it to be preserved for the States by s.107. And it is a matter for the peace, order and good government of the Commonwealth, not of the States, to say ". . . what shall be the relative situation of private rights and the public rights of the Crown representing the Commonwealth where they conflict".[17] If this be accepted there is no need to go further into the nature and incidents of the federal compact in order to show that the legislation cannot be supported. However, the disclosure of the "basic error" has not discouraged its recommission in *Cigamatic*. It is extant in the judgment of McTiernan, J. His Honour describes the law on the winding up of companies as ". . . State legislation on a matter which is within the residue of legislative power left after the grant of power which s.51 of the Commonwealth of Australia Constitution grants to the Parliament with respect to the subjects enumerated therein".[18]

It is suggested that the Justices reach different conclusions for the reason that they begin their examinations with different attitudes to the character of the disputed legislation. One attitude is that the law is a law with respect to the winding up of companies, and so within s.107. The other is that of Sir Owen Dixon, who views the operation of the purported legislation as an interference with the prerogative of the Commonwealth Crown. It is a matter of

[11] *Id.* at 389.
[12] *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31.
[13] Coke: *Commentaries* 131(b).
[14] (1962) 108 C.L.R. 372 at 378 *per* Dixon, C.J.
[15] (1947) 74 C.L.R. 515 at 517-518 *per* Latham, C.J., 525 *per* Starke, J., and 539 *per* Williams, J.
[16] *Id.* at 530.
[17] *Ibid.*
[18] (1962) 108 C.L.R. 372 at 380.

the proper characterisation of a law, the constitutional validity of which is disputed, a subject which has in the past occasioned the High Court no little difficulty. The criteria which the Court usually employs when faced with the problem are those set forth by Latham, C.J.[19] in the *First Uniform Tax Case*:

> The true nature of a law is to be ascertained by examining its terms and, speaking generally, ascertaining what it does in relation to duties, rights or powers which it creates, abolishes or regulates. The question may be put in these terms "What does the law do in the way of changing or creating or destroying rights or duties or powers?" The consequential effects are irrelevant for this purpose.[20]

Applying the above to sections of the New South Wales Companies Act, 1936, one finds that s.199 states that the provisions as to priorities are to bind the Crown and s.297 enumerates a system of priorities inconsistent with that held by the prerogative at common law. This alteration to the rights of the Crown is the change purported to be made in the existing law and the necessary legal effect has been found. However, one may also argue that the legislation imposes a duty on the liquidator to pay in the prescribed order the debts of the company in the process of winding up, and so it may be classified as a law on the subject of companies. The difficulty is that these conclusions though both valid are not seen as compatible. Different members of the Court adopt one of the conclusions to the exclusion of the other as if that adopted were the sole way in which the legislation might be characterised.[21] This being the case, the judges have a prior commitment to arrival at different decisions in the matter at hand. To McTiernan, J., State legislation on companies is obviously within s.107: To Sir Owen Dixon, who has categorised the legislation differently, such a position is untenable.

## II

*Cigamatic* marks the correction of a mistaken belief as to the ambit of the decision in the *Melbourne Corporation Case*. The doctrine in that case has two aspects, dealing not only with what the Commonwealth may do with reference to the States, but also with what the States may do with reference to the Commonwealth. It is not restricted to one operation as appeared from *Uther's Case*.[22]

Although invoked by counsel on several occasions, the doctrine in the *Melbourne Corporation Case* was applied by the Court with anything but corresponding frequency.[23] Before *Cigamatic* there was but one instance of a Justice showing readiness to apply it; and that in a dissenting judgment.[24]

The first refusal to elaborate the doctrine was given by the Court in

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[19] This is not always the case. See *Dennis Hotels Pty. Ltd.* v. *Victoria* (1959-60) 104 C.L.R. 529 at 545 *per* Dixon, C.J. (dissenting) for a "realistic" approach and *c.f.* Kitto, J. at 563.

[20] *South Australia* v. *Commonwealth* (1942) 65 C.L.R. 373 at 424-425.

[21] This is not always so. *Attorney-General for Victoria* v. *Commonwealth* (1962) 107 C.L.R. 529 is notable because of the way in which the court approached the characterisation of the disputed sections of the Marriage Act, 1961 (Cth.). Kitto, J. (at 554) was careful to point out that ss.89 and 90 could be characterised not only as laws with respect to legitimation (not within s.51(xxi)) but also as laws "with respect to the step to which legitimating effect is given" (i.e., as laws with respect to marriage, and thus within s.51(xxi) and valid). See also Owen, J. at 601-602 and *c.f.* McTiernan, J. at 549-550 and Windeyer, J. at 582-583.

[22] (1947) 74 C.L.R. 508 at 519-520 *per* Latham, C.J. and 539 *per* Williams, J.

[23] *Re an application by the Public Service Association of N.S.W.* (1947) 75 C.L.R. 430; *Wenn* v. *A.G. (Victoria)* (1948) 77 C.L.R. 84; *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201; *Victoria* v. *Commonwealth* (1957) 99 C.L.R. 575.

[24] *Lanshed* v. *Lake* (1957) 99 C.L.R. 132 at 150 *per* McTiernan, J.

*Uther's Case*. To the argument that Commonwealth government functions such as prerogative rights were protected against destruction or impairment by State laws, the members of the majority gave differing responses. Latham, C.J. was able to say the issue did not arise as in his view the principles in the case cited were concerned only with the security of the States.[25] They did not have a symmetrical operation shielding the Commonwealth against State legislation of the character proscribed. There were some subjects with which the New South Wales Parliament could not deal, but this was because they did not relate to the peace, order and good government of the State: it was not because of anything to be found in the *Melbourne Corporation Case*. The Chief Justice was fortified in this belief by the fact that the Commonwealth could legislate and gain the protection of s.109.[26]

But the Commonwealth can only prevail by virtue of that section with laws on the limited range of subjects in sections 51 and 52. And one may well ask why the federal Parliament should be put to the task of legislating to be rid of obnoxious State laws when the States themselves are free of corresponding federal laws *ab initio*. That it has in s.109 a weapon the States lack is surely not justification or reason, as distinct from pretext, for denying the Commonwealth an additional safeguard.

Also in *Uther's Case* Williams, J. declared that "the application of the principle (in the *Melbourne Corporation Case*) varies with the circumstances"[27] and went on to accept the debatable proposition that the State law was for the peace, order and good government of New South Wales and thus was not likely to be a "cloak" for discrimination against the Commonwealth.[28] But his Honour did not suggest that the principle could protect only the States.

Later in *Pioneer Express* v. *Hotchkiss*[29] it was argued, *inter alia*, that a State Act requiring the licensing of public motor vehicles could have no operation regarding the carriage of passengers to or from the Australian Capital Territory, because it was aimed against and unduly interfered with the government of the Commonwealth. With this the Court did not agree, but it was not said that the principle could never assist the Commonwealth. The reason the Court gave was that the legislation was, as Menzies, J. put it, "not concerned with the Commonwealth at all nor . . . with people dealing with the Commonwealth".[30]

Apart, then, from the remarks of Latham, C.J., there was no authority to support a restrictive interpretation. On the contrary, in the *Melbourne Corporation Case* itself, Starke, J., Dixon, J. and Williams, J. expressed themselves in terms that would give the principle a dual operation.[31] It was succinctly stated by Starke, J. as "neither federal or State governments may destroy the other nor curtail in any substantial manner the exercise of its powers or obviously interfere with one another's operation". The decision in *Cigamatic* is consonant with such sentiments.

But the enigma in the *Melbourne Corporation Case* remains. There is still no judicial elucidation of the criteria which define an "obvious interference" or a "substantial curtailment". Thus, in the *Second Uniform Tax Case*[32] a distinction was drawn between the holding out of an economic inducement by means of s.96 (valid) and the imposition of a legal obligation on the States

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[25] (1947) 74 C.L.R. 508 at 519-520.
[26] *Ibid.*
[27] *Id.* at 539.
[28] *Ibid.*
[29] (1958) 101 C.L.R. 536.
[30] *Id.* at 560.
[31] (1947) 74 C.L.R. 31 at 74 *per* Starke, J., at 81-82 *per* Dixon, J. and at 99 *per* Williams, J.
[32] *Victoria* v. *Commonwealth* (1957) 99 C.L.R. 575. Note Dixon, C.J. at 610.

(invalid). Yet the Commonwealth Banking Act, 1945, no more imposed a direct legal obligation on the States than did the procedure in the *Tax Case* and yet it was this Act from which sprang the *fons et origo* of the *Melbourne Corporation* doctrine. The thread leading through the labyrinth is presumably held by the Justices, who, however, show no greater disposition in *Cigamatic* than in the past to emulate Ariadne and offer to others a means of guidance.

It is perhaps a consequence of the umbrous language which envelops the doctrine that it has not been invoked in circumstances where the Court might well give a favourable response. Rich, J. deemed repugnant federal legislation subjecting the States to some provisions of general application (for example, a taxation Act) which impeded them in performance of their functions.[33] And Dixon, C.J. has observed that the matter of taxation was reserved in the *Engineers' Case*.[34] But since 1941 the States have allowed to go unchallenged provisions of the Payroll Tax Assessment Act, 1941-1961, by which the Commonwealth taxes them in respect of their employees.[35] The recent success of the Commonwealth may embolden the States to seek benefits from the doctrine for themselves.

Those viewing with disfavour the *Melbourne Corporation Case* as an unwarranted gloss on the dogma laid down in the *Engineers' Case* will no doubt descry in *Cigamatic* a further retreat from *Engineers'* principles.[36] The argument runs that in the *Engineers' Case* the majority intended to overrule the doctrine of implied prohibitions in both its applications—to protect the States from the Commonwealth and also the central government from the States. In place of this, there may be inferred in the *Engineers' Case* the establishment of a presumption that the laws of one party in the federation are applicable to the operations of the other. In *Cigamatic* there was denied to the New South Wales law such an effect on Commonwealth operations: that case is as incompatible as the *Melbourne Corporation Case* with the principles enunciated in the *Engineers' Case*.

To such strictures the Chief Justice would make two objections. Firstly, it may be maintained that propositions drawn from the *Melbourne Corporation Case* are reconcilable with the earlier case. This is on the ground that any inferences in the *Melbourne Corporation Case* as to the nature of the federal system are claimed by the Justices to be drawn from the terms of the Constitution itself, and not as before 1920, from outside it.[37] And, secondly, Sir Owen Dixon has observed that the *Engineers' Case* should not be taken as authority for more than it decided, namely, that "a power to legislate with respect to a given subject enables the (Commonwealth) Parliament to make laws upon that subject which affect the operations of the States and their agencies".[38] In the case itself, the majority stressed that it was dealing with a specific grant of power and that it was illogical to make an implication subjecting it to an innominate residue of power. *Cigamatic* involved the converse position. The States have no specific heads of power allotted them so no implication can be made restraining the exercise of such power. This was emphasized in *Cigamatic* by Dixon, C.J.:

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[33] (1947) 74 C.L.R. 31 at 74-75.

[34] *Essendon Corporation* v. *Criterion Theatres Ltd.* (1947) 74 C.L.R. 1 at 19 *et. seq.*; *Melbourne Corporation* v. *Commonwealth* (1947) 74 C.L.R. 31 at 78-79; *The Professional Engineers' Case* (1959) 107 C.L.R. 208 at 239.

[35] S.3(1) and s.12.

[36] (1920) 28 C.L.R. 129. See the notes by Professor G. Sawer in (1960-61) 34 *A.L.J.* 274 and (1961) 1 *Tasmanian U.L.R.* 580.

[37] *Melbourne Corporation Case* (1947) 74 C.L.R. 31 at 84 *per* Dixon, J.

[38] *Id.* at 78 *per* Dixon, J. See also *West's Case* (1937) 56 C.L.R. 657 at 682 *per* Dixon, J., at 688 *per* Evatt, J. and the *A.R.U. Case* (1930) 44 C.L.R. 319 at 391 *per* Dixon, J.

> It is not a question of making some implication in favour of the Commonwealth restraining some acknowledged legislative power of the State. . . . It is not a question of the exercise of some specific grant of power which according to the very meaning of the terms in which it is defined embraces the subject matter itself; for it is not the plan of the Constitution to grant specific powers to the States over defined subjects.[39]

This attitude of the Chief Justice to the natures of the legislative powers of the parliaments is at the heart of his approach to Commonwealth-State relations. The Commonwealth is "a government to which enumerated powers have been affirmatively granted. The grant carries all that is proper for its full effectuation. Then supremacy is given to the legislative powers of the Commonwealth".[40] This shows that the position of the federal government "is necessarily stronger than that of the States".[41] And these considerations "add great strength to the implication protecting the Commonwealth from the operation of State laws affecting the exercise of federal power".[42]

But, with respect, it may be submitted that the grounds chosen by Dixon, C.J. are not sufficient on which to rest a claim of Commonwealth supremacy in a general sense. The Commonwealth has exclusive and concurrent powers. Its laws made in pursuance of these powers may prevail over inconsistent State laws by s.109. In this sense *the laws* of the Commonwealth are paramount. However, that is not to say that *the powers* in exercise of which the laws are made, enumerated though they may be, are of any superior quality to the powers of the States. The Constitution gives a special force to the consequence of the exercise of its powers by the Commonwealth Parliament, but it does not give special force to any inherent nature of the powers themselves. Still less does the Constitution assume for the Commonwealth a position in the federation of supremacy in a general sense. It is, then, not correct to assume that the powers of the Commonwealth put it in a position of unassailable supremacy where the conflict is not between a State law and a Commonwealth law, but between a State law such as the New South Wales Companies Act in dispute in *Cigamatic*, and the Commonwealth as a subject of that State law. The Commonwealth is guarded against the New South Wales law. But it is guarded by the reciprocity of the *Melbourne Corporation* doctrine. That doctrine is sufficient protection. There is no need to argue in elaboration that the Commonwealth is protected because it is in a superior position to the States, when rather it is protected because the legislative powers of *neither* government in the federal system may be used to deprive the other of its rights or authority.

## III

The *Melbourne Corporation Case* was concerned with impingement by one party in the federation upon the governmental functions and operations of the other: the New South Wales Companies Act in dispute in *Cigamatic* attempted to burden the operations of the Commonwealth. In this sense the *Melbourne Corporation* doctrine is relevant to *Cigamatic*. But, however relevant the broad principles in the *Melbourne Corporation Case*, the issue in *Cigamatic* cannot be regarded as "simply governed by the applicability" of them.[43] For, of the area of Commonwealth-State relations comprehended by the earlier case, *Cigamatic* above all touches and concerns that portion relating to the prejudice

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[39] (1962) 108 C.L.R. 372 at 377-378.
[40] (1947) 74 C.L.R. 31 at 82-83 *per* Dixon, J.
[41] *Ibid.*
[42] *Ibid.*
[43] (1962) 108 C.L.R. 372 at 378 *per* Dixon, C.J.

of advantages stemming from the prerogative. And the Chief Justice has emphasized that "the fact that the priority claimed by the Commonwealth springs from one of the prerogatives of the Crown is an added reason, a reason perhaps conclusive in itself for saying that it is a matter lying completely outside State power".[44] One must ask why this should be a reason conclusive in itself.

The prerogative is the medium through which, in a common law system, the executive power of the Crown is exercised. The Australian Constitution took effect in a common law system.[45] By s.61 it vests the executive power of the Commonwealth in the Queen as represented by her Governor-General. The prerogative may be modified or relinquished by and with the consent of the federal Parliament.[46] That the Queen's representatives in the States also exercise the prerogative raised a federal problem in *Cigamatic*. The problem involved the competency of a State legislature to abridge or abolish not only the prerogative as exercised in its State, but also as exercised in the Commonwealth. *Cigamatic* denies this competency.

It is submitted that deeply involved in this conclusion, and also in resolutions of the issues concerning the prerogative in *Uther's Case*[47] and *Farley's Case*,[48] are particular attitudes to the "juristic personality" of the State. Theories as to the juristic personality of a federation and its components may seem fanciful. But judicial disagreement in the cases as to the constitutionality of the impugned legislation followed from different answers to questions regarding distinct "juristic personalities" for the Commonwealth and States, and the divisibility of the Crown to permit this.

First, if it be acknowledged that the Crown in Australia is to be seen not as one but as several juristic persons, it would follow that the exercise of a prerogative of government by the one polity should not be prejudiced at the instance of the other. State legislation purporting to affect the Commonwealth Crown would be asserting a spurious supremacy over an executive distinct from and different in identity to that in the constitutional structure of the State, and so beyond the purview of its legislative power. This would support the holding in *Cigamatic*.

On the other hand, it may be asserted that while the legislative, executive and judicial power of the Crown is exercisable by different "agents" in various parts of its territories, the Crown is still ubiquitous and monistic. And if there be but one Crown for the Dominions, the Commonwealth and States, then there is but one prerogative attaching to it. And if the Crown is indivisible then it is said that a statutory provision expressed to bind the Crown will *prima facie* bind it in all its aspects. Therefore, if a State Act such as the Companies Act, 1936 (New South Wales), is expressed to bind the Crown and it alters a prerogative right, then there is an alteration in the powers of the Crown in all its capacities, including the Crown "in the right of" the Commonwealth. By this means a conclusion opposite to that in *Cigamatic* may be reached.

Sir George Rich, a keen exegete of the monistic theory, declared in *The Minister of Works (W.A.)* v. *Gulson*:[49]

> It has been decided by the highest authority that in constitutional theory the Crown is one and indivisible (*Williams* v. *Howarth*)[50]. . . . Thus the prerogatives of the Crown are the prerogatives of a single individual

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[44] *Uther's Case* (1947) 74 C.L.R. 508 at 530 *per* Dixon, J.
[45] *Farley's Case* (1940) 63 C.L.R. 278 at 304 *per* Dixon, J.
[46] (1947) 74 C.L.R. 508 at 531.
[47] *Op. cit.*
[48] *Op. cit.*
[49] (1944) 69 C.L.R. 338 at 356-357.
[50] (1905) A.C. 551.

> Crown and enure for the benefit of each and every part of the Empire, save to the extent in any part any particular prerogative has been abrogated or diminished. . . . The theory of the unity of the Crown produces . . . the twofold result, first the Crown in all its capacities is *prima facie* not bound by a Statute made in any particular part of the Empire unless this is provided for expressly or by necessary implication, and second, a provision that a Statute binds the Crown, binds it *prima facie* in all its capacities unless a contrary intention appears."[51]

Then in *Uther's Case* his Honour proceeded to apply these principles to the provisions of the Companies Act:[52]

> As regards the prerogative now in question, the legislature of N.S.W. can, as to any funds within its legislative competence, abridge or abolish it *qua* the Crown in the right of, for example, Great Britain, or of South Africa, or of any other of the States of Australia. Insofar as the right of the Crown in the right of the Commonwealth to rank as a preferential creditor is based merely on the prerogative of the Crown, as such I see no reason why the State legislature cannot validly abridge or abolish it just as it could any other Crown prerogative of this sort.

With respect, it may not seem surprising that the premises from which this conclusion was reached have received judicial criticism. If a unitary theory were adopted Barton, J. saw great difficulty in construing s.85 of the Constitution. Section 85(iii) involves the Commonwealth[53] making agreements with or compensating the States for property acquired from them. On the unitary theory this would mean compensation made by the Crown to the same Crown or agreements by the Crown with itself. In either case there would be an operation which to the learned Justice, "baffles comprehension". Section 85(iv) would also be "meaningless".

Barton, J. agreed with the position taken by Griffith, C.J. in *Municipal Council of Sydney* v. *The Commonwealth*[54] where the Chief Justice deemed it "manifest" from the structure of the Constitution that "the Commonwealth and States are distinct and separate sovereign bodies and that the Crown as representing those several bodies is to be regarded not as one, but as several juristic persons, to use a phrase which well expresses the idea".[55] In *R.* v. *Sutton*, O'Connor, J. noted that while for some purposes, notably the enlistment and control of his army, the King was the same juristic person throughout the Empire, this was not otherwise the case.[56] The *Engineers' Case* discredited tenets held by the foundation Justices: criticism was directed not only at their doctrine of implied prohibitions, but also at their views on the divisibility of the Crown.[57] Rich, J. later observed that "the ghost of the heresy of Crown schizophrenia (in *R.* v. *Sutton*) was laid in such explicit terms in the *Engineers' Case*" that he could not but be surprised at any attempt to resuscitate it.[58]

One may wonder if *Cigamatic* does not mark the success of just such an attempt. It is true that Dixon, C.J. has never in terms adopted the position of Griffith, C.J., Barton, J. and O'Connor, J., but he has made statements closely consistent with it.[59] In the *Banking Case*[60] his Honour said:

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[51] *Op. cit.* at 356-357.
[52] *Op. cit.* at 523.
[53] *Municipal Council of Sydney* v. *Commonwealth* (1904) 1 C.L.R. 235.
[54] *Id.* at 231.
[55] *Ibid.*
[56] (1908) 5 C.L.R. 789 at 803-804.
[57] (1920) 28 C.L.R. 129 at 143.
[58] *Gulson's Case* (1944) 69 C.L.R. 338 at 357.
[59] For His Honour's attitude to the doctrine of the indivisibility of the Crown throughout all parts of the British Empire see *Farley's Case* (1940) 63 C.L.R. 278 at 302-303 where he discusses *In re the Oriental Bank Corporation* (1855) 28 Ch. D. 643. There, in an English winding-up Chitty, J. ordered payment of a debt due to the Crown in the right of,

> It is perhaps strictly correct to say that it (the Commonwealth) means the Crown in the right of the Commonwealth . . . it must be borne in mind that the dual system of government, which is the essence of federation, involves a legal recognition of the distinct existence of component polities. . . . From beginning to end the Constitution treats the Commonwealth and the States as organisations or institutions of government possessing distinct individualities. Formally, they may not be juristic persons but they are conceived as politically organised bodies having mutual legal relations.[61]

The late Sir Wilfred Fullagar had no doubts on the matter. In *The Commonwealth* v. *Bogle*[62] his Honour favoured what, it is submitted, is the better opinion, namely, that "the Commonwealth—or the Crown in right of the Commonwealth, or whatever you choose to call it—is, to all intents and purposes, a juristic person".[63] With the reasons for the judgment in the course of which this remark was made, Dixon, C.J. and Kitto, J. expressed their agreement.[64] The possession by the Commonwealth Crown of a distinct juristic personality will result in the failure of State laws intended to diminish the prerogatives of that Crown.

> If the answer to the question of construction be that the Statute in question does purport to bind the Crown in the right of the Commonwealth, then a constitutional question arises. The Crown in the right of the State has assented, but the Crown in the right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth. The Commonwealth . . . is not a juristic person which is subjected either by the State Constitution or by the Commonwealth Constitution to the legislative power of the State Parliament.[65]

In these sibylline phrases may be found the crux of the holding in *The Commonwealth* v. *Cigamatic Pty. Ltd.*

That holding is incompatible with the monistic theory. The Chief Justice quoted with some incredulity the words of Rich, J. in *Uther's Case* and remarked,

> Except by adopting such a doctrine, I cannot see how it could be thought that State legislative power could directly deprive the Commonwealth of the priority to which it is entitled under the law derived from the prerogative.[66]

## IV

Another mode in which the decision in *Cigamatic* may be expressed begins by seeing the Commonwealth Crown as taking effect with all the authority and

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*inter alia*, Victoria in priority to debts due to English creditors. For the decline in the doctrine of indivisibility throughout the British Commonwealth and its replacement by the theory of the Monarch enjoying a separate sovereignty in each of her Realms see D. P. O'Connell, "The Crown in the British Commonwealth" (1957) 6 *Int. & Comp. L.Q.* 103.

[60] *Bank of N.S.W.* v. *Commonwealth* (1948) 76 C.L.R. 1.

[61] *Id.* at 363.

[62] (1953) 89 C.L.R. 229.

[63] *Id.* at 259.

[64] *Ibid.*

[65] *Ibid.* See also *Asiatic Steam Navigation Co. Ltd.* v. *Commonwealth* (1956) 96 C.L.R. 397 and *Commonwealth* v. *Anderson* (1960) 105 C.L.R. 303 where Fullagar, J. reaffirmed these views with the apparent support of Dixon, C.J. in *Brown's Case* (1957-58) 100 C.L.R. 32 at 41. See also *Commonwealth* v. *Anderson* (1960) 77 W.N. (N.S.W.) 538 *per* Else-Mitchell, J. who agrees with Fullagar, J., unlike G. Sawer (1960-61) 34 *A.L.J.* 274.

[66] (1962) 108 C.L.R. 372 at 377.

incidents of the Crown in a common law system. This involves a bond or *ligamen* between the Crown and its subjects with rights and privileges, duties and disabilities shared by both parties. The definition of these matters is confined to those parties privy to the relationship whence they arise. The right of the Crown as a preferential creditor of the subject is such a matter. The issue is between the Commonwealth and its people: there are no conflicting claims between Commonwealth and States.[67] The advantages claimed by the Commonwealth "spring from the nature of the Commonwealth as a government of the Queen. Therefore to treat those rights as subject to destruction or modification or qualification by the legislature of a State must mean that under the Constitution there resides in the States a legislative power to control rights and duties between the Commonwealth and its people. . . . I do not speak of legal rights which are the immediate product of federal statute and so protected by s.109 of the Constitution".[68]

If valid the power claimed for the States would have a general application, extending beyond preference of debts. It would, for example, mean that before the Claims Against the Crown Act, 1902 (Commonwealth) made the Commonwealth liable for torts committed by it against its subjects, the States had had the power to derogate from the previous immunity of the Commonwealth Crown from the process of its courts.[69] Again, although the common law did not countenance the assignment of legal choses in action, the Sovereign was enabled by the prerogative to give or take such assignments (see *Booth* v. *Williams*):[70] if valid the power would sanction the State Parliaments taking this privilege from the Crown in the right of the Commonwealth, or regulating it by the requirement of notice in writing.

The decision in the *Cigamatic Case* does not mean that the Commonwealth may never be affected by State laws which have a general application to a description of transactions when the Commonwealth enters into such a transaction. If it makes a contract in New South Wales the terms and effect of the contract may have to be sought in the Sale of Goods Act, 1923-1953 (New South Wales).[71] And s.35 of the Companies Act, 1961 (New South Wales) lays down the requisite form of the contract should the Commonwealth decide to contract with a company.[72] But the Chief Justice has in the past emphasized the difference in the nature of laws of this type and that of those discussed above. His Honour marks "a clear distinction between the general law, the content or condition of which, although a matter for the legislature of the States, may incidentally affect the Commonwealth's administrative action and, on the other hand, government rights and powers belonging to the Federal Executive as such". The priority of debts, being a matter of the prerogative, is of the latter description and so beyond the reach of State power.

However, the Chief Justice does not stress that under the federal system any given subject will be in relations not only with the Commonwealth, but also with a State Crown. If the relationship with the Commonwealth Crown be protected against legislation from an extraneous source, as *Cigamatic* would have it, one may ask if a corresponding position does not obtain with the subject-State relationship. Were this so, the Commonwealth in turn would be precluded from making laws interfering with the relationship between the State Crowns and their people. This is one of the matters to be given focus by a consideration of sections of the Commonwealth Bankruptcy Act, 1924-60.

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[67] (1947) 74 C.L.R. 508 at 528 *per* Dixon, J.
[68] *Op. cit.* at 97-98.
[69] *Op. cit.* at 528. See also *Farley's Case* (1940) 63 C.L.R. at 308 *per* Dixon, J.
[70] (1909) 9 S.R. (N.S.W.) 421.
[71] See *Bogle's Case* (1953) 89 C.L.R. 229 at 259.
[72] *Op. cit.* at 528.

## V

The right of the Crown as a preferential creditor included at common law satisfaction in priority to other creditors in distribution of a bankrupt's assets. The Bankruptcy Act, 1924-60 (Commonwealth) lays down in s.84 a system of priorities inconsistent with this right. Such provisions are by s.5(2) expressed to bind the Crown as representing the Commonwealth or any State. In *Cigamatic* Taylor, J. noted and apparently accepted this position.[73] Yet from the holding in *Cigamatic* there arises the question of the extent to which it has a reciprocal operation. If it does have such an operation then the Commonwealth by such laws as the Bankruptcy Act can no more restrict the exercise of the prerogatives of a State Crown than can the States those of the Commonwealth Crown. An examination of this possibility reveals the strengths and weaknesses of the approach in *Cigamatic* and affords a means of gauging its significance for Commonwealth-State relations.

At the outset, there appears no cause for permitting the Commonwealth Parliament to interfere in the operation of the rights and duties between the State Crowns and their subjects. Even in the *Engineers' Case* the question of the competency of federal laws to affect the exercise of the prerogative in the States was left open.[74] And, being a component of the Constitutions of the States, the prerogative is preserved by s.106 of the Commonwealth Constitution until it is altered in accord with State law.[75]

However, Sir Owen Dixon has continually pressed his belief that the plenary nature of the powers in sections 51 and 52, and the force given laws made under them by s.109, is in significant contrast with the undefined residue of legislative power given the States.[76] From the supremacy of Commonwealth laws, his Honour argues for the supremacy of the Commonwealth powers in execution of which the laws are made. From this notion of the supremacy of Commonwealth powers, his Honour then reaches the conclusion giving the Commonwealth supremacy of position of the federation. This preoccupation with the special position of the Commonwealth has been noted in connection with the relation between the *Engineers'* doctrine and *Cigamatic*: it has also led the Chief Justice to regard the Commonwealth power in s.51(xvii) as an affirmative grant of power extending even to "reducing or excluding the priority of the State Crowns in relation to bankruptcy and insolvency".[77]

In *Farley's Case* both Dixon, J. and Evatt, J. considered the Bankruptcy Act and their opinion favoured the validity of its effect on a State Crown.[78] Dixon, J. began with the proposition that while the prerogative concerned attached to the States before federation, with that event there arose the possibility of a competition not only between Crown and subject as heretofore, but also between two governments, each claiming the same first priority. The ranking *inter se* of State and Commonwealth claims when this occurs "must depend upon the consequences deduced from the establishment within one territory of two governments, neither subordinate to the other".[79] The lack of subordination leads to the conclusion that the two governments have an equal right and are thus entitled to a ratable distribution when in competition.

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[73] (1962) 108 C.L.R. 372 at 383.
[74] (1920) 28 C.L.R. 129 at 143-144.
[75] Section 106 provides: "The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth . . . until altered in accordance with the Constitution of the State."
[76] *Farley's Case* (1940) 63 C.L.R. 278 at 313-314. *Uther's Case* (1947) 74 C.L.R. 508 at 523-530.
[77] (1947) 74 C.L.R. 508 at 529.
[78] *Op. cit.* at 313-314 *per* Dixon, J., at 322-323 *per* Evatt, J.
[79] *Id.* at 304.

However, a legislature with power to regulate the priorities between Commonwealth and States may change this position.

Section 51(xvii) "is a specific power, and priority in the distribution of assets among a bankrupt's creditors is a matter to be governed by bankruptcy legislation. It is a subject to be dealt with as a coherent whole . . .".[80] A matter of characterisation is involved here, as it was with the provisions of the Companies Act. Dixon, J. has criticized those who see the latter as laws on a subject matter within State power (that is, companies). When dealing with Commonwealth specific powers, characterisation is to be approached with, if anything, greater circumspection, but here his Honour is ignoring a possibility of a kind he saw clearly in *Uther* and *Cigamatic*, namely that the law is not one on bankruptcy and insolvency but rather one to be categorised as pertaining to the State Crown prerogative of preference.

Dixon, J. notes that to destroy the equality in preference "does spell an interference with an existing governmental right of the State flowing from the constitutional relations of the two polities", an interference which, however, "may be not enough" to prevent the application of the *Engineers'* doctrine.[81] Presumably then, the interference is not of such a nature as to attract the operation of the *Melbourne Corporation Case*, as it is not sufficiently "obvious" or "substantial".

The difficulty arises because there is no precise definition of the scope of the doctrine in the *Melbourne Corporation Case*.

The reservation in the *Engineers' Case* as to the prerogative[82] is not relevant to Dixon, J.'s view as the claim that State and Commonwealth Crown rank equally in distribution of assets, unlike the right of the Crown to be preferred to the subject, does not depend upon the prerogative.[83] Section 106 gives no protection: even if the right to payment *pari passu* is part of the "Constitution" of the State, "it is not easy to regard it as existing at the establishment of the Commonwealth".[84]

From his Honour's words it appears that if the right of the State was within its pre-federation constitution, then it would be safeguarded. It is not disputed that in the words of Evatt, J., "there is nothing in our Constitution which suggests that the States have been stripped of . . . the preferences, immunities and exceptions which the King enjoys by virtue of his prerogatives".[85] This being so, the right of preference must be behind the shield of s.106. It is indisputable that the right does not always have the same operation as it did before federation. As a "logical consequence"[86] of federation, provision has to be made for a similar right vested in the Commonwealth Crown and this is accomplished by the Commonwealth and State sharing ratably when they both claim priority in the same administration of assets. When the Commonwealth does not also claim, the State privilege should be unaffected and function as before. The Chief Justice takes the fact that the governments share *pari passu* in instances of competition and presents this is a new right enjoyed by the States, and being a new right, one not within s.106. The true position, it is submitted, is that this "right" is no more than the measure of the extent to which the operation of the prerogative vested in the States before 1901 may now in certain circumstances be qualified. The prerogative right may on occasion yield a lesser return, but, where it has not been abrogated by a

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[80] *Id.* at 313-314.
[81] *Id.* at 313.
[82] (1920) 28 C.L.R. 129 at 143-144.
[83] *Op. cit.* at 313-314.
[84] *Ibid.*
[85] *Id.* at 322-323.
[86] *Uther's Case, op. cit.* at 508 *per* Kitto, K.C. (as he then was), *arguendo.*

legislature with power to do so, it still subsists.

The *Engineers'* doctrine is not relevant to the issue. It deals with the impact of the Commonwealth legislative powers, not upon a State's Constitution, but upon the scope of a State's legislative powers over the subject, powers supposedly insulated by s.107. Sir Owen Dixon himself explained the situation in *West's Case*, saying that the Commonwealth "cannot deal with a State . . . as if it were legislating for the subject. . . . It may be that section 106 provides the restraint upon the legislative power over the States, which differentiates it from the power over the subject, and that no law of the Commonwealth can impair or affect the Constitution of a State".[87]

If the situation be thus clarified the Bankruptcy Act will be seen, however unwelcome the prospect may be from a "practical" viewpoint, to be ineffective to deprive the Crown of a State of a prerogative right.

## CONCLUSION

The resolution of the issue raised in *Cigamatic* "goes deeply into the nature and operation of the federal system".[88]

It illustrates the significance of the characterisation of the legislation whose constitutionality is challenged.

It involves the application of the principles propounded in the *Melbourne Corporation Case*. Those principles, with all their imprecision of definition, may now be taken to have a reciprocal operation.

It contains a tacit recognition by the Chief Justice of the theory of the divisibility of the Crown with all that that theory entails for the exercise of the prerogative by the components of the federation.

There are several complications. Once the divisibility of the Crown be accepted, there would seem, despite *dicta* given by the Chief Justice in the past, to be no justification for placing the Commonwealth prerogatives beyond the reach of the States, whilst abandoning those of the States to encroachment by the Commonwealth.

And, when dealing with federal conflict, the Chief Justice tends to circumscribe the permissible consequences of interaction between State and Commonwealth power. This tendency may be seen even to involve a denial of *Engineers'* principles, by a return in *Cigamatic* to an implied prohibition protecting the Commonwealth from State laws. This would have all the exaggeration of a canard. However, it is submitted that in the approach of the Chief Justice there seems to be a confusion of paramountcy of Commonwealth laws with an imputed paramountcy of the power under which its laws are made: this leads his Honour to decide that the Commonwealth is in an impregnable position and hence to place a curb on State power when the exercise of that power might qualify the position of the Commonwealth.

*W. M. C. GUMMOW, B.A., Case Editor—Third Year Student*

# ILLEGALITY IN THE LAW OF TORTS

## *GODBOLT* v. *FITTOCK*[1]

### *A. Facts*

*Godbolt* v. *Fittock* was described by Manning, J. as "a case in which a nice point of law has been brought to the surface of an unedifying contest between

[87] (1931) 56 C.L.R. 657 at 682.
[88] (1962) 108 C.L.R. 372 at 377 *per* Dixon, C.J.
[1] (1964) N.S.W.R. 22.