LEGAL LANDMARKS, 1955-1956
CONSTITUTIONAL AND ADMINISTRATIVE LAW

Exclusiveness of Judicial Power of the Commonwealth.

The doctrine of separation of powers was carried a big step further by the High Court in *R. v. Kirby, ex p. Boilermakers' Society of Australia.*[1] It has been settled doctrine since *Alexander's Case*[2] that judicial power, unlike legislative and executive powers under the Federal Constitution, is exclusive in the sense that it can validly be exercised only by courts of the kind mentioned in S.71 of the Constitution, composed of persons appointed in accordance with the provisions of S.72, which have been construed to require life tenure. No comprehensive definition of judicial power has ever appeared, for the evident reason that it is conceptually impossible to draw any clear dividing line between judicial and other powers. But ever since *Alexander's Case* it has been assumed by all concerned, including the High Court in many cases, that a body established for special non-judicial purposes, in particular the Commonwealth Court of Conciliation and Arbitration, can validly be given judicial powers if it is constituted as a Federal court and its members appointed in accordance with S.72. The High Court has now decided, by a four to three majority, that this assumption has been incorrect and that the judicial power of the Commonwealth is exclusive in a stricter sense: bodies established primarily for non-judicial purposes, whether called courts or not, and whether composed of persons appointed in accordance with S.72 or not, cannot be given judicial powers, and conversely Federal courts cannot be given non-judicial powers. *The Boilermakers' Case* thus marks a change in the policy of the High Court like the *Engineers' Case*,[3] with this difference, that the particular issue had never before been squarely presented to the Court, so that what was overruled was an assumed principle rather than any fully considered judgment of the Court.

The actual decision in the case involved a finding that SS.29A, 29(1)(b) and (c) of the *Conciliation and Arbitration Act* 1904-1952 were invalid. These provisions gave the Arbitration Court power, in case of breach or non-observance of any order or award of the Court or a Conciliation Commissioner, to order compliance there-

1. [1956] A.L.R. 163.
2. *Waterside Workers' Federation of Australia v. Alexander* (1918) 25 C.L.R. 434.
3. *Amalgamated Society of Engineers v. Adelaide Steamship Co.* (1920) 28 C.L.R. 129.

with and to issue injunctions to that end, and also power to punish for contempt of the Court. The power of enforcement of arbitral awards has always been regarded as judicial power, and the power to punish for contempt clearly is judicial. Various other powers conferred on the Court by the Act were characterised by the majority (Dixon C.J., McTiernan, Fullagar, and Kitto JJ.) in their joint judgment as judicial and therefore unconstitutional: summary jurisdiction to punish offences against the Act (S.119); the imposition of penalties for breach or non-observance of orders or awards (SS.29 (1) (a), 59); power to declare union elections void, to enforce orders made by the Court concerning such elections, and to declare acts of union officers void in certain circumstances (SS.96G(3) (a) and (b), 96H, 96J). The immediate effect of the decision was to require a clear separation of the functions of arbitration of industrial disputes, and of supervision of union organisation and elections, on the one hand, from the functions of enforcement of the Act and awards and of conclusive determination of questions of law, on the other hand—a separation effected by the 1956 amendments to the Act which allocate those two sets of functions to two distinct newly-constituted tribunals.

The reasons offered by the majority of the High Court for their conclusion depended, of course, not on any appeal to precedent, but on an *a priori* conception of the nature of the judicial power and its segregation in Chapter III of the Constitution. It has previously been held by the High Court[4] that, apart from S.51 (xxxix) (the "incidental" power)[5] and S.122 (government of Commonwealth territories), Chapter III is the only constitutional source of judicial power. The minority judges (Williams J., Webb J., Taylor J.) did not regard this as any reason why complementary and compatible judicial powers should not be conferred on arbitral authorities (otherwise constituted as a Federal Court)—in fact they took the view that S.51 (xxxix) expressly authorised such provision. But the majority took the separation of powers as their fundamental principle—"the dominant principle of demarcation".[6] The reason why the American doctrine was not applicable to the legislative and executive powers was the incorporation in the Constitution of the special feature ("accidental to federalism") of responsible government on the British model. But "when this dominant principle is applied to Chapter III it con-

4. *E.g. Judiciary Navigation Acts* (1921) 29 C.L.R. 257.

5. The Federal Parliament's power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature".

6. Adopting a phrase of Isaacs J.'s in *New South Wales v. The Commonwealth* (1915) 20 C.L.R. 54 at 90.

firms the inference to which its terms, independently considered, give rise, namely that Courts established by or under its provisions have for their exclusive purpose the performance of judicial functions and that it is not within the legislative power to impose or confer upon them duties or authorities of another order".[7] It follows, of course, that tribunals established for non-judicial purposes cannot be constituted as Federal courts and authorised to exercise judicial powers, however convenient or "complementary" such an arrangement may be. Though the majority judges stated that this conclusion was reached without any reliance on the U.S. experience, they did express the opinion that Chapter III was drafted in the light of that experience of "the impossibility of mixing judicial and non-judicial functions", with the deliberate intention that American principles concerning the judicial power should apply in Australia.

The majority did concede that functions which, considered in isolation, might be regarded as non-judicial could be validly combined with judicial power if they were fairly incidental to it.[8] Traditional notions of what is appropriate for judicial administration might determine what is fairly incidental in this context, *e.g.* in the sphere of bankruptcy. But, so it seems, no such concession can be made in a reverse direction.

The views of the minority judges have already been sufficiently indicated. Of the three Taylor J. was perhaps closest to the majority in that he accepted the principle that non-judicial powers could not be conferred on a court unless they were strictly incidental to the performance of its judicial functions, but he regarded industrial arbitration powers as satisfying this test. Webb J. made the interesting suggestion that the majority decision could be easily nullified by Parliament's conferring arbitral powers on judges not in their judicial capacity but as *personae designatae*.

It may well be questioned whether this decision reflects sound policy. It must add to the difficulties already experienced in attempting to draw hard and fast dividing lines between judicial and other powers. A new crop of thorns in the already thorny field of industrial arbitration may be expected. No doubt the decision reflects that "excessive legalism" which Dixon C.J. regards as one of the High Court's prime virtues.[9] It will certainly serve to further insulate the Federal judiciary from the legislative and executive spheres of govern-

7. [1956] A.L.R. at 172.

8. Reference was made to *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144 at 151; *R. v. Davison* (1954) 90 C.L.R. 353 at 366-70

9. (1952) 85 C.L.R. xi.

ment: the answer which many will give to the doubters is that if a high price must be paid for this result, it is still worth it.

Leave to appeal against the decision has been given by the Privy Council.

Inter Se Questions. Inconsistency between Commonwealth and State Laws.

The decision of the High Court in *O'Sullivan v. Noarlunga Meat Ltd.*[10]—in which it was held that certain Federal regulations governing the slaughtering of stock for export as meat were within the powers of the Federal Parliament under S.51(i) of the Constitution, and that certain South Australian laws were inconsistent with those regulations and therefore invalid—was discussed in the last number of this Journal.[11] Wishing to appeal to the Privy Council, the unsuccessful prosecutor was obliged to apply to the High Court for a certificate under S.74 of the Constitution, since any question as to the extent of a paramount power of the Commnowealth is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of the States, and therefore beyond the jurisdiction of the Privy Council unless the High Court certifies that the question ought to be decided by it. So much is accepted principle about *inter se* questions, and if nothing further had arisen no discussion here of the application to the High Court[12] or of the subsequent appeal to the Privy Council[13] would have been warranted.

However, the Commonwealth (intervening to uphold the decision of the High Court) advanced the novel contention that the question of the meaning to be given to the term "inconsistent" in S.109 of the Constitution,[14] a question which the appellant had indicated he proposed to argue before the Privy Council, was also an *inter se* question. The application of S.109 has always been treated by the High Court as not involving an *inter se* question—it is "a question not between powers but between laws made under powers".[15] It may be more accurate to describe it as a question between a law of the Commonwealth and a power of the State: it requires a decision which involves a determination of the limits of State power, but not at the same time a determination of the limits of Commonwealth

10. [1955] A.L.R. 82.
11. 2 U.Q.L.J. 365.
12. *O'Sullivan v. Noarlunga Meat Ltd.* [1956] A.L.R. 223.
13. [1956] 3 W.L.R. 436; [1956] 3 All E.R. 177.
14. "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".
15. [1956] A.L.R. at 226.

power since the Commonwealth law is by hypothesis within power—it is therefore not an *inter se* question. But the Commonwealth's contention, in the words of Dixon C.J., Williams, Webb, and Fullagar JJ.,[16] was that the principle of inconsistency "defines the limits of all the legislative powers of the Commonwealth and the legislative powers of the States . . . What is said is that the meaning and general operation assigned to S.109 determines the extent to which all legislative powers exercisable by the Commonwealth are paramount over the legislative powers of the States. Correspondingly it determines the extent to which a concurrent legislative power of the States is subordinate and liable to be defeated by an exercise of Commonwealth power . . . It means that a question as to the meaning and operation of S.109 is a question within S.74".

This is clearly a forceful argument, and Kitto J. was convinced by it, though he expressed the view that there is no *inter se* question where it is merely a matter of applying S.109 to a particular case without any dispute as to the meaning of "inconsistent". The other judges, however, having decided to refuse a certificate in any event, expressly refrained from coming to any decision on that question.

It was with some interest that the decision of the Privy Council on the question was awaited when the appeal came before it, limited of course to non-*inter se* issues. The appellant, however, then stated that he did not now propose to argue the test of inconsistency but to present his appeal on the basis of the accepted principle, which the Privy Council also accepted. Their Lordships went on to adopt the consistent view of the High Court that the *application* of the inconsistency test in any particular case does not involve an *inter se* question. The actual application of the test made by the High Court in the case was upheld, and the main question argued before the High Court thus remained unanswered.

If, as the Commonwealth contended and as Kitto J. accepted, a question as to the meaning of inconsistency in general is an *inter se* question, it ought to follow that a question as to the application of the principle to a particular case is, contrary to the view of Kitto J., also an *inter se* question. The meaning of meaning is an elusive philosophical concept, but it is submitted that S.109 can have no abstract

16. At 227.

17. In the words of Dixon J. in *Ex parte McLean* (1930) 43 C.L.R. 472 at 483: "The inconsistency does not lie in the mere co-existence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed. When a Federal statute discloses such an intention, it is inconsistent with it for the law of a State to govern the same conduct or matter."

meaning existing independently of hypothetical or actual cases of its application to Commonwealth and State laws. Every actual situation in which S.109 is applied is part of its meaning. The general is made particular: but the general can be ascertained only from the particular. The processes of deduction and induction are constantly interacting. Dixon C.J., Williams, Webb, and Fullagar JJ. admitted that "it is a possible view that an attempt to distinguish between the meaning to be assigned to S.109 and the application of that meaning to a given case of supposed conflict between State and Federal laws cannot succeed in dividing the question of the operation of S.109 upon the case into two completely independent questions".[18] The dichotomy adopted by Kitto J. (and perhaps also by the Privy Council) is, it is submitted, unsound.

Freedom of Interstate Trade, Commerce, and Intercourse.

The courts had some respite from the tortuous problems of S.92 during the twelve months under review, a respite due to them after their hectic labours of the previous year.[19] Mention, however, may be made of the fact that the decision of the High Court in *Antill Ranger & Co. v. Commissioner for Road Transport*[20]—that a New South Wales Act purporting to bar all legal claims which might have arisen out of the invalidity of the transport legislation struck down by the Privy Council in *Hughes and Vale Pty. Ltd. v. New South Wales*[21] was itself invalid as being contrary to S.92—was upheld by the Privy Council.[22] The Privy Council (per Viscount Simonds) was content, in a brief judgment, to express full agreement with the judgments delivered in the High Court and with that of Fullagar J. in the similar case of *Deacon v. Grimshaw*.[23]

It may be appropriate here to remark that this case and the *Noarlunga Case* discussed above both clearly illustrate the tendency of the Privy Council of recent years,[24] in those relatively few constitutional appeals which it has had occasion and jurisdiction to determine, to be content merely to adopt views expressed in the High Court, particularly by Dixon C.J. This, no doubt, is a compliment to the Chief Justice and his colleagues, and one which, if we may say so with respect, is no more than their due. But one may well wonder

18. [1956] A.L.R. at 225.
19. See 2 U.Q.L.J. 369-79.
20. [1955] A.L.R. 605. Discussed in 2 U.Q.L.J. 374-5.
21. [1955] A.C. 241.
22. *Commissioner for Motor Transport v. Antill Ranger & Co.* [1956] A.C. 527.
23. [1955] A.L.R. 611. See 2 U.Q.L.J. 375.
24. Also clearly evident in *Hughes & Vale Pty. Ltd. v. New South Wales* [1955] A.C. 241.

whether the compliment is not dearly bought in terms of the time, trouble, and expense associated with Privy Council appeals.

In the *Noarlunga Case*, on the application for a certificate under S.74 discussed above, Dixon C.J., Williams, Webb, and Fullagar JJ. said, referring to S.74: "The provision may be regarded as recognising that federalism is a form of government the nature of which is seldom adequately understood in all its bearings by those whose fortune it is to live under a unitary system. The problems of federalism and the considerations governing their solution assume a different aspect to those whose lives are spent under the operation of a Federal Constitution, particularly if by education, practice and study they have been brought to think about the constitutional conceptions and modes of reasoning which belong to federalism as commonplace and familiar ideas. A unitary system presents no analogies and indeed, on the contrary, it forms a background against which many of the conceptions and distinctions inherent in federalism must strike the mind as strange and exotic refinements".[25] These are sound reasons for the High Court's persistence in refusing to allow questions covered by S.74 to be taken to the Privy Council. The Privy Council's record of dealing with the question, what is an *inter se* question, amply demonstrates the truth of their Honours' remarks. It may well be thought that the same considerations apply no less strongly to those other questions which, though not concerned with the federal division of power, nevertheless arise under provisions of a written Constitution, such as S.92 and Chapter III, which are "strange and exotic" to an English or Scottish mind. The tendency of the Privy Council simply to follow the dominant lead in the High Court may be a reflection of this unfamiliarity with and unsureness of the context. Serious consideration should be given to further limitation of the right of appeal to the Privy Council, at least in constitutional cases.

Royal Commissions, Parliamentary Privilege, and the Administration of Justice.

Townley J. of the Supreme Court of Queensland, sitting as a Royal Commissioner to enquire into allegations of corruption in connexion with certain Crown leaseholds in Queensland, was called upon to decide two important questions of law concerning the powers and the duties of Royal Commissions. His carefully prepared decisions on these questions are reported in [1956] St.R.Qd. 225, 239.

The first question was whether his statutory power to compel persons to give evidence before him extended to a Federal Senator in

25. [1956] A.L.R. at 227.

respect of a speech made by him in the Senate in which he made the allegations of corruption which gave rise to the issue of the Royal Commission. Since the privileges of the Senate and its members, under S.49 of the Constitution, are the same as those of the House of Commons and its members, the question was amply covered by authority, and after reference to such classic cases as *Stockdale v. Hansard*,[26] *Chubb v. Salomons*,[27] and *Bradlaugh v. Gossett*.[28] he had no difficulty in concluding that a member of the Senate was not bound to give evidence of anything which passed within the House without the permission of that House, which had not been given. Townley J. went on to say: "I do not think it follows that he is bound to give such evidence if he has the permission of the House but with that question I am not really concerned". That question would involve a consideration of the extent to which Parliamentary privilege attaches to a member personally as distinct from the particular institution to which he belongs. In the circumstances his Honour also found it unnecessary to rule upon the question of the Senator's immunity from service of a summons to attend as a witness.

The second question of law which Townley J. had to decide was a more difficult one. During the course of his enquiry a specific allegation was made against the Minister for Lands which resulted in a charge of corruption being preferred against him under the Criminal Code S.442B. His Honour, quite properly of course, adjourned his enquiry pending determination of that charge, which was summarily heard and dismissed by a magistrate. The question now facing Townley J.—who had been appointed to enquire into, *inter alia*, "whether any person and, if so, what person was guilty of any, and, if so, what corrupt conduct" in respect of the Crown leaseholds—was whether he had the power or the duty to proceed to determine the truth or falsehood of the allegation which formed the subject of the charge against the Minister.

After noting that on the authorities acquittal of a criminal charge did not raise any estoppel or *res judicata* as to matters in issue in any subsequent civil proceedings before a court, Townley J. went on to consider the special position of a Royal Commission which is not a trial of any issue. He drew support from a statement by Dixon J. in *McGuinness v. A.-G. for Victoria*:[29] "For while the principle that the Crown cannot grant special Commissions, outside the

26. (1839) 9 Ad. & El. 1.
27. (1852) 3 Car. & K.75.
28. (1884) 12 Q.B.D. 271.
29. (1940) 63 C.L.R. 73 at 102.

ancient and established instruments of judicial authority, for the taking of inquests, civil or criminal, extends to inquisitions into matters of rights and into supposed offences, the principle does not affect commissions of mere enquiry and report involving no compulsion, except under the authority of statute, no determination carrying legal consequences and no exercise of authority of a judicial nature *in invitos*".

Townley J. pointed out that he was acting in a purely inquisitorial capacity and that anything he did could not be regarded as a retrial of the case against the Minister. Whatever his finding there could be no question of the magistrate's verdict being impugned, if only because, not being bound by the rules of evidence and procedure which bind a court, he might have before him material which could not be placed before a court.

He accordingly held that he had not only the power but also a duty to investigate and report on the allegation against the Minister. In his final report he did in fact find that the Minister had been guilty of corrupt conduct.

From the point of view of general policy the dilemma in which Townley J. found himself was a real one. It is clearly embarrassing both to the individual concerned and to the institution of government as a whole that a person should be found not guilty of reprehensible conduct by one public process and guilty of it by another. Lawyers may fully appreciate the situation, but it would not be surprising if laymen were puzzled and disturbed by it. They are not likely to be satisfied by the statement, legally correct though it obviously is, that the Royal Commissioner is not conducting a retrial, though the individual concerned can take some comfort from the knowledge that his acquittal cannot be upset. One might propound as a good principle of public policy that Royal Commissions should not be issued for public enquiries as to whether criminal offences have been committed: that that is a matter for which the private investigatory procedures of the police and the public trial before a court of law with its traditional safeguards for the accused person exist. But in this case Townley J. was not appointed to determine whether any *offence* had been committed. He was, of course, appointed to find facts which might lead to the inference that an offence had been committed, but if such an enquiry is always to be ruled out as improper, then the value of the Royal Commission procedure as an aid to good democratic government is seriously impaired. On the other hand, it is scarcely reasonable to propose that no criminal charges should ever be made as a result of facts brought to light in the course of a Royal Commission. Embarrassment to the Commissioner would, of course, be

avoided by a principle that the preferment of criminal charges should await the presentation of his report. But such a procedure might seriously prejudice a fair trial of an individual who, according to the Commissioner's findings, appears guilty of an offence. As Townley J. himself recognised, all the safeguards which the criminal law gives to an accused person do not apply to a Royal Commission.

The dilemma seems inevitable. It arises out of the different ends sought to be achieved by two different public processes of government —or rather out of the different emphasis on a variety of ends which may be common to both processes. Ultimately both aim at good government and ordering of the community. But the emphasis in the case of a Royal Commission is on enquiry for the purpose of a better ordering, if need be, in the future. The criminal process, though designed in part to have a deterrent effect and to secure a better ordering of society by the removal of offenders, is primarily backward-looking, aimed at punishment of actual offenders. These various aims and emphases are bound sometimes to conflict. The only safe general rule that can be laid down is that the two processes should not go on simultaneously, as they did not in this particular case. It is submitted that, from the standpoint of policy, both the governmental authority responsible for laying the charge against the Minister (one would assume it was the Cabinet) and Townley J. in his decision to continue the enquiry after the Minister's acquittal acted correctly.

ROSS ANDERSON

CONTRACT

Contractual provisions exempting third parties from liability for negligence.

In *Wilson v. Darling Island Stevedoring* Co.,[1] the High Court has recently shown a remarkable divergence of opinion both as to principle and as to the effect of certain authorities. The points raised in and by this case may, perhaps, be most conveniently approached by first setting out the essential facts of two other cases as well as those of the present one.

In *Elder Dempster & Co. Ltd. v. Paterson Zochonis & Co. Ltd.*[2] the House of Lords considered a clause in a bill of lading which relieved "the company" (*i.e.* the charterers) from liability to the owner of goods carried under the bill for damage due to the negligent stowage of the goods by the servants or agents of the company. The bill of

1. [1956] A.L.R. 311.
2. [1924] A.C. 522.