COMMENT

ASPECTS OF THE HIGH COURT'S JURISDICTION TO GRANT PREROGATIVE WRITS UNDER S. 75 (iii) and S. 75 (v) of the CONSTITUTION

Introduction

During the latter half of the 1960s the High Court decided three cases involving the *National Service Act*;[1] *White*,[2] *Collett*[3] and *Thompson*.[4] All of these cases have already been analyzed,[5] but I want to take another look at them and hope, in the process, further to illuminate various problems arising out of the High Court's jurisdiction to grant prerogative writs under s. 75 (iii) and s. 75 (v) of the Constitution.

In all three cases, the applicant had begun conscientious-objector proceedings before a State-court judge exercising federal jurisdiction under the *National Service Act*. Dissatisfied with the result of those proceedings, each applicant had then sought a prerogative writ against the judge from the High Court. In *White's* case it was prohibition, in *Collett's*, mandamus and in *Thompson's*, certiorari. In addition to naming the judge as respondent, each applicant had also named the Minister of Labour and National Service, who had opposed him at the proceedings before the State-court judge. White and Thompson had also named the Commonwealth as yet a third respondent. Of the three applicants, only Collett was successful, obtaining a mandamus against the judge to hear the proceedings Collett had initiated. In none of the three cases was there much discussion as to the High Court's jurisdiction in the matter. In *White's* case, three of the five judges[6] held that the Court had jurisdiction, but did not reveal which head or heads of jurisdiction under ss. 75 and 76 of the Constitution they were relying on. The other two judges[7] said that it was unnecessary to decide on jurisdiction because the application failed on its merits in any event. In *Collett's* case there was no reference by any of the judges to either s. 75 or s. 76.[8] In

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1 *The National Service Act* 1951 (Cth.).
2 (1966) 116 C.L.R. 644.
3 (1966) 117 C.L.R. 94.
4 (1968) 118 C.L.R. 488.
5 P. H. Lane, (1967) 41 *A.L.J.* 130; Lane, (1969) 43 *A.L.J.* 21; Lane, *Australian Federal System* (1972), 511-14.
6 Barwick C.J., McTiernan and Windeyer JJ.
7 Taylor and Menzies JJ.
8 McTiernan J. did say, 117 C.L.R. at 604, that the Court should 'make an order of the nature mentioned in' the *Judiciary Act* 1903 (Cth.), s. 33 (1) (a). Whether this was intended to mean that s. 33 (1) (a) conferred jurisdiction on the Court in the case is unclear. If this was its meaning, then it was said *per incuriam*. See Lane, *Australian Federal System* (1972), 512. See also *R.* v. *Governor of S.A.* (1907) 4 C.L.R. 1497, 1513, *per curiam*.

Thompson's case only one of the five judges[9] held that the Court had jurisdiction, relying on s. 75 (iii). The other four judges[10] said that it was unnecessary to decide on jurisdiction because the application failed on its merits in any event; but one of those four judges[11] expressed doubts, without elaborating on the reason for them,[11a] as to whether the Court had jurisdiction. It is submitted that, while the Court had jurisdiction in *White's* case, it could well have been without it in *Collett's* and in *Thompson's* cases, depending on the proper interpretation of the words 'party' in s. 75 (iii) and 'against' in s. 75 (v).

White

It is submitted that the Court had jurisdiction here under s. 75 (v), which allows the High Court to grant, *inter alia,* prohibition against Commonwealth officers. Prohibition can be directed not only to a tribunal, but also to the applicant's opposing litigant before the tribunal, either in lieu of or in addition to the tribunal.[12] Although here the tribunal was not a Commonwealth officer,[13] the applicant's opposing litigant before the tribunal was, so that the Court could at least prohibit him.[14] Of course, this explanation of the Court's jurisdiction is predicated on the assumption that prohibition could be directed to the Minister in his capacity as litigant before the State-court judge. This assumption would be unfounded if the Minister, when appearing before

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9 McTiernan J.

10 Barwick C.J., Kitto, Taylor and Menzies JJ.

11 Barwick C.J.

11a The Chief Justice did say, 118 C.L.R. at 491, that he had already expressed his doubts in Collett's case as to whether the Court would have jurisdiction in a case like Thompson's. This was a slip on his part. He meant to refer to his judgment in White's case, not Collett's. In any event, he had no more elaborated in White's case on the reasons for those doubts than he did in Thompson's case itself.

12 *London Corporation* v. *Cox* (1866) L.R. 2 H.L. 239, 280, *per* Willes J.

13 *Ex p. Commonwealth* (1916) 22 C.L.R. 437.

14 *Cf.* E. Quick and R. Garran, *Annotated Constitution of the Australian Commonwealth* (1901), 783: 'Seeing that a writ of prohibition lies against the parties to a suit, as well as against the judge, it would appear that where an "officer of the Commonwealth" is party to a suit in a State court, a prohibition may issue against him out of the High Court, on the suit of the proper party.'
Furthermore, it is submitted that the Court could also have prohibited the State-court judge. So much appears from the High Court's decision in *Ex p. National Oil* (1943) 68 C.L.R. 51. In that case it was the tribunal that was composed of Commonwealth officers, while the applicant's opposing litigant before the tribunal was not. The Court granted prohibition not only against the tribunal, but also against the opposing litigant. Two of the three judges who held that prohibition should issue specifically referred to the Court's jurisdiction to issue it not only against the Commonwealth officers (see footnote 27, *infra,* on this point), but also against the non-Commonwealth officer. In particular, Latham C.J. said of s. 75 (v), at 57-58: 'The provision is not merely that the Court may issue a writ of prohibition against an officer of the Commonwealth. Jurisdiction is conferred upon the Court in any matter in which such a writ is sought. In this matter a writ is sought against officers of the Commonwealth and against the Federation. The Court can deal with the whole matter, and therefore in my opinion the order should be made absolute against the members of the Board and against the Federation'.

the State-court judge, had been doing so as a Commonwealth agent, because of the rule that prevents, *inter alia*, prohibition from issuing against the Crown and its agents.[15] It is submitted, however, that the assumption is correct and that when appearing before the State-court judge the Minister was doing so as a *persona designata* exercising an independent discretion, rather than as agent.[16] This submission is made because the Minister's discretion was conferred directly on him by legislation,[17] so that when he was exercising it the Commonwealth (in effect, his ministerial colleagues) would be powerless to direct him.[18] If, however, this submission is wrong it might still be argued that the Court had jurisdiction under s. 75 (v). The argument would be that the word 'against' in s. 75 (v) means not only 'directed to', but also 'against the opposition of, even if not directed to'. If this latter meaning of the word were accepted, it could be said that White was seeking prohibition 'against' the Minister even though the writ, if granted, could not have been directed to the Minister. It is submitted that this interpretation of the word is strained.[19]

Collett

When mandamus issues to a tribunal it, unlike prohibition, is directed only to the tribunal and not to the applicant's opposing litigant before the tribunal.[20] That being the case, the Court could not have had jurisdiction here under s. 75 (v) unless the broad interpretation of 'against', referred to above, were accepted. It has already been submitted that this interpretation is strained.

Is there then any prospect that the High Court might have had jurisdiction in *Collett's* case (and even in *White's* case, if necessary) under

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15 *Australian Communist Party* v. *Commonwealth* (1953) 83 C.L.R. 1, 179, *dictum per* Dixon J. (as he then was) regarding all prerogative writs and the Governor-General; *Reynolds* v. *A.-G.* (1909) 29 N.Z.L.R. 24 (C.A.), 38-39, *dictum per curiam* regarding prohibition and the Governor; *Re A.-G. Canada and Anti-Dumping Tribunal* (1973) 30 D.L.R. (3d) 678 (Fed. Ct. of Can., Trial Div.), 716, *dictum per* Cattenach J. regarding all prerogative writs and the Crown. There is also a *dictum* that certiorari will not lie to a State Governor in *Banks* v. *Transport Regulations Bd. (Vic.)* (1969) 119 C.L.R. 222, 241, *per* Barwick C.J.; while in *Border Cities Press Club* v. *A.-G. Ontario* [1955] 1 D.L.R. 404 (C.A.), the *ratio* was that certiorari would not lie against the Provincial Lieutenant-Governor. It can safely be inferred that judges who have taken this view with respect to certiorari would take a similar view with respect to prohibition.

16 *Cf.* the growing trend to treat Ministers as *persona designata* rather than as agent in respect of their statutory duties, so as to render them liable to mandamus. See S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed., 1973), 495; P. W. Hogg, *Liability of the Crown* (1971), 13.

17 See *National Service Regulations*, S.R. 32 of 1951, reg. 47 (a).

18 *Cf.* Hogg, footnote 16, *supra*, 104-8.

19 *Cf.* the *Bank Nationalization* case (1948) 76 C.L.R. 1, 363, *per* Dixon J. (as he then was: '... s. 75 (v) ..., it is apparent, was written into the instrument to make it constitutionally certain that there would be a jurisdiction capable of *restraining officers of the Commonwealth* from exceeding Federal power'. (Emphasis added).

20 *Collett's* case itself illustrates this rule. See the Court's order, 117 C.L.R. at 110.

s. 75 (iii), which confers jurisdiction on the High Court in matters in which, *inter alia*, the Commonwealth or a person being sued on the Commonwealth's behalf is a party? Such an argument would require in both *White's* and *Collett's* cases the successful assertion of the proposition that the Commonwealth or a Commonwealth agent can be a 'party to' a prerogative writ application within the meaning of s. 75 (iii) even if the writ, if issued, cannot be directed to it or him.[21] It would also require in *Collett's* case the successful assertion of a further proposition: that the Minister, when appearing as respondent to the mandamus application, was doing so as a Commonwealth agent. (Such a proposition would not have to have been asserted in *White's* case because there the Commonwealth itself was an additional respondent).[22]

Let us assume, for the sake of argument, that the Minister should be treated as a Commonwealth agent when appearing as respondent to Collett's mandamus application.[23] Discussion of the other proposition, the one concerning the meaning of the word 'party' in s. 75 (iii), is best postponed until the discussion of *Thompson's* case to which, as will be seen, it is also relevant.

Thompson

Certiorari, like mandamus and unlike prohibition, is not directed to the applicant's opposing litigant before a tribunal, but only to the tribunal. However, even if the broad definition of 'against', in s. 75 (v) mentioned above, were accepted that would still not have assisted Thompson in establishing the Court's jurisdiction, as it would Collett and White. The reason is that, while s. 75 (v) mentions prohibition and mandamus as remedies which can be sought against Commonwealth officers, it does not mention certiorari. This almost certainly precludes the High Court from issuing certiorari under s. 75 (v).[24] Therefore, unless the High Court had jurisdiction in *Thompson's* case under s. 75 (iii), it did not have it at all. Could it be said then that s. 75 (iii) provided a jurisdictional basis in *Thompson's* case and in the other two cases because either the Commonwealth or a Commonwealth agent was respondent to the writ application, although the writ, if issued, could not be directed to it or him? Would it or he be a 'party' to the application within the meaning of s. 75 (iii)? Certainly, to describe it or him in that way would require a liberal interpretation of that word. The traditional explanation for the inclusion of s. 75 (iii) in the

21 Authorities for the proposition that prohibition and certiorari cannot be directed to the Commonwealth and its agents have already been referred to. See footnote 15, *supra*. Authorities for the proposition that mandamus cannot be so directed are more numerous. See e.g., *ex p. Bridekirk* (1957) 99 C.L.R. 496, 504, *per curiam*.

22 In *White's* case, Windeyer J. held that the Commonwealth had properly been made a respondent: see 116 C.L.R. at 655.

23 McTiernan J. treated the Minister as a Commonwealth agent when appearing as respondent to Thompson's certiorari application: see 118 C.L.R. at 495.

24 Footnote 5, *supra*.

Constitution is that it provided a jurisdiction in which the illegal actions of the Commonwealth and its agents could be redressed.[25] The applicants' complaints in the three cases under discussion did not relate to any alleged illegal action of the Commonwealth or of a Commonwealth agent at all. They were complaints of illegality by State-court judges. To create a jurisdiction in which a remedy can be obtained against the illegal actions of one not a Commonwealth agent, only because the Commonwealth or a Commonwealth agent has asserted the action's legality, seems to be extending the original conception of s. 75 (iii) quite significantly although, as has already been mentioned, one judge, McTiernan J., did hold, although without any elaboration,[25a] that the Court had jurisdiction in *Thompson's* case under s. 75 (iii).

Conclusion

It has been submitted that the Court had jurisdiction in *White's* case and that that jurisdiction is explicable on traditional grounds. It has been submitted that the Court was without jurisdiction in *Collett's* and *Thompson's* cases, unless a generous interpretation is given to the word 'party' in s. 75 (iii) or, alternatively in *Collett's* case, unless a generous interpretation is given to the word 'against' in s. 75 (v).

Two matters remain to be dealt with by way of conclusion. First, if in principle the Court did not have jurisdiction in *Collett's* case, in which it granted mandamus without discussing its jurisdiction to do so, of what value as a precedent on jurisdiction is the case? It is submitted that the rule, first adopted by the American Supreme Court in 1805,[26] is the appropriate one here. As reiterated by that Court in 1974, the rule is as follows:[27]

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25 See the *Bank Nationalization case,* footnote 19, *supra,* 363-67, *per* Dixon J. as he then was): 'There is the strongest presumption that in using the expression "or person... being sued on behalf of the Commonwealth" the framers of the Constitution were... concerned with... amenability to the jurisdiction of persons... *against whom causes of action lay,* but in their official capacity only and as agencies or emanations of the Commonwealth. ... the purpose of providing a jurisdiction which might be invoked against the Commonwealth could not... be... attained... unless it was expressed so as to cover the *enforcement of actionable... liabilities* of officers and agencies in their official and governmental capacity, when in substance they formed part of or represented the Commonwealth'. (Emphasis added). Obviously, these remarks are as applicable to the Commonwealth itself as to its agents.

25a 118 C.L.R. at 494-95.

26 *U.S.* v. *More* 7 U.S. 159.

27 *Hagans* v. *Lavine* 415 U.S. 528, 535, n. 5. It may be that the High Court broke this rule in *ex p. National Oil,* footnote 14, *supra.* In that case prohibition was sought under s. 75 (v) of the Constitution against, *inter alia,* the members of the Coal Mining Industry Central Reference Board, which consisted of an Arbitration Court judge together with employer and employee representatives. It was argued by the applicant that the members of the Board were Commonwealth officers for the purpose of s. 75 (v) and, so far as the Arbitration Court judge was concerned, this argument was bound to succeed, the point having previously been settled in *ex p. Whybrow* (1910) 11 C.L.R. 1 and reiterated in the first *Tramways* case (1913) 18 C.L.R. 54. So far as the employer and employee representatives

> ... when questions of jurisdiction have been passed upon in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.

Secondly, what is one to make of Taylor and Menzies J.J.'s judgments in both *White* and *Thompson* and of Barwick C.J.'s and Kitto J.'s judgments in *Thompson* alone, that it was unnecessary to decide on the Court's jurisdiction since the applicant failed on the merits in any event? It is submitted that this was a most unsatisfactory way of proceeding.[28] What was there about those cases that so concerned these judges that they were determined to deny their merits no matter what?

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were concerned, the applicant relied on *ex p. BHP* (1920) 28 C.L.R. 456 to establish their status as Commonwealth officers for the purpose of s. 75 (v). In that case the Court had, under s. 75 (v), prohibited the members of the Coke Industry Special Tribunal, all of whom were similar in character to the non-judicial Board members National Oil was now seeking to have prohibited. Three of the five judges in *National Oil*, Latham C.J., Starke and Williams JJ., expressly relied on *ex p. BHP* as authority for holding that the non-judicial members of the Board were Commonwealth officers for the purpose of s. 75 (v). However, examination of the report of *ex p. BHP* does not disclose that any argument was offered by counsel as to whether the members of the Tribunal were Commonwealth officers for the purpose of s. 75 (v), and only one judge in that case, Starke J., expressly considered the question whether they were. Thus the Court in *National Oil* seems to have come dangerously close to accepting as authority for its jurisdiction in one case an earlier case in which jurisdiction had been exercised without being discussed. To the extent that it did so, it is submitted that it was wrong.

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28 *Cf.* the attitude of the High Court in *Cockle* v. *Isaksen* (1957) 99 C.L.R. 155 to an attempt to invoke its appelate jurisdiction. In that case, Cockle attempted to appeal to the High Court from a magistrate's dismissal of informations he had laid against Isaksen and another under the *Conciliation and Arbitration Act* 1904-56 (Cth.). However, s. 113 (3) of that Act attempted to prevent such appeals. In upholding the validity of the section, Dixon C.J., McTiernan and Kitto JJ. said: 'The respondents showed no more desire than did the appellant to question the Court's jurisdiction to entertain the appeals. But for ourselves we were unable to perceive how ... an appeal ... could lie ..., unless that provision [s. 113] were considered invalid. In these circumstances we were not prepared to entertain the appeal simply because the parties wished us to do so ... [T]he appellant's counsel proceeded to attack its [s. 113's] validity and the respondent's [*sic*] counsel was not prepared to submit any argument to the contrary. In these circumstances we allowed counsel for the Commonwealth to intervene in the argument as to the validity of s. 113 ...' Assuming the attitude in *Cockle* of Kitto and Taylor JJ. (both of whom sat in that case) to have been consistent with their later attitude in *White* and *Thompson*, we can infer that they believed that Cockle's appeal would have succeeded on the merits if the Court had had jurisdiction to hear it. This is said because if they had believed it failed on the merits they would have decided the case on that ground, as in *White* and *Thompson*, instead of on the jurisdictional ground, as they did.

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