[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF THE COMMONWEALTH OF AUSTRALIA . . . } APPELLANT;

AND

THE QUEEN AND OTHERS . . . . RESPONDENTS.

KIRBY AND OTHERS . . . . . APPELLANTS;

AND

THE QUEEN AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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Jan. 14-17, 21-23; *Mar.* 19.

Viscount Kilmuir L.C., Viscount Simonds, Lords Morton of Henryton, Tucker, Cohen, Keith of Avonholm, Somervell of Harrow.

Constitutional Law (Cth.)—Industrial Law (Cth.)—Industrial arbitration—Court of Conciliation and Arbitration—Arbitral power—Judicial power—Combination of powers in one body—Validity—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxv.*), (*xxxix.*), *Chap. III, s.* 122—*Conciliation and Arbitration Act* 1904-1952 (*No.* 13 *of* 1904—*No.* 34 *of* 1952), *ss.* 29 (1) (*b*), (*c*), 29A.

The source of the authority of the Parliament of the Commonwealth of Australia to confer judicial power is, subject to such qualification as is imposed by s. 51 (xxxix.) of the Commonwealth Constitution, to be found in Chap. III of such Constitution alone and there is nothing in such chapter, so qualified, which justifies the Parliament in conferring on one body judicial and non-judicial power.

Accordingly, s. 29 (1) (*b*) and (*c*) and s. 29A of the *Conciliation and Arbitration Act* 1904-1952, which provide for the exercise by the Court of Conciliation and Arbitration, in addition to its prime function of the settlement of industrial disputes by conciliation and arbitration, of powers essentially judicial in character, are invalid.

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Chapter III exhaustively describes the federal judicature and its functions in reference only to the federal system, of which the Territories do not form part. The legislative power of the Parliament of the Commonwealth in respect of Territories being a disparate and non-federal matter, there is no reason why, having plenary power under s. 122 of the Constitution Parliament should not invest the High Court or any other court with appellate jurisdiction from the courts of the Territories.

R. v. *Bernasconi* (1915) 19 C.L.R. 629 and *Porter* v. *The King*; *Ex parte Yee* (1926) 37 C.L.R. 432, explained.

The departure from the principle of the separation of powers as recognised by the conferment of legislative power on bodies executive in character, explained and distinguished.

The question of the constitutional validity or invalidity of s. 29 (1) (*b*) and (*c*) and s. 29A of the *Conciliation and Arbitration Act* 1904-1952 is not a question as to the limits *inter se* of the constitutional powers of the Commonwealth and States respectively.

Decision of the High Court of Australia: *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254, affirmed.

APPEALS from the High Court of Australia.

These were consolidated appeals, by special leave, from the decision of the High Court in *Reg.* v. *Kirby*; *Ex parte Boilermakers' Society of Australia* (1). The first appeal was brought by the Attorney-General of the Commonwealth of Australia, who intervened by leave in the original proceedings, and the second by the judges of the Court of Conciliation and Arbitration, who were some of the respondents to such proceedings.

The Solicitor-General of the Commonwealth (Professor *K. H. Bailey*) (with him *D. I. Menzies* Q.C. and *C. I. Menhennitt*), for the appellants.

There were no appearances for or on behalf of the respondents.

Their Lordships took time to consider the advice which they would tender to Her Majesty.

Mar. 19. VISCOUNT SIMONDS delivered the judgment of their Lordships as follows:—

These consolidated appeals from an order of the High Court of Australia raise questions of great constitutional importance upon which the Judges of that Court were not able to agree. This has had for their Lordships the advantage that both sides of the case

(1) (1956) 94 C.L.R. 254.

have been presented with the cogency and clarity which distinguish the judgments of the Court, an advantage the more valuable because they have not had the assistance of argument by counsel for the respondents.

The constitutional issues that arise can best be understood if the relevant facts are first briefly stated.

The respondents, the Boilermakers' Society of Australia, which will be called the union, is an organisation of employees registered in accordance with the provisions of the *Conciliation and Arbitration Act* 1904-1952, a federal Act which will be referred to as the Act. The Metal Trades Employers' Association is an organisation of employers similarly registered. On 16th January 1952, an award was made under the Act binding both the union and the association, of which cl. 19 (*ba*) (i) was as follows :—"No organisation party to this award shall in any way, whether directly or indirectly, be a party to or concerned in any ban, limitation or restriction upon the performance of work in accordance with this award."

The association, alleging that the union had not complied with this clause of the award, applied to the Commonwealth Court of Conciliation and Arbitration, a court established under the Act which will be referred to as " the court ", for a rule that the union should show cause why an order should not be made under s. 29 (1) (*b*) of the Act ordering compliance with the said clause of the award and an order under s. 29 (1) (*c*) of the Act enjoining them from committing or continuing a breach of the same clause. On 16th May 1955 the court made an order accordingly. The rule came on for hearing on 31st May before the court constituted by *Kirby*, *Dunphy* and *Ashburner* JJ. and (subject to certain immaterial amendments) was made absolute, the union being ordered to comply with the award as therein stated and being enjoined from further breach of it.

The union having, as the association alleged, disobeyed the order of the court of 16th May 1955, the latter issued a summons directed to the former to answer a charge of contempt of the court in respect of such disobedience and upon the hearing of this summons the court on 28th June 1955 made orders fining the union £500 for contempt and ordering them to pay the costs of the association.

At this stage the controversy begins which has now reached their Lordships, for on 30th July 1955 the union applied to the High Court of Australia and obtained from *McTiernan* J. an order nisi directed to the judges of the court which had made the orders of 31st May and 28th June 1955 and to the association to show cause why a writ of prohibition should not issue prohibiting them from

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further proceeding with or upon the said orders. The ground of the application and order may conveniently be set out in full. It was "That the provisions of ss. 29 (1) (*b*) and 29 (1) (*c*) and 29A of the *Conciliation and Arbitration Act* 1904-1952 are *ultra vires* and invalid in that:—(a) the Commonwealth Court of Conciliation and Arbitration is invested by statute with numerous powers, functions and authorities of an administrative, arbitral, executive and legislative character, and (b) the powers which ss. 29 (1) (*b*), 29 (1) (*c*) and 29A respectively of the *Conciliation and Arbitration Act* 1904-1952 purport to vest in the said court and exercised by it in making the said orders are judicial, and (c) the said ss. 29 (1) (*b*), 29 (1) (*c*) and 29A are accordingly contrary and repugnant to the provisions of the Constitution of the Commonwealth and, in particular, Chap. III thereof".

The matter duly came before the High Court and was heard by seven Judges in August 1955. On 2nd March 1956, the order nisi was made absolute, a majority judgment being given by *Dixon* C.J., and *McTiernan*, *Fullagar* and *Kitto* JJ., and separate dissentient judgments by *Williams*, *Webb* and *Taylor* JJ.

After this brief statement of the facts it will be convenient to turn to the Act and it must be considered in the first place in the form which it bore at the date when the relevant orders were made. It will be necessary at a later stage to refer to some of the changes which were made before it assumed that form.

The title of the Act is not without importance. It is (and always has been) intituled "An Act relating to Conciliation and Arbitration for the prevention and settlement of Industrial Disputes extending beyond the limits of any one State". The chief objects of the Act are stated to be "(*a*) to establish an expeditious system for preventing and settling industrial disputes by the methods of conciliation and arbitration: (*b*) to promote goodwill in industry and to encourage the continued and amicable operation of orders and awards made in settlement of industrial disputes: (*c*) to provide for the appointment of Conciliation Commissioners having power to prevent and settle industrial disputes by conciliation and arbitration: (*d*) to provide means whereby a Conciliation Commissioner may promptly and effectively whether of his own motion or otherwise, prevent and settle threatened, impending, probable or existing industrial disputes: (*e*) to provide for the observance and enforcement of such orders and awards: (*f*) to constitute a Commonwealth Court of Conciliation and Arbitration having exclusive appellate jurisdiction in matters of law arising under this Act and limited jurisdiction in relation to industrial disputes: and (*g*) to encourage

the organisation of representative bodies of employers and of employees and their registration under this Act."

Such being the title of the Act and such its chief objects, it cannot be denied that its primary purpose and in effect its only purpose is the settlement of industrial disputes by conciliation and arbitration. It is necessary, however, to see what part is to be played by the court established under the Act in a field apparently so remote from the proper exercise of the judicial function.

After certain introductory matters in Pt. I the Act proceeds in Pt. II to provide for the appointment of conciliation commissioners and to prescribe their duties and functions. The importance for the present purpose of this Part of the Act lies in the fact that it is made competent for, and in certain events compulsory on, the conciliation commissioner to refer disputes in which he has original cognisance to the chief judge of the court who may in turn refer them to the court for hearing and settlement. The jurisdiction of the court (if in this connexion jurisdiction is a proper term to use) extends to industrial disputes beyond those specially referred to it by later provisions of the Act.

Part III of the Act establishes the court. It enacts that there shall be a Commonwealth Court of Conciliation and Arbitration, that it shall consist of a chief judge and such other judges as are appointed in pursuance of the Act and that it shall be a superior court of record. It provides that the chief judge and each other judge shall be appointed by the Governor-General and shall not be removed except by the Governor-General on an address from both Houses of the Parliament in the same session praying for his removal on the ground of proved misbehaviour and incapacity, and it makes provision for remuneration. It thus complies with the provisions of s. 72 of the Constitution in regard to the Justices of the High Court and of the other courts created by the Parliament. It then prescribes what jurisdiction may be exercised by a single judge, other jurisdiction being exercised by not less than three judges. By s. 25 an important original jurisdiction is conferred on the court. It enacts that the court may for the purpose of preventing or settling an industrial dispute make an order or award (*a*) altering the standard hours of work in an industry, (*b*) altering the basic wage for adult males (that is to say that wage or that part of a wage which is just and reasonable for an adult male without regard to any circumstance pertaining to the work upon which, or the industry in which, he is employed) or the principles upon which it is computed, (*c*) making provisions for or in relation to, or altering a provision for or in relation to long service leave

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with pay, (*d*) determining or altering the basic wage for females as therein mentioned.

Enough has been said to place it beyond dispute that there have been vested in the court powers, functions, and authorities of an administrative, arbitral and executive character as alleged in the application for a writ of prohibition.

Next it must be asked whether judicial power also has been vested in it. It is clear that that is a purpose of the Act. For otherwise it would not be called a court or a superior court of record or make such provision for the appointment of judges as has already been mentioned. But if this is not enough, it is necessary only to look at ss. 29 and 29A of the Act. Under s. 29 the court is empowered (*a*) to impose penalties as therein mentioned for a breach or non-observance of an order or award proved to the satisfaction of the court to have been committed, (*b*) to order compliance with an order or award proved to the satisfaction of the court to have been broken or not observed, (*c*) by order to enjoin an organisation or person from committing or continuing a contravention of the Act or a breach or non-observance of an order or award, (*d*) to give an interpretation of an order or award, together with divers other powers. And by s. 29A it is provided (1) that the court has the same power to punish contempts of its power and authority whether in its relation to its judicial powers or otherwise as is possessed by the High Court in respect of contempts of the High Court, (2) that the jurisdiction of the court to punish a contempt of the court committed in the face or hearing of the court when constituted by a single judge may be exercised by that judge and that in any other case the jurisdiction of the court to punish a contempt of the court shall (without prejudice as therein mentioned) be exercised by not less than three judges, (3) that the court has power to punish as a contempt of the court an act or omission although a penalty is provided in respect of that act or omission under some other provision of the Act, (4) that the maximum penalty which the court is empowered to impose in respect of a contempt of the court consisting of a failure to comply with an order of the court made under s. 29 (1) (*b*) or (*c*) is (a) where the contempt is by (i) an organisation not consisting of a single employer five hundred pounds, or (ii) an employer or the holder of an office in an organisation as therein mentioned two hundred pounds or imprisonment for twelve months, or (b) in any other case fifty pounds.

No other section of the Act need be mentioned. It has become clear that just as administrative, arbitral and executive powers, functions and authorities are vested in the court so also is judicial

power vested in it even to the extent of fining a citizen or depriving him of his liberty.

At this stage their Lordships would refer to a significant passage in the majority judgment of the High Court. It is as follows: "There is, of course, a wide difference—and probably it is more than one of degree—between a denial on the one hand of the possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose and, on the other hand, a denial of the possibility of adding to the judicial powers of a court set up as part of the national judicature some non-judicial powers that are not ancillary but are directed to a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question" (1). Their Lordships by no means dissent from this statement, but they make use of it in order to emphasise that the substance of the matter must be regarded and that in the matter under consideration the primary and essential object of the Act was the settlement of industrial disputes, that this object can be fulfilled only by the intermediacy of a body of persons established for that purpose, that the functions of a body so established are not judicial, that to call it a court or a superior court of record does not convert its non-judicial functions into judicial functions and that to add judicial functions or powers to them means only that a body created to exercise non-judicial functions has now vested in it judicial functions also. Before turning to a consideration of the vital question in this case it is desirable to repeat that (as was said in the majority judgment) the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. As was said by *Isaacs* and *Rich* JJ. in *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2): ". . . the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other" (3). And as was said by *Taylor* J. in his dissentient judgment in the present case: "It is, of course, much too late in the day to contend that 'arbitral' functions of the nature created by

(1) (1956) 94 C.L.R. 254, at p. 271.
(2) (1918) 25 C.L.R. 434.
(3) (1918) 25 C.L.R., at p. 463.

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the *Conciliation and Arbitration Act* can ever constitute any part of the judicial power of the Commonwealth " (1). With this statement the learned Solicitor-General for the Commonwealth expressed his agreement. It is necessary throughout to bear in mind that the words " arbitration " and " arbitral functions " refer exclusively to the arbitration and arbitral functions for which the Act provides. The same words in another context may mean something closely resembling a judicial process.

It must be stated here that in their formal case the respondents objected to the competence of this appeal on the ground that it raised what has become familiarly known as an *inter se* question and therefore fell within s. 74 of the Constitution. The argument in favour of the objection was fully stated in the case and their Lordships gave the question long consideration. They have however been satisfied that the objection is not a valid one and will state their reasons after they have dealt with the case on its merits.

The problem can now be stated. Is it permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that upon one body of persons, call it tribunal or court, arbitral functions and judicial functions shall be together conferred ? The problem can be solved only by an examination of the Constitution itself. The expression " arbitral functions " is here used to describe compendiously the functions exercisable by the Court other than its judicial functions.

The Constitution was enacted and established by an Act of the Imperial Parliament (63 & 64 Vict. c. 12). The Act recited that the people of New South Wales, Victoria, South Australia, Queensland and Tasmania had agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom and under the Constitution thereby established and by s. 9 enacted that the Constitution of the Commonwealth should be as therein followed. Some weight has been attached to the fact that the Act was an Imperial Statute but it is difficult to see how this can affect its interpretation. It can safely be assumed (and it is the historical fact) that in convention after convention in Australia the terms of the Constitution were hammered out by members of the several States who were profoundly conversant with the political systems of the United Kingdom and the United States and were in particular well aware both of the advantages of the separation of powers in a federal system and of the danger of a too rigid adherence to that theory. It is with this background that the Constitution must be interpreted, and their Lordships find it equally easy to accept as

(1) (1956) 94 C.L.R., at p. 341.

general propositions the statement of the appellants that, whereas under the United States Constitution there is a complete separation of powers, in the Australian Constitution which in some aspects follows the British model, the doctrine is not strictly followed, and on the other hand the statement of the respondents, founded upon the highest authority, that " the Constitution is based upon a separation of the functions of Government and the powers which it confers are divided into three classes—legislative, executive and judicial ". Both these statements are true but both are subject to the qualifications which are to be found in the Constitution itself.

That the Constitution is based upon a separation of the functions of government is clearly to be seen in its structure, which closely follows the model of the American Constitution. By s. 1 which is contained in Chap. I " The Parliament " it is provided that the legislative power of the Commonwealth shall be vested in a Federal Parliament and the following fifty-nine sections deal broadly with its composition and powers. It is only necessary at this stage to refer to s. 51 which provides that the Parliament shall, subject to the Constitution have power to make laws for the peace order and good government of the Commonwealth with respect to (amongst other matters) " (xxxv.) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ". By s. 61, which is the first section of Chap. II " The Executive Government ", it is provided that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The following nine sections of Chap. II deal with the exercise of executive power. By s. 71 which is the first section of Chap. III " The Judicature " it is provided that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other Federal Courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. The following nine sections of Chap. III deal with the appointment of Judges, their tenure of office and remuneration, the appellate jurisdiction of the High Court, appeals to the Queen in Council, the original and additional jurisdiction of the High Court, the power of the Parliament to define jurisdiction and certain other matters.

Such is the bare structure of the Constitution and it will be necessary to look more closely into some of its provisions. But enough has been said to suggest that in the absence of any contrary provision

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the principle of the separation of powers is embodied in the Constitution. Section 1 which vests legislative power in a Federal Parliament at the same time negatives such power being vested in any other body. In the same way s. 71 and the succeeding sections while affirmatively prescribing in what courts the judicial power of the Commonwealth may be vested and the limits of their jurisdiction negatives the possibility of vesting such power in other courts or extending their jurisdiction beyond these limits. It is to Chap. III alone that the Parliament must have recourse if it wishes to legislate in regard to the judicial power. That Chapter is in its terms detailed and exhaustive, and their Lordships dissent from the contention sometimes explicitly, sometimes implicitly, advanced that, inasmuch as there is no express prohibition of other legislation in this field, it is open to the Parliament to turn from Chap. III to some other source of power.

Yet this general proposition is subject to a qualification and it is a qualification which powerfully supports the proposition. For in s. 51, the final matters in respect of which the Parliament is empowered to make laws are found in placitum (xxxix.) " Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof or in the Government of the Commonwealth or in the Federal Judicature or in any Department or officer of the Commonwealth ". This placitum looks forward to the vesting of power in the Federal Judicature which is found in Chap. III : it assumes such vesting and empowers the Parliament to make laws in respect of matters incidential to the execution of such power. The conferment of such a limited power of legislation in s. 51 makes it very clear that it is in Chap. III alone that a larger power is contained. There could not well be a clearer case for the application of the maxim *Expressio unius exclusio alterius*.

The argument so far appears to lead irresistibly to the conclusion that it is only in Chap. III that legislative authority is to be found to vest the judicial power of the Commonwealth. If so, it is to the provisions of that Chapter that one must look to find authority for the vesting in a court powers and functions which are not judicial or to vest in a body of persons exercising non-judicial functions part of the judicial power of the Commonwealth. The problem is advisedly stated in this alternative form, because it appears to their Lordships (to use words familiar in connexion with another much debated section) that it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a

court vest in it judicial power. In *Alexander's Case* (1), which has already been referred to, *Griffith* C.J., once and for all established this proposition in words that have not perhaps always been sufficiently regarded. "It is impossible" he said, "under the Constitution to confer such functions" (i.e. judicial functions) "upon any body other than a Court, nor can the difficulty be avoided by designating a body, which is not in its essential character a Court, by that name, or by calling the functions by another name. In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a Court is entirely ineffective" (2). And in the same case these words came from *Barton* J. "Whether persons were Judges, whether tribunals were Courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name" (3). The question in whatever form it is stated is whether and how far judicial and non-judicial power can be united in the same body. Their Lordships do not doubt that the decision of the High Court is right and that there is nothing in Chap. III, to which alone recourse can be had, which justifies such a union. It may be repeated that this is subject to such qualification as is imposed by s. 51 (xxxix.).

Little reference has so far been made to the great volume of authority on this subject. Their Lordships have thought it right to make an independent approach to what is after all a short, if not a simple, question of construction of the Constitution. They must add that the exhaustive examination of the problem and the review of the relevant authorities which are to be found in the majority judgment of the High Court have been of the greatest assistance to them and appear to lead inevitably to the conclusion which they and the High Court have reached.

It is proper, however, if only out of respect to the dissentient judgments in the High Court and to the argument of learned counsel for the appellants to refer to certain aspects of the case.

In the first place it has been a matter of somewhat theoretical controversy how far the Constitution embodies the doctrine of separation of powers. It is a doctrine, said *Williams* J. which should be applied "with great circumspection" (4). Their Lordships do not dissent but must bear in mind how often it has been stated in the High Court that the Constitution is based upon a separation of the functions of Government. One among many examples may be found in *New South Wales* v. *The Commonwealth* (5).

(1) (1918) 25 C.L.R. 434.
(2) (1918) 25 C.L.R., at p. 442.
(3) (1918) 25 C.L.R., at p. 451.
(4) (1956) 94 C.L.R., at p. 301.
(5) (1915) 20 C.L.R. 54, at p. 88.

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But, first and last, the question is one of construction and they doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached. Their Lordships would adopt the words of *Dixon* J. (as he then was) in *Victorian Stevedoring & General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (1):—"But an independent consideration of the provisions of the Commonwealth Constitution unaided by any such knowledge" (i.e. knowledge of the Constitution of the United States) "cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution" (2). It was consistent with this view that in the very early days of the Commonwealth the High Court construed the Constitution as containing negative implications, saying in *Dalgarno* v. *Hannah* (3), that Parliament "has no authority to create any additional appellate jurisdiction" (4).

Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. That is perhaps so, but the explanation of it rests not on a theoretical rejection of the doctrine but upon the text of the Constitution as expounded in a series of cases culminating in *Dignan's Case* (5), from which the majority judgment in the present case cites significant passages. It is worth noting that in the judgment of *Gavan Duffy* C.J., and *Starke* J., in that case a distinction is made between the union of legislative and executive power on the one hand and the union of judicial and other power on the other hand. "It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested etc." (6) are the opening words of a passage in which the granting of a regulative power akin to a legislative power to a body other than Parliament itself was justified. Nor, if any further justification is sought than that of the text itself of the Constitution, would it be difficult to find a distinction. The delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature. On the other hand in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the

(1) (1931) 46 C.L.R. 73.
(2) (1931) 46 C.L.R., at p. 96.
(3) (1903) 1 C.L.R. 1.
(4) (1903) 1 C.L.R., at p. 10.
(5) (1931) 46 C.L.R. 73.
(6) (1931) 46 C.L.R., at p. 84.

same body executive and judicial power is to remove a vital constitutional safeguard.

Reference at this stage may conveniently be made to an illuminating case: *In re Judiciary and Navigation Acts* (1). That Act purported to give the High Court jurisdiction to hear and determine any question of law as to the validity of the federal law which the Governor-General might refer for hearing and determination and to make the determination final and conclusive and subject to no appeal. The Act was held to be invalid. The jurisdiction purported to be given was treated as judicial power but as a judicial power falling outside the judicial power which alone could under Chap. III of the Constitution be conferred upon a court. It is, as is pointed out in the majority judgment in the present case, at least a question whether any judicial power in a real sense was conferred by the Act: for it might truly be said that what the Governor-General was empowered to refer was rather an academic question than a justiciable issue. But it was treated as judicial power and upon that footing the Act was held invalid. The High Court justly observes that it would be strange indeed if the Parliament was incompetent to vest in the Judicature judicial power outside the provisions of Chap. III but competent to vest in it executive or other powers. Would the result, it might be asked, have been different, if the High Court in the case cited had taken the alternative view that the Act does not purport to confer judicial power? It is possible that the case may have a deeper significance. For it has by many been thought an unwise practice to try to anticipate judicial decisions extra-judicially by obtaining the opinion or advice of the Judges, the reason being that it is regarded as tending to sap their independence and impartiality. More serious objection may for the same reason be taken to vesting in them powers which if exercised by another would be open to challenge on all the grounds that are available to a citizen who thinks his rights have been infringed. For it is their own executive act which they may be invited judicially to examine.

These considerations lead directly to a question which is of the utmost importance because it has a close bearing upon the dissentient judgment of *Williams* J. If the judicial power can (contrary to their Lordships' opinion) be united in one body with other powers beyond those prescribed by s. 51 (xxxix.), with what powers can it be so united? There have no doubt from time to time been judicial statements that such a union is possible. In *Dignan's Case* (2), for example *Evatt* J. said in general terms that a court set up by the Federal Parliament might exercise non-judicial functions,

(1) (1921) 29 C.L.R. 257. (2) (1931) 46 C.L.R. 73.

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though he clearly did not mean any and every non-judicial function. In other cases it has been suggested that the union is possible so long as the power joined to the judicial power is not " incompatible " or " inconsistent " with it: see for example the judgment of *Latham* C.J., in *R.* v. *Federal Court of Bankruptcy*; *Ex parte Lowenstein* (1). But in the present case it became necessary to face the question squarely and ask what was the test of legitimate union. It fell to Mr. *Menzies*, who argued the case with conspicuous ability, to answer the question. His answer was that any power might be joined with the judicial power which was not inconsistent with its exercise. Pressed to say what in this context " inconsistent " meant he replied that he meant any power which it would be contrary to natural justice for the judicial authority to exercise. It appears to their Lordships very difficult to determine the intended scope of this exception but it would be reasonable to include within it any combination of functions in which a tribunal might be both actor and judge. The fundamental principle which makes such a combination appear contrary to natural justice is not remote from that which inspires the theory of the separation of powers. Far different was the test suggested by *Williams* J. Generally he acceded to the appellants' contention that judicial power might be united in the same body with other powers. But after referring to the decision under s. 122 of the Constitution (which will be later briefly examined) he said: " This being so, it would be irrational to imply a prohibition against the Parliament imposing similar functions on federal courts by legislation under s. 51. In each case the implied limitations must be the same. The functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed on them. Discretionary judgments are not beyond the pale but there must be some standards applicable to a set of facts not altogether undefined before a court can hear and determine a matter " (2). Here the word " inconsistent " is used but apart from their common use of this word there is little similarity between the conclusion to which *Williams* J. came and the case as presented upon appeal to their Lordships' Board. If there is any other similarity it lies in this, that the very functions, whose joinder with judicial power the learned judge would prohibit, closely resemble the functions of conciliation and arbitration which are joined with judicial power in the impugned Act. In the result it appears that either test, vague and unsatisfactory though it is,

(1) (1938) 59 C.L.R. 556, at p. 566. (2) (1956) 94 C.L.R., at p. 315.

may yet be fatal to the appellants' case. Their Lordships however prefer to abide by the text of the Constitution which neither under Chap. III alone nor under that chapter aided by s. 51 (xxxix.) supports the one test or the other. Their view is reinforced by the obvious difficulty of arriving at a sure conclusion if it is sought by implication to read something into the Constitution which is not there.

In his dissentient judgment *Taylor* J. makes a somewhat different approach to the problem. He accepts the view that Parliament may not confer upon courts powers which are essentially legislative or executive in character except in so far as they are strictly incidental to the performance of their judicial functions. " The investing of courts " he says " with such powers would clearly be in conflict with constitutional principles and, in turn, with judicial authority " (1). Here is a clear denial of the appellants' case which demands any union short of inconsistency and here too another illustration of the dangers that beset a departure from the straight path of interpretation. But the learned Judge while maintaining that judicial functions could not be united with essentially legislative or executive power, was of opinion that such arbitral functions as were conferred by the Act upon the court did not bear the indelible imprint of legislative or executive character, and accordingly in the absence of any clear provision or implication to the contrary in the Constitution it was competent for Parliament to combine such functions with the exercise of judicial power. He was fortified in this opinion by the consideration that, as it appeared to him, the arbitral functions both in their nature and exercise presented a number of features which are characteristic of judicial functions.

In their Lordships' opinion this approach to the question cannot be supported. The conferment of judicial power is limited by the express enactment of Chap. III aided by s. 51 (xxxix.): it is not to be regarded as unlimited except so far as it is expressly prohibited. It is not only functions " essentially " legislative or executive in character which cannot be conferred upon a court: only those judicial functions can be so conferred which fall within Chap. III and s. 51 (xxxix.). This does not mean that there may not be room for controversy what are " powers incidental to the execution of any power vested by this Constitution . . . in the Federal Judicature " within s. 51 (xxxix.) (as may be seen from the judgments in *Lowenstein's Case* (2)) nor even (despite the classic and widely accepted definition given by *Griffith* C.J., in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3)) what is the precise scope and meaning

(1) (1956) 94 C.L.R., at p. 341.
(2) (1938) 59 C.L.R. 556.
(3) (1908) 8 C.L.R. 330.

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of judicial power. But whatever latitude may be given in either of these directions, it does not appear to their Lordships that the appellant's case is advanced. They must wholly dissent from the view that arbitral functions (as that expression is here used) have any relevant similarity to judicial functions. The essential difference has already been pointed out. Such facts as that the same qualities of fairness patience and courtesy should be exhibited by conciliator arbitrator or judge alike and that none of them should act without hearing both sides of the case do not weigh against the fact that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue. But it must be added that the judgment of the learned judge indicated that in his view there were powers which could not be brought within the description of legislative executive or judicial (or presumably be described as incidental to the execution of such powers) and that it was this fourth category of powers in particular that could be united with judicial functions. But if, as their Lordships think, the true criterion is not what powers are expressly or by implication excluded from the scope of Chap. III but what powers are expressly or by implication included in it, it is irrelevant whether there is such a fourth category. Even if there is, it is outside Chap. III, except in those matters which are incidental to the execution of the judicial power. With regard to the possible width of this exception their Lordships would say nothing to qualify what fell from the High Court in *Queen Victoria Memorial Hospital* v. *Thornton* (1) and *Reg.* v. *Davison* (2). Their Lordships would endorse what was said in the former case by the High Court " Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers " (3).

Reference must be made here to two matters relied on by the appellants, the one as inconsistent with the interpretation placed on Chap. III, the other as illustrating the substantial departure from the principle of the separation of powers which has taken place.

The first matter relates to the decision of the High Court admitting an appeal from the Courts established by Parliament in the Territories of the Commonwealth. By Chap. VI of the Constitution which is headed " New States " it is provided (by s. 121) that the Parliament may admit to the Commonwealth or establish New

(1) (1953) 87 C.L.R. 144.
(2) (1954) 90 C.L.R. 353.
(3) (1953) 87 C.L.R., at p. 151.

States and may upon such admission or establishment make or impose such terms and conditions as it thinks fit and (by s. 122) that the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth or of any territory placed by the Queen under the authority of and accepted by the Commonwealth. Under this power the Parliament has made legislative provision for an appeal from the Courts of the Territories to the High Court, and the validity of such law has been upheld. If this is right, so runs the argument, the provisions of Chap. III cannot be an exhaustive statement of the jurisdiction of the High Court and reference is made to such cases as *R.* v. *Bernasconi* (1) and *Porter* v. *The King*; *Ex parte Yee* (2). It appears to their Lordships that these decisions (the latter of which was not reached without difficulty and dissent) can be satisfactorily reconciled with the opinion they have formed in the present case by regarding Chap. III as exhaustively describing the federal judicature and its functions in reference only to the federal system of which the Territories do not form part. There appears to be no reason why the Parliament having plenary power under s. 122 should not invest the High Court or any other court with appellate jurisdiction from the courts of the Territories. The legislative power in respect of the Territories is a disparate and non-federal matter. If in regard to it an exception is made to the exclusiveness of Chap. III, it has no bearing upon the problem which faces their Lordships.

The other matter to which their Lordships must refer has already been mentioned. It is the departure from the principle of separation of powers in matters legislative and executive. They refer to this matter again lest it should be thought that in anything they have said in relation to the judicial power they intended to cast any doubt upon the line of authorities where the union of legislative and executive power has been considered. Reference has already been made to *Dignan's Case* (3) and a salient passage from it cited. From the same case in exhaustive judgments of *Dixon* J. and *Evatt* J., many other passages will be found which illustrate how different are the measures which have been and ought to be meted out to the union of legislative and executive powers on the one hand and the union of such powers and judicial power on the other. Two instances must suffice. *Dixon* J., after asserting the essential proposition that the Parliament is restrained both from reposing any power essentially judicial in any other organ or body and from reposing any other than that judicial power in such tribunals and

(1) (1915) 19 C.L.R. 629.
(2) (1926) 37 C.L.R. 432.
(3) (1931) 46 C.L.R. 73.

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referring to the vesting of the legislative power of the Commonwealth in the Parliament asks "Does it follow that in the exercise of that power the Parliament is restrained from reposing any power essentially legislative in another organ or body?" (1) and after a review of the authorities concludes that the Constitution does not forbid the statutory authorisation of the Executive to make a law. In part at least this is justified in these words: "The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less on juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law" (2). A passage from the judgment of *Evatt* J. (who generally took a more liberal view of the union of powers) may also be cited. He said:— "The observation of *Isaacs* J. (as he then was) (3) that there is a 'separation' of powers only 'to a certain extent' has a special application when the question concerns the exercise of legislative functions and powers by executive bodies. Questions of judicial power occupy a place apart under the Constitution, not only because of the special nature of the judicial power but because of the elaborate provisions of Chap. III. As Sir *W. Harrison Moore* has pointed out in his well known work on the Australian Constitution 'between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage' (*Commonwealth of Australia*, 2nd ed. (1910), p. 101)" (4).

Finally it is necessary to consider an aspect of this difficult case which has been in the forefront of the appellants' argument. And it can best be introduced by a brief history of the legislation which, when these proceedings were started, had assumed the form of the *Conciliation and Arbitration Act* 1904-1952. Their Lordships will refer only to the immediately relevant changes that have been made since the Act was first enacted under its present title as No. 13 of 1904. The objects were stated in seven headings and did not refer to the enforcement of awards or any other judicial process. By s. 11 it was enacted that there should be a Commonwealth Court of Conciliation and Arbitration which should be a court of record and should consist of a president who was to be appointed from among the Justices of the High Court and was to hold office for seven years. The court and the president were fully equipped with the functions of conciliation and industrial arbitration. The Act created a number of specific offences which were punishable by summary proceedings before courts exercising federal jurisdiction.

(1) (1931) 46 C.L.R., at p. 98.
(2) (1931) 46 C.L.R., at pp. 101, 102.
(3) (1926) 38 C.L.R., at p. 178.
(4) (1931) 46 C.L.R., at p. 117.

But power plainly judicial was conferred upon this court itself to impose penalties for breaches or non-observance of order and awards which were proved to the satisfaction of the court to have been committed. Between 1904 and 1918 the Act was amended by conferring further judicial power on the court by provisions corresponding with ss. 29 (1) (*b*) and 29 (1) (*c*) and 29A of the present Act. In 1918 came *Alexander's Case* (1). It was in that case decided that as s. 72 of the Constitution requires that judges of federal courts created by Parliament should be given life tenure and as the judges of the court had not been given such tenure, they could not exercise any part of the judicial power of the Commonwealth. Great importance has been attached by counsel for the appellants to the fact that no attack was made on the conjunction of judicial and arbitral functions in the court. After *Alexander's Case* (1) the Act was amended so as to remove from the court to courts exercising the judicial power of the Commonwealth some at least of the powers which had been invalidly conferred on the court. Thus the matter rested for nearly eight years, the court continuing to exercise its conciliation and arbitral functions under the Act as amended.

In 1926 important amendments of the law were made by Act No. 22 of 1926. It is sufficient to say of it and the many subsequent amending Acts that by 1952 the court has assumed the form and been invested with the powers which have already been described. It remains the same court throughout; its primary function was at all times the settlement of industrial disputes by conciliation and arbitration but unmistakably from 1926 onwards it was invested with, and exercised, judicial power; not indeed always the same measure of judicial power for s. 29A was only inserted after 1951, but power which was indubitably part of the judicial power of the Commonwealth.

It is therefore asked, and no one can doubt that it is a formidable question, why for a quarter of a century no litigant has attacked the validity of this obviously illegitimate union. Why in *Alexander's Case* (1) itself was no challenge made? How came it that in a series of cases, which are enumerated in the majority and the dissentient judgments, it was assumed without question that the provisions now impugned were valid?

It is clear from the majority judgment that the learned Chief Justice and the Judges who shared his opinion were heavily pressed by this consideration. It could not be otherwise. Yet they were impelled to their conclusion by the clear conviction that consistently with the Constitution the validity of the impugned

(1) (1918) 25 C.L.R. 434.

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provisions could not be sustained. Whether the result would have been different if their validity had previously been judicially determined after full argument directed to the precise question and had not rested on judicial dicta and common assumption it is not for their Lordships to say. Upon a question of the applicability of the doctrine of *stare decisis* to matters of far reaching constitutional importance they would imperatively require the assistance of the High Court itself. But here no such question arises. Whatever the reason may be, just as there was a patent invalidity in the original Act which for a number of years went unchallenged, so for a greater number of years an invalidity which to their Lordships as to the majority of the High Court has been convincingly demonstrated, has been disregarded. Such clear conviction must find expression in the appropriate judgment.

Their Lordships must now return to a question the discussion of which has been postponed. The respondents, though they did not appear by counsel at the hearing of the appeal, put in a formal case and in it submitted that the appeal was not competent in that it raised an *inter se* question and the High Court had not given a certificate under s. 74 of the Constitution that the question was one which ought to be determined by Her Majesty in Council.

The issue then is whether there is involved in this appeal " any question howsoever arising as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any State or States ". More narrowly stated the issue is whether the validity or invalidity of those sections of the Act which purport to give the Court judicial power is a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the States respectively.

It appears to their Lordships that this issue does not raise an *inter se* question. They would not in any way narrow the scope of those questions which are reserved to the High Court subject to its own discretionary power to grant a certificate. But if the wide test, which has become the settled interpretation of the section, is adopted, it cannot fairly be held to cover the present case. That test so far as relevant is whether the decision under appeal is a decision upon the extent of a paramount power of the Commonwealth over the concurrent powers of the States. If the power is one the exercise of which is denied to Commonwealth and States alike, for example because s. 92 invalidates it, no *inter se* question arises. If the power is one, of which the exercise is exclusively vested in the Commonwealth, no such question arises. It is only where the delimitation of the Commonwealth power necessarily

implies a decision as to the extent of a subordinate State power that an *inter se* question truly arises. For in such a case the advance of the Commonwealth power must *pro tanto* reduce the State power.

If that test is applied here, it appears to their Lordships that a decision for or against the validity of the impugned sections neither advances the Commonwealth power nor reduces the State power. It is undeniable that it is competent for the Commonwealth Parliament by appropriate legislation to provide for the enforcement of the awards of the Conciliation and Arbitration Court and for the punishment of a breach of them. It cannot be said that what has been described as the undefined residue of absolute and uncontrolled power remaining to the States is in any real sense affected by a decision that a power which might have lawfully been exercised in one way has been unlawfully exercised in another way. It is implicit in an *inter se* question that between the powers of Commonwealth and State there should be a mutual relation and a reciprocal effect. Neither of those features are present in a question the answer to which whatever it may be will not alter the boundaries of the respective powers. In these circumstances their Lordships, though they have carefully weighed the arguments advanced by the respondents in their formal case, have concluded that s. 74 of the Constitution has no application to the question before them.

Having taken the matter into their consideration accordingly they will humbly advise Her Majesty that these appeals should be dismissed.

Appeals dismissed.

Solicitors for the appellants, *H. E. Renfree*, Crown Solicitor for the Commonwealth of Australia, by *Coward, Chance & Co.*

Solicitors for the respondents, by *Waterhouse & Co.*

R. A. H.