The Exercise of "Judicial Power" in the Commonwealth of Australia

F. R. BEASLEY*
Perth, Western Australia

The distribution of judicial power in the Commonwealth of Australia differs substantially from that which obtains in Canada. It is modelled, in some respects, on the system in force in the United States; but the High Court of Australia has both more and less power than the American Supreme Court — more, inasmuch as it is authorised to act as a court of appeal from certain State courts in all matters of State law; less, in so far as, with a few exceptions, appeal lies from its judgments to the Privy Council.

The advent of federation on January 1st, 1901, had no immediate effect upon the jurisdiction of State courts. The constitutions of the six Australian States are not derived from the Commonwealth of Australia Constitution Act, 1900,[1] but exist independently of it.[2] Section 106 of the Constitution expressly provides that "the constitutions of each State shall, subject to this Constitution, continue as at the establishment of the Commonwealth . . . until altered in accordance with the constitution of the State". The next section provides further protection for State rights: "Every power of the parliament of a Colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be".

* Dean of the Faculty of Law, University of Western Australia.

[1] 63 & 64 Vict., c. 12.

[2] The constitutions of the six States, originally established by Acts of the United Kingdom or under powers conferred by such Acts, now depend almost entirely upon local (*i.e.*, State) legislation. See Constitution Act, 1902-1947 (New South Wales); Constitution Act, 1856-1928 (Victoria); Constitution Act, 1867-1946 (Queensland); Constitution Act, 1934-1947 (South Australia); Constitution Act, 1890-1947 (Western Australia); and Constitution Act, 1934-1946 (Tasmania). It will be noted that some of these Acts are consolidations or re-enactments.

Among the substantive powers retained by the States is the right to make such provision for the exercise of their judicial power as they may think fit, subject only to a prohibition against trespassing on the federal sphere.

The Constitution declares (in section 71) that the judicial power of the Commonwealth "shall be vested in a Federal Supreme Court to be called the High Court of Australia", in such other federal courts as the Parliament may create, and in such State courts as it may select for the purpose. But neither federal parliament nor federal executive was granted any power to interfere with the composition of State courts or to direct how their functions, in purely State matters, should be exercised.[3] Federation could therefore affect the State systems of judicature in three ways only: (1) by the establishment of a High Court as an alternative[4] appellate tribunal, (2) by the vesting of certain *original* jurisdiction exclusively in that Court, and (3) by requiring State courts to exercise federal jurisdiction in prescribed matters. It was not until 1903 that the federal Parliament passed the Judiciary Act to set up a High Court of a Chief Justice and two[5] other judges and to make certain aspects of its jurisdiction exclusive. But Parliament can not confer an unlimited jurisdiction on the High Court; on the other hand, there are certain heads of jurisdiction which Parliament cannot take away from it.

The Constitution itself confers both original and appellate jurisdiction on the High Court, some parts of the former not having been previously exerciseable, *ex natura rerum*, by any court in Australia. The original jurisdiction which Parliament cannot take away comprises:[6]

(1) matters arising under any treaty;

(2) matters affecting consuls or other representatives of other countries;[7]

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[3] The statement in Shumiatcher, Section 96 of the British North America Act Re-examined (1948), 27 Can. Bar Rev. 131, at p. 135, that "the restrictive criteria of the Australian constitution are based upon the exercise of judicial powers, these being within the exclusive jurisdiction of the federal government", is inaccurate if it is intended to mean that Australia has only one system of judicature established and controlled by federal parliament and executive. If it means "the exercise of such judicial powers as are under the exclusive control of the federal parliament" it is, with respect, inaptly phrased and still misleading.

[4] Alternative, that is, to direct appeal to the Privy Council.

[5] The number has since been increased, and is now six.

[6] Constitution, s. 75.

[7] The precise meaning and ambit of the last five words have never been judicially determined; but they would not appear to authorise a departure from the recognized principle of the immunity of diplomatic representatives

(3) litigation to which the Commonwealth itself is a party;
(4) litigation between States, between residents of different States, or between one State and a resident of another;
(5) where mandamus, prohibition or injunction is sought against a Commonwealth officer.

In addition, Parliament is authorised to confer original jurisdiction on the High Court in matters (a) arising under the Constitution or involving its interpretation; (b) arising under any laws made by the Parliament; (c) of Admiralty and maritime jurisdiction; and (d) relating to the same subject matter claimed under the laws of different States.[8] By the Judiciary Act, 1903, Parliament conferred original jurisdiction in the precise terms of the first provision; by the Judiciary Act, 1915, it granted a like jurisdiction in trials of indictable offences against the laws of the Commonwealth, and has conferred a limited jurisdiction for the purposes of a large number of other Acts such as the Customs Act, 1901–1948, Post and Telegraph Act, 1901–1934, and the Bankruptcy Act, 1924–1946. For a time, Admiralty jurisdiction was also expressly conferred on the High Court; but, when it appeared that the effect might be to debar State courts from entertaining Admiralty matters, the Act conferring the jurisdiction was repealed. The High Court and all the State Supreme Courts are now deemed to be Admiralty Courts by virtue of the Colonial Courts of Admiralty Act, 1890.[9]

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from suit in the courts of the country to which they are accredited, if only for the reason that it was not contemplated at the time of federation (either by the Australian Conventions which drafted the Constitution or by the Parliament of the United Kingdom which enacted it) that Australia might some day receive diplomatic representatives from foreign countries. *Semble* the High Court would have jurisdiction in an action against a foreign diplomatic representative only if he waived his immunity; but this is not an exclusive jurisdiction, being equally competent to State courts. (The International Organizations (Privileges and Immunities) Act, 1948, ratifies the General Convention adopted by the United Nations on February 13th, 1946, and provides for the observance throughout Australia of the privileges and immunities postulated by that Convention. This Act was passed under the "external affairs" power conferred by s. 51 (xxix) of the Constitution.)

[8] S. 76. The obscurity of the last provision is obvious; Parliament has never conferred additional original jurisdiction on the High Court in these terms.

[9] 53 & 54 Vict., c. 27. Jurisdiction in Admiralty was first expressly conferred on the High Court by the Judiciary Act, 1915, but only during the war then in progress and six months thereafter; the time limit was repealed by the Judiciary Act, 1920. Both Acts were repealed by the Judiciary Act, 1939 (see incidentally 161 Commonwealth Parliamentary Debates, pp. 162 *et seq.*). In *Union Steamship Co. of New Zealand Ltd.* v. *The Caradale* (1937), 56 C.L.R. 277, Dixon J. had doubted whether the Supreme Court of Victoria could exercise Admiralty jurisdiction since the Judiciary Acts of 1915 and 1920. As to the effect of the repeal of those Acts see *McIlwraith McEacharn Ltd.* v. *Shell Co. of Australia Ltd.* (1946), 70 C.L.R. 175.

Section 77 of the Constitution empowers the Parliament (1) to define the jurisdiction of any federal court other than the High Court and (2) to determine the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States — but only in respect of those matters in which the High Court has original jurisdiction under the Constitution itself or may receive such jurisdiction from a valid federal Act. The Judiciary Act, 1903, deprived all State courts of jurisdiction in regard to a list of matters which does not exactly coincide with the original jurisdiction conferred by section 75 of the Constitution. From the matters set out in that section there are omitted from the exclusive jurisdiction of the High Court (1) matters affecting consuls or other representatives of other countries, (2) actions between the Commonwealth and private citizens, and (3) applications for injunction against Commonwealth officers. The Act then proceeded to deprive all State courts of the remainder of the heads of jurisdiction exerciseable by the High Court *but to restore it to them as federal jurisdiction and subject to certain conditions*, the most important of which was to give a right of appeal to the High Court and to that alone. Since the High Court had been granted original jurisdiction over "all matters arising under the Constitution or involving its interpretation",[10] but not exclusive jurisdiction, it followed that State courts could consider and decide such constitutional issues by virtue of the power delegated to or vested in them by the Judiciary Act. At the same time, the only appeal from their judgments on such issues was to be to the High Court, whose control over constitutional interpretation was thus thought to be assured; section 74 of the Constitution providing that no appeal shall lie to the Privy Council, without a certificate of the High Court, from any decision of the latter "upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States". Subsequent litigation, however, revealed a serious gap in the system created by the Judiciary Act, 1903.

Under the Constitution, customs and excise were to come within the exclusive control of the Commonwealth, to which the existing State departments (both officers and buildings) were to be transferred. A Mr. Wollaston, previously employed by the

[10] S. 76 (i), and Judiciary Act, 1903.

Victorian government, was appointed Comptroller-General of the new Federal Customs Department; he continued to live in Victoria, though his official duties required him to pay periodical visits to the other States. The Victorian Commissioner of Taxation sought to levy income tax on that part of his salary that was earned in Victoria; he objected that a State legislature had no power to tax the salary of a federal officer. On a case stated, the Supreme Court of Victoria, unmoved by analogies drawn from *McCulloch* v. *State of Maryland*,[11] held Mr. Wollaston liable; there was no appeal.[12] But two years later a similar demand was made upon a much more prominent resident of Victoria — Mr. Alfred Deakin, Attorney-General in the first federal ministry. Mr. Deakin was assessed on his allowance as a federal member and on his official salary as a minister; once more a case was stated, but the Supreme Court of Victoria[13] saw no reason to depart from its decision in *Wollaston's* case. This time there was an appeal to the High Court, which was much more susceptible to the persuasive effect of American decisions[14] and imported into the interpretation of the Australian Constitution the doctrine of "the immunity of instrumentalities" [15] based upon *McCulloch* v. *Maryland*. It had no difficulty in finding that the attempt of a State to tax the salary of a federal officer was an unconstitutional interference with a federal instrumentality.[16] In 1905 the Supreme Court of Victoria, now regarding itself as bound by the decision of the High Court in *Deakin* v. *Webb*,[16] held that the

[11] (1819), 4 Wheat. 316.
[12] *Wollaston's* case (1902), 28 V.L.R. 357.
[13] *Deakin's* case (1904), 29 V.L.R. 748.
[14] American decisions were not infrequently quoted at the Federal Conventions of 1891 and 1897, more particularly at the latter. Of the first three members of the High Court the Chief Justice, Sir Samuel Griffith, had been one of the leading figures at the 1891 Convention. Barton J. (the first Prime Minister of the Commonwealth) had been present at both Conventions, being unanimously elected "leader" of the second; O'Connor J. had been an active member of the 1897 Convention. To expect them to be able to expel from their subconscious minds the influence which the American constitution undoubtedly exercised on the deliberations of the Conventions was to expect the impossible. See also Hunt, American Precedents in Australian Federation (1930, Columbia University Press, N.Y.).
[15] Despite criticism by the Privy Council the High Court did not abandon that doctrine until 1920, when its membership had changed considerably. In *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920), 28 C.L.R. 129 — a decision invariably known as the *Engineers' Case* — the High Court abandoned its own method of interpretation in favour of the principles laid down by the Privy Council in 1906 (see footnote 18, *infra*) and proclaimed its adherence to the terms of s. 109 of the Constitution as the only valid method of resolving conflicts between federal and State legislation. S. 109 reads, "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".
[16] *Deakin* v. *Webb* (1904), 1 C.L.R. 585, overruling *Deakin's* case and *Wollaston's* case.

Deputy Postmaster-General for Victoria, a federal officer, was not liable to Victorian income tax. On an application for leave to appeal to the Privy Council,[17] Hodges J. of the Victorian Supreme Court held that the provisions of the Judiciary Act, 1903, which purported to deprive State courts of their jurisdiction in certain causes and then to restore it to them as federal jurisdiction, were self-contradictory and ineffective, that the section which gave a right of appeal to the High Court only was *ultra vires* the federal Parliament, and that leave should therefore be granted. In 1906 the Privy Council allowed the appeal,[18] disagreeing with the High Court's reasoning in *Deakin* v. *Webb* and denying the validity of analogies drawn from the constitution of the United States and from judicial decisions on it. But the last word has not yet been said.

In 1907 a District Court in New South Wales, on a case stated, considered itself bound to follow the Privy Council rather than the High Court, and held a federal officer resident in that State liable to its income tax. The taxpayer appealed to the High Court, which refused [19] to regard itself as bound by the Privy Council's decision on the ground that section 74 of the Constitution clearly envisaged the High Court, not the Privy Council, as the final arbiter on all questions "as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States"; and a dispute as to the power of a State to levy income tax on the salary of a federal officer was, in the judgment of the High Court, such a question. But endless conflict between High Court and Privy Council was possible so long as appeal lay in such matters direct from State Supreme Courts to Privy Council; Parliament therefore intervened to put an end to this danger. In 1907 it amended the Judiciary Act by inserting two new provisions to exclude State Supreme Courts from this debatable ground. Section 38A now provided that "In matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court

[17] *Outrim's* case (1905), 30 V.L.R. 463.

[18] Reported in [1907] A.C. 81, *sub nom.*, *Webb* v. *Outrim*. It will not escape notice, however, that the Privy Council completely misinterprets the significance of the word "unconstitutional" in a federally organised member of the British Commonwealth of Nations (or of the British Empire as then constituted).

[19] In *Baxter* v. *Commissioners for Taxation for New South Wales* (1907), 4 C.L.R. 1087.

shall be exclusive of the jurisdiction of the Supreme Courts of the States; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court". Section 40A then provides that if such a question arises at any stage in the hearing of any cause before a State Supreme Court, the latter must proceed no further; by virtue of the Act and without any order of the High Court the cause is removed to the latter. From those inferior State courts by which jurisdiction over *inter se* questions can be exercised there never was a right of appeal to the Privy Council; since appeals from them must go to the High Court, the latter can now prevent any *inter se* question from being considered by the Privy Council unless it is prepared to grant a certificate under section 74. The gap has been completely closed.[20]

In 1907 the Parliament also passed the Commonwealth Salaries Act to authorise the States to impose a non-discriminatory tax on the salaries of federal ministers, members, and officers resident therein, and to provide that ministers and members should be deemed, for purposes of liability to State income tax, to be resident in the State for which they were elected. The validity of this concession was unsuccessfully challenged by a disappointed federal officer in *Chaplin* v. *Commissioner of Taxes for South Australia*.[21] When the Commonwealth itself subsequently entered the income tax field in 1915, in order to raise money for the prosecution of the first World War, it assessed State officers to its tax; but none of the States sought to attack the federal legislation on the ground of unconstitutional interference with a State instrumentality.

The 1907 amendments to the Judiciary Act, by closing the gap revealed by the income tax cases, secured the High Court's

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[20] The validity of the Judiciary Act as amended was considered and upheld by the High Court in *Commonwealth* v. *Limerick Steamship Co. Ltd.* (1924), 35 C.L.R. 69.

[21] (1911), 12 C.L.R. 375. This decision raised an interesting question which the High Court virtually ignored. If, as the court had held in the previous income tax cases, there is implicit in the Constitution a prohibition against State interference with federal instrumentalities, and if the attempt to tax a federal officer's salary is within the prohibition, was it competent to the Parliament to authorise such interference? Griffith C. J. adverted to it briefly only to dismiss it with the remark, "*Quilibet potest renunciare juri pro se introducto*". In *Flint* v. *Webb* (1907), 4 C.L.R. 1178, Higgins J. had said "At present I cannot see how, if an income tax upon the salary of a federal servant is made invalid by the Constitution, the federal parliament can alter the Constitution by making the income tax payable"; but the learned judge took no part in *Chaplin's* case, in which no comment was made on the opinion previously expressed by him.

control over many, but by no means all, constitutional issues. The Court can prevent any *inter se* question from being taken on appeal to the Privy Council by the simple expedient of refusing a certificate; only once has it allowed such an appeal.[22] But it has no power to prevent an appeal, even on constitutional issues, where no *inter se* question is involved. Hence, when it decided in *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation*[23] that the (federal) Income Tax Assessment Act, 1922–1925, in creating an administrative Board of Review, did not attempt to confer any part of the judicial power on a body constitutionally incapable of exercising it, it was unable to deny to the appellant the right, if it wished to exercise it, of appealing to the Privy Council. Appeal was in fact taken, but to no avail, since the Privy Council upheld the judgment of the High Court.[24] But there has been a marked tendency in the latter to give the words *questions inter se* so wide a meaning as to bring nearly all

[22] *In Colonial Sugar Refining Co. Ltd.* v. *Attorney-General of the Commonwealth* (1912), 15 C.L.R. 182; [1914] A.C. 237. All other applications for a certificate have been consistently refused. When the judgment in respect of which a certificate has been sought has been a majority decision, the dissenting judges have usually joined in refusing the certificate. It is, of course, still open to the unsuccessful applicant to ask the Privy Council for special leave on the ground that the judgment of the High Court did not in law determine an *inter se* question. But the Privy Council, here showing remarkable restraint, has never granted such leave; see, for example, *Minister of Trading Concerns for the State of Western Australia* v. *Amalgamated Society of Engineers*, [1923] A.C. 170, in which the applicant sought but was refused special leave to appeal from the judgment of the High Court in the *Engineers'* case (footnote 15, *supra*).

[23] (1926), 38 C.L.R. 153; not to be confused with an earlier case between the same parties (reported in (1925), 35 C.L.R. 422), in which the High Court held that there had been an unconstitutional grant of judicial power to the (Taxation) Board of Appeal whose members did not enjoy life tenure. Parliament thereupon amended the Income Tax Assessment Act by substituting a Board of Review with administrative powers only; it was the validity of this amendment which was challenged in the instant case.

[24] Reported in [1930] A.C. 275, *sub nom.*, *Shell Co. of Australia* v. *Federal Commissioner of Taxation*, the appellant company having changed its name since the date of the High Court's judgment. Contrary to what is stated in Shumiatcher, Section 96 of the British North America Act Re-examined (1948), 27 Can. Bar Rev. 131, at p. 135, the Privy Council had no occasion to consider whether sections 71 and 72 of the Constitution "restricted the authority of the States to invest its [*sic*] appointees with judicial powers" because those sections are concerned only with the judicial power of the Commonwealth. Whatever restrictions there may be on the legislative authority of the States to invest their appointees with judicial powers are to be sought in their respective constitutions, which in fact contain none. But such restrictions, if they existed, could be removed by State legislation, since no Australian State has a "rigid" constitution: see *McCawley* v. *The King*, [1920] A.C. 691. There are instances, however, of self-imposed limitations, though not in relation to the judicial power. For example, New South Wales (Constitution Act, 1902, s. 7A — inserted by No. 28 of 1929) requires every Bill to abolish or alter the composition of its Legislative Council or to amend or repeal s. 7A to be submitted to referendum: *Attorney-General for New South Wales* v. *Trethowan*, [1932] A.C. 526. Western Australia (Con-

constitutional issues into that category. In *Ex parte Nelson (No. 2)*, Dixon J.[25] said that

> in the process of defining the Commonwealth power a line is ascertained. Upon one side of it is the undefined residue of absolute and uncontrolled power remaining to the States.[26] Upon the other is the legislative power of the Commonwealth, made supreme by sec. 109. Upon that side of the line State legislative power, if any there be, is subordinate. It is a boundary at which the supreme power of the State begins, and that of the Commonwealth ends, a limit *inter se* of these plenary powers.

The same judge again propounds this interpretation in somewhat different terms in *Australian National Airways Pty. Ltd.* v. *The Commonwealth (No. 2)*, where he says:

> The settled interpretation of the crucial words of sec. 74 . . . is that they cover any decision upon the extent of a paramount power of the Commonwealth, paramount over the concurrent power of the States. The reason is that the advance, by interpretation, of a paramount power of the Commonwealth would mean that the area of State legislative power which is absolute would recede, absolute in the sense that its exercise is not liable to be defeated or rendered inoperative by an inconsistent exercise of Commonwealth legislative power. Correspondingly, any reduction of a paramount power of the Commonwealth would mean an increase of the area of State power, the exercise of which is free from possible invalidation by the exercise of Commonwealth power. There is therefore a boundary between the paramount legislative power of the Commonwealth and the power of the States, limits *inter se* [*sic*]. Not to adopt this interpretation would have been to confine the operation of sec. 74 to a very small and insignificant subject matter. For the only logical alternative would be to treat it as covering the demarcation of the boundary between the exclusive powers of the Commonwealth and the States and perhaps the relations between the constitutional powers of one organ of the Federal system and the immunities of another organ and the exercise of its powers.[27]

In *Commonwealth* v. *Bank of New South Wales and others*,[28] now before the Privy Council,[29] it is part of the respondents' case

stitution Act, 1890, s. 73) requires Bills to alter the composition of either House to be passed by absolute majorities in both Houses; *semble* by like majorities (if not by simple majorities) the legislature could, if it thought fit, repeal s. 73.

[25] (1929), 42 C.L.R. 258, at p. 271.

[26] The Commonwealth of Australia Constitution Act contains nothing comparable with s. 92 of the British North America Act. The States retain all powers not expressly or by necessary implication withdrawn from them; subject to this qualification (as indicated in the quotation from Dixon J.), that when the Commonwealth Parliament exercises any of the non-exclusive powers conferred upon it by s. 51 of the Constitution, it ousts all State legislation (by virtue of s. 109) from so much of the field of power as is occupied by the federal legislation, and *pro tanto* makes its own control of that field exclusive.

[27] (1946), 71 C.L.R. 115, at pp. 122-123.

[28] For the judgment of the High Court in this action see (1948), 76 C.L.R. 1; [1948] 2 Argus L.R. 89.

[29] *I.e.*, at the time of writing (May 1949).

that a decision as to the validity of the federal Banking Act, 1947 (the object of which is to nationalise all banks), necessarily involves an *inter se* question because the Act, if upheld as a valid exercise of federal legislative power, must deprive the States of all power in regard to "private" banks and banking; and that the appeal is therefore incompetent because no certificate under section 74 has been obtained from the High Court.[30] The Commonwealth did not seek such a certificate, contending that no *inter se* question is involved.

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Difficulties have also arisen because of the High Court's decisions as to what tribunals can exercise the "judicial power" of the Commonwealth. Section 71 of the Constitution entrusts the judicial power (as defined in sections 75 and 76) to (i) the High Court, (ii) such other federal courts as Parliament may establish, and (iii) such other courts (*i.e.*, State courts) as Parliament authorises to exercise it. The Constitution sets no limits on Parliament's choice of State courts, but does not authorise it to interfere in any way with their internal constitution; if the Parliament selects certain State courts to exercise all or specified parts of the judicial power of the Commonwealth, it must take those courts as it finds them. If it thinks it advisable that the judicial power should be vested only in those State courts whose judges (or magistrates) have security of tenure, it must limit its choice to those State courts which satisfy the condition; it cannot compel a State to alter the tenure of office of its judges or magistrates, nor can it change their tenure itself, nor can it make any appointments to such courts or ask to be consulted when appointments are being made. The Constitution itself does not expressly say that judges of the High Court and of other federal courts must be appointed during good behaviour or for life; it merely provides by section 72 that such judges are to be appointed by the Governor-General in Council, that they are removable by the Governor-General in Council only on the ground of proved misbehaviour or incapacity and after presentation of an address from both Houses,[31] and that their salaries are irreducible during their term of office. The Judiciary Act, 1903, which created the High Court, is completely silent as to the

[30] The respondents raised the same objection when the application for special leave was being heard; but the Privy Council granted leave, with liberty to the respondents to argue this issue at the hearing.

[31] No judge of any federal court has ever been removed from office under this section.

tenure of its judges. Hence the constitutional provision alone governs.

The Constitution also provides, in mandatory terms, that "there shall be an Inter-State Commission, with such powers of *adjudication*[32] and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder" (section 101). The conditions of office of members of the Inter-State Commission are the same as those of judges of the High Court and other federal courts with this important exception, that they are to hold office for seven years; *semble* they are eligible for re-appointment since the Constitution does not disqualify them from holding successive terms. The Inter-State Commission Act, 1912, provided for a chairman and two other members, to hold office in accordance with section 103 of the Constitution and to be eligible for re-appointment. The first three appointments were made on August 11th, 1913, and proved to be the last.

In 1914 New South Wales passed a Wheat Acquisition Act expropriating all wheat in the State and converting all rights therein into claims for compensation, the object of the Act being to make the maximum quantity of wheat available for export to the United Kingdom during the war. Before the Act was passed, certain wheatgrowers in New South Wales had contracted to sell their wheat to Victorian purchasers; when they sought to make delivery of this wheat it was seized by officers of the New South Wales government. Since section 92 of the Constitution says that "trade, commerce, and intercourse among the States . . . shall be absolutely free", this seizure (and the attempt to expropriate the grower) seemed to violate the Constitution; hence an application was made to the Inter-State Commission for an order commanding the government of New South Wales to cease and desist from preventing the growers from performing their contracts. Section 23 of the Inter-State Commission Act had provided that the Commission, "for the adjudication of any matter", should be deemed to be a court of record (although only one of its members was required, by section 4, to be "of experience in the law"); section 24 had given it jurisdiction "to adjudicate upon any matter" relating to acts of commission or omission by any State or State authority in contravention of the constitutional provisions as to trade and commerce. In the exercise of this power the Commission, being of opinion that the Wheat

[32] Author's italics.

Acquisition Act violated section 92, granted an injunction in the terms asked. Since section 73 of the Constitution authorises the High Court (subject to such exceptions as Parliament might prescribe) to hear appeals from the Inter-State Commission on questions of law, and since section 42 of the Inter-State Commission Act confirms that authority, the defendants appealed to the High Court.

The High Court held (by a majority of four to two)[33] that under the Constitution tribunals created by Parliament can only exercise "judicial power" if their members have the security of tenure postulated by section 72; that section 101, by authorising Parliament to confer "powers of adjudication" on the Inter-State Commission, did not *pro tanto* cut down the terms of section 72 or authorise the Parliament to make the Commission a court of record; that "powers of adjudication" must be construed as being limited to such quasi-judicial functions as might be ancillary and necessary to the administrative powers of the Commission. It followed, in the opinion of the majority, that the Commission had no power to grant an injunction or perform any function of a judicial nature; therefore the whole of Part V (Judicial Powers of the Commission) of the Inter-State Commission Act was *ultra vires* the Parliament.[34]

The next tribunal to come under the fire of the High Court was the Commonwealth Court of Conciliation and Arbitration (commonly called the Federal Arbitration Court) established under section 51 (xxxv) of the Constitution to deal with industrial disputes of an interstate character. The Act[35] establishing that court required the Governor-General to appoint one of the judges of the High Court as its President; as President he was to hold office for seven years, he could be re-appointed, and he could only be removed from his office as President on an address of both Houses on the usual grounds.[36] In *Waterside Workers'*

[33] *The Commonwealth* v. *New South Wales* (1915), 20 C.L.R. 54.

[34] An Inter-State Commission bereft of every vestige of judicial power was deemed by successive governments to be such an ineffective, if not completely impotent, body that when the terms of office of the commissioners came to an end (by lapse of time or prior resignation) no further appointments were made. In spite of the mandatory terms of section 101, all the provisions of the Constitution in regard to the Inter-State Commission thereupon became, and have since remained, a dead letter. Parliament itself could not confer life tenure on the members of the Commission so as to cure the defect in their powers; only a constitutional amendment by referendum could do that — and experience had already shown the extreme reluctance of the electorate to approve any constitutional amendment.

[35] Commonwealth Conciliation and Arbitration Act, 1904.

[36] The President was not relieved of his duties as a judge of the High Court; whenever possible he continued to sit on the latter (except when it was engaged in reviewing his activities as President).

Federation v. *J. W. Alexander Ltd.*,[37] a summons had been issued against the defendant alleging a breach of an industrial award binding upon it and upon the complainant; on the hearing before the Federal Arbitration Court objection was taken that, proceedings for the enforcement of an award requiring an exercise of "judicial power", the President could not act because he was appointed for seven years only. On a case stated for its opinion the High Court (by a majority of five to two) held that the effect of section 72 of the Constitution is to require all judges of the High Court and of every other court created by Parliament to be appointed for life. Since the President of the Arbitration Court was appointed for seven years only, he could not as President exercise judicial power even though as a High Court judge he did enjoy life tenure; and the enforcement of an award is a judicial, not an arbitral, act. The Commonwealth Conciliation and Arbitration Act was promptly amended to vest the power of enforcing awards (and of punishing breaches thereof, etc.) in courts which satisfied the criteria of section 72; in 1926 a clean sweep was made by abolishing the office of President and by providing for the appointment of a Chief Judge and other judges of the Arbitration Court with security of tenure.

The decision in the *Waterside Workers'* case was followed by the High Court in *Silk Bros. Pty. Ltd.* v. *State Electricity Commission of Victoria*,[38] the principle having already received the blessing of the Privy Council in 1930 [39] when their Lordships said that "though relieved of the necessity of giving a decision upon the point, [they] desire to make it quite clear that, as at present advised, they are not prepared to assent to the view that it is competent, either with or without legislation by the Federal Parliament, to appoint justices of the High Court or of the other courts created by the Parliament under sec. 71 of the Constitution, with other than a life tenure of their office". This ruling has had two results. In the first place, it is not possible to compel any federal judge to retire on his reaching a specified age;[40] pro-

[37] The hearing before the High Court is reported in (1918), 25 C.L.R. 434.

[38] (1943), 67 C.L.R. 1. This case decided that war-time regulations made under the authority of the National Security Act could not vest in the Fair Rents Boards thereby constituted power to hear and determine applications by landlords for the recovery of premises, because the members of such Boards did not enjoy life tenure.

[39] *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation*, [1930] A.C. 275, at p. 298.

[40] The ages of the present members of the High Court, and the dates of their appointments, are: Latham C.J., 71 (1935); Rich J., 86 (1913); Starke J. (at present on leave of absence owing to ill-health), 78 (1920); Dixon J., 63 (1929); McTiernan J., 57 (1930); Williams J., 60 (1940); and Webb J.,

vision is made for payment of a pension on retirement after fifteen years' service or on earlier resignation due to ill health; most High Court judges have died in harness or within two years of resignation. In the second place, federal legislation creating administrative boards or tribunals is always subject to challenge, if their members have not been appointed for life (and it is most unlikely that they will be), on the ground that an unconstitutional attempt has been made to confer "judicial power" on them; and the decisions do not provide an infallible guide as to the precise connotation of the "judicial power".[41] Since the boundary between administrative (including quasi-judicial) function and judicial power can never be exactly drawn, it may happen (1) that the High Court decisions have merely helped to fertilise another field of litigation of the kind unfortunately so prolific in any federation,[42] or (2) that administrative efficiency may suffer from excessive caution of crown law officers and their draftsmen who naturally do not wish to see departmental procedures upset or at least interrupted by frequent challenge.

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A survey of the work of the High Court since its establishment in 1903 reveals that it has always taken very seriously its duty as "guardian of the constitution". It is right and proper that it should have done so; it is neither improper nor disrespectful to suggest that at times the Court has been over anxious to consolidate its own position regardless of the effect of some of its decisions upon the working of the other, co-ordinate organs of the Commonwealth scheme. A further criticism may be made in conclusion, that the High Court has not always been consistent even in its laudable efforts to preserve the independence and the powers which it considers are guaranteed to it (and to a lesser extent to other federal courts) by the Constitution. As has been stated earlier, certain original jurisdiction has been conferred upon the High Court by the Constitution itself; and the

62 (1946). The average age is 68 (on first appointment, 49); the average length of service, 18½ years. Of the sixteen justices who have sat or are now sitting on the High Court, the average age on first appointment is 51½ and the average period of service 17½ years.

[41] See Sawer, The Judicial Power of the Commonwealth (1948), 1 University of Western Australia Annual Law Review 29.

[42] It may be remarked (1) that such litigation is likely to increase proportionately with the extension of the range of governmental activities, and (2) that the High Court's decisions effectively bar the creation of administrative tribunals (unless their members are appointed for life) with independent judicial powers and the development of a system of administrative law beyond the power of the ordinary courts. It is not within the author's province to express an opinion as to whether (2) is desirable or undesirable.

Court has not hesitated to declare invalid any federal legislation which purports to take away any part of that jurisdiction. For example, section 31 of the Commonwealth Conciliation and Arbitration Act, 1904, provided that "no award of the [Arbitration] Court shall be challenged, appealed against, reviewed, quashed, or called in question in any other Court on any account whatever". In *Whybrow's* case[43] the High Court held that this section should not be construed as if it purported to attempt to deprive the High Court of the power conferred upon it by section 75 (v) of the Constitution to issue prohibition against an officer of the Commonwealth. Isaacs J. dissented on the ground that prohibition properly belongs to appellate, not original, jurisdiction, and that Parliament is authorised by section 73 to except such matters as it thinks fit from the appellate jurisdiction of the High Court. The next year saw the Act amended by the insertion of the words "or be subject to prohibition or mandamus" after the words "called in question" in section 31. The validity of the amended provision was considered in the *Tramways' Case No. 1*,[44] when the High Court held that no Act of the federal Parliament can deprive it of the power to issue prohibition to a Commonwealth officer; on this occasion Isaacs J. changed his ground, and, now accepting the view of the remainder of the court that prohibition is original and not appellate in character, agreed with his learned brethren on the constitutional issue. Undeterred, Parliament again amended the Act later in 1914 by denying the power of any court to review the proceedings of the Arbitration Court by prohibition, mandamus *or injunction*.[45] But the High Court continued to issue prohibition, in proper cases,[46] to the Arbitration Court until finally Parliament gave up the unequal struggle and amended the Arbitration Act once more in 1930 by adding the words "other than the High Court" after the words "any other Court". The High Court had been successful in its determination to retain the original jurisdiction in prohibition which the Constitution confers upon it.

Section 75 (iv) of the Constitution gives the High Court original jurisdiction over matters "arising between residents of different States". Here, however, without any interference from Parliament, the High Court has narrowly interpreted the scope of the power and has shown itself somewhat reluctant to exercise

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[43] (1910), 11 C.L.R. 1.
[44] (1914), 18 C.L.R. 224.
[45] The words in italics were added by the 1914 Act.
[46] *E.g.*, in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt, and Sanderson Ltd.* (1924), 34 C.L.R. 482.

even the residue. In *Australasian Temperance and General Assurance Society Ltd.* v. *Howe*,[47] the High Court held by a bare majority that the word "residents" refers only to natural persons and not to artificial persons such as the corporation aggregate. In *Watson and Godfrey* v. *Cameron*,[48] a resident of Victoria and a resident of New South Wales were joint plaintiffs in an action against another resident of the latter State; the High Court refused to exercise jurisdiction on the ground that where there is on each side of the record a resident of the same State (even though residents of other States are joined as necessary parties), that is not a matter between residents of different States within the meaning of the section. A sentence in the judgment of Isaacs J. shows which way the wind was blowing; "if [counsel's] argument were right", he said, "it would lead to an alarming extension of the jurisdiction of this Court". Already, in *Faussett* v. *Carroll*,[49] the Court had said that if the only reason for bringing the action in the High Court instead of a State court was that the parties were residents of different States, the plaintiff would not get his costs even if successful. It is respectfully submitted that if the Constitution, as in effect it does, confers upon a resident of one State a right to use the High Court as the forum in which to sue a resident of another State, the Court — even at the risk, not very great, of increasing its work — should be as quick to uphold that right as it is to maintain those provisions of the Constitution which confer certain powers upon the Court and guarantee the security of tenure of its members.

On Judgment and its Incidents

Judgments are of four sorts:—First, Where the facts are admitted but the law disputed; as if a man says, "I know I am wrong, but I will trust to a quibble of the law to decide that I am right", which is called judgment on demurrer. Secondly, Where the law is admitted but the facts are disputed; when it may become a question of hard swearing, which is judgment by verdict. Thirdly, Where both law and fact are admitted by defendant, who says, "Fire away and do your worst", which is judgment by default. And lastly, Where the plaintiff has commenced an action against law and fact; when, finding that he has put his foot, or rather both his feet, in it, he consents to judgment, as in the case of a nonsuit. After judgment comes execution, unless the party, wishing to have plenty of fun for his money, or rather having plenty of money to pay for his fun, indulges in a series of expensive appeals, which we shall consider in the next chapter. (Gilbert Abbott A Beckett: The Comic Blackstone. 1856 ed.)

[47] (1922), 31 C.L.R. 290; approved in *Cox* v. *Journeaux* (1934), 52 C.L.R. 282.

[48] (1928), 40 C.L.R. 446.

[49] Reported briefly in Weekly Notes (New South Wales), August 14th, 1917.