COMMENT

THE BOILERMAKERS' CASE — THE QUESTION INTER SE

In the last issue of this Review[1] the Editors expressed the hope that it would be possible later to publish a note on the nature of the argument advanced by counsel for the Commonwealth in the *Boilermakers' Case*[2] with respect to the issue as to whether or not there was an *inter se* question within the meaning of section 74 of the Constitution involved in the appeal to the Privy Council.

It will be remembered that the Commonwealth had appealed from the High Court's decision that the Conciliation and Arbitration Act 1904-1952 was unconstitutional in so far as it purported to vest Commonwealth judicial power in the Commonwealth Court of Conciliation and Arbitration.

When the appeal came on for hearing before the Privy Council, the respondents, although they did not appear, submitted in a written case that the appeal involved an *inter se* question. The precise question involved in the appeal was whether sections 29(i) (b) and (c) and 29A of the Act were valid or not. Those provisions empowered the Court of Conciliation and Arbitration to order compliance with an order or an award and to enjoin any organization or person from committing any contravention of the Act and, so far as section 29A was concerned, conferred upon the court the same power to punish for contempt as was possessed by the High Court. The High Court had held that those powers were essentially judicial in character and that point was not really in issue on appeal.

Mr D. I. Menzies, Q.C., for the Commonwealth, made two separate submissions. In the first place he submitted that, to decide the validity of sections 29(i) (b) and (c) and 29A, while to do so might decide something as to the limits of Commonwealth constitutional power, would determine nothing as to the limits of State constitutional power, and therefore the question was not one *inter se* as comprehended by section 74 of the Constitution. His second submission was that, although such a decision would determine something as to the constitutional power of the Commonwealth, it would not determine the limits of that constitutional power. In effect this was the submission which was accepted by their Lordships, and it amounted to arguing that the decision was as to the exercise of power but not as to the

[1] (1957) 1 *M.U.L.R.* 245.
[2] *Attorney-General for Australia v. The Queen and the Boilermakers' Society of Australia and Others* [1957] A.C. 288; *sub. nom. The Queen v. Kirby ex parte The Boilermakers' Society of Australia* (1956) 393 C.L.R. 254.

limits of power. As was noted in the previous comment referred to, Their Lordships' acceptance of the argument was phrased in the following words:

> It cannot be said that what has been defined 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.

But, as was suggested in the previous comment, this argument is not necessarily satisfactory or exhaustive. It was put by Mr Menzies as an alternate argument only. His main argument was that the decision had simply no effect upon the definition of State constitutional powers. It is suggested that that argument was the more convincing one.

The argument may be briefly stated as follows: section 17 of the Act purported to create a federal court, and subsequent sections, among which were the sections in issue in this case, purported to give that court part of the judicial power of the Commonwealth. Those sections, it was argued, were clearly enacted in exercise of constitutional power discovered in section 71 of the Constitution, together with powers contained in section 77(i) of the Constitution. That is to say, the sections concerned were an exercise of the Commonwealth's power to create a federal court on the one hand and to define its jurisdiction on the other. It was common ground so far as this argument was concerned that the only power Parliament has to create a federal court is derived from section 71 and further, that the power to give a court constituted by Parliament jurisdiction to punish for contempt or enforce its own decisions by judicial order, must also be discovered in chapter III of the Constitution and could never be derived from, for example, section 51(xxxv).

The issue on appeal therefore was: had Parliament validly exercised its powers under chapter III to create a court and to give it part of the judicial power of the Commonwealth? The decision of that question, it was submitted, while it went to the limits of Commonwealth power, said nothing at all as to the limits of State constitutional power. It said nothing of State power because the power to create federal courts and to invest them with federal jurisdiction is not a power which could ever be exercised by a State. So far as the definition of State constitutional power was concerned, the definition of the limits of the Commonwealth power and the question whether that power had been validly exercised or not by the Commonwealth, were completely immaterial.

Some members of the Privy Council had difficulty with this argument and Mr Menzies argued the point from the second day into

the fourth day of the hearing. To appreciate the argument as put it is necessary to remember continually that the issue on appeal was confined to sections 29 and 29A of the Act. If the other sections of the Act which gave the court non-judicial powers were to be considered, of course *inter se* questions would have arisen. However, those other sections did not rely upon sections 71 and 77 of the Constitution for their source of power but, in the main, on section 51(xxxv). It was vital to the argument submitted by Mr Menzies to limit the issue to the question: has the Commonwealth validly created a federal court with the powers discovered in sections 29 and 29A to enforce its own orders? and not to ask the question: has the Commonwealth Parliament validly created a federal court with the powers set out generally in the Conciliation and Arbitration Act? If the former question is asked, then it is comparatively easy to see that the decision of it does not affect the existence or definition of State powers to create courts and to define the jurisdiction of those courts. The exercise of jurisdiction by such State courts and by the Commonwealth court might well be affected by the co-existence of the two hierarchies of courts, but that would not affect the constitutional power to create the courts and to define their jurisdictions.

This, then, was the argument not adverted to by their Lordships in their judgment. It turns of course on the basic premise that the Commonwealth's power to create federal courts is a special kind of exclusive power,[3] because it involves no power taken concurrently with or withdrawn from the States, and therefore it does not mark out a line between Commonwealth and State constitutional powers but merely creates a power which, of its very nature, could only be exercised by the Commonwealth. This involves stating the power in the words of the Constitution as a power to create federal courts. If it were stated merely as a power to create courts and define their jurisdictions, then it might well be thought of as a power held concurrently with the States and the definition of that power's limits might well then be thought to be a question *inter se*. Quite apart from the fact that in this area of the law the precise, though sometimes accidental, words of the Constitution are inevitably important in deciding constitutional issues, the distinction between those two statements of constitutional power is not merely one of words but is one of substance.

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[3] For an examination of Commonwealth exclusive powers in this context see D. P. Derham, 'Inter Se Questions and Commonwealth Exclusive Powers' (1957) 3 *University of Western Australia Annual Law Review*.

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