FUNCTUS OFFICIO AND THE PREROGATIVE WRIT OF PROHIBITION

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An imaginary system cunningly planned for the evil purpose of thwarting justice and maximizing fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies . . .[1]

There would appear to have been a deal of unnecessary litigation occasioned by the very fine line separating the stages at which the writs of *certiorari* and prohibition are properly sought. The objection in point of plurality of remedies is supported by the law of *functus officio*—that despite the many points of law common to *certiorari* and prohibition each is available at a different stage in proceedings. The scene for the discussion that follows can be set very simply:

> Once proceedings have begun in the tribunal, but not until they have begun, prohibition may be obtained at any time until they are finished. . . . if the proceedings have ended, the lower tribunal is said to be *functus officio* and prohibition ceases to be available.[2]

Is this a refinement that should be retained? Is it likely to result in many cases failing to reach the merits? Have the courts done anything to minimize the procedural difficulties that could arise from the distinction? These are some of the questions to which attention should be directed. The writs have the following points in common: historically they were used to control inferior courts; they are available in respect of a body with power to determine questions affecting the rights of subjects and having an obligation to act judicially; neither goes to an administrative tribunal, or so it is said;[3] they are available only when the power to determine is derived from statute or subordinate legislation; the rules as to standing are the same; neither writ lies against the Crown. The grounds of issue of the writs are the same: lack of jurisdiction; breach of the rules of natural justice and a decision obtained by fraud. There appears to be no authority on whether prohibition will issue for error of law on the face of the record. The law of *functus officio* would in many cases provide an answer to an attempt to obtain prohibition on this ground, though there is no logical reason why it should not be available. It might, in view of these many similarities, be thought that little other than frustration results from the law of *functus officio*.

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1 Davis, *Administrative Law* (1960) 447.

2 Brett and Hogg, *Cases and Materials on Administrative Law* (2nd ed. 1967) 72.

3 Lord MacDermott, *Protection from Power under English Law* (1957) 88.

It is proposed to examine this corner of the law to assess on the one hand the degree of inconvenience (if any) caused by this aspect of plurality, and to consider whether on the other hand the law is not so settled that practitioners are unlikely to be confounded by the distinction.

THE LEADING CASES

Perhaps the leading modern case is *Estate and Trust Agencies (1927) Ltd. v. Singapore Improvement Trust.*[4] The respondents, entrusted with the duty of carrying out the provisions of the Singapore Improvement Ordinance of 1927, made a declaration that the appellant's dwelling house was insanitary within the meaning of section 57 of the Ordinance.[5] The appellants objected, and were supplied with a copy of the Health Officer's report, stating the grounds of the declaration. Objections to the declaration were heard by the respondent, and pursuant to section 59[6] the declaration was submitted to the Governor in Council for his consideration. At this stage an originating summons was issued asking for a writ of prohibition prohibiting the respondents from proceeding further in respect of the declaration in question. It was alleged, *inter alia,* that the respondents had acted *ultra vires* in that they had applied a wrong or inadmissible test in making the declaration. The Judicial Committee dealt at length with this argument and upheld the appellant's contention. The respondents had acted beyond their powers, and the declaration was not enforceable. The case is important here for the respondent's argument that the Board was *functus officio* and that prohibition could not therefore be granted. The argument ran as follows: first that the Board was not a court, and did not act judicially or quasi-judicially at any stage; secondly that even if the Board did act quasi-judicially it did so only when it held a meeting to hear objectors, and that after it submitted its declaration to the Governor in Council it was *functus officio*—the only power the Board then had was a power to appear and plead its case before the Governor in Council;[7] thirdly, that as the Board was *functus officio,* prohibition would not lie because there were no further proceedings in excess of jurisdiction on which prohibition could operate.[8] The respondents' counsel added:

[4] [1937] A.C. 898.

[5] 57. Whenever it appears to the Board that within its administrative area any building which is used or is intended or is likely to be used as a dwelling place is of such a construction or is in such a condition as to be unfit for human habitation, the Board may by resolution declare such building to be insanitary.

[6] *Infra* n. 7.

[7] 59(1) After consideration of all the objections the Board may revoke any declaration made under section 57 or may submit it to the Governor in Council . . .

(3) If no objection has been made to the declaration or if any objection made has been withdrawn, the Governor in Council shall approve the declaration.

(4) If any objection has been made and not withdrawn, the Governor in Council shall inform the objectors and the Board of a time and place at which they may be heard.

(5) At such hearing the Board may appear by one of its officers or by an advocate . . . and the objectors may appear . . .

(6) Each party may adduce further evidence.

[8] [1937] A.C. 898, 903.

> As part of the third proposition it is submitted that the residuum of rights and duties under the Ordinance consist of two things: (a) those powers which are permitted to the Board as a quasi litigant in a new proceeding before the Governor in Council[9] and (b) purely administrative acts required to carry out the statutory duties if an order should be made by the Governor in Council.[10]

The appellant's counsel had argued that prohibition could issue as long as there was anything left to prohibit:

> Prohibition is never too late so long as there is, as there was in this case, something for it to act upon, *i.e.,* so long as it will have any effect: it is immaterial that what remains to be done—that on which prohibition can have effect—is merely administrative and not part of judicial functions: *Darby v. Cosens* (1787) 1 T.R. 552; *Shortt on Mandamus and Prohibition* (1887), at page 454 . . . This Board would not refuse a prohibition just because it might not prove effective, and will restrain the respondent Improvement Board when there is something resulting from its own action without jurisdiction which it may do in the future: *Mayor etc., of London v. Cox* (1866) L.R. 2 H.L. 239, 279-281.[11]

The Board upheld the appellant's argument. Admitting that this important point was of a 'purely technical character', Lord Maugham said:

> On the other hand there must remain something to which prohibition can apply, some act which the respondents if not prohibited may do in excess of their jurisdiction, including any act, not merely ministerial,[12] which may be done by them in carrying into effect any quasi-judicial order which they have wrongly made. Their Lordships do not doubt the correctness of the view expressed by R. S. Wright, J., in *Re London Scottish Permanent Building Society* 63 L.J. (Q.B.) 112, at page 113 (1893)—namely that 'an application for prohibition is never too late so long as there is something left for it to operate upon'. In *Rex v. North; Ex parte Oakey* [1927] 1 K.B. 491, Scrutton, L.J., after expressly approving this dictum as that of a judge who had great familiarity with this subject, remarked: 'When the sentence is unexecuted a statement of intention to execute it may be followed by a writ of prohibition, however long a time may have elapsed since the original sentence was pronounced'.[13]

His Lordship then examined the remaining steps that could be the subject of prohibition. He rejected the steps under section 59 (5)[14] on the ground that the Governor in Council could proceed with his enquiry without the presence of the respondents. Without deciding whether prohibition could issue in relation to the registration procedure of section 60 (1)[15] the

[9] S. 59(4).

[10] This was a reference to s. 60(1) and s. 61(1) which were as follows: '60(1) Every order made by the Governor in Council under sub-ss. 3 or 7 of s. 59 shall be notified. The Board shall thereupon cause a memorandum to be presented to the Registrar of Deeds containing a complete list of all the lands affected by such order, and the Registrar shall note in the Register against all such lands the fact that such order has been made.
61(1) At any time after the registration of an order declaring that a building is insanitary the Board may require the owner or reputed owner thereof by notice in writing to demolish the same within a period to be stated in the notice.'

[11] [1937] A.C. 898, 902. [12] *Infra* n. 30.

[13] [1937] A.C. 898, 917-8. There is no limitation period for an application for prohibition; and see *infra* n. 16. [14] *Supra* n. 7.

[15] *Supra* n. 10.

Board was clearly of the view that the demolition would in fact be the carrying out of the original declaration. Again noting the 'technical nature' of this part of the case Lord Maugham observed that the declaration was *ultra vires* and that if the respondents were to attempt to exercise their power under section 60 they would be relying on an order which, had it been challenged in time by suitable proceedings,[16] could not have been made.[17]

The Board seemed conscious of the merits of the case in coming to its conclusion on the technical point. The case illustrates rather well this particular complexity confounding the use of *certiorari* and prohibition. The earlier reports abound in cases where litigants came to grief by seeking prohibition alone where the tribunal was *functus officio*. One doubts however whether many cases will arise when the appropriate remedy is not quite apparent,[18] and clear cases such as *Re Poe*[19] and *Re York*[20] are not likely to recur. *Re Poe* was a case where prohibition was refused on the ground that a court martial sentence had been ratified by the King and carried into execution.[21] In *Ex parte Fangett*[22] the applicant obtained a rule *nisi* for a writ of prohibition to prohibit a Police Magistrate and a Crown Law Officer from proceeding further in a matter after the Magistrate had forfeited a recognisance which bound the applicant to pay costs. The rule was discharged on the ground that after judgment had been signed in the Supreme Court on the certificate of forfeiture, the application for prohibition was too late, as there was nothing remaining to be done in the inferior tribunal for the court to prohibit. Similarly in *Denton v. Marshall*[23] a writ was refused and Pollock C.B. said:

> there is nothing to prohibit. There has been a judgment and an execution; the money has been paid over by the registrar, and is no longer within the control of any court; the suit is at an end.[24]

Martin B. added:

> But when there has been a trial, judgment and execution, and the money has been paid over, I am unable to see how a writ of prohibition can issue, or, if issued what object it can attain. There is, in such a case nothing to prohibit. The forms of prohibition shew that before judgment, the prohibition to the inferior court is to prohibit the holding of the plea; to the party to prohibit the following of the plea; after judgment, it

[16] One of many cases when prohibition is sought only because of the limitation period attaching to *certiorari*. *Certiorari* must be applied for within six months of the making of the decision: see *e.g.* O.55 r. 11 *High Court Rules;* O.53 r. 7 *Rules of the Supreme Court of Victoria.*

[17] [1937] A.C. 898, 919.

[18] There is, of course, nothing save the six months' time limit for *certiorari* and costs, against duplicating proceedings for safety. While a prerogative writ claim cannot be joined with any non-prerogative writ application, claims for *certiorari* and prohibition may be combined in the one application. And see the 1966 amendments to R.S.C. (Vic.).

[19] (1833) 5 B. & Ad. 681; 110 E.R. 942.

[20] (1841) 2 Q.B. 1; 114 E.R. 1.

[21] To the same effect *In re Clifford and O'Sullivan* [1921] 2 A.C. 570.

[22] (1906) 8 W.A.L.R. 195.

[23] (1863) 1 H. & C. 654; 158 E.R. 1046.

[24] (1863) 1 H. & C. 654, 660; 158 E.R. 1046, 1049.

is to prohibit the proceeding on the judgment. The latter form would, in the present case, be a mere nullity.[25]

Chabot v. Lord Morpeth[26] is an important case and shows a plaintiff with his remedies confused. A statute empowered the Commissioners of Woods and Forests to form a royal park. A jury was empanelled before the sheriff of Surrey to ascertain what recompense should be made to any claimant for the value of lands required for the purposes of the Act. The jury found a verdict for £750 in favour of Chabot, for which sum the sheriff gave judgment, and ordered it to be paid to the claimant. Thereupon the plaintiff applied for prohibition to prohibit the sheriff and the Commissioners from entering and recording the verdict and judgment, and further acting upon or making available the same, on the ground of excess of jurisdiction and misdirection by the sheriff. The Attorney-General, Sir J. Jervis, appeared for the defendants and argued several objections to prohibition. First, that the sheriff acted in a mere ministerial capacity in ordering payment. Secondly, that the matter in dispute was finally concluded and that prohibition was too late, and he relied on *Re Poe*.[27] The sheriff had given judgment, and ordered payment of the sum awarded; he was not required to make any return, and was *functus officio*. Nothing remained to be done save to record the judgment and verdict, and to pay the purchase money into the Bank of England; the statute did not require either the Commissioners or the sheriff to have the proceedings recorded. Thirdly, that this was a prohibition by the Crown to itself, and he relied upon the *mandamus* cases.[28] Lord Campbell C.J., giving judgment said:

> This is the first time that an attempt has been made to extend the writ of prohibition to such a case. Where there has been a complaint of an excess of jurisdiction in holding an inquisition to ascertain the value of property taken under an Act of Parliament, the course hitherto has been to apply for a *certiorari* with a view to quash the proceedings alleged to be illegal. What might have been the success of such an application in this case we are not called upon to say: but it clearly appears to us that the plaintiff has not entitled himself to a prohibition, either against the Sheriff or the Commissioners. He comes to us after the assessment, the verdict and the judgment, without seeking to set aside these proceedings, but praying that the defendants may be prohibited from entering or recording the assessment, verdict and judgment, or from acting upon them. . . . the duty of entering and recording them is not cast either on the Sheriff or on the Commissioners. After the Sheriff has given judgment, ordering the sum assessed by the jury to be paid by the Commissioners, he is *functus officio*. The recording is to be in the office of Land Revenue

[25] *Ibid.* and see also *Ex parte Foster* (1872) 11 S.C.R. (N.S.W.) 195; *Ex parte Medlyn* (1893) 14 N.S.W.R. 276. Some other New South Wales cases are difficult to reconcile with this: *e.g. In re Scully* (1864) 3 W.N. 50. *Scully* is thought extremely dubious on the substantive point also. So too is *Ex parte McDermott* (1901) 18 W.N. 231, which is inconsistent with earlier New South Wales authority: *e.g. Ex parte Manning* (1897) 18 N.S.W.R. 324; *Ex parte Hetherington* (1887) 4 W.N. 57. See also *R. v. Call; Ex parte Brown* (1884) 10 V.L.R. (L.) 359.

[26] (1884) 15 Q.B. 446; 117 E.R. 528.

[27] (1833) 5 B. & Ad. 681; 110 E.R. 942.

[28] *E.g. R. v. The Commissioners of Her Majesty's Woods and Forests* (1844) 15 Q.B. 761; 117 E.R. 646; *R. v. Powell* (1841) 1 Q.B. 352; 113 E.R. 1166.

> Records and Enrolments, an entirely different office from that of the Commissioners of Woods.[29]

The remaining discussion turned on whether the court could prohibit the Commissioners from gaining title to the land pursuant to the statute by payment in to the Bank. It was enacted that 'thereupon the land should vest in the Queen's Majesty'. This the court refused to do on the ground that there was no judicial proceeding now to take place. 'Were we to grant prohibition against this measure, we should be interfering with proceedings not judicial, but belonging to the executive government of the country.'[30]

Chabot v. Lord Morpeth[31] was followed in *Ex parte McInnes*[32] where Sir James Martin C.J. for the Full Court of the Supreme Court of New South Wales said of it:

> That case appears to me to be a clear authority against issuing a prohibition as now asked for against this municipality. A municipality is not a tribunal, and a prohibition only issues to a court or a pretended court which assumes to exercise judicial functions. To the magistrate it cannot go, because he has nothing further to do, the enforcement of the assessment not depending on the order made by him, the municipality having the power independently of him to enforce the assessment or not.[33]

THE HIGH COURT'S FROLIC

The reasons given in *Chabot v. Lord Morpeth*[34] and *Ex parte McInnes*[35] do not appear consistent with the decision of the High Court of Australia in *R. v. Hibble; Ex parte Broken Hill Pty. Co. Ltd.*[36] It is sometimes said that this decision was influenced by section 75 (v) of the Commonwealth Constitution. Thus it is said:

> A greater use of prohibition is made in Australia than in England. This derives largely from the fact that the Commonwealth Constitution (Section 75 (v)) grants to the High Court of Australia original jurisdiction in any matter 'in which a writ of *mandamus* or prohibition or an injunction is sought against an officer of the Commonwealth'. The Court thus cannot be deprived by Parliament of the power to grant these remedies against 'officers of the Commonwealth' (which phrase is widely construed), in appropriate cases. But as the section does not mention *certiorari,* it can be deprived by Parliament of the power to grant that remedy, and often is. Prohibition is accordingly sometimes used to do what would normally be done by *certiorari.*[37]

[29] (1844) 15 Q.B. 446, 457-8; 117 E.R. 528, 533.

[30] Accord *Singapore* case [1937] A.C. 898, 917-8. But compare *R. v. North; Ex parte Oakey* [1927] 1 K.B. 491; *Darby v. Cosens* (1787) 1 T.R. 552; 99 E.R. 1247; *R. v. St. Edmundsbury and Ipswich Diocese; Ex parte White* [1948] 1 K.B. 195, 215, and see De Smith, *Judicial Review of Administrative Action* (1968) 398. Admittedly the last three cases merely support the proposition that the enforcement of an order may be prohibited, although this is a ministerial act and this is unexceptional. The cases cannot it seems speak for ministerial acts other than the enforcement of orders, and *Chabot v. Lord Morpeth* seems a clear authority to the contrary. See also *Kavanagh v. Herbig* (1907) 9 W.A.L.R. 121.

[31] (1844) 15 Q.B. 446; 117 E.R. 528.

[32] (1883) 4 N.S.W.R. 143.

[33] *Ibid.* 148-9. See also *Ex parte Bennett* (1898) 19 N.S.W.R. 139.

[34] (1844) 15 Q.B. 446; 117 E.R. 528.

[35] (1883) 4 N.S.W.R. 143.

[36] (1920) 28 C.L.R. 456.

[37] Brett and Hogg, *op. cit.* 85.

Section 75 (v) is in these terms:

> 75. In all matters . . . (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction.

Why was prohibition mentioned in section 75 and *certiorari* not included? Section 75 (v) has no equivalent in the United States Constitution. One can shortly state that the reason for the inclusion of the clause stemmed from the decision of the Supreme Court of the United States in *Marbury v. Madison*[38] that Congress could not give power to the Court to entertain cases of *mandamus* or prohibition against an officer of the United States. The question for the Federal Convention of 1898 was whether, without an express authority in the Constitution the High Court could grant a writ of *mandamus* or prohibition or an injunction against an officer of the Commonwealth. Some vocal members of the 1898 Melbourne Convention thought its insertion a good idea. Dr Quick asked whether, having regard to the express mention of *mandamus,* prohibition and injunction, the Court would have power to issue writs of *certiorari* or *habeas corpus.* It was his view that the Court would not have that power.[39] He was given an assurance by Mr Barton that *habeas corpus* would be available,[40] but that part of his question relating to *certiorari* was never specifically answered, although he returned to the point later having consulted Storey,[41] and noted that Mr Barton's earlier answer was not adequate, because the United States Constitution contained a distinct recognition of *habeas corpus.* He said:

> But in the Constitution of the United States there is no section such as is now proposed, limiting or defining the writs which may be issued by that Court; it is left to the operation of the common law. Here it is proposed to put in a clause limiting and defining the class of writs to be issued to three, viz., *mandamus,* prohibition, and injunction. That, according to the great doctrine of limitation which has been so often impressed on the Convention, would exclude, by process of definition, the right to issue a writ of *habeas corpus* or a writ of *certiorari.* If there is to be a clause defining those writs, then I contend that it ought to be a complete definition and a complete enumeration embracing all possible writs for the enforcement of remedies, otherwise it is best to leave out the clause.[42]

Mr Isaacs too thought that: 'You will have to put all sorts of other things in the provision',[43] but Mr Symon denied this saying that its design was to ensure that proceedings of the type set out would be available against officers of the Commonwealth in Commonwealth courts only.[44] At a later stage however, Mr Barton observed that it was not intended to specify all the writs in respect of which jurisdiction might be exercised; that the writs mentioned were those addressed to persons who might be carrying out the

[38] Cranch. 137 (1863).
[39] *Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne* (1898) ii, 1876 (hereafter *Debs. Melb.*).
[40] *Ibid.*
[41] Storey, *Commentaries on the Constitution of the United States* ii, 237.
[42] *Debs. Melb.* 1880-1. [43] *Ibid.* 1879. [44] *Ibid.*

provisions of the statute law of the Commonwealth, and to enable proceedings to be taken directly in the High Court.[45] This appeared to satisfy the participants and the clause was agreed to.

It is proposed to treat the cases in the High Court on *functus officio* to discover the extent to which the Court has departed from the English cases. It should be noted that as a background to the decisions to be discussed lay questions of high constitutional significance which for many years remained in a state of flux, the most important of which was settled in the middle, chronologically speaking, of the judicial wrangle about to be unfolded.

In *R. v. Hibble; Ex parte Broken Hill Pty. Co. Ltd.*,[46] a special tribunal was constituted under the Industrial Peace Act 1920 (Cth) in respect of the coke industry. It consisted of Hibble as Chairman and several other members. A purported award was published in the Commonwealth Government Gazette and signed by Hibble as Chairman. The award was therefore an award of Hibble (if an award at all) and not of the Special Tribunal—the award being phrased in the first person singular throughout. The case arose out of a motion to make absolute an order *nisi* for prohibition[47] to prohibit Hibble and others from further proceeding on the purported award, on the ground that the award was not that of the Tribunal. The whole court accepted that the alleged award was on this ground invalid, and the significance of the decision lies in the discussion of the availability of the remedy. The Tribunal had no power to enforce its awards, but by section 17 of the Industrial Peace Act an award of a special tribunal could be enforced as an award of the Arbitration Court—that is, by proceedings in a District, County or Local Court or court of summary jurisdiction.[48] The Company submitted that prohibition would not lie as the Tribunal having made its award was *functus officio;* that there was nothing for prohibition to act upon as the Tribunal had no power of enforcement and therefore nothing further it could do; *Re Poe*[49] and *Denton v. Marshall*[50] were relied on. The Commonwealth, intervening, argued to a like effect, but more specifically that prohibition would not lie where another tribunal had to enforce the determination, and it relied upon *Chabot v. Lord Morpeth*[51] and *Ex parte McInnes*[52] discussed above. The

[45] *Ibid.* 1884-5.
[46] (1920) 28 C.L.R. 456.
[47] In the alternative *certiorari* to quash the award was sought; but this claim was dropped, although it is difficult to see why. Counsel's argument against *certiorari* merely alleged that the writ only lies when a tribunal is exercising a common law jurisdiction by procedure outside the common law, and does not lie to courts exercising statutory jurisdiction. He relied upon *Halsbury's Laws of England* x, 160, 192. The cases cited there do not support this proposition, and it is not easy to imagine an abandonment on this ground alone. Moreover Isaacs and Rich JJ. observe that there were 'various reasons' for dropping the claim: (1920) 28 C.L.R. 456, 465.
[48] S. 44(1) Commonwealth Conciliation and Arbitration Act 1904.
[49] (1833) 5 B. & Ad. 681; 110 E.R. 942.
[50] (1863) 1 H. & C. 654; 158 E.R. 1046.
[51] (1844) 15 Q.B. 446; 117 E.R. 528.
[52] (1883) 4 N.S.W.R. 143.

Commonwealth might well have considered that this disposed of the case. The Court however was equally divided on this question. Knox C.J., Gavan Duffy and Starke JJ. being in favour of granting prohibition, and Isaacs, Rich and Higgins JJ. of refusing it; the opinion of the Chief Justice prevailed.[53] The Chief Justice and Gavan Duffy J. delivered a joint judgment holding that the practice of the Court had always been to grant prohibition to the Arbitration Court after award and they relied upon the *Builders' Labourers'* case.[54] They did not advert to counsel's forceful submission[55] that prohibition was granted in the *Builders' Labourers'* case on the assumption that the Court of Conciliation and Arbitration had power to enforce its awards.[56] With an eye perhaps to policy rather than to the letter of the law Their Honours said:

> The real object of the writ was not merely to prevent an individual being vexed by an order which might affect him in his person or property, made by a person or tribunal assuming to have jurisdiction to make such an order, but having no such jurisdiction, but also to prevent any person or tribunal from assuming a jurisdiction which has not been conferred on him or it. So far as the writ is regarded as a means of protection for the individual who has not disentitled himself by his conduct, the necessity of the case demands that it shall be granted at any time until all possible operation of the order complained of has been completely exhausted. If, on the other hand, the issue of the writ be regarded as intended to keep an inferior court within the limits of its jurisdiction, it should never be too late to get rid of what might be regarded in the future as a precedent for the exercise of a jurisdiction which is not really justified by law.[57]

In Their Honours' view so long as a judgment made without jurisdiction remained in force to impose liabilities upon an individual, prohibition would lie,[58] and on this basis their conclusion was not in doubt. It appeared to them 'quite irrelevant' that the enforcement was left in the hands of another body. It is difficult to believe that Their Honours knew of 'no case in which the tribunal which made the order had thereby completely performed its function, the enforcement being left to some other body'; even if they had not read *Chabot v. Lord Morpeth*[59] or *Ex parte McInnes*[60] the form of their statement avoids the real objection which, surely, is this: how can a court grant prohibition against the respondent Hibble when he certainly has nothing further to do, which purports to prohibit some other body, not named, from enforcing the order? This is the question, and it seems fairly answered and met by such cases as *Chabot*

[53] S. 23(2)(b) Judiciary Act 1903-1960 (Cth).

[54] *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Jones* (1914) 18 C.L.R. 224.

[55] (1920) 28 C.L.R. 456, 457.

[56] This was not denied until four years later in *Alexander's* case: *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd.* (1918) 25 C.L.R. 434.

[57] (1920) 28 C.L.R. 456, 463.

[58] This comes very close to obliterating the distinction between *certiorari* and prohibition.

[59] (1844) 15 Q.B. 446; 117 E.R. 528.

[60] (1883) 4 N.S.W.R. 143

v. Lord Morpeth[61] and *Ex parte McInnes*.[62] The reasoning of the judgment seems, to say the least, somewhat lacking in elegance. The judgment of Starke J. also evades this vital point.[63]

The most persuasive judgment, it is thought, is that of Isaacs and Rich JJ. Its reasoning is clear: the applicant sought prohibition restraining the Coke Industry Special Tribunal from further proceeding upon the award purported to be promulgated by the Chairman; that the reason for a grant of prohibition is that the inferior court is about to exceed its powers—'that the Coke Tribunal, whatever has happened in the past, is in fact about to proceed in the future upon unlawful course'; as the award did not even purport to be that of the Tribunal, and was not in fact that of the Tribunal, a case for prohibition against the Tribunal could not get off the ground. The judgment turned on the applicant's submission that when any decision has been given without or in excess of jurisdiction, at any time so long as the decision retains any force, prohibition lies notwithstanding that the tribunal is *functus officio* and has no intention of taking any step in relation to its decision.[64] Their Honours thought this contention 'fundamentally erroneous' due to a radical misapprehension of the nature of prohibition. After an exhaustive review of the cases, *Chabot v. Lord Morpeth*[65] and *Ex parte McInnes*[66] were found to determine the issue. Higgins J., who also dissented said:

> Prohibition will not be granted against a tribunal unless there be something still to be done by it . . . There is certainly no power given to the Tribunal to execute the award, or to enforce it by imposing a penalty . . . In the case of courts which can execute their judgment, a writ of prohibition may be claimed at any time before execution is complete, but not afterwards . . . There is now no judicial proceedings to take place *before the tribunal,* and there is nothing to prohibit as regards any action, or proposed action, of the tribunal (*Chabot v. Lord Morpeth*).[67]

It has been suggested that as its maker had power to vary the award he had not completely lost authority in connection with it.[68] This suggestion is not it is thought, of significant weight. It stretches the imagination too far to suggest that prohibition could go to the Tribunal in respect of an award not purporting to be an award of the Tribunal, but which, if application were to be made and that body saw fit to entertain the same, and it found a valid award made by itself in existence (which it could not do), might be varied.[69] It is clear law that the fear that an inferior tribunal *might* in the future exceed its jurisdiction (in this case vary an award which

[61] (1844) 15 Q.B. 446; 117 E.R. 528.
[62] (1883) 4 N.S.W.R. 143.
[63] (1920) 28 C.L.R. 456, 491.
[64] (1920) 28 C.L.R. 456, 478.
[65] (1844) 15 Q.B. 446; 117 E.R. 528.
[66] (1884) 4 N.S.W.R. 143.
[67] (1920) 28 C.L.R. 456, 488-90.
[68] See the dissenting judgment of McTiernan J. in *R. v. Connell; Ex parte The Hetton Bellbird Collieries Ltd.* (1944) 69 C.L.R. 407, 444; see also Brett and Hogg, *op. cit.* 86.
[69] There was no suggestion of an application to vary being made.

was not its to vary) is no ground for prohibition: *Hill v. Bird;*[70] *Ex parte Burns.*[71]

In 1921 the House of Lords decided in re *Clifford and O'Sullivan,*[72] a case very similar to *Re Poe.*[73] Viscount Cave said[74] that a writ of prohibition could not issue as the officers of the military court had long since completed their investigation and reported to the commanding officer, so that nothing remained to be done by them, and a writ of prohibition directed to them would be of no avail, and he cited *Chabot v. Lord Morpeth*[75] as authority. Lord Sumner said:

> My Lords, I think there is another difficulty in the appellant's way, which ought to be mentioned. So far as the evidence shows the officers who constituted the military court are now completely *functi officio* and, as a tribunal, are definitely dispersed, so far as this case is concerned. There is no material to support the surmise that they might be called upon to reconsider either their decision or their sentence. True, judgment, though given, is not yet executed, *but the execution is not in the hands of these officers or of any one acting under their directions or authority.*[76]

In *Waterside Workers' Federation of Australia v. Gilchrist, Watt and Sanderson*[77] it was argued that *Hibble* was inconsistent with *Clifford and O'Sullivan.*[78] Isaacs J. said:

> having regard to the constitution of the Court that decided *Hibble's Case No. 1* and of the Court that is called upon to decide this, no reconsideration of that fundamental proposition would be profitable or proper, if it were not for a very material circumstance that has happened since . . .[79]

and His Honour referred to *Clifford and O'Sullivan.*[80] The judges constituting the majority[81] found it unnecessary to reconsider what they were able to call the Court's practice, distinguishing the House of Lords decision on the ground that the officers who were said to constitute the tribunal did not purport to act as a Court in any legal sense.[82] Their Honours, while quoting parts of the several judgments, did not note the remarks of Lord Sumner set out above on the point in issue—that although something remained to be done, it was by another body, differently constituted. Isaacs and Rich JJ. dissented with renewed vigour, and supported by the

[70] (1682) Aleyn 56; 82 E.R. 913.
[71] (1916) 86 L.J.K.B. 158, 160.
[72] [1921] 2 A.C. 570.
[73] (1833) 5 B. & Ad. 681; 110 E.R. 942.
[74] (1921) 2 A.C. 570, 584.
[75] (1844) 15 Q.B. 446; 117 E.R. 528.
[76] [1921] 2 A.C. 570, 591. Italics supplied. Approved by Supreme Court of New Zealand in *Manawatu Catchment Board v. Taylor* [1949] N.Z.L.R. 910.
[77] (1924) 34 C.L.R. 482.
[78] Which was then binding on the Court: *Piro v. W. Foster and Co. Ltd.* (1943) 68 C.L.R. 313.
[79] (1924) 34 C.L.R. 482, 501.
[80] [1921] 2 A.C. 570.
[81] Knox C.J., Gavan Duffy and Starke JJ.
[82] (1924) 34 C.L.R. 482, 498 and 555 respectively. What the officers purported to do is hardly the question. 'There is in my opinion no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also': Lord Simmonds in *Jacobs v. London County Council* [1950] A.C. 361, 369.

judgments of Viscount Cave and Lord Sumner in particular, felt bound to adhere to their old view.[83]

The view of the majority prevailed, and was assumed by a majority[84] of the Court in *R. v. Connell; Ex parte The Hetton Bellbird Collieries Ltd.*,[85] but the matter was discussed by McTiernan J. who dissented, holding that prohibition would not lie because the tribunal was *functus officio*. His Honour was clearly sympathetic to the views of the statutory minority in *Hibble*, although he distinguished that case on the ground that the tribunal there had power to vary its own award while Connell had not.[86] His Honour apparently thought this the only satisfactory way of reconciling *Hibble* and *Clifford and O'Sullivan*. Dixon J. has said that until the matter is authoritatively determined by the Privy Council the view of the statutory majority in *Hibble* should be applied,[87] and the Court has in many cases done so.[88] In *R. v. Spicer; Ex parte Waterside Workers' Federation of Australia (No. 2)*[89] the High Court refused to issue the writ where all that remained to be done was to recover certain costs which in any event were recoverable under a valid order made contemporaneously with the invalid one by the same body. What is interesting is the implication in the judgment[90] that had the valid order not existed prohibition might still not have issued. This none too covert implication should be contrasted with the decision of the Supreme Court of New South Wales in *Honnery v. Smith*[91] where prohibition went on the sole ground that costs were outstanding.

Part of the explanation for the greater use of prohibition than *certiorari* in Australia might be thought to lie in this—that the cases expanding the jurisdiction by way of prohibition beyond the limits conditioning its use in England, are in the field of Conciliation and Arbitration. Section 31 (1) of the Commonwealth Conciliation and Arbitration Act 1904 provided: 'No award of the Court shall be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever.' Counsel may have assumed that the provision could have no effect on the constitutionally guaranteed jurisdiction by way of prohibition or *mandamus* though it might have removed jurisdiction by way of *certiorari*. One might

[83] *Ibid.* 505.

[84] Latham C.J., Rich, Starke and Williams JJ.; Rich J. had at last thrown in the towel.

[85] (1944) 69 C.L.R. 407.

[86] *Ibid.* 447, and *supra* n. 69 and corresponding text when the validity of this distinction is doubted.

[87] *R. v. Hickman; Ex parte Fox and Clinton* (1945) 70 C.L.R. 598, 619. His Honour drew attention to the statement of Lord Maugham in the *Singapore* case which seemed to conflict with the view of the majority in *Hibble*.

[88] *E.g. R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1944) 69 C.L.R. 407; *R. v. Foster; Ex parte Crown Crystal Glass Co. Pty. Ltd.* (1944) 69 C.L.R. 299; *R. v. Commonwealth Rent Controller; Ex parte N.M.L.* (1947) 75 C.L.R. 361.

[89] (1958) 100 C.L.R. 324.

[90] *Ibid.* 341.

[91] (1957) 57 S.R. (N.S.W.) 598.

however have thought that notwithstanding the terms of section 31 (1) *certiorari* would have continued available where there was a lack of jurisdiction, which, as error of law on the face of the record was then in desuetude, would have been the sole ground for the issue of *certiorari: Colonial Bank of Australasia v. Willan.*[92] By section 14 of the Commonwealth Conciliation and Arbitration Act 1911 section 31 was amended to read as follows:

> No award or order of the Court shall be challenged, appealed against, reviewed, quashed, or called in question or be subject to prohibition or mandamus in any other court on any account whatever.

It is clear of course that so far as the section purports to take away the jurisdiction of the High Court to issue prohibition or *mandamus* against an officer of the Commonwealth[93] it is repugnant to section 75 (v) and invalid: *Tramways* case (No. 1).[94] But in the light of the clear judicial policy that *certiorari* cannot be excluded, even by the use of the word 'quash' in a section like section 31, where there is a want of jurisdiction, it seems odd that *certiorari* has not figured more in High Court proceedings. It is for this reason that the statement that greater use is made of prohibition than *certiorari* in Australia because of the existence of section 75 (v) of the Constitution,[95] is difficult to test, and not easy to accept. Indeed it seems difficult to say more than this: that one 'gets the feeling that the very presence of section 75 (v) has led to the extension of the writ of prohibition to cover most of the ground of the writ of *certiorari*'.[96] However, the recent observations of the High Court in *R. v. White; Ex parte Byrnes*[97] are worthy of note. A decision to fine the applicant had been made by a tribunal and he had been notified that action was being taken to deduct the amount of the fine from his salary. On an application for *certiorari* the Court[98] said:

> *Certiorari* appears to be an odd remedy to seek but there may have been reasons why a writ of prohibition was not sought. Apparently one member of the Board was not an officer of the Commonwealth so a writ of prohibition could not have been justified solely under s. 75 (v) of the Constitution.[99]

It is surprising that the High Court considered that prohibition was otherwise more appropriate, because the letter referred to and dated 7 August 1963 stated that steps *were being taken* to deduct the amount of the fine from his wages, and his application for *certiorari* was not made until 3

[92] (1874) L.R. 5 P.C. 417; and see also *Ex parte Herman; Re Mathieson* (No. 1) [1961] N.S.W.R. 1137; (1961) 78 W.N. (N.S.W.) 6; *Halsbury's Laws of England* ii, 119; *Re Toronto Newspaper Guild* [1952] 2 D.L.R. (2d) 302.

[93] See *R. v. White; Ex parte Byrnes* (1963) 109 C.L.R. 665.

[94] (1914) 18 C.L.R. 54. See also *R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow & Co.* (1910) 11 C.L.R. 1; *R. v. Hickman; Ex parte Fox and Clinton* (1945) 70 C.L.R. 508.

[95] See n. 7 *supra.*

[96] Anderson, 'The Application of Privative Clauses to Proceedings of Commonwealth Tribunals' (1956) 3 *University of Queensland Law Journal* 35, 55.

[97] (1963) 109 C.L.R. 665.

[98] Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

[99] (1963) 109 C.L.R. 665, 669.

October 1963. It seems unlikely that the steps already instituted to deduct on 7 August should not have been completed by 3 October. If the steps had already been taken this decision is tantamount to saying that prohibition can do whatever *certiorari* can do without the inconvenient limitation period.[1]

It is probable that the High Court will maintain its attitude to the extended use of prohibition as a remedy. Although the majority in *Hibble* was a statutory majority the Court has acted on the decision for some time.

To return to the enquiry into the amount of unnecessary litigation occasioned by the law of *functus officio*—there is no doubt that the cases exploring and explaining the content of this expression have been many, especially in the first half of the nineteenth century. That an area of law has required much explanation in the past should not necessarily condemn it for all time. The law is reasonably clear on most points, and so long as litigants continue to be counselled with moderate competence, the pitfalls of remedial strife can easily be avoided. The extended use of prohibition sanctioned by the High Court will, it is thought, be carried over into state law without comment. There is some evidence that this has already occurred: see *R. v. Industrial Court; Ex parte Wilkinson.*[2]

The point remains that the law of prohibition and *certiorari* would have one less pitfall were it not necessary to choose in borderline cases between risking the more likely remedy and commencing proceedings for both.[3] The decisions in *R. v. May; Ex parte M'Gee*[4] and *R. v. Call; Ex parte Braun,*[5] show that a court will not permit an order *nisi* for prohibition to be amended to an order to quash. The extension of the scope of prohibition does mean that the reach of the writ is extended, and when *certiorari* is not available for a reason such as the six month limitation, review will be possible at a very late stage[6] even when enforcement or some other step, perhaps ministerial only,[7] is in the hands of another body, uncontrolled by the tribunal itself. However inelegant this may appear, from the litigant's point of view it has advantages, and will mean that, if Australian state courts adopt the High Court's approach, the difficulties of choice between prohibition and *certiorari* are to some extent overcome.[8]

To conclude, it is thought that the obliteration of the distinction between *certiorari* and prohibition, having as the writs do so many points of law in common, would be a significant step in accommodating the ancient remedies to the needs of the moment.

[1] *Supra* n. 57 and corresponding text.
[2] [1958] Qd.R. 80.
[3] *Supra* n. 18.
[4] (1882) 3 A.L.T. 98.
[5] (1884) 10 V.L.R. (L.) 359: 'We should be unwilling to create a precedent which might lead to confusion and laxity of practice.'
[6] *R. v. White; Ex parte Byrnes* (1963) 109 C.L.R. 665.
[7] *Supra* n. 30.
[8] See the width of the propositions of the majority in *Hibble supra.*