THE FINALITY OF JUDICIAL DECISIONS

(1) *INTRODUCTION.*

In *Rola Co. (Australia) Pty. Ltd.* v. *Commonwealth*[1] the High Court of Australia decided that a "judicial" can be distinguished from an "administrative" tribunal by the fact that judgments and decrees of judicial tribunals are final and conclusive (subject only to appellate judicial review), whereas decisions of administrative tribunals are not.[2]

Distinctive of any "judicial" decision is the rule that at some stage, which is dependent upon the jurisdiction and procedure of the particular tribunal and upon the particular case, the tribunal which makes it becomes *functus officio*. Even though some other tribunal may be able to review the decision on appeal or otherwise, the general rule is that the decision is final and conclusive so far as the tribunal which made it is concerned and that it cannot thereafter be reviewed by that tribunal.

To every such decision there also applies the Doctrine of *Res Judicata*. This does not preclude the parties resorting to any avenues of judicial appellate review that may be open to them, but the rules as to *res judicata* lay it down that, in general, if the parties either do not explore or unsuccessfully explore those avenues, they cannot subsequently challenge the final decision, whatever it might be, in any other proceedings whatsoever in any judicial tribunal at all. This is so even if a judicial tribunal should happen, in the course of some other proceedings, to form an opinion that the particular earlier decision has been decided contrary to some *ratio decidendi*, or other rule of law, which because of the Doctrine of *Stare Decisis* should have been binding upon both the former tribunal and the latter.

(2) *THE DOCTRINE OF RES JUDICATA.*

(i) *The Nature of the Doctrine.*

If any judicial tribunal in the exercise of its jurisdiction delivers a judgment which is in its nature final and conclusive, the judgment is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment can be pleaded by way of estoppel in the subsequent case.

1. (1944) 69 C.L.R. 185.
2. The distinction between, on the one hand, a judicial decision which is unchallengeable except by following prescribed avenues of judicial appellate review, and, on the other, a non-judicial decision or mere opinion, often depends for its usefulness as a *practical* test upon pre-knowledge as to which instrumentalities are judicial and which are not. However, this test is oftentimes circuitous in its operation. It is frequently possible to determine whether a decision is a "judicial decision" only after it has been determined whether the instrumentality which made it was a judicial tribunal; and *vice versa*.

If the cause of action which led to the judgment is really the same as that in the subsequent proceedings (that is, if the matters in controversy are identical, even though the form of proceedings in which they are raised is different); if the judgment was a "final and conclusive" one as to the merits; if the tribunal which delivered the judgment was a judicial tribunal and was at the time not exceeding its jurisdiction; then the plea of *res judicata* will succeed. It will succeed if pleaded in any judicial tribunal whatsoever, and not merely in the tribunal by which the judgment was delivered. In such circumstances, it is futile to endeavour to raise exactly the same matter again in new judicial proceedings. The only possible course is to endeavour to get rid of the *res judicata* by some form of appeal or other form of appellate review, should any be available. If no such means are available, then the *res judicata* cannot be impeached in any judicial proceedings whatsoever.

In the following passage[3] there are enumerated the circumstances to which the Doctrine of *Res Judicata* is applicable:—

> "(1) Where an issue of fact has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties;
>
> "(2) Where the first determination was by a Court having exclusive jurisdiction, and the same issue comes incidentally in question in subsequent proceedings between the same parties;
>
> "(3) In some cases where an issue of fact affecting the status of a person or thing has been necessarily determined in a final manner as a substantive part of a judgment *in rem* of a tribunal having jurisdiction to determine that status, and the same issue comes directly in question in subsequent civil proceedings between any parties whatsoever."

Pleas of *res judicata* in civil cases have their parallel in criminal cases in pleas of *autrefois convict* and of *autrefois acquit;* and the Doctrine of *Res Judicata* is usually taken to include the two latter kinds of pleas.

(ii) *The judgment is not res judicata unless it is final and conclusive.*

The Doctrine of *Res Judicata* enables controversies to be submitted to judicial tribunals with an assurance that, whatever judgment or order is finally made as a result of the hearing and of any review thereof, it will for all purposes be final and conclusive in respect of the matters which were in issue in the case. This doctrine is partially expressed in two legal maxims: *Interest reipublicae ut sit finis litium,* and *Nemo debet bis vexari pro eadem causa.*

3. *Halsbury's Laws of England* (2nd Edn.) Vol. 13, p. 399.

Consequently, a judgment is *res judicata* only if it is a final one.[4] The doctrine does not operate in favour of "interlocutory" judgments. In this connection, however, the term "final" has rather a special meaning. "A judgment which purports finally to determine rights is none the less effective for the purposes of creating an estoppel because it is liable to be reversed on appeal, or because an appeal is pending, or because for the purpose of working it out inquiries or accounts have to be taken".[5]

However, for the doctrine to be applicable in any particular case, the proceedings must have resulted in a judgment or decree; a mere verdict, without a subsequent judgment or decree, is not *res judicata.*

Some record of the act of the judicial tribunal on which the estoppel is to be based must be available to the second tribunal, or a valid reason must be given why it cannot be produced. Nevertheless the Doctrine is not a technical doctrine applicable only to "records" strictly so called. A judgment or decree, and the issues which it has decided, can usually be proved satisfactorily in subsequent proceedings even if there is no formal "record" in existence, or if the formal "record" is not tendered in evidence.

Therefore, the Doctrine of *Res Judicata* operates in favour of "final and conclusive" judgments of judicial tribunals which are not of record as well as of courts of record.

(3) *RULES WHICH DETERMINE WHEN A JUDICIAL TRIBUNAL BECOMES FUNCTUS OFFICIO FOR VARIOUS PURPOSES.*

(i) *The conception of a judicial tribunal being functus officio.*

Complementary to the Doctrine of *Res Judicata* is the conception that, when a judicial tribunal becomes *functus officio* in respect of a particular case, its powers and jurisdiction are exhausted in respect of that case.

In order to decide whether a judicial tribunal has or has not become *functus officio*, somewhat different rules are applied according to circumstances. Or, to state the point in another way, there are four different meanings of the term.

The first three meanings, and the rules from which they are derived, are primarily relevant to applications for revisions of decisions

4. Sometimes it is said that a judgment is *res judicata* only if it is "final and conclusive." This phrase is probably derived from the fact that, in the older authorities, "estoppel" was frequently called "conclusion." A plea of *res judicata* operates as an estoppel if the plea is based upon a judgment which is "final and conclusive."
5. *Halsbury's Laws of England* (2nd Edn.) Vol. 13, p. 403. On the other hand, it has to be kept in mind that, if a judgment is not intended to be final and is therefore not a *res judicata*, it nevertheless may be sufficient to ground an estoppel.

or for re-trials. The first of these points out that, if a tribunal becomes totally defunct as a judicial tribunal, it becomes *functus officio* in respect of decisions made by it before it becomes defunct. The second and third indicate the limits of a judicial tribunal's powers to revise its own decisions or to re-try any case after decisions made by it in the original trial have been rescinded.

The fourth meaning, and the rule from which it is derived, is primarily relevant to the conditions upon which prohibitions will be issued.

The above-mentioned rules which determine when a judicial tribunal becomes *functus officio* for various purposes, merit closer analysis.

(ii) *A tribunal becomes functus officio if it ceases to exist as a judicial tribunal.*

(a) *A Summary of this first rule.*

There is a rule that if a judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is *functus officio* in respect of that case.

The House of Lords decided in *In re Clifford and O'Sullivan*[6] that a "military court" established to execute martial law was not a judicial tribunal of any kind and, never having possessed a judicial *officium* of any kind, could never be *functus officio*. Lord Sumner went on, however, to say in an *obiter dictum* that, even if it had been a judicial tribunal, its existence had been merely temporary, and that as a consequence of its "dispersal" the military officers who had been members of it would have become *functi officio*:

> "It had no element of permanency. . . . Having reported to the commanding officer, the officers comprising the 'tribunal' were definitely dispersed . . . and the so-called 'tribunal', if it ever existed, ceased to exist. There is no analogy whatever between such a 'tribunal' and a permanent institution . . . nor was there, in that case, any power in the 'tribunal' to reconsider its decision or its sentence".[7]

It would seem that similar considerations may apply even to a judicial tribunal which, although it had been a "permanent" tribunal at the date it delivered judgment in a case, is later deprived by legislation of either its existence or its judicial functions.

6. [1921] 2 A.C. 570, at p. 591. As to military courts established by belligerents to try aliens charged with war crimes, crimes against humanity, and crimes against peace, see, however, the writer's *The International and National Competence of Australian Parliaments to Legislate in respect of Extra-Territorial Crime (including War Crimes)*, University of Queensland Papers, Faculty of Law, Vol. 1, No. 2, 1947.
7. *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt and Sanderson Ltd.* (1924) 34 C.L.R. 482, at p. 497, *per* Knox C.J. and Gavan Duffy J.

(b) *The distinction between a "pretended court" and a judicial tribunal acting in excess of jurisdiction.*

Of course, a "pretended court", such as the military court in *In re Clifford and O'Sullivan,* is an instrumentality which has no existence as a judicial tribunal, whether temporary or permanent.

The line is sometimes hard to draw between a judicial tribunal properly so called and a "pretended court". A "pretended court" is in the eyes of the law "not a Court or judicial tribunal of any kind" and does not possess any judicial jurisdiction at all, "not even a jurisdiction which is irrelevant" to any particular case under consideration; but it may be called a "court", as was the "military court" established to execute martial law which was considered in *In re Clifford and O'Sullivan.* On the other hand, if a tribunal has been invested with any judicial functions at all, even if the jurisdiction which it possesses is irrelevant to any particular case under consideration, it is a judicial tribunal and is not merely a "pretended court". Lord Sumner pointed out in *In re Clifford and O'Sullivan*[8] that it is nevertheless difficult to draw the line between a judicial tribunal acting in excess of its jurisdiction and the acts of a "pretended court": "The ursurpation of jurisdiction [may be] a little more flagrant, but it is the same kind of usurpation if any — namely, a usurpation of a right to try the issue which it in fact does try. Whether there is no right or merely not enough, may be immaterial for some purposes but it is quite material in deciding whether the tribunal is merely a 'pretended court' or is a judicial tribunal."

A tribunal may cease to possess any judicial functions it may formerly have had; or judicial functions may be conferred on what was formerly a "pretended court", thereby transforming it into a judicial tribunal.

(iii) *The circumstances in which a judicial tribunal, which has delivered a final and conclusive judgment in the course of a "real" trial, becomes functus officio.*

(a) *A summary of the second and third rules.*

There is a rule that, if a final and conclusive judgment or decree given by a judicial tribunal as to the merits of a case exhausts, in the absence of an order to the contrary by a superior tribunal, its powers and jurisdiction in respect of that case, it is *functus officio.* This rule as to *functus officio* is of importance mainly if an attempt is made to induce the tribunal to vary or rescind in whole or in part, at its own discretion and on its own initiative, any final and conclusive judgment which it may have given as to the merits of a case.

8. [1921] 2 A.C. at p. 587.

In its application to trials, held by a judicial tribunal in the course of its "original" jurisdiction, Sir George Rich in 1944 in *Cameron v. Cole* formulated this rule in the following words: "A court which, after a real trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law".[9] This formula itself indicates that it is applicable only if there happens to have been a "final" and "determinative" decision, after a "real" trial; and that a judicial tribunal becomes *functus officio* in this sense only in relation to a particular matter, not in respect of all matters.

Sir George Rich's formula does not expressly take cognisance of cases in which certain tribunals may validly be empowered by a superior tribunal in particular cases to vary or rescind their judgments, in whole or in part.

In this connection, the fact that the term *"functus officio"* may be used with different meanings should be particularly noticed. Sometimes a judicial tribunal is said to be *functus officio* if it has given a "final and conclusive" judgment and possesses no jurisdiction to vary or rescind it at its own discretion. (This is the second rule.) On other occasions it is said that, even in such circumstances, a judicial tribunal is not *functus officio,* if it still retains a contingent jurisdiction to vary or rescind its judgment in the event of a superior tribunal remitting the matter to it for re-consideration in whole or in part, or of an order being issued to it by a superior court commanding it to vary or rescind its judgment in whole or in part. (This is the third rule.)

Thus, after a judicial tribunal has given a final and conclusive judgment in a particular case, although it may subsequently not be able to vary or rescind it at its own discretion, it may nevertheless have in reserve a contingent power, which enables it to vary or rescind its judgment in whole or in part in the event of a superior tribunal remitting the matter to it for re-determination by it in whole or in part.

It would seem, however, that a judicial tribunal is *functus officio* within both the second and third rules, if, although an appeal lies to a superior tribunal, the latter has no power to remit the matter to the former for retrial, and the former has no reserve power to state a special case or at its own discretion take any further steps in furtherance of the appellate proceedings.

Looked at from one point of view, the conception of a tribunal being *functus officio* is little more than a particular application of the general rule that a tribunal can validly do anything that is within its powers, and nothing that is beyond its powers. One of its powers may

9. (1943-4) 68 C.L.R. at p. 590.

be that of varying or rescinding its decisions, either in certain specified circumstances (such as a direction to that effect received from a superior court) and in accordance with certain specified procedures, or at its own discretion. On the other hand, it may not have any such power. Only by an examination of the relevant legislation and case-law can the existence or non-existence of such a power be ascertained, and, if existent, only by such an examination can its extent and the conditions of its exercise, be determined.

(b) *There must be a res judicata.*

For a judicial tribunal to become *functus officio* it must have delivered a valid judgment or decree of a final and conclusive nature. A *res judicata* must have come into existence.[10] This is so, in respect of both the second and the third rules.

A final and conclusive, or definitive, judgment must have been given; not a merely interlocutory one.[11]

This implies, furthermore, that the Court must have had jurisdiction to give the judgment. As Sir George Rich pointed out, his formula is inapplicable if there has been no "real" trial. "If in the course of a purported trial a fundamental irregularity has occurred which prevents it being a trial at all", the tribunal is not *functus officio* and can treat its earlier decision as void or voidable (according to the status of the tribunal) and either disregard it or set it aside, whichever course of action is appropriate. Sir John Latham, Sir George Rich and Mr. Justice McTiernan, three of the five members of the High Court who sat in 1943-4 in *Cameron v. Cole*[12] were of opinion that, although the Federal Court of Bankruptcy had made a sequestration order on 22 December, 1942, the Court was not *functus officio,* because the hearing was only a "purported" trial and not a "real" trial. They were therefore of opinion that the Court had jurisdiction to disregard or set aside the order of 22 December, 1942, and to make the new sequestration order which it subsequently made on 13 August, 1943, and that, therefore, the order of 13 August, 1943, was a valid one.[13] On the other hand, Mr. Justice Williams[14] thought that in this particular case, despite the irregularity, the Bankruptcy Act made it necessary to employ the procedure prescribed by that Act for reviewing the validity of sequestration orders, and that, except in so far as the Bankruptcy Act had conferred upon it particular statutory powers

10. See above, as to the Doctrine of *Res Judicata.* The judgment must be final and conclusive even if not in form: *Halsbury's Laws of England* (2nd Edn.), Vol. 13, p. 446.
11. (1943-4) 68 C.L.R., at p. 590. Also see *In re St. Nazaire Co.* (1879) 12 Ch.D. 88; *Hession* v. *Jones* [1914] 2 K.B. 421; *Re V. G. M. Holdings Ltd.* [1941] 3 All E.R. 417; *Blyth* v. *Blyth* [1943] P. 15.
12. (1943-4) 68 C.L.R. 571.
13. Sir Hayden Starke reached the same conclusion, but based it on different grounds.
14. (1943) 68 C.L.R., at pp. 607-612.

of review, the Federal Court of Bankruptcy could not merely disregard or set aside the sequestration order of 22 December, 1942, as though it had never been made at all.

(c) *There must not remain in the tribunal any jurisdiction to vary or rescind the res judicata, either at its own discretion or contingently upon its receiving from a superior tribunal an order to do so.*

To such a great extent do the exact limits of the jurisdiction and powers of judicial tribunals in Australia in modern times depend upon the provisions of legislative enactments, that there can never be any certainty that a judicial tribunal in any particular case is or is not *functus officio* at any particular stage of proceedings, unless and until a careful examination has been made of all relevant legislative provisions.

For example, it should be noticed that although modern legislation as to a Case Stated, Quashing Order, Statutory Order of Prohibition, or a Special Case, proceeding from an inferior to a superior tribunal, has in certain instances affected the common law rules as to re-trials, it has, in other instances, left them unimpaired.

Platz v. Osborne[15] is a case in point. Osborne had been convicted by a stipendiary magistrate of having in his possession two motor tyres and nine motor tubes suspected of having been unlawfully obtained. Osborne having obtained an order nisi to quash the conviction, the Queensland Full Court held that Osborne had been wrongfully convicted as to the nine motor tubes, but refused either to amend the sentence of two months imprisonment with hard labour or to remit the matter to the stipendiary magistrate for reconsideration by him, and quashed the conviction in its entirety and not only in respect of the motor tubes. The High Court granted the prosecutor special leave to appeal, but after argument dismissed the appeal. In the course of their opinions the High Court drew a distinction between those provisions of the Queensland *Justices Acts* which provided for the review of decisions by means of Quashing Order and those which provided for review by Special Case; and decided that under the former provisions the appellate tribunal has no power to remit the case for reconsideration by the stipendiary magistrate, whereas it does possess such a power under the provisions as to Special Case. The relevant points are brought out in the following passages taken from the opinion of Mr. Justice Williams[16]:

> "At common law, when an inferior court acquitted or convicted an accused person, subject to a case stated which was then removed into a superior court on certiorari, the superior court could

15. (1943) 68 C.L.R. 133.

16. (1943) 68 C.L.R., at pp. 148-149, and 146.

only quash the acquittal or conviction upon the hearing of the case, and could not remit the matter for a rehearing. This was because a decision of an inferior court on the merits, though quashed, exhausts the powers and jurisdiction of that court. It is *functus officio* (*R. v. Bourne*[17], *R. v. Justices of Antrim*[18]). It was no doubt to overcome such defects that express powers to remit upon a case stated and to modify a decision of a court of summary jurisdiction were conferred upon a superior court by s. 6 of the Imperial *Summary Jurisdiction Act* 1857, and by s. 33 of the Imperial *Summary Jurisdiction Act* 1879. . . .

"Where the appeal to the Supreme Court of Queensland is by way of special case under ss. 226-236 of the [*Queensland Justices Acts*] on the ground that a decision of justices is erroneous in point of law or is in excess of jurisdiction, the Court may, *inter alia,* remit the matter to the justices; but on such an appeal any party to the proceedings who desires to appeal may apply to the justices to state a case, the justices as they have to state a case are not *functi officio,* and s. 231 confers an express power upon the Supreme Court to remit the matter to the justices . . .

"The question that arises upon this appeal is whether the Supreme Court can by force of . . . [ss. 209-217 of the Queensland *Justices Acts*] remit the matter to the justices for a new trial . . . [These sections do] not authorize the Court to direct a new trial . . . If there are mistakes made by the justices which are amendable the Supreme Court of Queensland can exercise the power conferred upon it by s. 214 of the Queensland Act and allow the conviction or order to be amended, just as the Supreme Court of New South Wales can exercise similar powers conferred upon it by s. 115 of the New South Wales Act. But if either Court considers that the conviction or order cannot be amended it must direct it to be quashed or stayed. It cannot order a new trial."

It is obvious from *Platz v. Osborne* that legislation can prescribe exactly when a tribunal becomes *functus officio.* As Sir John Latham[19] said in *Platz v. Osborne,* if the words of a statute confer upon a superior court power to remit a case to a lower court, "it is beside the point to say, in any sense, that the lower court is *functus officio.*" However, legislation may be ambiguous, and does not always deal clearly and expressly with a court's powers to review its own decisions. Legislation often, therefore, needs to be very closely considered in deciding whether a court is or is not *functus officio.*

(iv) *The fourth rule: Prohibition lies even after final judgment, until the judgment has been fully executed.*

17. (1837) 7 A. & E. 58; 112 E.R. 393.
18. [1906] 2 I.R. 298.
19. (1943) 68 C.L.R., at p. 140.

Whether a tribunal is or is not *functus officio* in any particular case is particularly relevant when a "superior" court is asked to issue a prohibition, which cannot be validly issued if the "inferior" tribunal is already *functus officio* as to the particular decision complained of.

The law as to prohibition has developed a wider concept of *functus officio* than has the law, considered above, concerning new trials and the revision by a court of its own decisions.

An inferior tribunal is not *functus officio,* within the meaning of the rules as to the issue of prohibition, merely because a final and conclusive judgment has been delivered and because all avenues of review have been exhausted. Prohibition may be issued to it at any time before the judgment has been fully executed. This has been held to mean, in respect of an industrial award made by an industrial tribunal, that prohibition may issue at any time whilst the award remains in force. It should be kept in mind, however, that in this connection the term *functus officio* is used in a different sense than in the rule which Sir George Rich enunciated in *Cameron v. Cole.* In the latter case the jurisdiction of a tribunal to vary or rescind its own judgments was considered, and no question arose as to prohibition.

In *Platz v. Osborne* in 1943 Sir John Latham[20] pointed out this difference in terminology:

> "In this case there is no suggestion that the magistrate of his own motion can rehear the case in which he has convicted the respondent. In the sense that he has completely exercised his functions in determining the case it can be said that he is *functus officio.* But strictly, where a court has made an order, the court is not *functus officio* until the order has been fully obeyed—see *R. v. Hibble*[21]— though this proposition of course does not mean that a court may without express statutory authority, of its own motion, rehear and redetermine a case which it has already heard and determined."

In respect of judicial tribunals in general, "whenever the want of jurisdiction appears on the face of any proceedings prohibition will go after judgment and even after sentence"[22] and until the moment that its execution is completed. From this principle it has been deduced, in respect of any industrial award made by an industrial tribunal, that, unless and until the award is repealed, the tribunal will not be *functus officio.* So long as the award remains in force prohibition will therefore lie to correct any excess of the tribunal's jurisdiction committed in the making of it.

This point has been of importance in a number of Australian cases concerning industrial awards made by various industrial

20. (1943) 68 C.L.R., at p. 139.
21. (1920) 28 C.L.R. 456, at pp. 467, 475.
22. (1924) 34 C.L.R., at p. 552.

tribunals[23], such as the Commonwealth Court of Conciliation and Arbitration. In several reported cases concerning industrial awards the High Court has issued prohibition to the Commonwealth Court of Conciliation and Arbitration, and to other industrial tribunals, even after the tribunals have made and promulgated the particular industrial award in question. The underlying assumption has been that an industrial tribunal does not become *functus officio* in respect of an award merely by making it and promulgating it.

One difficulty[24] experienced in extending the principle to industrial, as well as other, tribunals was the fact that some industrial tribunals had not been given jurisdiction to enforce their awards, enforcement being left to other tribunals. The majority judges of the High Court, however, have not considered this difference as significant. Thus, in *R. v. Hibble; Ex parte Broken Hill Proprietary Co. Ltd.*, a case in which the High Court in 1920 issued prohibition to the Chairman of a Special Tribunal constituted under the Industrial Peace Act directing him not to proceed further with an award, which had been invalidly made by the Chairman instead of by the Special Tribunal as a whole, Knox C.J. and Gavan Duffy J. expressed the following views in their joint opinion:[25]

> "So long, at any rate, as a judgment or order made without jurisdiction remains in force so as to impose liabilities upon an individual, prohibition will lie to correct the excess of jurisdiction . . On principle, it appears to us quite irrelevant whether the enforcement of the order made without jurisdiction is left in the hands of the Court which made the order or is committed to some other tribunal. No doubt the test usually applied in cases decided in England for the purposes of determining whether the operation of the order complained of has been exhausted is to inquire whether the Court which made the order can proceed to enforce its performance, but probably the reason for this is that in those cases the order if enforceable at all would be enforceable in the Court which made the order."

In the High Court there was formerly a strong undercurrent of minority opinion on this question, but it has not prevailed, despite the cogency of their arguments. This minority contention was expressed

23. (1920) 28 C.L.R., at p. 492, *per* Starke J.

24. For example, Mr. Justice Higgins, one of the dissenting judges in *R.* v. *Hibble. Ex parte Broken Hill Proprietary Co. Ltd.*, considered that, after a Special Tribunal under the Industrial Peace Act had made an award, the Special Tribunal (and its Chairman) was *functus officio:* " There is now no judicial proceeding to take place *before the tribunal*, and there is nothing to prohibit as regards any proposed action, of the tribunal ": (1920) 28 C.L.R., at p. 490. At that stage, he considered, prohibition was an inappropriate remedy; but an invalid industrial award could be successfully challenged should any attempt be made to prosecute anybody for contravention of it.

25. (1920) 28 C.L.R., at pp. 463-4.

as follows by Isaacs and Rich JJ. in *R. v. Hibble; Ex parte Broken Hill Proprietary Co. Ltd.*[26]:

> "The 'award' is not an exercise of the judicial power of the Commonwealth: it is not like an order of a Court, as to which, as the House of Lords has said, the Court is not *functus officio* until the order is fully obeyed. It is a part, and a necessary part, of the method of legislation by sec. 51 (xxxv) . . . [of the Australian Commonwealth Constitution] . . . An award is of a 'legislative' nature because it is a 'factum' on which the law operates. The Tribunal, then, is *functus officio* unless and until it is by law put again in motion, but only for the purpose of creating a different 'factum' either wholly new or by way of variation. But in the meantime, and with regard to the completed award, how can it reasonably or legally be said that the Tribunal is about to do anything?"

(4) *CONCLUSION.*

Capacity to give final and conclusive decisions is a characteristic of judicial tribunals[27]. The High Court is disposed to use, as one test of the judicial character of any decision, the question whether, in the words of Sir Owen Dixon[28] in the *Commissioner for Railways (N.S.W.) v. McCulloch,* it is made by "a judicial tribunal giving a conclusive judgment, subject to appeal, on the relative rights of all the parties arising under the legal system"; that is, whether the decision is one which is protected by the Doctrine of *Res Judicata.*

The question whether in any particular case a judicial tribunal has or has not given a decision which is final and conclusive, so far as that particular tribunal is concerned in that particular case, is determined by ascertaining whether it is or is not *functus officio* in respect of that decision in that particular case. The answer to this question depends upon the following four rules:—

26. (1920) 28 C.L.R., at pp. 475-6. Also see the opinion of these two judges in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (1924) 34 C.L.R., at p. 500; and the extract, given in footnote 24 above, from an opinion by Higgins J.

27. It is not correct to say, however, that because a judgment happens to be "final and conclusive," and therefore "binding," nothing but judicial decisions are "binding," or that if a decision is a "binding" decision that it must necessarily be judicial in its nature. As Sir John Latham pointed out in *Rola Co. (Australia) Pty. Ltd.* v. *Commonwealth:* "The word 'binding' is used in more than one connection. . . . It is not a word limited to the description of obligations created by judicial action. A man is 'bound' by a statute which applies to him: he is 'bound' by a contract which he makes: he is 'bound' by an award of an arbitration pursuant to a submission by him: he is 'bound' by an industrial award which applies to him. . . . The fact that a Committee of Reference is given power to decide contested questions of fact, and the further fact that its determination upon such questions is made binding upon parties who are in controversy as to fact, do not show that judicial power has been entrusted to the Committee." (1944) 69 C.L.R., at pp. 197 and 201. Also see *per* Starke J. at p. 212.

28. (1946) 72 C.L.R., at p. 161.

(1) For all purposes, a judicial tribunal is *functus officio* in respect of any particular case if, after giving a final and conclusive judgment as to the merits of the case, it has ceased to possess any of its judicial functions or, from any other cause, has ceased to exist as a judicial tribunal.

(2) If a judicial tribunal has given a final and conclusive judgment as to the merits of any particular case, it is sometimes said to be *functus officio* in respect of that case, in the sense that it cannot at its own discretion vary or rescind that judgment in whole or in part.

(3) If a judicial tribunal has given a final and conclusive judgment as to the merits of any particular case, but has in reserve a contingent power to vary or rescind it in whole or in part in the event of a superior tribunal remitting the matter to it for re-determination in whole or in part, the superior tribunal can so remit the matter, the original tribunal not being *functus officio* in any way which would prevent it varying or rescinding its judgment in whole or in part, to the extent that it is so ordered by the superior tribunal.

(4) A superior court may issue prohibition to any inferior tribunal to prevent it proceeding further in any case in which the inferior tribunal has exceeded its jurisdiction; but prohibition will not lie after the inferior tribunal has become *functus officio*. For this purpose, however, a tribunal is not *functus officio* unless and until a final and conclusive judgment has been fully executed; and in respect of an industrial award made by an industrial tribunal this means that prohibition will lie for as long as the award is unrepealed.

These four rules as to *functus officio* determine whether a decision is final and conclusive so far as concerns the subsequent powers of the judicial tribunal which made it, and in respect of the particular case in which it was made. The rules as to *res judicata* ensure that the decision shall also be final and conclusive in any subsequent judicial proceedings whatsoever (other than in the particular case in which the decision was made), whether such proceedings be instituted in the same, or in some other, judicial tribunal, provided that exactly the same question is in issue in the later proceedings as in the earlier.

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Dr. Fry died suddenly at Canberra on September 23, 1953, after this article had been received from him. An obituary is published on p 86.