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БИБЛІОТЕКА
* Ученаго Комитета Мин. Фин. *

29574.

THE CONSTITUTION

OF

The Commonwealth

OF

Australia

36452.

BY

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OF KING'S COLLEGE, CAMBRIDGE, AND OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW; DEAN OF THE FACULTY OF LAW IN THE UNIVERSITY OF MELBOURNE.

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PREFACE.

It is now more than nine years since the Commonwealth of Australia was established; and the Constitution which was then planted in Australian soil has been watered bounteously by judicial decision, Parliamentary practice and the course of politics between England and Australia, and Commonwealth and States. It will probably be long before the more elusive political development will warrant any confident judgment upon the whole—time only can give the necessary perspective. So, at any rate, it appears to the writer, who has aimed at presenting merely the externals embodied in the law, in such practice as appears to be established, and in what may perhaps be described as doctrinal opinion. The limitations of a text-book are sufficiently obvious, of which we are not likely to want frequent reminders. Federalism, as Professor Dicey remarked years ago, is legalism; and much of its law is hard, dry, and technical. But at the same time it involves, more perhaps than any other branch of law, a frequent recurrence to first principles; and problems have already emerged in Australia which stir the depths of juristic thought—the nature of the federal state in an Empire (p. 345 *et seq.*); the nature of the taxing power and whether rewards are sanctions (p. 511 *et seq.*); what are the essentials of legislative, executive, and judicial power respectively; what is the principle of judicial precedent—is

it limited by the possibility of reversal (p. 238); while the relations of the Commonwealth Arbitration Court to the State laws have furnished some interesting discussions on right and liberty or "the attitude of legal indifference." Thus, if politics in a federal system become more legal, legal thought is broadened and deepened both by the nature of the problems and the magnitude of the interests with which it has to deal.

While the present work is mainly concerned with "The Constitution" in its technical sense, and the interpretation of it, it has been thought well to include so much of the supplementary legislation adopted by Parliament as would ordinarily be dealt with in an English treatise on constitutional law. Some explanation and apology is due to readers for the incompleteness of the references given to recent cases; the explanation is that the book had to be printed off in sections before the reports were published. The same cause is in part responsible for the somewhat formidable list of "Errata and Addenda." An unforeseen delay in the production of the work has enabled me to insert a note embodying the result of the Referenda on the Constitution Alterations.

My indebtedness to American writers will in most cases sufficiently appear by citations. I must, however, particularly express my obligation to Professor W. W. Willoughby's *American Constitutional System*. Mr. A. Berriedale Keith's *Responsible Government in the Dominions* reached Australia too late for me to make as much use of it as its importance demands, for which this book is the poorer. Turning to Australia, I must take upon myself a large share of the common debt to Quick and Garran's *Annotated Constitution of the Australian Comwonwealth* and to the late Mr. Justice Inglis Clark's *Australian Constitutional Law*. To express my debt to the judgments of the High

Court of Australia would be an impertinence; but I may be permitted to acknowledge how much I have learnt from the arguments before that Court which I have had the opportunity of hearing, arguments the more interesting because the members of the Bench, and sometimes the Bar as well, are among the "Fathers of the Constitution" whose work was being interpreted.

Finally, I desire to acknowledge the kindness of the many gentlemen who have answered my inquiries on various subjects; and to thank my friends Mr. Bernard O'Dowd for preparing the indexes, Mr. G. M. àBeckett, of the Victorian Bar, for undertaking an annotated index of the text of the Constitution, and Mr. R. C. Mills, LL.B., of Queen's College, Melbourne, for assisting me in reading the proofs.

W. HARRISON MOORE.

MELBOURNE, *May, 1910.*

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Whybrow, Australian Boot Trade Employés Federation *v.*, Addenda.
Wiggins Ferry Co., Chicago and Alton Railroad *v.*, 479.
Wilkinson, Armytage *v.*, 403.
Willan, Colonial Bank of Australasia *v.*, 306.
Williams *v.* Howarth, 89.
Wilson, Callan *v.*, 316.
Wilson, R. *v.*, 490.
Wisconsin *v.* Pelican Insurance Co., 479, 480, 493.
Wollaston's Case, 71, 91, 423, 424, 426.
Wong Wing *v.* U.S., 319.
Woodhouse, R. *v.*, 305, 306, 317, 398.
Woodruff *v.* Parham, 514.
Woodworkers' Case, The, (Federated Sawmillers' Association *v.* James Moore & Sons), 286-7, 366, 372, 376, 408, 411, 414, 452, 453, 454, 455, 456.
W.U. Telegraph Co. *v.* Pendleton, 554.
———, Pensacola Telegraph Co. *v.*, 554.

Y

Yale Todd, U.S. *v.*, 319.
Yarbrough, *Ex parte*, 277.
Young *v.* s.s. Scotia, 86.

ERRATA AND ADDENDA.

Pages 81 and 83, Heading.—For "Nature and Authority of the Commonwealth," read "The Constitution of the Commonwealth."

Page 101, Note 2.—The *Opium Case* is now reported under the title of *Baxter* v. *Ah Way* in 8 C.L.R. 626, and 15 A.L.R. 603.

,, 121.—By the *Commonwealth Electoral Act* 1909, sec. 4, three Commissioners for each State are substituted for the single Commissioner.

,, 122.—In November 1909, the Commissioner for Western Australia having made a report under the Act, a motion for its acceptance was submitted by the Minister for Home Affairs to the House of Representatives. The motion was rejected, all the Ministers, except the Minister for Home Affairs, voting against it.

,, 132.—Various amendments in detail are made by the *Commonwealth Electoral Act* 1909.—"Voting by Post" is now governed exclusively by that Act; and the distance from the polling place is reduced from 7 to 5 miles.

Pages 144-145.—This part of the book was printed before the rejection of the Budget by the Lords in November 1909.

Page 160, Note 1.—On the departure of the Governor-General, Lord Dudley, for Ceylon at the end of 1909, a proclamation was issued announcing that the government would be administered during his absence by Lord Chelmsford, the Governor of New South Wales, under a dormant commission dated December 2nd, 1909. (*Commonwealth Gazette*, December 21st, 1909).

,, 166, Note.—For "Help," read "Helps."

Page 168, Note.—On the resignation of the Deakin Ministry following upon the general election of April, 1910, Mr. Fisher, leader of the Labour Party in the last Parliament, was sent for by the Governor-General. He asked for delay pending the meeting of the Party. On his re-election as leader he became free to accept office as Prime Minister. A second meeting of the Labour members of both Houses was held for the selection of the other members of the Ministry, and this was carried out by exhaustive secret ballot. The allotment of the offices was, as in 1908, left to the Prime Minister. All but one of the members of the preceding Cabinet were chosen. The Ministry consists of one member from Queensland and Tasmania, and two from New South Wales, Victoria, South Australia and Western Australia. There is no State unrepresented in the distribution of portfolios, while New South Wales alone has two—the second member from South Australia, Western Australia and Victoria being without administrative office. From these facts it appears reasonable to assume that State representation was considered, both in the election of Ministers and in the allotment of offices ; and it has been stated that the omission of a gentleman from Western Australia who was a member of the Cabinet of 1908 was owing to a desire to include a representative of Tasmania. Of the ten Ministers, three are Senators, one of whom holds the portfolio of Defence, a second holds the title of Vice-President of the Executive Council, and the third is an "Honorary Minister." The Prime Minister takes the office of Treasurer.

Pages 187 *et seq.*—The report of the Public Service Commissioner for 1908 (*Commonwealth Parliamentary Papers* 1909, No. 46), shows that there is in substance a considerable evasion of the safeguards of the *Public Service Act* in the extensive employment of persons who are "exempted" from the Act or are "temporary" hands, engaged under sec. 40 of the *Public Service Act.* In 1908 the number of persons so employed was over 16,600, of whom 15,650 were in the Postal Department. The practice of providing for increased staff requirements by engaging temporary hands is increasing, and the Commissioner believes that there is an undoubted abuse of the provisions of the Act, and considers that the only solution of the trouble is to remove from the Departments all patronage in the matter of temporary employment, and to vest the power in the Commissioner (p. 24).

Page 240, Note 1.—For "1908," read "1907."

Page 272, Line 16.—For "1858," read "1853."

Pages 307-311-313.—*Huddart Parker* v. *Moorhead* is now reported in 8 C.L.R. 330.

Page 320.—The case of *Oceanic Steam Navigation Co.* v. *Stranahan*, (1908) 214 U.S. 320, may be added to the cases cited in the notes.

,, 329.—Line 4 from bottom, for "charge," read "change."

,, 383.—For "Chapter IV.," read "Chapter III."

Pages 384-5.—On the extent of invalidity, see also *The King* v. *Barger*, (1908) 6 C.L.R. at pp. 80-81, 111.

,, 389-390.—See also *D'Emden* v. *Pedder*, 1 C.L.R. pp. 119-120, where it was held that a State Taxing Act passed in general terms ought to be construed as not intended to conflict with the Commonwealth Constitution.

Page 408, Note 3.—The matter here referred to came before the High Court for decision in the case of the *Australian Boot Trade Employés Federation* v. *Whybrow and Others* (March 30th, 1910) not yet reported. The Court held that a federal award giving a higher rate of wages than the minimum prescribed by a State Wages Board was not inconsistent therewith, since the parties might lawfully have made an agreement for such higher rate.

,, 428.—In *The King* v. *Bawden*, (1905) 1 Tas. L.R. 156, the rule exempting federal officers from taxation on their official salaries is applied to a *State Ability Tax* which, though calculated on multiples of the annual value of the residence, the Court finds to be in substance an income tax.

Pages 452 *et seq.*—*Federated Saw Mill &c. Association of Australasia* v. *James Moore & Sons* (*The Woodworkers' Case*), is now reported in 8 C.L.R. 465.

Page 453, Note.—*Conway* v. *Wade* is now reported in (1909) A.C. 506.

,, 455.—The *Broken Hill Case* is now reported in 8 C.L.R. 419, *sub nom. R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Broken Hill Proprietary Co. Ltd.*

,, 457.—Line 6, The question here referred to arose in the case of the *Australian Boot Trade Employés Federation* v. *Whybrow and Others* (March 30th, 1910). In that case a majority of the High Court (Griffith C.J. and Barton and O'Connor J.J.) re-affirmed

the principle laid down in the *Woodworkers' Case* that a federal award must not be inconsistent with the State laws, and that the determinations of Wages Boards were acts of State legislation ; but held also that the powers of the Arbitration Court in industrial disputes extended to doing whatever the parties to the dispute might have effected by agreement. As an agreement for a higher rate of wage than the minimum established by a State Wages Board was undoubtedly within the competence of the parties, it was within the competence of the Arbitration Court to award such higher rate.

Page 457.—Line 9 from bottom, for "9" read "109."

,, 461.—On the subject of Treaties, see further, *Journal of Comparative Legislation*, October 1909, at pp. 79 *et seq.* (*South African Union*, by A. Berriedale Keith), and Keith, *Responsible Government in the Dominions*, p. 136*n*.

Pages 471-473.—*Huddart Parker* v. *Moorhead* is now reported in 8 C.L.R. 330.

,, 497, 499, 501, 503.—For Heading "Subjects of Legislative Power," read "Subjects of Federal Jurisdiction."

Page 576.—For "sec. 102," read "sec. 103."

PART I.—HISTORICAL INTRODUCTION.

CHAPTER I.

THE FOUNDATION OF THE AUSTRALIAN COLONIES AND THE SOURCES OF THEIR LAWS AND INSTITUTIONS BEFORE FEDERATION.

THE Commonwealth of Australia is formed of the Colonies of New South Wales, Victoria, Queensland, Tasmania and Western Australia, and the Province of South Australia. It appears therefore desirable to state briefly the time and circumstances of their foundation, and the sources to which regard must be had in the administration of their laws.

The first thing which must strike an English lawyer who turns to the study of Colonial institutions is the multiplicity and complexity of the sources of the law and their striking contrast with the singleness of authority which dominates the English system.

The Common Law, the Prerogative, Acts of Parliament and Orders thereunder play their part as in England. But the Prerogative looms larger in Colonial than in Home institutions; Acts of Parliament have varying force and authority according to their date and their nature; Orders in Council are less frequently acts of supplementary legislation than the exercise of a statutory suspending power or power to put into operation. In addition to these are the

Acts and Ordinances of Colonial Legislatures, sometimes of Legislatures between which the power of legislation is divided, sometimes of Legislatures which have been superseded by others, as Colonies have been divided or joined together, or their progressive development has been marked by changes in their institutions.

All the Australian Colonies belonged to the class of colonies acquired by settlement or occupancy. The doubts once held as to the status of New South Wales as a penal settlement (see Bentham, *Works*, vol. IV.), must now be regarded as set at rest by the decision of the Privy Council in *Cooper* v. *Stewart*.[1] The sources of the law common to all these Colonies are the following:—

1. The laws of England at the time of the settlement (or some date fixed by Statute in lieu thereof) so far as they are applicable to the conditions of an infant colony. "It hath been held that if an uninhabited country be discovered and planted by English subjects, all the English Laws then in being which are the birthright of every English subject are immediately in force (Salkeld, 411, 666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English Law as is applicable to their own situation, and the condition of an infant colony."[2]

The "laws of England" include the Statute Law as well as the rules of common law and equity; the law so imported forms what is sometimes called the common law of the Colony. The applicability of any law according to the principle laid down is one for judicial determination as the occasion arises; it forms one of the most difficult tasks of the colonial judiciary, and from its nature gives rise to many conflicts of opinion. Even the principle itself appears not yet to be wholly settled. Does the "infant Colony"

[1] (1889) 14 A.C. 286.

[2] Blackstone, *Com.* i. 107.

attract more of English Law as its needs develop (as is suggested by Lord Watson in *Cooper* v. *Stewart*)[1] or must a Court called on in 1909 to determine the applicability of any English law take its stand upon the condition of the Colony at the time of its foundation, as laid down by the High Court of Australia in *Quan Yick* v. *Hinds*?[2] If the latter be the true view, a Colony may be founded in conditions which make very little of English Law applicable as of authority; and its legal development will then be peculiarly in the hands of its Judges who would theoretically have a large field for the expression of that "private justice, moral fitness, and public convenience"[3] which make common law. Practically, however, whether by way of authority or of doctrine, English Law is applied as of course unless there be some striking cause of inapplicability or unsuitability. If there be, any theoretical difficulty in avoiding the particular rule of English Law is overcome by the consideration that it would certainly not be more suitable or applicable at the foundation of the Colony than it is to-day.

Another way of approaching the subject is suggested by the dictum of Sir W. Grant, M.R., in *Att.-Gen.* v. *Stewart*.[4] "Whether the Statute (of Mortmain) be in force in the island of Grenada will, as it seems to me, depend upon this consideration—whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English Law that property is governed." According to this view, attention is fixed not on the condition of the Colony, but on the English Law. That law consists in part of institutions and rules which

[1] (1889) 14 A.C. 286.

[2] (1905) 2 C.L.R. 345, 356.

[3] Per Willes J. in *Millar* v. *Taylor* (1779), 4 Burr. 2303, at p. 2312.

[4] 2 Mer. 143, at p. 160.

operate upon or in relation to facts and conditions which are peculiar and local; in part, of laws and institutions which are so far general as to be reasonably applicable, wherever English Law is the *lex terræ*. The whole of the latter law becomes the law of a settlement Colony except so far as it may be particularly excluded. In other words, the rule depends upon a distinction analogous to one of the antitheses of *jus civile* and *jus gentium* in Roman Law. The principle has much to commend it: it substitutes a more definitely legal test than "suitability," one which gives the same result in the case of all settlement Colonies, and one which if adopted would give a real meaning to the expression "British law." It overcomes also the difficulty already referred to as to the time to be regarded in determining suitability, and that of subsequent attraction. It was adopted by the High Court of Australia in *Delohery* v. *Permanent Trustees Co.*,[1] but is not adverted to in *Quan Yick* v. *Hinds*.[2] It is certainly not from this point of view that the matter has commonly been dealt with by the Courts.

In any case, this class of laws—the "common law" of the Colony in the sense above described — falls completely within the power of the Colonial Legislature, which may declare what laws are in force and may repeal any of them; and on the same principle no repeal of such laws by the Parliament of the United Kingdom affects their operation in the Colony.[3]

2. Acts of the Imperial Parliament made applicable.—Acts of the Imperial Parliament *made applicable* to the Colony either in common with other dominions of the Crown or specially, whether by express words or necessary intendment—these Acts are of paramount obligation. The

[1] (1904) 1 C.L.R. 283.
[2] (1905) 2 C.L.R. 345.
[3] See per Fellows J. in *R.* v. *Mount*, 4 A.J.R., at p. 39.

expression *made applicable to the Colony* requires some explanation. In the first place, it excludes those Acts of Parliament which being part of the general law of England applicable to the circumstances of the Colony are received at its settlement as part of its common law; and it includes all Acts by which Parliament intends to bind the Colonies, whether those Acts were passed before or after the settlement of the Colony.[1] In the second place, an Act of the Imperial Parliament may relate to a Colony without being in force there, just as it may relate to a foreign country. An Imperial Act may relate or refer to persons, to things situated, to acts done, or to events happening in a Colony or foreign country; but the enforcement of the regulation established by the Act may belong to the English Courts alone, and be limited by the powers of those Courts to make their orders effective. The Colonies, through their inhabitants and in other ways, receive by many Statutes certain favourable treatment in England and in English Courts, either absolutely or upon terms of reciprocity, *e.g.*, by the *Colonial Solicitors Act* 1900, the *Colonial Probates Act* 1892, and the *Finance Act* 1894. These and the like Acts are very commonly regarded as "applicable to" the Colony; they are in fact "in operation in England in respect to" the Colony. The importance of this distinction is obvious; but it was ignored by those who compared the financial proposals of the Chancellor of the Exchequer in 1894 with the *Stamp Act* of 1765 and the *Tea Duty* of 1770. Again, the *Wills Act* 1861, secs. 1 and 2, affects wills made in the Colonies and wills of persons domiciled in the Colonies, but only for the purpose of admitting them to probate in England or Ireland, and in Scotland to confirmation. The *Bankruptcy Acts* and the *Companies Act* illustrate the two different kinds of operation. The *Bankruptcy Acts* vest in

[1] See Lewis, *Government of Dependencies*, p. 201.

the trustee the debtors' property everywhere in such a way that the trustee's title is enforceable in all parts of the British Dominions; and a discharge in bankruptcy in England is a discharge in a paramount jurisdiction, recognized and enforced in all parts of the British Dominions.[1] On the other hand, in the winding up of a company in England, while the English Court will treat its orders as affecting all Colonial property of the debtor and as binding all his Colonial creditors, the operation of these orders is limited by the power of the English Court to give effect to them, and any recognition they may obtain in the Colonies is due, not to any paramount jurisdiction, but to the "comity of nations."[2]

Statutes of this class, *i.e.*, made applicable or extending to the Colonies, may not in general be repealed or varied except by the Imperial Parliament (*Colonial Laws Validity Act* 1865, sec. 2). But the application of this rule is occasionally excluded by a provision giving special power to the Colonial Legislature to make laws as if the Act had not been passed, and to alter or vary it (*e.g.*, *Coinage Act* 1853), or to repeal the Act or some part of it (*e.g.*, the *Merchant Shipping Act* 1894, sec. 735). A special reason for such a provision is that the machinery for carrying out an Act, even upon an Imperial matter, as extradition, may be more conveniently devised by the Colonial Legislature.

3. Statutory Orders and Regulations.—Orders or Regulations made by the Crown in pursuance of Acts of the Imperial Parliament, to which they are equal in authority. These Orders—

(*a*) Put an Act into operation in a Colony, the Act being in terms postponed in the case of such Colony until an

[1] *Ellis* v. *McHenry*, L.R. 6 C.P. 228.

[2] *New Zealand Loan and Mercantile Agency Co. Ltd.* v. *Morrison*, L.R. 1898 A.C. 349.

Order is made. This is the commonest case, and many illustrations might be given, *e.g.*, *Colonial Courts of Admiralty Act* 1890, in the case of four Colonies scheduled.

(*b*) Suspend the Act or a portion of it, or apply it with modifications in the case of a Colony, generally on the ground that the Legislature of the Colony has made suitable provision for carrying out the purposes of the Act, *e.g.*, the *Extradition Act* 1870, sec. 18; *Coinage Act* 1853; *Colonial Copyright Act* 1847; *International Copyright Act* 1886, sec. 8, sub-sec. 3; *Patents Designs and Trade Marks Act* 1883, sec. 104.

(*c*) Supplement the Act, *e.g.*, The Charters of Justice of New South Wales 1823 and Tasmania 1831.

(*d*) Bring new subjects within the scope of the Act, as where the operation of the Act depends upon treaties, *e.g.*, the *Extradition Act* 1870 and the *International Copyright Act* 1886.

(*e*) Give to a Colonial Law the force of law throughout the British Dominions, *e.g.*, *Colonial Prisoners Removal Act* 1884, sec. 12; the *Fugitive Offenders Act* 1881, sec. 32; *Merchant Shipping Act* 1894, sec. 264 (Application of Part II. by Colonial Legislatures).

The Orders in Council under the *Colonial Prisoners Removal Act* 1869, sec. 4, and the *Merchant Shipping Act* 1894, secs. 670-675 (Colonial Lighthouses, &c.) are made upon an address of the Colonial Legislature.

3. Prerogative Orders, Charters, and Letters Patent.—Prerogative Orders, including Charters and Letters Patent, are not of the same importance in a settled as in a conquered Colony; as Constitutions come to rest more and more on Statute, the Prerogative recedes. Its most important exercise is in the grant of Constitutions, the establishment of Executive authority, the appointment of Governors and the definition of their powers, and the

setting up of Courts of Justice. Most of these things in Australia, however, are done by the Crown under statutory authority, and so fall into the last preceding class. The Orders in Council relating to colonial currency are conspicuous cases of Prerogative Orders in operation in the Colonies.

These instruments are contained in volumes published annually by authority, and those in force are periodically collected and published under the description "Statutory Rules and Orders Revised."

5. Statutes and Ordinances of Colonial Legislatures.—Statutes and Ordinances made by the Legislature of the Colony, meaning thereby the authority other than the Imperial Parliament or the Crown in Council competent to make laws for the Colony, are of course the ordinary source of new laws in the Colony. There may be more than one such authority. Some Colonies have been formed by separation from others, and inherit the laws enacted by the Legislature of the mother Colony before the separation. Such laws, so far as they apply within her borders, the daughter Colony may repeal. In other cases, there may be legislatures with exclusive powers over different subjects, or with concurrent powers but so related that in case of conflict the enactment of the one shall prevail over the enactment of the other. Both these conditions are true of the Dominion of Canada, and of those Colonies of Australasia which were members of the Federal Council of Australasia. Generally, the powers are exclusive, but where the same matter is within the power of both the central and the local Legislature, the enactment of the central Legislature prevails. Each authority retains control over its own laws, and alone may alter or repeal them.

Amongst "Laws and Ordinances made by the Legislature of the Colony" are included many Acts of the Imperial

Parliament which have been adopted for the Colony by the local Legislature. They form part of the ordinary legislation of the Colony, and are to be distinguished from other local laws merely by a rule that where a Statute has before its adoption by the Colony received an authoritative judicial construction in England, that construction is generally deemed binding in the Colonies.[1]

6. Orders under Acts of Colonial Legislature.—Rules, Orders and Regulations issued by some authority within the Colony under powers conferred by the Colonial Legislature, *e.g.*, the Governor in Council, are hardly to be regarded as an independent source of law, since they are issued by an authority acting by delegation merely and are subject to the control of the local Legislature.

THE AUSTRALIAN COLONIES SEPARATELY CONSIDERED.

NEW SOUTH WALES.

Captain Phillip's expedition arrived at Botany Bay on the 18th January, 1788, and formal possession of Sydney Cove was taken on the 26th January, which is observed in Australia as "Foundation Day," though the proclamation of the Colony did not take place until the 7th February. The Governor's commission and proclamation embraced the territory now forming the States of New South Wales, Tasmania, Victoria, and Queensland, as well as part of New Zealand and of the Western Pacific. The early government

[1] See *Harding* v. *Commissioners of Stamps for Queensland* (1898), A.C. 769. But in *R.* v. *Hyland* (1898), 24 V.L.R. 101, the Supreme Court of Victoria declined to follow *R.* v. *Hillman* (1863), 9 Cox. 386, a decision on an English Statute subsequently adopted in Victoria.

was little in accord with the principles applicable to free settlements, and much that was done in the name of authority had a very slender basis of law to support it. The uncertainty as to the legality of the government was met by the Statutes of 4 Geo. IV. c. 96, and the Charter of Justice of the 13th of October, 1823, and by 9 Geo. IV. c. 83. Although the Act under which the Colony was founded (27 Geo. III. c. 2) contemplated the establishment of "a colony and civil government," the true foundation of civil as distinguished from military government dates from 1823. A Supreme Court with the ordinary adjuncts of a common law Court as contrasted with those of a Court Martial was established, and the Ordinances of a Council, equipped by Statute with Legislative power, took the place of the doubtful regulations of the Governor. In 1829, the *Australian Courts Act* 1828 (9 Geo. IV. c. 83) superseded the temporary provisions of the Act of 1823; and while confirming the Supreme Court and the Legislative Council, the Act also set at rest doubts concerning the law in force in the Colony. Section 24 of the Act provided "that all Laws and Statutes in force within the Realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any Charter, or Letters Patent, or Order in Council which may be issued in pursuance hereof), shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said Colonies." This has been construed as not applying merely to procedure on the one hand nor introducing the whole law of England on the other, but putting the Colony in the same position as if it had been founded on the 25th of July, 1828.

The law enacted in the Colony before the establishment of the Commonwealth consisted of—

1. Laws and Ordinances made by the Governor and a nominee Council established by Royal Warrant, coming into operation in 1825 under the authority of 4 Geo. IV. c. 96, continued by 9 Geo. IV. c. 83.

2. Laws made by the Governor and a Legislative Council, one-third nominee, two-thirds elective, established by 5 & 6 Vict. c. 76. The Constitution and powers of the Council were affected by 13 & 14 Vict. c. 59.

3. Laws made by the Queen and a Legislative Council (nominated) and Legislative Assembly (elective) established by 18 & 19 Vict. c. 54 (empowering the Queen to assent to the New South Wales Act 17 Vict. No. 41).

4. Orders, Rules and Regulations made by various authorities in pursuance of powers conferred by the Legislature of the Colony.

New South Wales did not become a member of the Federal Council of Australasia, established by the Imperial Act of 1885 (48 & 49 Vict. c. 60).

TASMANIA.

Although the commission of Governor Phillip included the territory of Van Diemen's Land, there was no settlement there until the arrival of an expedition under Lieutenant Bowen, on 12th September, 1803. Bowen was commissioned "Commandant of the Island of Van Diemen" by Governor King of New South Wales; and in February, 1804, the island was made a Lieutenant-Governorship under New South Wales. For some years it was treated less as an integral part of New South Wales than as a dependency of that Colony. The Act of 1823, which established a Council in New South Wales (to make laws for that "Colony and its dependencies,") authorized the establishment of a Supreme Court of Judicature for Tasmania, with an appeal to the Governor of New South Wales. This power was

exercised on 13th October of the same year. Sec. 44 of the Act empowered the Crown to erect Van Diemen's Land into a separate Colony independent of the Government of New South Wales, and to commit to any person or persons within the island such and the like powers, authorities and jurisdictions as might be committed to any person or persons in New South Wales. On 3rd December, 1825, the island was proclaimed a separate Colony, and the appropriate Legislative and executive authority established. By the *Australian Courts Act* 1828, provision was made for the Government of Van Diemen's Land identical with that made for New South Wales (q.v.), and including the provision for the introduction of the Laws of England in the administration of Justice. A Charter of Justice, dated 4th March, 1831 was granted under the powers of the Acts of 1823 and 1828. When the representative principle was introduced into New South Wales in 1842, all that was done for Van Diemen's Land was to make permanent the arrangements of the Act of 1828 and to enlarge the number of members of Council. (See 5 & 6 Vict. c. 76, sec. 53). The island was, however, embraced in the Constitutional arrangements of the Act of 1850 (13 & 14 Vict. c. 59), and under that Act acquired a Legislative Council, one-third nominated and two-thirds elected, with the power to alter its own Constitution. This power was exercised by 17 & 18 Vict. No. 17, passed on 31st October, 1854 (confirmed by 25 & 26 Vict. c. 11), and a Legislative Council and Legislative Assembly, both elected, were substituted for the old Legislative Council. The new Legislature held its first session on 2nd December, 1856.

The Colony was an original member of the Federal Council of Australasia, and remained a member until the abolition of the Council by the *Commonwealth of Australia Constitution Act* 1900.

VICTORIA.

The Colony of Victoria was established by separation from New South Wales on 1st July, 1851, under the provisions of 13 & 14 Vict. c. 59, sec. 1, and was upon that day duly proclaimed by the Governor-General. Thereupon the authority of the Legislative Council of New South Wales over the Colony ceased and determined. The law of the Colony to the establishment of the Commonwealth comprised—

1. Laws and Ordinances of the Legislative Council of New South Wales up to 1st July, 1851, which by the Act were continued in operation in the Colony until such time as the Governor and Legislative Council of Victoria should see fit to repeal or alter them.

2. From 1st July, 1851, to 20th March, 1856, Laws and Ordinances of the Governor and Legislative Council of Victoria (one-third nominated, two-thirds elected).

3. From 21st November, 1856, Laws made by the Legislature consisting of Her Majesty, a Legislative Council and a Legislative Assembly (both elected), established by 18 & 19 Vict. c. 55, empowering Her Majesty to assent to a Bill as amended passed by the Governor and Legislative Council entitled: "An Act to establish a Constitution in and for the Colony of Victoria." This Act was proclaimed in the Colony on 23rd November, 1855, and thereupon came into force.

4. Orders, Rules and Regulations made by various authorities in pursuance of powers conferred by the Legislature of the Colony.

5. Acts of the Federal Council of Australasia, of which the Colony became a member in 1886.

QUEENSLAND.

The Moreton Bay district of New South Wales was by Letters Patent proclaimed a separate Colony under the

name of Queensland on the 6th of June, 1859, in pursuance of a power contained in 5 & 6 Vict. c. 76, secs. 51 and 52 ; 13 & 14 Vict. c. 59, secs. 34 and 35 ; and 18 & 19 Vict. c. 54, schedule 1, sec. 46. The law of the Colony therefore includes—

1. Ordinances and Statutes of New South Wales up to the date of separation, so far as not varied or repealed by the Legislature of Queensland.

2. Statutes passed by a Legislature, consisting of the Governor, a Legislative Council and a Legislative Assembly established by an Order in Council of 6th June, 1859, validated and effectuated by 24 & 25 Vict. c. 44.

3. Orders, Rules and Regulations made by various authorities in pursuance of powers conferred by the Legislature of the Colony.

4. Acts of the Federal Council of Australasia, of which the Colony became a member in 1886.

SOUTH AUSTRALIA.

In 1834, Parliament was persuaded to sanction an experiment in free colonization, and on the 28th of December, 1836, under the powers contained in 4 & 5 Will. IV. c. 95, His Majesty proclaimed "The Province of South Australia." The Act specially exempted the province from the laws and jurisdiction of any other part of Australia. The law enacted in the Colony before the establishment of the Commonwealth consisted of—

1. Ordinances or Acts of Council passed from 28th December, 1836, to and inclusive of the year 1843, by a Council consisting of the Governor and four official members, constituted under the authority of 4 & 5 Will. IV. c. 95, and 1 & 2 Vict. c. 60.

2. Ordinances or Acts of Council passed from the year 1844 to the 21st of February, 1851, both inclusive, by a

Legislative Council consisting of the Governor, three official and four non-official members, constituted under the authority of 5 & 6 Vict. c. 61.

3. Ordinances or Acts of Council passed from the 3rd of October, 1851, to the year 1856, both inclusive, by the Governor and a Legislative Council of twenty-four members, eight nominated by the Crown and sixteen elected, constituted under Ordinance No. 1 of 1851, pursuant to power given by the Imperial Statute, 13 & 14 Vict. c. 59.

4. Acts passed from 1857 onwards by the Parliament of South Australia, constituted under the *Constitution Act* (No. 2) 1855-6, which Act itself was authorized by 13 & 14 Vict. c. 59, the "Act for the better government of Her Majesty's Australian Colonies."

5. Orders, Rules and Regulations made by various authorities in pursuance of powers contained in these Acts.

South Australia in 1888 became a member of the Federal Council of Australasia, and sent delegates to the session of 1889. No law affecting her was passed, and she ceased to be a member before the next session.

WESTERN AUSTRALIA.

Western Australia was declared a British Colony by settlement on 2nd May, 1829, and the first Governor entered upon his government on 1st June, which is said[1] to be the date of the introduction of English Law. The law enacted in the Colony before the establishment of the Commonwealth consisted of—

1. Laws, Institutions and Ordinances made by persons appointed first by Order in Council of 29th December, 1831, under 9 & 10 Geo. IV. c. 22. The power of appointment was continued from time to time by other Acts, and the "Persons" were increased in number, and became a "Legis-

[1] *Journal of the Society of Comparative Legislation*, N.S. No. i., p. 71.

lative Council." A non-official element was introduced in 1839, and in 1868 a representative element. This Legislature began to exercise its powers at the commencement of 1832 and continued until the end of 1870.

2. Laws made by the Governor and a Legislative Council (one-third nominated and two-thirds elected) established in 1870 by Ordinance of the Council last mentioned (Act No. 13, 1st June, 1870) under the authority of 13 & 14 Vict. c. 59, sec. 9.

3. Laws made by the Queen with a Legislative Council and Legislative Assembly established by 53 & 54 Vict. c. 26 (empowering the Crown to assent to the Western Australian *Constitution Act* 1889, passed by the Governor and Legislative Council).

4. Orders, Rules and Regulations issued under the authority of the Ordinances or Acts.

5. Since 1886, Acts of the Federal Council of Australasia.

CHAPTER II.

THE HISTORY OF AUSTRALIAN FEDERATION.[1]

THE dangers which attended the existence in a remote part of the world of a group of separate Colonies, became apparent as soon as the first of those Colonies obtained the most rudimentary form of self-government. An Imperial Act of 1842 provided for the establishment of a Legislature in New South Wales of whose members two-thirds were to be elected by the inhabitants of the Colony. In a few years the Legislatures of New South Wales and Van Diemen's Land were in conflict on the tariff, and Sir Charles Fitzroy, the Governor of New South Wales, in recommending the disallowance of an Act of the Council of Van Diemen's Land, indicated at once the danger and the remedy. He considered it "extremely desirable that the Colonies in this part of Her Majesty's dominions should not be permitted to pass hostile or retaliatory measures calculated not only to interrupt their commercial intercourse with each other, but to create feelings of jealousy and

[1] A very full account of "The Federal Movement in Australia" is contained in Quick and Garran's *Annotated Constitution of the Commonwealth of Australia* (1901). Mr. C. D. Allin, a Canadian writer, in his work *The Early Federation Movement in Australia* (Kingston, Ontario, 1907), has dealt in detail with the movement down to 1863, and has drawn largely upon the less accessible sources, such as newspapers, as well as upon official documents.

ill-will, which, if not checked, may lead to mischievous results." It appeared to him that "considering its distance from home, and the length of time that must elapse before the decision of Her Majesty's Government upon measures passed by the Legislatures of these Colonies can be obtained, it would be very advantageous to their interests if some superior functionary were to be appointed to whom all measures adopted by the local Legislatures, affecting the general interests of the mother country, the Australian Colonies, or their intercolonial trade should be submitted by the officers administering the several governments before their own assent is given." The necessities of trade which called forth this the first suggestion of a single control were to the last the central fact upon which the federal movement depended, at once the most formidable obstacle—"the lion in the path"—and the great impelling force.

That the evils foreseen by Sir Charles Fitzroy would grow with the increase in the number of the Colonies was apparent to the Committee for Trade and Plantations to which in 1849 Earl Grey referred the subject of the better government of the Australian Colonies. The Committee reported that the separation of Port Phillip from New South Wales—which they recommended—would probably be followed by differences in tariffs which would become a grave inconvenience as the number of settlers on both sides of the dividing line increased; and to prevent this, they proposed that an uniform tariff for Australia should be fixed by the Imperial Parliament. For the adjustment of this tariff from time to time, there was to be a General Assembly, representative of all the Colonies, to be summoned as occasion required by a Governor-General. The mode of constituting the General Assembly was indicated; and to it were to be committed, besides the tariff, postal communications, intercolonial transit, the erection and main-

tenance of beacons and lighthouses, port and harbour dues on shipping, and the regulation of weights and measures. The General Assembly was to have power to establish a General Supreme Court with original and appellate jurisdiction, and generally to enact laws upon subjects referred to it by the Legislatures of the Colonies. Finally, there was to be allowed to the General Assembly a power of appropriating funds for the purposes committed to it.[1]

The Constitution Bill of 1850, introduced by Earl Grey, adopted the scheme of the Committee for Trade and Plantations, for the establishment of a general executive and legislative authority in Australia to "superintend the initiation and foster the completion of such measures as those communities may deem calculated to promote their common welfare and prosperity." The scope of the General Assembly was extended in the Bill by a proposal to put the "waste lands" of the Colonies under that body as a means of preventing the dissipation of the resources of the Colonies by the competition of different land systems; and the Government promised consideration to a suggestion that a Supreme Court should be established for the settlement of disputes between the Colonies. Neither in Parliament nor in the Colonies was the measure cordially received. In England, the fact that the Colonies had not asked for such superintendence and supervision; in Australia, jealousies among the Colonies and of the Colonial Office, combined to make the scheme unpopular. The General Assembly clauses passed the Commons, but were withdrawn in the Lords. The amendments required could hardly be made without communicating with the Colonies. Meanwhile the immediate object of the Bill—the separation of Port Phillip from

[1]For the full report, see *The Colonial Policy of Lord John Russell's Administration*, vol. i. Appendix.

New South Wales—was pressing, and the establishment of a General Assembly could be dealt with at some future time.

That part of the scheme which concerned a General Executive, however, did not require Legislative sanction; and Earl Grey had not abandoned his scheme. Accordingly in 1851 Sir Charles Fitzroy was appointed "Governor-General of all Her Majesty's Australian possessions, including the Colony of Western Australia," and the Lieutenant-Governors were instructed to communicate with the Governor-General in matters of common interest. Not less important were the Commissions appointing the Governor-General Governor of each of the Colonies, for they enabled him by a visit to any Colony at once to assume the administration of government there.[1] But Earl Grey left the Colonial Office in 1852, and the nursing policy was abandoned. In the future, suggestions for the government of Australia must come from the Colonies themselves, and on matters of common concern the Home Government must be well assured that the Colonies were thoroughly agreed before any action could be taken. In 1855, the Lieutenant-Governors became Governors, and in 1861 the Duke of Newcastle determined not to renew the commission of Governor-General to the Governor of New South Wales, on the ground that such a title indicated "a species of authority and pre-eminence over the Governors of other Colonies which . . . could not with justice be continued, and if continued could not fail to excite dissatisfaction very prejudicial to their common interests."

In Australia, the expediency of a general, or as it soon came to be called a federal, government demanded too much political foresight to capture the popular imagination. Earl Grey's hopes were, however, shared by Wentworth and Deas-Thomson in New South Wales, and

[1] See Jenks, *Government of Victoria*, 155-6.

by Charles Gavan Duffy in Victoria. In 1853, Committees of the Legislative Council in New South Wales and Victoria were preparing Constitutions embodying responsible government in those Colonies. Wentworth succeeded in inducing the Legislative Council of New South Wales to declare in very emphatic terms for a scheme substantially the same as Earl Grey's; and Victoria, more guardedly, recorded an opinion in favour of occasionally convoking a general assembly for legislating upon subjects submitted to it by any Legislature of the Colonies. The Constitution Bills forwarded to England, however, dealt purely with the affairs of the two Colonies respectively, and a Government whose hands were very full in 1855 did not see its way on the thorny path of Constitution making for the Colonies.

But Wentworth, who had returned to England, Gavan Duffy, who had come to Victoria, and Deas-Thomson pursued the subject with zeal; and the year 1857 was one of promise for the federal cause. The "General Association for the Australian Colonies," under Wentworth's auspices, adopted a Memorial to the Secretary of State, which indicated matters in which the difficulty of securing joint action had already been experienced, and after urging the duty of Her Majesty's Government to anticipate the wants of the Colonies, sketched out the scheme of a permissive bill, for the establishment of a General Assembly. The Legislatures of the Colonies were to appoint an equal number of representatives to a Convention for framing a Constitution for a Federal Assembly. There was no mention of a federal executive, and the expenses of the Federal Assembly were to be apportioned amongst and provided by the Legislatures of the Colonies. The body contemplated was in fact not very different from the Federal Council established in 1885. The list of federal subjects is, however,

an extensive one, and bears witness to the growing inconvenience of separation. The reply to the Memorial was written by Mr. Herman Merivale, and was a *non possumus*. The Secretary of State was sensible of the difficulties which had been experienced, and was aware that they were likely to increase. He did not think, however, that the Colonies were prepared to give such large powers to the Assembly in respect to taxation and appropriation as were involved in the tariff and many other matters to be submitted; and even if they were to assent in the first instance to the establishment of such a scheme, the further result in his opinion would probably be dissension and discontent. He would readily give attention to any suggestion from the Colonies for providing a remedy for defects which experience might have shown to exist in their institutions and which the aid of Parliament was required to remove. If the establishment of some general controlling authority should be impracticable, he trusted that much might be done by "negotiations between the accredited agents of the several local Governments, the results agreed upon between such agents being embodied in Legislative measures passed uniformly and in concert by the several Legislatures."

More important were the steps taken in the Colonies. Independent action was taken in New South Wales and Victoria by the appointment of committees of the Legislature to consider the subject of federation. Mr. Charles Gavan Duffy's committee (Victoria) was the first to conclude its labours, and its report is a striking statement of the case for federation. After affirming that there is unanimity of opinion as to the ultimate necessity for federal union, the report proceeds:—"We believe that the interest and the honour of these growing States would be promoted by establishing a system of mutual action and co-operation amongst them. Their interest suffers and must continue to

suffer while competing tariffs, naturalization laws, and land systems, rival schemes of immigration and of ocean postage, a clumsy and inefficient method of communication with each other and with the Home Government on public business, and a distant and expensive system of judicial appeal, exist. The honour and importance which constitute so essential an element of national prosperity, and the absence of which invites aggression from foreign enemies, cannot perhaps in this generation belong to any single Colony in this southern group, but may and we are persuaded would be speedily attained by an Australian Federation representing the entire. Neighbouring States of the second order inevitably become confederates or enemies. By becoming confederates so early in their career, the Australian Colonies would, we believe, immensely economise their strength and their resources. They would substitute a common national interest for local and conflicting interests and waste no more time in barren rivalry. They would enhance the national credit, and attain much earlier the power of undertaking works of serious cost and importance." Finally, the Committee recommended a conference of New South Wales, Tasmania, Victoria, and South Australia, and laid down with minuteness the questions which such a conference would have to consider.

The New South Wales Committee recognized the difficulties that attended an attempt to deal with the subject, but shrewdly observed that those difficulties were likely to increase rather than diminish.

In 1858, the four Colonies had agreed to a Conference, and in 1860, the new Colony of Queensland gave in her adhesion. All this, however, was not without reservation. South Australia was of opinion that the project of a Federal Legislature was premature, but believed that there were many topics on which uniform legislation would be desir-

able. Queensland, as was to be expected from her newly won independence, foresaw obstacles to the creation of a "central authority tending to limit the complete independence of the scattered communities peopling this continent." A change of Ministry in New South Wales led to a change of policy there, and despite urgent representations from Victoria and Tasmania, the proposed conference never took place. The fiscal conference held in 1863 for the purpose of attempting an agreement on the tariff declined without instructions to consider federation.

The six Colonies of Australia were now well started on their career as separate countries, and as they developed separate interests and separate policies, the prospects of union became more and more remote. The difficulties were of more than one kind. The tariff had been a source of trouble from the beginning. The geographical situation of some of the Colonies was such that goods imported into a Colony with lower duties could readily find their way into other Colonies, and in this way evasion of the revenue laws was systematized, for it was impossible for the Colonies to bear the expense of a service capable of guarding their frontiers. It was for this reason that the need for an uniform tariff was insisted upon in the early years. Even when there was no desire to evade the higher revenue duties, it was often the case that the port of a particular territory was either by natural situation, or the course of trade, in another Colony. Agreements were made which in a rough and ready way provided a remedy. New South Wales and Van Diemen's Land for some years mutually gave free admission to goods. In 1855 an arrangement was come to by New South Wales, Victoria, and South Australia, whereby, first, no import duties were to be taken on goods crossing the Murray, the frontier of New South Wales and Victoria; and secondly, goods coming

by water carriage up the Murray for New South Wales or Victoria paid duty at Adelaide, New South Wales and Victoria dividing equally the proceeds of collection. This arrangement subsisted until 1864, when negotiations for a revision of the system of distribution broke down. The agreement, with some modifications, was renewed, and was finally terminated in 1873. A modified system of intercolonial free-trade, by which each Colony admitted free goods *bonâ fide* the produce of any other Colony, was suggested by South Australia in 1862, but received little encouragement.

There was in fact another obstacle than the inability to agree. All the Colonies were restrained by Imperial Acts from establishing preferential or differential duties; and this applied equally to their relations with each other as with the outside world. The Colonies set themselves therefore in the first instance to secure the removal of these obstacles, and intercolonial conferences asked the Home Government to permit reciprocal arrangements among them. At first, these proposals met with little encouragement. Successive Secretaries of State—the Duke of Buckingham in 1868, Earl Granville in 1869, and Lord Kimberley in 1870—felt that they could not with propriety ask Parliament to assent to a measure whereby one part of the British Dominions might differentiate against another; and the Home Government was affected by the fear of complicating foreign relations. The Colonial Office, however, pointed out that the objections and the difficulties of the Home Government would be removed by a "complete customs union," or by any arrangement which made the Australian Colonies one country, instead of several countries. In 1873, the resistance of the Imperial Government gave way before the insistence of the Colonies; and the *Australian Colonies Duties Act* 1873 removed all obstacles to

tariff arrangements amongst the members of the Australasian group.

The removal of legal restraints had, however, no other result than to mark the width of the gap between the Colonies. The question between them was no longer the mere adjustment of tariff regulations so as to meet the financial necessities of all, and to secure to each its fair share of revenue collected. Protection had taken firm root in Victoria; and it was not long before that Colony was as much concerned to protect her agricultural products and her pastoral industry against her neighbours as to protect her manufactures against the pauper labour of Europe. The way was thus barred to the free exchange even of Australian products, for Victoria would hear of it on no other terms than that her manufactures should find a free market in the other Colonies. Protection begot retaliation; and after an unsuccessful attempt to effect a fiscal union in 1881, it became evident that in the interests of peace the tariff must be laid aside for a time.

The impossibility of establishing a customs union, and the bitterness of feeling which attended the tariff differences, gave little hope for the cause of federation. Still there were other matters in which disunion meant inconvenience and even danger; and in 1870 Mr. Charles Gavan Duffy obtained a Royal Commission in Victoria on the best means of accomplishing a federal union of the Australian Colonies. The time was one in which the foreign relations of the Empire, both with Europe and America, wore an unusually threatening aspect; and there were not wanting responsible statesmen both in England and the Colonies who believed on the one hand that the Colonies were a source of entanglement and weakness to England, and on the other that the connexion with England was the one thing which threatened the peace of the Colonies. There were also plentiful

elements of discord within the Empire, and the recent confederation of the Canadian Provinces was generally regarded as a step towards independence. In the not unlikely event of war, the Colonies were in a peculiarly exposed condition, for the Home Government had just carried through the withdrawal of Imperial troops in pursuance of the policy approved by the House of Commons. The report of Mr. Charles Gavan Duffy's Commission bears the impress of the times. Urging as before the importance on sentimental grounds of creating an united nation, the report declared that the Colonies presented the unprecedented phenomenon of responsibility without either corresponding authority or adequate protection. They were as liable to all the hazards of war as the United Kingdom, but they were as powerless to influence the commencement of war as to control the solar system; and they had no certain assurance of that aid against an enemy upon which the integral portions of the United Kingdom could reckon. This was a relation so wanting in mutuality that it could not be safely regarded as a lasting one, and it became necessary to consider how far it might be so modified as to afford greater security for permanence. Reference was made to the former relation between England and Hanover, and between England and the Ionian Isles, which showed that two sovereign States might be subject to the same Prince without any dependence on each other, and that each might retain its own rights as a free and sovereign State. The only function which the Australian Colonies required to entitle them to this recognition was the power of contracting obligations with foreign States, "the want of this power alone distinguishes their position from that of States undoubtedly sovereign." "If the Queen were authorized by the Imperial Parliament to concede to the greater Colonies the right to make treaties, it is contended that they would

fulfil the conditions constituting a sovereign State in as full and perfect a manner as any of the smaller States cited by jurists to illustrate this rule of limited responsibility; and the notable concession to the interests and duties of humanity made in our own day by the Great Powers with respect to privateers and to merchant shipping, renders it probable that they would not on any adequate grounds refuse to recognize such States as falling under the rule." "It must not be forgotten that this is a subject in which the interests of the mother country and the Colonies are identical. British statesmen have long aimed not only to limit more and more the expenditure incurred for the defence of distant Colonies, but to withdraw more and more from all ostensible responsibility for their defence, and they would probably see any honourable mode of adjusting the present anomalous relations with no less satisfaction than we should." The Imperial Government might ascertain the views of the African and American Colonies and take the necessary steps to obtain its recognition as part of the public law of the civilized world.[1] The circulation of the report elicited expressions of opinion from a number of public men in the Colonies (amongst them Mr., afterwards Sir Henry, Parkes), as to which Sir C. G. Duffy has since remarked that "a dozen years had not apparently ripened the question for action, but apparently had raised a plentiful crop of new objections." The truth was, however, that Duffy's scheme of neutrality appeared to involve nothing less than separation and independence. There was small faith in the sanctity of neutrality, and the general opinion was probably expressed by the gentleman who observed that "no enemy who had the means or power to attack us would respect our neutrality."

Australia was in fact beginning to have foreign affairs

[1] *Parliamentary Papers, Victoria*, 1870, 2nd Session, vol. ii., p. 247.

very near her door, and the policy of more than one great Power began to develop in the Pacific in a manner which would compel Australia to adopt a counter policy, to maintain which she would require at her back the whole strength of the Empire. It was in 1870 that an intercolonial conference first discussed the subject of defence and the Pacific Question. Present interest centred upon Fiji, where the lawlessness of the relations between natives and European traders had long been a grave scandal; and after many negotiations and inquiries, the islands were ceded to Great Britain in 1874. In 1864, France sent her first consignment of criminals to New Caledonia; and Australia, which in the eastern Colonies had long got rid of transportation, saw the last arrival of convicts in the West in 1867. The Colonies were not disposed to view with equanimity the establishment of the hated thing so near their shores; and their sentiments no doubt magnified the dangers of escaped convicts finding a refuge on Australian shores. There was reason to believe that France, anxious to increase her possessions and extend her system, intended to annex the New Hebrides, and to use them for the wholesale transportation of her most hopeless criminals. An agreement in 1878 between England and France that neither should annex the islands did not altogether allay apprehensions, and the designs of France have always been and are now regarded with suspicion in Australia. In the Samoan group, important German and American interests were established, and wound themselves about the complicated internal politics of the islands, so that action by the Governments became necessary, and the intervention of the United States in 1875 was soon followed by that of Germany.

In 1883, federation was "in the air." The junction of the New South Wales and Victorian railways at Albury led to an exchange of courtesies—then not too common—

between the politicians of the Colonies, and many pious wishes were expressed for federation. There the matter might have ended but that events outside Australia suddenly gave a stimulus to action. The suspected designs of Germany upon New Guinea had for some time aroused anxiety in Australia. At last the Government of Queensland sent a commissioner to take possession of New Guinea, and, aware that the Home Government was likely to disapprove of the step, at once took action to secure the support of the other Colonies, in which she had some success, notably with the Colony of Victoria. The Secretary of State (Lord Derby), while repudiating the act of Queensland, took the opportunity of pointing out that—

"If the Australian people desire an extension beyond their present limits, the most practical step that they can take, and one that would most facilitate any operation of the kind and diminish in the greatest degree the responsibility of the mother country, would be the federation of the Colonies into one united whole which would be powerful enough to undertake and carry through tasks for which no one Colony is at present sufficient." In November and December 1883, owing principally to the exertions of Mr. Service, the Premier of Victoria, the first Australasian Convention met at Sydney to consider the subjects of "The Annexation of Neighbouring Islands, and the Federation of Australasia." The Convention consisted of Ministers from the Australian Colonies and New Zealand, and in the later stages of the proceedings Fiji was represented. The Convention promulgated what has been called the Monroe Doctrine of Australia. It resolved that "the further acquisition of dominion in the Pacific south of the equator, by any foreign power would be highly detrimental to the safety and well being of the British possessions in Australasia and injurious to the interests of the Empire." Other

resolutions of the Convention urged the annexation of New Guinea, protested against the transportation of French criminals to the Pacific, and demanded that the understanding of 1878 in regard to the New Hebrides with France should be observed by that power, or, if it were possible, that the New Hebrides should be acquired by Great Britain. Of these measures, the Convention declared that the Colonies were prepared to bear the cost, thus removing what had hitherto been a great obstacle to the Home Government meeting the wishes of the Colonies in the extension of responsibilities.

But it was not the mere acceptance of a policy with which Mr. Service would be content. In the course of the correspondence which followed the action of Queensland, Mr. Service, following up his emphatic declaration at Albury, said: "That Confederation can now be effected in all its fullness I do not hope, but that some basis can be agreed upon for a federal union of both a legislative and executive character capable of dealing with those important questions which are immediately pressing, and which will gradually develop into a complete Australian Dominion, I have the greatest hopes. Conferences hitherto have produced a minimum of result. Resolutions have been passed over and over again, but as there existed no common legislative body to give them force the greatest part of them remained a dead letter. A limited federation now would give practical effect to the wishes of the Colonies on those points on which they are agreed. A common danger—the outpouring of the moral filth of Europe into these seas—a common desire—to save the islands of Australasia from the grasp of strangers—render federal action a necessity, and federal action is only possible by means of a federal union of some sort." The result fell short of his aims; but it marked a great step forward, for the Convention of 1883 gave birth to the Federal Council of Australasia.

At an Intercolonial Conference in the summer of 1880-81 the usual variety of matters had been discussed, and it was clear that the Colonies were completely at issue upon the tariff. Sir Henry Parkes, however, chose the occasion for submitting a series of resolutions on the subject of federation, and laid before the Conference a Draft Bill which he proposed should be introduced in the several Colonial Legislatures. The resolutions affirmed that the time was not come for the construction of a Federal Constitution with an Australian Federal Parliament; that the time was come when a number of matters of much concern to all the Colonies might be dealt with more effectually by some federal authority than by the Colonies separately; that an organization which would lead men to think in the direction of federation and accustom the public mind to federal ideas would be the best preparation for the foundation of federal government; and that the Bill framed should be the forerunner of a more mature system. The resolutions were discussed and the Bill considered, but nothing came of it. A proposal of Sir Graham Berry (Victoria) that the Federal Council should be endowed from the sale and occupation of the public lands of the Colonies did not tend to encourage confidence in the disinterestedness of Victoria's zeal in the federal cause.

The scheme which had fallen flat in 1881 was revived in the Convention of 1883. On the motion of Mr. Samuel Griffith (Queensland) it was resolved:

"That it is desirable that a Federal Australasian Council should be created for the purpose of dealing with the following matters:—

"1. The marine defences of Australasia beyond territorial limits.

"2. Matters affecting the relations of Australasia with the islands of the Pacific.

"3. The prevention of the influx of criminals.

"4. The regulation of quarantine.

"5. Such other matters of general Australasian interest as may be referred to it by Her Majesty or by any of the Australasian Legislatures."

A committee was appointed to draft the necessary Bill; and on the report, a Bill was approved on the motion of Mr. Samuel Griffith

"That this Convention, recognizing that the time has not yet arrived when a complete federal union of the Australasian Colonies can be attained, but considering that there are many matters of general interest with respect to which united action would be advantageous, adopts the accompanying Draft Bill for the Constitution of a Federal Council as defining the matters upon which in its opinion such united action is both desirable and practicable at the present time, and as embodying the provisions best adapted to secure that object so far as it is now capable of attainment."

In 1884, all the Colonies of the Australasian group (including Fiji) except New South Wales and New Zealand adopted addresses praying for legislation on the lines of the Bill, and in August, 1885, the *Federal Council of Australasia Act* received the Royal Assent.

The time from 1863 to 1883 is the time of Intercolonial Conferences; and not fewer than ten such Conferences had been held with a view to uniform action in various matters of common concern. Postal and telegraphic communication and the navigation of the Australian coasts urgently called for agreement. As a result of a Conference in 1867, New South Wales passed an Act proposing to create a Federal Council to carry into effect resolutions as to ocean mail service. At one time the Colonies were supporting in rivalry three lines of steamers, and instead of the public getting the advantage of competition, letters were detained

in the several Colonies for the proper line. As we have seen, the withdrawal of the Imperial forces brought defence into the programme in 1873, and in the same year the Pacific question was first discussed. In the early years, the land system, the goldfield regulations, and the transportation of convicts to Western Australia are discussed. The early importance of uniform land laws has been referred to; and in later times there was some disposition to regard the vast area of unappropriated lands in several of the Colonies as an Australian asset.[1] The anomalies and scandals of the defective administration of the law through inability to co-operate in the service of legal process and the enforcement of judgments were ventilated from time to time. The inconvenience of carrying appeals to England was from early times the ground of a demand for a General Court of Appeal for Australia. South Australia and Victoria were for some years active in promoting the establishment of such a Court, and in 1861 South Australia found a sympathetic Secretary of State in the Duke of Newcastle. It was not until the Conference of 1881 that the matter passed beyond the stage of discussion, and a Bill was agreed to, which, saving the Prerogative, provided for an Australian Court of Appeal. But it was entirely in accordance with custom that the matter should end there. The tariff as a subject of conference has been already considered; and

[1] As witness Sir Graham Berry's proposal in the Conference of 1881. At the first meeting of the Federal Council a proposal was made that 50,000,000 acres of the waste lands of Western Australia should be appropriated to form a fund for defence purposes; and Western Australia—which had not then received responsible government—was not unfavourable to the plan if she could secure a federal guarantee for the £5,000,000 required for the construction of a transcontinental railway. At the Federation Conference of 1890, it was suggested that the unsettled territories of Queensland, South Australia, and Western Australia should be made federal, and Sir Henry Parkes spoke of "the immense advantage to these Colonies themselves if four or five new Colonies were cut out of their vast and unmanageable territories."

the other principal matters suggested for joint action were the regulation of Chinese immigration, and the suppression of another "undesirable immigrant," the rabbit.

The failure of intercolonial Conferences and its causes are referred to by Mr. Service in the passage cited above. The Conferences were indeed a valuable means of educating opinion amongst politicians as to the need of some closer and permanent union of the Colonies. But as a practical method of getting business done they were almost useless. First, there was the difficulty of securing assent to a Conference at all. If the matter to be settled was a competing claim on the part of two Colonies, as in respect to rights in the River Murray, or the adjustment of border duties, the party in possession, who had something to lose and nothing to gain, was well enough satisfied with the *status quo.* Then time and place to suit the Governments of seven or eight Colonies—for New Zealand and Fiji were interested members of the Australasian group—formed another obstacle; and the common action aimed at seemed a long way off when a prompt answer, or any answer at all, to an invitation to Conference was by no means a common courtesy. When after months of correspondence the Conference assembled, it would be found that some Colony whose presence was of importance could not send representatives. As a Conference of States, the meeting had all the marks which distinguish such a body from the deliberative assembly of a nation. Every delegate was charged first and foremost with the promotion of the interests of his own Colony: the Conference was, in fact, a "Congress of ambassadors from different and hostile interests, which interests each must maintain as an agent and advocate against other agents and advocates." The vote was taken by States, so that the smallest Colony had equal voting power with the greatest. This, however, was of small importance, because the majority

had no power to bind the minority; the dissent of a single Colony prevented Australia from speaking with one voice to the Home Government, and was often fatal to effective action in matters within the powers of the Colonies themselves. Nor did unanimity in council, even when it was obtained, by any means ensure unanimity in action. The delegates were not plenipotentiaries; they had in most matters no power to bind; they could only bear a report and offer advice to their principals. The neglect of a Colony to carry out the measures agreed upon was itself calculated to promote ill-will and to give rise to accusations of bad faith, which would have been more serious had not failure been so much the rule as to count amongst the things expected. It was said by Mr. Service in 1883 that of twenty-three subjects discussed in the Conferences not more than three had been dealt with effectively, and of those agreements which required uniform legislation not one had been carried out. When the matter involved communication with the Home Government, the presentation of a resolution to the Secretary of State was but the beginning of negotiations which had to be carried on with every member of the group, and which rarely failed to disclose differences of opinion amongst the Colonies. The proposed amendment of the law concerning fugitive offenders may serve as an example. In 1867 the Conference had passed a resolution calling upon the Home Government to enlarge the jurisdiction of the Colonies in criminal matters. The Secretary of State pointed out that the differences in the criminal law of the various Colonies presented certain difficulties, and invited suggestions, and particularly a draft Bill, for the best mode of giving the powers required. Some Colonies were in favour of one course, others proposed another; some did not take the trouble to answer the letters of the Colonial Office. Three years delay would have

taxed the patience of a more sympathetic Secretary than Earl Granville, and in 1870 the Minister announced the decision of Her Majesty's Government not to proceed further in the matter, on the ground of "the want of unanimity of opinion both as to the proper mode of proceeding and as to the scope of the proposed legislation."

Called into existence by the pressure of external conditions at a time when the commercial policies of the Colonies were unfavourable to complete union, the Federal Council was no more than an attempt to provide a remedy for the most obvious of the defects of the intercolonial Conferences. A Constitutional body could be summoned; a Conference was merely invited. The Conferences met at irregular intervals; the Council was to meet at least once in every two years. A Conference could only recommend legislation; the Council could make laws. A Conference had no corporate existence; the Council was a permanent body, and under the powers conferred by the Act (sec. 34), it proceeded at its first meeting in 1886 to appoint a Standing Committee to act out of session, which should, through its Chairman, communicate with the Secretary of State. Thus the Council lightened the burden of negotiation with the Imperial Government. The functions of the Council were mainly deliberative and advisory; above all things it was to have been the articulate voice of Australia. The legislative function was subordinate; federal judiciary or executive there was none. Altogether, the Federal Council of 1885 fully merited the description applied by Sir Henry Parkes to his scheme in 1881—"an unique body" "formed upon no historical model."

In constitution the Council was modelled on the Conferences. The members of the Council were the Colonies, and while the Council itself had a permanent existence, membership was purely voluntary and terminated at pleasure.

Queensland, Victoria, Tasmania, and Western Australia were the only constant members, and in 1891 Western Australia was unrepresented. Fiji was represented only at the first meeting of the Council, and South Australia withdrew from membership after a single session. But more serious was the fact that New Zealand and New South Wales never became members at all. Sir Henry Parkes was in England when the Convention of 1883 adopted the scheme, and when he returned to New South Wales joined forces with those who were opposed to federation in any form. In 1881 Sir Henry Parkes had been one of those who believed that the great thing was to get an union of some sort as the foundation of a more complete union in the future. In 1884 Sir Henry Parkes believed that the Council would impede the federal movement; and his "unique body" had become such a "rickety institution" that to join it would be to make a "spectacle before the world which would cover the country with ridicule."

The representatives of the Colonies in the Council were delegates, nominated and not elected; until 1895, when the representation of each Colony was increased, they were always Ministers or Ministerial supporters. Save in a few matters the legislative powers could be exercised only on the initiative of the Legislatures of the Colonies. Every power of the Council was restrained by the fact that it could neither raise nor appropriate revenue; even its own expenses had to be provided for in the budgets of the Colonies. Lord Derby, well aware of the difficulty of settling Colonial contributions even when the Colonies were ready to provide money, had urged that the Council should have powers of expenditure; but the Colonies would not hear of it. The power of the purse must lie in a body chosen by popular election, and in such a body the equal representation of communities of very unequal powers of

contribution would be impossible. Financial powers would have involved the creation of an assembly in which the Colonies would have been represented according to their population; and the claims of equality of states would have involved the establishment of a Second Chamber. The expenditure of money would have required an executive. But this would have been exactly that complete federal union for which, according to the Convention of 1883, the Colonies were not ripe, and for which the Federal Council was only to prepare the way. Sir Henry Parkes was right when he said that the Council could not by any mere process of expansion undertake the subject of national defence; those who would give a constitution to a nation must build anew. Changing membership and the hostility of New South Wales prevented the Council from becoming an efficient instrument even for its limited purposes. After 1895 the Conference of Premiers overshadowed the Council in dignity and importance, while for co-operation in special matters—military, marine, postal and statistical—there were frequent Conferences of officials. The best that can be said of the Council—but that is not a little—is that far from exhibiting a natural jealousy of schemes which involved its own extinction, it did good service in fostering the cause of national union.

The next step in the federal movement is connected with the subject of defence. At the Colonial Conference, held in London in 1887, important conclusions were arrived at, both as to naval and military defence. In regard to the former, an agreement was come to between the Imperial Government and the Australasian Colonies whereby the latter were to contribute the sum of £126,000 per annum for the provision of the Australian Squadron. The agreement was ratified by Acts of the Legislatures of each of the Colonies and by the Imperial Parliament in the *Imperial*

Defence Act 1888. As to military defence, it was agreed that there should be a periodical inspection of the Australasian forces by a General Officer of the Imperial Army. The further proceedings concerning this inspection themselves offer an interesting illustration of the futility of all attempts at concerted action by the divided Colonies. Immediately after the Conference, a correspondence began,[1] which soon developed the usual differences of opinion, and Sir Henry Parkes on behalf of New South Wales withdrew from the arrangement altogether. At last, the Imperial Government undertook to bear the cost of sending Major-General Edwards, the officer commanding the forces in China, to report on the defences, and in May, 1889, the offer was accepted. The report was presented in October, 1889, and was virtually a recommendation of the federation of the Colonies for purposes of defence, and as one incident of defence, of the establishment of a common gauge for the railway system of Australia in place of the existing three gauges by which communication was impeded.

Sir Henry Parkes at once made the report the basis of a propaganda, and while there is room for great difference of opinion as to where the balance would lie in taking account of Sir Henry Parkes's activity in the matter of federation, his efforts at this time to arouse public interest must be accounted a great national service. He had difficulties to encounter, both in his own Colony and in other Colonies. Victoria was anxious that New South Wales should make trial of the Federal Council; but Sir Henry Parkes would have none of it. Believing that the time was ripe for consolidating the Australias into one, he invited each of the other Colonies to appoint through their Legislatures six representatives, who he suggested should be chosen equally from both sides in political life. In the end he consented to a

[1] *Victorian Parliamentary Papers*, 1889, vol. iii., p. 605.

Conference which should meet for purposes of preliminary consultation merely; and on 6th February, 1890, a Conference of the seven Colonies met at Melbourne. The true purpose of the Conference was, in the words of a delegate, to "decide whether there is such a wave of public opinion through these Colonies that it has removed the question from the mere sentimental airiness in which it has existed for some years past, and has brought it into the region of practical politics." It was moved by Sir Henry Parkes, seconded by Mr. Alfred Deakin, and unanimously resolved that "the best interests and future prosperity of the Australasian Colonies would be promoted by an early union under the Crown, and that the time was come for the union of these Colonies under one Legislative and Executive Government on principles just to the several Colonies." The members of the Conference pledged themselves to endeavour to induce their Legislatures to appoint delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a Federal Constitution; and the Conference resolved that such a Convention should consist of not more than seven members from each of the self-governing Colonies and four from each of the Crown Colonies. The Parliaments of the Colonies appointed their delegates, though the discussion in New Zealand made it clear that that Colony withdrew from more than a friendly interest in the scheme.

The National Australasian Convention met at Sydney on 2nd March, 1891, and sat until 9th April. On 18th March the following resolutions were, after exhaustive debate, agreed to:—

"That in order to establish and secure an enduring foundation for the structure of a Federal Government the principles embodied in the resolutions following be agreed to:—

"1. That the powers and privileges and territorial rights of the several existing Colonies shall remain intact except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.

"2. No new State shall be formed by separation from another State, nor shall any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned as well as of the Federal Parliament.

"3. That the trade and intercourse between the federated Colonies, whether by land carriage or by coastal navigation, shall be absolutely free.

"4. That the power and authority to impose Customs duties and duties of excise upon goods the subject of Customs duties and to offer bounties shall be exclusively lodged in the Federal Government and Parliament, subject to such disposal of the revenues thence derived as shall be agreed upon.

"5. That the naval and military defence of Australia shall be entrusted to federal forces under one command.

"6. That provision shall be made in the Federal Constitution which will enable each State to make such amendments in its Constitution as may be necessary for the purposes of the federation.

"Subject to these and other necessary conditions, this Convention approves of the framing of a Federal Constitution which shall establish—

"1. A Parliament which shall consist of a Senate and a House of Representatives, the former consisting of an equal number of members from each Colony, to be elected by a system which shall provide for the periodical retirement of one-third of the members, so securing to the body itself a perpetual existence combined with definite responsibility to

the electors, the latter to be elected by districts formed on a population basis and to possess the sole power of originating all Bills, appropriating revenue, or imposing taxation.

"2. A judiciary consisting of a Federal Supreme Court which shall constitute a High Court of Appeal for Australia.

"3. An executive consisting of a Governor-General and such persons as from time to time may be appointed as his advisors."

The work of framing a Constitution upon these lines was delegated to three Committees to deal respectively with Constitutional functions, finance, and judiciary. The deliberations of these Committees were finally put into form by a Drafting Committee, consisting of Sir Samuel Griffith, Mr. (afterwards Mr. Justice) A. Inglis Clark (Tasmania), Mr. (now Sir Edmund) Barton (New South Wales), and Mr. Kingston (South Australia). The result was the "Draft of a Bill to constitute the Commonwealth of Australia."

The preliminary discussions in 1890 had made it clear that Sir Henry Parkes's plan of a Dominion of Australasia on the model of the Dominion of Canada was impracticable; and the scheme adopted followed in its main outlines the Constitution of the United States. Important amendments in detail were afterwards made in the scheme, principally in the direction of democratising the Constitution; but the Draft Bill of 1891 contains in substance the Constitution which received the Royal Assent in 1900 and came into operation on 1st January, 1901.[1] On the motion of Sir Samuel Griffith the Convention recommended that pro-

[1]For a critical study of the Bill of 1891 and a comparison with the Canadian Constitution, see a Paper by Sir John Bourinot, in *Transactions of the Royal Society of Canada*, 2nd series, vol. i., sec. 2, p. 3 (1895). For a consideration of the differences between the Bill of 1891 and the Constitution as it left the Adelaide Convention in 1897, see an article by the author in the *National Review*, vol. xxxi., p. 269.

vision should be made by the several Parliaments for submitting for the approval of the Colonies respectively the Constitution adopted by the Convention; and it was further recommended that as soon as the Constitution was accepted by three Colonies the Home Government should be requested to take the necessary steps to put it into operation.

With so great an advance and with such fair prospects, federation seemed to be now within reach. Sir Henry Parkes took steps to carry out his part of the bargain in New South Wales. But his Government was soon in difficulties, and in order to placate the different sections of its supporters, was compelled to give federation a subsidiary place in its programme. In October, 1891, the Parkes Ministry went out of office, and though the new Ministry included Mr. Edmund Barton, a prominent federalist, the Prime Minister, Mr. Dibbs, if he were in favour of union at all, desired unification rather than federation. Victoria, South Australia, and Tasmania dealt with the Bill in a tentative fashion; the other Colonies did nothing. All were in fact waiting for the signal from New South Wales, and the signal did not come. Sir Henry Parkes, in despair, urged that if the question were too big for the Parliaments, "the Australian people should take the matter into their own hands, and elect a Federal Congress representing all the Colonies and the whole people." The next few years were years of financial crisis in which Governments had more than sufficient to do, first in staving off disaster, and next in "balancing the ledger;" and though the crisis itself had illustrated the dangers of division, Sir George Dibbs's proposal in 1894 for the unification of New South Wales and Victoria received scant attention. The country, however, was beginning to take Sir Henry Parkes's advice, and a popular movement was organised, which, if it did not take

federation out of the hands of Parliament, at least supplied a force with which Parliament must reckon. The Australian Natives' Association had interested itself in the cause from its first demonstration in 1884, and from 1893 federation leagues were formed in various parts of Australia. At the end of 1893 a Conference of delegates from the various organizations met at Corowa, and on the motion of Dr. (now Sir John) Quick (Victoria), adopted a scheme for the popular election of a federal Convention, which should frame a federal Constitution to be submitted to the electors, and if approved by two or more Colonies, to be forwarded to the Imperial Government.

The next step was taken at the Conference of Premiers held at Hobart in January, 1895. The Premier of New South Wales (Mr. Reid) submitted, and the Conference adopted, the following series of resolutions:—

1. That this Conference regards federation as the great and pressing question of Australasian politics.

2. That a Convention consisting of ten representatives of each Colony, directly chosen by the electors, be charged with the duty of framing a Federal Constitution.

3. That the Constitution so framed be submitted to the electors for acceptance or rejection by a direct vote.

4. That such Constitution, if accepted by the electors of three or more Colonies, be transmitted to the Queen by an address from the Parliaments of those Colonies praying for the necessary Legislative enactment.

5. That a Bill be submitted to the Parliament of each Colony for the purpose of giving effect to the foregoing resolutions.

Mr. (now Sir George) Turner (Victoria) and Mr. Kingston drafted a Federal Enabling Bill, which was in its main features passed by New South Wales, Victoria, South Australia, and Tasmania, and with an important difference, by Western Australia. In four of the Colonies a minimum

vote for the Constitution was required—50,000 (afterwards raised to 80,000) in New South Wales, 50,000 in Victoria, and 6,000 in Tasmania and Western Australia. Subject to this, a bare majority of votes cast was sufficient to declare the consent of the Colony. In Western Australia the ten members of the Convention were to be elected, not by direct popular vote, but by the members of both Houses of Parliament sitting together and voting by ballot. In Queensland the Bill was lost in the first instance through the disagreement of the Houses as to the mode of election. The diverse interests and aims of the northern, central, and southern parts of the Colony (for the reconciliation of which a sectional federation of the Colony of Queensland has more than once been proposed), and a general lack of knowledge on or interest in federation, both among the politicians and the scattered population of her vast territory, were the main causes that nothing was done, and the Convention met and finished its labours without the assistance of the northern Colony.

[1]In March, 1897, the Convention elections took place. There was everywhere a large field of candidates, and the contests in the four Colonies where the election was by popular vote did a good deal to stimulate interest, and to remove the misapprehensions which abounded on the subject. In every Colony the delegation was fairly representative in the sense that the candidates elected were well known in the Parliamentary life of the Colonies.[2]

[1]For a detailed history of the federal movement from this time the reader is referred to Quick and Garran's *Annotated Constitution of the Australian Commonwealth*.

[2]Of old federal leaders, Sir Henry Parkes was dead, Sir Samuel Griffith had become Chief Justice of Queensland, and Mr. A. I. Clark (Tasmania) was unable by reason of health to become a candidate. Mr. Barton, Mr. Alfred Deakin, and Mr. Kingston were, however, members of the Convention.

The number and percentage of the electors voting in the several Colonies were—[1]

Victoria	... ...	103,932 or 43.5%
New South Wales	...	142,667 or 51.25%
South Australia	...	42,738 or 30.9%
Tasmania	... ...	7,582 or 25%

On 22nd March, 1897, the Convention held its first session in Adelaide. ' Mr. Kingston, Premier of South Australia, was elected President, and Mr. Barton, who had received a larger number of votes at the polls than any other member, was acclaimed Leader of the Convention. The proceedings closely followed the order of 1891. A series of resolutions was submitted and debated. These affirmed "That, in order to enlarge the powers of self-government of the people of Australasia, it is desirable to create a Federal Government which shall exercise authority throughout the federated Colonies," subject to certain principal conditions which were substantially identical with those which were the basis of the Bill of 1891. It was significant, however, that the reference to the "Senate" or "States Assembly" was more guarded than before; there was nothing said of equal representation; the States Assembly was to consist of "representatives of each Colony to hold office for such periods and be chosen in such manner as will best secure to that Chamber a perpetual existence combined with definite responsibility to the people of the State which shall have chosen them." By common consent the Draft Bill of 1891 was taken as the foundation of the work of the Convention.

Three Committees were appointed as before, and their work was submitted to a Drafting Committee consisting of Mr. Barton, Mr. R. E. (now Mr. Justice) O'Connor (New South Wales), and Sir John Downer (South Australia). The character of the debates was significant that the Convention

[1] *Victorian Year Book*, 1895-8, section i.

"meant business." There was the sharp clash of interests; and the struggle between large and small States over the financial powers of the Senate, the contest over the rights in the rivers, railway rates, and the adjustment of financial relations indicated that great material interests were deemed to be at stake. On 23rd April the first consideration of the Bill was concluded, not without clear indications that there were some matters which must be revised. The Convention then adjourned; and in accordance with arrangement, the Bill was remitted to the various Parliaments for consideration and for the suggestion of amendments. The second session of the Convention began at Sydney on 2nd September and ended on 24th September. The financial questions were sent to a Committee. A large number of amendments was considered, for the proceedings in the legislatures of New South Wales and Victoria had indicated that the larger Colonies were in favour of some concessions to the claims of population. There were keen debates on the Constitution and powers of the Senate and various ingenious expedients were suggested for the prevention of "dead-locks." The third and final session of the Convention began at Melbourne on 20th January, 1898. There the financial Committee brought up its report, and salvation was found in the "Braddon Clause" (now sec. 87 of the Constitution). The duels between New South Wales and South Australia on the claims of irrigation and navigation in respect of the rivers, and between New South Wales and Victoria as to railway rates, were fought out at length and with great determination. A solution for deadlocks was found at last, and a jaded Convention gave its assent to clauses affecting the appeal to the Queen in Council which were then and later the subject of much misunderstanding. The Bill was finally revised by the Drafting Committee, which had remained in existence throughout and exercised the most scrupulous care

over the formal expression of the Constitution. On 16th March the Bill was adopted by the Convention; on 17th March, after calling for cheers for the Queen and for Australia, the President declared the proceedings of the Convention closed.

The referendum was fixed for 3rd June by New South Wales, Victoria, and Tasmania, and for 4th June by South Australia. In neither Queensland nor Western Australia was any move made at this time. It was soon apparent that the opposition to the measure in New South Wales was very serious. First, there was the "democratic" opposition which was directed to the equality of representation in the Senate, the powers of the Senate, and the rigidity of the Constitution. Secondly, there was dissatisfaction with the financial arrangements which, it was contended, would throw upon New South Wales a heavy burden of taxation to meet the necessities of Tasmania and Western Australia. Thirdly, there was the fear of the people of Sydney that federation might endanger the commercial position of that city by its inevitable variation of the fiscal policy of the Colony, and by enabling Melbourne to "capture" New South Wales trade. Finally, the old sore of the capital was re-opened, and a claim was made that either Sydney should be made the seat of Government, or at any rate Melbourne should not. When at last a vote was taken, it was found that, although there was a small majority for the Bill, the statutory number of votes (80,000) had not been cast in its favour. In Victoria and Tasmania the Bill was carried by a majority of five to one, and in South Australia by two to one. The voting was as follows:—[1]

[1] *Victorian Year Book*, 1895-98, p. 39; *Commonwealth Official Year Book*, 1901-1907, p. 20.

	For.	Against.	Majority.	Percentage of voters to electors on the Roll.
New South Wales	71,595	66,228	5,367	49.88
Victoria	100,520	22,099	78,421	48.94
Tasmania ...	11,797	2,716	9,081	46.5
South Australia	35,800	17,320	18,480	39.44

The number of electors voting shows some improvement on the election of members of the Convention; but the increase is far short of what might have been expected from the amount of attention which had in the meantime been given to the subject in the press and on the platform. It should be added, in explanation of the small vote in South Australia, that when the vote was taken in that Colony the failure in New South Wales was known.

As three Colonies had accepted the Bill, it was within the terms of the Premiers' agreement that they should address the Crown to have the Bill enacted. But federation without New South Wales was not a matter of practical politics, and it was everywhere recognized that no effort should be spared to include all the Colonies of Australia. After a general election in New South Wales the Premier (Mr. Reid), who had been the principal critic of the Bill of 1891 and the Bill of 1897-8, presented, and the Legislative Assembly adopted with some amendments, the modifications in the Constitution required by New South Wales. A Conference of Premiers was held in Melbourne on 29th January, 1899, and the six Colonies were represented, the re-appearance of Queensland being hailed as a pledge of adhesion to the federal cause. The Conference agreed to the following amendments:—(1) The substitution of an absolute majority of members for a three-fifths majority at the joint sitting of the Houses on the occasion of "dead-

locks"; (2) the "Braddon Clause" (sec. 87) to be limited to ten years and "until the Parliament otherwise provides"; (3) the insertion of a clause enabling the Parliament to grant financial assistance to necessitous States; (4) a further guarantee of territorial rights and a special provision relating to Queensland; (5) the application of the "deadlock" provisions to the amendment of the Constitution. The vexed question of the capital was settled by compromise—it was to be in New South Wales, but not within 100 miles of Sydney; and until the seat of Government should be ready the Parliament was to meet at Melbourne.

Arrangements were at once made for a second Referendum. In New South Wales questions of Constitutional preference which had played an important part in the earlier campaign, went into the background, and the attack was directed against the financial arrangements and the compromise on the capital. But the conditions of the fight were altered by the fact that Mr. Reid was now in favour of the Bill; and it was his influence that carried the day in favour of federation. On 20th June, 1899, the New South Wales poll was taken, and 107,420 votes were cast for and 82,741 against the Bill; majority 24,679. The poll in the other Colonies was :—[1]

Victoria	...	For, 152,653; against, 9,805
South Australia	...	For, 65,990; against, 17,053
Tasmania	...	For, 13,437; against, 791

In September a vote was taken in Queensland, and there was a majority of 7,492 in favour of the Bill—For, 38,488; against, 30,996.

Western Australia still stood aloof in the hope of further concessions in the matter of Customs duties and the transcontinental railway, and it was not until after the Bill had

[1] *Commonwealth Official Year Book*, 1901-1907, p. 20.

received the Royal assent that a poll was taken in that Colony. The voting was—For, 44,800; against, 19,691; majority, 25,109.

Addresses to the Crown praying for the enactment of the Bill were adopted in New South Wales, Victoria, Tasmania, South Australia and Queensland, and the addresses and the Bill were transmitted to England.

On the invitation of the Secretary of State, delegates representing the Colonies which had adopted the Bill proceeded to England to confer with the officials of the Colonial Office and the Law Officers in England. The delegation consisted of Mr. Barton (New South Wales); Mr. Deakin (Victoria); Mr. Kingston (South Australia); Mr. Dickson (Queensland); and Sir Philip Fysh (Tasmania). Western Australia, which was anxious to secure amendments to meet the special circumstances of the Colony, was separately represented by Mr. Parker, Q.C., now Chief Justice Parker. New Zealand, which had held aloof from Federal politics since 1891, made representations through the Agent-General, Mr. W. P. Reeves, that provision ought to be made whereby New Zealand, which, under the Bill, might become a State, should be permitted to come in whenever she pleased on the same terms as an original State; that New Zealand and the Commonwealth might make common arrangements for defence; and that there should be a right of appeal from New Zealand to the High Court of Australia.

Western Australia and New Zealand lodged memoranda containing their case; and the observations of the Law Officers on the Bill were laid before the delegates.[1] The

[1] For the proceedings of the London Conference, see Papers relating to the Federation of the Australian Colonies, published in the Parliamentary Papers in England and in the several Colonies. These proceedings, together with the Debates in the Imperial Parliament, have also been published in a volume entitled *Commonwealth of Australia Constitution Bill*, issued by Messrs. Wyman & Sons, London.

delegates presented a counter memorandum dated 23rd March, 1900, and thereafter conferences and negotiations followed lasting until after the introduction of the Bill to Parliament. Some minor amendments in the covering clauses of the Bill were agreed to, and the question of the appeal to the Queen in Council became substantially the single matter in dispute. The Constitution (sec. 74) provided that "no appeal shall be permitted to the Queen in Council in any matter involving the interpretation of the Constitution, or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved." It was also declared that save as thus provided, the prerogative to hear appeals as of grace should be unimpaired, but that the Parliament of the Commonwealth might make laws limiting the matters in which leave might be asked. The objections to these provisions were obvious. The questions withdrawn from the Queen in Council were those on which, in the words of the Law Officers, "the Queen in Council has been able to render most valuable service to the administration of law in the Colonies, and questions of this kind, which may sometimes involve a good deal of local feeling, are the last that should be withdrawn from a tribunal of appeal with regard to which there could not be even a suspicion of pre-possession." The provisions of the section safeguarding the appeal where the "public interests" of other parts of Her Majesty's Dominions were concerned, were vague and uncertain, and the Commonwealth was receiving extended powers of legislation which might well affect places and interests outside Australia. Finally, the Law Officers urged that "the retention of the prerogative to allow an appeal to Her Majesty in Council would accomplish the great desire of Her Majesty's subjects both in England and Australia, that the bonds which now

unite them may be strengthened rather than severed, and by ensuring uniform interpretation of the law throughout the Empire, facilitate that unity of action for the common interests which will lead to a real federation of the Empire."

The delegates held that the clause was part of the federal agreement which had twice received the approval of the people of the Colonies; that an amendment would make the Constitution no longer the very instrument which the people had accepted, and cited the declaration of Mr. Reid that "there will be no safety or security for Australian union until it is known that the Bill that Australia has drafted for the Imperial Parliament to pass word for word is passed by that august tribunal word for word." Finally, they urged that, while the real links of Empire were the consciousness of kinship, a common sense of duty, and the pride of race and history, the cause of Imperial unity would not be aided by putting in apparent conflict the federation of Australia and Imperial federation.

In the later negotiations the Queensland delegate separated himself from his colleagues, and public opinion in Australia was strengthening the hands of the Imperial authorities. A Conference of Premiers in Melbourne, after urging that the clause as drafted could not work injuriously to the interests of the Empire, observed that as the only alternatives seemed to be an amendment of the Bill or postponement of its consideration, they did not hesitate to say "that the latter course would be much more objectionable to Australians generally even than the former." On 14th May Mr. Chamberlain introduced the Bill into the House, and after some further negotiations an amendment was agreed upon.[1] The debates in both Houses were marked by a cordial welcome of the Bill from all political

[1] Refer Cap. "The Appellate Jurisdiction": see Table of Contents.

parties, and the only criticisms heard were of the compromise and of the steps taken by the Colonial Secretary to ascertain Australian opinion on the subject of appeals to the Queen in Council. The Bill received the Royal Assent on 9th July, 1900.

Rarely has any group of states been so singularly marked out by nature for political union as are the six States of Australia. Though new countries, whose whole life lies within a period characterised by great movements of the population of the old world, there is less diversity of nationality amongst them than is to be found in most European countries. Religious differences there are in plenty, but sectarian strife, though bitter enough, affects or interests but few. The State has been strictly unsectarian, and there has been no party of irreconcilables. The population has long been sufficient to enable an united Australia to stand with the nations of the old world; it was in 1900 almost the same as the population of the United States and the British North American Provinces at the time of their respective unions. In distribution of population, the Colonies satisfy the condition of union laid down by Mill "that there should not be any one State so much more powerful than the rest as to be capable of vying in strength with many of them combined," and again we may glance at the successful union of the Canadian Provinces where the numbers of Upper and Lower Canada bore much the same relation to each other and the other Provinces as do the numbers of New South Wales and Victoria to each other and the other Australasian Colonies. The six States are the sole occupants of a continent and its adjacent islands, with an extent of territory little less than that of Europe. There is no "No Man's Land"; the territories of the States are co-terminous; every State on the mainland except Western Australia touches the borders of two of her sisters; South

Australia touches four. The State boundaries are generally no more than conventional lines, and at the present day the judge who goes on circuit from Sydney to Broken Hill travels *via* Melbourne and Adelaide, while a large part of New South Wales, the rich "Riverina," has its natural port at Melbourne. Every State has an extensive coast line well furnished with harbours unaffected by the seasons. The coast districts are the places of closest settlement, and from the first the sea has been the great highway of colonial traffic, so that the difficulties of internal communication, and notably the absence of great navigable rivers, have not prevented intercourse between the centres of population. In all these respects the Australian Colonies greatly differed from the British Provinces of North America, which fell into four distinct groups, sharply severed from each other by natural obstacles, and finding their access to the world by foreign outlets.[1] The distances in Australia, it is true, are great—from Brisbane to King George's Sound is 2,500 miles. But distance is a relative thing; to men who have made a journey of 12,000 miles, and, perhaps, spent four months in the passage, 2,000 miles traversable in little over a week, is no more than neighbourhood. That Australians regard distance on the grand scale has been more than once proved to British statesmen. There is nothing in the life or occupation of the people to cause deep divergence among the States. The real conflicts of interest are between town and country, rather than between State and State, and while the fact that a great part of Australia is within the tropics would naturally tend to conditions of life there different from those in the temperate parts, there is no

[1] "These obstacles are to be surmounted, nature is to be vanquished, and the commercial outlet of each territory placed by her to the south is to be wrested round to the east and west by lines of political railways constructed at enormous cost to the Canadian people." Mr. Goldwin Smith in the *Contemporary Review*, 1884.

policy to which the Colonies were more devoted than a "white Australia," with all that that implies. To the solution of the same problems of government—the holding of the public lands, the regulation of mining, fiscal policy, the relation of the State to religion, national education, and a host of others—the Colonies brought the same stock of political ideas. They brought with them the same common law; they received and developed similar institutions.

In these favourable conditions it may be wondered why union was so long delayed. The wonder should rather be that it was at last accomplished. Writing after the Convention of 1891, Professor Jenks said[1]:—"If the Australian Colonies accomplish federation under existing circumstances they will succeed in a political experiment for which there is practically no precedent in modern times. All through modern history there has been but one determining cause of political union between communities—physical force or the fear of physical force. In Switzerland, Germany, Austro-Hungary, Sweden and Norway, the United States of America, Canada, Mexico, Central America, the tale has been always the same. No community has consented to link its fortunes with the fortunes of another, save when instigated by fear of violence from that other or a third power. Many attempts have been made on other grounds, many other excellent motives have suggested themselves to thinking men. But the determining cause, the dead-lift over the hill, has always been force or the fear of it." Common subjection to the Crown went far to satisfy such desire for political union as there was. The Provinces of Canada, separated and remote from each other, had a powerful neighbour from whose territory had proceeded more than one act of hostility, who made no secret of her resentment at the existence of their "political system" on the American

[1] *Government of Victoria*, p. 373.

continent, and who in 1865 was flushed with military triumphs achieved for the cause of American unity in the teeth of what she regarded as the active hostility of England. Australia had no such dangerous neighbour. Her partnership in the British Empire, which was in Canada a cause of offence, was the security of Australia. Since the development of anything like a national life in Australia, the British Empire had been at peace, so far, at any rate, as world politics are concerned. Protected by the shield of Empire from external dangers, the Colonies were rarely reminded that they were dependencies, and in general if they had ground to complain of the mother country it was on the score of indifference to the claims of Empire rather than any pressure of lordship. Within their own territories the work of pioneers was carried on without fear of a hostile aboriginal population. The absence of national and religious feuds such as divided Upper and Lower Canada has been already referred to. If the sea gave every Colony means of communication with her neighbours, it also opened to her the trade of the world. Unlike the River Provinces of Canada, dependent for half the year on the licence of a foreign, and, it might be, unfriendly power for their external trade, the development of internal communications was not matter of life or death to any Australian Colony, though in the latter stages of federal movement the attitude of Western Australia in regard to the projected Transcontinental Railway recalled, as it was perhaps suggested by, the story of Canadian Confederation.

Australia was without all but one of the great causes which were instrumental in bringing about the Confederation of 1867. Just as the North American Provinces complained that the Foreign Office was disposed to sacrifice Canadian interests, partly from ignorance of local conditions and partly for the sake of a good understanding

with the United States, so the Australian Colonies complained that Australian interests in the Pacific were too lightly regarded, and, if not given away, were bargained away for a compensation which might have some value for other parts of the Empire, but was no direct advantage to Australia.

The material prosperity of the Colonies, and at times their phenomenal wealth, tended to prevent the growth of that "healthy discontent" which is the condition of political as well as economic progress. In 1890, it was Sir Henry Parkes's boast, "there is no one so wealthy as we." Yet a statesman of Sir Henry Parkes's acumen might have known that that was not an argument for changing the institutions and the policies to which politicians were never tired of reminding their constituents this happy state of things was due. It was, in fact, the lean years which gave Australia the serious call to set her house in order.

New Colonies, whatever the conditions of their foundation or their form of government, are less states, in the Old World sense, than trading and industrial communities; their citizenship recalls membership of the "regulated companies," or even the stockholding in the joint stock companies which have played so great a part in our colonial history. With rare exceptions "politics" means public works, the tariff, or the conditions of holding and working the lands and minerals of the State. The development of the resources of the country is the chief concern of the Government, and the task is one in which the Australian Colonies were no laggards. These very material interests develop a special kind of patriotism. Every inhabitant of a thinly populated country feels that its territory is an asset in which he has an appreciable share; and the once common distinction in older lands between the man with a stake in the country and the man who has not is meaningless in

colonial politics. Every neighbouring Colony is a rival concern, on whose doings the shrewd man of business must keep a sharp look-out. If there is to be a partnership, each must make the best bargain he can. If your neighbour has a small territory and you have a large one, if his estate wants water and you control the supply, if your railways pay and his do not, you must protect your interest and must be well assured of advantages to yourself before you agree to join him.

The absence of urgent external affairs in Australian politics favoured the growth of that rivalry and bitterness which is common to small contiguous communities. This rivalry and bitterness were intensified by the concentration of population in the capitals. Sydney and Adelaide contained more than one-third of the population of their respective Colonies, and in 1891 about two-fifths of the population of Victoria was in Melbourne. The political influence of a capital is more than proportionate to its population, and the natural jealousy of Sydney and Melbourne as rival ports assumed a national character, the more serious because of the scope of Governmental action. The railway wars of Governments are more far-reaching in their effects than the rivalries of companies, for Governments can employ more weapons in the fight.[1]

[1] Cf. The Queensland *Railway Border Tax Act* 1893, which contained an interesting recital of typical wrongs:—"Whereas large sums of money have been expended by the Government in extending railway communication with the Southern and Western Districts of the Colony for the purpose of promoting agricultural and pastoral settlement in those districts; and whereas large sums of money have at various times been expended by the Government in harbour and river improvements for the purpose of increasing the shipping facilities of the Colony; and whereas a large sum of money has been and is being annually paid by the Government in subsidising direct steam communication with Europe, primarily with the object of facilitating the speedy and direct shipment of goods and produce therefrom and thereto; and whereas it has been ascertained that differential rates on the railway lines of the neighbouring Colonies have been promulgated and otherwise

In New South Wales and Victoria the guiding principle of railway policy was to secure its "legitimate traffic" for Sydney and Melbourne respectively. The claim of each of the two great cities to be the seat of government in any federation was an obstacle to union from the time when Melbourne put forward its claim in 1852, and added insult to injury by urging the special advantage of "a safe and capacious harbour."[1] But it may be doubted whether the competition for the capital was the most serious incident in the jealousy of the two cities. Speaking of the City-States of the Middle Ages, Freeman says:—"The highest point which human hatred can reach has commonly been found in the local antipathy between neighbouring cities." In more than one sense the Colonies were City-States.

Another great obstacle to federal union was the fact that, with the exception of the tariff, the subjects calling for federal action were those which, in Australia, attracted little popular attention. The need for union was apparent mainly to those who were responsible for the administration of affairs, and it was some compensation for the inconveniences which attended the rapid succession of Colonial ministries, that this class was large. The Legislatures were apathetic; even when matters had advanced so far that the Federal Council Bill was under discussion, thin attendances in the

arranged for, which have had and are continuing to have the effect of diverting the traffic which ought legitimately to be conveyed over the railway lines of this Colony, thereby entailing a considerable loss of railway revenue; and whereas it is considered desirable to prevent as far as practicable this diversion of traffic"—because these things were so, every ton of station produce crossing the border was to pay a railway tax of £2 10s.; every person who attempted to evade the tax was liable to a penalty of £100, and every thing, animate or inaminate, concerned in the adventure, teams, drays, and produce, was declared forfeit. In such circumstances, one does not wonder that the construction of a railway by one Colony to the borders of her neighbour's territory often provoked feelings similar to those evoked by the project of the Channel Tunnel.

[1] *Votes and Proceedings Legislative Council* 1852, p. 197.

House bore witness to the lack of interest in New South Wales, Victoria, and South Australia. A cynical public readily referred the zeal of a "professional politician" to the billet-hunting nature of his kind. For the rest, the description of public opinion in New South Wales in 1884, by W. B. Dalley—himself no enthusiast for federation—though intended by way of contrast to Victoria, where "for some time there had been a strong public opinion in its favour which her statesmen merely expressed," may serve as a description of the public attitude throughout Australia—some thought it of doubtful ultimate advantage, and an immediate attempt to accomplish it dangerously premature; those who were in favour of it differed as to ways and means, and finally there was "a large party as in all national questions who give the matter little or no consideration at all, is influenced more easily by a cry than by an argument, and which is consequently disposed to regard the eagerness and activity of other Colonies as signs of peril to the interests of their own." There were those who feared that Australian Federation meant separation; there were others who saw in the anxiety of the Home Government for federation, a design to prepare the way for an Imperial Federation, which to them meant the sacrifice of self government. Finally, the advent of the Labour Party after 1890 provided an organised body of opinion pledged to resist all schemes which "did nothing for the people," and the members of this party, with some exceptions who, with great courage and at some sacrifice, separated themselves from their fellows, were opposed to every practicable federal scheme.

Amid these difficulties—the greatest of them all was indifference—and the great cleavage in fiscal policy, the federal movement had to make its way. The financial disasters awakened a sense of sympathy, and the burden of

the common trouble was necessarily shared. In regard to the tariff, a *modus vivendi* became possible through the acknowledged necessity for developing the intercolonial trade. The growth in the proportion of "native born" to the whole population, the existence of Australian questions, and the untiring zeal of a band of enthusiasts in each Colony, created a sentiment sufficiently strong to serve as an impulse to action. The votes cast at the first Referendum were an improvement on those cast at the election of the Federal Convention, and the second Referendum marked an advance in popular interest upon the first. It is easy to point to the fact that at the Convention election only from 25 to 51 per cent. of the electors took the trouble to vote; at the first Referendum only from 40 to 50 per cent., and at the second Referendum only from 36 to 67 per cent., as compared with from 50 to 70 per cent. at general elections presenting no burning national question. But it is hard, indeed, for any single public question to compete with the varied attractions of a general election. Local wants are the matters of first consideration, and the member, no matter how distinguished his past services or present position, must never cease to be the Parliamentary agent of his constituency, or he will soon cease to be a member. That this is so, is due not to the degeneracy of members or constituency. In a country like Australia where the central Government has functions which elsewhere are carried out by local agencies or by private enterprise, there must be some one to do the business of the constituency with the central Government; and the satisfaction of local wants may well mean the difference between prosperity and adversity. After these, there is in a general election the personal element—the contest in the constituency between two or more known men, and the stimulus of the personal canvass which counts for so much; more remotely, there is

the knowledge that on the result of the election depends the fate of the Ministers. It is "men, not measures" that in ordinary times give to politics their interest for the mass of mankind. With the local and the personal element eliminated, it is a tribute to the efforts of the workers on both sides, that at the second Referendum 583,865 of the 983,000 electors recorded their votes. And when we observe that 422,788 votes were cast for the Bill and only 161,077 against, we see that it was no mere form which declared that the people of the Colonies had agreed to unite. The federation of Australia was a popular act, an expression of the free will of the people of every part of it, and therein, as in some other respects, it differs in a striking manner from the federation of the United States, of Canada, and of Germany.

PART II.—GENERAL.

CHAPTER I.

THE NATURE AND AUTHORITY OF THE FEDERAL COMMONWEALTH.

On 17th September, 1900, the Queen by Proclamation declared that the people of the Colonies of New South Wales, Tasmania, Victoria, Queensland, and Western Australia, and the Province of South Australia, should be united in a Federal Commonwealth under the name of "The Commonwealth of Australia"; and on 1st January, 1901, the day appointed by the Proclamation, the Commonwealth became established, and the Constitution of the Commonwealth took effect, in accordance with secs. iii. and iv. of the Act of the Imperial Parliament known as the *Commonwealth of Australia Constitution Act* 1900 (63 & 64 Vict. c. 12).

The style "Commonwealth of Australia" has been subjected to some criticism. It has been contended that it is a break in uniformity; that Australia should have followed Canada, and become a "Dominion," if it did not assume the

title proposed for Canada but rejected in deference to the susceptibilities of the United States—"Kingdom." It is enough, perhaps, to say here that the union of the Australian Colonies differs fundamentally from the union of the provinces of Canada, and that the name Dominion had been associated for too long with features which Australia did not desire to copy. The "Kingdom of Australia" would be acceptable to none; one class would see in it a menace to democratic institutions, another would find in the creation of a "distinct Dominion" a suggestion of dismemberment of the Empire. The name "Commonwealth of Australia" does not, and did not in 1891, indicate a leaning to separation or republicanism. It was adopted by the Constitutional Committee in 1891 on the suggestion of Sir Henry Parkes, whose fancy led him to pay this tribute of admiration to the statesmen of the "Commonwealth Period." Perhaps, if this origin had been better known, the name would have met with more opposition. Commonly the title was associated with Mr. Bryce's "American Commonwealth," first published in 1888, the great source of knowledge as to the working of federal government amongst English-speaking people. The term passed without much notice into the popular discussion of federation; and having thus taken root, was adopted in the later Convention almost as of course.

The mode in which the Commonwealth came into being leaves no room for doubt or speculation as to the theoretical origin or legal foundation of the Commonwealth and the Constitution. The establishment of the Commonwealth is no "act of State," transcending the limits of legal inquiry; it is an act of law performed under the authority of the acknowledged political superior. The Constitution is first and foremost *a law* declared by the Imperial Parliament to be "binding on the Courts, Judges and people of every

State and of every part of the Commonwealth" (sec. v.) The formal source of the Constitution being acknowledged, its historical sources may be recognized without any fear of impairing the stability of the union. In the United States Constitution, the famous declaration "We, the people of the United States, do ordain and establish" has acquired a threefold significance. First, it asserts the national or unilateral as distinguished from the conventional nature of the union; secondly, as the act of the people and not of their governments it negatives the old confederate union; and thirdly, it indicates the democratic basis of the union. In the Commonwealth the legal basis of the union makes it possible to acknowledge frankly the agreement behind it. The people do not affect to ordain and establish; they have, as people of the several Colonies, "agreed to unite,"[1] and in the making of that agreement the most scrupulous care was taken to make the popular participation a reality and not a fiction. Secondly, the Commonwealth of Australia, being a union of the people and not of their governments, is no mere confederacy. Thirdly, the emphasis of "the people," both in the preamble and in sec. iii., indicates the democratic origin of the Commonwealth and foreshadows the nature of its Constitution.

In accordance with the preamble and sec. iii. of the Act, the Queen's Proclamation declares that the people shall be united in a *Federal* Commonwealth, and that term is repeated in the designation of the several organs—legislative (sec. 1), executive (sec. 62), and judicial (sec. 71)—of the new government. The term, indeed, is more appropriate in conjunction with a government and its several organs than with the political community itself. But it serves to mark the fact that the new nation is primarily, and was at its foundation exclusively, a commonwealth of common-

[1] *Vide* Preamble.

wealths, of existing political communities; and that the Constitution is founded on the assumed continuance of those communities in the distribution of powers between the Commonwealth and the States, in the organization of the Commonwealth Government, and in the machinery for the alteration of the Constitution (sec. 128).

A "federal government" exists where, in a political community, the powers of government are distributed between two classes of organization—a central government affecting the whole territory and population of the Sovereignty, and a number of local governments affecting particular areas and the persons and things therein—which are so far independent of each other that the one cannot destroy the other or limit the powers of the other, or encroach upon the sphere of the other as determined by the Sovereign in the Constitution. Both are completely subject to the state. Either may be changed or abolished at will by the state.[1] It appears to involve also the existence of some authority recognized by the central and local parts as competent to determine the conflicts which arise as to their respective powers. This, while it imperfectly describes any existing federation, is all that can be said of every federation, and would, indeed, require modification and explanation to fit the Dominion of Canada.

But the observation of Federal Governments leads us in the case of any particular federation to consider what is its organization in various other particulars. The following are, from this point of view, the leading features in the Federal Commonwealth of Australia :—

1. The Commonwealth is formed of communities which, whatever their earlier condition, were at the time immediately preceding the union separate and independent in their relation to each other. In the formation of the Com-

[1] Burgess, *Political Science and Constitutional Law*, vol. 2, pp. 556.

monwealth there is no severance of existing communities, as in Canada, where the legislative union of Upper and Lower Canada was dissolved by confederation. But the question of disintegration was raised in relation to Western Australia and Queensland, and there is full power to form new States within the Commonwealth, either by the division or the union of States' territories (Constitution, sec. 124).

2. The Commonwealth Government is a government of limited and enumerated powers; and the Parliaments of the States retain the residuary power of government over their territory.

3. The Commonwealth and State Governments are each organized separately and independently for the performance of their functions, whether legislative, executive, or judicial. But though the Commonwealth and State Governments are separately organized, the Commonwealth and the State system must be regarded as one whole; and in the United States the disposition to treat the Federal and State authorities as foreign to each other has been condemned as founded on erroneous views of the nature and relations of the State and Federal Governments. "The United States is not a foreign sovereignty as regards the several States, but is a concurrent and within its jurisdiction a paramount sovereignty"; their respective laws "together form one system of jurisprudence which constitutes the law of the land for the State, and the Courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as Courts of the same country having jurisdiction partly different and partly concurrent."[1]

The institutions and powers of the "States" were theirs prior to federation; there is no break in the continuity of the political existence which began as "Colony" or "Pro-

[1] *Claflin* v. *Houseman*, 93 U.S. 130. And see the judgment of Marshall C.J. in *Cohens* v. *Virginia*, 6 Wheaton 428.

vince." It is no part of the purpose of the Constitution to recast the institutions of the State, and the Constitutions of the States and the powers of their Parliaments are in general terms continued as before (Constitution, secs. 106, 107, 108), but modified, of course, by the powers conferred upon the Commonwealth Government, and by certain restrictions imposed on the States. The organization of the Commonwealth Government—the establishment of its legislative, executive, and judicial organs, and the definition of their functions—is the principal subject of the Constitution.

4. The legislative powers of the Commonwealth Parliament are not in general exclusive powers. A few exclusive powers are expressly conferred, including the power over the matters of administration taken over by the Commonwealth Government (sec. 52); others arise from the fact that some of the powers conferred upon the Commonwealth Parliament were not derived from the existing powers of the Colonies. The general relation of the "concurrent powers"—to use the popular term—of the Commonwealth and State Parliaments is fixed by the provision that, in case of inconsistency, the law of the Commonwealth prevails, and the law of the State is, to the extent of the inconsistency, invalid (sec. 109).

5. Subject to what has been said in (4), the Commonwealth Government and the States Governments are in their relations independent and not hierarchical. There is no such general supervision of the State in the exercise of the powers belonging to it as is enjoyed by the Dominion Government over the Provinces of Canada, or as it is proposed that the South African Government shall exercise over the Provincial Governments. This is not to say that the respective Governments do not owe certain duties to each other, or that the State or some of its organs may not be in some cases the instrument of the Commonwealth

Government. The exception to this independence is in the department of judicature, for the High Court of the Commonwealth is the head of the judicial system both of the Commonwealth and of the States, and the States as corporate communities are made amenable to the jurisdiction of the Commonwealth Courts. (Constitution, Chapter III.—The Judicature.) The existence of a sphere of State activity which is subject to no sort of control by the legislative or executive organs of the Commonwealth Government, and the absence of any veto by the Commonwealth Executive upon State legislation, may be facts of some importance in determining the limits of State powers. In Canada, the existence of the controlling power of the Dominion Government has been referred to[1] as a reason for taking a more liberal view of the powers of the provinces than is taken of the powers of the States in the United States, where the relations are similar to those set up in Australia.

6. The observance by the Commonwealth Government and the States of the limits set to their powers is secured by the action of the Courts whose judicial duties may involve the determination of the validity of the authority under which acts are done, whether that authority is the Crown, a subordinate Legislature, or any whatsoever save the Imperial Parliament.

The Nature of the Commonwealth.—The Commonwealth of Australia thus established is not a mere arrangement of Governmental powers for limited and defined purposes, based on the organic existence of the States; it is a territorial community organized for all the purposes of political life, consistently with the supremacy of the Imperial

[1] *e.g.*, *Bank of Toronto* v. *Lambe*, 12 App. Cas. 575. This is a subject on which, in regard to Australia, judicial authorities differ. The Supreme Court of Victoria (*Wollaston's Case*, 28 V.L.R. 357) and the Privy Council (*Webb* v. *Outtrim*, (1907) A.C. 81) adapt the Canadian case to Australia. The High Court of Australia (*Deakin* v. *Webb*, 1 C.L.R. 585) reject it.

Parliament. The position is stated with force in a despatch from the Secretary of State in 1903[1] :—"In the first place it seems to me that the aim and object of the Commonwealth of Australia Constitution Act was not to create merely a new administrative and legislative machinery, but to merge the six States in one united Federal State or Commonwealth furnished with the powers essential to its existence as such. Before the Act came into operation, each of the separate States enjoyed (subject of course to the ultimate authority of the Imperial Parliament) practically all the powers and all the responsibilities of a separate nation. By the Act, a new State or nation was created, armed with paramount power not only to settle the more important internal affairs relating to the common interests of the united people, but also to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any foreign power. That appears to me the obvious meaning of sec. iii. of the Act, which declares that on and after a day appointed by proclamation the people . . . shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. On that day, Australia became a single entity and no longer six separate States in the family of nations under the British Crown, and the external responsibility of Australia . . . vested immediately in the Commonwealth, which was armed with the paramount power necessary to discharge it." This language, while it illustrates the ambiguity of the term "Commonwealth" as describing the political entity and the Federal Government, asserts with equal clearness and force that the Constitution has created a new territorial community organized, through the powers committed to the organs of Federal Government and the inclusion of the Governments of the several States, for all the purposes of

[1] *Parliamentary Papers* (*Commonwealth*), 1903, p. 1164.

state existence compatible with its continued membership of the Empire.

This despatch, as well as the Act and the Constitution, reflects popular usage in its varying application of political terms. Sec. vi. of the Act—the interpretation section—does no more for the term "Commonwealth" than provide that "the Commonwealth shall mean the Commonwealth of Australia as established under this Act." But the term is in fact used in several senses connected so closely that it is peculiarly important to distinguish them. First, it is as already explained, the territorial community, the "single entity," the "new State or nation," established under the Act (*e.g.*, secs. iii. and iv.). Secondly, it describes the territory occupied by that community (*e.g.*, sec. 95). Thirdly, it describes the Federal Government or some appropriate organ thereof. It is in this sense that prohibitions to make laws of various kinds (*e.g.*, secs. 99, 100, 114, 116) are to be understood; they are addressed to the Parliament as the legislative organ of Federal Government; the prohibition does not bind the Commonwealth as a political organism, for the Constitution may be amended by the Commonwealth. The Commonwealth, in its ultimate organization behind its government, is politically supreme over all its parts and over all persons and things therein, and short of dissolving itself or otherwise infringing an Imperial Act, may exercise every power of government within its territory and strip the States—which exist as governmental agencies only by the sufferance of the Commonwealth in this sense of the term—of every power. This is no more than follows from the analogy of the Commonwealth to a state or sovereignty in the ordinary sense of public law. It threatens nothing to the security of the States in the Commonwealth; for the acknowledgment of the organic nature of the Commonwealth implies nothing as to the form of its organization or the

powers of the Federal and States Governments respectively.

By sec. vi. "the States" mean "such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called 'a State.'"

The enumeration of the Colonies eligible in the first instance to become members of the Commonwealth is a matter of political significance. It includes none but "settlement" Colonies, which have a common civilization, similar social and economic conditions, and which have all had a sufficient training in self-government. Fiji is a member of the "Australasian group" of Colonies as defined by more than one Act of Parliament, and she was a member of the Federal Council of Australasia. But the tropical and sub-tropical islands of the Pacific, whatever their importance, could hardly be associated as part of a democratic Government, and their union with the Commonwealth, if it be established, must be as dependents rather than as members.

THE AREA OF FEDERAL AUTHORITY.—We have seen that the Commonwealth is a territorial community; its territory includes the territory forming the constituent States, with their "territorial waters"; and in that sense the territory of every State is Commonwealth territory. All such territory is subject to the dual Government.

But sec. v. of the *Constitution Act* expressly enlarges the area of Commonwealth authority by the provision that "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Common-

wealth.[1]" The legal doctrine whereby a ship is deemed to be a part of the territory of the nation to which she belongs is thus adapted to the class of ships here described; the law of the Commonwealth on any matter upon which the power of the Commonwealth Parliament may be exercised is their law, and in this conventional sense such ships would be a part of the territory of the Commonwealth, though not in any sense part of any State.

The expression "territory of the Commonwealth" may serve to describe areas either within or without the geographical limits of Australia over which the Commonwealth Parliament has exclusive authority. This would include dependencies such as Papua,[2] placed under the authority of the Commonwealth by the Crown, or surrendered by a State or otherwise acquired under sec. 122 of the Constitution. These dependencies, though territory of the Commonwealth in a political sense, would not be legally a part of the Commonwealth.[3] Within Australia, territory may come under the exclusive authority of the Commonwealth through surrender by any State (sec. 111); the exclusive authority of the Commonwealth probably attaches to the seat of government established under sec. 125, and to all places acquired by the Commonwealth for public purposes (sec. 52).

[1] This section was modelled upon, but is narrower than, sec. 20 of the *Federal Council of Australasia Act* 1885, whereby Acts of the Council had the force of law on board all British ships other than Her Majesty's ships of war, whose last port of clearance or port of destination was in any Colony which had become a member of the Council. The meaning of the section is discussed in the *Memorandum of the Australian Delegates*, *Wyman's Reprint of Proceedings*, 1900, pp. 142-143, and in *Commonwealth Parliamentary Debates*, 1904, pp. 2069-2073. See also *The Merchant Service Guild of Australasia* v. *The Commonwealth Shipowners Association*, Commonwealth Arbitration Reports, 1905-1907, p. 1, and (1908) 5 C.L.R. 737.

[2] See *Papua Act* 1905.

[3] The question whether dependencies are a part of the United States has been very important, and is involved in the "*Insular Cases*"; *Di Lima* v. *Bidwell*, (1900) 182 U.S. 1; *Dooley* v. *U.S.*, 182 U.S. 222, (1901) 183 U.S. 151; *Downes* v. *Bidwell*, 182 U.S. 244.

CHAPTER II.

THE CONSTITUTION OF THE COMMONWEALTH.

THE preamble of the *Commonwealth of Australia Constitution Act* 1900 recites the agreement of the people of the Colonies "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established." The enacting part of the Act consists of nine sections, known as the "covering clauses," and of these, sec. ix. contains "The Constitution." Substantially the Act falls into two parts, of which the first eight sections, and the introductory words of sec. ix. have the ordinary character of an Imperial Act, and are unalterable save by the Imperial Parliament; while the second part consists of "The Constitution" in 128 clauses, and is made alterable by the Commonwealth (Constitution, sec. 128).

In addition to conferring the power to establish the Commonwealth (secs. iii. and iv.), the covering clauses prepare the ground by (sec. vii.) repealing the *Federal Council of Australasia Act* 1885, and (sec. viii.) providing that the *Colonial Boundaries Act* 1895 shall no longer apply to any Colony which has become a State of the Commonwealth, but that for the purposes of the Act the Commonwealth shall be taken to be a self-governing Colony. Sec. ii. is formal, and sec. v. deals with the operation and binding force of the Act and defines the operation of laws made by the

Parliament of the Commonwealth under the Constitution. Sec. ix. provides:—"The Constitution of the Commonwealth shall be as follows:—" and then under the title "The Constitution" are set out the organization of the Commonwealth, the distribution of power between Commonwealth Government and States, the powers and duties of the Commonwealth Government. "The Constitution" is thus a definite instrument having the Imperial Parliament for its source, binding the organs of Government which it establishes, and therefore superior in authority to the enactments of the Legislature which it creates; but it may be freely altered or added to by the Commonwealth in its ultimate organization, as is provided by the instrument itself (sec. 128).

A Constitution,[1] in the modern sense, is a fundamental law or instrument of government. It consists mainly of—

1. The frame of Government, which creates and provides for the continuance of the legislative, executive and judicial organs, and defines their powers and relations to each other;

2. An enumeration of rights of the citizens or classes of citizens against the government, which may vary from the enunciation of a few general principles, which are rather counsels of perfection than practical restraints, to the most minute provisions on all sorts of matters rigorously binding the organs of government; and

3. Provisions for amendment.

It will also contain a number of arrangements which are provisional and temporary merely, but are necessary to start the machine upon its work.

The constitution of a State formed by the union of States is a more complicated matter. We do some violence to the idea of contract when we regard an ordinary constitution either as a compact of the citizens or a compact

[1]For the history of the term "Constitution," see *The English Constitution*, by Jesse Macey, cap. xlvii.

between the citizens and their government; but we need neither analogy nor metaphor to speak of the agreement of the parties in an union of States. As Professor Dicey remarks, "the foundations of a federal State are a complicated contract," and this bargain may include many matters. The States are jealous, not merely of possible encroachments of the central government upon their sphere, but of the possibility of a rival State securing any advantage over them in matters within the power of the central government. This jealousy is not less apparent in the Australian Constitution than in others of the same kind, and it has some very important consequences. The principle of State equality and State right, pressing upon and conflicting with the democratic principle, modifies the democratic character of the Constitution which, where there is not room for that conflict, is the dominant note of the instrument. Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him. Another feature which belongs to the federal character of this instrument is that the Constitution in many cases does not confine itself to conferring powers on the central government, but prescribes how those powers are to be used. This, in the opinion of an eminent and friendly critic (Sir Samuel Griffith), goes beyond the proper functions of a Constitution. Others see in these provisions indications of a general distrust of Parliamentary institutions.[1] The contractual basis of the Constitution seems a sufficient answer to both objections.[2]

[1] See the two articles by Mr. A. H. F. Lefroy in the *Law Quarterly Review*, April and July, 1899.

[2] The contractual basis of the Constitution is an element to be considered in its construction. See *Cousins* v. *Commonwealth*, (1906) 3 C.L.R. at p. 539; *Commissioners of Taxation* v. *Baxter*, (1907) 4 C.L.R. at pp. 1109, 1113.

If the Constitution makes fundamental some things that might be in the control of the governmental organs, it also contains much that is not fundamental. There are many provisional arrangements which are completely under the control of Parliament, but which had to be established before the government could get under way. "Until the Parliament otherwise provides," is a phrase which meets us in all parts of the Constitution. But the general character of the Constitution is its supremacy over all the organs of Government within the Commonwealth, including the Commonwealth Parliament.

THE STATE COURTS AND THE CONSTITUTION. — The emphatic declaration of Art. VI. in the Constitution of the United States that the Constitution and the laws made in pursuance thereof shall be "the supreme law of the land," is not to be found in the Commonwealth Constitution. The *Constitution Act* can claim no higher force than belongs to an Act of the Imperial Parliament, and it is not the only Act in operation in the Commonwealth. The duty of the Commonwealth Executive to maintain the Constitution and execute the laws of the Commonwealth Parliament is expressed in its very establishment (sec. 61); the duty of the judiciary to recognize and enforce the Constitution, and the laws made in pursuance of it, is manifest. But the position of the States Governments is different. They are not created and established by the Constitution; their executive and judiciary are not co-ordinate with but subordinate to the State Parliament. The State Parliaments are bodies with "plenary powers," a phrase which would cover many extravagant claims which it was wise to anticipate by preventive provisions. It might be plausibly contended that in a State Court, State law was paramount over Commonwealth law, and that Commonwealth legislation was there controlled by State legislation, even to the

extent of giving validity to Acts of nullification passed by the State Parliament as to Acts of the Commonwealth Parliament. Or it might be urged that the Constitution set up a separate and independent system; that its laws were cognizable in the Federal Courts alone, and that all causes brought in the State Courts were to be determined by the State laws as defined by the State Parliaments. There would thus be *imperium in imperio*—State laws enforced by State Courts, Commonwealth laws enforced by Commonwealth Courts. We have only to look to our own history, even our recent history, to see that such a dual system is conceivable. We remember the separateness of the ecclesiastical and royal Courts, the Court of Admiralty and the Courts of common law, the Courts of common law and the equitable jurisdiction of the Chancellor, as cases where distinct and often conflicting systems claimed to deal with the same persons and subject-matters within the same territory. Even when the sharpness of the conflict was blunted by the acknowledgment of a common superior, the existence of the separate systems was not less a legal fact, though its political importance was diminished.

As a measure of caution, then, the *Constitution Act* provides—

"Sec. V. This Act and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, judges and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State."[1]

Thus, in the causes within their jurisdiction, the Courts of the States are bound to uphold the Constitution and

[1]Sec. V. of the *Commonwealth Act* strikingly resembles the original form of Article VI. in the Constitution of the United States. The draft provided that "legislative Acts of the United States and treaties are the supreme law of the respective States, and bind the Judges there as against their own laws."

maintain the Commonwealth laws. As this is their duty, they have to determine for themselves whether an Act of the Parliament is in truth a law, whether it is within the powers committed by the Constitution to the Parliament. The interpretation of the Constitution, therefore, is not for the judiciary of the Commonwealth alone; it falls upon every Court throughout the Commonwealth, whatever the authority under which it sits.

COLONIAL CONSTITUTIONS.—The Legislatures of British Colonies have necessarily existed under some higher law, and have from the nature of the case recognised some limits to their power other than their own will. These limits, however, have been so vaguely conceived, that in practice the restraint has hardly been felt. The paramount nature of Imperial legislation has of course been evident; but the sphere of local and Imperial laws has been different, and there has been little conflict. On the few occasions when Colonial laws have been challenged as *ultra vires*, the English Courts and especially the Privy Council have been emphatic in their assertion of the plenitude of the powers of the Colonial Legislatures, and have laid it down that "an act of the local Legislature, lawfully constituted, has as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament.[1]" Thus, Colonial Legislatures have been formed on the model of the Imperial Parliament; and the Acts giving a Constitution to a Colony have done little more than establish a Legislature, and have left the further organization of Government within the Colony, if not to the establishment, at any rate to the control of the Legislature. The

[1] *Phillips* v. *Eyre*, L.R. 6 Q.B. 1. See also *R.* v. *Burah*, 3 A.C. 889; *Hodge* v. *Reg.*, 9 A.C. 117; *Powell* v. *Apollo Candle Co.*, 10 A.C. 282; *Rex.* v. *Cain & Gilhula* (1906), A.C., 542; *Webb* v. *Outtrim* (1907), A.C. 81.

source of executive power, and the origin of courts of justice, may have been in the Crown, but that in no wise withdrew these matters from the control of the Legislature. The legislative power is all embracing and within the Colony all other powers of Government follow it. The self-government of the Colonies has not in a legal sense been committed to the people thereof as a quasi-sovereign political community; it has been vested in the legislative bodies established by their Constitutions which have had the same legal independence of the political quasi-sovereign, *i.e.*, the electorate, as the Imperial Parliament has of the electors of the United Kingdom.

A Constitution, therefore, which establishes a Legislature not merely as a representative assembly, responsible politically to its constituency, but legally bound by many and exact limitations, is hardly less a novelty in a British colony than it would be in the United Kingdom. This will be the more apparent if we consider for a moment what would be the position were the paramount power of the Imperial Parliament removed. In the Colonies as organized before federation, the removal of the only legal control would have left the Colonial Legislature unquestioned sovereign, wielding in the Colony the same power that the Imperial Parliament exerts in the United Kingdom. In the Commonwealth of Australia, however, the disappearance of the Imperial Parliament would not exalt the Commonwealth Parliament; the sovereignty would fall upon the Commonwealth as organized behind the Parliament by the Constitution. If now we remember that the supremacy of the Imperial Parliament is a force rarely exerted, while the pressure of the Constitution is constant, we shall see that there was reason on the side of those who murmured that a "cast-iron Constitution" was something essentially different from the Parliamentary rule to which the Colonies had been accustomed.

It may be added that the proceedings of the Commonwealth Parliament contain abundant evidence of the unfamiliarity of the new conditions to members, most of whom have served in colonial Legislatures under the old *régime*.

"THE CONSTITUTION" AND CONSTITUTIONAL LAW.—In the British Constitution, we are familiar with the fact that the "Law of the Constitution" does not exhaust the rules under which our system of government is carried on; there is the custom as well as the law of the Constitution, to complicate the terms "constitutional" and "unconstitutional." In the Commonwealth there is a further complication, for "The Constitution" does not exhaust even the Constitutional law in force there.

Much of the law which we regard as constitutional is so much the application to public relations of the ordinary law between citizens that an exhaustive constitutional code would hardly be practicable without a codification of the common law itself. But even in matters relating to the organization of the central government of the Commonwealth, much of the constitutional law of the Commonwealth may be provided by the Parliament—*e.g.*, the qualification of electors and of candidates for the Parliament, disputed elections, privileges of the Houses and the members thereof, &c. Then there is the constitutional law of the Commonwealth as a member of the Empire and the relation of the Commonwealth to the Imperial Government and the States, and there is the constitutional law of each of the States. In addition to the "Law of the Constitution," as thus understood, there is, of course, the maze of customs and understandings which invade every part of our institutions, defining the political limits of the exercise of legal powers. There are the delicate relations of Imperial and Colonial governments; the conventions of Cabinet Government made more intricate by the constitution and powers of the Senate.

To these will doubtless in time be added some conventions affecting the exercise of powers by Commonwealth Government and State respectively, as a means of promoting harmony in the working of the dual government. Of all these, account must be taken by those who would understand Australian institutions; they all form part of our "constitutional" system as that term is commonly used by Englishmen.

CHAPTER III.

THE CROWN IN THE COMMONWEALTH.[1]

THE recital in the preamble to the *Constitution Act* that the people have agreed to unite under the Crown of the United Kingdom of Great Britain and Ireland, serves to call attention to the manifold capacities of the Crown in our complex Constitution. The Crown does in fact pervade every part of our political system, and is the hardest worked of our legal institutions. The Crown establishes the Commonwealth, is a part of the Commonwealth Parliament, and is the depositary of the federal executive power. But the Crown is also directly or indirectly a part of every State Parliament. As a result of the fact that the provincial or royal, and not the chartered or proprietary government, has become the type of colonial Constitution, the executive government of a Colony proceeds in the King's name; the governor is merely the King's delegate to exercise so much of the royal power as has been committed to him. In the United Kingdom the prerogative has become an instrument of popular government; it may even, through the use of the power of dissolution, be made to furnish those checks upon representative bodies which are elsewhere found in formal

[1] On the subject of this chapter, see L.Q.R., vol. xvii. (1901), p. 131, "The Crown as Corporation," by F. W. Maitland, and vol. xx., p. 351, by W. Harrison Moore; also two articles on "The Crown as Representing the State," by Pitt Cobbett, in the *Commonwealth Law Review* (1903-4).

constitutions and in the referendum. By a similar process, the prerogative in the Colonies is no reservation of personal enjoyment or profit to the King, nor does it primarily stand for any power of the Imperial Government; it is mainly an instrument for increasing and effectuating the powers of self government. The extent of delegation made by the Crown, and the mode of exercise as prescribed by the royal instructions, are, in fact, a measure of the responsible government which the Colony enjoys.

So far as the prerogatives of property, of exception and of privilege are concerned, they are as extensive in the case of Colonies as of England; every virtue which the law imputes to the King attaches to him equally as the head of a Colonial government.[1]

The establishment of the Commonwealth in no way affects the participation of the Crown in the government of the States; the prerogative communicates powers and duties to the State Governor as it did to the Governor of the Colony. The emphatic declaration of the Constitution (sec. 2) that "a Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth" does no more than define the position in relation to the powers exercisable for and on behalf of the Commonwealth as a whole. The State Governor is the representative of the Crown in all that belongs to State Government, and continues to receive even the ceremonial recognition which is paid to the presence of the King's representative. Even in Canada the existence of the Dominion Government does not sever the connection between the Crown and the Provinces, so as to make the Dominion Government the only Government of the King in North America. The Provincial

[1] See *In re Bateman's Trusts*, L.R. 15 Eq. 355; *In re Oriental Bank Corporation*, (1884) 28 Ch. Div. 643; *Young* v. *s.s.* "*Scotia*," (1903) A.C. 531.

Governments are no mere municipal institutions; they are, within the limits prescribed to them by the *British North America Act* 1867, governments of the King, partaking of all the qualities which belong to that status.[1] This position is carefully avoided in the draft South African Constitution, where the Provincial Administrators are completely subordinate to the central Government, and in no way represent the King.

From the Crown as constituting the Colonial Government, we pass to the Crown in its Imperial capacity. There the Crown stands, first, for the unity of the whole; it is, in the words of Mr. Balfour, "the living symbol of the unity of the Empire."[2] Next, it appears as "the Imperial Government," exercising a not very well-defined superintendency varying with the political status of the Colony—the "Downing Street" of Colonial politicians when they are out of humour with it. In two respects especially it exercises an important revising function—in the allowance and disallowance of Commonwealth and State legislation (where the King may disallow his own Act), and in the receiving appeals from Commonwealth and State Courts. Finally, the community has been so far absorbed by its head, that we have no other means of expressing the juristic personality of these free self-governing communities than through the natural personality of the King,[3] while in 1903 it was gravely argued in the Parliament of the Commonwealth that the expenditure of public money is no charge upon *the*

[1] *Maritime Bank of Canada* v. *New Brunswick Receiver General*, (1892) A.C. 437.

[2] "In my judgment, the Crown in our Constitution is not a diminishing but an increasing factor. It is increasing and must increase with the growth and development of those free self-governing communities, those new Commonwealths beyond the sea which are bound to us by the person of the sovereign, who is the living symbol of the unity of the Empire." (House of Commons, 25th January, 1901.)

[3] *Sloman* v. *Governor and Government of New Zealand*, L.R. 1 C.P.D. 563.

people within the meaning of the Constitution (sec. 53), because expenditure is charged on the Consolidated Fund which is legally the property of the Crown.[1]

Now we are warned in the comminatory language of Coke against any attempt at the severance of the bodies of the King. If nothing less than the Athanasian creed will serve the turn of those who distinguish between a body natural and body politic of the King, what shall be his who sees not one body politic, but several bodies politic within the Empire invoking the King's name? And yet there is no escape from the fact that political developments have, not for the first time, run away from legal theory. The Federal Governments of Canada and Australia present us daily with the need for recognizing *Dominion* and *Province*, *Commonwealth* and *State* as separate juristic entities, which lip service to the unity and indivisibility of the Crown can only obscure. The High Court of Australia very early gave expression to this fact when, in the *Municipal Council of Sydney* v. *Commonwealth of Australia*,[2] it declared that "it was manifest from the whole scope of the Constitution that just as the Commonwealth and the States were regarded as distinct and separate sovereign bodies, with sovereign powers limited only by the ambit of their authority under the Constitution, so the Crown as representing those bodies politic was to be regarded not as one but as several juristic persons." Practically, the Courts in England have met the same difficulty in the same way when they have held that claims against Colonial Governments, though legally claims against the Crown, cannot be pursued in England against the Crown under the *Petitions of Right Act*, an Act which they have construed as inapplicable to claims which are properly

[1] See L.Q.R., vol. xx., p. 354.

[2] (1904) 1 C.L.R. 208. This doctrine is re-affirmed in *The King* v. *Sutton*, (1908) 5 C.L.R. 789.

provided for out of the revenues of some part of the King's dominions other than the United Kingdom.[1] The more recent case of *Williams* v. *Howarth*[2] seems to point in the opposite direction. That was a claim pursued in New South Wales against the New South Wales Government, sued in the name of a statutory defendant, and was for an alleged balance of pay due to the plaintiff in respect of military service in South Africa. The New South Wales Government had engaged with the plaintiff to pay him 10s. a day, the Imperial Government paid him 4s. 6d. a day, and the question was whether in ascertaining the balance due from the New South Wales Government, that Government was entitled to take credit for the sum paid by the Imperial Government. The Privy Council held that it was so entitled inasmuch as the claim was against the Crown, and the payment made by the Imperial Government was a payment by the Crown, and that the distinction between Imperial and Colonial Government was immaterial. In the circumstances of the particular case, this may well be so. The very nature of military service in time of war makes it difficult to sever the authority to which it is rendered, and without insisting that the one government was the agent or the guarantor of the other in a strict sense, it was tolerably clear that the contract was merely that the plaintiff should have 10s. a day for his service.

Practical difficulties must frequently arise under Statutes from which, as not being mentioned therein, "the Crown" claims exemption; or, "the Crown" being mentioned, a Government claims that it is not comprehended within the terms of the imposition; or, more than one Government

[1] *Holmes* v. *Reg.*, (1861) 31 L.J. Ch. 58; *Palmer* v. *Hutchinson*, (1881) 6 A.C. 621; *Frith* v. *The Queen*, (1872) L.R. 7 Ex. 365. See also *Doss* v. *Secretary of State*, (1875) L.R. 19 Eq. 509; *Reiner* v. *Salisbury*, (1876) 2 Ch. Div. 378; and *Strachan* v. *Commonwealth*, (1904) 4 C.L.R. 453.

[2] (1905) A.C. 551.

claims the benefit of the Statute. The question may, of course, arise, and has in fact arisen in the interpretation of Imperial Statutes. In 1879 the House of Commons adopted the report of a strong select committee to the effect that by his appointment as Attorney-General for Victoria—then as now a self-governing colony—Sir Bryan O'Loghlen, member for County Clare, had incurred the disqualification attaching to an office of profit under the Crown.[1]

The Supreme Court of New South Wales had in *Attorney-General* v. *Collector of Customs*[2] to consider whether the Crown in right of New South Wales was liable to pay duties of customs on the import of goods for the use of the Government, and they held that whether or not the Commonwealth Parliament had *power* to impose such a liability on the State, they had not done so, because the Crown could only be charged by express words, and no such words were found in the Act of the Commonwealth Parliament under consideration. After the matter had been for some years the subject of difference of opinion between the Commonwealth and State Governments as to the application of the general terms of the Customs Acts to the Crown as bearing the *persona* of the States, the High Court definitely determined in *The King* v. *Sutton*[3] that the rule which exempts the Crown from the operation of Statutes in which it is not named applies only to the Crown considered as the executive authority in relation to the Statute in question, and that, accordingly, the Commonwealth Customs Acts must be understood to extend to the States Governments, though not expressly named therein. Stress was indeed laid on the fact that the Commonwealth was exercising an exclusive power, but the

[1] *Hansard's Debates* (1879), vol. 245, p. 1104. See also Constitution, sec. 44 (iv.)

[2] (1903) 3 S.R. (N.S.W.) 115.

[3] (1908) 5 C.L.R. 789.

principle appears to be nothing short of that stated by O'Connor J. (at p. 856) that the rule of construction in favour of the King must be limited to the King as representing the community whose legislation is under consideration, and cannot be applied to the King as representing some other community.

The Constitution raises many questions as to the powers of the Crown which will have to be considered in connection with that department of government with which they are immediately associated. Two of them, which are of first rate importance, may be indicated here.

The first is the power of the Crown to disallow Acts of the Commonwealth and the State Parliaments. This power, of undoubted value as enabling the Crown to protect Imperial interests, has assumed an unexpected importance from the significance attached to it by the Supreme Court of Victoria,[1] and apparently by the Privy Council,[2] as a means of preventing either State or Commonwealth from embarrassing the activity of the other. This phase of the power of the Crown must be considered later in connection with the vexed question of the "immunity of instrumentalities." The other matter is the power of the Crown to entertain appeals from the High Court, and from State Courts in Constitutional matters, and the possibilities of conflict between the Privy Council and the High Court in the interpretation of the Constitution. This matter must be considered in connection with the judicial power of the Commonwealth.

[1] *Wollaston's Case*, (1902) 28 V.L.R. 387.
[2] *Webb* v. *Outtrim*, (1907) A.C. 81.

PART III.—THE ORGANIZATION OF THE COMMONWEALTH GOVERNMENT.

CHAPTER I.

THE DISTRIBUTION OF POWERS IN THE COMMONWEALTH GOVERNMENT.

THE Constitution follows the plan of the United States Constitution in committing the functions of government—legislative, executive, and judicial—to three separate departments.

"The legislative power of the Commonwealth shall be vested in a Federal Parliament" (sec. 1).

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to" the matters enumerated (sec. 51).

"The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth" (sec. 61).

"The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction" (sec. 71).

The allotment of functions by the Constitution is thus not merely an allotment between State and Commonwealth; it is also an allotment amongst the organs of the Commonwealth Government. The Constitution does not commit subjects to "the Commonwealth" in general; it designates certain organs which are to exercise particular kinds of power over the subjects committed to them. To the Courts belongs the duty of interpretation, and the question then arises how far this distribution of power is subject to a legal, as distinguished from a merely political, sanction. May the Courts for example consider whether an Act of the Commonwealth Parliament upon a subject undoubtedly committed to the Commonwealth Parliament is truly "legislative" in nature, or is an assumption of executive or judicial power on the subject-matter?

The form of the separation of powers is copied from the American Constitutions, and in America the separation of powers is uniformly sanctioned by the action of the Courts both in relation to the National and the States Constitutions. Each of the organs is restrained to the exercise of that kind of power which has been committed to it, and a jealous watch is kept upon any trespass by one on the ground of another. But though the doctrine is now thoroughly established in the Courts as an independent principle, the greater number of cases in which the Courts have called attention to the separation of powers has been decided, not on the implied prohibition arising from the separation, but upon express restraints imposed on the Legislature by the Constitution, as the prohibition of bills

of attainder, the deprival of due process of law, or the making of *ex post facto* laws, and—in the case of States Legislatures—laws impairing the obligation of contracts, or infringing the Fourteenth Amendment. Especial care must therefore be taken in the application of American authorities on this subject to a Constitution where these additional restrictions do not exist.

In the British colonies this fundamental separation of powers has not existed. As already pointed out, our political doctrine is not that of a sovereign people committing limited powers of government to their agents. Self government has been parliamentary government, and consequently the disposal of executive and judicial duties, as well as of subordinate powers of legislation, has devolved upon the organ vested with the general power to make laws;[1] the model of the Colonial Legislature has been the Imperial Parliament, as has been affirmed on every opportunity by the Privy Council.[2]

[1] Cf. Cooley, *Constitutional Limitations*, sec. 90.

[2] *E.g. Hodges* v. *The Queen*, 9 A.C. 117; *Webb* v. *Outtrim*, (1907) A.C. 81. Canadian Courts have, however, in several instances dwelt upon the purely legislative powers of the Provincial Legislatures and have considered that the executive and judicial powers are implicitly withheld (*vide* Lefroy, *Legislative Power in Canada*, p. 125). In the Privy Council itself there have been some suggestions that the question "What is legislation?" is one for judicial consideration. Thus, during the argument in *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (L.R. 5 P.C. 179), Mellish L.J. said that "It was assumed in *Phillips* v. *Eyre* that an Act of Attainder would be void," and in the leading case of *R.* v. *Burah* (3 A.C. 889, 904), where one of the questions was as to the power of the Governor-General in Council in India to remove a certain area from the jurisdiction of the High Court, Lord Selborne, in delivering the opinion of the Board, uses language which, while not unambiguous, suggests that the question whether what has been done is legislation is a matter for the consideration of the Court. "If what has been done is legislation within the general scope of the affirmative words which gave the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." In the case of *Fielding* v. *Thomas*,

It may be assumed, then, that the legislative character of Acts of the State Parliaments in Australia is not submitted to the consideration of Courts of law ; and that the separation of powers is in the States no more than a rule of expediency subject to political sanctions. These sanctions must, it is submitted, be found in the State itself. In the case of the American Colonies, the assumption of judicial power by the assemblies was a common cause for the exercise of the Crown's power of disallowing Statutes.[1] It would still be a proper ground for interference by the Crown in any Colony which is not self-governing; but in the case of a self-governing colony, it would, it is submitted, be an unconstitutional invasion of the local sphere.

In the case of the Commonwealth Parliament it is impossible to avoid the conclusion that the separation of

(1896) A.C. 660, a Statute of Nova Scotia had conferred upon the House of Assembly the character of a Court of record with inherent power to punish for insults or libels on members during session, and had provided that members who were present and voted on the question of the arrest of an offender, should enjoy the immunities of a Court of record. In holding that the Act was valid, the Judicial Committee said :—"It may be that the words if construed literally and apart from their context would be *ultra vires*. Their Lordships are disposed to think that the Legislature could not constitute itself a Court of record for the trial of criminal offences. But read in the light of other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that these sections were merely intended to give to the House the powers of a Court of record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as an incident to the protection of their proceedings, sec. 30 cannot be supported." While the terms used here are plain enough, there is some difficulty in knowing whether in their Lordships' opinion the suggested vice lies in the assumption of judicial power instead of conferring it upon some Court by virtue of the Provincial legislative power to "constitute, maintain, and organize Provincial Courts, both of civil or criminal jurisdiction"; or in the invasion of the exclusive power of the Dominion Parliament to deal with "Criminal Law."

[1]See Chalmers' *Opinions of Eminent Lawyers*, vol. II., *passim*. For instances of the exercise of judicial powers by the Colonial Legislature of Massachusetts, see *Harvard Law Review*, vol. XV., p. 208.

powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to address themselves to the problem of defining the functions of those organs.

The question then becomes important: What are the proper conclusions from this separation?

"The difference between the departments undoubtedly is that the Legislature makes, the executive executes and the judiciary construes the law."[1] A purely logical determination of the functions would require us to consider the nature of law as a *rule of conduct*. We should insist that because the Legislature has power only to make law, its enactments should be marked by *generality* in their application to persons and circumstances, and should be wholly *prospective* in their operation. We should insist that, because the Legislature alone has power to make law, it must express a rule of sufficient *definiteness* and *certainty* to be applicable in the particular case without substituting the discretion of the administrator or the Judge for its own.[2] Many acts would fail, not because they actually encroached upon the executive or the judiciary, but simply because they did not make law according to the juristic notion of law. A divorce pronounced by the Legislature in a country where there is no general law of divorce or for a cause not recognized by that law, is a familiar example. Another illustration may be taken from the provisions of the Commonwealth *Customs Act* 1901, whereby, amongst "prohibited imports" are "all goods the importation of which may be prohibited by proclamation" (sec. 52 (*g*)), thereby granting inferentially a discretionary

[1] Per Marshall C.J., *Wayman* v. *Southard*, 10 Wheaton 46.

[2] *E.g.* A Statute authorizing a board to cancel a physician's licence for "grossly unprofessional conduct," has been held to require a more particular definition of such conduct. See Cooley, *Constitutional Limitations*, 245*n*. And see per Brewer J. (diss.), *Interstate Commission* v. *Brimson*, 155 U.S. 1.

power to the Governor-General in Council to prohibit all or any goods.[1] In the United States the investigation of the validity of Statutes by the Courts has in fact taken account of these tests, and the result is embodied in a large number of decisions against arbitrary *privilegia*,[2] against the retrospective operation of Statutes, and against the delegation of powers, tempered by some concessions to usage and practical convenience.

The executive power is so closely allied to the legislative that it may be impossible to draw any other line than that which expediency and practical good sense commend. Whether we turn to the colonial history of the North American commonwealths, or to the modern history of the State Governments in the United States, or to the relations of the Executive and the Legislature in Continental Europe, we are not encouraged to believe that the executive can make good an independent sphere of its own, free from legislative interference and control. In the separation of powers between Executive and Legislature, the main function of the Courts would seem to be the enforcement of the principle in the Commonwealth Government as in the States Governments that the executive has no inherent legislative power.

But while the Executive has no inherent power, can it receive grants of legislative power from the Legislature? In the United States it is agreed that the Legislature may not commit the determination of legislative policy to the

[1] Under this provision the importation of grain-sacks above a certain size was prohibited in 1908, and was the subject of much discussion. Such a power including discretion in matters of policy, would not in the United States be recognized as one which could properly be committed to the executive. See *Field* v. *Clark*, 143 U.S. 649. The validity of the provision was sustained by the High Court, in May 1909, in the prosecutions of Ah Way and E. Merchant for the importation of opium contrary to proclamation. For reference, see *Addendum*.

[2] See Cooley, *Constitutional Limitations*, cs. v. and viii.

executive or any other authority. The distinction is pointed out in *Field* v. *Clark* (143 U.S. 649) between "the delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under or in pursuance of the law. The first cannot be done; to the latter, no valid objection can be made." The Legislature can "make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend which cannot be known to the law making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation" (p. 694). Accordingly the judgment upholds an Act of Congress which enables the President to suspend its provisions relating to the free introduction of various commodities as a means of securing reciprocal trade relations with countries exporting those commodities. And in *Buttfield* v. *Stranahan*[1] it is held that an unconstitutional delegation of power is not made by an Act which forbids the importation of teas inferior to standards of purity to be prescribed by the Secretary to the Treasury; such a provision "merely leaves to the Secretary the executive duty to effectuate the legislative policy declared in the Statute."

In the Australian Colonies, as in England, the practice of committing to the Executive a power of making rules and regulations to carry out in detail the administration of Statutes is one of the best marked departures of modern Parliamentary action. It is not possible to believe that the Constitution meant to deny to the Commonwealth Parliament the power—which it has certainly assumed from the

[1] (1903) 192 U.S. 470.

first and exercised with great freedom[1] —of enabling the Executive to issue administration regulations.

Legislation by delegation is the modern mode of reconciling the claims of the Legislature and the Executive, and the means whereby in British countries the predominance of the Legislature is secured without the sacrifice of public interest which is involved when the Legislature, jealous of entrusting discretionary powers to the Executive, itself attempts to regulate and direct administration in detail. The Cabinet system, and the mutual dependence of Executive and Legislature which it involves, is recognized in the Constitution, and constitutes a vital difference from that completeness which marks the separation of the functions in the American system. An attempt to define rigidly in a logical or scientific way the provinces of execution and legislation might well leave the power in question to the executive; it is something of a national peculiarity that we treat the power of administrative regulation as essentially legislative. But even if upon a strict classification the power must be deemed legislative, it is well established that a due regard must be had to history and common practice as well as to the nature of the powers themselves,[2] and from these the only conclusion which can be drawn is in favour of the power.

The case is not so simple where Parliament leaves to the

[1]The "statutory rules" of the Commonwealth are governed by the *Rules Publication Act* 1903, where rules are divided into two classes—those which have to be laid before the Houses of Parliament before they come into operation, and those which are promulgated as law by the rule-making authority. In the latter case 60 days notice of an intention to make rules must be given, and during that time any person may obtain copies of the draft rules, and may make representations to the authority thereon (sec. 3), but if the matter is one of urgency the authority may make provisional rules (sec. 4). The Act also contains directions concerning the publication of the rules and their proof in judicial proceedings.

[2]Cf. *Murray* v. *Hoboken Land Co.*, 18 Howard 272.

discretion of the Executive the whole matter of legislative policy, as a general power to prohibit the importation or exportation of such goods as it pleases. Such a provision would clearly be *ultrâ vires* if enacted by Congress. But even here there are distinctions between America and Australia. The first of these—the existence of the Cabinet system—has already been referred to. The other is the doctrine of delegated power which denies to the Legislature all power of delegating in turn—*delegatus non potest delegare*. But the Commonwealth Parliament, and not the people of Australia, are the immediate grantees of power from the Imperial Parliament, and it has been repeatedly decided that Colonial Legislatures constituted by the Imperial Act are not the delegates of the Imperial Parliament, and are therefore not restricted as to delegation of power.[1] It may well be, then, that the Commonwealth Parliament has, notwithstanding the separation of powers, a far wider power of delegation to the Executive than has Congress.[2]

Between legislative and executive power on the one hand and judicial power on the other, there is a great cleavage. The danger of the usurpation of judicial power by the Legislature or the Executive furnishes a long chapter in our constitutional history which is familiar to every student. The protests against the inquisitorial powers of Royal Commissions in the middle of the nineteenth century are less well known;[3] they were revived in a recent judgment of the Supreme Court of New South Wales in *Ex parte*

[1]See Part V., Chapter I., "The Powers of Colonial Legislatures."

[2]This question is now (May, 1909) decided by the High Court in the opium importation prosecutions—*R.* v. *Ah Way and E. Merchant*—in favour of the validity of the prohibitions. See *Addendum.*

[3]See Todd's *Parliamentary Government in England*, vol. II., pp. 345 *et seq.*, for reference to the literature of the subject; *Law Review* 1851-2, vol. 15; and *Clark's Australian Constitutional Law*, p. 226.

БИБЛІОТЕКА

Leahy.[1] The experience of the United States shows that in modern times the constitutional separation is important principally as guarding the judicial sphere against encroachment by the Legislature ; and it is this subject to which the American cases are almost exclusively addressed.[2] This must be considered more in detail under the head of "Judicial Power."

But it is also well established in the United States that no power can be committed to the Courts which does not fall within the ambit of the Judicial Power, as, for example, the duty of giving advisory opinions.[3] The department of judicial power, however, is not absolutely limited to the act of adjudication ; it may embrace matters incidental to the administration of justice. In spite of the rule against delegation, Statutes giving power to the Courts to make rules relating to their own procedure have been sustained,[4] and in the Commonwealth large powers of making "Rules of Court" have been conferred upon the justices of the High Court.[5] How far the justices of a Court as *personæ designatæ* can be made the recipients of a non-judicial power seems not to be settled in America ; but it is clear that powers unconnected with the performance of judicial functions cannot be exercised by a Court.

THE PREPONDERANCE OF THE PARLIAMENT.—The distribution of powers by the Constitution is not inconsistent with the preponderance of the Parliament in the Government of the Commonwealth ; the tradition of the identity of self-

[1](1904) 4 S.R. (N.S.W.) 401 ; reversed (1904) 2 C.L.R. 139.

[2]See Cooley, *Constitutional Limitations*, chapter v.

[3]See Thayer, *Cases in Constitutional Law*, p. 176, and *In the Matter of the Application of the Senate*, (1865) 10 Minnesota 78 ; Thayer, p. 181.

[4]See *Wayman* v. *Southard*, (1825) 10 Wheaton 1 ; *Bank* v. *Halstead*, *ib*. 51.

[5]*Judiciary Act* 1903, sec. 86 ; *High Court Procedure Act* 1903, secs. 32-34 ; *Judiciary Act* 1906.

government with Parliamentary government remains, and the dominant fact in the Constitution is a transfer of powers previously exercised in the several Colonies by the respective Parliaments to a Parliament which represents the whole. In addition to that kind of control over other functions which the power of making laws necessarily carries, the Parliament is expressly given considerable powers of control over the executive and judiciary. Parliament may make laws on any matter incidental to the execution of powers vested by the Constitution in any of the organs or officers of the Commonwealth (sec. 51, art. xxxix.). The organization and regulation of the executive is almost exclusively in the hands of Parliament, which fixes the number of Ministers (sec. 65) and controls the appointment and removal of all officers in the public service (sec. 67). Cabinet Government is everywhere a matter of convention rather than of law, but it is more clearly adverted to in the Commonwealth Constitution than in the *Constitution Act* of any of the Colonies (sec. 64). The financial necessities which secure Parliamentary control over the working of the public departments will, of course, exist in the Commonwealth as elsewhere; and the Constitution does not leave the assembly of Parliament to those necessities, but requires that it shall meet every year and at such times that twelve months shall not intervene between sessions (sec. 6). Even in the judicial department the establishment and jurisdiction of Courts other than the High Court of Australia are completely controlled by Parliament. The provision as to the tenure of Judges (sec. 72) intended to secure them against arbitrary interference by either the Executive or the Legislature, probably rather indicates the course to be followed by the two Houses of Parliament in the exercise of the power of removal, than imposes any legal limits on their power to remove at will. In the

important matter of the amendment of the Constitution, the power of initiation lies in the Parliament alone, and is not, as in the United States, shared with the States Governments, or, as in Switzerland, with the people.

CHAPTER II.

THE PARLIAMENT.

By sec. 1 of the Constitution, "The Parliament of the Commonwealth" consists of the "King, a Senate, and a House of Representatives." The Commonwealth thus follows the Constitution of Canada (*British North America Act* 1867, sec. 17) in adapting to its institutions the legal theory of the composition of Parliament.[1]

There is a singular diversity of practice through the British Dominions in respect to the formal relation of the Crown to the Legislature. In non-self-governing Colonies it is the Governor who legislates with the consent of his Council. In the self-governing Colonies the transition to "Parliamentary" government is sometimes marked by a change in the form of legislation; acts which were previously made in the name of the Governor are now made in the name of the Crown.[2] Others continue to enact in the name of the Governor, with the consent of the Chambers;[3] while in the case of New Zealand, legislation proceeds in the name

[1] Blackstone, *Com.* 1, p. 153:—"The constituent parts of a parliament are . . . . the King's majesty . . . . and the three estates of the realm."

[2] *E.g.* Canada (Dominion and Province), New South Wales, Victoria, Western Australia, Queensland. Mr. Justice Clark gives some reasons against this practice: *Studies in Australian Constitutional Law*, pp. 309 *et seq.*

[3] *E.g.* South Australia, Tasmania, Cape of Good Hope.

of the General Assembly, of which the Governor is made a part. In the Dominion of Canada, though the Constitution expressly declares that the Parliament consists of the Queen, the Senate and the House of Commons, it also lays down the legislative form, by vesting the power to make laws in the Crown, by and with the advice and consent of the Senate and the House of Commons (sec. 91).

It is hardly to be supposed that these several forms indicate any real difference of power; the plenitude of legislative power has been asserted as unequivocally in the case of those Legislatures of which the Crown is no immediate part, as where the legislation proceeds in the name of the Crown.[1]

In the Commonwealth, not merely is the Crown a part of the Parliament, but in that Parliament so constituted is expressly vested the legislative power of the Commonwealth (sec. 1), and the power to make laws is conferred not upon the Crown, but upon "The Parliament." The Senate and the House of Representatives are thus not merely *partes consentientes*; they are not less than the King himself, *partes agentes*.[2] Accordingly, Parliament had to select a form of enactment which should appropriately express the constitutional power committed to it; and after some debate[3] the following was adopted:—"Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia."

A.—THE GOVERNOR-GENERAL.—A Governor-General

[1] *E.g. R.* v. *Burah*, 3 A.C. 889 (Governor-General of India in Council); *Hodge* v. *The Queen*, 9 A.C. 117 (Lieutenant-Governor and House of Assembly of Ontario); *Dominion of Canada* v. *Province of Ontario*, (1898) A.C. 247.

[2] The distinction in the case of the English Parliament forms part of the argument of Oliver St. John in the *Case of Ship-money*, 8 State Trials, at p. 863.

[3] See *Post and Telegraph Bill* 1901, P.D. pp. 1192 *et seq.*

appointed by the King is "His Majesty's Representative in the Commonwealth" (sec. 2) "with such powers and functions of the King as His Majesty shall be pleased to assign to him." The Constitution, however, expressly authorizes the Governor-General to exercise such of the powers of the Crown as relate to the Parliament and to legislation. There is thus some duplication of sources in the powers of the Governor-General which, with the nature of the office, will be considered under the head of the Executive.

The following are the powers and duties of the Governor-General in respect to the Parliament which correspond with the prerogative in England :—

1. He summons, prorogues and dissolves the Parliament. This is provided by sec. 5 ; but the powers purport also to be granted by the Letters Patent. The Parliament is to be summoned to meet not later than 30 days after the day appointed for the return of the writs, and there is to be a session of the Parliament once at least in every year, "so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session" (sec. 6). The first Parliament of the Commonwealth was to be summoned to meet not later than six months after the establishment of the Commonwealth; it did in fact meet on 9th May, 1901.

2. He recommends to the House in which the proposal originates votes resolutions or proposed laws for the appropriation of revenue or monies (sec 56).

3. He assents to legislation in the King's name (secs. 58, 128).

In the exercise of these powers the Governor-General will, as to the second, necessarily, as to the first and third, generally, but not necessarily nor always, act on the advice of his Ministers. As to the summoning of the Parliament, he is in this as in other matters the guardian of the law and

should see that it meets at the proper times. As to the power of dissolution, that has always been the most difficult and delicate of a Governor's powers in a self-governing Colony, and is the one matter in which Governors always exercise a personal discretion which not infrequently leads them to refuse a dissolution. The principle which has commonly been acted upon is that, with the short Parliaments in the Colonies, a dissolution should, save in special circumstances, be resorted to only when it is clear that in no other way can government be carried on.[1]

The provisions of sec. 58 relating to the Royal Assent to Bills are taken from the *British North America Act* 1867, sec. 55, with an important difference. The Governor-General is to exercise his powers of assenting, or withholding or reserving for the Royal Assent, "according to his discretion, but subject to this Constitution." "According to his discretion" raises the consideration of two matters by which the discretion of the Governor-General may be guided—the Royal Instructions, and the advice of his Ministers. As to the Royal Instructions, it has been doubted whether a law assented to by a Governor would not in all cases be valid notwithstanding that such assent was given contrary to the terms of the Instructions. The *Constitution Acts* of the Australian Colonies, however, made the observance of the Instructions a condition of validity;[2] though as the Instructions themselves gave the Governor a discretionary power to assent to any Bill in case he should be of opinion that an

[1] See the whole subject discussed in Todd's *Parliamentary Government in the Colonies*, cap. xvii., part iii., and especially the summary at pp 800-803. See also Keith, *Responsible Government in the Dominions*, pp. 43 *seq.* On the two occasions on which an extraordinary dissolution has been advised by the Ministry of the Commonwealth—the defeats of the Watson Ministry in 1904 and the Reid Ministry in 1905—it was refused by the Governor-General (see *Commonwealth Parliamentary Debates*, 1904, p. 4265; 1905, pp. 133, 134).

[2] See 13 & 14 Vict. c. 59, sec. 12.

urgent necessity existed for bringing it into operation, the result was that the non-reservation of a Bill prescribed for reservation by the Royal Instructions only, would not impair its validity. The *British North America Act*, sec. 55, provides that when a Bill is presented to the Governor-General for the Royal Assent, he shall declare "according to his discretion but subject to the provisions of this Act, and to Her Majesty's Instructions, either that he assents," &c. The words "and to Her Majesty's Instructions" are omitted in the Commonwealth Constitution, and there is no provision on the subject similar to that in the *Constitution Acts* of the Australian Colonies. Sec. 58 provides that the Governor-General shall declare his assent, &c., according to his discretion "but subject to this Constitution;" sec. 2, limiting the powers of the Governor-General to such "powers and functions of the Queen as Her Majesty may be pleased to assign to him," is also "subject to this Constitution."

The result so far as the Constitution is concerned appears to be that the Instructions do no more than limit the authority of the Governor-General in an official sense as between himself and the Crown, and that a disregard of them would not invalidate an Act actually assented to. If the provisions of the *Colonial Laws Validity Act* 1895 be applicable at all they strengthen rather than weaken this conclusion. Sec. 5 of that Act provides:—"No Colonial law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof by any instrument other than the Letters Patent or instrument authorizing such Governor to concur in passing or to assent to laws for the peace order and good government of such Colony even though such instructions may be referred to in such Letters Patent or last mentioned instrument."

In the case of the Commonwealth, the authority of the Governor-General to assent to legislation is derived directly from the Constitution itself and does not depend upon any grant by Letters Patent or other (prerogative) instrument. As a matter of fact, the Letters Patent and the accompanying Instructions do not refer to the subject at all, and any instructions which the Governor-General may have received as to reserving or refusing his assent have not been published. The Crown has a simple remedy in its own hands in its power to disallow any Statute (sec. 59).

In the exercise of his discretion as to assenting to or withholding assent from Bills, the Governor-General must regard his duty as an officer of the Imperial Government. He must consult his instructions, published or secret, as to whether the measure is one which he ought to reserve. If it appears likely to involve any Imperial interest, as by specially affecting foreign countries or parts of the British dominions beyond the Commonwealth, or if it appears to conflict with any treaty binding the Commonwealth,[1] the measure would probably be reserved, unless the Imperial Government had already approved of the principle involved; modern facilities of communication greatly diminish the responsibilities of Governors in these particulars. The Governor-General ought also to be satisfied that *prima facie* the subject is one over which the Commonwealth has power and that the proposed law does not conflict with any Imperial law in operation in the Commonwealth. For this purpose he may receive a report from the Attorney-General; if the matter is of more than local importance, he may seek the advice of the Imperial Law Officers. Subject to these considerations, it

[1] On this ground the Customs Tariff (British Preference) Bill was reserved in 1906 and not proceeded with. See *Parliamentary Papers* 1906, p. 177, and Keith, op. cit., p. 235.

is submitted that he ought to be guided by the advice of his Ministers.[1]

In any case where the Governor-General assents to a Bill the Crown may disallow the Act within one year, and the law will then be annulled from the day when the disallowance is made known (sec. 59).

There is one matter in which the Constitution itself requires that proposed laws shall be reserved. Sec. 74, which gives power to the Parliament to make laws limiting the matters in which leave to appeal to the Crown in Council may be asked, directs that every such proposed law shall be reserved by the Governor-General for the pleasure of the Crown.

The minor powers of the Governor-General in relation to the Parliament will be considered with the matters to which they relate.

B.—The Senate.—The principal notion underlying the Constitution of the Senate may be gathered from the alternative names which were suggested for it—the House of the States, the States Assembly. Though it differs in many important respects from the Senate in the United States and in the Dominion of Canada, it stands like them for the federal principle in the Constitution. Every original State has equal representation in the Senate (sec. 7), a condition which was vigorously assailed in the larger States. This equality can be varied only by an amendment of the Constitution, and then only with the consent of the electors of the State or States whose "proportionate representation" it is proposed to diminish (sec. 128). In the first instance,

[1] But see Todd, p. 169: "Whenever Bills are tendered to the Governor of a Colony for the purpose of receiving the Royal Assent, he is bound to exercise his discretion in regard to the same, and to determine upon his own responsibility as an Imperial Officer, unfettered by any consideration of the advice which he has received from his own Ministers on the subject, the course he ought to pursue in respect to such Bills."

each State has six members; but the Parliament may increase the number. Apart altogether from the importance of numbers in relation to the character of the body, the number of Senators is important, because the Constitution contemplates that the Houses shall have twice as many members as there are Senators, a provision which establishes a certain balance of power at a joint sitting (secs. 24, 57).

As the Senate is to represent the States it is fitly provided that each State shall constitute one electorate, though this is a provision which the Parliament may alter (sec. 7). This mode of constitution may also be regarded as a check upon "localism" in Commonwealth politics; it is a common complaint of popular assemblies that "they represent the nation too little and particular districts too much." Large constituencies are in the Colonies a feature of the Second Chamber, where that Chamber is elective; and on the whole the anticipation has been fulfilled that from the mode of its constitution, the Senate might be more "national" than the national Chamber itself.

Though federal in constitution, the Senate is, unlike the German Bundesrath, unitary in action. It may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate (sec. 11). Until the Parliament otherwise provides, one-third of the whole number of the Senators makes a quorum (sec. 22), without regard to the manner in which that quorum is composed. Questions arising in the Senate are determined by a majority of votes, and the voting is personal and not according to States (sec. 23).

A condition which the Senate shares with Second Chambers and Upper Houses in general is "perpetual existence." Except in the event of deadlocks (sec. 57) it is not liable to dissolution. Its members retire by rotation after six years service (sec. 7), the length of service of a Senator being

double the legal term of the House of Representatives. By sec. 13 the rotation of Senators was to be determined by the body itself as soon as practicable after its first meeting and after every dissolution (sec. 13), so that half the Senators of each State in the first Senate and every new Senate should retire at the end of three years service. Accordingly, soon after the meeting of the first Parliament in 1901 the Senate adopted resolutions whereby the six Senators representing each State were divided into two classes according to the number of votes received by them at their election, and the class which received the smaller number of votes was to retire at the end of three years.[1] By an amendment of the Constitution adopted in 1906, a slight modification in the term of a Senator is made so as to enable this election to be held at the same time as the ordinary triennial election of the House of Representatives.[2] Whenever the number of Senators for a State is increased or diminished, the Parliament may make such provision for the vacating of the places of Senators for the State as it deems necessary to maintain regularity in rotation (sec. 14).

The Senate is popular in the mode of its Constitution. The Bill of 1891 followed the United States Constitution in providing that Senators should be directly chosen by the Houses of the Parliament of the several States. In 1897 there was nothing as to which there was more agreement than that this system should give way to one which secured immediate responsibility to the people. Senators are directly chosen by the people of the States (sec. 7), and the qualification of Senators and electors is not left to the States to determine, but is uniform with that of members and electors for the House of Representatives "but in the choosing of senators each elector shall vote only once" (secs. 16, 8).

[1] *Senate Journals*, 1901, p. 59.

[2] Constitution Alteration (Senate Elections), 1906.

Only in the case of casual vacancies is the scheme of 1891 resorted to (sec. 15). The provision for filling casual vacancies is curiously complex and minute. The person chosen holds the seat until the expiration of the term of the person whose seat he fills, or until the election of a successor, whichever first happens. If the State Parliament is not in session when the vacancy is notified (by the President, or if there is no President, by the Governor-General, to the Governor of the State—sec. 21) the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until fourteen days after the beginning of the next session of the State Parliament, or "until the election of a successor, whichever first happens." The last-mentioned condition of tenure is explained by a provision that "at the next general election of members of the House of Representatives, or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place until the expiration of the term"[1] (sec. 15). By

[1] Some difficult questions arose in connection with the South Australian election for the Senate in 1906. A petition was presented against one of the persons returned, Mr. Vardon, and the Court of Disputed Returns (Mr. Justice Barton) sustained the petition and held that the election, so far as concerned that gentleman, was absolutely void. Thereupon the Houses of Parliament in South Australia, being advised that this was a vacancy provided for by sec. 15 of the Constitution, proceeded to choose Mr. J. V. O'Loghlin as Senator. Meantime, proceedings in the High Court for a *mandamus* to the Governor of South Australia to issue his writ for a new election had been taken, but failed on the ground that the duty was of a political and discretionary kind, with which the Court could not interfere (*The King* v. *The Governor of South Australia*, 4 C.L.R. 1497). Mr. Vardon presented a petition to the Senate against Mr. O'Loghlin's return; and the Committee of Disputed Returns and Qualifications, to which it was referred, reported that the vacancy caused by the decision of th Court was not one of those vacancies to which sec. 15 applied, that there should have been a new election, and that the choice of Mr. O'Loghlin therefore was ineffectual (P.D., 1907, pp. 4393 *et seq.*). The Government moved the Senate to disagree with the report, and eventually (17th October) a compromise was arranged whereby the question was to be remitted to the High Court for consideration, the Government undertaking

the *Senate Elections Act* 1903, if at an election of Senators there are both periodical and casual vacancies to be filled, the periodical vacancies shall be filled by those of the persons elected who stand highest at the poll, the casual vacancies by the other persons elected.

The Parliament may establish an uniform method of electing Senators (sec. 9), and by the *Commonwealth Electoral Acts* 1902-5 has made elaborate provision in respect to elections for both Houses. In regard to the Senate, the Act, amongst other things, forbids "plumping" by the provision that "the voter shall vote for the full number of candidates to be elected" (sec. 150); and also provides that "candidates to the number required to be elected who receive the greatest number of votes shall be elected" (sec. 161). To the present no scheme of "proportionate representation" has received favourable consideration, and the existing system is, of course, open to the objection that it enables an organized plurality of voters to secure the whole representation, though it has only a small majority of votes, or, even in the case of a large number of candidates, is an actual minority of the electors voting. In case of equality, a casting vote is given to the returning officer (sec. 161).

The State Parliaments may make laws governing the times and places of elections for Senators, and, subject to any Commonwealth law, may make laws prescribing the method of choosing Senators (sec. 9). In default of any Commonwealth law regulating the conduct of Senate elections, the State laws "for the more numerous House of the

to introduce legislation to enable that course to be taken. See *Disputed Elections and Qualifications Act* 1907. The proceedings in the Senate on the petition being removed into the High Court under this Act, the Court held that the vacancy was not one of those provided for by sec. 15 of the Constitution, and that therefore the choice of a Senator by the South Australian Legislature was null and void (*Vardon* v. *O'Loghlin*, (1907) 5 C.L.R. 201). A new election was held and Mr. Vardon was returned.

Parliament of the State" apply to Senate elections as nearly as practicable (sec. 10). In these matters the field of legislation appears now to be fully covered by the *Commonwealth Electoral Acts* 1902-5 and the *Senate Elections Act* 1903.

The issue of writs for a Senate election is the duty of the Governor of a State (sec. 12), and in case of a dissolution must be issued within ten days of the proclamation thereof. By the *Electoral Act*, sec. 90, writs should be addressed to the Commonwealth electoral officer for the State; a model form of writ is provided in Form G. in the Schedule to the Act.

The Senate, before proceeding to the despatch of business, and thereafter as occasion arises, is to choose a Senator to be President (sec. 17). In the business of the Senate, as in the House of Lords, the President has a single ordinary vote, and no casting vote; and in the Senate, as in the Lords, when the votes are equal the question passes in the negative (sec. 23). The President ceases to hold office (*a*) if he ceases to be a Senator; (*b*) by a vote of the Senate removing him; or (*c*) by resignation of his office or seat by writing addressed to the Governor-General (sec. 17).

A Senator may resign his seat (sec. 19), and if he be absent from the Senate without leave for two consecutive months of any session of the Parliament, his seat becomes vacant (sec. 20). His seat may also become vacant under secs. 44 and 45.

C. The House of Representatives.—The Constitution contains throughout elements which suggest unity and elements which suggest union merely. Writers on the Constitution of the United States, which presents the same phenomena, speak of these respectively as the "national" and "federal" elements in the Constitution. Using the terms in this sense, we have seen that the Senate is

the federal chamber; and we now come to the House of Representatives, which is regarded as the national chamber. As the name "Commonwealth" has been objected to on account of its republican associations, so the title "House of Representatives" has been criticised as too American. It is not, however, altogether new in Australian Constitutions. Earl Grey's Act of 1850, giving Constitutions to all the Australian Colonies, empowered them to substitute for their single chambered legislature "a Council and House of Representatives," or other separate House. None of them adopted the name "House of Representatives"; but in New Zealand the General Assembly does consist of a Council and House of Representatives. There were sufficiently good reasons for not following the Dominion of Canada in establishing a "House of Commons"; you cannot translate the thing or its traditions, and without these the name in Canada or Australia is meaningless or misleading. If we look to history, we see that it is the Senate rather than the House of Representatives which recalls the *communitas communitatum*, the assembly of the organized political communities. It is indeed a signal merit that in the Senate the constituency is such an organized body and not a mere electoral district formed *ad hoc*. If we look to practical politics we shall hardly find that the Lower House can successfully maintain the same supremacy which the House of Commons claims over the hereditary Chamber in England and the nominee Senate of Canada.

The national character of the House, the federal character of the Senate, are intended to be emphasized by the different terms used in respect to their constitution. The Senators are directly chosen by the people of the States (sec. 7); the House is composed of members "directly chosen by the people of the Commonwealth" (sec. 24). But even in the case of the House, the State is for many incidental purposes an electoral unit.

The number of members of the House is regulated by provisions which have reference to two matters—the distribution of seats, and the relation of the House to the Senate.

The number of members chosen in the several States is in proportion to the respective numbers of their people; and until the Parliament otherwise provides, is determined whenever necessary as follows:—

1. A quota is ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the Senators.

2. The number of members to be chosen is determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State (sec. 24). But five members at least shall be chosen from each original State. By a provision suggested by the Fourteenth Amendment (sec. 2) to the United States Constitution, if the law of a State excludes the people of any race from the franchise, such race is not to be reckoned in computing the population of the State (sec. 25); nor are aboriginal natives to be counted (sec. 127).

The distribution of seats among the States is thus subject to change. The total number of seats in the House, however, bears a fixed relation to the number in the Senate—the number of members is as nearly as practicable twice the number of the Senators (sec. 24). This provision has more than one reason. In the first place it was inserted with a view to measuring the strength of the Houses on a joint sitting should that ever be necessary; and in the end, the scheme for avoiding deadlocks does involve such a joint sitting. In the second place, it serves to maintain the

tradition of the Lower House as "the more numerous House," and at the same time it maintains the relative proportions of the Houses which without it might be upset by the increase of members of the House of Representatives, which may become advisable by the increase of population. It will be remembered that the Parliament may increase or diminish the number of Senators, but cannot diminish the representation of original States below the present number—six (sec. 7).

The representation to which each State was entitled in 1900 was ascertained during the passage of the Bill through the Imperial Parliament, and sec. 29 provided for the number of members to be returned from each State at the first election as follows:—

New South Wales	...	...	26
Victoria	...	...	23
Queensland	...	...	9
South Australia	...	...	7
Western Australia	...	...	5
Tasmania	...	...	5

This representation was varied in 1906, a report of the Chief Electoral Officer as to the population of the States having shown that New South Wales was entitled to one more and Victoria to one less than its original number of representatives.[1]

In 1905, Parliament passed an "Act relating to the representation of the several States in the House of Representatives" (No. 11 of 1905), and in place of the ambiguous "Statistics of the Commonwealth," as to the meaning of which there had been much difference of opinion,[2] the population is to be certified by the Chief Electoral Officer of the Commonwealth (sec. 10); and the Act provides machinery

[1] *Parliamentary Papers*, 1906, vol. 2, pp. 387, 355, 287.

[2] See P.D. (1905), pp. 2077 *et seq.*

whereby the population is to be determined (*a*) as soon as practicable after the commencement of the Act, (*b*) every fifth year after the first census taken after the commencement of the Act (sec. 3). In the case of enumerations made at times other than that of a census, allowances are to be made as prescribed by the Schedule, or by regulations of the Governor-General in Council, by adding the increases and deducting the decreases arising from births, arrivals, deaths and departures during the period from the last census day (sec. 4). Persons excluded from the franchise by the law of any State, and aboriginal natives are not to be reckoned in the enumeration of population[1] (sec. 4).

"Subject to this Constitution," the Parliament may make laws for increasing or diminishing the numbers of the members of the House (sec. 27), *i.e.*, so that it does not alter the proportion of members to Senators, and does not bring the number of members returned from an original State below five. By sec. 128, no alteration of the Constitution altering the proportionate representation or the minimum number of representatives of a State in the House shall become law unless the majority of the electors voting in that State approve the proposed law.

In respect to the establishment of electoral divisions there were three possibilities under the Constitution. The Commonwealth Parliament might provide; in default of any provision, the State Parliament "might make laws for determining the divisions in each State for which members were to be chosen, and the number of members to be chosen for each division." But a division was not to be formed out of parts of different States. In the absence of provision by Commonwealth or State each State was to be one electorate (sec. 29). Under the powers of this section and sec. iv. of

[1]As already stated, the Chief Electoral Officer presented a report on the population in January, 1906—P.P. 1906, vol. 2, p. 387.

the Act, four of the States passed laws dealing with this subject. Tasmania and South Australia were at the first election single electorates.

By the *Commonwealth Electoral Acts* 1902-5,[1] provision is made for the establishment of electoral divisions for the House of Representatives in all the States. It adopts the principle of single member constituencies with approximately equal numbers of electors, tempered however by a regard to (*a*) community or diversity of interest; (*b*) means of communication; (*c*) physical features; (*d*) existing boundaries of divisions; (*e*) boundaries of State electorates, the margin of allowance not to exceed one-fifth of the quota (secs. 15 and 16). A Commissioner appointed by the Governor-General was charged with the duty of determining the electoral divisions; his report was to be laid before Parliament (sec. 20), and if approved in the case of any State by both Houses of the Parliament, should furnish the electoral division for that State (sec. 21). In case of disapproval by either House, the Minister might direct and the Commissioner should propose a fresh distribution (sec. 22). By sec. 23, re-distributions are to be made from time to time in the same manner whenever directed by the Governor-General.

The first reports of the Commissioner were, on the motion of the Government, disapproved in the case of all the States except Tasmania and South Australia, and the general election of 1903 was held in all the States except these under the provision made by the State Acts which had governed the first elections. In 1906, the schemes prepared by the Commissioners for New South Wales, Victoria, Queensland and Western Australia were approved,[2] and the general

[1] See *Commonwealth Electoral Acts* 1902-5, printed in the Volume of Statutes for 1905.

[2] *Parliamentary Papers* 1906, vol. i., pp. 4, 12. The schemes themselves are set out in vol. ii., pp. 287 *et seq.*

election of that year took place according to the federal distribution in all the States.

Any provision corresponding with that referring to the Senate under which the House might proceed to business notwithstanding the failure of a State to provide for its representation, is of course unnecessary, and would be out of place; and it has been thought unnecessary to provide directly for the failure of electoral divisions to return members. By sec. 39 of the Constitution, until the Parliament otherwise provides, the presence of one-third of the whole number of the members of the House is necessary to constitute a meeting of the House for the exercise of its powers. In respect to its duration, the House is assimilated to the popular House in all British communities. It is liable to dissolution by the head of the Government—the Governor-General—and if not dissolved it expires three years after its first meeting[1] (sec. 28). (Three years is the term assigned to the Lower House in all the Australian States, except Western Australia, where it is four years). The House has thus no permanent existence, and it is made of course more sensitive to public opinion than the Senate by the fact that a general election sends all the members to their constituents at the same time.

Writs for general elections are issued by the Governor-General;[2] for casual vacancies, by the Speaker, or, in his absence, the Governor-General.[3] They are addressed to the Divisional Returning Officers for the several electoral divisions.[4] On a dissolution or the expiry of a Parliament, writs for a general election must be issued within ten

[1] A Colonial Legislature is not dissolved by a demise of the Crown: *Devine* v. *Holloway*, 14 Moo. P.C., 290.

[2] Constitution, sec. 32.

[3] *Ib.*, sec. 33.

[4] *Electoral Act*, sec. 92.

days.[1] The conduct of elections was provisionally governed by the State laws.[2] It is now regulated by the *Commonwealth Electoral Acts* 1902-5. The principal provisions relating to the House are that the elector may not make his mark opposite the name of more than one candidate (sec. 158), which excludes any indication of preference; that the candidate who receives the greatest number of votes is elected (sec. 164), *i.e.*, no absolute majority is necessary; and that the general election shall be held in all places on the same day (sec. 91). The returning officer has a casting but no ordinary vote (sec. 164).

A member of the House may resign his seat (Const., sec. 37); and his seat becomes vacant if for two consecutive months in any session, being without leave of absence, he fails to attend the House (sec. 38).

The House, before proceeding to the despatch of business and as often as occasion requires, must choose a member to be Speaker; and both the Senate and the House, by analogy to the practice of the House of Commons, have presented their choice to the Governor-General.[3] The Speaker ceases

[1] Constitution, sec. 32.

[2] *Ib.*, sec. 31.

[3] At the opening of the first Parliament the Governor-General directed the Senate and the House to choose a President and Speaker respectively, and indicated that he would appoint a time and place for the persons chosen to be presented for his approval. The President and Speaker duly waited on the Governor-General. The President of the Senate reported that he had received His Excellency's congratulations, and that His Excellency had at the President's request confirmed the usual rights and privileges of the Senate (*Senate Journals* 1901, pp. 3 and 4). The Speaker of the House reported merely that he had received from His Excellency an expression of pleasure at and confidence in the choice of the House (*Votes and Proceedings of Representatives* 1901, p. 9). At the second Parliament, in 1904, a ceremony more strictly in accordance with the Constitution was adopted by the Governor-General and both Chambers. The President and Speaker were "presented," but not "for the approval" of the Governor-General; and the prayer for the "allowance," and the Governor-General's "confirmation" of the "usual rights and privileges" were abandoned (*Senate Journals* 1904, pp. 2 and 3; *Votes and Proceedings*, pp. 2 and 6).

to hold his office (*a*) if he ceases to be a member, or (*b*) if he be removed by a vote of the House, or (*c*) if he resign his office or his seat (sec. 35).

Questions arising in the House of Representatives are determined by a majority of votes, the Speaker having a casting but not an ordinary vote (sec. 40).

BOTH HOUSES OF THE PARLIAMENT.

Qualifications of Electors and Members of the Senate and House of Representatives.—The Constitution assimilates these qualifications (secs. 8, 16). Some of the qualifications are dealt with in the Constitution under the head of "the House of Representatives," others under "Both Houses of the Parliament."

In regard to the qualifications of electors and members alike, it is a striking feature of the Constitution that it gives power to the Commonwealth over each; and this power was accorded in recognition of the fact that it was impossible to regard such matters as purely of State concern. The qualifications of electors and members, therefore, may be prescribed by the Parliament; and the provisions of secs. 30 and 34 are only until provision is made by the Parliament. The power of the Parliament is, however, limited by conditions, of which the first is that the qualification for members of and electors to Senate and House is the same, while as to electors, the provisions of secs. 8, 30 and 41 are designed to secure the "democratic" principle that the suffrage shall be of the widest, and that no person shall have more than one vote.

Electors.—Sec. 30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Sec. 8. The qualification of electors of Senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of Senators each elector shall vote only once.

On these sections the following observations may be made.

1. In sec. 30, the words "until the Parliament otherwise provides" carry under sec. 51, art. xxxvi., the power to provide from time to time.

2. The reference to the more numerous House of Parliament of the State is taken from the United States Constitution, where the federal franchise is regulated by the provision that "the electors in each State shall have the qualification requisite for electors of the more numerous branch of the State Legislature." In those States of the Commonwealth in which both Houses are elective, the law of the State has fixed the number of representatives in each House, and has always provided that the lower House shall contain a number of members substantially larger than that in the Upper House. In New South Wales and Queensland, the Upper House is nominated, not elected, and the number of members is by law unlimited. The electoral qualification in the States at the time of the establishment of the Commonwealth varied considerably; but practically this is not now important, as the Parliament, by the *Commonwealth Fran-*

chise Act 1902, exercised the power of establishing an uniform franchise for the Commonwealth. This Act provides as follows:—

Sec. 3. Subject to the disqualifications hereafter set out all persons not under 21 years of age whether male or female, married or unmarried—

(*a*) Who have lived in Australia for six months continuously, and

(*b*) Who are natural born or naturalized[1] subjects of the King, and

(*c*) Whose names are on the electoral roll for any Electoral Division

shall be entitled to vote at the election of members of the Senate and the House of Representatives.

Sec. 4. No person who is of unsound mind and no person attainted of treason, or who has been convicted and is under sentence or subject to be sentenced for any offence punishable under the law of any part of the King's dominions by imprisonment for one year or longer shall be entitled to vote at any election of members of the Senate or the House of Representatives.

No aboriginal native of Australia, Asia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an electoral roll unless so entitled under sec. 41 of the Constitution.

Sec. 5. No person shall be entitled to vote more than once at the same election.[2]

[1] *Semble*, naturalized under a law of the United Kingdom, or of a Colony which has become a State, or of the Commonwealth, or of a State: Constitution, sec. 34 (2).

[2] Secs. 30 and 41 of the Constitution present some difficulties of construction which were important so long as the electoral franchise was governed by State law, and might have been important if the Commonwealth had adopted a franchise narrower than the States. The wide franchise adopted, however, makes it unnecessary to recur to the matters discussed in the first edition of this book at pp. 107-109, and in *Quick and Garran*, 483-7.

Qualification of Members.—By the Constitution, sec. 16, the qualifications for a Senator are the same as those of a member of the House, and by sec. 34 it is enacted that the Parliament may deal with the qualifications of a member of the House, but until the Parliament has provided otherwise—

I. He must be (*a*) of the full age of 21 years, and must be (*b*) an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and (*c*) must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen.

II. He must be a subject of the Queen, either natural born or for at least five years naturalized under a law of the United Kingdom or of a Colony which has become or becomes a State, or of the Commonwealth or a State.

"Disqualifications for Membership" are imposed as follows:—

Sec. 43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House.

Sec. 44. Any person who—

I. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen, or is entitled to the rights or privileges of a subject or a citizen of a foreign power; or

II. Is attainted of treason or has been convicted and is under sentence or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer; or

III. Is an undischarged bankrupt or insolvent; or

IV. Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

v. Has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth, otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;

shall be incapable of being chosen or of sitting as a Senator or a member of the House of Representatives.

These disqualifications require little explanation. Sub-sec. iv. is dealt with in the section itself by a provision that it does not apply to the office of (*a*) any of the Queen's Ministers of State for the Commonwealth; or (*b*) any of the Queen's Ministers for a State; or (*c*) to the receipt of pay, half-pay or a pension as an officer of the Queen's navy or army, or (*d*) to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth. Sub-sec. iv. does, however, apply generally to offices of profit in the States other than the excepted offices, and is not confined to offices of profit held of the Crown in right of Commonwealth or State.

A member of either House vacates his seat if he becomes subject to any of the disabilities mentioned in sec. 44, or if he takes the benefit whether by assignment, composition, or otherwise of any law relating to bankrupt or insolvent debtors; or "directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth," or for services rendered in the Parliament to any person or State (sec. 45).

Until the Parliament otherwise provides any person declared by the Constitution to be incapable of sitting as a member of either House is liable, for every day on which he so sits, to pay £100 to any person who sues for it in a Court of competent jurisdiction.

Secs. 43, 44 and 45, imposing disqualifications, cannot be

altered by the Parliament, nor is any express power given to establish additional disqualifications. Sec. 34, declaring the qualifications of members, is, however, one of the sections which operate "until the Parliament otherwise provides." Acting under this not very explicit power the Parliament has declared certain additional disqualifications.

It is noteworthy that the Constitution does not disqualify members of the State Parliaments from being members of the Commonwealth Parliament; indeed, from the express exemption of States Ministers from the disability imposed on holders of office under the Crown, it may be said to have contemplated that some persons would be members of both State and Commonwealth Parliaments. The presence of such members might have been a useful means of reducing friction between Commonwealth and State Governments, and would, of course, have done something to relieve the strain which federal institutions put upon the available political talent of an unleisured community. Practically, the calls of political life are so great that it is not likely that many persons would have been able to combine the two functions. But before the inauguration of the Commonwealth, the Colonial Parliaments passed Acts disqualifying members of the Commonwealth Parliament from being elected to the State Parliament. The Commonwealth Parliament retaliated by the provision that no person who is within 14 days of the date of the nomination a member of a State Parliament may be nominated.[1] The State member, ambitious of federal honours, must first let go the bird in the hand before he can attempt to take the bird in the bush. One explanation of the measure lies in the disadvantage at which a federal member is placed as compared with the State member by necessary absence from his constituency during long periods, with consequent loss of those opportunities for keeping in

[1] *Commonwealth Electoral Acts* 1902-1905, sec. 96.

touch with his constituents and for rendering services to the locality which are enjoyed by the State member.

The Parliament has also provided that any person convicted of bribery or undue influence, or of attempted bribery or undue influence at an election; or found by the Court of Disputed Returns to have committed or attempted to commit bribery or undue influence (*sic*) when a candidate shall, during a period of two years from the date of conviction or finding, be incapable of being chosen or of sitting as a member of either House of the Parliament.[1]

The question of the eligibility of women for membership may at any time arise for determination, especially since the *Electoral Act* (sec. 95) now requires that a person to be entitled to be nominated must be qualified to be elected.[2] The question turns principally on the applicability of the provision of the (Imperial) *Interpretation Act* 1889, sec. 1, that in every Act of Parliament, unless the contrary intention appears, words importing the masculine gender include females. If the matter stood upon that alone, there can be little doubt that a provision adopted for convenience in drafting and to avoid the constant repetition of words describing both sexes where it was the intention of Parliament to include both, could not be read to establish some new capacity for public functions which would not otherwise exist; the case would fall within the principle laid down by Esher M.R. in *Beresford Hope* v. *Sandhurst*.[3] But the present case is much stronger than that. The Constitution has expressly set out the "qualifications"—which as there used appears to include *capacity*

[1] *Commonwealth Electoral Acts* 1902-1905, sec. 206A.

[2] At the first election for the Senate Miss Spence and Miss Goldstein were candidates in South Australia and Victoria respectively.

[3] (1889) L.R. 23 Q.B.D. 79. See also the judgment of Cockburn C.J. in *Queen* v. *Harrald*, (1872) L.R. 7 Q.B. 361; *Chorlton* v. *Lings*, (1868) L.R. 4 C.P. 374; and *Nairn* v. *University of St. Andrews*, (1909) A.C. 147.

—in a form ("the qualifications . . . . shall be as follows") which suggests not merely that no person may be elected unless so qualified, but that any person who has these qualifications may be elected. One of these qualifications is that the person shall be an "elector." With this provision before it, the Parliament has declared[1] that all persons "whether male or female married or unmarried" shall be entitled to vote; and has provided nothing in the *Electoral Acts* 1902-1905 to take away the qualification for membership which appears to be conferred upon electors by the Constitution, sec. 34. In *Beresford Hope* v. *Sandhurst*,[2] the majority of the Court (Lord Coleridge, L.C.J., Cotton, Lindley, Fry and Lopes, L.JJ.) considered that there was great force in the argument that by the operation of the *Interpretation Act* a provision that a person should not be qualified to be elected as a councillor unless he was enrolled and entitled to be enrolled as a burgess, conferred a qualification upon women-burgesses; but held that special limiting words in the Act under consideration ousted the general provision of the *Interpretation Act* and specifically restricted the statutory meaning of the masculine words to the right to *vote*. In the present instance there is no special restriction upon the words of the English *Interpretation Act*; the *Commonwealth Franchise* and *Electoral Acts* are subject to the same general provision by sec. 23 of the Commonwealth *Interpretation Act* 1901; and the "qualification" is dealt with by sec. 34 in positive language as compared with the negative language of the *Municipal Corporations Act* 1882.[3]

[1] *Commonwealth Franchise Act* 1902, sec. 3.

[2] (1889) L.R. 23 Q.B.D. 79.

[3] The case of *De Souza* v. *Cobden*, (1891) 1 Q.B. 637, may also be referred to.

Conduct of Elections.

The *Commonwealth Electoral Acts* 1902-5 contain elaborate machinery for the preparation and revision of electoral rolls; the only section which need be noticed is the convenient provision for the co-operation of States and Commonwealth in the production of a roll which may be used by both (sec. 30). In the nomination of candidates it is to be noted that the consent of the person nominated is required (sec. 97), and that he must deposit a sum of £25 (sec. 97), which is to be returned after the election unless the candidate fails to obtain "more than one-fifth of the number of votes polled by the successful candidate who obtained the smallest number of votes at the election" (sec. 103). Voting is to be by ballot, and the usual machinery for taking the poll and preserving secrecy is provided, but blind or illiterate voters may be assisted (sec. 148). Following a recent departure in several of the States, electors are in certain cases allowed to vote by post. Distance of not less than seven miles from the polling place on polling day; in the case of a woman, ill-health; or in the case of anyone, serious illness or infirmity; all these causes of probable inability to come to the polling place without serious inconvenience may be anticipated by those who will take the trouble to comply with the provisions relating to voting by post (secs. 109-121). The poll having been taken and the scrutiny held, the writs are returned, in the case of the Senate, to the Governor of the State (sec. 165); in the case of the House of Representatives, to the Commonwealth Electoral Officer for the State (sec. 166).

Following the model of the English *Corrupt Practices Act* 1883, which has been adopted by several of the States,[1] the

[1] South Australia: *Electoral Code*, 1896; Victoria: *Constitution Act* 1903; Western Australia: *Electoral Act* 1904; Tasmania: *Electoral Act* 1901.

Electoral Act fixes a maximum expenditure to be incurred in an election—for the Senate £250, for the House £100 (sec. 169), and requires a return of expenditure to be made by every candidate, which is to be made available for public inspection (sec. 172). The Act specifically enumerates the matters on which electoral expenses may be incurred, "electoral expenses" being defined as all expenses incurred by or on behalf or in the interests of any candidate at or in connection with any election, excepting only the personal and reasonable living and travelling expenses of the candidate (sec. 171). Any contravention by the candidate of these provisions is an "illegal practice" (sec. 180); and any person incurring or authorizing any electoral expense without the written authority of the candidate or his agent is liable to a penalty not exceeding £50 (secs. 185, 182). Breaches of the law relating to elections are divided into three heads (sec. 173)—

I. Breach or neglect of official duty, punishable by a penalty not exceeding £200 or a year's imprisonment (sec. 174).

II. Illegal practices, including bribery and undue influence.

III. Electoral offences.

"Bribery" is minutely defined by sec. 175, and "undue influence" by sec. 177; and without limiting the effect of the general words in these sections, bribery is declared to include "the supply of meat drink or entertainment after the nominations have been officially declared, or horse and carriage hire for any voter whilst going to or returning from the poll, with a view to influence the vote of an elector" (sec. 176), and "undue influence" to include "every interference or attempted interference with the free exercise of the franchise of any citizen" (sec. 178). But "no declaration of public policy or promise of public action shall be deemed bribery or undue influence" (sec. 179).

Illegal practices also include (*a*) "any publication of any electoral advertisement, handbill or pamphlet, or any issue of any electoral notice (other than the announcement by advertisement in a newspaper of the holding of a meeting) without at the end thereof the name and address of the person authorizing the same; (*b*) printing or publishing any printed electoral advertisement, handbill or pamphlet (other than an advertisement in a newspaper) without the name and place of business of the printer being printed at the foot of it; (*c*) any contravention by a candidate of the provisions of Part XIV. of this Act relating to the limitation of electoral expenses" (sec. 180, amended by *Electoral Act* 1906, sec. 2). Bribery and undue influence are punishable by a penalty not exceeding £200 or one year's imprisonment; other illegal practices by a penalty not exceeding £100 or six months' imprisonment (sec. 181). In addition to these penalties there is the disqualification for two years, already noticed, imposed upon all persons convicted of bribery or undue influence, or attempts thereat, or found by the Court of Disputed Returns to have committed, or attempted to commit bribery or undue influence when a candidate (sec. 206A). Under the original Act of 1902, the Court of Disputed Returns held that the penalties imposed by the Act for statutory "illegal practices" were exhaustive, and that as the Act did not provide for the avoidence of the election, the Court could not declare the election void for any act which would not avoid an election at common law.[1] This is now provided for by secs. 197 and 198A of the Amended Act of 1905, whereby an election may be declared void on the ground that illegal practices were committed in connection with the election. If the Court finds

[1] *Chanter* v. *Blackwood*, (1904) 1 C.L.R. 39. See also Constitution, sec. 44 (ii.), whereby the seat of any member convicted of an offence punishable by a year's imprisonment is vacated.

that the successful candidate has committed or attempted to commit bribery or undue influence, his election must be declared void. But the Court shall not declare that any person was not duly elected, or declare any election void (*a*) on the ground of any illegal practice committed by any person other than the candidate, and without his knowledge or authority ; (*b*) on the ground of any illegal practice other than bribery or corruption, or attempted bribery or corruption, unless the Court is satisfied (in either case) that the result of the election was likely to be affected and that it is just that the candidate should be declared not to be duly elected or that the election should be declared void" (sec. 198A). "Electoral offences" is a miscellaneous head with various penalties. Sec. 182D imposes a penalty of £5 on employers who refuse leave of absence for such reasonable period not exceeding two hours as may be necessary to enable an employee to vote. The employee is under a like penalty not to obtain leave of absence under pretence of an intention to vote; and "the section shall not apply" to any elector whose absence may cause danger or substantial loss in respect of the employment in which he is engaged. By sec. 206B gifts or promises of gifts by candidates within three months before the election to any club or other association are forbidden under a penalty of £5 "in addition to any other penalty provided by law." Sec. 206C is inserted for the protection of candidates against the circulation of defamatory statements. Such statements may be restrained by injunction; and their publication is made an offence punishable on conviction with a penalty of £100 or six months' imprisonment, but the defendant in such criminal proceedings is entitled to acquittal if he shows that he had reasonable ground for believing, and did in fact believe the statement to be true.

Disputed Elections.

By sec. 47 of the Constitution, it was enacted that until Parliament otherwise provided, any question respecting the qualification of a Senator or member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, should be determined by the House in which the question arose.

By the *Commonwealth Electoral Acts* 1902-5 (supplemented by Act No. 10 of 1907 applicable to casual vacancies in the Senate), the Parliament has followed the course now generally favoured for the determination of this kind of dispute, and has declared that the validity of any election or return may be disputed by petition addressed to the Court of Disputed Returns, and not otherwise[1] (sec. 192). The High Court is constituted the Court of Disputed Returns, with power either to try the petition itself or to refer the petition for trial to the Supreme Court of the State in which the matter arose (sec. 193). The Court is furnished with the ordinary powers of a Court and does not merely investigate and report, but determines the validity of the election in question (sec. 197), and the decision is self-executing, *i.e.*, if the Court declares a person not elected, he ceases to be a Senator or member; if any person not returned is declared duly elected, he may take his seat accordingly; and if an election is declared absolutely void a new election shall be held (sec. 205). The powers of the Court are to be exercised on such grounds as the Court in its discretion thinks just and sufficient (sec. 197 (2)), and

[1]Similar provision has been made by the States of Tasmania (*Electoral* Act 1901); Western Australia (*Electoral Act* 1904). In Queensland (*Elections Tribunal Act* 1886) and South Australia (*Electoral Code* 1896) a Supreme Court Judge sits with members of the House concerned as a jury or assessors.

the Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms or technicalities or whether the evidence before it is in accordance with the law of evidence or not (sec. 199). No election is to be avoided on account of errors, delays or neglects not proved to have affected the result of the election (sec. 201). The decisions of the Court are final and conclusive and without appeal; and in accordance with the decision of the Privy Council, the prerogative of the Crown to grant special leave to appeal does not apply to judgments given in a jurisdiction of this nature.[1] If the Court finds that any person has committed an illegal practice at an election, that must be forthwith reported to the Minister (for Home Affairs) (sec. 198B), and no finding by the Court shall bar or prejudice any prosecution for any illegal practice (sec. 198A). The Court may award costs (sec. 202B) and provisions designed to limit expenditure on petitions are, first, that no more than £100 may be so awarded, and next, that no party to a petition shall, except by consent of all parties or leave of the Court, be represented by counsel or solicitor, and in no case shall more than one counsel or solicitor appear (sec. 202A).

By sec. 42 of the Constitution every Senator and member of the House must, before taking his seat, make and subscribe an oath of allegiance or affirmation in the form set out in the Schedule to the Constitution.

Remuneration of Members.

In all the States, members of the Lower House are paid a salary, "allowances" or "re-imbursement of expenses" varying from £100 to £300 per annum with railway passes and other privileges. In South Australia and Tasmania the members of the Legislative Council are also paid, and in all

[1] *Theberge* v. *Laudry*, 2 A.C. 102.

the States they have the same privileges of travelling as members of the Assembly. It was therefore of course that provision should be made for the payment of members of the Federal Parliament, and there was no reason for distinguishing between Senators and members of the House of Representatives. The greater distances to be travelled, the necessity of absence from home for long periods of time, made it equally of course that the allowance should be fixed at a higher amount than is provided in any of the States. Accordingly the Constitution (sec. 48) declared that "until the Parliament otherwise provides each member of the Parliament shall receive an allowance of £400 a year."[1] In 1907 this amount was raised to £600, a measure which called forth a large amount of public disapproval, directed less at the increase itself than at the impropriety of the members of the Parliament voting public money to themselves without any mandate on the subject from the country.[2]

[1] The *Parliamentary Allowances Act* 1902 fixes the time from which the allowances of members are to be reckoned after their election.

[2] Members are provided with passes over the State Railways and with the cost of sea travelling (in the case of those who come oversea). This amounted in 1905-6 to £8,425. An allowance is also sometimes made for service on Royal Commissions, *e.g.*, Tariff Commission, 1905, P.D. 1,434.

PRIVILEGES OF THE PARLIAMENT.

It has long been settled that the *lex et consuetudo Parliamenti* does not apply to Colonial Legislatures.[1] While the Chambers of such a Legislature have "every power reasonably necessary for the proper exercise of their functions and duties, powers such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute," this does not extend to or justify punitive action. Accordingly, the Constitution Acts of most of the Colonies have authorized the Legislature or the Houses respectively to supply this defect in their power.[2] The Legislature of Victoria having adopted for each House and for the committees and members thereof the powers, privileges and immunities of the House of Commons, it was held by the Privy Council that the doctrine of the English privilege cases applied, and that where a person was committed by order of the Legislative Assembly for contempt, there was no power in the Courts to examine the cause of contempt.[3]

The Constitution proceeds at once to oust the common law doctrine from application to the Parliament. "The powers, privileges and immunities of the Senate and the House of Representatives and of the members and com-

[1] See *Kielly* v. *Carson*, 4 Moo. P.C. 63; *Doyle* v. *Falconer*, L.R. 1 P.C. 328; *Barton* v. *Taylor*, 11 A.C. 197; *Crick* v. *Harnett*, 7 N.S.W. State Reports 126; (1908) A.C. 170; see Forsyth's *Cases and Opinions on Constitutional Law*, p. 25; Keith's *Responsible Government in the Dominions*, p. 97.

[2] Victoria, *Constitution Act* 1855, sec. 35; South Australia, *Constitution Act* 1855-6, No. 2, sec. 35; *British North America Act* 1867, sec. 18, and the *Parliament of Canada Act* 1875.

[3] *Dill* v. *Murphy*, 1 Moo. P.C. N.S 487; *Speaker of Legislative Assembly of Victoria* v. *Glass*, L.R. 3 P.C. 560.

mittees of each House shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom and of its members and committees, at the establishment of the Commonwealth" (sec. 49). The Parliament has thus plenary power over the subject, untrammelled by the condition that privileges shall not exceed those of the House of Commons at the date of the Constitution Acts, respectively, as in the case of the other Australian Acts, or at the date of the Act conferring the privileges, as in Canada. By the *Jury Exemption Act* 1905, Senators and members of the House of Representatives are in common with a number of other persons made exempt from jury service either in the Commonwealth or State Courts; and by the *Parliamentary Papers Act* 1908, documents published under the authority of either House are not to be the subject of civil or criminal proceedings.

Procedure.

Under sec. 50, each House separately, or the two Houses in conjunction may make rules and orders for the conduct of its or their business and proceedings. The same section contains a provision that each House may make rules and orders with respect to "the mode in which its powers privileges and immunities may be exercised and upheld."

Both Houses sat in the first instance under the Standing Orders used in the Legislature of South Australia, of which State the President of the Senate and the Speaker of the House of Representatives were representatives. Eventually, permanent Standing Orders were adopted by the Senate for the regulation of its procedure, and came into operation on September 1st 1903.[1] The House continued to work under the original Standing Orders as amended from time to time.

[1](1903) P.D. 3847.

Two very important changes were introduced in 1905 with a view to the economy of Parliamentary time. Under the first of these, lapsed bills may be proceeded with in the next session of Parliament provided that neither a general election, nor a periodical election of the Senate, has intervened.[1] The other amendment provides for the regulation of debates in the House of Representatives. It declares (*a*) that any member may move the closure of a debate, and if a majority of the House (consisting of not less than 24 members) is in favour of the motion, the question under discussion shall forthwith be put[2]; (*b*) that the House may at any time resolve that a member be no longer heard[3]; and (*c*) that various formal motions (*e.g.* that the Speaker or Chairman leave the Chair) shall be put without debate.[4]

The procedure in regard to legislation is to some extent regulated by the Constitution itself. The provisions affecting the Royal Assent (secs. 58-60) have been already referred to. Various provisions are made for defining the relation of the Senate and the House in regard to Money Bills; these will be considered in the following chapter,

[1] *Senate Journals*, (1905) p. 54; P.D. (1905) p. 7,089. "Any public Bill which lapses by reason of a prorogation before it reaches its final stage may be proceeded with in the next ensuing session if a periodical election for the Senate or a general election for either House has not taken place between two such sessions, under the following conditions :—

"(*a*) If the Bill be in the possession of the House in which it originated, not having been sent to the other House, or if sent then returned by message, it may be proceeded with by resolution of the House in which it is, restoring it to the notice paper.

"(*b*) If the Bill be in the possession of the House in which it did not originate, it may be proceeded with by resolution of the House in which it is, restoring it to the notice paper, but such resolution shall not be passed unless a message has been received from the House in which it originated requesting that its consideration may be resumed."

[2] (1905) P.D. 5,721.

[3] *Ib.* 5,792.

[4] *Ib.* 5,792.

dealing with the relations of the Senate and the House. But the provision requiring the recommendation of money votes by the Governor-General may be here noticed. It is an essential part of our Parliamentary system that every grant of money for the public service shall be based upon the request or recommendation of the Crown. "The foundation for all Parliamentary taxation is its necessity for the public service as declared by the Crown through its Constitutional advisers."[1] This principle fixes upon the Ministry a definite responsibility for the national finance, which acts as a safeguard against Parliamentary recklessness. The absence of such a rule in the Colonies was regarded by Lord Durham as one of the principal factors in the ill government of Canada; competent observers of a later date notice financial disorders in France and Italy as a consequence of the neglect of this rule. Ever since the introduction of responsible government into the Colonies, the rule has in one form or other found a place in colonial constitutions. Consistently therefore, it is provided in the Constitution that "a vote, resolution, or proposed law for the appropriation of revenues or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated" (sec. 56). This provision must, like so much else that belongs to our system of Parliamentary government, be supplemented by conventional rules such as exist in the House of Commons as to the origination of laws imposing taxation, and the prohibition of the increase of the amount asked for by the Crown.[2]

[1] May, *Parliamentary Practice*, cap. xxii.

[2] It will be noticed that the prohibition does not extend to taxation, and it was resolved during the first session of Parliament that it was competent to a private member to move an increase in the amount of a proposed customs duty ((1901) P.D. 7,135, 7,139).

CHAPTER III.

THE RELATIONS OF THE SENATE AND THE HOUSE OF REPRESENTATIVES.

In the working of responsible government in the Colonies we are accustomed to such a constitution of the two Houses of the Legislature as ensures the supremacy of the Lower House. The Colonies are democratic communities, and the Legislative Councils sin against the current doctrines of democracy in that they are constituted by nomination and not election, or, if they are elective bodies, their members generally require some qualification of property and are always elected by a "select" constituency; while they are not by dissolution made readily responsive to public opinion. The Assembly, always elected on the broadest basis of qualification, both for the members and electors, and frequently reconstituted by a general election, is the predominant power because it harmonizes, and the Legislative Council does not, with the national life and spirit.

These conditions are not fully reproduced in the Commonwealth Government. The constitution described in the last chapter, shows us two Chambers, each elected upon a popular basis, uniform alike in the qualification for members and for electors; and the provisions for payment of salaries equal in amount to Senators and members of the

House leave no room for the suggestion of social exclusiveness as a mark of distinction between them.

Thus popularly constituted as the House itself, the Senate represents an essential principle of union—it is the House of States in a Federal Commonwealth. It is true that neither in Canada nor in Switzerland does the House of the States exercise an equal power with the other House, but in both cases there are circumstances of constitution—in Canada the nomination of members and the imperfection of the State principle, in Switzerland the small number of members and the want of any single principle of constitution—which have determined for it an inferior position.[1]

The other circumstances of constitution which may affect the position of the Senate in the Government are its permanent existence as a body and the longer tenure of its members. These are conditions which are commonly believed to be a check upon "democratic recklessness"; they are the especial marks of the "revising" and "retarding" Chamber—the "Second Chamber," or "Upper House."

The circumstance which most closely touches the relation of the two Houses of the Parliament is the introduction of Cabinet Government, with its tradition of the supremacy of one House through the control of finance. The Constitution seeks to establish the main features of this familiar relation consistently with recognizing the distinctive position of the Senate. This accounts for—(1) the provisions as to Money Bills; (2) a novel provision for deadlocks.

Revenue and Appropriation Laws.—This matter is dealt with by secs. 53 to 56. Secs. 53 to 55 seek to define with more detail and precision than is customary in Constitutions the powers of the two Chambers of the

[1] Even in Switzerland the Council of States exercises considerable power, and has not been relegated to that condition of subordination found in the Upper House of countries where the Cabinet System exists.

Legislature respectively, a matter which has in all the Colonies been one of controversy, and in some has produced conflicts of so much heat as to involve Governor, Ministry, and both Houses of the Legislature in discredit. The attempt to translate to the Colonies the traditions of the Lords and Commons has hardly succeeded, even where the Legislative Council has been a nominee body; where the Legislative Council has been elective, there has been more than a plausible ground for standing purely upon the law of the Constitution, a law which, reproducing, often clumsily and in ill-chosen words, some of the conventional rules which are observed by the Lords and Commons, has been silent as to others. In the Commonwealth, the Senate is more than the Legislative Council of a Colony; not merely elected, it rests upon the same popular basis as the House of Representatives, and its constitution charges it with the protection of interests which might not be those represented by the majority of the House. On the other hand, the States contribute to the Commonwealth upon a population basis, and the House of Representatives is, broadly speaking, the representative of population. While the House of Representatives cannot claim that Parliamentary supplies are made good by their sole constituents, they can evidently claim a larger power than can the Senate. These are the conditions which underlie secs. 53 to 55.

Powers of the Houses in respect of legislation.

53. Proposed laws appropriating revenue or moneys or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Repre-

sentatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bills.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

In sec. 53 the Constitution avoids the ambiguous words "for appropriating" of the *Constitution Acts* of the Colonies, and adopts a word expressive of the most extensive power claimed by the Lower House. The words following, however, while preserving the initiation of measures of finance to the House, make provision against certain inconveniences which would attend the strict application of the rule. The exclusion of fees and penalties from the rule is suggested by the Standing Order of the House of Commons of 24th July, 1849.

The succeeding paragraphs of the section are suggested by certain resolutions adopted by the Council and Assembly in South Australia, and known as "The Compact of 1857." Unlike the *Constitution Acts* of some of the Colonies, the *Constitution Act* of South Australia (No. 2 of 1855-6) made no special provision as to money bills save as to their recommendation to the Assembly by the Governor. Conflicts between the Council and Assembly as to their respective powers, in other colonies postponed for a time, began in South Australia at once. In the result, the Council

waived its claim to deal with the details of the ordinary annual expenses of the Government submitted in an Appropriation Bill in the usual form, but reserved the right to demand a conference thereon, to state objections and to hear explanations. As to other Bills, the object of which was to raise money, or to authorize the expenditure of money, the Council asserted its competence to suggest alterations to the Assembly, and to assent to or reject such measures. These resolutions were agreed to by the Assembly.

It will be observed that in sec. 53 the prohibition of amendment by the Senate is not co-extensive with the provision as to origination, so far as concerns proposed laws appropriating revenue or moneys. While all proposed laws appropriating revenue or moneys, save those specially excepted in the first clause, must originate in the House, the Senate is restrained from amending none but the proposed law for appropriating revenue or moneys for the ordinary annual services of the Government. But in no case must the power of amendment be exercised by the Senate so as to increase a proposed charge or burden on the people. When the power of amendment is denied, the power of requesting an amendment is given to the Senate, and as such request may be made "at any stage" in the progress of the bill through the Senate, it is clear that the Senate may exercise the extreme power of rejection if its requests are not adopted.

The last clause in sec. 53 has a political rather than a legal importance. Australian experience has abundantly shown that no opinion upon financial powers is too wild to obtain some currency; and therefore it may not have been superfluous to insert words showing that the powers conferred by sec. 53 upon the Senate do not exhaust the powers of that body over Money Bills—that the section in general is not one granting new power, but limiting and directing the exercise of power already enjoyed.

Secs. 54 and 55 are auxiliary sections designed to secure the arrangements of sec. 53. They prevent "tacking" in its most objectionable forms; they also deprive the House of the power of effectuating its control over finance by including the whole of the financial measures for the year in one bill—the course hinted at by the Commons Resolutions of 1860, and adopted in the Colonies for the purpose of compelling the Upper House to accept an unwelcome measure. The great resource of the Commons, however, depends for its efficacy upon a tradition which has not equal force in the Colonies—that the Upper House will not embarrass the Crown by refusing to pass an Appropriation Act. In Australia, a Legislative Council, by rejecting an Appropriation Bill, merely embarrasses its political opponents, and has not hesitated thus to deal with attempts to deprive it of power over such matters as the tariff or payment of members. In fact, the old constitutional weapon—the refusal of supplies—is in new hands, and may be made to serve a new purpose. The control of the Lower House over the policy of the Crown and its Ministers is now so complete that the problem of modern governments is rather how to protect the Government from the caprice of the House than to secure further control; it is never necessary for the House to fall back upon the source of its power. The responsibility of the Ministry to the Upper House, if it exists, is of a very indirect kind; but a check upon the Ministry and the Lower House lies in the fact that the Upper House might in an extreme case refuse to pass the Appropriation Bill, and thereby force a dissolution or a change of Ministry. These are the conditions recognised by the Constitution. It marks the province of the Senate in financial matters, and prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance

of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over money bills beyond that of any other second chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the "ordinary annual services of the Government" upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. That is a position which in the future, the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which even in the history of Parliamentary Government in the Colonies, the strongest supporters of the Upper House have generally shrunk.

It took some time for the Parliament to adjust the forms to which its members had been accustomed in the Colonial Parliaments to those relations which the Constitution had established between the Senate and the House of Representatives. The first Supply Bill introduced into the House in 1901 contained the usual address to the Sovereign and a recital of the resolution of the House of Representatives to grant the sums therein mentioned towards making good the supply cheerfully granted by them to His Majesty.[1] The only departure from familiar forms consisted in the omission of the words praying the Crown to enact, the prayer being regarded as inappropriate where not the Crown alone, but the whole Parliament, was the enacting authority. As soon as the Bill reached the Senate, objection was taken that no estimates formed part of the Bill, and that it contained nothing upon which the Senate could exercise its judgment in the exercise of its constitutional powers. In this view the Government acquiesced, and on their suggestion the Senate made the first exercise of its power under sec. 53 by returning the Bill to the House with a request that the

[1](1901) P.D. 1021.

House would so amend the Bill that it might show the items of expenditure comprised in the sums which the Bill purported to grant.[1] The House accepted the position, the Bill was laid aside, and a new Bill introduced.[2] In the new Bill, the preamble already referred to was omitted and a schedule of items of expenditure added, thus assimilating the Supply Bill to an Appropriation Bill[3]; and after some experiments in form, the Bill went to the Senate with the recital preceding the words of enactment: "For the purpose of appropriating the grant made by the House of Representatives."[4] But even this failed to carry out the scheme of the Constitution, and the Senate resolved to request the omission of words relating to the grant of the House, and the insertion in the title and in the Bill itself of words showing that the grant was made by the whole Parliament.[5] These requests were acceded to by the House making the amendments sought, with the exception that the recital was retained, the words "originated in" being substituted for "made by."[6]

Old forms still lingered in the terms of the Governor-General's speech at the opening of Parliament informing the "gentlemen of the House of Representatives" that estimates would be laid before them, and in the prorogation speech thanking them for the liberal provision made for the service of the Crown. Attention was called to the matter in 1904, and a resolution was carried for an address to the Governor-General praying that he would recognize in his addresses to Parliament that supply was the grant of both Houses.[7] This

[1] (1901) P.D. 1153.
[2] *Ib.* 1174.
[3] *Ib.* 1190.
[4] *Ib.* 1352.
[5] *Ib.* 1471.
[6] See Act No. 1 of 1901 (Consolidated Revenue).
[7] (1904) P.D. 942-947.

course is now followed, and no distinction is made between the Houses in the Governor-General's prorogation speech, though the opening speech somewhat clumsily informs the gentlemen of the House of Representatives that the estimates of expenditure originating from them will be framed with economy.

As early as June, 1901, the President of the Senate took objection to the practice of printing in italics all words in Senate Bills relating to the imposition of penalties or the appropriation of fines, by analogy to the practice of the House of Lords, and directed that it should be discontinued.[1] Such bills are expressly put outside the restraints on the powers of the Senate by sec. 53 of the Constitution, and there are therefore no peculiar privileges of the other House to be considered in respect to them.

The questions that have arisen as to the construction of sec. 53 must be briefly noticed. Early in the first session of Parliament, in 1901, objection was taken in the Senate to the inclusion of non-recurrent items in a Supply Bill which, as has been seen, is a sessional Appropriation Bill, and it was argued that expenditure on the military demonstrations connected with the Royal visit, or on the construction of new public buildings, could not be regarded as "ordinary annual services of the Government," that it should therefore be separately presented in order that the Senate might if it desired exercise its powers of amendment thereon. To this the answer was made that the expression must be interpreted by reference to the Parliamentary practice from which it was adopted, and that therefore all matters which would according to that practice be presented in the usual departmental estimates for the current year were properly included, whether the expenditure was of a recurrent kind

[1](1901) P.D. 763. See *May's Parliamentary Practice*, 10th ed., pp. 460, 529, 548, 705.

or not.[1] This view was approved by the general sense of the Senate and adopted.[2]

There has been more difference of opinion as to the nature of the power to request amendments. On the *Customs Tariff Bill* 1902, the Senate made a large number of requests for amendment; some of these amendments were made by the House, and in other cases the requests were refused. The refusals were taken into consideration by the Senate, which resolved to repeat its requests. This at once raised questions of serious importance, for if the Senate was at liberty before parting with the Bill to repeat its requests, it was obvious that the distinction between this practice and a power to make and insist on amendments was merely formal. A sharp constitutional struggle might have ensued but for the fact that the settlement of the tariff was deemed urgent, and that the constitutional issue would certainly be obscured by the fiscal views of members. The Government accordingly invited the House to accept a resolution refraining from the determination of its constitutional rights or obligations, and to take the Senate's message into consideration. Notwithstanding protests that this was "an ignobly easy way of responding to a direct challenge," the motion was adopted.[3] The leader of the Government in the Senate proposed a similar "without prejudice" motion; but the Senate took the stronger step of affirming that "the action of the House of Representatives in receiving and dealing with the reiterated requests of the Senate is in compliance with the undoubted constitutional position and rights of the Senate."[4]

[1] See May, *Parliamentary Practice*, pp. 517 *et seq.*

[2] (1901) P.D., pp. 1310 *et seq.*

[3] (1902) P.D., pp. 15,676-15,728.

[4] (1902) P.D., pp. 15,813 *et seq.* The same course was followed on the Customs Tariff Bill 1908, P.D. 11,437 (House), 11,581-8 (Senate). The resolutions were moved in this instance by the Prime Minister in the House, and the Vice-President of the Council, as "leading the Senate," in the Senate, and were treated as non-party questions.

In 1903, a series of interesting debates took place on the financial powers of the two Houses. The occasion was the Sugar Bounty Bill,[1] which provided for the payment of a bounty to all growers of sugar in the production of which white labour only was employed, and appropriated and made payable out of the Consolidated Fund whatever sum was required for this purpose. The Senate made an amendment extending retrospectively the time over which the bounty was payable, and thereby increasing the number of persons entitled to the bounty.[2] In the House, the Prime Minister moved to disagree with the amendment as inconsistent with sec. 53 of the Constitution, in that it increased a charge or burden on the people; and the House accepted the motion.[3] In the Senate, it was finally resolved not to insist on the amendment, and the proposal was re-submitted to the House in the form of a request, which was conceded.[4] Those who supported the claim of the Senate urged that in determining the character of a proposed law under sec. 53 and the accompanying section, regard must be had exclusively to its immediate purpose, and not to its ultimate consequences. Any proposal which imposed taxation or defined the machinery by which the amount of a tax was computed, imposed a charge or burden on the people, and to these the restriction applied. But appropriations of public money took nothing out of the pockets of the people; they were burdens on the Crown or the revenue. If as a consequence it was necessary to raise additional revenue, that must be done separately, and to the measures introduced for that purpose the restriction would apply. If the restriction were applicable to appropriations, it would be equally applicable

[1] See *Sugar Bounty Act* 1903.
[2] (1903) P.D. 1691-1703, 1821-1860.
[3] (1903) P.D. 2013-2034.
[4] (1903) P.D. 2076-2078, 2364-2415, 2469-2489.

to proposals involving the expenditure of public money, a class of measure which the Senate had repeatedly originated and amended.[1] Finally, it was contended that if you were to look beyond the immediate character of the measure to its consequences, you must regard the whole scheme of which it formed part. In this case, the bounty was merely the substitute for the rebate of excise duty by which hitherto white labour had been encouraged. The rebate of course diminished revenue, and in that sense lessened the burden on the people; and the same quality might fairly be attributed to the bounty which took its place. Incidentally, the speakers considered whether the "burden on the people" applied only to the people collectively, or to the incidence on the individual taxpayer. The whole discussion reveals the too familiar difficulties which arise from the insertion in Acts of Parliament of terms which serve well enough to express the flexible ideas of political and popular thought, but are without legal precision.

What is a "law imposing taxation" was considered by the Supreme Court of Victoria in *Stephens* v. *Abrahams*,[2] where it was held that the provisions in the *Customs Act* 1901 —the "Machinery" Act for the organization of Customs administration—whereby goods falling under two heads of dutiable goods should pay the higher duty (sec. 138), that substitutes for dutiable goods should pay the duty chargeable upon those goods (sec. 139), and some others of a similar nature (*e.g.*, secs. 140, 148), did not impose any tax, since their entire operation was dependent upon rates of duty to be imposed by a later Act, and in fact imposed by the *Customs Tariff Act* of 1902. It was the latter Act alone which imposed the duty, and therefore the penal pro-

[1] *E.g.* Property for Public Purposes Acquisition Bill 1901, where the rate of interest payable by the Commonwealth was raised from 3 to $3\frac{1}{2}$ per cent.

[2] (1903) 29 V.L.R. 201, 229.

visions of the Act of 1901 were not void as foreign matter introduced into a Taxing Act. Williams J. was also of opinion that if the Act of 1901 was a "law imposing taxation," penal provisions in respect to evasion did in fact "deal only with the imposition of taxation," and were not other matters within the prohibition of sec. 55.

There is one matter which, from the very nature of the Senate, is its special concern. As the Courts are the guardians of the rights of the States in matters that lie outside the federal power, so the Senate is the guardian of the interests of the States in matters which are within the federal power. For the rest, it has been contended that the system of Cabinet Government which was introduced from England to the Colonies, and which the Colonies imposed upon the Commonwealth, is essentially a feature of unitary government and is inapplicable in a federal government; that a Ministry cannot serve two masters—the Senate and the House; that if the weakness of the Executive is one of the greatest dangers of party government with responsibility to one House, responsibility to two Houses would break down the Executive machinery altogether; and that responsibility to one House alone means unitary not federal government. The answer to this seems to be that neither the Cabinet System nor Federal Government is a rigid institution. The liability of the first to change and to mould itself to conditions is its one permanent feature and perhaps its principal advantage. Both "federal" and "unitary" governments are commonly mere approximations to a type, and neither necessarily excludes all the features of the other.

The experience of the first eight years of the Commonwealth shows that the character of the Senate in the working Constitution is determined more by its popular basis than by its position as a House of States or, in spite of its

permanence as a body and the longer term of its members, as a Second Chamber. Very far from being a "drag on the wheel"—the conventional rôle of an Upper House—the Senate has been more "radical," "progressive," or "socialistic"—readers will choose their own epithet according to their political sympathies—than the House of Representatives.

As yet this has not been attended by any real attack upon the doctrine of responsibility of Ministers to the House, though on more than one occasion the Ministry has been compelled to accept important amendments in their legislation at the instance of the Labour Party, which has been stronger in the Senate than in the House. All but two, or at most three, members of the Ministry are members of the House, and in spite of resolutions that the Government should be more adequately represented in the Senate and should initiate more business there,[1] and proposals that Ministers should be able to speak in both Houses, the Government representation in the Senate in the last three Ministries has consisted of one Minister with and another without office. The organization of parties in the Senate is certainly more marked than in the Legislative Councils, but it is less complete than in the House of Representatives or in the Legislative Assemblies of the States. If the Senate is less easily "led" by the Government, the "Opposition" is not so clearly defined. Motions have been carried in the Senate in spite of Government disapproval which, had they been passed in the House in similar circumstances, must have been treated as a withdrawal of confidence from the Government. At present, the Senate makes no claim that its confidence is essential to the continuance of a Ministry in office, and probably would not entertain a direct vote of censure. On the other hand, there is no reason to suppose that any

[1](1903) P.D. 1473.

"constitutional," as distinguished from "political," considerations would deter it from amending or rejecting as it pleased any Government measures sent to it from the House of Representatives. The actual part of the Senate in Australian politics appears to reveal a new rôle for a Second Chamber. Bagehot has emphasized the "informing" and "educational" functions of the House of Commons, functions which are being seriously obscured in an era of closure. They are functions which require some leisure, which is exactly what is most lacking in a typical modern Legislature spurred by Party Government. The Senate, finding itself unprovided with legislative work by the Government, occupies a good deal of time in the consideration of private members' motions, advocating the extension of the functions of Government by the nationalization of some industry, or the assumption by the Commonwealth of some power now belonging to the State, or some other matter forming a part of the "advanced" political programme. Through its Committees it undertakes inquiries and collects information. Its educational and informing efforts are somewhat frustrated by the meagreness of newspaper reports, of which, however, the House has almost as much reason as the Senate to complain. The future of the Senate holds too many possibilities to invite prophecy. But the power of compelling the acceptance of amendments to legislation is a very real one, and will probably prevent that decline in prestige and influence which, under the Party system of government, would probably lie before a legislative Chamber which gained a reputation for academic discussions. And if the Senate chooses to assert itself as a factor in Party Government there is nothing in the law of the Constitution to prevent it.

The ultimate political effect of the clauses of the Constitution on the financial powers is to strengthen the Senate,

for it is entitled to exercise an effective control by means less heroic than the rejection of an Appropriation Bill. "Deadlock," then, in the strict sense—the bringing the machinery of government to a standstill—is a contingency so remote as hardly to be within the range of practical politics. But, moved by the experience of more than one of the Colonies, and especially of the Colony of Victoria, the Convention set itself to discover some constitutional means of reconciling differences between the Houses. All sorts of schemes were considered in the Convention, in the Parliaments, and in the press. Those who may be called the National Democrats desired that questions of difference should be settled by the referendum pure and simple—by a simple majority of the electors in the Commonwealth. But this was a reference to the constituents of one Chamber only, and was naturally objected to by the smaller States. Accordingly, there was a party whom we may call Federal Democrats, who urged that there should be a referendum to the constituents of the respective Houses. Then there were those who were totally opposed to the referendum and favoured a resort to the ancient constitutional remedy of dissolution, to be applied alternatively, simultaneously, or successively to the Senate and the House. Others, again, thought that to make any provision at all was the surest means of precipitating conflicts which might be avoided in the ordinary course of things by a little forbearance and good sense. In the end, the Convention adopted a system which, with a trifling alteration by the Premiers, is now contained in sec. 57 of the Constitution.

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate,

and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

The solution is curious and unique. In the first place it will be noticed that the scheme applies only to measures initiated in the House of Representatives, a fact significant of the parts which the two Houses were expected to play in government. Secondly, there is ample provision made for delay and for reconsideration by the House,[1] and there is no obstacle to a resort to the familiar means of conference. The application of the principle of dissolution to the Second Chamber is not wholly a novelty, and was inspired in a measure by the Constitution of South Australia.[2] But in

[1] Professor Burgess attaches great importance to repetition of the vote as a natural way of securing deliberation, maturity, and clear consciousness of purpose. He suggests a mode of facilitating constitutional amendments in the United States which probably was not without influence in the Convention (*Political Science and Constitutional Law*, vol. i., p. 152).

[2] *Constitution Act Further Amendment Act* 1881, sec. 16. It has been copied by Victoria (*Constitution Act* 1903).

South Australia a dissolution of the Legislative Assembly must precede the dissolution of both Houses, and the Constitution of the Commonwealth avoids the appearance of punishing or putting pressure upon one House rather than the other. The mere double dissolution of the South Australian system may of course result in each House receiving a mandate from its constituents to "stick to its guns." For such a contingency the Commonwealth Constitution provides by establishing a joint sitting of the Senate and House, in which the Bill is disposed of by the vote of an absolute majority of the total number of members of both Houses.

The requirement of an absolute majority of each House, in its separate sitting, is to be found in most of the Constitutions of the Colonies as the condition of various amendments; but the joint sitting is a novel feature in Australian politics. In the United States it is resorted to by the States Legislatures in case the Chambers have in separate sittings chosen different persons as Senators. And in the Constitution of the Commonwealth a joint sitting of the Houses of the State Parliament fills casual vacancies in the Senate (sec. 15). The French Constitution can be amended by a National Assembly consisting of the two Chambers in joint session, and the same body elects the President. In Switzerland the two Chambers of the Federal Assembly meet in joint session for three purposes—the decision of conflicts of jurisdiction between the federal authorities; the granting of pardons; and the election of the Federal Council, the Federal Tribunal, the Chancellor of the Confederation, and the Commander-in-Chief of the Federal Army.[1]

The real origin of the joint sitting provided for in sec. 57, however, is none of these; but rather the Norwegian system,

[1] Lowell, *Governments and Parties in Continental Europe*, vol. ii., p. 214.

according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences.

The system of sec. 57 is applicable to proposed laws of every kind but one—the amendment of the Constitution. That matter will be referred to in its proper place; but it may be noted here as a curious fact that the provisions of sec. 128 for avoiding the obstacle of disagreement between the Houses are less cumbrous than those applicable to ordinary legislation. The reason is that the alteration of the Constitution is treated as pre-eminently a matter to be determined by direct vote of the electors.

CHAPTER IV.

THE ORGANIZATION OF THE EXECUTIVE: THE GOVERNOR-GENERAL—THE FEDERAL EXECUTIVE COUNCIL AND THE KING'S MINISTERS OF STATE—THE CABINET SYSTEM.

THE ORGANIZATION OF THE EXECUTIVE.

By sec. 61 of the Constitution it is declared that the executive power of the Commonwealth is vested in the King and is exerciseable by the Governor-General as the King's representative. The Governor-General is thus the principal executive organ of the Commonwealth.

Notwithstanding the general vesting of executive power by sec. 61, it is within the discretion of the Parliament to provide the machinery for carrying out its own laws, to establish bodies or offices to which their execution is entrusted, and, it would appear, even to designate the persons who shall constitute such bodies or fill such offices. It is long since our Legislatures departed from the practice of merely laying down the broad outlines of law; the characteristic of British legislation has been extreme minuteness of enactment, the extent to which it has plunged into the details of administration. Even in the United States, it is admitted, in spite of the separation of powers, that the

authorities which are to execute an Act of the Legislature, as distinguished from a power created by the Constitution, are within the discretion of the Legislature—"the authority which makes the laws has large discretion in determining the means through which they shall be executed; and the performance of many duties which they may provide for by law, they may refer either to the chief Executive of the State, or at their option to any other executive or ministerial officer, or even to a person specially named for the duty."[1]

Where particular powers are granted by the Constitution to a particular authority it is, of course, not in the power of the Legislature to commit them elsewhere, unless, as in the case of the appointment of civil servants (sec. 67), it is expressly provided that the Legislature may confer the power on some other authority.

THE GOVERNOR-GENERAL.

The principal provisions relating to the office of Governor-General are to be found in the Constitution under the head of "The Parliament." Sec. 2 of the Constitution having provided for the office, it was constituted by Letters Patent of 29th October, 1900, and a Commission was passed under the Royal Sign Manual and Signet on the same day appointing the Earl of Hopetoun Governor-General.[2] Subsequently a "dormant commission" was issued appointing Lord Tennyson (Governor of South Australia), or, in his default, Sir Arthur Lawley (Governor of Western Australia), to administer the government of the Commonwealth in case of the death, incapacity, removal or absence of the

[1] Cooley, *Constitutional Limitations*, pp. 135-6. And see *Kendall* v. *U.S.*, 12 Peters 524. Cf. also the observations in *Moorhead* v. *Huddart Parker*, (1909) C.L.R., as to the Inter-State Commission.

[2] See *Appendix*.

Governor-General and of the Lieutenant Governor-General should any be appointed.[1]

Sec. 3 assigns a salary of £10,000 and makes a permanent appropriation to meet it. The amount may be altered by the Parliament; but so that the salary of the Governor-General then in office is not affected.[2] Sec. 4 provides that powers conferred by the Constitution upon the Governor-General may be exercised by the person for the time being administering the Government; sec. VII. of the Letters Patent contains a like provision in regard to any powers and authorities conferred by that instrument. By sec. 126 of the Constitution, the Crown may authorize the Governor-General to appoint a deputy or deputies to act in any part of the Commonwealth; and the Crown has exercised this power in sec. VI. of the Letters Patent, repeating the proviso that such an appointment shall not affect the exercise by the Governor-General himself of any power or function. The power is a very useful, almost a necessary one, in view of the large number of formal acts done in all parts of the Commonwealth which may require the concurrence of the Governor-General.[3]

Sec. 2 of the Constitution contains a description of the office and powers of the Governor-General. It declares that he "shall be His Majesty's representative in the Common-

[1] *Commonwealth Government Gazette*, 23rd May, 1902. On Lord Hopetoun's recall, Lord Tennyson took up the government under this commission until he was formally appointed Governor-General. Presumably similar provision is now made for an emergency, but no public intimation has been given of the existence of a dormant commission.

[2] The question of additional allowances to the Governor-General was raised in 1901 by the Secretary of State, and the proceedings and disagreements thereon in the Commonwealth led to a request from Lord Hopetoun that he should be recalled. See *Commonwealth Parliamentary Papers*, 1901, vol. ii., pp. 827, 833.

[3] Advantage has been taken of the power to authorize State Governors to sign warrants for the expenditure of money (P.D. 1901, p. 1,249), and to appoint a Commissioner to open the Parliament (*Senate Journal* 1904).

wealth, and shall have and may exercise in the Commonwealth during the King's pleasure but subject to this Constitution such powers and functions of the King as His Majesty may be pleased to assign to him."

The modern theory of colonial government regards that Government as residing in the King; so the Legislative and Executive Acts are Acts of the Crown. This is recognized in the Commonwealth Constitution, which makes the King a part of the Parliament and declares that the executive power is vested in the King (sec. 61). The character of the Governor-General then is essentially representative: he is the delegate of the King to exercise certain powers of the Crown. In this sense he is Vice-Regal: in the summoning, proroguing and dissolving Parliament, in assenting to legislation, in appointing to and removing from offices. The expression "His Majesty's representative" has not (it is believed) heretofore been used in any Statute, Letters Patent, or Commission, but it is a familiar colloquialism, and is found even in the Rules and Regulations for the Colonial Service.[1] As used in secs. 2, 61 and 68, its sole effect, it is submitted, is to emphasise the delegate character of the office and its powers. It does not assert that the Governor-General is a Viceroy in the sense denied to Colonial Governors by the Privy Council[2]—that he enjoys as a natural person or an official those legal privileges which belong to the King whether regarded as a natural man, as the head of the State, or as a juristic entity bearing the *persona* of the State. Nor does it assert any pre-eminence of dignity over the States' Governors, who within their sphere are not less representatives of the Crown.

The question which arises in regard to the Governor-General is of another kind. Heretofore the prerogative

[1] See Rules, 13 and 159.

[2] *Cameron* v. *Kyte*, 3 Knapp. 332; *Hill* v. *Bigge*, 3 Moo. P.C. 476.

powers in a Colony have commonly been exercised by the Governor under the authority committed to him by the Crown, and not by Statute. Under the Constitution, the Governor-General has a statutory power to exercise many of the King's powers. This of course is a sufficient authority from which the King cannot detract by any prerogative instrument, and which, being given by Statute to the officer as *persona designata*, is not enlarged by being granted over again by Letters Patent. For this reason, some parts at any rate of the Letters Patent constituting the office of Governor-General appear to be superfluous, *e.g.*, secs. III., IV., V. On the other hand, sec. VI. of the Letters Patent, conferring a power to appoint deputies, is in direct pursuance of the Commonwealth Constitution, sec. 126.

Another question arises in respect to the powers of the Crown exerciseable by the Governor-General. When these powers are by Statute declared to be exerciseable by and through a particular officer, can they be exercised otherwise, as by the Crown in person or by some other person designated by the Crown?[1] Assuming that the provision for a representative would not prevent the King from exercising the powers in person if he were in Australia, could he constitute some person not the Governor-General to exercise any of these powers on his behalf? The question was, in fact, raised in regard to the Commission which appointed the Duke of Cornwall and York to "begin and hold" and to "open and declare and cause to be opened and declared the cause of holding" the first Parliament of the Commonwealth, "and to do everything which for us and by us should therein be done." The Commission, reciting that the King could not conveniently be present in his Royal Person in his Parliament at Melbourne, assumes that the

[1] Maitland has suggested a similar question in regard to English legislation, *Constitutional History of England*, pp. 420-1.

King could supersede the Governor-General in this particular at any rate, and appoint another person to act in his place. The particular function of "opening" the Parliament is not indeed anywhere expressly conferred upon the Governor-General but it appears to be an incident of the "summoning." Any practical difficulties which might have ensued from informality were obviated by the fact that, on the day succeeding the "opening" by the Duke of Cornwall, the causes of holding the Parliament were declared by the Governor-General according to the usual form of opening a session of Parliament.[1]

The case appears to be more clear in regard to the control of the forces of the Commonwealth. By sec. 68, "the command-in-chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the King's representative." The power is essentially executive and belongs to the prerogative. But it is from its very nature exclusive, and it is probably a safe general conclusion that the object of the express grant of powers to the Governor-General or the Governor-General in Council as distinguished from the general grant to the King was to indicate that the power was exerciseable through the authority designated alone.[2]

The Letters Patent constitute the Governor-General "Commander-in-Chief in and over Our Commonwealth of Australia." Thus they go beyond the provision in the Constitution. The latter deals only with the command of the naval and military forces of the Commonwealth; the former contain no such qualification, and in virtue thereof the Governor-General is the Commander-in-Chief of all

[1]The incident is discussed in Clark's *Australian Constitutional Law*, 2nd ed., p. 69 *seq.*

[2]As to the relation of the control of the forces to Responsible Government, see next chapter under "The Department of Defence."

forces, whether Imperial or Colonial, in the Commonwealth. The relation of Imperial forces to the Colonial Government when on active service is discussed by Mr. Todd in reference to the difference between Sir Bartle Frere and Mr. Molteno in 1877.[1]

Whether in cases where specific powers of the Crown have not been committed by the Constitution to the Governor-General, he can exercise those powers without direct authority from the King, and whether those powers may be exercised otherwise than through him, depends, it is submitted, not on the designation of the Governor-General as the King's representative, but on whether the powers themselves fall within "the executive power of the Commonwealth." The pardoning power is probably not, or not exclusively, a part of "the executive power of the Commonwealth," and can be exercised by the Governor-General only so far as that power of the Crown has been committed to him by the King (Constitution, sec. 2). The Instructions[2] do expressly commit the power to the Governor-General, but with limitations, and it can hardly be doubted that it may (in law) still be exercised in all its fulness by the King, acting through Imperial Ministers.

The law on the subject of Petitions of Right may be cited in illustration of the vitality of prerogatives in the Imperial Government. Most of the Australian Colonies have passed Statutes establishing a procedure analagous to that upon the Petition of Right at common law; but the Imperial Law Officers have uniformly held that the powers conferred by these Statutes upon the Colonial Executive do not supersede the prerogative powers of the Crown Consequently, when the Colonial Executive has refused to

[1] Todd, pp. 380-388. See also *Defence Act* 1903, secs. 53-54; Keith's *Responsible Government in the Dominions*, p. 194 *seq.*

[2] See *Appendix.*

co-operate in the submission of claims against the Government to a judicial tribunal, petitioners have carried their claims to the Queen, and the Secretary of State, after consultation with the Imperial Law Officers (as to Western Australia in 1897, South Australia in 1894, and New South Wales in 1863) has, as a matter of ministerial duty, advised Her Majesty to grant her *fiat* that right be done in the Court of the Colony concerned.

In addition to the powers of the Crown which are exercised by the Governor-General as the King's representative in the Government, there are various powers which do not belong at common law to the Crown and which are committed to the Governor-General as the most appropriate officer, either by the Constitution or by other Statute. By the Letters Patent, also, he has duties which are to be regarded rather as ministerial than regal, *e.g.* to keep the Great Seal of the Commonwealth, to administer oaths to various officers, to take care that laws assented to by him shall when transmitted to the King be "fairly abstracted in the margin," &c.

THE FEDERAL EXECUTIVE COUNCIL.

After the Governor-General the principal executive organ is the Federal Executive Council. Though it is established "to advise the Governor-General in the government of the Commonwealth" (sec. 62), its characteristic function is action rather than advice. There are no legal qualifications for membership, but every Minister of State must be a member of the Council (sec. 64). On the other hand, an Executive Councillor is not necessarily a Minister of State. An Executive Councillor is not as such the holder of an office of profit, and is therefore not disqualified for a seat in the Parliament. Members of the Council "shall be chosen and summoned by the Governor-General and sworn as Executive

Councillors," and hold office during pleasure (sec. 62). This must be subject to existing constitutional custom ; there can be no duty in the Governor-General to summon particular members to the Council. There is some scope for choice in the constitution of the Council. It might legally become like the Privy Council, a body composed of present and past Ministers, great officials, and other persons who have attained eminence in any sphere and upon whom the membership is conferred as a mark of honour, though in substance such a development of the Council would hardly be consistent with the right of the King to be the source of all honours. Or, like the Executive Council in Victoria, it might consist of present and past Cabinet Ministers. Or, again, like the Executive Council of New South Wales and the Privy Council in Canada, it might be limited to the Ministry of the day, including in that term, of course, the " honorary members " of the Cabinet.[1] As a matter of fact, the present practice is that Commonwealth Ministers on retirement from office do not cease to be members of the Federal Executive Council.

In the vesting and exercise of powers, the Constitution distinguishes between the " Governor-General " and the " Governor-General in Council." Sec. 63 declares that " the provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council," whence it might be inferred that all the powers conferred upon the Governor-General were intended to be exercised by him upon his own discretion. But though the terms are not wholly unconnected with the distinction between personal action and action on the

[1] For a consideration of the relative merits of the Victorian and New South Wales systems, see correspondence between Sir Arthur Help and Sir Henry Parkes (*Fifty Years in the Making of Australian History*, Parkes, vol. i., p. 305).

advice of Ministers, this is not the main character of the distinction. Statutory powers conferred or duties imposed upon the Colonial Executive have generally been exercise-able or performable by the Governor in Council alone; powers emanating from the Crown have been exerciseable by the Governor in some other form of law than an Act or Order in Council. While in both cases powers have been exerciseable, if not always on the advice of Ministers yet always in accordance with the doctrine of ministerial responsibility, the co-operation of the Executive Council in a Colony no more ensures action in conformity with modern constitutional practice, than does the co-operation of the Privy Council in acts of the Crown in England, for as we shall see the Executive Council is in some cases formally distinct from the Ministry. In one matter, however, the use of the terms "Governor-General" and "Governor-General in Council" adverts, as do the Constitution Acts of the Colonies, to the constitutional practice of the cabinet system. The appointment of officers to administer the Departments of State is a power conferred upon the Governor-General (sec. 64), while the appointment of civil servants (sec. 67), and of the justices of the Commonwealth Courts (sec. 72) is to be made by the Governor-General in Council. The terms used in this connexion serve to point a contrast between the choice of Ministers, which is an act of personal discretion without the advice of Ministers, and the ordinary patronage of Government which is under ministerial control.

THE MINISTERS OF STATE.

After the Federal Executive Council come the King's Ministers of State for the Commonwealth, who are appointed by the Governor-General "to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish" (sec. 64). They hold office during

the pleasure of the Governor-General; their offices are such as the Parliament prescribes, or in the absence of provision, as the Governor-General directs (sec. 65). The annual sum of £12,000 per annum is appropriated to the payment of the salaries of the Ministers of State, but Parliament may alter the amount (sec. 65).

Unlike most Colonial Constitutions, the Commonwealth Constitution goes far in establishing an organic relation between the Ministers and Parliament. For not merely does the Constitution, following the British and Colonial Constitutions, absolve Ministers from the general disqualification of holders of offices of profit for a seat in Parliament (sec. 44), but by sec. 64 it provides that "after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a Member of the House of Representatives." The other provisions regarding the Ministers of State, though they are made with a view to the Cabinet System, do not preclude very extensive modifications of that system. There is no recognition of the Cabinet, for, as pointed out, the Federal Executive Council is not necessarily identical in constitution or functions with the Cabinet. There is no recognition of the collective responsibility of the Ministers of State; sec. 64 treats them as separate administrative officials; and there is no hint of a Prime Minister. There is nothing to prevent the virtual establishment of Ministries elected by Parliament[1] which at one time found some favour in Australia, though they cannot be given the fixity of tenure which the instability of political parties has recommended to many persons. All that has been done is to establish a Parliamentary Executive; the rest is left, as

[1] The newspaper accounts of the formation of the Fisher Government in 1908 are that the Ministers were selected by the Labour members of the Commonwealth Parliament in caucus, and that their offices were assigned on the recommendation of the Prime Minister.

in England and the Colonies generally, to custom and convention.

It has been already stated that the development of the Executive Council is a matter of uncertainty—it may or may not ultimately be identical in constitution with the Cabinet. There are some other points connected with the Ministry upon which a comparison may be made with English practice. In England, the Cabinet and the Ministry are not identical bodies, the latter includes a large number of officers "liable to retire upon political grounds" (to use an expression common in the Colonies) who are able to sit in Parliament. In Australia there are no Ministers outside the Cabinet; and habitual inclusion of law officers in the Cabinet has had the result of making those appointments dependent much more on political than professional position. The *Constitution Acts* designate a limited number of offices tenable with a seat in Parliament; and the Commonwealth Constitution, by enacting that, until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, practically made it imperative that all the Ministers should be in the Cabinet. Another point of difference between English and Australian practice is the existence of what are sometimes called "honorary Ministers" or "Ministers without a portfolio" in the Colonies. In spite of occasional exceptions, the rule seems to be firmly established in England that the Ministry is a body of departmental chiefs, restricted (to adapt Addington's description of the Cabinet) to the persons "whose responsible situations in office require their being members of it." It is true that the rule has been broken; that the Duke of Wellington, Lord Lansdowne and Lord John Russell were members of the Cabinet without holding any office, but strong objections were made to the practice, in one case by the Prime Minister, Sir Robert Peel, in another by the Queen herself. In

Australia, on the other hand, every Cabinet includes from one to three members who hold no office and receive no salary. They are not to be compared with the light administrative offices—such as the Privy Seal, the Chancellorship of the Duchy of Lancaster, or the First Lordship of the Treasury, held by important members of the Cabinet with heavy parliamentary or party duties. With rare exceptions, they are held by gentlemen of whom it may be said, without intending any disparagement, that they are politically deemed of less account for the moment than their colleagues; and who will have claims to promotion when a vacancy occurs.[1] The "honorary Ministers" or "Ministers without a portfolio" are generally members of the Upper House, and sometimes the only members of the Government in that House, for it is not unknown that the Prime Minister finds himself compelled to distribute all his salaried offices in the House upon whose support the Ministry mainly depends. The Commonwealth Cabinet has always contained two honorary or non-official members, and the practice may be be expected to form a regular feature in the Commonwealth.[2] One of the honorary Ministers receives the dignified title of Vice-President of the Federal Executive Council.

The successive steps taken upon the inauguration of the Commonwealth are interesting as illustrating the relation of the various authorities. By virtue of the Royal Proclamation of 17th September 1900, the federating Colonies were united in a Federal Commonwealth on 1st January

[1] They must be qualified. Mr. Deakin on forming his Ministry in June, 1909, became Prime Minister without assuming any administrative office.

[2] In some Colonies, the honorary members, besides representing the Ministry in the Upper House, often assist from time to time in the work of Departments where there is heavy pressure upon a Minister, and particularly in the Department of the Prime Minister, or in any other in which the parliamentary duties are specially onerous.

1901 ; and under sec. III. of the Act the Queen had on 29th October 1900 constituted the office of Governor-General and Commander-in-Chief and had appointed the Earl of Hopetoun thereto. On 1st January 1901, the Royal Proclamation was read at Sydney, the Governor-General took the prescribed oaths, and thereupon made proclamation that he had assumed the office. The next step was the constitution of the Federal Executive Council, which consisted of nine gentlemen who were to form the first Cabinet. Then the Governor-General proceeded "with the advice of the Federal Executive Council" to establish the following Departments of State, viz. :—

The Department of External Affairs.
The Attorney-General's Department.
The Department of Home Affairs.
The Department of the Treasury.
The Department of Trade and Customs.
The Department of Defence.
The Postmaster General's Department.

Finally, the Governor-General appointed seven members of the Federal Executive Council to administer the Departments respectively allotted to them.[1] In accordance with the doctrine of ministerial responsibility all the notifications of these executive Acts were signed by Sir Edmund Barton, the gentleman who had successfully undertaken the task of forming a Ministry. On the establishment of the Commonwealth, the Departments of Customs and Excise in each State became transferred to the Commonwealth ; and on 1st March under proclamations of 14th February and 25th February respectively, the Departments of the public service in the States "posts, telegraphs and telephones," "naval and military defence," passed under Federal authority.

[1]See *Commonwealth of Australia Gazette*, No. 1, 1st January, 1901.

CHAPTER V.

THE ORGANIZATION OF COMMONWEALTH ADMINISTRATION.

THE general nature of the departments of State is indicated by their titles.[1]

THE DEPARTMENT OF EXTERNAL AFFAIRS was described by the Prime Minister (Sir Edmund Barton) in 1901[2] as embracing immigration and emigration, the influx of criminals, the relations with England, communications with the Governor-General and the several States, the Executive Council and the officers of Parliament. Some of these matters hardly fall under the title of the Department, but their presence is accounted for by the fact that the Department was organized in the first instance in view of its assumption by the Prime Minister. It has, in fact, been presided over by the Prime Ministers in four of the seven Commonwealth Governments; in the two Labour Ministries the Prime Minister has taken the office of Treasurer, and Mr. Deakin (1909) is Prime Minister "without a portfolio."[3] To the matters enumerated by Sir Edmund Barton we may add the relations between the Commonwealth Government and

[1] A tabular statement of the principal matters under the control of the several Departments will be found in the *Commonwealth Official Year Book*, 1901-8, p. 970.

[2] The Melbourne *Age*, 18th January, 1901.

[3] Usage has established the term "Prime Minister," as the title of the First Minister of the Commonwealth, and "Premier" as that of the First Minister of the State.

its representative in England, the Government of Papua, the Mail Services to the Pacific Islands, and such matters as are undertaken by arrangement with countries outside Australia, *e.g.*, the investigation of tropical diseases, the cost of which appears on the estimates of this Department.

THE TREASURY discharges the functions ordinarily associated with that office. Technically, the Auditor-General and his staff belong to the Department. Actually, of course, much of their work consists in checking the Department, and they have an independent position as explained in connection with the system of issue and audit.

THE DEPARTMENT OF HOME AFFAIRS corresponds with no specific head of federal authority, and so constitutes a sort of "omnibus" Department. In the speech already referred to, the Prime Minister stated that the matters committed to the administration of the Department would include public works, the question of the federal capital, the Inter-State Commission, federal elections, public service regulations, old-age pensions, and the acquisition and construction of railways where the States concerned have given their consent. The last of these subjects has not yet advanced to the stage of administration, and the course of administrative organization points to the Department of Trade and Customs as that which is likely to be concerned with the Inter-State Commission whenever it is constituted. Old-age pensions are administered by the Treasury. But the administration of the Electoral Acts, of the Public Service Acts, census and statistics, meteorology, and the Lands (for public purposes) Acquisition Act belongs to the Minister of Home Affairs, as well as the general control of public works.

THE DEPARTMENT OF THE ATTORNEY-GENERAL includes the advising of the Government, the drafting of Government bills, and the promulgation of Acts of Parliament and

statutory rules, and the editing of the official collections in which they are contained, the conduct, through the sub-department of the Crown Solicitor, of legal proceedings to which the Commonwealth is a party, and such administrative matters as arise in relation to the Commonwealth judiciary, including the Court of Conciliation and Arbitration.

THE DEPARTMENT OF TRADE AND CUSTOMS, in addition to the administration of the Customs and Excise laws, undertakes patents, trade-marks, copyright and designs, and quarantine. Acts relating to Trade and Commerce, including navigation and shipping, fall to the Department, and important powers are granted to the Minister under the *Australian Industries Preservation Acts* 1906 and 1907. The Department co-operates with the Department of External Affairs in executing the immigration laws. Some questions arise as to the extent of the powers for the administration of laws relating to commerce which may be committed to the Department or its officers, having regard to the provision made by the Constitution for an Interstate Commission (sec. 101).[1]

THE POSTMASTER-GENERAL'S DEPARTMENT administers the law relating to postal, telegraph and telephone services, of which the chief is the *Post and Telegraph Act* 1901.

THE DEPARTMENT OF DEFENCE has the administration of the *Defence Acts* 1903-4. The most important fact to be noticed in connection with this Department is that the whole naval and military organization of the Commonwealth is a matter to be undertaken by the Ministry, which is responsible therefor to Parliament. It is important that this should be realized, first, because there has been a good deal of misconception in the Colonies as to the relation of the control of the forces to responsible government, and

[1]On this subject, see *Huddart Parker* v. *Moorhead*; *Appleton* v. *Moorhead*, (1909) C.L.R.

secondly, because the terms of the Constitution expressly vesting the command in the Governor-General (sec. 68) might be cited in confirmation of this misconception.[1]

In England the King gave up the personal command of the army upon the establishment of the office of General Commanding in Chief in 1793. In the Colonies, however, the civil and military government have nominally remained in the hands of one person, for the Governor's Commission has designated him Commander-in-Chief or Captain-General in the possession. For this there are several reasons. In the first place—and this is true of several of the Australian Colonies—the military command has often preceded the civil government, and it was but gradually that the government passed out of the military to the civil state. In the second place, even in Colonies which have reached an advanced stage of self-government in civil matters, defence has been regarded as in the main an Imperial affair; and notwithstanding the general withdrawal of the Imperial forces from the self-governing Colonies, the local forces which have been raised and maintained by the Colonies have generally been under the immediate direction of Imperial officers, who for many reasons were disposed to regard themselves as outside the scope of the local government of the Colony. Even Chief Justice Higinbotham, above all others the champion of independence in local affairs, treated the control of Her Majesty's military and naval forces as a matter in which the Governor was bound to obey instructions given to him by the Crown directly or through the Secretary of State. In all these circumstances, it was natural that there should be not a little friction. The Governor's own position is defined by the Colonial Office Regulations.[2] Though bearing

[1] See preceding chapter.

[2] Chapter II., sec. ii.

the title of Captain-General or Commander-in-Chief, he is not, without special appointment from Her Majesty, invested with the command of Her Majesty's Regular Forces in the Colony, and in the event of the Colony being invaded, the officer in command of Her Majesty's land forces assumes entire military command over the forces. Most of the difficulties that have arisen are described by Mr. Todd in *Parliamentary Government in the Colonies*, chapter xii., "Imperial Dominion exerciseable over self-governing Colonies: in naval and military matters."[1] The most important of these questions has been as to the right of communication on military affairs between the Governor and the officer commanding the forces, without the intervention of the Colonial Minister of Defence. The principle is now generally recognized that the forces locally raised and maintained are, in the words of Sir Henry Parkes, as much subject to the responsible government of the Colony as any other branch of the public service. The provision of sec. 68 of the Commonwealth Constitution, vesting the command in chief of the naval and military forces of the Commonwealth in the Governor-General as the Queen's representative, is intended to carry out these principles, and in no way points to the exercise of independent powers.[2] The whole military and naval organization of the Commonwealth is a matter to be undertaken by the Ministry, which is responsible therefor to the Parliament. In this organization there must be some division of functions between military and civil officers; and if a reasonable standard of efficiency is to be maintained, appointments, promotions, dismissals, and discipline must be treated as

[1] See also Chapter IV., p. 135.

[2] The first General Order of the Commander-in-Chief in the Commonwealth was issued in connexion with the inauguration of the Commonwealth, and was addressed to the Minister of State for Defence, directing him to inform the Major-General commanding the forces, &c.

non-political matters. But this organization is subordinate to the cardinal principle of ministerial responsibility; and the question of the limits within which Parliamentary control is legitimate in matters of administration is not peculiar to the subject of defence.

A consideration in detail of the internal organization of the several Departments lies beyond the scope of this work; but something may be said about the organization of the administration generally. This in the Commonwealth, as in the several States, is provided for by Statutes and Regulations issued thereunder. It is therefore a part of the law, cognizable by the Courts, and not as in England a mere matter of administrative regulation giving rise to no legal relations.

The *Commonwealth Public Service Act* 1902 provides that each of the Departments of State shall have a permanent head, who is called the Secretary to the Department, except in the case of the Customs, where he is called the Comptroller-General. The permanent head is "responsible for its general working and for all the business thereof," and advises the Minister of the Department in all matters relating thereto.[1] Various powers of supervision and control are committed to him by Statute and Regulations in respect to the officers of his Department and their work.[2] The Comptroller-General of Customs differs from the other permanent heads in more than name, for he is an officer charged as *persona designata*, with various discretionary powers under the *Customs* and *Excise Acts*, and with very important powers under the *Australian Industries Preservation Acts* 1906-7.

In spite of the general description of permanent heads their actual functions must vary considerably with the

[1] Sec. 12 and Schedule 2.
[2] Sec. 12.

Department and the character of its work. Where there is a large amount of routine and detailed work in a Department, with a large staff of officers throughout the Commonwealth (as in the case of the Customs and Postal Departments), and where the Commonwealth was the successor to State Administratons, it has been found convenient to retain the States as units of administration, and to establish chief officers for each State who exercise there the ordinary functions of a permanent head. This is specifically provided for by the *Customs Act* 1901, sec. 8 (Collector of Customs), and the *Post and Telegraph Act* 1901, sec. 7 (Deputy Postmaster-General). In such a case the relations of the central staff to the State staff may not be very clearly defined, and the pending inquiry by the Postal Commission appears to indicate that in that Department there is some friction between the two. In the Defence, Home and Treasury Departments, also, the States are, for certain purposes, treated as distinct units of administration. In Defence, the primary distinction is, of course, between the civil staff and the military and naval. Here, as wherever the work of a Department is mainly professional and expert, the non-professional permanent head can hardly be very active in determining policy, while the execution of plans must in the main lie in professional hands. The advisory function in the Commonwealth mainly belongs to the Council of Defence; there are separate Boards of Administration for the Army and the Navy;[1] and the forces themselves are respectively under the direction of an Inspector-General and a Director. The principal civil administration and the headquarters staff are at the seat of Government, while the

[1] *Defence Acts* 1903-4, sec. 28. See generally, *Report on the Department of Defence*, from 1st March, 1901, to 30th June, 1906. *Commonwealth P.P.* 1906, vol. ii., No. 79.

several States are constituted Military Districts under a Commandant.

The miscellaneous matters collected within the Department of Home Affairs require different systems of administration, according to their nature. The *Commonwealth Electoral Acts* constitute what is practically a sub-department with its own organization under a Chief Electoral Officer for the Commonwealth, and for each State there is a Commonwealth Electoral Officer, who is the principal electoral officer for that State.[1] The *Public Service Acts* are in the same position, as will be seen—they are administered by an independent Public Service Commissioner, assisted by a staff of inspectors. Census and Statistics, again, is a technical subject forming a separate branch of work under the Commonwealth Statistician;[2] the same is true of Meteorology, which is under the direction of the Commonwealth Meteorologist.[3]

In the case of the Treasury, the Auditor-General forms a distinct sub-department acting as a check and control upon the Treasury itself as well as upon other Departments. He has power to appoint State deputies. The administration of the *Invalid and Old-age Pensions Act* 1908 is under the immediate control of a Commissioner of Pensions,[4] with Deputy Commissioners for each State. In the main, however, the work of the Department is under the immediate direction of the permanent head, who as the principal financial adviser of the Minister has peculiarly responsible and important duties.

In the Attorney-General's Department the administrative

[1] *Commonwealth Electoral Acts* 1902-1905, secs. 5 and 6.

[2] *Census and Statistics Act* 1905.

[3] *Meteorology Act* 1906.

[4] In the first instance, the Secretary to the Treasury has been appointed Commissioner.

work is comparatively small, and the permanent head, in addition to his duties in administration, acts as a legal adviser to the Government and as Parliamentary Draughtsman. It must be remembered that in Australia, unlike England, the Attorney-General is a member of the Cabinet, so that the office may be filled by reference to political rather than professional qualifications. It is, therefore, the more important that there should be a permanent official of high legal qualification, a necessity which has been recognized in some of the Colonies by the appointment of a Solicitor-General as a non-political and permanent officer.

The work of the Department of External Affairs is primarily political rather than administrative, so that the responsibility of the political head is more personal and less purely official than in other Departments, where the Minister can hardly be expected to have an intimate knowledge of extensive and intricate details.

Collection and Issue of Public Money: Audit of Public Accounts.—One of the first Acts of the Parliament of the Commonwealth was, under the power given by sec. 97 of the Constitution, to provide machinery for the collection, custody and issue of Commonwealth money. Legislation of this kind has more than one purpose. It serves to secure the constitutional responsibility of the Executive to Parliament by preventing the expenditure of money upon objects not sanctioned by Parliament. It prevents leakages whether in collection or expenditure; it prevents the interception of public moneys on the way to the Treasury; it secures that money voted for a particular purpose shall be issued only for that purpose, and, being so issued, spent on that purpose—that it does not stick anywhere. In short, "there should be a real control which will follow the money from its collection from the taxpayer until the final appropriation of it in payment of the public

creditor" (Sir G. C. Lewis's *Memorandum on Financial Control, Appendix to Report of Select Committee on Public Moneys* 1857—Sess. Papers, No. 54, Sess. 2, 1857). The machinery should be devised so as to promote efficiency and economy in the management of public business, while the public accounts should be in such a form as to make it possible to know, with ordinary care and intelligence, the real state of the finances at all times. The Constitution lays down the leading principles that all moneys or revenues of the Commonwealth shall form one Consolidated Revenue Fund (sec. 81), and that no money shall be drawn from the Treasury except under appropriation made by law (sec. 83). In the English system and in the systems already at work in the several States, the Commonwealth Parliament had models ready to hand, and the *Audit Act* 1901[1] follows familiar lines.

The scheme of the Act of 1901 required that all money received on behalf of the Commonwealth should be paid immediately and without deduction into "The Commonwealth Public Account," an account opened at such bank or banks as the Treasurer might direct. In one case only—that of the Money Order business of the Post Office—was this principle departed from; and a "Money Order Account" was established which might be operated on by the Postmaster-General, or any other person authorized by him, for the purposes of the money order business. Even in this case the Postmaster-General was required at the end of each month, or oftener if need be, to pay in to The Commonwealth Public Account all money received as revenue (sec. 26). The system, however, proved inconvenient in practice, and important modifications were introduced by the *Audit Act* 1906. That Act (sec. 13) provides that a number of

[1] Amended by the *Audit Act* 1906, the Acts now being printed and cited together as the *Audit Acts* 1901-1906.

scheduled accounts, which are in the nature of "trading accounts,"[1] should be separated as "Trust Accounts" from the Consolidated Revenue, and to them respectively should be paid—(*a*) all money appropriated by law for the purpose thereof; (*b*) all money received from the sale to any person or Commonwealth Department of any articles purchased or produced, or for work paid for, with money standing to the credit of the account; (*c*) all money paid by any person for the purpose of the account; and (*d*) pay due to a member of the militia force and unclaimed in the hands of an accounting officer for three months. It is provided that money standing to the credit of any Trust Account may be expended for the purposes of the account; while in the case of the Money Order Account it is provided that it may be used for the receipt or payment of any public moneys (sec. 5). Further, the Treasurer is given power to establish additional Trust Accounts and to define the purposes for which they are established (sec. 13). All moneys in any Trust Account are to be deemed to be money standing to the credit of the Trust Fund.

The Trust Fund is one of the three funds into which the original Act separated the accounts at the Treasury. As originally defined, it consists of money held by the Commonwealth for or on account of or for the use or benefit of any person (sec. 27). All money remaining unclaimed in the Trust Fund for six years falls into the Consolidated Revenue Fund, and the claim thereto is determined, subject to a power in the Government in its discretion to pay any lapsed claim (sec. 30).

The Loan Fund consists of all moneys raised by way of loan on the public credit of the Commonwealth, and placed to the credit of the Loan Account (sec. 55).

The detailed provisions of the Act concerning the collec-

[1] *E.g.*, see *Government Gazette*, 31st January, 1902.

tion and banking of public money (secs. 20-23), the receipts and statements to be forwarded to the Treasurer (sec. 24), and the Auditor-General (sec. 25), are made applicable to the Trust Fund (secs. 27 and 61 (2)), and the Loan Fund (sec. 59 (2)), as well as to the Consolidated Revenue Fund. They are supplemented by Regulations issued by the Governor-General in Council.

From the collection and keeping of the money of the Commonwealth, we come to its appropriation and issue. The provision of the Constitution that no money shall be drawn from the Treasury except under appropriation made by law (sec. 83) has been already referred to.

As to the Loan Fund, the *Audit Act* (sec. 57) provides that no money standing to the credit thereof shall be expended save under the authority of an Act of Parliament showing the nature of the proposed work or other object of the proposed expenditure, and the amount of the proposed expenditure in each case, and the total amount proposed to be expended for such work or object. From the Trust Fund no money may be expended except for the purposes of such fund or under the authority of an Act (sec. 61).

The mode of operating upon the Public Account is prescribed by the *Audit Act*, secs. 31-37, and is made applicable also to the Loan Fund (sec. 59 (1)) and the Trust Fund (sec. 62 (1)). After declaring that no money shall be issued except in the manner provided (sec. 31), the Act introduces us to the first of the important functions cast upon the Auditor-General. The Treasurer (sec. 32) prepares statements of money required for transmission to the Auditor-General, whose duty it is before countersigning the instrument to "ascertain that the sums therein mentioned are legally available for and applicable to the services or purposes mentioned in such instrument." If satisfied, he countersigns the instrument, and returns it to the Treasurer,

who then submits it to the Governor-General for his signature. When signed by the Governor-General the instrument becomes the warrant for the issue by the Treasurer of drafts and cheques on the Public Account in the Banks for the several services or purposes (secs. 32, 33). If the Auditor-General is not satisfied, he returns the instrument with a statement of the sums not found by him to be legally available, together with the grounds for his decision. These provisions are followed by detailed arrangements as to the mode of certifying and paying public accounts.[1] Sec. 36 contains the important provision that every appropriation made out of the Consolidated Revenue Fund for the service of any financial year shall "cease to have any effect for any purpose at the close of that year, and any balance of the moneys so appropriated which shall then be unexpended shall lapse." If the unexpended balance is required for the service in question, it must be again voted by Parliament as part of the next year's appropriation. An express exception is made in favour of the pay of members of the Militia forces (sec. 36 (1)), and practically a great inroad is made upon the "cash system" by the establishment of Trust Accounts under the *Audit Act* 1906 and the power to the Federal Treasurer "to establish additional Trust Accounts and define the purposes for which they are established."[2]

Some flexibility of the specific appropriations is provided for by secs. 36B, 36C, and 37, of which the last, authorizing the alteration of the proportions assigned to particular items in any subdivision of the annual supplies, forbids the application of the power so as to augment or add to any salary or wages. By sec. 36A expenditure in excess of specific appropriations or not specifically provided for by appropria-

[1] See further Regulations, *Government Gazette*, 24th January, 1902.

[2] *Audit Acts* 1901-6, sec. 62A.

tion, may be charged to such heads as the Treasurer may direct, provided that the total expenditure so charged in any financial year after deduction of amounts of repayments and transfers to heads for which specific appropriation exists, shall not exceed the amount appropriated for that year under the head "Advance to the Treasurer."

There remains the function of inspecting and auditing the Commonwealth accounts, which is committed to the Auditor-General. This official, who must not be a member of the Executive Council or of the Parliament of the Commonwealth or any State (sec. 5), holds office during good behaviour and may not be removed therefrom except upon an address from both Houses of Parliament (sec. 7). In certain contingencies, however, he is deemed to have vacated his office (sec. 5 (2)), and the Governor-General has a carefully guarded power of suspension (secs. 7 (2) and (3)). His salary is fixed by the Act at £1,000, which is thereby permanently appropriated for the purpose (sec. 4).

Here there are three operations to be regarded. In the first place, there is provision for an inspection and detailed audit of the books and accounts of all persons having control of public moneys (sec. 45), and this extends to reporting to the Treasurer on the circumstances of departmental contracts and the sufficiency or excess of public stores. This function is carried out by persons appointed by the Auditor-General (sec. 11), who are in fact assigned to the several larger Departments of the Commonwealth to make a daily audit of their accounts.[1]

In the second place, there is proceeding continuously through the year an independent audit in the Auditor-General's office. For this purpose, all persons charged with receiving (sec. 35), or disbursing (sec. 39), Commonwealth moneys are required to send a statement monthly, verified

[1] Treasurer's Statement, P.D. 1901, p. 1249.

by statutory declaration, to the Auditor-General. Banks at which the Commonwealth Public Account is kept must send, as required by the Treasurer, a "Bank Sheet" to the Treasurer and to the Auditor-General (sec. 38). The Treasurer is required to keep a "Cash Book," and to furnish daily a "Cash Sheet" to the Auditor-General (sec. 40). The Auditor-General, having then the several statements, accounts and vouchers before him, proceeds to audit, a function which includes the important duty of determining whether the forms of issue and payment have been duly complied with, and whether the money issued has been spent on purposes for which it was legally available (sec. 41). If the Auditor-General is satisfied that the accounts are correct, and that the law has been complied with, he grants an acquittance to the Treasurer (sec. 42 (1)). If not, he must surcharge the Treasurer (sec. 42 (2)), who in turn surcharges any defaulting officer concerned (sec. 43), and takes such steps as are necessary to recover the money in question. The officer is given a right to appeal to the Governor-General, who may make such order directing the relief of the officer as may appear to be just and reasonable (sec. 44).

Finally, the Act requires the publication of periodical statements for the information of the public and of the Parliament. Every quarter the Treasurer must publish in the *Gazette* a statement in detail of the receipts and expenditure of the Consolidated Revenue, Trust and Loan Funds, with a comparative statement for the corresponding period of the preceding year (sec. 49); and must annually prepare and transmit to the Auditor-General a statement of all receipts and expenditure from the several Funds, the expenditure to be set out in the case of the Consolidated Revenue Fund according to the classification adopted in the appropriation (sec. 50). The Treasurer's annual statement

forms the principal material upon which is based the report which the Auditor-General is required to present annually to *both Houses of the Parliament* (secs. 51-53)—a significant provision recognizing that in matters of finance the Senate fills a different position from the House of Lords or Legislative Councils.

We have thus outlined the system from the collection of revenue to the report to the Parliament upon its expenditure, which at present is the final stage of the matter. As yet the Commonwealth Parliament has not followed the example of the House of Commons and some of the State Legislative Assemblies, in appointing a Committee of Public Accounts.

THE ORGANIZATION OF THE PUBLIC SERVICE, as distinguished from that of the administration of the departments, must be briefly considered. The question of departmental services, as against a single public service the members of which pass in course of promotion from one Department to another as vacancies occur, has long been settled in Australia in favour of the latter system. This, then, is the plan adopted in the *Commonwealth Public Service Act* 1902, for, as has been already noticed, the Commonwealth followed the example of the Colonies in putting the regulation of its servants upon a statutory basis. The principle suffers certain necessary modifications; for instance, the members of the naval and military forces constitute distinct services governed by their own rules, and the Act generally is declared not to apply to classes of persons enumerated in sec. 3 of the Act, which include officers to whom "on the recommendation of and for special reasons assigned by the Commissioner the Governor-General declares that the Act shall not apply."

The service is divided into four divisions—*Administrative*, consisting of the permanent heads and "chief officers"

of departments, with such persons as the Governor-General on the recommendation of the Public Service Commissioner directs to be included in the Division;[1] *Professional*, consisting of persons whose work involves special skill or technical knowledge "usually acquired in some profession or occupation different from the ordinary routine of the Public Service," and whose offices are directed to be included in the Division; *Clerical*; and *General*, the last including all persons in the Public Service who are not placed in one of the other Divisions.

Appointments are made to the Professional, Clerical and General Divisions after examination, "designed to test the efficiency and aptitude of candidates for employment in such several Divisions," and it is specially directed that the educational examination for the General Division is to be of "an elementary or rudimentary character."[2] The Clerical Division consists of five classes, of which four have five sub-divisions and the fifth or lowest, six;[3] and all appointments to that Division are made to the lowest sub-division of the lowest class. In the fourth and all higher classes, no person may be promoted except to the next sub-division above that in which he is serving, and must serve in any sub-division twelve months before further promotion.[4] Promotion from class to class is made only as vacancies arise; sub-divisional promotion is irrespective of vacancies.[5] But these provisions are subject to an important qualification whereby on the report of the Permanent Head of a Department, and the recommendation of the Commis-

[1]There was some friction between the Commissioner and the Postmaster-General in respect of the proposed inclusion of the Assistant-Secretary to the Post Office in this Division—see P.P.

[2]Sec. 28.

[3]Sec. 19 and Third Schedule.

[4]Sec. 23.

[5]*Ib.*

sioner, and the approval of the Governor-General, an officer may be promoted from one class to the next higher class, although he has not served a year in each sub-division [1]—a provision which, properly administered, may do something to combine, in the words of Mr. Deakin, "statutory control with an infusion of something of the spirit and energy of private business affairs."[2] The principle of promotion is very carefully stated so as to avoid two evils which have been common in colonial administration. The first of these is regard to mere seniority, combined with absence of misconduct, the second that of the transfer of officers on the ground of seniority to a Department with the work of which they were unfamiliar. It is accordingly provided that on a vacancy in any Department, an appointment may be made from among the officers of the Department, regard being had to relative efficiency, and in case of equal efficiency and then only, seniority is to be regarded;[3] while if an appointment from some other Department would appear to lead to a better performance of the work, recourse may be had to properly qualified officers of other Departments, with the same regard to efficiency and seniority.[4] Efficiency is defined as "special qualifications and aptitude for the discharge of the duties of the office to be filled, together with merit and good and diligent conduct."[5]

The road to promotion to the highest offices in the service is thus open to all public servants, and normally no appointment can be made even in the Professional or Administrative Divisions except in the way of regular promotion.[6] But if it appear that there is no person available in the public

[1] *Ib.*

[2] *Parliamentary Debates* 1901, p. 1298.

[3] Sec. 42. See also sec. 44 (1).

[4] Sec. 42.

[5] *Ib.*

[6] Sec. 31.

service *as* capable of filling the vacant position in these Departments as some person outside the service, the outsider may be appointed. This is a wide discretionary power, for it means nothing less than that in determining who is the fittest person for such a position, the authorities have as unrestricted a field of choice as a private employer. It is, however, carefully guarded—there must be a report from the permanent head, a certificate and recommendation from the Commissioner, and as the appointment is made by the Governor-General, Cabinet approval also is required ; while all the papers have, in such a case, to be laid before Parliament.[1]

In the making of appointments and promotions, experience has indicated pretty clearly the objects to be kept in view and the danger to be avoided. The several Departments must be provided with a sufficient number of capable officers ; therefore those primarily responsible for the administration of the Department must be able to make their needs heard. But there is a well-known tendency of Departments—not in Australia only—due to various causes, to take a rather excessive view of their needs, or, at any rate, a reluctance to admit the necessity for a diminution of their staff; while the evils of "patronage" where the political head has a free hand in appointments are even more notorious. Experience also shows that in the long run efficiency suffers from the prevalence of discontent amongst officers, so that care must be taken to offer hopes of advancement and not to disappoint reasonable expectations. But "seniority" alone is a very poor assurance of efficiency. "Merit," then, must be regarded; but merit, on the one hand, must not be allowed to become simply absence of offence ; on the other, it must not be merely another name for influence and favouritism.

[1]Sec. 31.

These are the conditions which govern the provisions of the Act as to the arrangement of the staff. The permanent head, who is acquainted with the needs of his Department and the capacity of officers, reports to the Public Service Commissioner, who inquires and satisfies himself as to the work, the officer, and the necessity for the office, and has the further advantage of a knowledge of all the Departments, so that he has standards for comparison. The Commissioner then makes his recommendation to "the Governor-General," which gives the political head of the Department concerned an opportunity of considering the decision and laying before the Cabinet any objections he may have. The Ministry may reject the Commissioner's nominee for any office, whereupon the Commissioner has to make another recommendation. But in all cases where the nomination is rejected, the reasons therefor are forthwith to be laid before Parliament (sec. 44 (3)).

The salaries of all officers except those who are intended to be independent of Ministers—the Judges, the Auditor-General, and the Commonwealth Public Commissioner and his Inspectors—are appropriated annually by Parliament. But the salaries of the several classes and subdivisions of the Clerical Division are fixed by a Schedule to the *Public Service Act* and range from £40 to £600. An important provision applicable to the Clerical and General Divisions declares that every person in such Divisions who has served for three years and is 21 years of age shall receive not less than £110 a year,[1] subject, in the case of the Clerical Division, to passing a prescribed examination to show that he is capable of performing the work of an office to which such a salary is attached. The provision, like the rest of the Act, applies to women as well as men, and is a demonstration of the State's function as model employer. If its

[1] Secs. 21 and 25.

object be, as has been represented, to encourage young men in the service to marry, that may be counteracted by its influence on young women, who are required to leave the service on marriage.

The remuneration of the Professional and General Divisions is prescribed by regulation, while the salaries of the Administrative Division are not fixed, but are such as are provided in the *Appropriation Act*, an invidious distinction which exposes the permanent heads to Parliamentary criticism and attack, and encourages the notion that they share the political responsibility of their chiefs.

No pensions are paid to officers, and consequently the provision that "every officer having attained the age of 60 years shall be entitled to retire" does not confer any highly valued privilege. Between 60 and 65 he may be called on to retire, and at 65 he must retire, but may upon the advice of the Commissioner be retained for 12 months. In place of pensions, all public servants are required to insure their lives for an amount which increases with the increments to their salaries.

In general the duties of public servants are governed by the Regulations issued by the Governor-General in Council, of which the principal are those contained in the *Government Gazette*, December 23rd, 1902. In regard to them the only matter which appears to call for special notice is the provision relating to the political activity of the public servants. By the Original Regulations[1] "officers are expressly forbidden to publicly discuss or in any way promote political movements. They are further forbidden to use for political purposes information gained by them in the course of duty."[2] This was repealed by the Labour Ministry in

[1] Regulation 41.

[2] This prohibition was interpreted as applicable to State as well as Commonwealth politics.

1909,[1] and in place of it a new Regulation was promulgated, whereby

(*a*) "An officer shall not publicly comment on the administration of any Department of the Commonwealth: or

(*b*) Use for any purpose other than the discharge of his official duties information gained by or conveyed to him through his connexion with the Public Service."

The result is, therefore, that Commonwealth officers may, subject to these qualifications, take the most active part in Commonwealth politics, and may even be accepted candidates for Parliament, though they must resign before nomination.[2] So far as taking part in State politics is concerned, they are without restriction.

This new departure is sharply contrasted with the action of the State Parliament in Victoria in 1903,[3] which was so far impressed with the danger of the political activity of public servants as to segregate them in special constituencies. That enactment was repealed in 1906.[4] The varying policy on this subject indicates the important part which the public service vote plays in Australia, and does not augur well for the success of an experiment in a Government which contains such a large number of officers as the Customs, Post Office and Defence Services.

The discipline of the service is governed by the Act and regulations. Minor offences may be dealt with by the Chief Officer by way of reprimand. More serious offences are the subject of a charge before a Board of Inquiry which investigates the facts and reports. The officer may be represented by counsel, and the inquiry may be in public or private. When the charge is proved, the case is according

[1] Statutory Regulations, No. 6 of 1909.

[2] Constitution, sec. 44.

[3] The Constitution, 1903.

[4] Act No. 2075.

to its nature the subject of fine or loss of leave imposed by the permanent head, reduction by the Commissioner, or dismissal by the Governor-General. The Board of Inquiry consists of three persons of whom one is the elected representative of the Division of the service to which the officer belongs for that State in which he is serving.

The statutory regulation of a service creates rights in public servants which have frequently been and are a source of embarrassment to the Government in its administration. The most important variation of the common law lies in the fact that public servants have a legal tenure, so that their services may not be dispensed with at will, and that, whether as matters of contract or otherwise the salaries appointed to them constitute money claims which can be pursued in the Courts. In the case of the defence forces, however, the *Defence Act* 1903[1] expressly declares that no engagement or promotion of any person shall constitute a civil contract; but a person may on ceasing to be a member of the forces recover by suit any moneys due to him under his engagement. Even in the civil service officers in excess of public requirements may be called on to retire[2]; but it may be taken that such a power must be exercised *bonâ fide* and not as a means of avoiding the steps to be taken before an officer can be dismissed for misconduct. For it is clear that no officer under the *Public Service Act* may be dismissed or punished except for cause (which includes incapacity—sec. 65), and after the observance of procedure prescribed by law.

It remains to speak of the Public Service Commissioner, upon whom lies the burden of administering the Act and upon whose integrity, judgment, and courage depends, in the main, the reconciliation of the various aims and interests which meet in the organization and working of the service.

[1]Secs. 13 and 12.

[2]Sec. 8.

He is at once administrator, adviser, and critic, responsible not merely or mainly to his political chief, but also to Parliament. For these reasons, security of tenure and of salary are granted.[1] But so much depends on the efficient performance of his duties, and this again depends so much on the personal qualities of the officer, which can only be tested by experience, that his appointment is for a fixed term of seven years and not for life. He is required to present an annual report for submission to Parliament on the condition and efficiency of the service, on his own proceedings and those of his Inspectors, with suggestions for "improving the method of the working of the Public Service and especially for ensuring efficiency and economy therein in any Department or Subdivision thereof."[2] In this report he is charged, like the Auditor-General, with the duty of calling attention to any breaches or evasions of the law which may have come under his notice. His duties in relation to appointments and promotions have been considered. He has a staff of inspectors who enjoy the same tenure as himself, and through them he ascertains the nature, value, and quality of the work of all officers. By this means he is able to classify the work and the officers, and to learn enough of the personal qualities of the individual servants to guide him in dealing with appointments and promotions. He is not, however, dependent solely on his own staff; he may call on the Departments for reports and may hold inquiries. In relation to the classification of officers and the arrangement of work in the Department, the duty of the Commissioner is to present recommendations and proposals to the Government; and upon these a special procedure is established. The Government may proceed to give effect to them, or may reject them. If they are rejected, the Commissioner proceeds to a reconsideration

[1] Secs. 5 and 6.

[2] Sec. 11.

of the matter with a view to further recommendations or proposals, and a statement of the reasons for rejection must be laid before Parliament.[1] Finally, although the Act does not require that the Regulations issued by the Governor-General for the government of the service shall be on the recommendation of the Commissioner or shall have his approval—for as general regulations they are more legislative than are particular acts of administration, and therefore more peculiarly within the political sphere of the Executive which is immediately answerable to Parliament—they are, no doubt, within the general provision which requires him to submit reports as to matters requiring to be dealt with by the Governor-General under the Act.[2]

[1] Secs. 8 and 9.

[2] Sec. 5.

CHAPTER VI.

THE JUDICATURE.

JUDICIAL power is an essential element in government and the administration of laws. It follows that a Federal Government which is to be capable of effectuating its powers must have its own judicature; it must not be dependent solely upon the aid of authorities which are subject to another control. Further, in a composite government with its inevitable conflicts, there must be some jurisdiction capable of giving an uniform interpretation which shall be final and supreme.

How these ends are to be secured forms one of the main problems to be solved by the framers of federal constitutions. In Canada, the Dominion Parliament has power to establish and has established at the head of the whole judicature, a Supreme Court with appellate jurisdiction in all matters, and has power to establish such Courts as it pleases for the better administration of the laws of Canada (*British North America Act* 1867, sec. 101), a power which has been exercised in the establishment of some special Courts. Further, though the distinction between a Provincial Judicature and a Dominion Judicature is observed, and the Provinces constitute, organize, and maintain the Provincial Courts, the Dominion Government appoints, pays

and, if necessary, removes, the Judges of the Courts of the Provinces. Finally, it must be remembered that the Dominion control over Provincial legislation and the grant of exclusive power to Dominion and Province were devised with a view to minimising occasions of conflict.

In the United States, consistently with the principle of State autonomy, the States continued to organize their judiciary and to control and appoint their judicial officers. But the paramount objects of a due execution of the powers of government, and uniformity in the interpretation and operation of those powers and of the laws enacted in pursuance of them, are secured by the establishment of a national judiciary. To attain the ends for which it exists, this national judiciary ought, in the language of Story, to possess powers co-extensive with the legislative department, and must be so organized as to carry into complete effect all the purposes of its establishment.[1]

The Commonwealth Constitution follows the example of the United States, and, while preserving to the States their own judiciary, provides a national judiciary for enforcing and guarding the Commonwealth powers.

But the national judiciary in the United States and the Commonwealth is not merely the auxiliary of the federal Legislature and Executive. The Constitution may be attacked from within as well as from without; and it is the duty of the judiciary, within its own sphere of judicial power, to uphold and maintain the Constitution against all attack, as well from the Commonwealth Executive or Legislature as from the States Governments.

The judicial power of the Commonwealth is the power to adjudicate as an organ of the Commonwealth, and under sec. 71 is vested in and can be exercised only (1) by a Federal Supreme Court called the High Court of Australia,

[1] Story, Constitution, secs. 1576-7.

(2) by such other Federal Courts as the Parliament creates, and (3) by such other Courts as it invests with federal jurisdiction (sec. 71). The content of the judicial power is measured out by the jurisdiction conferred or which Parliament may confer upon the High Court, and consists of—(*a*) the general appellate jurisdiction of the High Court under secs. 73 and 74; (*b*) the jurisdiction over the specific matters enumerated in secs. 75 and 76.

In the main, the distribution of the judicial power amongst the judicial organs of the Commonwealth is controlled by the Parliament under secs. 77, 78 and 79, and sec. 51 (xxxix.) of the Constitution. Sec. 80 limits the powers of the Parliament by declaring that the trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed. If the offence was not committed within any State, the trial is to be held at such place as the Parliament prescribes.

The provisions of the Constitution relating to the judicature are supplemented, and the distribution of jurisdiction in the main effected, by the *Judiciary Acts* 1903-1907 and the *High Court Procedure Act* 1903. But it must be remembered that the High Court draws its existence from the Constitution itself, and cannot be abolished by any means short of an amendment of the Constitution, while it has a jurisdiction both appellate and original granted immediately by the Constitution itself (secs. 73, 74, 75). The *Judiciary Act*[1] declares the High Court to be a superior Court of record,[2] with the same power to punish for contempts as is possessed by the Supreme Court of Judicature in England.[3] Its principal seat is at the seat of

[1]The details of these Acts are outside the scope of this work. They are fully dealt with in Quick and Groom's *Judicial Power of the Commonwealth.*

[2]*Judiciary Act* 1903, sec. 4.

[3]Sec. 4.

government,[1] and its process runs, and its judgments and orders have effect and may be executed, throughout the Commonwealth.[2]

THE APPOINTMENT, TENURE AND EMOLUMENTS OF JUSTICES, not of the High Court alone, but of all other Courts created by the Parliament, are defined by sec. 72. These Justices "shall be appointed by the Governor-General in Council"; "shall not be removed except by the Governor-General in Council on an address from both Houses of the Parliament in the same Session praying for such removal on the ground of proved misbehaviour or incapacity";[3] and "shall receive such remuneration as the Parliament may fix, but the remuneration shall not be diminished during their continuance in office."[4] By the *Judiciary Act* 1903, the Justices of the High Court are appointed by Commission (sec. 4), and every person so appointed must be or have been a practising barrister or solicitor of the High Court or of the Supreme Court of a State, of not less than five years standing (sec. 5). The salary of the Chief Justice is fixed at £3,500 a year, and the salaries of the other Justices at £3,000 (sec. 47), and are charged upon and payable out of the Consolidated Fund (sec. 48). The Constitution provides that the Court shall consist of a Chief Justice and such number of Justices, not less than two, as Parliament prescribes. The *Judiciary Act* 1903 fixed the minimum number of Justices allowed by the Constitution, but an Act of 1906 increased the number by two.

The statutory provisions which in England secure the

[1] Sec. 24.

[2] Sec. 25.

[3] For a question on the interpretation of this provision, see a note in the succeeding chapter.

[4] Assessment under an *Income Tax Act* is not a diminution of remuneration: *Cooper* v. *Commissioner of Income Tax, Queensland*, 4 C.L.R. 1304, 1315-1317.

independence of the Judges of the superior Courts have been generally reproduced in the self-governing Colonies. It may, indeed, be no longer necessary that they should offer "a barrier to the despotism of the prince;" but the political power which has passed from the throne is not less likely to magnify itself in the hands of a Parliamentary Executive or a legislative body. Against the abuse of sovereign power no legal protection is possible, and, the Imperial Parliament being supreme, the Judges in England necessarily hold office and emoluments at the will of Parliament: the universal acknowledgment of the sovereignty of Parliament is sufficient to prevent those conflicts of authority which in the past have been the occasion of attacks upon the bench.

In the Colonies, however, Legislatures are not supreme, and "encroachments and oppressions" against the law may not be unknown. In the early days of responsible government in Australia, there were some sharp conflicts between the popular chamber or the Parliamentary Executive, and the Courts, and even between Parliament and the Courts, in which it must be owned that it was not always the Judges who carried away the honours of war. There was a disposition on the part of some Judges, as there has been on the part of the military authorities, to regard themselves as standing outside the system of responsible government, and as entitled in their official relations to communicate with the Governor without the intervention of a Minister. There was in South Australia what Sir Roundell Palmer and Sir Robert Collier described as "an unfortunate disposition manifested upon the Bench to favour technical objections against the validity of Acts of the Colonial Legislature." And this "unfortunate disposition" was made by the Government and the Legislature the excuse for the perpetuation of a Court of Appeals consisting prac-

tically of the Executive Government, a tribunal the unfitness of which called for strong remonstrance from the Secretary of State. In Victoria, during the "deadlocks" of 1865 and 1867, the Courts were called on to adjudicate upon the measures taken by the Government, with the support of the Legislative Assembly, for carrying on the government of the Colony without an *Appropriation Act*; and in two cases decided against the validity of the Government acts.[1]

It is not, therefore, an ideal arrangement which makes the Judges of the Supreme Courts removable on the address of the two Houses of Legislature. The power of removal upon such address in some Colonies belongs to "Her Majesty"; in others, "to the Governor in Council." Where the power is exerciseable by Her Majesty, it is upon the advice of the Secretary of State, and it has been established that "in dismissing a judge in compliance with addresses from a local Legislature, and in conformity with that law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility, which Her Majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper."[2] Where, on the other hand, the power under the local law is in the Governor, he must act as in other matters upon the advice of his Ministry, and there is no legal security that the occasion is a proper one for dismissal. It seems clear that in such a case, there is no power to appeal to the Queen in Council.[3]

The provisions of the Commonwealth Constitution go beyond those contained in any English or Colonial Act or in the Constitution of the United States for protecting the

[1](1865) *Stevenson* v. *Reg.*, 2 W.W. & àB. (L.) 143; (1867) *Alcock* v. *Fergie*, 4 W.W. & àB. (L.) 285.

[2]Case of Mr. Justice Boothby, Todd, 848.

[3]*Secus*, if the removal is under the powers of 22 Geo. III. c. 75.

judiciary. As in the United States, the tenure and emoluments of Judges of all federal Courts are protected by the Constitution; while the Constitution supplies a defect which has been noticed in the American Constitution—it prescribes the minimum number of Justices in the High Court. The English and Colonial model gives no protection against Parliament; the power to remove on an address of both Houses is in addition to the power to remove for misbehaviour. In the Commonwealth these independent powers are interwoven—the Executive may remove only upon an address, which is to be based on proof of the causes stated.[1]

Nevertheless, it is not less true of the Commonwealth than of the United States that the judicial department does not really have an independent existence with the legislative and executive departments. That there is no legal process for compelling the Governor-General in Council to proceed to the appointment of Judges is no more than may be said of other powers and duties, notably the summoning of the Parliament. But while there is the imperative necessity of obtaining money or authority to spend money, to secure the latter, there is not the same necessity for appointing Judges or preserving the existence of Commonwealth Courts. The Ministry of the day and the two Houses of the Parliament would be practically the sole judges of what constituted misbehaviour or incapacity, and when or how such misbehaviour or incapacity was "proved"; their action would not be subject to review in any Court of law, except perhaps in a case where the procedure was flagrantly unjust. Though a Judge may not be removed except as provided, the Legislature may abolish Courts other than the High Court, and there is nothing to protect the Judges from loss

[1] This stands as in the first edition. But the Commonwealth Constitution served as a model for the Transvaal (1906) and the Orange River Colony (1907) (see Keith, *Responsible Government*, p. 275), and the Draft South African Constitution 1909, clause 101.

of office upon such an event, and nothing to secure them compensation; the legal consequences of such an abolition have been discussed in the United States on the action of Jefferson in 1802.[1] The Constitutional provision in relation to judicial salaries applies in favour of the officer rather than the office, and the provision for future Judges is entirely within the discretion of the Executive and the Parliament.

The decision of the Judicial Committee in *Buckley* v. *Edwards*[2] throws light upon the constitutional provisions as to the appointment and tenure of Judges. An Imperial Act (15 & 16 Vict. c. 72) appropriated a sum of money for the salary of a Chief Justice and a puisne Judge in New Zealand, and gave power to the General Assembly of New Zealand to alter these appropriations by any Act or Acts, provided that the salary of a Judge should not be diminished during his continuance in office. An Act of New Zealand—*The Supreme Court Judges Act* 1858—enacted that the Supreme Court should consist of "a Chief Justice and such other Judges as His Excellency in the name and on behalf of Her Majesty shall from time to time appoint." Under this power the Government appointed an additional Judge for whom a salary had not been provided by Parliament. Parliament refused to appoint a salary, and proceedings were taken by *quo warranto* against the Judge. The Judicial Committee said:—"It is manifest that the limitation of the legislative power of the General Assembly was designed to secure the independence of the Judges. It was not to be in the power of the Colonial Parliament to affect the salary of any Judge to his prejudice during his continuance in office. But if the Executive could appoint a Judge without a salary, and he needed to come to Parliament every year for remuneration for his services, the proviso would be

[1] Story, 1633.

[2] L.R. (1892) A.C., 387.

rendered practically ineffectual, and the end sought to be gained would be defeated. It may well be doubted whether this proviso does not by implication declare that no Judge shall hereafter be appointed save with a salary provided by law to which he shall be entitled during his continuance in office, and his right to which could only be affected by that action of the New Zealand Legislature which is excluded by the Imperial Act." After such an intimation of opinion the Executive Government is practically bound to submit to Parliament a permanent appropriation of salary for a new judgeship before the office is filled, and will act rightly in refusing to make any judicial appointment without such permanent provision. This was the principle acted upon when the appointment of two additional Justices to the High Court was preceded by a Parliamentary provision of their salaries.

CHAPTER VII.

FEDERAL JURISDICTION.

THE Government of the Commonwealth is in all its departments primarily a government of limited and enumerated powers; the general unenumerated powers belong to the States. In the case of the judicial department, the general appellate jurisdiction of the High Court is a notable exception from the special character of federal powers. But in addition to this appellate jurisdiction of the High Court (to be considered in the next chapter), there is a federal jurisdiction over certain matters specifically enumerated. As in interpreting an Act of the Commonwealth Parliament the first thing to be done is to ascertain that the subject of the Act is one committed to the Parliament, so in invoking the jurisdiction of the federal Courts it must be shown that the cause is within the enumerated matters. In the United States it is held that the federal judiciary has no common law jurisdiction,[1] and it must always appear that a case in a federal Court is within its jurisdiction, the presumption is against it until it is shown.[2]

[1] *Ex parte Bollman*, 4 Cranch. 75.

[2] *Godfrey* v. *Terry*, 97 U.S. 171; *Robertson* v. *Crease*, 97 U.S. 646.

The subjects of federal jurisdiction in the Constitution closely follow the subjects of the judicial power of the United States, though in many respects the political condition of the Australian Colonies and the character of their Courts was widely different from the state of things which in America led to the inclusion of certain subjects in the judicial power of the Central Government. In the great case of *Chisholm* v. *The State of Georgia*,[1] Mr. Justice Iredell remarked, in terms which have had the approval of Story, that "the judicial power of the United States is of a peculiar kind. It is, indeed, commensurate with the ordinary legislative and executive powers of the general government (*i.e.*, the Federal Government) and the powers which concern treaties. But it also goes further. When certain parties are concerned, although the subject in controversy does not relate to any special objects of authority in the general government wherein the separate sovereignties of the several States are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy; and the Legislature of the United States may pass all laws necessary to give such judicial authority its proper effect." The principles underlying these subjects are stated by Kent[2]:— "All the enumerated cases of federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice."

The subjects of federal jurisdiction are the nine classes of matters enumerated in secs. 75 and 76 of the Constitution.[3]

[1] (1793) 2 Dallas 419.

[2] Kent's *Commentaries* (Holmes' edition, vol. i., p. 320).

[3] *Per* Griffith C.J., *Baxter* v. *Commissioner of Taxation*, 4 C.L.R., p. 1113.

Sec. 75—

i. Arising under any treaty:

ii. Affecting consuls or other representatives of other countries:

iii. In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:

iv. Between States, or between residents of different States, or between a State and a resident of another State:

v. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

Sec. 76—

i. Arising under this Constitution, or involving its interpretation:

ii. Arising under any laws made by The Parliament:

iii. Of admiralty and maritime jurisdiction:

iv. Relating to the same subject matter claimed under the laws of different States.

In secs. 75 and 76 the matter of jurisdiction alone is dealt with, the existence of legal rights is assumed, and the sections do no more than indicate that the rights may be enforced in a certain tribunal or class of tribunals. The term "matter" which governs the enumeration of subjects is in itself so indefinite that its meaning must be gathered almost wholly from its particular use. In the Constitution it is used in relation to legislative, executive, and judicial power. It is well established by usage as a comprehensive term for describing every kind of proceedings competently brought before and litigated in a Court of law.[1] In relation to judicial power, it excludes political disputes not arising out of legal right; such disputes "do not present a case

[1] "Cause or matter": *Judicature Act* 1873, sec. 100.

appropriate for the exercise of judicial power," and "it is only where the rights of persons or property are involved, and where such rights can be presented under some judicial form of proceedings, that Courts of justice can interpose relief."[1] Even the reference to the Judicial Committee of "any such other matters whatsoever as His Majesty shall think fit" (3 & 4 Will. IV. c. 41, sec. 4), is in practice limited to such matters as are fit for judicial determination, and in which the opinion may be followed by effective action by the Crown, a limitation which is the more significant when we remember that the Judicial Committee has many of the marks of the Council rather than of the Court.[2]

In respect to the exercise of jurisdiction in these matters, sec. 75 declares that in the matters there enumerated the High Court shall have original jurisdiction, and of this of course the Parliament cannot deprive it. The matters contained in sec. 76 are matters over which jurisdiction may be committed to the High Court by the Parliament, and sec. 77 defines the power of the Parliament with respect to the further distribution of judicial power over the subjects of secs. 75 and 76. Sec. 77 declares that the Parliament may make laws—

i. "Defining the jurisdiction of any federal Court other than the High Court."

The jurisdiction of the High Court is defined by the Constitution itself. It must be noted in dealing with the American authorities that there are marked differences between the American and the Australian Constitutions in the distribution of judicial power. Apart from the fact that the United States Constitution does not set up a general appellate power in the Supreme Court, the jurisdiction of

[1] *Cherokee Nation* v. *State of Georgia*, 5 Peters 1; *State of Georgia* v. *Stanton*, 6 Wallace 50.

[2] See Todd, 305-6, 843.

the Supreme Court in the limited class of cases which belong to the federal jurisdiction is in certain cases declared to be original, in others appellate merely. These provisions are peremptory, and cannot be varied by Congress. Thus, Congress cannot add to the original jurisdiction any matter which by the Constitution is committed to the appellate, and, similarly, where a matter is in the original jurisdiction of the Supreme Court, appellate jurisdiction cannot be exercised over it.[1] But in the Commonwealth Constitution the High Court has by sec. 73 (ii.) jurisdiction, subject to such exceptions and regulations as the Parliament prescribes, to hear appeals from all judgments of any federal Court or Court exercising federal jurisdiction; while by secs. 75 and 76 the High Court either has or may have original jurisdiction of all the matters of federal jurisdiction. Thus the High Court, in addition to its original jurisdiction over the specified matters, has an appellate jurisdiction over them when determined in other Courts. The power to define the jurisdiction of other federal Courts is a power to commit to those Courts either appellate or original jurisdiction in the matters referred to them.[2]

The only federal Court which the Parliament has established is the Commonwealth Court of Conciliation and Arbitration, whose jurisdiction is defined by the *Conciliation and Arbitration Act* 1904.

ii. "Defining 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."

The mere grant of jurisdiction to a tribunal is not inconsistent with the existence of the same jurisdiction elsewhere. Therefore, the fact that the Constitution confers

[1] *Marbury* v. *Madison*, 1 Cranch. 137; *Osborn* v. *Bank of United States*, 9 Wheaton 738, at p. 820.

[2] *Ah Yick* v. *Lehmert*, (1905) 2 C.L.R., at p. 604.

jurisdiction in certain cases on the High Court does not prevent the Parliament from granting the like jurisdiction to other federal Courts, and the establishment of other federal Courts with power of adjudication in any class of cases, would not prevent the States Courts from taking cognizance of the same class of case, if otherwise such jurisdiction belonged to them. The sub-section now under consideration enables the Parliament to declare that the jurisdiction of any federal Court shall be exclusive of the jurisdiction of the State Court. In the case where the jurisdiction of the State Court arises under State law—which is presumably what is meant by the jurisdiction which "belongs to" it[1]—this is clear enough; so long as the prohibition is in force, the State Court is excluded from exercising the jurisdiction which it has under State laws. It is, however, hardly appropriate to speak of excluding the jurisdiction which has been invested in the State Court by federal law, and the power which established such a jurisdiction could certainly take it away without special authority.

iii. "Investing any Court of a State with federal jurisdiction."

This, again, is a matter in which the Commonwealth Constitution differs from the American; in the latter, there is no power in Congress to commit to the State Courts an authority to adjudicate in the name and on the behalf of the National Government. It becomes necessary to consider what is the force and effect of this constitutional provision, since important differences of opinion have arisen as to its meaning.

If the list of matters included in secs. 75 and 76 is looked at, it will be seen that many of them are matters over which

[1] *Baxter* v. *Commissioner of Taxation*, 4 C.L.R., *per* Isaacs J., at p. 1142.

the State Courts had undoubtedly jurisdiction by virtue of State laws. Thus, there was nothing in cases "arising under any treaty" (*e.g.*, Extradition Treaties) or "affecting consuls or other representatives of other countries," or "between residents in different States," or "of admiralty or maritime jurisdiction," to prevent them from exercising their ordinary jurisdiction; and neither the establishment of the Commonwealth nor the existence of the High Court took away or affected the nature of that jurisdiction. Further, the *Constitution Act*, sec. v., declaring that the Constitution and all laws made by the Parliament thereunder, shall be binding on the Courts, Judges and people of every State notwithstanding anything in the laws of any State, makes it part of the duty of the State Courts, as such, to give effect both to the Constitution and federal laws whenever they may be appropriate to the determination of a matter competently before the Court. The States Courts, therefore, in the exercise of their State jurisdiction, may perfectly well have before them matters "arising under the Constitution or involving its interpretation," or "arising under any laws made by the Parliament."[1] In such a case the jurisdiction of the State Court—its authority to adjudicate—springs from the State law, and the Constitution or the Commonwealth Statute merely determines the law to be applied in the adjudication.

But there are other cases in which the State Courts have not and could not have power to adjudicate under the State law. Thus, the independence of the Commonwealth involves the prohibition of State Courts from entertaining any suit against it; a similar reason excludes jurisdiction over suits against other States. Nor has the State Court as such power to issue *mandamus* to a federal officer to compel him to perform a federal duty,[2] or to issue *habeas corpus* to a

[1] *Claflin* v. *Houseman*, 93 U.S. 130.

[2] *McClung* v. *Silliman*, 6 Wheaton 598; *Ex parte Goldring*, (1903) 3 S.R. (N.S.W.) 260.

federal officer.[1] Moreover, it is accepted in the United States that where a federal Statute creates an offence, the State Courts have no jurisdiction to entertain a prosecution for it; it can be punished only in a federal Court.[2]

Now, in this second class of case, the Commonwealth Parliament can supplement the defect of State authority and give the State Courts the power to adjudicate. That is, under sec. 77 (iii.) of the Constitution, it may invest the State Courts with federal jurisdiction. In the opinion of Hodges J., this represents the full extent of the power given by the sub-section; it enables the State Courts to adjudicate in matters in which they had not, and could not have, any jurisdiction under State law, and has no application to matters which are within the cognizance of the State Courts independently of federal legislation.[3] According to this view, the grant of jurisdiction by the Federal Parliament to the State Courts in matters wherein those Courts already have jurisdiction by State law, is a mere nullity; they have already a power to adjudicate, and that power is not altered by the affectation of another grant of authority from a different source. On this ground, sec. 39 of the *Judiciary Act* 1903, so far as it deals with matters cognizable by the State Courts under State law, and affects to convert the authority of the State Courts into federal jurisdiction, would be *ultrâ vires*.

The view which has been adopted by the High Court is that the power to invest the State Courts with federal jurisdiction cannot be so limited, and insists that we must regard not merely the *matter* over which jurisdiction is exercised, but also the *source* from which it is derived. A State Court exercises federal jurisdiction when by virtue of

[1] *Tarble's Case*, 13 Wallace 397.
[2] *United States* v. *Lathrop*, 17 Johnson 4.
[3] *Outtrim's Case*, (1905) V.L.R. 463.

an Act of the Commonwealth Parliament it entertains a suit against the Commonwealth; but it equally exercises federal jurisdiction in a suit by the Victorian Commissioner of Income Tax for the recovery of taxes, where the defendant claims some immunity arising under the Constitution, if the Commonwealth Parliament has declared that its jurisdiction in such cases shall be federal jurisdiction. Under State law, it had power to adjudicate as an organ of State government; under federal law it has authority to adjudicate as an organ of Commonwealth government.[1] In respect to subject-matter, the power to adjudicate lies where it did; but the source from which it springs is different, and this source being the Commonwealth law, it is federal jurisdiction.

The power to invest the State Courts with federal jurisdiction is then co-extensive with the power to establish federal Courts;[2] and this jurisdiction may be original or appellate at the discretion of the Parliament.[3]

It remains to consider the principal features of the distribution of federal jurisdiction by the Parliament in the *Judiciary Act* 1903.

First, of the High Court. Sec. 30 declares that in addition to the matters in which original jurisdiction is committed by the Constitution to the High Court, the High Court shall have original jurisdiction in all matters arising under the Constitution or involving its interpretation.[4] Sec. 38

[1] *Baxter* v. *Commissioner of Taxation*, (1907) 4 C.L.R., at pp. 1136 (Griffith C.J.), 1142-3 (Isaacs J.).

[2] *Ah Yick* v. *Lehmert*, (1905) 2 C.L.R., at p. 604.

[3] S.C.

[4] No attempt is made here to describe exhaustively the cases in which the High Court has original jurisdiction in proceedings under Acts of the Commonwealth Parliament dealing with the several subjects of legislative power, *e.g.*, the *Australian Industries Preservation Act* 1906. A list of Acts conferring such jurisdiction, as well as of those investing State Courts with federal jurisdiction, will be found in the annual volumes of the Commonwealth Statutes in the "Table of Commonwealth Legislation in Relation to the Several Provisions of The Constitution."

enumerates five classes of matters in which the jurisdiction of the High Court shall be exclusive, viz. (*a*) matters arising directly under any treaty; (*b*) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State; (*c*) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State; (*d*) suits by a State, or any person suing on behalf of a State, against the Commonwealth, or any person being sued on behalf of the Commonwealth; (*e*) matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal Court. To these cases an addition is made by sec. 2 of the *Judiciary Act* 1907,[1] providing that the jurisdiction of the High Court in cases under sec. 74 of the Constitution shall be exclusive of the jurisdiction of the Supreme Courts (original or appellate) of the States, not, it will be observed, of other State Courts.

In the exercise of its original jurisdiction, the High Court may make and pronounce all such judgments as are necessary for doing complete justice in any matter before it (sec. 31); and sec. 24 (7) of the English *Judicature Act* 1873, enabling the Court to give all manner of relief, legal or equitable, is adapted to the High Court (sec. 32). The High Court may make orders or direct the issue of writs—(*a*) commanding the performance by any Court invested with federal jurisdiction of any duty relating to the exercise of its federal jurisdiction; (*b*) requiring any Court to abstain from the exercise of any federal jurisdiction which it does not possess; (*c*) commanding the performance of any duty by any person holding office under the Commonwealth; (*d*) removing from office any person wrongfully claiming to hold any office

[1] *Judiciary Act* 1903-1907, sec. 38A.

under the Commonwealth; (*e*) of *mandamus*; or (*f*) of *habeas corpus*.

The only case in which the Parliament has created a "federal Court" appears to be the Court of Conciliation and Arbitration, established in 1904,[1] to exercise the special and extraordinary powers in connection with conciliation and

[1] Act No. 13 of 1904. *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association*, (1908) 6 C.L.R. 309, 323-4. This Act is further considered in connection with the Subjects of the Legislative Power of the Parliament, but a word must be added in regard to the constitution and organization of the Court. Sec. 72 of the Constitution governs the appointment and removal of the Justices of all federal Courts. It appears to require that such Courts shall be held only by Justices who in their capacity as Justices of that Court are protected by the safeguards of the section, and to exclude the appointment of any Justice to a Court for a term of years, though the person so appointed is a Justice of another Court on the terms and conditions of sec. 72. This suggests a curious question on the interpretation of sec. 72. The desire of the framers of the Constitution was undoubtedly to give a life tenure to federal Justices, and to make the office more and not less assailable than that of Judges in the superior Courts in England and in Australia. To this end they departed from the customary form of declaring that Judges shall hold office during good behaviour, and, using the emphatic words of negation, declared that they should not be removed except in the cases prescribed in sec. 72 (2). The result is that there is no affirmative declaration of tenure, and while a Justice who is appointed without words defining his tenure has in fact a life appointment because he can only be removed in the cases prescribed, there is room for argument that a Justice might be appointed for a term of years, at the end of which his tenure would expire without any removal at all, just as it does by death. But the case of *Buckley* v. *Edwards*, (1892) A.C. 387, shows that constitutional usage has a great power of controlling the interpretation of this class of provision, and the power to appoint would probably be construed as a power to appoint *simpliciter* unaccompanied by any power to declare a tenure, in which case the Justice would, of course, hold office until death or removal by virtue of sec. 72 (ii.). Another question arises in regard to the Court of Arbitration. The President may appoint any Justice of the High Court or Judge of the Supreme Court of a State to be his deputy to exercise such of his powers as he thinks fit to assign, the appointment not to affect the exercise of any person or function by the President itself. If the powers to be deputed are merely those which belong to the *President* as distinguished from those of the *Court* consisting of the President, the provision may be good; but the President could hardly be vested with the power to authorize persons to exercise generally the functions of the Court in face of the constitutional provision which requires that Justices of federal Courts shall be appointed by the Governor-General, &c.

arbitration in industrial disputes. The Court consists of a President, who is to be appointed from among the Justices of the High Court for a term of seven years. "The Court of Disputed Returns," established by the *Commonwealth Electoral Acts* 1902-5, appears to be less a separate federal Court than the High Court exercising a special jurisdiction (sec. 193 (1) and (4)).

The power to invest the State Courts with federal jurisdiction has been exercised almost to its fullest extent by sec. 39 of the *Judiciary Act*. Briefly, the scheme of that section is to embrace the whole of the matters of federal jurisdiction which it is not intended to give to the High Court exclusively, and to declare, first, that the State Courts shall according to their nature and degree have jurisdiction in all of them, whether they are matters of which the Court would have jurisdiction under the State law or not; secondly, that no jurisdiction shall be exercised by the State Courts in any of such matters, except as federal jurisdiction. To secure the latter object in cases which already belonged to the jurisdiction of the State Courts by State law, it appears to have been thought advisable to declare formally that the jurisdiction of the High Court in all matters should be exclusive of the jurisdiction of the several Courts of the States, thereby precluding the State Courts from exercising jurisdiction in any of the nine matters mentioned in secs. 75 and 76 of the Constitution in which the High Court had original jurisdiction. The exclusion of the State jurisdiction in these cases is followed by a grant of federal jurisdiction in these terms: "The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last

preceding section" (*i.e.*, sec. 38, conferring exclusive jurisdiction in certain cases on the High Court). It is upon this section that the controversy already noted as to the power to invest with federal jurisdiction has arisen. It is enough to say here that the High Court has sustained the grant in respect to all matters, whether there was any jurisdiction belonging to the State Courts under their own law or not.[1] The High Court has also held that the grant applies equally to the State Courts in their appellate as in their original jurisdiction.[2]

The grant of federal jurisdiction under sec. 39 is subject to four conditions and restrictions. One of these defines the constitution of a State Court of summary jurisdiction when exercising federal jurisdiction. Another declares that, whenever an appeal lies from a Court or Judge of a State to the Supreme Court, an appeal may be brought to the High Court; and a third, that an appeal may by special leave be brought to the High Court from any Court or Judge of a State notwithstanding that the State law prohibits an appeal. The fourth condition is that " every decision of the Supreme Court of a State or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive, except so far as an appeal may be brought to the High Court." The constitutional question which arises under this provision will be considered under the appellate jurisdiction, and need not here be further discussed. The High Court has held that it does not purport to take away any right existing under an Order in Council, and that it leaves the appeal by special leave unaffected.[3]

[1] *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. 1087; see especially pages 1137-1138, and 1141-1143.

[2] *Ah Yick* v. *Lehmert*, (1905) 2 C.L.R. 593.

[3] *Baxter* v. *Commissioners of Taxation*, 4 C.L.R. 1087.

For the special matter of a cause or part of a cause arising under the Constitution or involving its interpretation and which is pending an appeal in a State Court, sec. 40 provides that it may be removed into the High Court by order made on the application of a party or of the Attorney-General of the Commonwealth or of a State.

CHAPTER VIII.

THE APPELLATE JURISDICTION: THE KING IN COUNCIL AND THE HIGH COURT OF AUSTRALIA.

THE vexation of appeals to the Privy Council is an old Colonial grievance, of which traces may be found even in the seventeenth century; and in the early history of the federal movement in Australia, there were few matters which were more frequently referred to as demonstrating the need for union than the hardships and inconvenience of "a distant and expensive system of appeal." The delay and the cost of a proceeding in the Privy Council and the occasional weakness of the Judicial Committee amounted to a real grievance; submission to an external Court was a sentimental grievance which counted for much in countries proud of their new won powers of self-government. In time, however, these influences lessened; and, while the establishment of a general appellate Court as part of any scheme of federation was assumed as inevitable, the desire for such a change in the judicial arrangements can hardly be regarded as an effective political force in the federal movement. The principal reason for the diminution of interest in the question was, no doubt, that, though there were lawyers in plenty in political life, the driving force in

politics had shifted to classes which, while not indifferent to the efficient administration of justice, are little concerned with the supreme jurisdictions. Other causes were at work to modify opinion, as the improvement of communications by cable and steam. On the other hand, the enormous investments of English money in the Colonies, and the importance of supporting Australian credit at a time when several of the Colonies were still suffering a recovery from financial disasters, made the commercial interests favourable to a tribunal submission to which might be regarded in England as a pledge of good faith. Some importance was attached among the same classes, as well as in the legal profession, to the maintenance of uniformity of law throughout the Empire. Finally, the discussion was caught in the tide of loyalty which swept over the country during the Boer war, and a strong public opinion declared against any severance of Imperial ties. The result, therefore, was compromise. The long expected general Court of appeal was established; and the appeal to the Privy Council was retained under conditions which, whatever their demerits, respect local and Imperial sentiment, and in the main preserve the royal prerogative without creating the evil of a multiplicity of appeals. The scheme is contained in sec. 73 (Appellate Jurisdiction of the High Court) and sec. 74 (Appeals to the Queen in Council) of the Constitution.

Sec. 73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences—

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii.) Of any other federal Court, or Court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other Court of any State from which at the

establishment of the Commonwealth an appeal lies to the Queen in Council;

(iii.) Of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which, at the establishment of the Commonwealth, an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Sec. 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court 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, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise in virtue of Her Royal prerogative to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed

laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure (*vide* sec. 60).

On these sections the following observations may be made:—

1. Sec. 73 shows the High Court in its two capacities—first, the Supreme Court of federal jurisdiction in the Commonwealth; secondly, the general Court of appeal in the Commonwealth. In the first capacity, it may be compared with the Supreme Court of the United States; in the second, with the Supreme Court of Canada.

2. Sec. 73 not merely confers jurisdiction on the High Court where there is a right of appeal, but grants a right of appeal to the litigant,[1] for the jurisdiction is to hear appeals from *all* judgments, &c.

3. The Commonwealth Parliament may make exceptions and regulations as to the right of appeal from State Courts to the High Court, subject to the limitation that it may not prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council (sec. 73). The State Parliament has no power to define the conditions and restrictions applicable to appeals from its Courts to the High Court.[2]

The Parliament may not create any additional appellate jurisdiction in the High Court.[3] "It is important to notice that the powers of Parliament, so far as regards the appellate jurisdiction of the Court, are limited to prescribing exceptions from the otherwise unrestricted jurisdiction conferred by the Constitution, to prescribing regulations as to the exercise of the right of appeal, *i.e.*, as to time, security,

[1] *Hannah* v. *Dalgarno*, 1 C.L.R. 1; *Parkin* v. *James*, 2 C.L.R. at pp. 329-330; *Ah Yick* v. *Lehmert*, 2 C.L.R. 593.

[2] *Peterswald* v. *Bartley*, 1 C.L.R. at p. 499.

[3] *Hannah* v. *Dalgarno*, 1 C.L.R. at p. 10, *per* Griffith C.J.

procedure, and similar matters, and to modifying the conditions and restrictions prescribed by the Orders in Council as to appeals from State Courts exercising State jurisdiction."[1] The power of the Parliament to establish exceptions to the exercise of the appellate jurisdiction is controlled by the paragraph which secures an appeal to the High Court from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal would lie to the King in Council. This has the important consequence that the Commonwealth Parliament may not take away the power of the High Court to grant special leave to appeal from any judgment of the Supreme Court of a State, since every such judgment was a matter in which an appeal lay (either under the Orders in Council or by special leave) to the King in Council.[2] But, consistently with the decisions of the Privy Council,[3] the High Court has held that no appeal lies to it from a State Court acting, not in the ordinary administration of justice, but in the exercise of a special jurisdiction of a kind not necessarily or usually committed to Courts of justice, as the hearing of election petitions, whenever that jurisdiction has been committed in such a way that judgments rendered under it are to be final and conclusive.[4]

The *Judiciary Act* 1903, Part V., proceeds to exercise the power of Parliament over the appellate jurisdiction, and sec. 35 of that Act (*a*) fixes the appealable amount in civil cases at £300, instead of the £500 established by the Orders in Council for appeals to the King in Council; (*b*) extends the class of cases in which an appeal may be taken without

[1] S.C.

[2] *Parkin* v. *James*, (1905) 2 C.L.R. 315, 333-335. *Quære*, where such Court is exercising federal jurisdiction—*Hannah* v. *Dalgarno*, 1 C.L.R. 1, 9-10.

[3] *Thebergé* v. *Laudry*, 2 A.C. 102.

[4] *Holmes* v. *Angwin*, (1906) 4 C.L.R. 297. See also *Parkin* v. *James*, 2 C.L.R. at p. 333.

special leave beyond those embraced in the Orders in Council; and (*c*) provides that in all other cases an appeal may be brought by special leave. These provisions are applicable not merely to judgments of the Supreme Court of a State but to the judgments of every Court of a State from which at the establishment of the Commonwealth an appeal lay to the King in Council, and apply whether the Court is acting in a federal jurisdiction or otherwise. The section emphatically declares that the appellate jurisdiction of the High Court shall apply to the cases therein dealt with "and to no others." The High Court has intimated an opinion that the regulations contained in sec. 35 are intended to be exhaustive and that (apart from the Constitution) the right of appeal must be considered with reference to that section alone.[1]

4. Early in the history of the High Court, a decision was given which has had grave consequences in respect to the working of the whole judicial system of the Commonwealth. The State Legislatures, in providing for the exercise of the jurisdiction of their Supreme Courts, have sanctioned the exercise of that jurisdiction by single Judges of the Court, and have declared that the judgment of a single Judge, so exercising the jurisdiction of the Supreme Court, shall be a judgment of the Court itself. The question arose whether such judgments were judgments of the Supreme Court of a State within the meaning of the Constitution, or whether that term was merely descriptive of quality or *status* so as to apply only to the Court of ultimate appeal in the State, by whatever name known. It was argued that the collocation of "Supreme Court" with other Courts from which "an appeal lay to the King in Council" showed an intention to describe the ultimate Court of appeal in the Colony, since the Orders in Council

[1] *Parkin* v. *James*, 2 C.L.R., at p. 337.

limited appeals without leave to the judgments of such Courts. Further it was urged that if the Constitution, in using the term "Supreme Court of a State" meant only a particular tribunal so known and called by the law of the State, the State law, by abolishing the tribunal of that name and re-constituting it under another name, might defeat the appellate jurisdiction of the High Court altogether. In *Parkin* v. *James*,[1] the High Court held it had jurisdiction to hear appeals from single Judges exercising the jurisdiction and pronouncing judgments in the name of the Supreme Court of the State. The designation "Supreme Court" was one common to each of the States, and it was impossible to doubt that it was intended as a specific designation and not merely as descriptive of status; it might be that the term would also include Courts established under another name in substitution for them but with similar functions.[2] As to the other arguments, the Court did not consider that the "Supreme Court" was qualified by the reference to other Courts of a State from which an appeal lay to the Crown in Council; but the latter expression could not be restricted to Courts from which an appeal lay "as of course"; it must extend to appeals by special leave, which were in the strictest sense appeals as of right.

The immediate effect of the decision, which has been accepted by the Privy Council,[3] was to make the High Court a first and ordinary Court of appeal from the Supreme Courts of the States exercising their original jurisdiction. The litigant thereby reaches the High Court without the intervention of the Full Court in the States; and as no Order in Council defining the conditions on which appeals may be had from the High Court to the King in

[1] 2 C.L.R. 315.
[2] S.C., at p. 330.
[3] *Blake* v. *Bayne*, 1908 A.C. 371.

Council has been made, the further appeal to the Privy Council cannot be had without the special leave of that body. In the result, the High Court, instead of being, as was contemplated, the substitute for the Privy Council after the State tribunals were exhausted, has become the substitute for the Full Courts of the States. The effect has been to fill the cause lists of the High Court at the expense of the Full Courts of the States. When the establishment of the High Court was under consideration, it was a common belief that, judging by the small number of cases that went from Australia to the Privy Council and the supposed infrequency of matters within the limits of the original jurisdiction, the Justices of the High Court would have a position of dignified leisure. But the combined effect of *Parkin* v. *James* and the *Commonwealth Conciliation and Arbitration Act* has already caused some congestion in the business of a Court which now consists of five Judges instead of the three assigned to it upon its establishment.[1]

5. An appeal lies to the High Court from the judgments, not merely of the Supreme Court of a State, but also from any other Court of a State from which at the establishment of the Commonwealth an appeal lies to the Crown in Council (sec. 73 (ii.)). This provision recalls the old jurisdiction formerly exercised in some of the Colonies by the Governor in Council as a Court of Error and Appeals

[1]The High Court follows the well established practice whereby the verdict of a jury cannot be impeached by way of appeal against the judgment founded in it; the proper course is to apply for a new trial to the State Court (*Musgrove* v. *Macdonald*, (1905) 3 C.L.R. 132). Where, however, the findings of a jury in a special verdict are accepted, and the judgment upon those findings is the thing challenged, an appeal does lie (*Brisbane Shipwrights' Union* v. *Heggie*, (1906) 3 C.L.R. 686). When a State Court is acting in its federal jurisdiction, the appeal to the High Court is governed by sec. 39 of the *Judiciary Act* (*Baume* v. *Commonwealth*, (1906) 4 C.L.R. 97).

from the Supreme Court.[1] Colonial Courts of Admiralty under 53 & 54 Vict. c. 27 are not identical with the Supreme Courts of the Colonies where the Act is in force; and it is probable that the Vice-Admiralty Courts in New South Wales and Victoria, which have not yet been brought under the Act, are not included under "Courts of any State." In Victoria, the Governor in Council has a statutory jurisdiction by way of appeal from judgments of Courts of marine inquiry. Although the Queen in Council is the ordinary Court of final appeal in Colonial cases, so that the terms used in sec. 73 are those which naturally suggest themselves as embracing the whole range of appellate jurisdiction, there is at any rate one case in which the appeal from a colonial Court lies to another English Court—appeals from Colonial Courts of Inquiry under 45 & 46 Vict. c. 76, sec. 6, lie to the Probate, Divorce and Admiralty Division of the High Court of Justice.

There is an ambiguity in the words "an appeal lies to the Queen in Council," as already pointed out in connection with *Parkin* v. *James*, and the High Court has held in that case that they cannot be limited so as to designate only Courts from which an appeal lay without special leave. But as the Crown can undoubtedly entertain an appeal from any Court whatever in its Dominions,[2] it is not clear what is the extent of the limitation which it was undoubtedly sought to establish on the right of appeal to the High Court by the designation in question. The High Court called attention to the

[1] *E.g.* in New South Wales under the Letters Patent of April 2nd, 1787, 4 Geo. IV. c. 96, and *The Charter of Justice* 1823. In South Australia, such a Court of Appeals was established by a local Act, 7 Will. IV. No. 5, and after an acrimonious conflict between the Supreme Court and the Cabinet, was confirmed and strengthened by 24 & 25 Vict. No. 5. The South Australian Court still exists but is rarely resorted to; and under the Order in Council of 1860 an appeal lies directly from the Supreme Court to the Queen in Council. Cf. *Parkin* v. *James*, 2 C.L.R. at p. 330.

[2] See *Parkin* v. *James*, 2 C.L.R. at pp. 331-332.

difficulty in *Kamarooka Gold Mining Co.* v. *Kerr*,[1] and observed that *Parkin* v. *James* did not decide that an appeal lay to the High Court from all Courts from which an appeal lay to the Privy Council by special leave only.

6. The mere grant of jurisdiction to the High Court to entertain appeals from the State Courts does not derogate from the right of the litigant to appeal from the State Court to the King in Council, or of the King in Council to hear the appeal, whether under the Orders in Council applicable to appeals from the State or by special leave.[2] The practice now well established in regard to judgments of the Supreme Courts of the Provinces in Canada is reproduced in the Commonwealth. In Canada the party aggrieved by a decision of the Supreme Court of a Province may elect to prosecute his appeal before either the King in Council or the Supreme Court of Canada. If both parties are aggrieved, there is nothing to prevent one party appealing to the Crown in Council, the other to the Supreme Court of Canada; and in one case, at any rate, it appears that this actually occurred.[3] Many inconveniences may be foreseen from this alternative appeal, though so far as concerns the uniformity and certainty of the law there seems no reason to doubt that the decisions of the Privy Council would be regarded as binding, since it has the ultimate power of reversing either the Supreme Court of Canada or the High Court of Australia. Reference will be made to the cases of *Baxter* v. *Commissioners of Taxation*[4] and *Flint* v. *Webb*,[5] in which the High Court refused to follow the decision of the Privy Council in *Webb* v. *Outtrim*,[6] a case taken on appeal direct

[1] (1908) 6 C.L.R. 255.

[2] *Webb* v. *Outtrim*, (1907) A.C. 81.

[3] Todd, *Parliamentary Government in the Colonies*, pp. 309-310.

[4] 4 C.L.R. 1087.

[5] 4 C.L.R. 1178.

[6] (1907) A.C. 81.

from the Supreme Court of Victoria, and determining the very matter in dispute. But the action of the High Court was based on the ground that sec. 74 of the Constitution expressly constituted the High Court the final arbiter of the law in the class of matter to which the case belonged, except so far as the High Court should permit the matter to be dealt with by the King in Council.

The right of appeal from the State Court to the King in Council is governed by Charters, Orders in Council under statutory power, and (in some cases) local Statutes. These may be recalled or varied by the several authorities from which they issue. The Commonwealth Parliament cannot abridge or extinguish a right arising from any of these sources.[1] But it is doubtful whether any of them apply to the judgments of State Courts in any matter in which those Courts are invested with federal jurisdiction by the Parliament of the Commonwealth.[2] Sec. 39 of the *Judiciary Act*, investing the Courts of the States with federal jurisdiction, declares that "every decision of the Supreme Court of a State or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the King in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court." In *Webb* v. *Outtrim*[3] Hodges J. (in the Supreme Court of Victoria) considered that this was an attempt to take away a right of appeal given by the Order in Council, and was *ultrâ vires*; but as he also held that the case was one not of federal, but of State jurisdiction, his decision hardly determines the question now under consideration. The same applies to the decision of the Privy Council[4] approving the decision of

[1] *Webb* v. *Outtrim*, (1907) A.C. 81.
[2] *Hannah* v. *Dalgarno*, 1 C.L.R. 1.
[3] (1905) V.L.R. 463.
[4] (1907) A.C. 81.

Hodges J.—it is not clear whether their Lordships regarded the case as one of federal or State jurisdiction. Probably, however, the judgment means that, whether the State Court was acting in the one jurisdiction or the other, the Commonwealth Parliament could not extinguish the right to appeal from the State Court to the King in Council, whether by special leave, or the Order in Council which (according to this view) extends to the federal jurisdiction of the Supreme Court of the State. In the view of the majority of the High Court, first, the grant of federal jurisdiction to the State Courts is equivalent to the establishment of a new Court, and the Order in Council does not apply to the judgments of the State Courts in this novel jurisdiction;[1] secondly, sec. 39 of the *Judiciary Act*, according to its true construction, does not attempt to interfere with the power of the Crown to grant special leave to appeal from the State Court in its federal jurisdiction; consequently, no question of the power of the Parliament of the Commonwealth is raised by that section.[2]

7. The Orders in Council governing appeals to the King in Council from the Supreme Courts of the States have made no provision for appeals in criminal cases, and these are always entertained by special leave. Under sec. 73 the like restriction governed criminal appeals from the Supreme Courts of the States to the High Court; and by the *Judiciary Act*, sec. 35 (1) (*b*), an appeal lies to the High Court in criminal matters only on special leave.

8. In those cases in which an appeal from a State Court to the High Court lies only with the special leave of the latter, the High Court is guided by the practice of the Privy Council in granting special leave to appeal from the

[1] *Hannah* v. *Dalgarno*, 1 C.L.R. 1, 10.

[2] *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. at pp. 1138-9, Higgins J., dissenting, at pp. 1162-3.

Supreme Court of Canada,[1] as laid down in *Prince* v. *Gagnon*.[2] In that case, appropriate cases were defined as those "where the case is of gravity involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character."

9. As no Order in Council has been issued defining the conditions of appeal from the High Court to the Privy Council, there is no appeal "as of course" or (to use the expression commonly applied in such a case) "as of right." But the declaration that the judgments of the High Court shall be "final and conclusive" would not impair the prerogative of the Crown to grant special leave to appeal, even if that prerogative were not specially preserved by the final clause of sec. 74. Whether a Colonial Legislature can, under its general power of legislation, affect the right of appeal by special leave to the Crown in Council, has been a moot point of constitutional law. Certainly no authority can be found in favour of the power,[3] and reason and now,

[1] *Hannah* v. *Dalgarno*, 1 C.L.R. 1. See also *Backhouse* v. *Moderana*, 1 C.L.R. 675; *Lilliecrap* v. *The King*, 2 C.L.R. 681; *Johansen* v. *City Assurance Society*, 2 C.L.R. 186; *In re Coleman*, 2 C.L.R. 834; *Millard* v. *The King*, 3 C.L.R. 827; *Bataillard* v. *The King*, 4 C.L.R. 1282; *McGee* v. *The King*, 4 C.L.R. 1458.

[2] 8 A.C. 103. See also *Daily Telegraph Newspaper Co.* v. *McLaughlin*, 1 C.L.R. 479.

[3] In *Cushing* v. *Dupuy*, (1880) 5 App. Cas. 409, which is sometimes cited as authority for the proposition that a Colonial Legislature cannot affect the prerogative to hear appeals as a matter of grace, no such proposition was affirmed and no opinion was expressed by the Judicial Committee on the subject; all that was said was—"It is, in their Lordships' view, unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the Royal Prerogative, since the 28th section of the *Insolvency Act* does not profess to touch it, and they think, upon the general principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment." See also *Peterswald* v. *Bartley*, (1904) 1 C.L.R. at p. 499.

perhaps, authority[1] is against it. It is important, therefore, to notice that the Parliament of the Commonwealth has by sec. 74 express power to make laws limiting the matters in which leave may be asked, Bills for this purpose, however, being required to be reserved by the Governor-General for the Royal Assent.

10. It follows that all appeals from the High Court to the King in Council are (with the exception of the limited class of cases mentioned in the first paragraph of sec. 74) by special leave of the King in Council. The principles which govern the reception of appeals from the Supreme Court of Canada are well established, and in the first case from the High Court, the Privy Council declared an intention of applying them to appeals from the High Court.[2] Their Lordships recur to the observations of the Board in *Prince* v. *Gagnon*,[3] that they are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal "save where the case is of gravity involving matters of public interest or some important question of law, or affecting property of considerable amount or where the case is otherwise of some public importance or of a very substantial character." At the same time their Lordships disclaim the intention of laying down any specific rule which would bind their discretion, and indicate that though all the features named may be present, the decision which it is sought to appeal from may be too plainly right or unattended with sufficient doubt to justify the exercise of the prerogative. If the party who desires to appeal to the King in Council was the party appellant in the High Court, then the fact that he elected to go to that tribunal from the State Court instead of appealing to the Privy Council

[1] *Webb* v. *Outtrim*, (1907) A.C. 81.

[2] *Daily Telegraph Newspaper Co.* v. *McLaughlin*, (1904) A.C. 776.

[3] 8 A.C. 103.

direct, is an additional fact which as a rule will stand in the way of the reception of his appeal in England.[1]

This practice was laid down before the decision in *Parkin* v. *James*[2] was known in England, and it is possible that one of the effects of that case may be to overcome the reluctance with which appeals are received by the Privy Council. In cases where the High Court's decision was given on appeal from a single Judge exercising the jurisdiction of the Supreme Court of the State, and the petitioner to the King in Council was not the person who invoked the jurisdiction of the High Court, the case for admission of the appeal in the Privy Council may receive special consideration. Several instances of cases in which the Privy Council has entertained appeals from the High Court will be found in the reports, of which the most notable are: *Colonial Bank* v. *Marshall*,[3] *Perry* v. *Clissold*,[4] *Blake* v. *Bayne*,[5] and *Macintosh* v. *Dunn*.[6] Leading cases in which leave to appeal was refused are *New South Wales Commissioners of Taxation* v. *Baxter*,[7]—the last of the Income Tax cases—and the *Attorney-General for N.S.W.* v. *Collector of Customs*.[8]

11. The establishment of a limited class of cases in which no appeal is permitted from the High Court except upon the certificate of that Court, is one of the most distinctive features in the Constitution, and commits to the Australian tribunal for final determination exactly that class of question which, it may be conjectured, would, from its importance and the nature of the interests engaged, have been most readily received in the Privy Council. The question of

[1] *Victorian Railway Commissioners* v. *Brown*, (1906) A.C. 381.
[2] 2 C.L.R. 315.
[3] (1906) A.C. 559.
[4] (1907) A.C. 73.
[5] (1908) A.C. 371.
[6] (1908) A.C. 390.
[7] (1908) A.C. 214.
[8] (1909) A.C. 345.

policy involved is hardly one for discussion here. On the one side may be set a tribunal far removed from the strong feelings which this class of question—closely verging on politics—may excite, and which secures the advantage of a judicial determination without drawing the colonial judiciary into the whirl of political contest. But this advantage may be too dearly bought, if it is at the price of a want of knowledge of all those conditions of a country—historical, social and economic—which enter into the construction of a Constitution. To this must generally be added the unfamilarity of English lawyers with the very nature of constitutional problems, which leads to an impatience of their discussion, and to a disposition to take short cuts. On the whole, an arrangement which places in the hands of an Australian Court the final determination of the sort of questions provided for in sec. 74, appears the better in present conditions.

12. The effect of the section was first brought under consideration on an application for a certificate in *Deakin* v. *Webb*,[1] where the Court pointed out that the intention was that, for the determination of the class of questions there described, the Court should be the tribunal of ultimate appeal, unless the Court itself was satisfied affirmatively that there was some special reason which would justify it in certifying that the question ought to be determined by the King in Council. Thus a grave responsibility was cast upon the Court after careful consideration, and it would be a dereliction of duty if it were to decline to accept that responsibility, unless it were in a position to say in intelligible language that there was some special reason, capable of being formulated, why the Privy Council was, and the High Court was not, the proper ultimate judge of the question. The position was unique, presenting no analogy to the familiar case of appeals to the Privy Council by

[1](1904) 1 C.L.R. 619.

special leave, and therefore the principles settled for that case were inapplicable to it. The questions raised in the case under discussion—whether the American cases asserting the immunity of instrumentalities were applicable to the Australian Constitution, and whether the State income tax imposed on the salaries of federal officers was an infringement of the rule—were not matters which the Court was "not competent to decide and ought not to decide as the final Judges of last resort" (p. 625). The extent of public interest in the matter, and the desire of the States Governments to have the decision of the Privy Council, were treated as irrelevant. Barton J. adverted to the history of the section, and asserted that the section was "designed in the first place to safeguard the right of the people who had framed it and had voted upon it, to interpret it and to bring to an end conflicts between Commonwealth and States by the decision of the Court which the Constitution was calling into existence, and in the same way to deal with cases which arose between two or more States, because in respect of the new self-governing powers constitutional conflicts between two States come within the category of local affairs. Primarily, then, it was intended that this Court should take the responsibility of deciding the class of questions of which that now before the Court is one" (p. 628). The provision that for "special reasons" a certificate of appeal might be granted, was intended primarily to provide a means whereby Australian constitutional cases involving the public interests of parts of the Empire external to Australia—a matter too elusive and indefinable for exact statutory expression—might be ultimately decided by the King in Council (p. 267). O'Connor J. was so strongly impressed with the nature of the responsibility cast on the Court that he had no hesitation in saying that if it were found that, by a current of authority in England, it was likely that, should a case go to the Privy

Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the Constitution as the Court believed it to be, it would be the duty of the Court not to allow the case to go to the Privy Council, and thus to save the Constitution from the risk of what the Court considered a misinterpretation of its fundamental principles (p. 631). In this emphatic way do the Justices express their sense of the duty of the Court as the interpreter and guardian of the Constitution.

The attitude of the Court is even more strikingly illustrated by the subsequent history of the income tax cases. In the case of *Flint* v. *Webb*[1] the Court refused a certificate for appeal, although their judgment from which an appeal was sought was in conflict with the decision of the Privy Council in *Webb* v. *Outtrim*,[2] and was based on decisions of the High Court of which the Privy Council had explicitly disapproved, and although two of the five members of the Bench had dissented from the judgment of the Court. The refusal of the certificate was concurred in by all the members of the Court.

13. The section not merely establishes the judgment of the High Court in the particular case against the possibility of reversal or alteration on appeal; it establishes the interpretation which the Court has put on the Constitution—the *ratio decidendi* as well as the decree or order. It asserts the imperative and final authority of the case as a precedent, so that not merely may the judgment not be reversed as between the parties, but its reason may not be over-ruled in a case competently before the Privy Council. So the High Court declared in *Baxter* v. *Commissioners of Taxation*.[3] The question decided in *Deakin* v. *Webb* by the High Court had

[1] (1907) 4 C.L.R. 1178.
[2] (1907) A.C. 81.
[3] (1907) 4 C.L.R. 1087.

been raised again in proceedings in the Supreme Court of Victoria, and the Commissioner of Income Tax for Victoria appealed direct to the Privy Council, who, in *Webb* v. *Outtrim*,[1] held, contrary to the decision of the High Court, that the American doctrine of instrumentalities was not applicable in the Commonwealth, and that federal officers were liable to pay State income tax on their salaries. In *Baxter* v. *Commissioners of Taxation* it was contended by the State that the decision in *Webb* v. *Outtrim* was an authority binding the High Court, and had the effect of over-ruling *Deakin* v. *Webb*. It was argued that there was nothing in the Constitution to detract from the position whereby the King in Council, adjudicating in a matter competently before it—of which of course it must be the judge—gave the law to all Colonial tribunals. It was impossible that the Constitution should have set up two independent tribunals as final interpreters of the law; one must prevail over the other. The Constitution permitted appeals on these matters to go from the High Court to the Privy Council with the consent of the High Court; it permitted them to go from the State Courts without the consent of the High Court. There was no provision in any circumstances for an appeal from the Privy Council to the High Court. The final authority of the Privy Council's decision as precedent was not limited by its power to reverse judgments which disregarded them, any more than the authority of judgments of the House of Lords depended on whether, in a particular case pending in an inferior Court, an appeal might be taken to the House of Lords. It rested upon the status of supremacy belonging in the one case to the King in Council, in the other to the King in Parliament. The High Court, however, considered that the mere protection of the parties in the particular case against a reversal of the judg-

[1] (1907) A.C. 81.

ment by the Privy Council, was not in itself an object of sufficient importance to account for the provisions of sec. 74. The primary object was to determine the authority to which the interpretation of the Constitution in the class of cases within the section should be committed. That object would be defeated if the High Court was to be bound in the way suggested, and it was considered that the unusual phraseology of the section—the use of the word "decision" in place of judgment, order, decree, and the like, and the express reference to "the question" decided—was an apt and sufficient mode of expressing the intention that the question of law decided by the High Court should not be brought to review in the Privy Council in the same or any other case except with the consent of the High Court itself. From this view Higgins J. dissented.

These divergent interpretations by the High Court and the Privy Council are a serious blot on the Constitution. The view of the High Court carries with it a solution of the difficulty, in that it imports a duty in the Privy Council to accept in all cases before it (even though coming from the State Courts), the law as laid down by the High Court, so far as concerns all the questions included in the first paragraph of sec. 74. The Privy Council, on further consideration, may accept that view; and *Webb* v. *Outtrim*[1] is not conclusive that it will not, since it is not clear that the Privy Council regarded the case as falling within the terms of sec. 74. The application to the Privy Council for leave to appeal from the decision of the High Court was refused on grounds outside the present question, and contributes nothing to their elucidation.[2]

[1](1907) A.C. 81.

[2](1908) A.C. 214. Leave to appeal from the judgment of the High Court in *Attorney-General for New South Wales* v. *Collector of Customs*—another of the instrumentalities cases—was refused by the Privy Council on the ground that the matter was within sec. 74 (1909) A.C. 345.

A mode of avoiding a recurrence of the difficulty was found by enacting in the Commonwealth Parliament that in matters (other than the trial of indictable offences), involving any question within sec. 74, the jurisdiction of the High Court 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."[1] The result is that in the class of cases referred to, no appeal to the Privy Council can be taken as of course under the Orders in Council, which are limited to judgments of the Supreme Courts of the States; and it is assumed that the Privy Council would not give leave to appeal to itself from an intermediate Court of federal jurisdiction.

But the fact remains that we have now in the reports vital differences in the fundamental principles of interpretation applicable to the Constitution, as enunciated by the Privy Council and the High Court respectively, and these differences extend beyond the determination of particular questions under sec. 74.[2]

14. The question whether a case does involve some questions falling within sec. 74 is not an easy one, and a difference may arise as to the proper tribunal—the High Court or the Privy Council—for determining whether a decision of the High Court is upon a question within the section. It is clearly not enough that the question should be as to the powers of Commonwealth or State only; it must be such that the concession of the power to the one is the denial of some—not necessarily the same—power to the other. Thus the question whether the Commonwealth may

[1] *Judiciary Act* 1908, sec. 2.

[2] The judgment of Isaacs J. on the "corporation" question in *Moorhead* v. *Huddart Parker*, (1909) C.L.R. will be found to illustrate these differences.

make a law on any subject is not generally within sec. 74—it puts in issue no power of the State to legislate on the same subject. On the other hand, the question whether either State or Commonwealth may levy an income tax on the salaries of the servants of the other, is within the section, since, though the power of the States to impose such a tax on federal officers is quite consistent with a power in the Commonwealth to impose a similar tax on the same persons, the matter in issue is whether the existence of the power in question is an interference with other powers of the Federal Government, and therefore involves the extent of those powers.[1] So, the Privy Council holds that the question whether the State Governments can import goods without paying duties of Customs thereon, so far as it depends on the power of the Commonwealth to exact such duties from those Governments, is within the section.[2]

The relation of the High Court to the Supreme Courts of the States in the exercise of the appellate jurisdiction of the former was considered in two cases—*Peacock* v. *Osborne*[3] and *Bayne* v. *Blake*.[4] In both cases the High Court had reversed judgments of the Supreme Court of Victoria, and remitted the cause to the Supreme Court for execution under sec. 37 of the *Judiciary Act* 1903, whereby it became "the duty of that Court to execute the judgment of the High Court in the same manner as if it were its own judgment." The cases were set down in the Supreme Court for inquiries as to damages; but on information that an appeal was pending before the Privy Council, a Judge in Chambers granted an application to stay proceedings until further order in *Peacock* v. *Osborne*, and in *Bayne* v. *Blake*

[1] *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R. at pp. 1118-9.

[2] *Attorney-General for New South Wales* v. *Collector of Customs*, (1909) A.C. 345.

[3] (1907) 4 C.L.R. 1564.

[4] (1908) 5 C.L.R. 497.

each of two learned Judges, in whose list the case was put for hearing, adjourned the matter until the result of the Privy Council appeal should be known. From these orders appeals were taken to the High Court, and in *Bayne* v. *Blake* the relation of the High Court and the Supreme Court in such cases was fully argued. It was contended that when a cause was remitted to the Supreme Courts of the States, it was remitted to them subject to the powers exerciseable by them over their own proceedings, including the power to hear cases at such times as their Rules and convenience should dictate. The Supreme Courts were not the servants of the High Court, and the application in the present case was equivalent to an application for *mandamus*; if the *Judiciary Act* must be so construed as to make them so, it was *pro tanto ultrâ vires*. The High Court held that the Supreme Court had no power to make any order preventing the execution of a judgment of the High Court, and that these orders, whether for a stay of proceedings or for an adjournment of proceedings, were in the circumstances orders thwarting or obstructing the execution of the judgment, were wrong, and must be set aside. The Court adverts to sec. v. of the *Constitution Act* declaring that all laws made by the Parliament shall be binding on the Courts, Judges, and people of every State, as casting a duty upon the State Courts, their Judges, and officers to execute the orders of the Court, and justifies sec. 37 of the *Judiciary Act* by reference to the power of the Parliament under sec. 51 (XXXIX.) of the Constitution to make laws incidental to the execution of powers vested in the Federal Judicature.

PART IV.—THE POWERS OF THE COMMONWEALTH GOVERNMENT.

CHAPTER I.

THE POWERS OF COLONIAL LEGISLATURES.

Every Act of a Legislature to be operative, must comply with two conditions—it must be valid in respect of form, and it must in point of substance be within the powers of the enacting authority.

Formal Validity.—Wherever a document is relied on as a Statute, the first matter to be determined is whether the document is what it purports to be—an Act of Parliament. Even in regard to alleged Statutes of the English Parliament questions have arisen whether they had in fact received the assent of all parts of the Legislature[1]; and in Europe where, notwithstanding the existence of fundamental Constitutions, the Legislatures are the only competent interpreters of their own power, the judicial office necessarily extends to an inquiry into the authenticity of the alleged act of legislation.

[1]See May, *Parliamentary Practice*, 10th ed., p. 488; Craies, *Statute Law*, p. 34. For a consideration of the formal validity of the *Constitution Act* of Victoria 1855, see Jenks, *Government of Victoria*, pp. 202-205.

In the case of subordinate Legislatures we frequently find that the procedure to be observed in legislation has been prescribed in certain classes of case, and it becomes important to consider how far the observance of such forms is essential to the validity of the Statute, and what authentication of the due observance of the prescribed forms is required by Courts of law.

The *Constitution Acts* of the several Colonies have commonly dealt with the procedure to be observed in the case of money bills and bills for the amendment of the Constitution; and doubts have been entertained as to the validity of Acts amending the Constitution which are not shown to have been passed by the statutory majorities, or to have been reserved for the Royal Assent.[1] In 1864, the Law Officers of the Crown (Sir Roundell Palmer and Sir Robert Collier) expressed the opinion that "when the power of legislation is given not to a simple majority, but to certain specified majorities in one or both branches of the Legislature, it is evident that such majorities are a *sine qua non* to its exercise, and, consequently, that the Judges are not at liberty to treat any law on that subject as valid if it appears either on the face of the law itself or by other proper evidence that it was not in fact passed by the required majorities." The customary forms of legislation, however, afford no indication of the use of any special procedure; and in the opinion referred to, the Law Officers did

[1] *E.g.*, the *Constitution Act* 1903 of Victoria. See the opinions of Messrs. Isaacs, Higgins and Cussen printed in the Melbourne *Herald*, May 14th and 15th, 1903. As to the practice under the American Constitutions, see Cooley, *Constitutional Limitations*, 114 *et seq.*, 186 *et seq.*, 245-6, and *Field* v. *Clark*, 143 U.S. 649, where, at p. 661, will be found a very full note on the decisions of the States Courts as to the conclusiveness of Acts of the Legislature. In the United States, the Courts have gone very far towards holding that the ordinary distinction between mandatory and directory provisions does not apply to Constitutions, and that as those high and solemn instruments do not condescend to mere procedure, all their enactments must be treated as mandatory. See also *Millard* v. *Roberts*, (1905) 202 U.S. 429.

not think it absolutely nccessary "that it should appear on the face of the law itself that it was passed by the requisite majorities (if the fact can be otherwise proved) in order to authorize the Judges to act upon such legislation as valid and effectual;" and they inclined to think, though they treated the point as admitting of some doubt, that "the Judges ought to presume until the contrary is proved, that every Act which has passed the Legislature, and which is authenticated as an Act of the Legislature, was passed by such a majority as would be necessary according to law to give it effect." Accordingly, the *Colonial Laws Validity Act* 1865, sec. 6, provides that "the certificate of the clerk or other proper officer of a legislative body in any Colony to the effect that the document to which it is attached is a true copy of any . . . colonial law assented to by the Governor of such Colony . . . . shall be *primâ facie* evidence that . . . . such law has been duly and properly passed and assented to." The question remains whether in all cases this presumption can be rebutted, and how in any case it may be rebutted. The proper evidence for rebutting the presumption would, of course, be the Journals of the Legislature; but as each House controls its own records it seems to be within the power of the Legislature to refuse to make that evidence available. In *Bickford Smith & Co.* v. *Musgrove*,[1] the question was raised as to the observance of the proper forms in the case of a Money Bill, and the issue fell because the Speaker of the Legislative Assembly of Victoria refused to allow the production of the Journals, and the Act was treated as valid. In the Commonwealth, it is provided by the *Evidence Act* 1905, sec. 7, that the votes and proceedings of Parliament shall be provable by the production of documents purporting to be such votes and proceedings and purporting to be printed

[1] 17 V.L.R. 296.

by the Government Printer. But apart from the question of evidence, can the presumption of validity be rebutted? So far as the common provisions concerning Money Bills are concerned, the Judicial Committee of the Privy Council in *Powell* v. *Apollo Candle Co.*[1] said:—"It has been argued that the proviso that all Bills for appropriating any part of the public revenue or for imposing any new rate, tax, or impost shall originate in the Legislative Assembly in the Colony, is at least a direction on the part of the Imperial Parliament that all levying of taxes in the Colony shall be by Bill, originating, as in this country, in the Lower House. It may be that the Legislature assumed that with respect to customs duties such a course would undoubtedly be pursued as is in accordance with the usages and traditions of this country; but it appears to their Lordships impossible to hold that the words of an Act which do no more than prescribe a mode of procedure with respect to certain Bills, shall have the effect of limiting the operation of those Bills."[2]

"*Laws*" *and* "*Proposed Laws.*"—This is the assumption which underlies the use of the terms "law" and "proposed law" in the Commonwealth Constitution, secs. 53-59. They indicate the difference between the product and the machinery; "law" is sanctioned by ill usage as an equivalent for "Act" or "Statute;" "proposed law" is an innovation, and a somewhat clumsy one, indicating "bill." Where the Constitution prescribes the procedure upon "proposed laws," the provisions are generally directory merely; they are matters of Parliamentary practice attended with Parliamentary and

[1] 10 A.C. pp. 282, 290.

[2] Mr. Burgess, speaking of the United States Constitution, Art. i., sec. 7, whereby "Bills for raising revenue shall originate in the House of Representatives," regards the matter as a legal question determinable by the Courts, and not a political question determinable by the Legislature alone. (*Political Science and Constitutional Law*, vol. i., p. 196.) See the recent decision of the Supreme Court of the United States in *Millard* v. *Roberts*, (1905) 202 U.S. 429.

political sanctions, and may be waived by the concurrence of the enacting authorities. Where, on the other hand, the Constitution speaks of "laws," it makes the observance or non-observance of the provisions a legal and not simply a political question.[1] What is the legal sanction? In the absence of express direction, nullity. By sec. 55 "laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only"; if they deal with more than "one subject of taxation," the whole will be void. "Laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only"; if either transgress, it is invalid. But in providing that "laws imposing taxation shall deal only with the imposition of taxation," sec. 55 expressly provides that "any provision therein dealing with any other matter shall be of no effect."

There are two cases, however, in which the term "proposed law" introduces provisions which go to the validity of the enactments to which they relate—in sec. 60 and sec. 128. Sec. 128 deals with the alteration of the Constitution and will be referred to under that head. By sec. 60, it is provided that "a proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's Assent the Governor-

[1]The ambiguity of "law" in the English language has often been commented upon. The inconvenience of using the same term for *jus* or *lex* is to some extent mitigated by the pre-eminence of the Imperial Parliament and the fact that Statute is our type of law. But the use of "a law" to describe an enactment of a subordinate Legislature leads us at once to confusion and paradox. For a "law" made by the Parliament of the Commonwealth or a State may be invalid, may not be "law" in the abstract. The authors of the Commonwealth Constitution are not the originators of the anachronism, a void or invalid "law." The same thing may be found in the *Colonial Laws Validity Act* 1865, which declares that "Colonial laws" shall, in certain cases, "be and remain absolutely void and inoperative."

General makes known by speech or message to each of the Houses of Parliament or by Proclamation that it has received the Queen's Assent."

Substantive Validity.—In no respect is there a greater difference between the American Legislatures and the British Colonial Parliaments than in this : that American Constitutions have been developed under the influence of the legal sovereignty of the people, and all legislative power vested in organs of government has been regarded as Locke regarded it—a trust held by delegation, not to be transferred or lodged elsewhere than where the people have placed it. The cases based on this principle fill a large section in all attempts to describe the legislative power in either the Federal or the State Constitutions in the United States.[1] In its most singular form, it prohibits the reference of a proposed law to the will of the people themselves.

British Colonial Constitutions have not been established by the people ; they have been granted by the Crown or by the Imperial Parliament, whence it might have been inferred that Colonial Legislatures were mere instruments charged with the function of executing by delegation the powers belonging to the constituent authority ; in other words that they were of a more essentially delegate kind than the American legislatures, since they were established by a determinate authority. But as a matter of fact, the English tradition of self-government has joined with the habit of Parliamentary government to reproduce in the Colonies institutions which find their model in the powers of the English Parliament, with the consequence that the Legislature has a legal, the electorate merely a political, supremacy.

The great attention which the framers of the Federal Constitution gave to American institutions, and the influence which American decisions have had and must continue to

[1] See Cooley, *Constitutional Limitations*, pp. 163-174.

have, in the interpretation of the Australian Constitution, makes it the more important to regard with care their essential points of difference.

The sovereignty of the Imperial Parliament, its power to make paramount laws on all subjects whatever, with the fact of uniformity in the mode of exercising its powers, tends to obscure the real nature of the power exercised upon any particular occasion. But if we regard the authority of the Crown, in respect to the Colonies, we see at once a difference in the nature of the powers which may be exercised. The Crown may by its prerogative convene a representative assembly in any Colony, whether acquired by conquest or cession or by settlement, except so far as it may be impeded by statute. But that the assembly so convened is not the mere agent of the Crown is shown by two facts: first, that in no case can the establishment of such a legislature be recalled by the Crown alone, there is no inherent power to cancel or recall the act[1]; secondly, that until the passing of the *British Settlements Act* 1887, this constituent power of the Crown existed, in the case of settlement colonies, without the Crown having any ordinary legislative power there at all. So, when the Constitution is established by Act of the Imperial Parliament, the action of Parliament may properly be described as constituent rather than legislative; and though it creates the legislature, determines its authority and defines the extent of the powers to be exercised, the powers so conferred, with the possible exception to be mentioned hereafter, are regarded as powers of self-government, and not as mere substitutes for the direct action of the paramount authority.

This is not mere political doctrine, but a legal principle

[1] *Campbell* v. *Hall*, (1774) 20 St. Tr. 239. In the case of conquered or cessionary Colonies, the Crown may in granting representative institutions, reserve power to legislate: see Jenkyns, p. 95.

with important practical consequences. The principle that a Colonial Legislature is not acting as a delegate of the Imperial Parliament has been thoroughly established in law by numerous decisions in cases where it has been sought to limit its powers by reference to its supposed delegate character;[1] and it is now a truism that "an Act of the local Legislature lawfully constituted has as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament."[2] In *R.* v. *Burah*[3] Lord Selborne, in delivering the decision of the Judicial Committee, described the powers of an Indian Legislature in terms which are applicable to Colonial Legislatures generally. He said:—"The Indian Legislature has powers which are limited by the Act of Parliament which created it, and can, of course, do nothing beyond the limits which circumscribe those powers. But, when acting within those powers, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which affirmatively the legislative powers were created, and by which negatively they are restricted. If what was done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in

[1] *R.* v. *Burah*, 3 A.C. 889; *Hodge* v. *The Queen*, 9 A.C. 117; *Powell* v. *Apollo Candle Co.*, 10 A.C. 282.

[2] *Phillips* v. *Eyre*, L.R. 6 Q.B. 1. See also *Webb* v. *Outtrim*, (1907) A.C. 81.

[3] 3 A.C. 889, 904.

which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

Two principal facts accounting for the plenary power of British colonial legislatures—the tradition of self-government and its association with Parliamentary sovereignty instead of people's sovereignty—have been already referred to. A further fact is that, whether the Crown is or is not a part of the colonial legislature, there is in the Crown, either as an assenting party or from its power of disallowance, a power of control in the hands of the Imperial government. Consequently the grant of legislative power may be interpreted liberally, and without the implied restraints which might be required by national unity if these legislatures were wholly cut adrift from the Imperial power. This is probably the significance of the observations of the Privy Council in *Webb* v. *Outtrim*,[1] where their Lordships say :—" No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different."[2] But the terms employed are not very happy ; they appear to treat the Colonial Act as a phase of legislation by the Imperial Parliament and thus to resort to that very theory of delegation which the Privy Council has so often denounced.

The passage cited from the judgment in *Webb* v. *Outtrim* may derive some additional significance from the reasons given by the Privy Council in another case decided in 1906.

[1](1907) A.C. 81, 88.

[2]See also *Bank of Toronto* v. *Lambe*, (1887) 12 A.C. 575.

In the judgment of the Board in *Attorney-General for Canada* v. *Cain and Gilhula*,[1] the question whether the power of the Dominion Parliament extended to the deportation of aliens, was approached from a consideration of the prerogative of the Crown in such matters, and a delegation of its prerogative by the Crown was inferred from the assent of the Crown to the Act. "The Imperial Government might delegate those powers to the Governor or Government of one of the Colonies either by Royal Proclamation which has the force of a Statute—*Campbell* v. *Hall*—or by a Statute of the Imperial Parliament, or by the Statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown, can exercise those powers and that authority as effectually as the Crown could itself have exercised them."[2] Without questioning that the power might be validly conveyed to the Colonial executive in any of the ways suggested, it certainly appears a novel proposition that the act of the Crown in assenting to a Colonial Act is to be construed as a delegation by the Crown in the same sense as if the Crown had committed its power to an officer, a proposition which would have this singular result, that what was done under the apparent authority of a Colonial Statute was really done not by the authority of the Colonial Government, but by or on behalf of the Imperial Government.

It is submitted that the doctrine propounded is not sound. As Sir Henry Jenkyns points out, "the Crown as the chief executive in a possession must be distinguished from the Crown as chief executive power in the United Kingdom or

[1](1906) A.C. 542.

[2](1906) A.C. at p. 546.

the whole Empire";[1] and "even the King in Council, when legislating in that capacity for a Colony, is a local and subordinate Legislature, and the legislation has no greater territorial effect than if it were enacted by the ordinary Legislature of the Colony."[2] Legislative Acts, in modern Constitutions at any rate, derive their validity and effect from the supremacy of the legislative power, a function which is as distinct from the merely mandatary as is government from property. This is recognized in the well-established rule that the prerogative of the King is subordinate to his own authority as part of the supreme Legislature—*i.e.*, the Imperial Parliament. It is submitted that the principle in the Colonies is the same, and that so far as a Colonial Legislature may affect the prerogative at all, it is in its legislative and not in any mandatary character, and that its statutory powers of legislation are not to be enlarged by blending them with executive powers of the Crown.[3]

[1] *British Rule and Jurisdiction beyond the Seas*, p. 12.

[2] *Ib.*, p. 16.

[3] The case of coinage may be taken as an illustration. The *jus cudendæ monetæ* is everywhere an attribute of sovereignty and is under the British Constitution a part of the prerogative of the Crown. It is not doubted to-day that in general those prerogatives of the Crown which are exercise-able separately in different parts of the King's Dominions may be abridged or extinguished by ordinary local legislation. Thus the "prerogatives by exception"—immunity from suit, from costs, from taxation—are constantly dealt with; and it is not less certain that *powers* of the Crown may equally be dealt with—that, for instance, the Legislature may regulate the Crown's power to exclude aliens from the territory of the Colony. If the Legislature may under its ordinary power make laws for currency and legal tender in that possession, that (it is submitted) is not because the assent of the Crown to Acts is a delegation by the Crown, but because the legislative power prevails over the operation of the prerogative within the possession. The Crown might, however, formerly by prerogative, and may now by proclamation under the *Coinage Act* 1870, sec. 11, establish branch mints in a Colony and make the coinage issuing therefrom legal tender in any British possession beyond the limits of the territory. But it could not be

If the view of their Lordships is sound, it would appear that any prerogative which may be exercised by the Crown in its Imperial capacity, may, so far as it concerns the Colony, be equally well dealt with by Colonial legislation, on the ground that the assent of the Crown has the effect of a prerogative act. The Crown may by virtue of the prerogative or of statute alter the boundaries of British possessions in many cases, or divide or join British possessions. (On the subject of Colonial boundaries generally, see Jenkyns, op. cit. pp. 3-4). May the Legislature of any British possession annex other territories on the ground that the assent of the Crown to its Act is a valid exercise of the power which belongs to the Crown? Again, the Crown may by prerogative cede any portion of its territory to a foreign State. (This is, *semble*, the better opinion. But see Jenkyns, op. cit. p. 3. See also Ilbert, *The Government of India*, 1st ed., p. 210.) If a Colonial Act assented to by the Crown is a mode of exercising an Imperial prerogative, such an Act of Cession, passed by a Colonial Legislature, would appear to be valid, though, as being assented to by the Governor in the King's name, it was never seen by the Imperial advisers of the King until after it purported to come into operation. This is the sort of consequence to which we are driven when we ignore the practical necessity for distinguishing in law as well as in politics the different capacities of the Crown as executive and as part of the Legislature, as exercising Imperial as well as local functions. It illustrates once again

contended that the mere assent to a Colonial Act establishing a local currency was such a delegation of prerogative, making the Colonial coinage currency throughout the British Dominions. Briefly, it is submitted that the doctrine propounded in the judgment of the Board, so far as concerns the territory of the Colony whose Act is assented to, is unnecessary to support the validity of a legislative act; and, so far as concerns places beyond the territory, cannot be invoked to give the Act an extra-territorial operation.

the straits to which we are put in modern government by driving too hard the doctrine of the unity of the Crown.[1]

Our starting point, then, in the case of Colonial Legislatures, is that they are bodies with "plenary powers," possessing a general and undefined power of government in their territory over all persons and things therein, and that this power extends to the creation of such executive and judicial machinery as well as such subordinate legislative authorities as appear necessary to the Colonial Legislature. The limitations upon a Colonial Legislature are found in certain definite restrictions.

1. In the first place a Colonial Legislature would *primâ facie* be bound by the terms of the instrument creating it, whether that was an Imperial Statute, or an exercise of the Royal Prerogative. The plenary legislative power would not *per se* carry a power to alter the Constitution itself. In spite of the emphatic assertions of the plenitude of the powers of a Colonial Legislature, and its power to establish organs of government and to define their functions according to its own discretion, the Privy Council has suggested a limit to this power: that it could not create and arm with general legislative authority, a new legislative power not created or authorized by the Act of Constitution.[2] But the Legislatures of the several Australian Colonies, by their Constitutions, received power to alter and vary the constitution and powers of their Legislatures, subject to the observance of certain prescribed forms; and by the *Colonial Laws Validity Act* 1865, sec. 5, every representative Legislature has full power and is deemed at all times to have had full power to make laws concerning the constitution, powers

[1] In *Robtelmes* v. *Brenan*, (1906) 4 C.L.R. pp. 400, 403, 405, the High Court of Australia cites with approval the passage of the judgment in *Attorney-General for Canada* v. *Cain and Gilhula*, here commented on. That case is referred to *postea*.

[2] Cf. *R.* v. *Burah*, (1878) 3 A.C. 889, *per* Lord Selborne, at p. 905.

and procedure of such Legislature, and to establish and reconstitute Courts, and to make provision for the administration of justice therein.

The power to amend the Constitution, whether conferred by the Constitution of the Colony or by the *Colonial Laws Validity Act*, exists as a distinct power from the ordinary power of legislation. In many cases it can be exercised only through the adoption of a special procedure, as the approval of an absolute majority of the members of the legislature, or the reservation of the Bill for the Royal Assent. But even apart from the necessity of observing special forms where they are required, it seems that the "constituent power" is so far distinct from the "legislative," that ordinary acts of legislation are controlled by the Constitution until it has been amended. This is the principle affirmed by the decision of the High Court of Australia in *Cooper* v. *Commissioner of Income Tax for Queensland*.[1] The Queensland Constitution contained the common provision for the protection of the tenure and salaries of the Judges of the Supreme Court, and also empowered the Queensland Parliament to amend or repeal any of the provisions of the Constitution. An Income Tax Act passed by the Queensland Parliament was alleged by the Chief Justice of that State, so far as it purported to tax the salary of his office, to be a reduction of his salary in violation of the Constitution. The Queensland Government contended (rightly, as the High Court held) that the exercise of the power of taxation in respect to the Judges in common with other citizens, could not be regarded as within the prohibition of the Constitution; but they also contended that if it were, then, as the Queensland Parliament had the amending power, the *Income Tax Act* must, so far as it was inconsistent with the Constitution, be held to be, *pro tanto*, an amendment, and to

[1] (1907) 4 C.L.R. 1307.

operate in accordance with the ordinary rule that of two inconsistent acts of legislation the latter must prevail. This contention the High Court rejected, and decided that before the Legislature could exercise a power withheld by the Constitution, it must, by an Act directed to that purpose, have amended the Constitution, and so removed the barrier to the exercise of its legislative power. In the words of Griffith C.J.:—"The distinction between an authority to alter or extend the limits of their powers, and an authority to disregard the existing limits, is clear."[1]

2. The general power of a Colonial Legislature to make laws has always been limited by a condition that such laws should not be "repugnant to the laws of England." This condition received widely different interpretations at different times, the narrower views occasionally finding expression in Acts of the Imperial Parliament authorizing Colonial legislation *non obstante*.[2] Latterly, however, probably as a result of the growth of self-government in the Colonies, this restriction was treated as meaning merely inconsistency with any Imperial Act applicable to the Dominions of the Crown generally, or to the particular Colony in question, and inconsistency with fundamental principles.[3] In 1865, mainly as the result of difficulties

[1] S.C. at p. 1314.

[2] See Forsyth, *Cases and Opinions on Constitutional Law*, p. 23, referring to 6 & 7 Vict. c. 22, which empowers Colonial Legislatures to make laws for receiving the evidence of barbarous and uncivilized persons. See also Chalmers, *Opinions of Eminent Lawyers*, 2, p. 62; Forsyth, pp. 459, 562, *South Australian Papers* 1861, vol. ii., No. 50; 1863, vol. ii., No. 24; 1864, No. 142, pp. 50 *et seq.*; 1862, vol. ii., No. 68.

[3] "Contrary to those essential principles of what may be called natural jurisprudence which as modified by the ideas and institutions of Christianity have been adopted as the foundation of the existing laws of England; but that it would not be void in consequence of any divergence from the provisions of the law of England, which, having no natural connection with any such fundamental principle, are or might have been dictated by mere national peculiarity or considerations of temporary or local convenience." (Sir William Atherton and Sir Roundell Palmer, April 12th, 1862, *Parliamentary Papers*, South Australia).

which had arisen in South Australia, and the opinions of the Law Officers of the Crown[1] thereon, the *Colonial Laws Validity Act* was passed, by which the vague limitations of fundamental principles disappear, and inconsistency with the provisions of some Imperial Act extending to the Colony remains as the single principle of limitation. The provisions of the Act on this subject are :—

> Sec. 2. Any Colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy but not otherwise be and remain absolutely void and inoperative.
>
> Sec. 3. No Colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act, order, or regulation as aforesaid.

The *Colonial Laws Validity Act*[2] is useful as clearing away the mist that surrounded the traditional condition of conformity to the laws of England; but inasmuch as the powers of a Colonial Legislature are themselves granted by an Imperial Act which extends to the Colony and by which therefore it is bound, and any Act of the Colonial Legislature inconsistent therewith is, by the terms of the *Colonial Laws Validity Act*, void and inoperative, the question of the extent of the powers granted is still a relevant question and one which Courts of Law are competent and bound to consider. This qualification must be borne in mind in reference to the statement by the Privy Council in *Webb* v. *Outtrim*[3] that if an Act of the Parliament of Victoria "were repugnant to the provisions of any Act of Parliament extending to the Colony it might be inoperative to

[1] Sir William Atherton and Sir Roundell Palmer ; Sir Roundell Palmer and Sir Robert Collier.

[2] 28 & 29 Vict. c. 63.

[3] (1907) A.C. 81.

the extent of its repugnancy (see the *Colonial Laws Validity Act* 1865), but with this exception, no authority exists by which its validity can be questioned or impugned." This brings us to the most distinctive limitation upon the powers of the Colonial Legislature as compared with the Imperial Parliament.

3. Colonial Legislatures are "local and territorial Legislatures" in a special sense. The Imperial Parliament, like the organs of every sovereign State, is limited territorially by the fact that its executive and judiciary, upon which the enforcement of its laws depends, can act effectively only within the territory of the sovereignty itself; but it can constrain every person and every authority within its borders to treat its enactments as valid, and the rule against the extra-territorial operation of Statutes[1] is a rule of interpretation merely, overborne by any clear indication of the intention of Parliament to apply an Act to persons, things, or acts outside the British Dominions. The territorial limitation on a Colonial Legislature, however, has been treated as more than a rule of interpretation; it is a rule in restraint of power, sanctioned not merely by the refusal of Courts beyond the Colony to recognize its authority, but by the refusal of the Courts of the Colony itself to treat the enactment as valid. This is the generally accepted opinion, but it has not passed entirely without question.[2] Many of the cases relied on for the opinion in question are unsatisfactory, in that they are decisions, not

[1] See Craies, *Statute Law*, Part II., cap. viii.

[2] See Craies, *Statute Law*, Part II., cap. ix.; Lefroy's *Legislative Power in Canada*, 321 *et seq.*; Ilbert's *Government of India*, 1st ed., p. 269; *Low* v. *Routledge*, (1865) L.R. 1 Ch. 42, 4 E. & I. App. 100; *McLeod* v. *Attorney-General for New South Wales*, (1891) A.C. 455; *Kingston* v. *Gadd*, (1901) 27 V.L.R. 418, (1903) A.C. 471; *In re the Award of the Wellington Cooks and Stewards Union*, (1906) 26 N.Z. L.R. 394. For the application of the doctrine to the States Legislatures in the United States, see Cooley, *Constitutional Limitations*, pp. 176-181, and 15 *Harvard Law Review*, p. 747.

of the Court of the Colony whose powers are in question, but of an English Court or the Court of another Colony. In such a case the decision is really no more than that the law in question is not entitled to extra-territorial recognition as a matter of private international law,[1] or that the Colonial Legislature cannot extend its enactments so as to operate as *leges terræ* beyond its own territory.[2]

But the principle, and the consequent distinction between the powers of Colonial Legislatures and the Imperial Parliament, have been recognized both by the Privy Council and the House of Lords. The Statute law of England and of New South Wales defines bigamy in similar terms, and gives jurisdiction to try and punish the offence, in the one case whether the second marriage takes place in "England or Ireland or elsewhere;" in the other, "Wheresoever the second marriage take place." In *M'Leod* v. *Attorney-General for New South Wales*,[3] the Privy Council held that, from the limited nature of the powers of the Colonial Legislature, the Colonial Statute must be restricted so as to read wheresoever *in the Colony* the marriage took place; while in the *Trial of Earl Russell*,[4] the House of Lords held that the words in the English Statute had no such restriction and extended to a marriage in Nevada, the decision in *M'Leod's Case* being expressly referred to the limited powers of a Colonial Legislature.

The limitations upon the power of Colonial Legislatures arising from their "local and territorial" character are the foundation of several Imperial Acts conferring special powers upon Colonial Legislatures; and the range of these

[1] *E.g. Brisbane Oyster Fishery Co.* v. *Emerson*, Knox (N.S.W.) 80; *Ray* v. *McMackin*, (1875), 1 Victorian L.R. 274.

[2] *Low* v. *Routledge*, (1865) L.R. 1 Ch. 42; *Leonard Watson's Case*, (1839) 9 A. & E. 721.

[3] (1891) A.C. 455.

[4] (1901) A.C. 446.

Acts is instructive as to the several views which have been held as to the operation of the restriction. The narrowest view of the power of the Legislature is perhaps that which underlies 23 & 24 Vict. c. 122, an Act whereby Colonial Legislatures are empowered to make laws enacting that where any person feloniously injured within the Colony shall die beyond the limits of the Colony, the offence may be dealt with in the Colony where the injury was inflicted. There are several Statutes which enable Colonial Courts to take jurisdiction of offences committed beyond their territory, *e.g.*, the several Acts giving jurisdiction over offences committed on the high seas: 12 & 13 Vict. c. 96; 23 & 24 Vict. c. 122; the *Fugitive Offenders Act* 1881, secs. 20 and 21. Other Imperial Acts serve in effect to extend *pro hac vice* the limits of Colonial territory by giving to acts of the Colonial Executive or Legislature the same operative effect beyond the ordinary limits of the Colony as they have within the Colony itself. In such a case the Colonial Statute is a law in and for the place in which it operates, just as if it were enacted by the Imperial Parliament. Examples of Acts which empower the exercise of Colonial authority extra-territorially in this sense, are the *Fugitive Offenders Act* 1881 (return of fugitive offenders) the *Colonial Prisoners Removal Acts* 1869 and 1884, the *Colonial Naval Defence Act* 1865, sec. 3 (7), the *Army Act* 1881, sec. 177, the *Bankruptcy Act* 1883, sec. 118 (extending the bankruptcy laws of a Colony to other parts of the British Dominions and requiring the Courts in such parts to give effect to such laws), the *Merchant Shipping Act* 1894, secs. 102, 264, 265, 279, 444, 478, the *Commonwealth Constitution Act* sec. v., (*semble*) the *Territorial Waters Jurisdiction Act* 1878,[1] and the *Colonial Marriages Act* 1865.

The "local and territorial" nature of Colonial Legislatures

[1] See Jenkyns, *British Jurisdiction*, p. 12 note.

has also been regarded as marking a difference of spheres in respect to the subject-matter of laws operating in the Colony itself. It has been considered that there were some matters which were essentially for Imperial action rather than local legislation, either because the matter was one requiring that the Empire should be dealt with as a whole, or because as a matter of history the matter had been treated as one of Imperial and not of local policy. Such matters are of course generally the subject of Imperial legislation, so that any Colonial Act thereon would be overridden by the Act of the paramount authority; but the opinion in question is that the matters referred to are excluded from the area of Colonial power, and that any Act of the Colonial Legislature enacted merely under the general power to make laws for the territory would be *ultra vires*.[1]

Much difference of opinion existed as to the power of Colonial Legislatures to pass local Naturalization Acts, conferring the privileges of British subjects within the territory, as may be seen from many of the cases in "Chalmers' Opinions." Sometimes the Law Officers allowed them to pass, more often they were disallowed as beyond the powers of a local Legislature. At last 10 & 11 Vict. c. 83 was passed to quieten doubts; and besides confirming Colonial Acts of Naturalization, it conferred the power of local naturalization upon all Colonial Legislatures, a power repeated by the *Naturalization Act* 1870, sec. 16.

In their fiscal and commercial policy, in the control of shipping and the jurisdiction of Admiralty, the Colonies came at the outset under a system which treated these matters as Imperial, so that Imperial laws on the subjects operated in the Colonies as of course. As the older policy has been abandoned, it has sometimes been deemed insufficient to repeal the paramount Imperial Acts; power of legislation has been speci-

[1] Jenkyns, pp. 27-8, 70-1.

ally conferred. The power over customs duties and establishments was conferred by a series of Acts in the main removing restrictions with which the customs power had been attended.[1] Much obscurity has attached and still attaches to the powers of Colonial Legislatures in respect to merchant shipping; and the subject has hardly been elucidated by the specific grants that have been made from time to time and are now collected in the *Merchant Shipping Act* 1894. These grants may be referred to various causes. Now it is the territorial limitation upon Colonial Legislatures, the double sense of which is not always clearly perceived; now it appears to be the notion that the whole subject is one *primâ facie* requiring uniform legislation which the Imperial Parliament is alone competent to pass. In the main, the special powers conveyed by the Act of 1894 are to be explained either by the fact that they enable the Colonial Legislature to supersede the provision made by the Imperial Act (*e.g.*, sec. 735), or give to the Colonial Act or thing done thereunder an operation upon the high seas or in other parts of the King's Dominions (*e.g.*, secs. 102, 264, 279, 444, 478, 670-1) which, without special authority, would of course be *ultrâ vires*. But difficult questions arise as the necessity for the special grant of some of the powers; as to how far, for instance, it was necessary to confer specially the power contained in sec. 736 to regulate the coasting trade; and how far the grant of these special powers may be a ground for inferring absence of power to deal with the subject generally is a question upon which very different opinions are entertained.[2]

[1] In Australia, 13 & 14 Vict. c. 59; 36 & 37 Vict. c. 22; and 58 Vict. c. 3.

[2] See a Memorandum by Mr. R. R. Garran appended to the *Report of the Royal Commission on the Navigation Bill*, pp. 53 and 56 (Commonwealth P.P. 1907, 2nd session, No. 114), criticizing the conclusions contained in a Memorandum on Colonial Merchant Shipping Legislation, by the Solicitor to the Board of Trade (Commonwealth P.P. 1905, No. 15, p. 18). See also *Merchant Shipping Legislation in the Colonies*, by A. Berriedale Keith, *Journal of Comparative Legislation*, No. 20, April, 1909.

The jurisdiction of the Admiralty has always been deemed an Imperial matter. Offences within the jurisdiction of the Admiralty are cognizable by Colonial Courts by virtue of Imperial Acts, principally the *Admiralty Offences (Colonial) Act* 1849. The Court of the Vice-Admiral in a Colony has always been a branch of the Admiralty, and outside the Colonial system of Courts and jurisdiction. The Court, its Judge, jurisdiction, and procedure have been regulated by Imperial and not Colonial Statutes and Orders. In 1890, however, by the *Colonial Courts of Admiralty Act*, this was altered, and the Courts become part of the Colonial establishment,[1] and Colonial Legislatures are given a considerable but limited power of vesting Admiralty jurisdiction in the several Courts of the Colony.

The Post Office, and Naval and Military defence, have also been functions the course of which has been affected by the notion that they were essentially Imperial, or matters of prerogative beyond the ordinary power of any Colony. The Imperial Acts conferring power have, indeed, definitely provided for an extra-territorial operation of Colonial laws which no ordinary power of the Colonial Legislature could give (*Colonial Naval Defence Act* 1865; *Army Act* 1881, sec. 177), or have given an express power to vary provisions of the Imperial Act operating in the Colony (*Army Act* 1881, secs. 156 (8), 169). But the *Colonial Naval Defence Act* specifically authorizes the raising of a force by virtue of Colonial legislation, and enables provision to be made for its discipline and government *within* as well as without the Colony; and similarly the *Army Act* 1881, sec. 177, provides that the Colonial law shall apply to Colonial militia or volunteers whether within or without the Colony. Curiously enough, the view under discussion receives most explicit expression in relation to the Post Office; for the

[1] New South Wales and Victoria are temporarily excepted.

Colonial Inland Post Office Act 1849 confers on Colonial Legislatures power to make laws with respect to their inland posts, and expressly restricts the power to the transmission or conveyance of letters within the limits of the Colony (sec. 4).

Enough has been said of the course of legislation to show that it serves as no sure guide in the practical application of the territorial limitations. The judicial decisions do more to illustrate the difficulty of the problem than to aid in its elucidation. The case of *McLeod* v. *Attorney-General for New South Wales* has been already referred to as determining that a Colonial Legislature may not make laws declaring that acts committed abroad shall be justiciable in its Courts as if they were offences committed within its territory. But it has been generally recognized that a Colony may control entry into its territory, and punish the entrance of persons who have committed offences abroad. As a matter of fact, most of the Australian Colonies, in their zeal against moral contamination, did pass Statutes which prohibited and punished the entry of persons who had been convicted of serious offences in any other place within a term of years. Advantage was taken of this power in framing the *Commonwealth Customs Act* 1901, sec. 192, which in substance makes it an offence to break on the high seas the seals that have been put on ships' stores in a Commonwealth port by the officers of Customs. The section was drawn so as to make entry into a port of the Commonwealth with seals broken the gist of the offence; and the section was supported by the Supreme Court of Victoria and the Privy Council.[2]

The evasion of the rule in its application to crimes appears from this not to be very difficult, and in other

[1] (1891) A.C. 455.

[2] *Kingston* v. *Gadd*, (1901) 27 V.L.R. 418; (1903) A.C. 471.

cases the tests for determining the extra-territorial character of a law are not very obvious. Some light may be drawn from the rules of private international law as determining broadly the sphere of a State's law and jurisdiction, and it would seem that a Colonial Legislature may well extend its laws to all cases which, according to principle, are properly governed by the law of that Colony.[1] But it is clear that its limits are not defined by the answer to the question whether in a given case a foreign Court would hold that the laws of the Colony did not apply, or a local Court hold in analogous circumstances that a foreign law did not apply. For instance, in *Ashbury* v. *Ellis*,[2] the Privy Council supported a Statute of New Zealand conferring jurisdiction on the tribunals of the Colony over persons neither resident nor present within the Colony who were parties to contracts made or to be performed in New Zealand, though a judgment given in such a case would not be recognized beyond New Zealand, and though New Zealand Courts would not recognize a foreign jurisdiction based on similar grounds.

The recent decision of the Supreme Court of New Zealand in *Re The Award of the Wellington Cooks and Stewards' Union*,[3] calls for special notice as involving a more careful consideration of the nature of this limitation upon the power of a Colonial Legislature than it appears to have received in any other case. The New Zealand Court of Industrial Arbitration had made an award against steamship companies whereby *inter alia* it was required that overtime should be paid for certain work if performed by the employees in port, and that they should be specially paid for work done on holidays. In the case of two steam-

[1] See for example Dicey, *Conflict of Laws*, p. 444, and note.
[2] (1893) A.C. 329.
[3] (1906) 26 N.Z. L.R. 394.

ship companies—the Union Steamship Co. of New Zealand and Huddart, Parker & Co.—it was admitted that these payments were not made in respect of work done in Australian ports, and on a prosecution for penalties for a breach of the award, it was argued that the New Zealand Legislature had no power to impose penalties for acts done or omitted beyond its territorial waters. The Court, in its decision, drew a distinction between the two companies, holding that the Union Company, as a New Zealand company, with its head office and management there, its vessels beginning and ending their round voyage (New Zealand—Australia—New Zealand) there, and engaging and paying its men there, was bound, while Huddart Parker's, as an Australian company, with its head office and management in Australia, its vessels beginning and ending their round voyage (Australia—New Zealand—Australia) there, and engaging and paying its men there, was not. The members of the Court, agreeing in the result, differed as to the essential grounds of the distinction. Stout C.J. went the length of declaring that the inhabitants of New Zealand were subject to the laws of that country even outside territorial limits, and might, without infringing the doctrine of *McLeod's Case*, be punished in New Zealand for crimes committed abroad. So also, there were "New Zealand" ships, whose "law of the flag" was the law of New Zealand, even when they were on the high seas. He found the justification for this in the necessary expansion of power with the development of the Dominion; it was impossible to provide for that peace, order and good government of the Colony for which plenary power was given by the Constitution, if such matters were not subject to New Zealand law. The majority of the Court more fully admitted the principle of the territorial limitation, and made no claim over inhabitants or ships of New Zealand as such; and it was

not necessary to consider whether a New Zealand Court could punish offences committed abroad as if they were done in New Zealand. The present case was not one of offences committed abroad by New Zealanders; it was the case of a corporation in New Zealand engaged in a complicated series of operations, some in New Zealand, some on the high seas, some in Australia. The most important elements in the case were that the service to which the award related arose out of a contract in New Zealand, which was to be performed in the course of a round voyage, beginning and ending in New Zealand. This service could not properly be broken up, and the award covered the whole voyage which was the subject of the contract. In respect of the work done in Australian ports, it was pointed out that there was nothing in the award which purported to make such work illegal; the work was lawful, and the award merely concerned the payment for it, an obligation the content of which could not be regarded as determinable by the law of that particular place in which payment might happen to be made.

If the case had been an action in the civil Courts for the difference between the wage provided by the award and that actually paid, the decision would seem to be merely an application of the familiar rule that the obligation of a contract is governed by its proper law; and there would seem to be no valid objection to a claimant recovering in any jurisdiction to which the defendant was amenable. But it was a penal proceeding, open, as the Court held, to any prosecutor, and not practicable in any Courts except those of New Zealand. Still, once it is established that the substantive matter belongs to New Zealand law, it seems to follow that the law of New Zealand may determine how the obligation shall be sanctioned, whether by civil or penal proceedings.

The Court recognized that every reason which bound the New Zealand company by the award exonerated the Australian company from it. That company would be properly bound by Australian law, if any; and the Court emphasized the importance internationally of each country restricting itself to its own proper sphere.[1]

The same result may be attained in another way. The maintenance of communications is an essential function of government, and not the less if those communications are by sea rather than by land. A disturbance of the country's shipping may paralyze its industry and even its police. In such a case effective measures for the prevention of dislocation must surely belong to its peace, order, and good government, even though they may relate to things done or happening without the jurisdiction. The decision in *R.* v. *Cain and Gilhula*[2] really goes much beyond this, for it sanctions the use of executive force beyond the limits of the Colony, if such be necessary to effectuate the power of government. Indeed, on the whole subject too little attention seems to have been given to the distinction between the attempt to exercise power outside the territory (as by arresting or imprisoning, or setting up a Court) and merely legislating in respect to matters outside the territory without attempting any enforcement or execution of the laws otherwise than through the executive or judiciary acting in the territory itself. It has never been supposed, for instance, that a Colonial Court could not entertain an action for damages for a tort committed abroad, or a suit for divorce based on misconduct committed outside the territory; and the Bankruptcy and Insolvency legislation of the Colonies is based on the

[1] For the operation of the Commonwealth Arbitration Laws see *The Merchant Service Guild of Australasia* v. *A. Currie & Co.*, (1908) 5 C.L.R. 727, considered in the next chapter.

[2] (1906) A.C. 542. See *postea*.

assumption that a man may be made bankrupt or insolvent on acts committed outside the territory.

The rule against extra-territorial legislation must not be read in a sense which would defeat or diminish the power to legislate for the peace, order and good government of the territory. This, it is submitted, is the true ground of the decision in *Attorney-General for Canada* v. *Cain and Gilhula.*[1] In that case the Dominion Parliament had passed an Act to restrain the importation of alien contract labour, and provided that any person unlawfully landed in Canada might be returned to the country whence he came. It was argued that expulsion or deportation from its nature involved the exercise of coercive power beyond the territory of Canada, and that the Act was therefore *ultrâ vires.*[2] The Privy Council held that the power to exclude imported the power to expel persons entering unlawfully, and if for this purpose it was necessary to exercise extra-territorial constraint, that power, too, must be implied. The case was applied by the High Court of Australia in support of the deportation clauses of the *Pacific Islands Labourers Act* 1901 in *Robtelmes* v. *Brenan.*[3]

The decision in *M'Kelvey* v. *Meagher*[4] also shows that the restriction must be read broadly and not subtly. That was an application to an Australian Court under the *Fugitive Offenders Act* 1881 (Imperial) for the return of a person to Natal who was charged with *quitting* Natal within four months of being adjudged insolvent, in fraud of his creditors.

[1](1906) A.C. 542. "Decides in accordance with a well-established principle that when a power is granted everything necessary to effectuate it is impliedly granted unless it is expressly forbidden." Per Isaacs J., *Hazelton* v. *Potter*, (1907) 5 C.L.R. at p. 471.

[2]The same ground was taken in the *Canadian Prisoners' Case*, (1839) 3 St. Tr. N.S. 963 at p. 982; in *Ray* v. *McMackin*, (1875) 1 Victorian L.R. 274, and in *Reg.* v. *Gleich*, (1879) Oliver, Bell & Fitzgerald 39 (New Zealand).

[3](1906) 4 C.L.R. 395.

[4](1906) 4 C.L.R. 265.

It was contended that a man could not quit a country while within it ; that therefore the offence could only be committed without the Colony. An obvious answer was that a man could not quit the country when he was outside it, and that so far as the act was done within the territory it was within the jurisdiction of the Legislature of Natal.[1]

There are certain powers of government which are not exerciseable territorially and severally, but must belong to some single authority in the most complex political community, and be exerciseable by it for the whole. Such, for instance, is power of war and peace, and the control over the territorial limits of the whole. No Colonial Legislature can annex territory or cede territory ; such powers extend beyond legislation for the peace, order and good government of the Colony ; they can be exercised only by the Crown in its Imperial capacity, or by virtue of an express delegation of that power.

Whether there is any limitation upon a Legislature with plenary powers to make laws for the peace, order and good government of a Colony, which cannot be brought under the essential conditions of political unity, inconsistency with Imperial Statutes, or extra-territorial operation of laws may be doubted. But if there were such a further condition it is not quite clear that it is affected by the *Colonial Laws Validity Act* 1865, for that Act is limited to objections to Colonial law based on "repugnancy to the laws of England."

In regard to all of what may be called the extraordinary powers of a Colonial Legislature, *i.e.*, those which spring from special grants, whether the purpose is to give extra-territorial operation or to extend the subjects of legislative action, or to supersede *pro tanto* an Imperial Act, the question may well arise whether they are the recognition of an extended area of self-government or whether they are no

[1] *Ib.*, pp. 280-281.

more than arrangements of political convenience whereby the Colonial Legislature is made the instrument of Imperial action—a branch of the "administrative" rather than of the "constitutional" law of the Empire. We are familiar in the sphere of local government with the difference between "functions of local government" and "functions of central government locally administered," of which latter police, the relief of the poor, and education, are the commonest examples. There is obviously room for a similar distinction in Imperial relations. The powers over customs, naturalization, shipping, fugitive offenders, inland posts, defence, admiralty, may be regarded as an abandonment of these subjects to Colonial self-government, and not the less though the extent of the power may be cautiously defined in some cases. But where in the *Extradition Act* 1870, the *Mail Ships Act* 1891, the *Coinage (Colonial) Offences Act* 1858, and some other cases, the Crown may suspend the operation of Imperial legislation in a Colony in favour of a Colonial law, or provide that the Colonial law shall operate as if it were part of the Imperial Statute, or where the *Army Act* 1881, secs. 156 (8) and 169, authorizes the Colonial Legislature to adjust fines established by Imperial law so as to suit the circumstances of the local population, and to declare the equivalents of such fines in local currency, the special powers of the Colonial Legislature are a recognition that the purpose of the Imperial Legislature may be more effectually carried out under local laws. In such a case the Colonial Legislature appears to be truly the instrument of the Imperial Parliament in the same sense as is the Crown in Council when it receives power to make statutory rules and orders. If this political truth receives its legal expression, it would follow that in this limited class of case, at any rate, the usual consequences of delegation would attach, and the Colonial Legislature, being itself a delegate, could not exercise its functions through another.

CHAPTER II.

THE LEGISLATIVE POWER OF THE PARLIAMENT OF THE COMMONWEALTH.

We proceed now to the consideration of the position and powers of the Commonwealth Parliament; and it becomes necessary to see how far the principles applicable to Colonial Legislatures generally are modified, whether by way of restriction or extension, in this case.

In three important particulars the Parliament of the Commonwealth is distinguishable from the Parliaments of the Colonies, now the States, of Australia. Its power of legislation is granted only over specified and enumerated objects; it is subject to a paramount distribution of power among the several organs of government, and it cannot by its own mere act amend the Constitution.

It is from the enumeration of its legislative powers that the Commonwealth Government takes its most prominent characteristic; that it is a Government whose functions are specific and limited to particular subjects. The legislative power is not, indeed, contained in any one or two sections; it meets us in every part of the Constitution. But as the main object of federation was to put under a central Legislature matters which could not be dealt with effectively

or at all by the Colonial Legislatures, the statement of those matters in secs. 51 and 52 is the very kernel of the measure. The other powers of Parliament, dispersed through the Constitution, are in general adjective rather than substantive; they relate not to independent matters, but to the regulation, explanation, or restriction, of the powers contained in secs. 51 and 52, or to the regulation of the departments of government, including, in some matters, the constituent elements of Parliament itself.

The terms of grant are as follows:—

> Sec. 51.—The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to

the matters enumerated.

Sec. 52 is in identical terms, save that it grants "exclusive power" over the matters therein enumerated.

These terms correspond with the grant of power to the Dominion Parliament to make laws for the "peace, order, and good government of Canada." In Australia, the grant of legislative power to the Colonies has been made in the same or similar terms. In the *Australian Courts Act* 1828, and *Australian Constitutions Act* 1850 the word "welfare" is found in the place of the word "order," which is in the Act of 1842; the use of the one word or the other seems to be a matter of indifference; either appears to deserve the description by the Privy Council of the Canadian form—"apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to."[1] They do not in themselves confer any substantive power, nor do they, it is submitted, warrant the view that the matters enumerated are merely means towards an end. They simply express the fact that in "a general and remote sense the purpose

[1] *R.* v. *Riel*, L.R. 10 A.C. 675. Mr. Lefroy, in *Legislative Power in Canada*, p. 214, note, regards the substitution of "order" for "welfare" in the powers of the Dominion Parliament as "advised" and significant.

and design of every law is to promote the welfare of the community."[1]

That the legislative powers of a Parliament to which have been committed specific and enumerated matters, are not, on that ground merely, different in their nature from those of a legislature with authority "in all cases whatsoever" has been affirmed by several judgments of the Privy Council in regard to the powers of the Provincial Legislatures of Canada, notably in *Hodge* v. *The Queen*[2]; and the principle is applied to the Commonwealth Parliament by the High Court in *D'Emden* v. *Pedder*.[3]

Of a government whose substantive powers are granted by enumeration and limited by the definition of the matters enumerated, it has been said by Marshall C.J., that it "can claim no powers which are not granted to it by the Constitution, and the powers granted to it must be such as are expressly given or given by necessary implication."[4] But a proper insistence upon this principle must not lead us to forget that it is an independent government exercising jurisdiction directly over persons, things and territory,[5] and that necessary implication therefore assigns to it certain power which, as being an adjunct of all independent authority, can hardly be ascribed in any special way to particular subjects. It has been held by the Supreme Court of the United States that it is not indispensable to the existence of any power claimed for the Federal Government that it shall

[1] See Lewis, *Methods of Observation and Reasoning in Politics*, vol i., p. 453, citing Bacon (De Augm. Sci. l. viii., aph. 5). "*Finis et scopus quem leges intueri, atque adquem jussiones et sanctiones suas derigere debent, non alius est quam ut cives feliciter degant.*"

[2] *Hodge* v. *The Queen*, 9 A.C. 130.

[3] 1 C.L.R. at p. 110.

[4] *Martin* v. *Hunter's Lessee*, 1 Wheaton 304, 343.

[5] Cf. *Ex parte Siebold*, 100 U.S. 371, 394. See also *United States* v. *Maurice*, 2 Brock. 109, *United States* v. *Tingey*, 5 Peters 128; *United States* v. *Hodson*, 10 Wall. 407; *Barton* v. *United States*, 202 U.S. 344.

"be clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from all of them combined. It is allowable to group together any number of them, and infer from them all that the power claimed has been conferred."[1] The Court follows Story in the recognition of what he called the "resulting powers," arising from the aggregate of the powers of government. Instances of such powers are the right to sue and to make contracts (exerciseable by the Executive or such authority as the Legislature may designate), to require oaths from officers of government, to build a capitol or a presidential mansion.[2]

The plenitude of the powers of the Parliament as well as its predominant position amongst the organs of government is indicated rather than created by sec. 51 (xxxix). By this article the Parliament has power to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth."

Of the similar provision in the Constitution of the United States, Judge Cooley says:—"The import of the clause is that Congress shall have all the incidental and instrumental powers . . . to carry into execution all the express powers. It neither enlarges any power specifically given nor is it a grant of any new power to Congress, but it is merely a declaration for the removal of all uncertainty that the means for carrying into execution those otherwise granted are included in the grant." [3]

[1] *Legal Tender Cases*, (1870) 12 Wallace 457, 534.

[2] *Ib.* p. 536. Story, *Commentaries on the Constitution*, sec. 1256. See also *Tingey* v. *United States*, 5 Peters at p. 128.

[3] *Principles of Constitutional Law*, p. 105. See also Story, secs. 1236 *et seq.*

In pursuance of its incidental power, Congress may be deemed to have a complete power of organizing and controlling the Federal Government except so far as it is restricted by the Constitution. Thus, it was held very recently that Congress, possessing the entire legislative authority of the United States, might make such laws as the public interest required to carry into effect the powers granted to it, and might thus make it an offence for a Senator to receive, or agree to receive, compensation for services before a department of the United States Government.[1] So also it may make laws dealing with violence or corruption at elections.[2]

The import of the clause, as well as the nature of the legislative power of Congress, was expounded by the Supreme Court of the United States in *McCulloch* v. *Maryland*,[3] which has ever since been the leading authority on the subject. An Act of Congress had incorporated the United States Bank, and the question was whether in the absence of any express power to establish banks or charter corporations, this Act was *intra vires*. Premising that the nature of a Constitution forbade us to expect an exact detail of the subdivisions of its great powers, and of all the means by which they may be carried into execution,[4] the Court laid it down that the Government which had power to do an act must be allowed to select the means, and those who would deny to it any appropriate means took upon themselves the burden of establishing the exception. "We think the sound construction of the Constitution must allow to the national Government that discretion with respect to the means by which the powers it confers are to be carried into

[1] *Burton* v. *Thompson*, (1905) 202 U.S. 344.

[2] *Ex parte Yarbrough*, (1883) 110 U.S. 651, 658.

[3] (1819) 4 Wheaton 316.

[4] Cf. *Baxter* v. *Commissioners of Taxation for N.S.W.*, 4 C.L.R. at p. 1105, where the same principle is laid down in the case of the Commonwealth Constitution.

execution, which will enable that body to perform the high duties that are assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional." In the Constitution were found great powers to levy and collect taxes; to borrow money, to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. Whilst it could never be pretended that these vast powers drew after them others of inferior importance merely because they were inferior, the exigencies of the government upon which the powers were conferred involved the collection, transport and expenditure, of treasure over a vast territory. The facilities of banking could not be denied to be an appropriate means for this purpose, and there was nothing in the Constitution which required the National Government to depend upon such facilities as might be offered by institutions existing under the laws and subject to the control of the States. "No trace is to be found in the Constitution of an intention to create a dependence of the Government of the Union on those of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone it was expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another Government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other Governments which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, the choice of means implies a right to choose a National bank in preference to State banks, and Congress alone can make

the election." The chartering of corporations, though a sovereign power, was not a substantive power involving an end in itself. It was never more then a means of accomplishing some other object, and it was that object which must be resorted to to test the power of the Legislature.[1]

It would be superfluous to attempt any detailed illustration of a principle which has been applied times without number in the American Courts. While it is the second principle laid down in *McCulloch* v. *Maryland*—the doctrine of the immunity of instrumentalities—which has claimed the more attention in Australia, the principle here considered has been tacitly accepted in the Commonwealth and is now expressly affirmed by the High Court.[2]

It has been already pointed out that the plenary power of a Colonial Legislature is "its own"; that it must be distinguished from cases in which the depositary of power is made the mere organ or instrument for fulfilling the purposes of a superior government. It is not to be doubted that in exercising its powers under secs. 51 and 52 (and by sec. 51 (xxxvi.), this includes by reference most of the other cases in which the Parliament has power under the Constitution), the Parliament is exercising its own powers and is no more the delegate of the Imperial Parliament than is the Parliament of New South Wales or Victoria. Nor does it seem, in spite of the fact that it has not plenary constituent power, to be any more the delegate of the electors than is any State Legislature. Hence, the doctrine *delegatus non potest delegare* has no application to it. To what extent the powers of the Parliament to organize government and to distribute powers in relation to the

[1] For a recent criticism of *McCulloch* v. *Maryland*, see an article by Mr. (now Mr. Justice) H. B. Higgins in 18 *Harvard Law Review*, p. 559, and 2 *Commonwealth Law Review*, p. 97 (1905).

[2] *Jumbunna Coal Mine* v. *Victorian Coal Miners Association*, (1908) 6 C.L.R. 309, Barton J., pp. 344-5, O'Connor J., pp. 355-8.

subjects committed to it by the Constitution, may be restricted by the constitutional distribution of power amongst the Parliament, the Crown, and the Courts, is elsewhere considered,[1] and need not be further dealt with at this stage.

The plenary power of legislation in the Commonwealth may be distinguished from a mere regulatory power, which, as probably importing the existence and preservation of the thing regulated,[2] introduces a number of considerations which, varying with the particular subject-matter, have the effect of limiting in various directions the discretion of the authority concerned. It would, for instance, be doubtful whether, under a mere regulatory power, the Legislature was not restricted to control and supervision of the operations of other people, whether it could assume the administration of services to the total exclusion of all others therefrom. The plenary power of legislation is not merely a power to regulate : it ranges from creation to destruction ; it may establish as well as prohibit.

In regard to territorial limitations upon legislative power, the principles applicable to Colonial Legislatures appear generally to apply to the Commonwealth Parliament. But the doctrine that this limitation must not be construed so as to defeat or diminish powers actually granted, has greater scope in relation to the proceedings of a Parliament

[1] See Part III., Chapter I., "The Distribution of Powers in the Commonwealth Government." See also Part IV., Chapter III., "Executive Power" and Chapter IV., "Judicial Power."

[2] Cf. *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1896) A.C. at p. 363 :—"A power to regulate naturally, if not necessarily, assumes, unless it be enlarged by the context, the conservation of the thing which is to be the subject of the regulation"; *City of Toronto* v. *Virgo*, (1896) A.C. at p. 93 :—"Their Lordships think there is a marked difference between the prohibition or prevention of a trade and the regulation or governance of it." See also Cooley, *Constitutional Limitations*, p. 291, note. On the other hand, the power of Congress to *regulate* commerce has received the widest interpretation. See also *The Lottery Cases*, (1902) 188 U.S. 354 *et seq.*, and cases there cited.

which has power to make laws with respect to "external affairs," "fisheries beyond territorial waters," and a number of other matters which regard things existing or occurring outside the Commonwealth. The case of *Kingston* v. *Gadd*,[1] already referred to, may serve as an illustration. In that case it was held that the plenary power over Customs, extending as it did to authorize the taxation of all goods introduced into Australia, would support a provision of the *Customs Act* directing the sealing of dutiable goods arriving in an Australian port, and imposing a penalty upon entry to any other Australian port with such seals broken, although the actual breach of the seal took place on the high seas beyond territorial waters. The power to make laws for Australia, may thus in particular cases extend to making laws in relation to persons, things, or acts outside the territorial limits of the Commonwealth.

Further, the *Commonwealth Constitution Act*, sec v., contains a provision which enlarges the jurisdiction of the Commonwealth beyond its territory or territorial waters. That section declares that the laws of the Commonwealth are in force on all British ships, the King's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.[2] The effect of this provision is to make the vessels of the class referred to as completely subject to the operation of laws passed by the Commonwealth Parliament when they are *beyond*, as all vessels are when they are *within*, the territorial waters of the Commonwealth.[3] The law, of course, must be one with respect to

[1](1901) 27 V.L.R. 418 ; (1903) A.C. 471.

[2]The meaning of sec. v. was considered in the negotiations between the Australian delegates and the English authorities in 1900 (*Commonwealth of Australia Constitution Bill — Debates in the Imperial Parliament, with Appendices*, Wymans, 1901, pp. 142, 150). See also *Parliamentary Debates*, 1904, pp. 2069 *et seq.*

[3]*Ex parte Oesselman*, (1902) 2 S.R. (N.S.W.) 438.

matters committed to the Commonwealth Parliament. Any act done or omitted on such vessels in contravention of the law of the Commonwealth is as completely justiciable in Australia as if it were done in a State; and on the other hand, the authority of the Commonwealth in any matter within its sphere is, whether in Australia or elsewhere, as complete a justification for anything done on such vessels as it would be for acts done in the territory of the Commonwealth.

The High Court applied this provision to determine the limits of the application of the *Commonwealth Conciliation and Arbitration Act* 1904. In the case of the *Merchant Service Guild of Australasia* v. *A. Currie & Co. Proprietary Limited*,[1] the question was whether the Arbitration Court had jurisdiction to determine disputes as to wages, hours, and conditions of labour between the owners of and men employed on a line of steamers trading between Sydney and Calcutta. The owners were an Australian Company, the ships were registered in Australia, and the men were engaged in Australia, though they signed articles in Calcutta. The Full Court was asked by the President of the Arbitration Court whether, in view of sec. v. of the *Constitution Act*, the Court had power to settle the dispute, the claim thus being presented as a whole, and no attempt being made to sever the dispute as to matters which might be done in Australia and those done abroad. The argument presented to the Court for the jurisdiction recalls in many respects the argument presented to the New Zealand Court in the *Wellington Cooks and Stewards' Award*,[2] that the ship was an Australian ship, owned and controlled in Australia, the parties resident in Australia, "citizens of the Commonwealth"; the

[1] (1908) 5 C.L.R. 737; s.c. *Commonwealth Arbitration Reports*, 1905-1907, p. 1.

[2] 26 N.Z. L.R. 394. See preceding chapter.

trade an Australian trade, beginning and ending in Australia, and that an award, even as to matters beyond the Commonwealth, could in the circumstances be made effective against the respondents. The Court held that the jurisdiction of the Court depended on whether the ships were subject to the legislative power of the Commonwealth as defined in sec. v., that, in that section, "port of destination" meant final destination, and therefore the Act applied only when the beginning and the end of the voyage were both in the Commonwealth. In this case that condition was not fulfilled, for there was here no "round voyage" beginning and ending in Australia, the evidence leading to the conclusion in fact that, if the voyage began in Australia it ended at Calcutta. In this respect—the absence of the "round voyage"—the case, of course, differs from the *Wellington Cooks and Stewards' Award*; and the High Court, with the New Zealand case before it, makes no comment on that case.

Finally, it is to be observed that under sec. 122 of the Constitution, the plenary authority of the Commonwealth may extend to places outside Australia altogether, such places being "placed by the Crown under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth." Such authority is exercised over Papua (British New Guinea).[1]

A question of some importance arises as to the power of the Commonwealth to make local laws applicable to part only of its territory, and not applying generally throughout the whole Commonwealth. Uniformity of bounties (sec. 51), absence of discrimination in taxation (sec. 51), and of preference in trade, commerce and revenue (sec. 99), are expressly provided for. But otherwise it would seem to be

[1]See *Papua Act* 1905, which recites the history of the acquisition, in relation to which see also *Strachan* v. *Commonwealth*, (1906) 4 C.L.R. 455.

a matter of legislative discretion to determine whether the interests of the Commonwealth require uniform or diverse, general or local legislation. So far as concerns those matters which are put under the exclusive power of the Commonwealth Parliament, including those new subjects over which the Colonial Legislatures may have had no power, this principle may be accepted without any qualification, since the Commonwealth Parliament possesses the sole legislative power exerciseable within the Commonwealth, and the State Parliament is unable to cover the local ground. In respect to these subjects over which the State has power within its own area, it is obvious that the interests of the whole may require special regulation in a single State or locality, and such regulation would be a law for the peace, order and good government of the Commonwealth in respect to that subject, though it required something to be done or forborne only in the State or locality in question. But the position is more difficult where the law is clearly not part of a general system of regulation, but is local or special. For instance, could the Commonwealth Parliament pass an Insolvency Act for the State of Victoria, or a Divorce Act for New South Wales, or an Act establishing old-age pensions in South Australia and not elsewhere? It has probably been settled for Canada that, so far as the enumerated powers of the Dominion are concerned, the Parliament of Canada may pass an Act for one part of the Dominion and not another, if in its wisdom it thinks the legislation applicable to or desirable in one and not in the other. But this conclusion has been reached mainly because the Dominion powers over these subjects are exclusive powers; and as it is not clear that the Provincial Legislatures may, under their power to make laws on "matters of a merely local or private nature in the Province," deal substantially with Dominion

[5] Lefroy, pp. 567 *et seq.*

subjects at all, there would be a failure of legislative power if the Parliament of Canada could not deal with them irrespective of area. *E concesso,* this failure would not arise in Australia. Even in these cases, there have not been wanting in the Privy Council indications of an opinion restricting the Parliament of Canada to "general legislation." Thus, in *L'Union St. Jacques de Montreal* v. *Belisle,*[1] the Board says:—"Their Lordships observe that the scheme of distribution in that section (sec. 91, *British North America Act* 1867) is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated except what may properly be described as general legislation." In *Fielding* v. *Thomas,*[2] Lord Herschell said:—"There can be no doubt, speaking generally, that the object and scheme of the Act is in sec. 91 to give the Dominion Parliament those things which were to be dealt with as a whole for the whole Dominion." The decision of the Privy Council in the *Liquor Prohibition Case,*[3] as well as the observations of members of the Board during the argument, affirms the doctrine that, so far as the Dominion legislation proceeds not from the enumerated powers but from the general power to make laws for the peace, order and good government of Canada in respect to matters not exclusively assigned to the Legislatures of the Provinces, it may not deal with "any matter which is in substance local or provincial and does not truly affect the interests of the Dominion as a whole."

It may be expected that in the Commonwealth the Courts

[1] L.R. 6 P.C. at p. 36.

[2] (1896) A.C. 600. The citation is from Mr. Lefroy's *Legislative Power in Canada*, at p. 575, referring to the shorthand writer's report. See also p. 580.

[3] *Attorney-General for Ontario* v. *Attorney-General of Canada*, (1896) A.C. 348.

will be guided by the analogy of the meeting of the general residuary power of the Parliament of Canada, and the power over matters of "a local or private nature" in the Legislatures of the Provinces, with this difference only, that the broader powers of the State Parliaments in Australia will narrow the field open to the "local legislation" of the Commonwealth Parliament. We may conclude that legislation by the Commonwealth Parliament for purely local or State purposes will not be *intra vires* except in the case of the exclusive powers; but that Commonwealth legislation may in general be directed to a particular State or States if it appears to be part of a scheme for effecting an object of common interest. This is but one instance of the difficult and delicate task which falls to the Court in determining the limits of authority in a Constitution which distributes power amongst separate organs. It is one of the cases in which legal approach very close to political issues, and in which, therefore, the presumption in favour of the validity of an Act of Parliament as a rule of interpretation will operate in full force. Courts of law will be slow to say that the Parliament, assuming to act for the interest of the whole community, has dealt with a matter of no more than local concern.

Express restrictions governing the exercise of the powers of the Commonwealth Parliament over the subjects committed to it are significantly few. Apart from those restrictions which belong to the definition of the subject-matter (*e.g.*, trade and commerce *with other countries and among the States*; conciliation and arbitration for the prevention and settlement of disputes *extending beyond the limits of any one State*), there are restrictions applicable to particular subjects, such as taxation, or trade and commerce, which must be considered in connection with each such subject. In the course of the argument in the *Woodworkers'*

Case,[1] it was suggested that sec. 99 ("The Commonwealth shall not by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or part thereof") does not relate exclusively to the exercise of the financial powers, or the power over "trade and commerce with other countries and among the States," but includes every enactment, under whatever head of power, which, by the regulation of trade, even the internal trade of the States, does in fact give such a preference, so that, for example, an award of the Court of Arbitration under the *Conciliation and Arbitration Act* might be impeached on this ground.

Two provisions imposing an express restriction upon the Commonwealth Parliament are found in Chapter V. of the Constitution—"The States." One of these is imposed on the Commonwealth Parliament in common with the States, and secures that no subject of the King, resident in any State, shall be subject, in any other State, to any disability or discrimination which would not be equally applicable to him if he were a subject of the King resident in such other State (sec. 117). The effect of this section is considered in the chapter herein on "The States."

Sec. 116 provides that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The last provision no doubt imposes a restraint on power, and the prohibition of laws "for establishing any religion" possibly prevents appropriations in aid of religious bodies. In 1899, an attempt was made under a similar provision in the United States Constitution to prevent the execution of

[1] *Federated Sawmillers' Association* v. *James Moore & Sons*, (1909) C.L.R.

an agreement with the Providence Hospital at Washington, a body incorporated by Act of Congress, whereby that body was to receive certain sums of money voted by Congress for providing an isolating building. It was contended that as the institution was governed and maintained by Roman Catholics, this was aid to a sectarian institution, and was a law respecting an establishment of religion. There was no suggestion that the benefits of the hospital were confined to any sect, and the Court held that the fact that the hospital was controlled by a sect was immaterial, in the case of a body which had been incorporated, so long as the management was in accordance with the constitution of the body. The grant therefore was held to be lawful.[1] In the *Mormon Case*,[2] where the provision against prohibition of the free exercise of any religion was relied on, the Court held that "a person's religious belief could not be accepted as a justification for his committing an overt act made criminal by the law of the land." The words "or for imposing any religious observance" are new. The Convention was informed that on the strength of a decision of the Supreme Court that the United States were a Christian people, Congress passed a law closing the Chicago Exhibition on Sunday, "simply on the ground that "Sunday was a Christian day." It was represented that the words in the preamble of the Commonwealth Constitution, "humbly relying on the blessing of Almighty God," might give some support to similar attempts in Australia; and, accordingly, words were inserted to meet the danger.

EXCLUSIVE POWER OF THE COMMONWEALTH.—Sec. 52 of the Constitution provides that:—

"The Parliament shall, subject to this Constitution, have

[1] *Bradfield* v. *Roberts*, (1899) 175 U.S. 291.
[2] *United States* v. *Reynolds*, (1878) 98 U.S. 145.

exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

"i. The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes."

Sec. 125 governs the determination and establishment of the seat of government; and the term "places acquired" seems to cover all lands the property in which becomes vested in the Commonwealth for any of the purposes committed to it, whether such property is acquired by voluntary dealings or by the exercise of compulsory power under sec. 51 (xxxi). It has been held that it embraces the property of the transferred State departments which became vested in the Commonwealth under sec. 85.[1]

The question of the nature of the power thus granted to the Commonwealth Parliament is of great importance. In the first place, does it constitute the Parliament the sole authority competent to exercise legislative power for such places, and remove them from the jurisdiction of the States, except so far as the Constitution has elsewhere continued temporarily the State authority? In the United States, exclusive legislative power over a place imports exclusive executive and judicial power also—"territory so placed becomes as extraneous to the State as if it were held by a foreign government." Or is it merely a power to enact such special legislation in respect to such places as their particular circumstances may appear to the Commonwealth Parliament to require, leaving them otherwise under the general legislation and jurisdiction of the State? In the case of *Rex* v. *Bamford*,[2] it was assumed that the former was the true meaning of the section. But it was held that the preservation of the operation of State laws, until the

[1] *Rex* v. *Bamford*, (1901) 1 S.R. (N.S.W.) 337.
[2] (1901) 1 S.R. (N.S.W.) 337.

Commonwealth Parliament otherwise provides (sec. 108), applied not merely to the substantive law, but also to the jurisdiction of Courts and the powers of the Executive of a State ; and that consequently a Court of the State of New South Wales had jurisdiction to try a person charged with an offence committed in a Post Office in New South Wales.

"ii. Matters relating to any department of the public service the control of which is by this Constitution transferred to the Commonwealth."

This must include departments which are transferred under the powers conferred by the Constitution. It follows of necessity that where the administration of a State department is taken over by the Commonwealth, the legislative control of the States should cease, and this appears to be the object of the provision. It does not imply that matters relating to new departments of the Commonwealth (*e.g.*, External Affairs, Treasury, or Home Affairs) are not within the exclusive power.

"iii. Other matters declared by this Constitution to be within the exclusive power of the Parliament."

This leaves at large the question what matters are under the Constitution within the exclusive power of the Commonwealth. The question arises mainly in relation to commerce, and it falls again to be considered in connection with the doctrine of "the immunity of instrumentalities." It is obvious that *primâ facie* the powers committed to the Commonwealth in respect to the organization of its own government are from their nature exclusive—they never did belong to the States, and no grant of "concurrent" power to the States can be inferred from a grant of power to the Commonwealth.

In addition to the provisions of sec. 52 (1) in respect to places, there are some other sections of the Constitution which more unmistakeably constitute the Commonwealth

the sole governmental authority over the territory with which they deal. Sec. 111 empowers the Parliament of a State to surrender any part of the State to the Commonwealth; upon such surrender and the acceptance thereof by the Commonwealth, that part of the State becomes subject to the exclusive jurisdiction of the Commonwealth; and by sec. 122 the Parliament may make laws for the government of such territory or of any territory placed by the Crown under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

CHAPTER III.

THE EXECUTIVE POWER OF THE COMMONWEALTH.

Sir William Anson introduces the subject of his second volume on the *Law and Custom of the Constitution* by the observation that "In every political society there must be some person or body which acts on behalf of the whole, which represents the state as dealing with other states, which represents its collective force and will in maintaining amongst its own citizens the rules which the society has made or accepted for the preservation of order and the promotion of the public welfare." In the history of Australia the want of such an authority to speak and to act for the whole was as potent a factor in producing union as the absence of a common legislative power. The authority must be continuous, and not occasional; it must be capable of prompt and immediate action; it must possess knowledge and keep its secrets; it must know discipline. In a word, it must have qualities very different from those which belong to the large representative and popular bodies which in modern times exercise legislative power.

It is characteristic of our methods that there has been small attempt to analyze the nature of the threefold division of governmental functions which we recognize. When

the distinction was being established, men were content to reason that this particular power belonged to the King in his Council, that to the King in his Courts, and that other to the King in Parliament. It was only after the lines of action were settled in England that men began to analyze for the benefit of others who had their own constitutional arrangements to make. The supremacy of Parliament has generally made it unnecessary to consider the distinctions with scrupulous accuracy, and the existence and undoubted validity of a number of anomalies has kept us from over refinement. It is for the King to put the law into operation and to admonish his subjects that they keep it; to execute the law by bringing offenders to justice, by maintaining and supporting Courts of justice, and by carrying out the judgments of those Courts. On the other hand, the King may not alter the law, may not make an offence where none is, may not establish new penalties or novel tribunals. These matters belong to the Parliament. Such are the lines upon which the distinction between executive and legislative power has been founded. The typical executive officers have been the sheriff and the constable.

But there is much more in government than mere execution of the law, whether enacted or unenacted; just as there is more in human life than the creation of legal relations. The state is a going concern; it has affairs which must be managed with prudence and judgment and which are not necessarily related to law in any other sense than that in which all conduct may be bounded by legal restraints. It is perfectly true that a very great part of this business of the state is regulated by law more than is the like business of private individuals; as an owner of property and as an employer of labour the state sets rules to its agents, and to a very great extent, in Australia at any rate, these rules are not mere matter of internal arrangement, but are matters of

definite legal right and duty cognizable in Courts of law. But were those laws directing and controlling the management of the state affairs repealed, the business would not itself come to an end; it would simply have to be carried on under conditions (to parody a once famous saying) of greater freedom and more responsibility by the agents of the state. In modern and settled times it is the conduct of the business of the state which men mean by government, the execution of the law is assumed as a thing of course; and the term "executive" has seemed little apt to describe functions which are so far removed from justice and police. Sir G. C. Lewis suggested that the term "administrative" would serve better to indicate the "stewardship" or "management" of government.

In speaking of the Executive Government, then, the term "Executive" must be understood in a very broad sense; and we are not to expect a complete statement of the functions of the Government in a legal instrument. For more than one reason Statutes defining the Constitutions of the Colonies have been almost silent on the subject of the powers as of the organization of the Executive. In the first place, the legislative power has included the power of making full provision for the execution of the law. Secondly, a large measure of executive power resides in the prerogative of the Crown, and has been conferred through prerogative acts and not by Statute, lest thereby the prerogative should be prejudiced. Finally, the organization of the Government, and the relations of the Ministry and Parliament in our system, are a very type of matters which are not under the continual direction of organic laws, but are freely organized as utility has suggested, or may suggest, within the ultimate bounds of law. The attempts which have from time to time been made to reproduce in terms of law for the Colonies some of the conventions of the British Constitution—as in the rela-

tions of the two Houses of the Legislature as to money bills—have not been very successful. Constitution Statutes for the Colonies, and even the prerogative instruments which accompany them, do no more than hint at the Cabinet System, and the delicate relations of the Crown and Parliament. They differ from the British Constitution on which they are modelled, principally in this—that they do hint at the Cabinet System. They contain some provisions which imply a Parliamentary Executive; they speak of "officers liable to retire upon political grounds," even of "responsible Ministers of the Crown." It would be impossible to frame a Constitution upon the law of Victoria such as the Convention at Philadelphia in 1787 framed upon the law of the British Constitution as expounded by Blackstone.

The first duty of the Executive appears to be to represent the Commonwealth whenever that is necessary, whether as a political organism, or as a juristic person making contracts and appearing as a party in Courts of justice. For this, no express power appears to be necessary; it follows of necessity from the establishment of the Commonwealth as a new political community. But a very serious and important question has arisen as to the extent of this representation. The Colonial Office[1] has laid it down that the sphere of the Commonwealth Executive is measured, not by the powers committed by the Constitution to the Commonwealth Parliament, but by the responsibility of the Commonwealth considered as a single political community, a responsibility which, according to this view, extends to all matters occurring within the Commonwealth and affecting external communities. Thus, where the question is as to the observance of a treaty, the Commonwealth Executive is the authority to which alone the Imperial Government can address itself, without regard to whether

[1]Cf. Keith, *Responsible Government in the Dominions*, pp. 170-171.

the Commonwealth Parliament is, under the Constitution, the proper authority to make laws upon the subject, or whether the Commonwealth Executive has any power to do more than address communications to the State Executive. It would follow that in the Imperial Conference the Commonwealth Executive alone can appear for any part of Australia, though the matters under discussion (*e.g.*, uniformity or recognition of professional qualifications) are not, as a matter of constitutional law, within the sphere of the Commonwealth Government at all. This matter has been considered under the head of The States, and it is there suggested that the analogy to international law and the relations of independent states is not sound.

In the next place the Constitution itself declares that the executive power extends to the execution and maintenance of the Constitution, and of the laws of the Commonwealth (sec. 61).

The most common function of the Executive Government of the Commonwealth is, of course, to execute the laws made by the Commonwealth Parliament, or, in the case of those Departments of Administration transferred from the States, to carry out the laws of the States until legislative power thereon is exercised by the Parliament. It cannot, however, be conceded that the Commonwealth Executive has nothing to do with the subjects of Commonwealth legislation except to carry out its own legislation upon them. In relation to all such matters, the Commonwealth Executive does, it is submitted—and to this extent an unqualified adhesion may be given to the views of the Secretary of State—represent the Commonwealth and all the States to the outside world, whether there has been any Commonwealth legislation or not: the Commonwealth Government has become responsible therefor, and if State authority

continues to be exercised over the matter, that is merely because the paramount authority permits.[1]

Further, the Constitution recognizes, if it does not establish, the Cabinet system in the Commonwealth, and the responsibilities of the Executive extend to the consideration of the subjects committed to Parliament, and, if need be, to the initiation of legislation upon them. This may not be unimportant in relation to the power to issue Commissions of Inquiry.

The power to execute and maintain the Constitution does not mean that the Executive Government may do all acts necessary to carry out any provision of the Constitution; it must be construed, like everything else in the Constitution, by reference to the established principles of English law, which will in many cases point to the Legislature or the Judiciary as the appropriate organs of action. But where a power or duty committed to "the Commonwealth" is of such a kind as is according to common law exercise-able by the Executive, the Commonwealth Executive is empowered to take such action as the common law allows. Thus, the provisions of sec. 119 impose on the Commonwealth the duty of protecting every State against invasion, and, on the application of the Executive Government of the State, against domestic violence. It will be for the Commonwealth Executive to take proper measures to carry out this duty, by the application of the forces at its disposal, or by getting from Parliament such other means as may appear to be necessary.

In pursuance of its duty to maintain the Constitution and

[1] Where, however, the matter is actually governed by law (State or Imperial), which designates the State Executive as the authority for carrying it out, the Commonwealth Executive cannot, independently of legislation by the Commonwealth Parliament, substitute its own action for that of the State Executive. See *Ex parte Gerhard* (*No.* 3), (1901) 27 V.L.R. 655; *M'Kelvey* v. *Meagher*, (1906) 4 C.L.R. 265.

the law of the Commonwealth, the Executive may, without any further statutory authority, take whatever measures are ordinarily allowed to the Executive by the common law, to protect every branch and Department of the Federal Government in the performance of its duties. The nature and extent of this power is well illustrated by two American cases—*In re Neagle*[1] and *In re Debs*.[2]

In *Neagle's Case*, information had been received by the Law Department of an intended attack to be made by one Terry upon Justice Field, Circuit Judge of the United States for California, and Neagle was ordered as Deputy-Marshal to attend the Judge for his protection. The anticipated attack was made, and Neagle shot Terry. Thereupon an information was sworn in the State Court against Neagle, who was arrested. He sued out a writ of *habeas corpus* in the Federal (Circuit) Court, where it was held that he was in custody for "an act done in pursuance of a law of the United States," and that this custody was in violation of the Constitution and laws of the United States. It was accordingly ordered that he be discharged. On appeal to the Supreme Court, it was objected that there was no Statute authorizing such protection as that which Neagle was instructed to give Justice Field; but it was held, nevertheless, that it was within the power and duty of the Executive to protect a Judge of any of the Courts of the United States when there was just reason to believe that he would be in personal danger while executing the duties of his office. Answering the argument that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States, Mr. Justice Miller said:—"We hold it to be an incontrovertible principle that the Government of the United States may by physical force exercised through

[1](1889) 135 U.S. 1.

[2](1895) 158 U.S. 564.

its official agents execute on every foot of American soil the powers and functions that belong to it. That necessarily involves the power to command obedience to its laws, and hence the power to keep order to that extent."

The especial significance of the case lies not in the question of the guilt or innocence of the defendant—*i.e.*, whether there was any justification under the law of California—but in the determination that such a matter could not be left to the State laws and tribunals. The duty of the Federal Executive to protect its officers was an inherent duty not requiring any Statute for its foundation; and the Legislature having committed to the Courts the power of issuing the writ of *habeas corpus*, that remedy was available for the support of the Executive.

In *Re Debs*,[1] it was held that the Executive, having the duty of protecting the mails and inter-State commerce, might, in case of interference with transit, deal with the emergency either by the use of force, or by the prosecution of offenders in a criminal Court, or by applying to the Court for a writ of injunction. All these means were open to it, and it was a matter of executive discretion which of them should be employed.

The express provisions of the Constitution on the subject of the executive power of the Commonwealth, and the declaration that this power, vested in the Crown, is exerciseable by the Governor-General as the King's representative, appear to avoid a difficulty that has arisen in respect to the source and extent of the Executive power in the Colonies. Legislative power was conferred by the *Constitution Acts* upon an authority which it was the principal object of those Acts to establish and define. Of Executive power in general nothing was said, though a few specific powers were conferred upon the Governor. The undoubted legal position being that the

[1] 158 U.S. 564.

Executive powers of the Crown were applicable in the Colony, the question arose—by what authority were they committed to any officer there? *Primâ facie*, the answer would be that the Governor represents the Crown in the Colony, and could in the name of the Crown make whatever provision the Crown itself could make. But as against this, there was the repeated declaration of the Privy Council that the Governor was no Viceroy, no general delegate, but merely the grantee of the special powers contained in the prerogative instruments governing his office.[1] Accordingly, in the case of *Toy* v. *Musgrove*[2] the majority of the Supreme Court of Victoria held that the Executive Government of Victoria had no power to exercise the Crown's prerogative (which was assumed to exist) of excluding aliens from the Colony, no grant of such a power being found in any of the constitutional instruments from which it was held that the Governor's only powers—apart from Statute—were derived. Higinbotham C.J. dissented, holding that the Executive power in the Colony was not dependent on the special grants contained in the Letters Patent, Commission, and Instructions, and that the Executive Government in Victoria had "a legal right and duty, subject to the approval of Parliament, and so far as may be consistent with the Statute law and the provisions of treaties binding the Crown, the Government, and the Legislature of Victoria, to do all acts and make all provisions that can be necessary and that are in its opinion necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria."[3] The view of the Chief Justice appears to be confirmed by Mr. A. Berriedale Keith, of the

[1] Cf. *Cameron* v. *Kyte*, 3 Knapp 332; *Hill* v. *Bigge*, 3 Moore P.C. 476.

[2] (1838) 14 V.L.R. 349.

[3] *Ib.*, at p. 397.

Colonial Office, who may perhaps be assumed to express the official view when he says that the Letters Patent "delegate to him (*i.e.*, the Governor) in the fullest manner the general executive power of the Crown in the Colony by directing him to perform all the acts pertaining to the post of Governor in the Colony" (p. 29), and that "the powers assigned to the Governor cover all the ordinary executive authority of the Crown" (p. 30).[1]

This view clearly involves the existence as a matter of constitutional law of a distinction between the powers of a local Executive and the executive powers of the King as the head of the Imperial Government, and this distinction was in fact emphatically stated by the Chief Justice. It can be no part of the general executive power of a Colony or of the Commonwealth to declare war or make peace, to annex or cede territory, or to make treaties with foreign Powers. It may be a difficult question to determine as to some powers, either from their nature, as for example, the admission or exclusion of aliens, or their history, as the chartering of corporations, coinage, and the Post Office—whether they belong to the one head or the other. The question whether the pardoning power and the power to appoint a Deputy

[1] Keith, *Responsible Government in the Dominions.* The Chief Justice was also of opinion that this general power of the Governor as local Executive was not derived by delegation from the Crown, but was implied in the *Constitution Statute* and *Constitution Act*, and that this statutory authority obscurely but sufficiently established that it was exerciseable only through his Ministers. In other words, that responsible government with its incidents was established by Statute. It followed that the Letters Patent or other prerogative instruments conferring either generally or specially any of the local executive powers were superfluous and improper, and any instructions or directions as to the mode of exercising these powers were contrary to law. In both these matters the majority of the Supreme Court was against the Chief Justice; and Mr. Keith's position in no way involves the acceptance of the Chief Justice's opinion on these matters. The Chief Justice's views on responsible government are also set out in a memorandum addressed by request to the Secretary of State (Lord Knutsford), which will be found in the *Memoir of George Higinbotham*, by Edward E. Morris (Macmillans).

belong to the Governor-General as part of the executive power and without special grant, has been referred to in considering the office of Governor-General, where also are considered some questions as to the relation of the statutory powers of the Governor-General under the Constitution, and the powers committed to him by the special grant of the Crown.

CHAPTER IV.

THE JUDICIAL POWER OF THE COMMONWEALTH.

THE Constitution, which has committed legislative and executive powers to their appropriate organs, vests "the judicial power of the Commonwealth" in Courts (sec. 71). It thus becomes necessary to determine what is meant by this expression, since the separation of powers in the Constitution imports that whatever is included in the grant, may not be exercised except by the Courts as constituted under the Constitution,[1] and that no power can be exercised by the Courts which is not within the ambit of the judicial power.

Definitions of judicial power, as of legislative and executive power, abound,[2] and the general nature of each is understood. But most of the definitions of judicial power are themselves little more than re-statements of the term itself. That the judicial power 'adjudicates,' that it 'administers and interprets the law,' that it 'declares the law,' that it decides disputes and contests—all these statements either tell us no more than does the expression 'judicial power' or state what is not true exclusively of the judicial department.

[1] *Kilbourn* v. *Thompson*, 103 U.S. 192; *Huddart Parker* v. *Moorhead*, (1909) 15 A.L.R. at p. 249, per Griffith C.J.

[2] A number are to be found in Cooley's *Constitutional Limitations*, Chapter V.

Laws impose duties upon and establish rights in persons who fall within what Bentham calls the "dispositive facts," that is to say, facts upon which the rights and duties are conditioned. Whether a particular person comes under the duty or has the right, is a question which arises when it is sought to enforce the duty against him or when he claims the right against some other person or persons. In an orderly system of government, the application of the "sanction" of the law is preceded by an inquiry, which investigates the truth of the facts, interprets the law applicable to those facts, and proceeds to a declaration in accordance with the law so interpreted upon the facts as found. The declaration is then operative and enforceable in accordance with its terms, pronouncing the penalty, awarding the claim, commanding or forbidding something to be done, declaring the right, or dismissing the proceedings.[1] But in any case, it is a juristic act establishing certain definite legal results. This investigation is a judicial proceeding and the determination a judicial act.

One other feature must be added. Acts of authority purporting to establish legal relations—whether the imposition of a duty or the declaration of a right—are either provisional and tentative, or conclusive and binding. It is characteristic of the determinations of Courts, acting in their jurisdiction, that they are conclusive and binding until nullified or amended by the appropriate revising authority (if any), and everything done under them is valid and lawful. In the English system it is a fundamental principle that acts of an executive or subordinate legislative authority have not this character; we do not recognize the doctrine, so well established in French law, that the *acte*

[1] "The nature of the final act determines the nature of the previous inquiry," per Holmes J. in *Prentis* v. *Atlantic Coast Line*, 211 U.S. at p. 227, cited by Isaacs J. in *Huddart Parker* v. *Moorhead*, (1909) 15 A.L.R. at p. 260.

administratif, as such, is valid and operative until it is revoked by competent authority. Consequently, as a general rule, the validity of any executive order or act depends, not on the decision of the executive body or officer on the facts or the law, but upon whether a correct view has been taken of the law or the facts. In all such cases, therefore, where it is necessary to invoke the Courts to give effect to the executive act, the whole question of validity is at large, and if the executive act itself is the invasion of any right in the citizen, that citizen may seek his remedy against the officer or other authority, unprejudiced by the view that the officer has taken of his duties or powers.

There are, however, a number of matters in which determinations of bodies, not Courts, have been made binding and conclusive in particular cases.[1] Many matters—and in modern law, an increasingly large number of matters—are committed to the discretion of authorities of one kind and another, and in such cases the authority acts or refrains from action upon an exercise of its own judgment and upon its own determination of facts. This power may be one which is committed to the discretion of the donee in such a way that he has an "arbitrary" power over the subject matter, exerciseable at his will.[2] Or the power may be one which approximates to the action of Courts, not merely in the decisory character of the act itself, but also in the manner of its exercise—the discretion may be a "judicial discretion," surrounded by these safeguards which belong to the proceedings of Courts—a hearing of persons affected, an authority unbiassed by interest, and so on.[3] In either case, though the act may not be challengeable collaterally, it is subject to the same control which is

[1] Cf. *Rex* v. *Woodhouse*, (1906) 2 K.B. at p. 535, per Fletcher Moulton L.J.
[2] Cf. *R.* v. *Arndel*, (1906) 3 C.L.R. 557 ; see per Barton J. at p. 575.
[3] Cf. *Sharp* v. *Wakefield*, (1891) A.C. 173.

exercised by the superior Courts over inferior tribunals by means of the writ of *certiorari*. While the Court will not entertain an appeal from the discretion of the authority so as to substitute its own determination for that of the authority, it will inquire whether the circumstances have arisen which call for the exercise of the discretion, *i.e.* on which its "jurisdiction" depends,[1] (unless, as may happen, those circumstances also have been committed to the determination of the authority in question),[2] whether the authority was competent and properly constituted, whether (in the second class of case) its proceedings were conducted in a way consistent with the due exercise of the discretion according to its nature; and whether its action was based upon facts excluded by law from its consideration or the failure to consider facts which by law it should have considered.[3] If the Court finds that the discretion of the authority is vitiated in any of these ways, it may "quash" or annul the act unless the Legislature has unequivocally deprived it of this power.[4]

These acts are frequently spoken of as "judicial."[5] In the first case, the use of the term is explained by the analogy to judicial proceedings which arises from the conclusiveness of the determination, and by the fact that in the English system, this conclusiveness, which belongs to the findings of Courts, rarely attends the findings of executive authorities. In the second case, there is of course a closer analogy—the procedure approximates to that of Courts, and the use of the term "judicial" in this connection is pro-

[1] See *Colonial Bank of Australasia* v. *Willan*, L.R. 5 P.C. 417, 442.

[2] See *The Queen* v. *Commissioners of Income Tax*, 21 Q.B.D. 313, at p. 319.

[3] See *Sharp* v. *Wakefield*, (1891) A.C. 173, and cases there cited.

[4] *E.G.*, see *Ex parte Ringer*, *The Times*, July 13th, 1909, probably to be reported in (1909) 2 K.B.

[5] See generally per Fletcher Moulton L.J. in *R.* v. *Woodhouse*, (1906) 2 K.B. at p. 535.

moted by the fact that many of the functions in question belonged to Justices of the Peace, who of course exercised an important judicial power in the administration of criminal justice, and who also performed a number of non-discretionary, "ministerial" acts, wherein their judgment was not conclusive, and which had to be distinguished from their other acts by the fact that they might be challenged collaterally in actions brought for acts done under them.

It will thus be seen that in English law, the test to which an official act is submitted for the purpose of ascertaining its "judicial" or "non-judicial" character, is whether it is a determination of the matters involved in it.

The position is put very clearly by Palles C.B. in his judgment in *Rex* v. *Local Government Board*[1]:—"I have always thought that to erect a tribunal into a Court or jurisdiction so as to make its determinations judicial, the essential element is that it shall have power by its determinations within jurisdiction to impose liability or affect rights. By this I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist or the right be affected although the determination be wrong in law or in fact. It is otherwise with a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened in order to know whether he shall exercise his power, his determinations do not bind. The happening of the contingency may be questioned in an

[1](1902) 2 Ir. Rep. at p. 373. The opening words of the passage are cited by Isaacs J. in *Huddart Parker* v. *Moorhead*, (1909) 15 A.L.R. at p. 260. See also *Groenveld* v. *Burwell*, (1899) 1 Lord Raymond, p. 465, per Lord Holt. Cf. Field J. in the *Sinking Fund Cases*, 9 Otto. at p. 761 :—"Whenever an Act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such Act is to that extent a judicial one, and not the proper exercise of legislative functions."

action brought to try the act done under the alleged exercise of power. But where the determination binds, although it is based on an erroneous view of law or facts, then the power authorizing it is judicial. It may be proper to state, of course, that the correlative proposition is not true. A judicial act by an inferior Court does not always bind even the parties to it. To do so, it must be within jurisdiction, and therefore if the determination be as to the limits of its jurisdiction, and be erroneous so that the act is in excess of jurisdiction, it will not bind." It may be added that the word "ministerial" in this passage is clearly used as equivalent to "administrative" or "executive," and not in the narrower and more common sense which excludes discretion.

It is clear that the mere giving of an *opinion* is not a judicial act,[1] even though it be given by a Judge after solemn argument;[2] nor is a mere *report* or *recommendation* upon which somebody else may or may not take action.

The person by whom the function is performed does not affect its nature. A branch of the Legislature investigating a breach of privilege, or conducting an inquiry into the conduct of a member with a view to his expulsion, or inquiring into the validity of an election—these being matters in which it has authority, and conclusive authority —is engaged in judicial duties. A proceeding before a Court Martial, an executive authority with power to award punishments, is strictly a judicial proceeding.[3]

The mere power to inquire, and to require testimony upon an inquiry, is not judicial power. Inquiry is incidental to judicial power, but it is equally incidental to other

[1] *R.* v. *Sheahan*, (1898) 2 I.R. 683.

[2] Cf. *Ex parte the County Council of Kent*, (1891) 1 Q.B. 725.

[3] *Dawkins* v. *Lord Rokeby*, L.R. 8 Q.B. 255.

powers of government.[1] The Executive and the Legislature alike are entitled to seek information to guide them in the exercise of their powers; and that which is non-judicial when exercised without coercive power does not change its nature when the information can be required.[2]

It is unnecessary to refer particularly to the cases in which, in England and the Colonies, inquiries are conducted by Royal Commissions or Parliamentary Committees; their light on the subject is obscured by the fact that Royal Commissions, in England at any rate, are in general without compulsory powers, that the Governments are plenary governments, and that there is no formal separation of powers. But in the United States it is established that the extensive inquisitorial powers conferred upon such bodies as the Inter-State Commerce Commission are *intra vires*, as incident to their administrative duties.[3] Nor do those inquiries become judicial because the course of them may disclose the commission of some offence,[4] or involve the investigation of some matter of private right. There are, however, opinions of eminent lawyers which suggest that an inquiry instituted by the Crown for the purpose of ascertaining whether an offence has been committed and by whom, or whether any penalty or forfeiture has been incurred, is an invasion of the judicial power of the Courts even though the inquiry is not for the purpose of awarding

[1] *Huddart Parker* v. *Moorhead*, (1909) 15 A.L.R., at p. 250, per Griffith C.J.; at p. 258, per O'Connor J. *In re Chapman*, 166 U.S. 668. Cf. inquiries of Select Committees in England upon Private Bills and the preliminary inquiries in the case of provisional orders. *R.* v. *Hastings Board of Health*, (1865) 6 B. & S. 401. *In re Local Government Board*, (1885) 16 L.R. (Ireland) 150; 18 L.R. (Ireland) 509.

[2] *Clough* v. *Leahy*, (1904) 2 C.L.R. 139. There is a *Commonwealth Royal Commissions Act* (No. 12 of 1902).

[3] *Inter-State Commerce Commission* v. *Brimson*, 154 U.S. 447.

[4] *Hale* v. *Henkel*, 201 U.S. 44; Cf. *Cock* v. *A.-G. and another*, (1909) 28 N.Z.L.R. 405, at p. 425.

any legal penalty,[1] and the Supreme Court of New Zealand has very recently (May, 1909) decided this.[2] If this be so, it would follow, in a system where there is a legal separation of powers, that such an inquiry could not be committed to any organ save that to which the judicial power is entrusted under the Constitution. Consistently with this, the Supreme Court of the United States has held that an inquiry by the Legislature into the conditions under which a compromise of legal claims was effected in an insolvency, being an inquiry into a matter which could only be effectively dealt with by the Courts, was *ultrâ vires* so far as concerned any attempt to compel the attendance or testimony of unwilling witnesses.[3]

The question of the legality of Executive inquiries has come under the consideration of the High Court of Australia in two cases, where they have been challenged as an exercise of or interference with judicial power. In *Clough* v. *Leahy*,[4] the Governor of New South Wales had issued a Royal Commission to inquire into the formation, constitution, and working of a particular industrial union, to

[1] *E.g.* Sir James Scarlett on Municipal Corporations Commission, *Annual Register* 1833, p. 15ℰ ; Sir G. J. Turner, Sir R. Bethell, H. S. Keating, and J. R. Kenyon on Oxford University Commission, *Sessional Papers* 1852 (English), vol. xxvi., pp. 331, 337 ; Bethell and Kenyon, *ib.* p. 341. The Opinion of the Law Officers of the Crown (Sir J. Dodson, Sir A. G. Cockburn, and Sir W. P. Wood) does not disagree as far as inquiry into offences is concerned (*ib.* p. 338). See also *The Case of Commissions of Inquiry*, 12 Co. Rep., c. 31 ; *Law Review* (1851), vol. xv., p. 269 ; and Clark's *Constitutional Law*, c. 12.

[2] *Cock* v. *A.-G. and another*, (1909) 28 N.Z.L.R. 405.

[3] *Kilbourn* v. *Thompson*, 103 U.S. 192.

[4] (1904) 2 C.L.R. 139. In *Cock* v. *A.-G.* (28 N.Z.L.R. 405) the New Zealand Court while "not questioning the decision," is unable to agree with some of the reasons by which it was arrived at (p. 422). The Court considers that the *examination* as well as the *determination* of matters of right before extraordinary tribunals is within the mischief of the 42 Edward III. c. 3, and the Act for the Abolition of the Star Chamber 16 Car. 1 c. 10 (p. 423).

consider whether it was an evasion of two Acts of Parliament, whether it hampered the Industrial Arbitration Court from doing justice in disputes arising in the pastoral industry, and whether any alteration of the law was necessary in this connection. On the prosecution of a witness for refusing to give evidence, it was argued, and held in the Supreme Court of New South Wales, that the object of the Commission being solely to inquire into matters already adjudicated upon by the Arbitration Court, and over which that Court had complete power, the Royal Commission was "a usurpation of the jurisdiction of a Court lawfully constituted to deal with the same matter," and was illegal. On appeal, the High Court held that there was no warrant for saying that any inquiry of itself was unlawful, even though it related to guilt or innocence, or to private right, and was held in public. In this case, of course, there was no formal division of powers to be considered, but the opinion of the Court is clear that the mere inquiry into guilt or innocence, even when backed by a power to compel testimony, is not a judicial proceeding, or a usurpation of judicial power.

In the case of *Huddart Parker* v. *Moorhead*,[1] the question was as to the validity of sec. 15 (*b*) of the *Australian Industries Preservation Act* 1906-7, giving power to the Comptroller-General of Customs, if he believed, or if he was informed in writing, that an offence had been committed under that Act, to interrogate persons in relation thereto. The High Court held that the power of inquiry was not of itself judicial power; that preliminary inquiries of this nature in relation to criminal offences had been held to be non-judicial, even when conducted by justices of the peace (*Cox* v. *Coleridge*[2]); and that the provisions in question were *intra vires* as equipping that portion of the Executive

[1] (1909) C.L.R.; 15 A.L.R. 241.

[2] 1 B. & C. 50.

which administered the *Australian Industries Preservation Act* with powers of effective inquiry, which were particularly needed in the administration of an Act of that kind, and were no more than was familiar in Acts in aid of the Administration, *e.g.*, Customs, Audit, Census, Immigration Restriction (O'Connor J.). In the words of Isaacs J., the case was one of "mere investigation with a view to inform the mind of the Executive whether the law has or has not been observed, and if not, whether the nature of the contravention is such as to merit further action."

The section under discussion also provided that while no person was to be excused from answering questions on the ground that the answer might tend to incriminate him, his answer should not be admissible in evidence against him in any "proceeding other than a proceeding for an offence against this part of this Act." It was contended that this provision showed that the power in question was really not in aid of executive but of judicial proceedings, and was in the nature of discovery, a process always treated as part of judicial power. On this the Court held that as there were no judicial proceedings pending, the proceeding was essentially different from discovery in such proceedings. It is to this argument that the observation of the Chief Justice appears to be directed: "The exercise of this power (*i.e.*, judicial power) does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not), is called upon to take action."[1] O'Connor J. goes on to indicate a limitation to the power given by the section. He affirms that "when the Comptroller-General makes his requirement under sec. 15 (*b*) there can be no proceeding pending in a Court. He is not empowered to use the section with reference to an offence when once it has been brought within the cognizance of the

[1] 15 A.L.R. at p. 250. See also O'Connor J. at p. 259.

Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in the Court by the Constitution."[1]

The determination of the nature of "judicial power" is, however, a part only of the problem as it presents itself under the Constitution. It does, indeed, show the limit of what could belong, or be committed by the Parliament, to the Commonwealth judiciary, for "the judicial power of the Commonwealth" is necessarily limited by the essential nature of judicial power itself. But it does not follow that everything which is in its nature judicial, or everything which, as being itself a determination of some matter not to be impugned collaterally, English Courts have declared to be "judicial," is a part of "the judicial power of the Commonwealth," as that expression is used in sec. 71 of the Constitution.

In construing the expression under consideration we naturally turn to the cognate provision in the Constitution of the United States, which declares that "the judicial power of the United States shall be vested in one supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III., sec. 1). But in dealing with the American cases, regard must be had to certain points of difference between the two Constitutions which affect their application in Australia. In the first place, there are, as has been already pointed out, a number of provisions in the United States Constitution designed to protect the rights of the individual; and of these perhaps the most important—certainly the most important in this connection—is the provision in Article V. of the Amendments that no person shall "be deprived of life, liberty, or property without due process of law." This imports, in general, a judicial trial; and the consequence is that this

[1] 15 A.L.R. at p. 259.

provision, with its emphatic terms of prohibition, looms larger in the reports than the inferential prohibitions which arise from the separation of powers in the Constitution, and tends to obscure the significance of that separation.[1] On the other hand, it is not, of course, to be ignored that the one Constitution contains and the other does not contain an express prohibition of this kind, and it is not to be inferred that every case which falls under "due process of law" is an authority upon the extent of the judicial power. In the second place, in spite of the resemblance between sec. 71 of the Commonwealth Constitution and Article III., sec. 1, of the United States Constitution, the actual content of the judicial power may have to be determined by different considerations. In the United States Constitution its limits are expressly defined by the declaration of sec. 2, clause 1, that it "shall extend to all cases, in law and equity arising," &c. In the Commonwealth Constitution the limits are nowhere thus defined. This difference is adverted to by Isaacs J. in *Huddart, Parker & Co.* v. *Moorhead*,[2] where he says:—"The judicial power of the United States is not only vested in the Courts, but is limited in extent to the ten descriptions of cases specified in the Constitution, so that the test of what is 'judicial power' is not to be found by merely ascertaining the ambit of the judicial power which the Courts there possess."

It is evident, then, that American cases on this subject must be used with more than usual caution. In a country like Australia, with a history of Parliamentary

[1] On the character of the first Amendments to the U.S. Constitution, see Field J. in the *Sinking Fund Cases*, 99 U.S. 700, at pp. 763-4, and Brewer J. in *Monangahela Navigation Co.* v. *U.S.*, 148 U.S., at p. 324. The questions of invasion of judicial power and deprivation without due process of law are considered together in *Taylor* v. *Porter*, 4 Hill N.Y. 140; *Murray* v. *Hoboken Land Co.*, 18 Howard 272, at p. 275. See also *Kilbourn* v. *Thompson*, 103 U.S. 168, at p. 182.

[2] 15 A.L.R. 241, at p. 260.

sovereignty and not of people's sovereignty, and without a background of enumerated and implied individual rights secured against legislative invasion, there is some presumption in favour of the power of the Legislature as against that of the other organs of government, and Australian Courts may not follow the American Courts into all the niceties of what ultimately becomes a very fine distinction. Admitting that Parliament could not pass *ex post facto* laws[1] which made criminal acts which were lawful when done, it does not follow that Parliament is prohibited from enacting any law which has a retrospective operation, as a declaratory act.[2] The retrospective operation of *Tariff Acts* has been expressly upheld by the Supreme Court of Queensland and the Privy Council in *Colonial Sugar Refining Co.* v. *Irving*[3] and by the High Court of Australia in *Donohoe* v. *Britz*.[4]

The question then is—what is "the judicial power of the Commonwealth" within the terms of sec. 71? Even in those Constitutions in which the separation of powers has been accepted as fundamental, by no means every function which is in its nature judicial is exclusively assigned, or permitted, to the judicial organ. Therefore, although neither history nor usage nor practical convenience can determine the nature of "judicial power," logical consistency may have to yield something to history and familiar and established practice in determining what is the judicial power of the Commonwealth committed to the Courts by

[1]For the nature of *ex post facto* laws see the judgment of Willes J. in *Phillips* v. *Eyre*, L.R. 6 Q.B. 1. Cf. *Donohoe* v. *Britz*, (1904) 1 C.L.R., p. 402, per Griffith C.J. :—"It does not follow (from the validity of the Act there sustained) that it (*i.e.*, the Parliament) had the power to make unlawful an act which was lawful at the time it was done."

[2]Cf. Quick and Garran, p. 722 :—"The Legislature may *over-rule* a decision though it may not *reverse* it."

[3](1903) S.R. (Q.) 261; L.R. (1906) A.C. 360.

[4](1904) 1 C.L.R. 391.

sec. 71.[1] Striking illustrations may be found in the United States, where the Supreme Court has held that Congress may commit to justices of the peace the trial of petty offences ordinarily punishable on summary conviction,[2] or to State officers such functions connected with judicature as are not ordinarily committed to Courts of record,[3] though the justices are not within the constitutional provision concerning the organization of Courts, and though federal judicial power cannot in America be vested in State tribunals. Illustrations may be found also in the Commonwealth Constitution itself. Sec. 47 commits to the House in which the question arises (until the Parliament otherwise provides) all questions of disputed elections, the qualification of members, and the existence of vacancies; and sec. 49, declaring the privileges of the Parliament, enables the Senate and the House to exercise respectively the power of punishing acts determined by it to be a breach of privilege.

The power to establish Courts Martial under the *Defence Acts* is a power to create tribunals to exercise a function which is strictly judicial, as already pointed out.[4] Yet of these tribunals it is said in the United States that "although their legal sanction is no less than that of the Federal Courts, being equally with them authorized by the Constitution, they are, unlike these, not a portion of the judiciary of the United States. , ... Not belonging to the judicial branch of the Government, it follows that Courts martial must appertain to the executive department, and they are in fact simply instrumentalities of the executive

[1] See *e.g.*, *Murray* v. *Hoboken Land Co.*, 18 Howard 272, and the judgment of Cooley J. in *Weimer* v. *Bunbury*, 30 Michigan 201, 212, Thayer's *Cases in Constitutional Law*, p. 1203.

[2] *Callan* v. *Wilson*, 127 U.S. 549, 552.

[3] *Robertson* v. *Baldwin*, 165 U.S. 275, 279.

[4] Cf. *Dawkins* v. *Lord Rokeby*, L.R. 7 H.L. 744; 8 Q.B. 255. See *Defence Act* 1903, Part VIII.

power provided by Congress for the President as Commander-in-Chief to aid him in properly commanding the army and navy, and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."[1]

Indeed, it must be admitted that there are many matters within the federal sphere which are "judicial" for the purpose of a *certiorari*, and yet are not within the judicial power of the Commonwealth; matters which may be committed to an administrative authority with a power of determination. The issue of licences, or other grant of privileges, seems primarily, at any rate, a matter for administrative rather than judicial action, and the fact that it has to be performed with a fair and just mind, and without bias, from interest or other cause, does not appear to alter its essential nature. That such proceedings, and many others to which *certiorari* is applicable, differ from the ordinary proceedings in Courts of justice is now admitted by the highest authority.[2] They have, indeed, the "binding" force characteristic of judicial determinations—a man who had a licence granted by a biassed or interested bench of justices, or one which might be quashed on other grounds by *certiorari*, could not be convicted of trading without a licence. They seem, however, to be more properly described as administrative acts to be performed in a judicial way.[3] Even in the United States, where the matter rests not merely on the separation of powers, but also on the provision that property shall not be taken without due process of law, it is held that some administrative determinations are operative and binding in the sense that they may not

[1] Thayer's *Leading Cases in Constitutional Law*, citing *Winthrop's Military Law*, pp. 52-3.

[2] Cf. *R.* v. *Woodhouse*, (1906) 2 K.B. 501, per Vaughan Williams L.J. at pp. 510-513, Fletcher Moulton L.J. at p. 535.

[3] *Royal Aquarium* v. *Parkinson*, (1892) 1 Q.B. 431.

be impugned in any collateral proceeding, except as to the jurisdiction of the officer.[1] This has gone so far as to hold that an administrative process authorizing the seizure of property, in satisfaction of some claim by the Government (as against a taxpayer or a public accounting officer), is itself conclusive evidence of the facts recited, and of the authority, and so a complete authority for action taken under it.[2] In this case the Court attached great importance to usage and history in proceedings for enforcing the debts in question; and it is to be noticed that the Act of Congress did make provision for a direct review of the administrative determination.

There are, again, some matters which are essentially political rather than legal, and are therefore primarily under the control of the political departments. The admission of aliens is one such matter; the observance of treaties and claims arising therefrom is another. It has been held in the United States that Congress may commit to Executive officers the determination of the whole of the questions upon which the admission of an alien depends,[3] or claims arising out of the provisions of a treaty.[4] But where a Statute went further, and, besides committing to the Executive officer the exclusion of the alien, also authorized him to commit the alien to punitive imprisonment, it was deemed to extend beyond matters political, and to vest in the Executive a portion of

[1] See Goodnow's *Administrative Law of the United States*, p. 335.

[2] *Murray* v. *Hoboken*, 18 Howard 272.

[3] *U.S.* v. *Ju Toy*, 198 U.S. 253, collects the principal cases on this subject. That case determines that the decision of the Executive is conclusive, even of alienage. The conclusiveness of the Executive determination, however, is dependent upon the supposition that there has been a hearing in good faith, and the Courts have to vindicate this right: *Chin Yow* v. *U.S.*, 208 U.S. 8. The Privy Council has held that at common law no alien has any right to enter British territory, so that his exclusion becomes purely a political matter: *Musgrove* v. *Toy*, 1891 A.C. 272.

[4] *U.S.* v. *Ferrara*, 13 Howard 40.

the judicial power of the United States; *pro tanto* it was void.[1]

Claims against the Government itself are of this class—the Government might decline to recognize such claims at all, and, agreeing to recognize them, may fitly commit to its officers the investigation of such claims, and withhold them from judicial determination altogether.[2]

The class of case here referred to—matters presenting a question fit for judicial determination and yet cognizable by an Executive authority—stands in a curious position in relation to the constitutional separation of governmental powers. *Ex hypothesi*, the question is not essentially one for judicial determination, as whether A has committed a crime or whether Blackacre belongs to C rather than to B. Not being of this nature, it would appear *primâ facie* that the Courts could not have cognizance of it: that its determination is no part of the judicial power, and that it cannot be taken from the department of government to which from its nature it belongs. Where, however, the matter is capable of being presented in such a fashion as to be fit for adjudication, it is conceded that the Legislature may so submit it, if it pleases. But if a submission is made, it must be complete, and a matter cannot be permitted to hover between the judicial and the executive or legislative departments of government. This is well illustrated in the history of claims against the Government in the United States.[3] Such claims may be withheld from

[1] *Wong Wing* v. *U.S.*, 163 U.S. 228. Cf. *Groenvelt* v. *Burwell*, (1699) 1 Lord Raymond at p. 467 :—" Where a man has power to inflict imprisonment upon another for punishment of his offence, there he hath judicial authority" (per Lord Holt).

[2] *Hayburn's Case*, 2 Dall. 409; *U.S.* v. *Yale Todd*, 13 Howard 52*n*; *U.S.* v. *Ferrara*, 13 Howard 40; *Gordon* v. *U.S.*, 117 U.S. 697.

[3] *Hayburn's Case*, 2 Dall. 409; *U-S.* v. *Yale Todd*, 13 Howard 52*n*; *U.S.* v. *Ferrara*, 13 Howard 40; *Gordon* v. *U.S.*, 117 U.S. 697; *U.S.* v. *Klein*, 13 Wallace 128.

judicial determination altogether, and treated as a matter within the executive or legislative discretion; the Government cannot be sued without its own consent. Or they may be committed to the Courts for adjudication. But they cannot be committed to the Courts for investigation and report to the Executive or Congress, or subject to any revision by these departments. Nor can any condition be attached to the submission which substantially derogates from the real determination of the issue by the Court.[1]

In a number of other cases the American Courts have recognized that the Legislature may commit to administrative officers or departments the conclusive determination of questions of fact on matters concerning the services rendered by those departments to the public; so far as their action depends upon the interpretation of the law the Courts have power to review the action;[2] the considerations upon which the exercise of this power depends stand outside the present inquiry. It appears to be in the power of the Legislature to commit the performance of administrative services to the uncontrolled discretion of any officer.[3] In such a case, no right having been conferred, no right is infringed if the service or privilege is withheld.

Even the constitutional prohibition in the United States of the taking of private property without due process of law does not mean that a judicial determination must in all cases precede executive action, even when such action is directed against the person or property of a citizen. There are many cases in which, either by common law or statute, administrative process is lawful. "Much of the process by means of which the Government is carried on and the order

[1] *U.S.* v. *Klein*, 13 Wallace 128.

[2] *Bates* v. *Payne*, 194 U.S. 106; *School of Magnetic Healing* v. *McAnnulty*, 187 U.S. 94; *Public Clearing House* v. *Coyne*, 194 U.S. 497.

[3] *R.* v. *Arndel*, (1906) 3 C.L.R. 557.

of society maintained is purely executive or administrative. Temporary deprivation of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law could afford redress."[1] In such cases "due process of law" in the American Constitution merely requires that the Executive authority shall not have the final determination of the legality of its act; that question must be left free for the judicial power. The same principle appears applicable in the Commonwealth—the Executive can have no power to determine conclusively the validity of its own act affecting the rights or liabilities of the citizen; that determination belongs to the judicial power.

It would be dangerous to attempt an exhaustive statement of the cases in which judicial functions may be exercised under the Constitution by authorities other than the Courts established or invested with jurisdiction under sec. 71. But, though there may be others than those mentioned above (disputed elections and qualifications of members; the grant and withholding of licences; the jurisdiction of courts martial), it may be accepted as a general rule that the separation of powers in the Constitution imports within the range of Commonwealth action that the legality of any governmental action, or the existence of any right, or the liability to any penalty, cannot be determined elsewhere than in the Courts: that determination is a part of the judicial power of the Commonwealth. This limitation upon administrative action is well illustrated by the case of Executive inquiries. The Commissioner or officer questioning a witness and requiring him to answer, could not be empowered to fine or imprison the recalcitrant witness.

[1] *Per Cooley* J., *Weimer* v. *Bunbury*, 30 Michigan 201; Thayer's *Cases*, p. 1203, cited with approval by the Supreme Court in *Public Clearing House* v. *Coyne*, 194 U.S. at p. 509. Cf. *Groenvelt* v. *Burwell*, 1 Lord Raymond at p. 467.

Nor could such authority by any determination of its own, create, by the mere force of that determination, a duty to answer the questions. The question whether the witness is bound to answer the questions can only be determined by the Court which is invoked to impose the penalties, and which then has to determine for itself whether there was a duty or whether it was broken.[1]

The rule which assigns the judicial power of the Commonwealth to Courts is thus a safeguard against arbitrary power more important than at first appears and importing restrictions upon the power of Parliament more extensive than is at first realized. It is not merely that the Legislature may not constitute itself or any other body unauthorized by the Constitution, a Court of justice with functions which might be validly performed by a Court regularly constituted, *i.e.* the determination, after hearing, of rights according to law. If this were all that is imported by the separation of powers, it would be of small importance legally, for a power of this nature is very rarely usurped by a Legislature. The temptation to which Legislatures are liable, to which American Legislatures have succumbed, and which American Courts have met by the allegation of an invasion of judicial power, is to apply a new rule to past acts or events, or to deal with a specific matter of injury or wrong independently of all rule. However mischievous and dangerous may be *ex post facto* laws and *privilegia*, their very mischief lies in the fact that they are something other than judicial acts; that what should have been done in a judicial way and according to law has been done by the assumption of arbitrary power. The grant of judicial power

[1] *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447 : Cf. *Huddart Parker* v. *Moorhead*, 15 Argus L.R. at p. 261, per Isaacs J. : "In neither case are liabilities imposed or rights affected by any determination of the Comptroller-General." Contrast the powers of examination possessed by the Commissioners of Bankruptcy under consideration in *Doswell* v. *Impey*, (1823) 1 B. & C. 163.

to a special organ means that if the matter be one which from its nature is proper for judicial determination alone, the Legislature cannot deal with it otherwise, or authorize anyone, even a Court properly constituted, to deal with it except in the way of adjudication. Thus, as already seen, the question whether a witness has incurred a penalty for refusing to answer questions in an Executive inquiry is essentially one for judicial determination. It would be unconstitutional for the Legislature to constitute itself, or one of its committees, or the Executive body pursuing the inquiry, a tribunal for determining the question upon a regular investigation of the facts and a consideration of the law. But it would be none the less unconstitutional for the Legislature to enact without regard to either law or facts that the penalties had been incurred and should be suffered by the witness. In one sense the act is not "judicial," for no Court could properly have acted in such a way. But it is an excess of legislative power and an invasion of the judicial power because it affects to deal with an essentially judicial matter in a non-judicial way.[1] On the same grounds, the power to adjudicate possessed by a Court imports the observance of principles of legal administration essential to the judicial office. The full extent of these principles cannot be easily determined; but whatever they are, they may not be interfered with by the Legislature. The Constitution empowers the Legislature to regulate the *incidents* of judicature—this power is expressly conferred in sec. 51 (xxxix.)—but any interference with the essentials of judicial administration is a deprivation of judicial power and an attempt to require the Court to act in a non-judicial way. A judicial act may be said to include *actor*, *reus*, *judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceed-

[1] See *Hoke* v. *Henderson*, 25 Am. Decisions, at p. 687.

ings.[1] It is an essential principle that no man shall be judge in his own cause, and that no person may be condemned without an opportunity of being heard. On the same ground of interference with the judicial office are based the American cases which declare that enactments purporting to construe the law retrospectively are *ultra vires*.[2] The Legislature may declare generally who shall be competent witnesses, what shall be admissible as evidence, and how proof may be made. It may even declare that certain things shall be *primâ facie* evidence of the matter in dispute, and thus affect the burden of proof.[3] This, however, is subject to the qualification that the matter proved must have a reasonable relation to the matter in issue and a real tendency to establish it—the inference must not be "purely arbitrary, unreasonable, unnatural or extraordinary."[4] To go further and pre-determine the probative force of evidence so as absolutely to exclude a party from rebutting it would be an interference with the judicial office and void.[5] For instance, the power of a Commerce Commission to pronounce upon the reasonableness of rates charged by a carrier cannot be made a conclusive determination in a prosecution or other proceedings based upon the unreasonableness of the charge.[6] It is probably not constitutional for the Legislature to declare that the averment of an offence in an indictment shall be a sufficient proof thereof, thereby throwing upon the defendant the entire burden of proving his innocence.

[1] Cf. *Murray* v. *Hoboken Land Co.*, 18 Howard, at p. 280 ; Cf. Blackstone, *Commentaries*, Bk. III. cap. 3, p. 25.

[2] See Cooley, *Constitutional Limitations*, pp. 134-137.

[3] *Ib.* p. 526.

[4] *People* v. *Cannon*, 139 N.Y. 32 ; *Courts* v. *Merchant*, 103 N.Y. 143 ; and *Meadowcroft* v. *People*, 54 Am. St. Rep. 547, 453.

[5] *Marx* v. *Hawthorn*, 148 U.S. 172 ; *U.S.* v. *Klein*, 13 Wallace.

[6] *Chicago Railway Co.* v. *Minnesota*, 134 U.S. 418. An exception must, it would seem, be made in that limited class of administrative matters referred to on p. 318.

PART V.—THE STATES.

CHAPTER I.

THE STATES: CONSTITUTION AND POWERS.

As the Australian Commonwealth is a Federal Commonwealth, it is impossible to advance a step in the consideration of the Constitution without meeting the States. In the structure of the Federal Government, the States or some part of their Governments, are a constituent part. They are the foundations upon which both Houses of the Parliament are built, and in the convocation of those Houses various incidental powers and duties are conferred upon the Governors and Legislatures of the States, while in all sorts of matters touching the Federal Government which must be the subject of some regulation, the laws of the States in their respective territories are applied to the subject matter, or the State Parliament is given power to make laws regarding them "until the Parliament otherwise provides." These matters and the miscellaneous relations between Commonwealth and State powers and rights are dealt with in what appears to be their proper place. In the present chapter it is proposed to deal with matters peculiarly belonging to the States to

which it appears desirable to draw attention under a distinctive title.[1]

By sec. 106 of the Constitution "the Constitution of each State shall subject to this Constitution continue as at the establishment of the Commonwealth or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State."

This is the first and most significant of a group of sections which recognize the autonomy of the States. One of the many matters in which the Commonwealth Constitution differs from the Canadian Constitution is this—that while the British North America Act had to organize both the Dominion and the Provincial Governments, the Australian Constitution had not as any part of its object the framing of a government for the States. The principle of State

[1]The term "State" in the Constitution of the United States is used in various senses. It "sometimes means the separate sections of territory occupied by the political society within each; sometimes the particular government established by those societies; sometimes those societies as organized into those particular governments; and lastly, sometimes the people composing those political societies in their highest sovereign capacity." (Madison's Virginia Report (1800), (Elliot's Debates, vol. iv. p. 547) cited by Story on the Constitution, secs. 454 and 208 *n*). In like manner, the Commonwealth Constitution uses the term, sometimes of territory (*e.g.*, secs 80, 92, 125), sometimes of the political society (*e.g.*, sec. VI. of the *Constitution Act*), sometimes of the government of the political society or some appropriate organ thereof, sometimes of a juristic entity (*e.g.*, sec. 51 (xxxi.) (xxiii.); and if it does not refer to the people of the political society "in their highest sovereign capacity," it appears in some cases to describe the people of the society as an economic unit (*e.g.*, secs. 51 (ii.), 99). It happens more than once that in the same section the term is used in different senses, and there is room for not a little doubt in some cases as to the meaning of the term—*e.g.*, in sec. 99, "preference to any State," and sec. 102, "preference or discrimination is undue or unreasonable or unjust to any State." In general it may be noted that when the Constitution saves powers or grants powers or imposes positive duties, it specifically refers to the organ of State Government which has hitherto exercised or is intended to exercise the power or perform the duty in question, and when it withdraws an accustomed power or imposes a prohibition it uses the term "State" as comprising all possible sources of action. (See, however, secs. 112, 118, 120).

autonomy has been carefully observed. In accordance with this principle the Constitution omits clauses of the Bill of 1891 which required that there should be a Governor in each State, and proposed that the Parliament of a State might make such provision as it thought fit as to the manner of appointment of the Governor of a State, and for the tenure of his office and his removal from office. To the same principle is to be referred the elimination of the clause requiring State correspondence with the Colonial Office to be transmitted through the Governor-General. The Constitution does, no doubt, in some of its provisions[1] assume that the States Constitutions will retain their present shape at least to the extent of having a Governor and two Houses of Parliament, and certain alterations of State machinery might cause inconvenience in the working of the Constitution. But this does not affect the independent power of the State over its own institutions.

THE STATE GOVERNORS.—The Governor of a State continues to be appointed directly by the Home Government, a fact which may be contrasted with the Canadian system whereby the Lieutenant-Governor of a Province is appointed by the Governor-General on the advice of the Dominion Ministers. Such a system is in accord with the extensive control exercised by the Dominion Government over the Provinces. It would be anomalous in Australia, having regard to the independent position assigned by the Constitution to the States. The Colonial Office correctly interpreted the sentiment of the States Governments when it said "there has been no indication that the States, whose contention it is that they remain sovereign States, would desire that their prerogative should be diminished, and the evidence of such sovereignty is in fact secured by making the appointment of Governor in the same manner

[1] Secs. 12 and 15.

and on the same terms as prior to federation."[1] The Colonial Secretary, however, thought there was much to be said for the Canadian system, and if the people of Australia were to desire to adopt a similar system in all probability the change would be made.

The principal change that has come about in the position of the State Governor is that some reduction has commonly been made in his emoluments, and that in Sydney and Melbourne the necessity for providing an official residence for the Governor-General has sent the State Governor into quarters more in accord with the reduced scale of his remuneration. From time to time demands are made that the office should be locally filled, either as a measure of economy by transferring the duties of the office (which it is assumed could be discharged without substantial interference with other duties) to the State Chief Justice, or, as a matter of sentiment, by the appointment of some person approved by the people or the Government. The only Government which has seriously interested itself in the matter is that of South Australia,[2] to whom the Home Government replied in the despatch already referred to. The proposal presented to the Colonial Secretary was merely that the Crown's choice should be confined to citizens of the State, but as the Colonial Secretary points out, that must mean in practice an appointment on the advice of the Ministry of the day. The practical difficulty then lies in the fact that the person recommended would almost inevit-

[1]Circular Despatch from Lord Crewe, October 9th, 1908.

[2]See proceedings of the Conference of Premiers, Brisbane, May, 1907 (*Victorian Parliamentary Papers*, 1907, No. 23, pp. 298-301). A South Australian motion "That in the opinion of this Conference the present system of State Governors should be altered so as to reduce the cost of government to the States" was negatived, and a resolution was carried (South Australia alone dissenting) "That the present is not an opportune time to alter the system of appointing State Governors."

ably be some one who was active in politics, even if the recommendation itself was not determined by political exigencies. In any case such a person could hardly inspire confidence if he were called on to discharge those rare but delicate functions of a Governor which peculiarly demand impartiality and aloofness from local political strife.

The Letters Patent constituting the office of Governor with the instructions that accompany them, differ hardly at all from those which applied to the Governor of a Colony before federation. There are, in fact, but two changes in substance. The first of these marks the changed relations to defence. The old Letters Patent and Commissions constituted and appointed respectively a "Governor and Commander in Chief in and over the Colony of . . . and its dependencies." But the Constitution has transferred naval and military defence to the Commonwealth (secs. 51 (vi.) and 69), vested the command in chief of the naval and military forces of the Commonwealth in the Governor-General (sec. 68), and forbidden the States, without the consent of the Parliament of the Commonwealth, to raise or maintain any naval or military force (sec. 114). Consequently, the new Letters Patent and Commission issued for the States on January 1st, 1901,[1] merely constituted and appointed respectively a "Governor of the State of . . . and its dependencies, in the Commonwealth of Australia." The Governor is no longer Commander in Chief, but it is surmised that his statutory position as Vice-Admiral is unaffected.[2]

The second matter in which a charge is made by the Letters Patent is in respect to the exercise of the pardoning power. As there are now two governmental authorities whose laws may establish crimes and whose courts may

[1] See Appendix.

[2] See the *Courts of Vice-Admiralty Acts* 1863, sec. 3, and 1867, sec. 4, and the *Colonial Courts of Admiralty Act* 1890, sec. 10.

decree punishments, the prerogative of mercy must be so granted as to preserve the independence of each, and a distinction must be drawn between offences against Commonwealth laws and offences against State laws. This is provided for in somewhat ambiguous terms by Clause IX. in the Letters Patent.

THE STATE PARLIAMENTS.—The key to the position of the States in the Constitution—as depositaries of the residuary powers of Government—is to be found in sec. 107, whereby, "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." It is not always easy to say what powers are withdrawn from the States or exclusively vested in the Commonwealth, since necessary implication is as potent as express provision.

Express provisions of the Constitution exclude the States from the exercise of legislative power with respect to matters relating to any department of the public service the control of which is by the Constitution transferred to the Commonwealth Executive (sec. 52); from the imposition of duties of customs or excise or (with limitations) the grant of bounties (sec. 90); from impairing the freedom of inter-State trade, commerce, or intercourse (sec. 92); from raising or maintaining any naval or military force without consent of the Commonwealth (sec. 114), from imposing any tax upon Commonwealth property (sec. 114), from discriminating against residents in other States (sec. 117), from coining money, or making anything but gold and silver coin a legal tender for the payment of debts (sec. 115).

Implied restraints are a more difficult subject. Judicial

decision has established the immunity of federal instrumentalities from State power;[1] and in the case of *The King* v. *Sutton*[2] the High Court appears to have held that the power to make laws with respect to foreign commerce belongs exclusively to the Commonwealth Parliament by implication. An example of implied withdrawal of power from the States may probably be found in respect to the powers enjoyed by them under various statutes to alter their territorial boundaries by mutual arrangement, a power which it is submitted could not now be exercised.[3]

Apart from the several restrictions upon State action which are associated with some power of the Commonwealth and are considered in relation thereto, the most important limitation expressly imposed on the power of the States is that contained in sec. 117 whereby—

"A subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

It is a general characteristic of the Constitution that as a rule it does not impose any restraint upon government except to further some federal purpose. Sec. 117 aims not at the protection of individual right against government interference, but at the prevention of discrimination by reason of residence in another State. The section aims at equality, and if the laws of a State refrain from disabling provisions and injurious distinctions affecting the residents of other States, the section is fulfilled. It is, therefore, very different in character from those provisions of the Constitu-

[1] See post, "The Doctrine of the Immunity of Instrumentalities."

[2] 5 C.L.R. 789.

[3] Cf.: *Rhode Island* v. *Massachusetts*, (1838) 12 Peters 725; *Florida* v. *Georgia*, 17 Howard 478; *Virginia* v. *Tennessee*, (1893) 148 U.S. 503. The power under the *Colonial Boundaries Act* 1895 is expressly withdrawn (*Constitution Act*, sec. VIII.).

tion of the United States which forbid the States to pass any Act of Attainder, *ex post facto* law, or law impairing the obligation of contracts; and from the Thirteenth, Fourteenth and Fifteenth Amendments to that Constitution, which, as protecting the States' own citizens, are essentially *national*, as distinguished from *federal* provisions. It may be compared with Art. iv., sec. 2 of the United States Constitution, whereby "the citizens of each State are entitled to all privileges and immunities of citizens in the several States"; and the purpose of that clause as declared by the Supreme Court is the purpose of sec. 117—"to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."[1]

The "privileges and immunities" article in the United States Constitution is limited by a qualification which is not found in the Australian provision. What are secured in the United States are the privileges and immunities of *citizens*, and this has been construed as embracing merely those fundamental advantages which belong of right to the citizens of all free governments. This means that it is still possible to discriminate between the citizens of the several States in matters standing outside this rather vague category.[2] In the Commonwealth we are saved from the perplexing questions that arise under the American provision by the absolute prohibition of discrimination against residents in other States. "The substance of section 117 is, in short, that whatever privileges are conferred upon residents of a State by its laws are to be taken to be equally

[1]Per Miller J., the *Slaughter House Cases*, 16 Wallace, 77.

[2]See the *Slaughter House Cases*, (1872) 16 Wallace 77; *Corfield* v. *Coryell*, (1825) 4 Washington C.C. 380; *Blake* v. *M'Clung*, (1898) 172 U.S. 239; *M'Cready* v. *Virginia*, (1876) 94 U.S. 391.

conferred upon residents of other States, and that every enactment conferring such privileges is to be construed as including residents of other States . . . The only way in which practical effect can be given to the provisions of sec. 117 of the Constitution is by allowing residents of other States to claim the same privileges as are formally given to residents of the particular State."[1]

The foundation of the section is "residence." The privilege can be claimed only by such British subjects as are resident in another State of the Commonwealth; and the discriminations forbidden in the case of such persons are those which are based on residence outside the legislating State.[2] Thus, an absentee tax imposed by any State would be inoperative so far as regards residents in another State. The same reasons would prevent the application of a special tax on commercial travellers coming from other States in the Commonwealth. Death duties imposed at one rate in favour of resident beneficiaries, and at a higher rate as against non-resident beneficiaries, would only subject the latter to the lower duty, and it would be quite immaterial that the discrimination was made in the form of a special privilege to residents; substance, not form, gives the rule.[3]

But a difficulty arises from the fact that the State law may divide residents into different classes between whom discrimination is made, and of course nothing in the Constitution prevents this. A West Australian law declares that persons domiciled in the State receiving property under a will shall pay a lower rate of duty than is paid by persons not domiciled. Each class consists in part of residents in

[1] *Davies & Jones* v. *The State of Western Australia*, (1904) 2 C.L.R. at pp. 38, 39.

[2] S.C., per Barton J. at p. 47. *Lee Fay* v. *Vincent*, 7 C.L.R. 389.

[3] S.C. 29.

Western Australia, in part of non-residents; can the non-resident domiciled in Queensland claim to be put on a more favourable footing that the West Australian resident who is domiciled in Queensland? The case of *Davies and Jones* v. *The State of Western Australia* (*supra*)[1] makes it clear that he cannot. The discrimination is based on domicil; the discrimination prohibited rests on "residence"; and residence as used in the Constitution is not synonymous with the technical notion of domicil.

This brings us to the question—what is a resident within the meaning of sec. 117? The case referred to furnishes a suggestion. "The word 'resident' is used in many senses. As used in sec. 117 of the Constitution, I think it must be construed distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that whatever that kind may be, the fact of residence of the same kind in another State, entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class."[2]

TAXATION BY STATES.—In the United States, the doctrine that the laws of a State can have no extra-territorial operation has been applied to limit strictly, as a matter of constitutional law, the taxing power of the States. Thus in *M'Culloch* v. *Maryland*,[3] Marshall C.J. said:—"All subjects over which the sovereign power of a State extends are objects of taxation, but those over which it does not extend are on the soundest principles exempt from taxation." "The subjects of taxation," it is said, "are persons, property and business, and any one of them may be taxed though

[1] There is a learned criticism of this decision (as well as of some views expressed in the first edition of this book) by Mr. F. L. Stow, in 3 Commonwealth Law Review, p. 97.

[2] Per Griffith C.J., at p. 39.

[3] (1819) 4 Wheaton 316, 429.

the others are beyond the jurisdiction."[1] Where the person is resident in a State (mere transient presence is not residence for this purpose) it seems that he may be taxed in proportion to the value of his property wherever situated, and upon the same principle a company may not be taxed upon the whole amount of its capital stock except by the State in which it is domiciled. Where taxation is based merely upon the presence of property or the carrying on of business in the State, only the property there situated or the business there done can be taxed. Intangible property follows the person of the owner. Stock or shares in a company are taxed where the owner of the stock resides. Debts are taxable only in the State of the creditor, where alone they are "property." Accordingly, bonds of a corporation held by non-residents in the State are not taxable, even though the corporation is chartered by or domiciled in the State, and the corporation may successfully resist an attempt to levy a tax in respect to them.[2]

No attempt has been made to limit the taxing power of the Colonial Parliaments upon similar principles. In *Re Tyson*[3] it was, indeed, argued unsuccessfully, that a colonial legislature could not impose a succession duty on property out of the colony, even in the case of a person domiciled in Queensland. In many cases the limits of the incidence of particular taxes have been expressly laid down by the Parliament of the Colony, and the only judicial question has been one of interpreting the particular exercise of legis-

[1] Hare, *Constitutional Law*, 322, and *Case of the State Tax on Foreign Held Bonds*, (1872) 15 Wallace 300.

[2] See generally, Hare, *Constitutional Law*, pp. 317-330; *Commonwealth of Pennsylvania* v. *Standard Oil Co.*, 101 Penn. St. 119; *Case of the State Tax on Foreign Held Bonds*, (1872) 15 Wall. 300; *Gloucester Ferry Co.* v. *Pennsylvania*, (1885) 114 U.S. 196; *Pullman's Car Co.* v. *Pennsylvania*, 141 U.S. 18.

[3] (1900) 10 Q.L.J. 34.

lative discretion.[1] When the limits have not been defined, the Courts have sought to discover and apply just principles to the incidence of the tax.

Save for the restrictions mentioned as arising out of the Constitution, the powers of taxation belonging to the State Parliaments are the same as those of the Parliaments of the Colonies. It is submitted that the State Parliaments are not subject to the limitations which the American Courts have inferred from the territorial operation of laws, and that the taxing power is limited territorially only by the ability of the legislature to make its laws effective in its own territory. This question is one of considerable practical importance, especially in relation to companies. Several of the States[2] for example have laws similar to those which have been declared unconstitutional in America, requiring companies to pay a tax in respect of their debentures and preference shares held by persons resident out of the several colonies and to deduct the amount from the interest or dividend of the creditor or shareholder. If the American doctrine applies, such companies can successfully resist the claim of the Government, and the debenture holder may in the Courts of the State itself recover from the company the full amount of the interest which it has contracted to pay him. If, on the other hand, such provisions are constitutional, the company may by proceedings in the Courts of the State be compelled to comply with the Statute, and the authority of the Statute will be a complete answer to any proceedings in those Courts by the debenture holder against the Government, for there is no provision in the Australian Constitution prohibiting laws which impair the obligation of contracts.

[1] See *Blackwood* v. *The Queen*, (1882) 8 A.C. 82.

[2] Victoria, *Income Tax Act* 1890, sec. 19 (1) ; New South Wales, *Land and Income Tax Assessment Act* 1895, sec. 22 ; Queensland, *Dividend Duty Act* 1890.

But it must be remembered, first, that a State Government is unable to resort to the Courts of any other State to enforce its revenue laws[1]; and secondly, that if the contract between the company and its debenture holder be not governed by the law of the State, the authority of the Statute will not protect the company in any other jurisdiction in which it may be suable by the creditor.[2]

THE "POLICE POWER" OF THE STATES.—In every work on the Constitution of the United States, we find reference to the "police power" of the States. In the *Mayor of New York* v. *Miln*[3] the Supreme Court described the powers "which relate to merely municipal legislation, or what may perhaps more properly be called internal police" in the following terms: "We should say that every law came within this description which concerned the welfare of the whole people of a State or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or their private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction." A later decision having a closer relation to the modern idea of the functions of government describes it as the power "to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."[4]

[1]Cf. *Municipal Council of Sydney* v. *Bull*, (1909) 1 K.B. 7, where an Australian municipality sued unsuccessfully in England for the recovery of rates.

[2]See *Spiller* v. *Turner*, (1897) 1 Ch. 911.

[3](1837) 11 Peters 102. See also Taney C.J. *in the Licence Cases*, (1847) 5 Howard 504.

[4]*Barbier* v. *Connolly*, (1885) 113 U.S. 27.

The most obvious subject of police is the establishment and maintenance of domestic order.[1] In the Commonwealth, this function belongs primarily to the States. Indeed, the antithesis of external security and domestic order serves to mark off the most characteristic spheres of the Commonwealth and the States respectively. Naval and military defence is committed to the Commonwealth; the States are forbidden to raise or maintain any military or naval force without the consent of the Commonwealth (sec. 114), and the Commonwealth is under a specific obligation to "protect every State against invasion" (sec. 119). The section last referred to emphasizes the fact that domestic order belongs to the State, for it requires the Commonwealth Government *on the application of the Executive Government of the State* to protect it against domestic violence. These duties are of course essentially "political," depending on the exercise of a discretion which no Court can control. It is only necessary to add the warning that it must not be inferred from the general reservation of domestic peace to the States or from the special provision of sec. 119, that the Commonwealth Government is shorn of its complete power to protect its own instruments and operations by its own means. The plenary power of the Federal Government to protect itself and accomplish its objects has already been dealt with. It is enough here to recall the fact that it has been laid down in the United States that there is "a peace of the United States"[2] which may be protected by appropriate action of the Federal Government either in or out of Court. The Commonwealth Government cannot have a more restricted power. Indeed, the functions of the Commonwealth Government are so many and its agencies and instrumentalities so far reaching, that internal disorder on

[1] Cf.: Blackstone, *Com.* vol. iv., p. 162.

[2] *In re Neagle*, 135 U.S. 1; and see *In re Debs*, (1894) 158 U.S. 564.

any large scale could hardly leave them unaffected. For their protection, the Commonwealth Government could intervene on its own initiative.

At its broadest the "police power" is nothing less than the sovereign power of acting for the public welfare, and as such it is not capable of exact definition. It has, however, come into common use in the United States to express one of the terms in a number of practical distinctions of power to which the Courts had to give effect. It follows that the many attempts that have been made by the Courts to describe, if not define it, vary according to the matter in hand and the practical distinction to be emphasized, so that it has been characterized as the "dark continent" in American jurisprudence.[1]

Sometimes it is used in discussions of the limits of the power of the State Legislatures considered merely in relation to the distribution of power between legislative, executive and judicial authorities.[2] Sometimes it is used in considering the power of the State Legislatures, as affected by the prohibitions and restrictions either of the State Constitutions or the Constitution of the United States.[3] The Constitutions contain certain guarantees against the interference of the States with private rights; it is held that such restrictions are to be read consistently with the police power and that the State is not deprived of its discretionary power to regulate good morals, promote health and preserve order, though in so doing it may incidentally deteriorate property or diminish profits arising out of a contract. So, though Congress has made patent laws, the State may as a matter of policy prohibit or regu-

[1] Burgess, *Political Science and Constitutional Law*, vol. ii. p. 136.

[2] See Thayer, *Cases on Constitutional Law*, p. 693.

[3] See *Commonwealth* v. *Alger*, 7 Cushing 53 (Mass.); and *Thorp* v. *Rutland &c. Railway Co.*, 27 Vermont 840.

late the sale of the patented article in the State.[1] Again, though the admission of subjects or citizens of other nations to American shores is a matter which can be regulated by Congress alone, it may be that a State can protect itself by appropriate legislation against paupers and convicted criminals from abroad.[2]

So far as concerns the respective powers of Congress and the States, the police power has been important mainly in relation to its conflict with the power of Congress over foreign and inter-State commerce. The Courts have declared the commerce power of Congress to be partly exclusive of, partly concurrent with, the power of the States. The exclusive power of Congress over foreign and inter-State commerce is mitigated by the doctrine that in the absence of legislation by Congress the State may affect such commerce by their laws of "police." Inspection laws, health laws, quarantine laws, the introduction of impure and adulterated foods or of diseased cattle are the most conspicuous illustrations of laws of this class.[3]

As has been pointed out later (Part VI., Chapter II.), a law may have more than one aspect. "All experience shows that the same measures or measures scarcely distinguishable from each other, may flow from distinct powers, but that does not show that the powers themselves are identical."[4] Public health is eminently a matter of police and for the State; foreign commerce belongs to Congress; and a quarantine law is a legitimate exercise of either power. If each authority has made a law upon the subject and there is a collision between them, the law of Congress must prevail.[5] On the other hand, there has been a tendency on the

[1] *Patterson* v. *Kentucky*, 97 U.S. 501.

[2] See *Chy Lung* v. *Freeman*, 92 U.S. 275.

[3] See *Gibbons* v. *Ogden*, (1824) 9 Wheaton 1; *Licence Cases*, (1847) 5 Howard 504; *Railroad Co.* v. *Husen*, 95 U.S. 465.

[4] Per Marshall C.J. in *Gibbons* v. *Ogden*, 9 Wheaton 1.

[5] *Ib.* p. 209.

part of Congress to enact laws purporting to be in pursuance of its commerce power but affecting matters which have not become or which have ceased to be subjects of foreign or inter-State commerce. Such Acts, whether they affect the internal commerce of a State, or deal with matters which are not the subjects of commerce at all, are an invasion of the exclusive powers of the State and are *ultra vires*. It has been determined by a large number of cases that the police power is an exclusive power in the States; and that there is no substantive police power in Congress. The powers of Congress are limited by enumeration, and the extent of the enumerated powers themselves must be defined by a regard to the fact that the Constitution leaves with the States the general power to protect the lives, health and property of the citizens, to preserve good order and the public morals.[1] This doctrine has received its most striking and practical application in the restrictive interpretation put by the Courts on the prohibition imposed upon the States and the powers conferred upon Congress by the fourteenth and fifteenth amendments of the Constitution adopted at the close of the Civil War.[2]

The frame of the Commonwealth Constitution is the Constitution of the United States; and it remains to consider how far the American decisions as to the nature and extent of police power affect the States in Australia. The powers of the State Parliaments in Australia are limited at fewer points than those of the State Legislatures in America; the "police power" is subject to fewer limitations. The questions that have arisen in the United States under the State Constitutions cannot at present arise, for the State Parliaments enjoy plenary powers unlimited by a

[1] For the Commonwealth, see Part VI., Chapter II. herein.

[2] See the *Slaughter House Cases*, (1873) 16 Wallace 36; *Barbier* v. *Connolly*, (1885) 113 U.S. 27; *Civil Rights Cases*, (1883) 109 U.S. 3.

distribution of powers among the legislative, executive and judicial organs or by express restriction. The State Parliaments indeed enjoy a position of independence unknown to the State Legislatures in the United States, or to the Provincial Parliaments in Canada. The powers of the former have been controlled by that jealousy and distrust of government which has been a characteristic of American constitutional history. The power of the Provincial Parliaments in Canada is limited by the fact that they have enumerated powers merely, and that the Dominion Executive exercises supervision over them. So far as the Commonwealth Constitution is concerned, the restrictions imposed by the United States Constitution in the interest of individual right are, with the exception of those contained in secs. 92 and 117, absent. On the other hand, the Commonwealth Constitution does leave room for the conflict of the Federal power over commerce and the State power of police. The extent of the difficulty indicated will depend largely on the question whether the power of the Commonwealth Parliament over inter-State commerce is exclusive, and what is the extent of the restriction imposed in sec. 92 by the declaration that "on the imposition of uniform duties of customs, trade, commerce and intercourse among the States shall be absolutely free." These questions are considered in the chapter on Trade and Commerce, where it is suggested, first, that the American decisions establishing the inability of the States to make laws with respect to inter-State commerce as such may not be applicable here in Australia; and secondly, that sec. 92 is limited, if not actually to fiscal imposts, at least by its association with fiscal and trading provisions. In the first view, it would not be necessary to resort to the doctrine of the "police power" to sustain State laws which dealt with the subject of inter-State commerce, since *quacunque via* they would be valid unless inconsistent with

some actual federal enactment. If that view is wrong, then American doctrine establishes that in conferring upon Congress the regulation of commerce it was never intended to cut off the States from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country;[1] and the strictest interpretation of the police power has conceded that a State may pass sanitary laws, may prevent persons or animals suffering under contagious diseases from entering the State, and for the purpose of self-protection may establish quarantine and reasonable inspection laws.[2] Further, "a State may prevent the introduction into the State of articles of trade which on account of their existing condition would bring in and spread disease, pestilence and death, such as rags or other substances infected with the germs of yellow fever or the *virus* of small pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality are unfit for human use or consumption."[3] The case becomes more difficult when we come to measures for the protection of the moral health of the community. The introduction of intoxicating liquids has given rise to constitutional difficulties both in the United States and Canada. In *Leisy* v. *Hardin*[4] the Supreme Court of the United States held that a Statute of Iowa prohibiting the transportation by a common carrier of intoxicating liquor from a point within any State for delivery at a place within Iowa, was a restriction of inter-State commerce, and therefore *ultra vires*, though in the opinion

[1] *Sherlock* v. *Alling*, 93 U.S. 99.

[2] *Railroad Company* v. *Husen*, 95 U.S. 465.

[3] *Bowman* v. *Chicago and N. W. Railway Co.*, (1888) 125 U.S. 465, 489. In this case and in *Leisy* v. *Hardin*, (1890) 135 U.S. 100, the American authorities are collected and examined.

[4] *Supra*.

of the Court it might fairly be said that the provision in question had been adopted "not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the morals and health of its people, and the peace and good order of the State against the physical and moral evils arising from the unrestricted manufacture and sale within the State of intoxicating liquors." In the Commonwealth Constitution this particular matter is provided for favourably to the power of the State by sec. 113, whereby "all fermented, distilled, or other intoxicating liquids passing into any State, or remaining therein for use, consumption, sale or storage, shall be subject to the law of the State as if such liquids had been produced in the State."[1] That the State may as a precautionary measure against social evils, exclude convicts, harlots, paupers, idiots and lunatics, is now generally admitted in the United States. But as the measure is one of self-defence, arising only from a vital necessity for its exercise it must not be carried beyond the scope of that necessity.[2]

There remains, of course, the question of the interpretation of sec. 92. It is suggested above that the collocation of the section with fiscal provisions leaves the police power of the States unaffected. But a broader interpretation is of course possible, and it may be that sec. 92 deprives of validity all State legislation, the direct effect of which is to impose a restriction on trade, commerce or intercourse among the States without regard to whether the legislation is referable to an attempt to regulate commerce as such or is undertaken under the police power.

[1] See *Fox* v. *Robbins*, (1909) 8 C.L.R. 115.

[2] The *Passenger Cases*, 7 Howard 283, per Grier J.; *Henderson* v. *New York*, 92 U.S. 259, and *Chy Lung* v. *Freeman*, *ib.* 275.

CHAPTER II.

THE STATUS OF THE STATES.

A QUESTION arises as to the *status* of the States, which is of practical importance principally in respect to what may be called their external relations, including relations with the Home Government. The question is—has the establishment of the Commonwealth, the formation of a new nation or political entity of which the States form a part, completely merged their independent political existence so that they have become mere internal divisions comparable with the areas of local government, unknown and unrecognized beyond Australia itself? If so, the Imperial Government would know but one Australian authority—the Commonwealth Government, and would in all matters affecting Australia or any part of it address itself to that Government and receive communications from or through it alone. This, indeed, was involved in a provision of the Draft Constitution of 1891, whereby "all references or communications required by the Constitution of any State or otherwise to be made by the Governor of the State to the Queen shall be made through the Governor-General as Her Majesty's Representative in the Commonwealth and the Queen's pleasure shall be made known through him" (Chapter v., sec. 5). But the clause was omitted by the Convention of 1897-8 as inconsistent with the maintenance

of State independence. The Crown had in the past been the executive and legislative head of the Colony, and acts of authority were done in the Queen's name. So far as concerned the representation of the Crown in the Constitution of the Colony, the Governor was the Queen's representative. This relation it was intended to preserve in the Commonwealth Constitution, and though the Governor-General is by sec. 2 declared to be "Her Majesty's Representative in the Commonwealth," this declaration in no way derogates from the old established relation of the Crown to the Constitution of the State.[1]

It is conceded on all hands that in matters "in which the Crown is concerned solely in its capacity as part of the Constitution of the State,"[2] the communications proceed directly between the State Governor and the Colonial Office without the intervention of the Governor-General. Such matters obviously include the reservation, the allowance and disallowance of State legislation, or the appointment and removal of State Governors and their instructions, or the amendment of the State Constitution. The contest begins when we proceed beyond this relation of the Crown and consider it in its Imperial capacity—"the central authority of the aggregate of communities composing the Empire." On this subject the Colonial Office has, under different chiefs, maintained a view which, however applicable to the Dominion of Canada, where the Dominion

[1] Even as to Canada, where there is much dependence of the Provinces on the Dominion, and where the Lieutenant-Governors are appointed by the Governor-General as an act of internal administration, it has been held by the Privy Council that "the relation between the Crown and the Provinces is the same as that which subsists between the Crown and Dominion in respect of such powers, executive and legislative, as are vested in them respectively." *Maritime Board of Canada* v. *Receiver General of New Brunswick*, L.R. (1892) A.C. 437.

[2] Mr. Chamberlain's Despatch of April 15th, 1903. *Parliamentary Papers* (*Commonwealth*), No. 18, 1903.

Parliament has the general legislative power and the Dominion Government exercises a supervisory authority over the Provincial Governments by appointing their executive head and allowing or disallowing their legislation, is, it is submitted, inapplicable in the Commonwealth. In a despatch to the South Australian Government dated April 15th, 1903,[1] Mr. Chamberlain wrote:—"So far as other communities in the Empire or foreign nations are concerned, the people of Australia form one political community for which the Government of the Commonwealth alone can speak, and for everything affecting external States or communities which takes place within its boundaries that Government is responsible. The distribution of powers between the Federal and State authorities is a matter of purely internal concern of which no external country or community can take cognizance." The particular matter under discussion was the proper channel of communication in respect to complaints by the Netherlands Government as to the non-fulfilment of treaty obligations in regard to the surrender of deserting seamen; and the Secretary of State proceeds to affirm that "whether the power given to the Commonwealth Parliament to legislate in regard to external affairs extends to treaties it is unnecessary for me to inquire, as from my point of view the question at issue . . . . is not one as to the powers of the Commonwealth Parliament, but as to the responsibility of the Commonwealth, which is the measure of the sphere of the Commonwealth Executive."[2]

It is submitted that the proposition here asserted is unsound, that the responsibilities of the Commonwealth Government are limited by its powers, and that the despatch proceeds upon the false analogy of the relations of independent states in international law. Independent

[1] *Parliamentary Papers* (*Commonwealth*), No. 18, 1903.

[2] Cf. Keith, Responsible Government in the Dominions, 170, 171.

states form part of a very imperfect political society whose relations are governed by rules which, as between them, no Court can enforce and which in the last resort depend on the will and force of the individual states. No distinction is more constantly insisted upon than that between the merely political obligations of international law and the sanctions of the municipal law of a state. The British Empire forms a single state consisting of several communities whose relations to each other are governed, not by international, but by constitutional law and by conventional understandings which must be consistent with that law and are ultimately limited by it. That constitutional law is municipal law—law in the strictest sense—binding, where its source is an Imperial Act, upon all authorities within the Empire. In the present case the constitutional relations depend upon the *Commonwealth Constitution Act*, an Act of the Imperial Parliament. That Constitution does, indeed, as Mr. Chamberlain pointed out, establish a new political entity—the Commonwealth of Australia. But that political entity is not, as a matter of constitutional law, to be identified with the Commonwealth Government, or any government or Parliament: its organic existence is to be found in that power behind the Governments and Parliaments which can amend the Constitution. Of the present Constitution the essential feature is that the functions of government are divided: it is that which makes it federal. The Commonwealth Government and Parliament are distinguished from the States by the fact that they are charged with powers and functions which are limited by enumeration, while the residuary powers of government are reserved to the States. These powers, save where they are subject to the paramount federal power in the case of the enumerated powers, are independent and not subject to federal supervision and control. There is nothing which casts on the States any

responsibility to the Commonwealth; the whole scheme of federal government is opposed to the existence of any supervisory authority over the States. This is undoubtedly the case within the Commonwealth itself, and it is submitted that there is nothing in the Constitution which either directly or by inference justifies the view that, while within Australia the Constitution is to be treated as a federal union, conferring limited powers merely upon the Commonwealth Government, it is to be treated by the Imperial Government as an unitary constitution with a single responsible government.

The divergence of opinion here indicated is at the root of several disputes between the Imperial and the Commonwealth and State Governments. It appeared in the first instance in respect to "the channel of communication" regarding the alleged breach of treaty obligations in the case of the *Vondel*, the matter already referred to.[1] The Home Government communicated with the Commonwealth Government, and the Government of South Australia protested, with the support of the other States. The particular contention of the States—that the enforcement of treaties, though it might be conferred in "external affairs" concerned the States solely until the Commonwealth exercised its legislative power—appears to be untenable. If a matter is within the paramount power of the Commonwealth, the continuance of State regulation of the subject matter depends on the will of the Commonwealth and that Government becomes at once the responsible authority. But the position of the Home Government advanced, as has been seen, far beyond this: "From my point of view the question between your Ministers (i.e., South Australia) and myself

[1]See Proceedings of the Conference of Premiers, Brisbane, May 1907 (*Vict. Parliamentary Papers*, 1907, No. 23, pp. 37-47), where the whole subject is discussed in relation to the *Vondel*, Benjamin and Weigall affairs.

is not one as to the powers of the Commonwealth Parliament but as to the responsibility of the Commonwealth, which is the measure of the sphere of the Commonwealth Executive."

The question of the "channel of communication" has been the subject of much friction and is probably not yet finally settled. More than once a suggestion has been made by the Colonial Office that copies of all State despatches should be sent to the Governor-General. To this the States objected, and the present practice it is understood is that in case of any despatch from the State Governor, touching what are vaguely denominated Commonwealth matters, a copy shall be sent to the Governor-General. Copies of all despatches from the Colonial Office to the State Governors are sent to the Governor-General, and a tendency to entrust the Governor-General with the distribution of circular despatches intended for the State Governors has manifested itself.

The same issue has appeared in various phases. When, soon after the establishment of the Commonwealth, the Mayors of Sydney and Melbourne were raised to the dignity of "Lord Mayor," the State Governments remonstrated on the ground that they should have been consulted before the change was determined on, and that the announcement should have been made to the State Governor. The recommendation to the Crown for honours has been another sore subject; it has been settled on the basis that while both the Governor-General and the Governor recommend, the Governor's recommendations are sent on to the Governor-General for his personal opinion thereon.

The most important phase of the matter has been in relation to the Colonial or (as it is now to be called) the Imperial Conference in London. When invitations were issued for the Conference of 1907 the States were not invited to send representatives. Then began an interesting

discussion on the Constitution of the Conference, both in the preliminary correspondence[1] and in the Conference itself.[2] The highest ground taken by any of the States Governments[3]—that the Commonwealth Government was practically an agency for the management under a united control of certain administrative departments, and hence that the admission of the agent to the Conference and the exclusion of the principal was indefensible, both from the practical and the constitutional point of view—was plainly untenable, and was repudiated by the Commonwealth Government in Mr. Deakin's declaration that the Commonwealth Government was in no sense the agent or representative of the States Governments.[4] A second position asserted by the States Governments—that they were constitutionally entitled to consultation in all matters except those within the *exclusive* power of the Commonwealth[5]—appears to be equally untenable. In all cases where the Commonwealth Government has a paramount power of legislation it is, it is submitted, the sole representative of Australia. But the States were on firmer ground when they called attention to the fact that the range of discussion at the Conference was unrestricted and that some of the matters suggested for discussion were within the exclusive authority of the States, while others (*e.g.*, Professional Qualifications, Imperial Stamp Charges on Colonial Bonds) were within the concurrent power (using that expression in its strict and proper sense) of Commonwealth and States. In regard to matters with which the States were alone competent to deal, the Prime Minister admitted that no

[1] *Parliamentary Papers* (English) 1907 Cd. Nos. 3340, 3524.

[2] No. 3523, pp. 92-24.

[3] Memorandum of the Premier of South Australia 1907 Cd. No. 3340, p. 24.

[4] P. 28.

[5] Memorandum of Premier of New South Wales, p. 2.

objection could be taken to the desire of the States to confer with representatives from other parts of the Empire; but he denied that such subjects had been discussed at past Conferences, and, asserting that the Conference was "one in which representatives of all the chief constitutional Governments of the Empire met for the purpose of discussing matters in which they have a common interest,"[1] suggested that ample opportunities for discussion might be found through the medium of the State Agents-General in London or subsidiary Conferences.

The desire of the Prime Minister of the Commonwealth was obvious—to restrict the range of discussion at the conference to such matters of pre-eminent importance and general concern as should establish it in a position of dignity and importance as the nucleus of an Imperial Council. But on the one hand Mr. Deakin's ambitions for a new Imperial organ were not shared by all, whether in England or the Colonies; and in the next place, discussions in a conference where all save one are governments of plenary powers, are not likely to be limited to those subjects which are in the power of the most restricted of them. Even the Conference of 1907 did consider certain subjects over which in Australia the Commonwealth Government either has no power, or over which the States exercise an independent authority which cannot be overridden by the action of the Commonwealth Government, *e.g.*, Judicial Appeals, Reciprocity in the Admission of Barristers, Double Income Tax, Reciprocity in Admission of Land Surveyors, Stamp Charges on Colonial Bonds, Colonial Stock Act. In the discussion of such matters the Commonwealth representatives are in the strictest sense unofficial, without any authority from those who alone are competent to carry out any determination to which the conference may come, or who, as governments,

[1] No. 3340, p. 15.

may be directly affected by the resolutions arrived at. It is easy to see that such a position contains many possibilities of inconvenience and misunderstanding which may well impair the usefulness of the Imperial Conference and discredit this experiment in Imperial co-operation.

STATE POWERS UNDER IMPERIAL ACTS.—The status of the States under Imperial law has in one case come under the consideration of the High Court of Australia, which has rejected the doctrine of the merger of the States in the Commonwealth. *M'Kelvey* v. *Meagher*[1] was a case under the *Fugitive Offenders Act* 1881. That Act, dealing with the case of persons who, being accused of an offence committed in "one part of H.M.'s Dominions," are found in some "other part of H.M.'s Dominions," provides for the necessary acts of authority to be done in the United Kingdom, or in the "British possession" concerned for the surrender of the fugitive. Its interpretation section (39) declares that the expression "British possession" means "any part of H.M.'s Dominions exclusive of the United Kingdom, the Channel Islands, and the Isle of Man," that all "territories and places within H.M.'s Dominions which are under one legislature shall be deemed to be one British possession and one part of H.M.'s Dominions," and that "the expression, 'legislature' where there are local legislatures as well as a central legislature, means the central legislature only." A warrant for the apprehension of an alleged criminal was issued in Natal and brought for execution to Victoria, where it was endorsed by the State Chief Justice, who would have been undoubtedly competent before the establishment of the Commonwealth. The defendant was apprehended under the warrant and committed by a Victorian Magistrate; but a writ of *habeas corpus* was obtained, and his release from custody was prayed on the ground that, since federation,

[1](1906) 4 C.L.R. 265. See also *In re Gerhard*, 27 V.L.R. 244, 655.

Victoria had ceased to be a "part of the British Dominions" or a "British possession" within the meaning of the Act; that these terms were now exclusively applicable to the Commonwealth, and that consequently neither the Chief Justice of Victoria nor the Victorian Magistrate was competent to act in the matter. The High Court held that the proceedings were good, and that the test of application in cases of this kind was to be found, not merely in the existence of central and local legislatures, but in the distribution of powers between them. If in the Constitution the power of the new legislature did not extend to the subject-matter of the Imperial Act—the administration of the criminal law and the extradition and rendition of fugitive offenders—such a legislature was not a central legislature within the meaning of the Act. In the present case the administration of criminal justice remained with the States. If the Commonwealth power over "external affairs" extended to making laws for the surrendering of fugitive criminals, then the existing law in force in the State at the establishment of the Commonwealth was preserved by sec. 108 of the Constitution until such time as the Commonwealth Parliament exercised its powers.

There are several other Imperial Acts applicable to "British Possessions" and "parts of His Majesty's Dominions," and conferring powers on the Legislature or the Governor of such possessions or parts, and raising questions similar to those arising under the *Fugitive Offenders Act, e.g.*, the *Extradition Act* 1870, and the *Naturalization Act* 1870. In regard to all Imperial Statutes passed after 1889, the *Interpretation Act* of that year makes a general provision of a corresponding nature. In all these cases the Imperial Act will continue to apply to the State, and the powers may be exercised by the State authorities by virtue of secs. 107 and 108 of the Constitution, unless the subject matter is one

withdrawn by the Constitution from the States or committed to the exclusive power of the Commonwealth. Several matters are so dealt with.

By sec. viii. of the *Constitution Act* the powers conferred upon Colonial Parliaments by the *Colonial Boundaries Act* 1895 are, in the cases of the Australian States, recalled, and, as by sec. 115 of the Constitution, the States may not coin money or make anything but gold or silver legal tender, their powers under Imperial coinage legislation are withdrawn. The special powers conferred by Imperial Acts in relation to defence, inland posts, Customs, and a few other matters, belong solely to the Commonwealth Parliament, because the subjects themselves are declared by the Constitution to be within the exclusive power.

In regard to special powers granted by the Imperial Parliament after the establishment of the Commonwealth, the test must be found in their relation to existing powers of the several Legislatures. If the special power granted relates to a matter within the control of the Commonwealth Parliament—as, for instance, if extended powers were given to Colonial Legislatures to vary or suspend the operation of the Imperial Copyright Acts in that possession—then, unless there were a clear intention that the power might be exercised by both Legislatures, it would presumably be exercised by the Commonwealth Parliament exclusively. But so far as the new power applied to matters not within the control of the Commonwealth Government at all—if, for instance, it extended territorially the effect of a grant of Colonial probate—it would belong to the States exclusively. If again it were declared that in certain specific matters Colonial Legislatures might make criminal laws operating extra-territorially, the power so given would belong to the Commonwealth or the State Parliament accord-

ing as the matter of such laws belonged to the one or the other.

In one respect the States in Australia have greater freedom than the States in the American Union. In the United States Constitution it is expressly provided that no State may "enter into any treaty, alliance or confederation" or "enter into any agreement or compact with another State or with a foreign power." In Australia there are no corresponding provisions. Treaties or compacts with foreign powers are, of course, not made independently by any part of the British Empire; and the power of the Commonwealth Government over "external affairs" would, no doubt, exclude the States from most of the matters of international agreement. But, as pointed out in the discussion of "external affairs," there are some matters of agreement which relate to matters belonging exclusively to the State, and in such cases it seems clear that the State must be a consenting party to any international agreement. As between the States of the Commonwealth, their power to make and carry out agreements is in no way impaired, except so far as the agreement is inconsistent with the federal union or the predominance of the Commonwealth in its own sphere. The States have, in fact, concluded some important agreements—*e.g.*, New South Wales, Victoria and South Australia in 1908 as to their respective rights in the waters of the River Murray, and Victoria and South Australia as to their disputed boundary line.[1] Reference may be made to the fact that the Conference of Premiers of the States has, since federation, increased rather than diminished in interest, and stands as an interesting illustration of the British tendency to develop "extra-legal" institutions, even under a formal and "rigid" Constitution.

[1]These agreements have not been ratified by the Parliaments of the States concerned.

БИБЛІОТЕКА * Ученаго Комитета Нин. Фин. *

PART VI.—THE CONTROL OF COMMONWEALTH AND STATE ACTION.

CHAPTER I.

THE COURTS AND LEGISLATION.

THE most distinctive feature of the Courts in the federal system is their power to determine whether a Statute passed by the Commonwealth or by a State Parliament is within the authority committed to that Legislature, a power which gives the Courts a peculiar importance in constitutional law and makes them in an especial way the "guardians of the Constitution." If we ask whence this power and duty come, we shall hardly find an answer in any specific provision of the Constitution itself, nor shall we find the explanation in the essential nature of the federal principle or of the "written Constitution." It is indeed, obvious that where there are two legislative authorities in a State which have enunciated irreconcileable rules of conduct, one must be paramount. Thus, in Germany and Switzerland, where the law of State or Canton conflicts with federal laws or the federal Constitution, the Courts must treat the State law as *pro tanto* over-ridden. But, save for this case, the balance of opinion in Germany appears to be that no Court can treat the authentic act of

a Legislature as inoperative, that *e.g.* a State Statute cannot be ignored because contrary to the State Constitution or an Imperial Act as contrary to the Imperial Constitution.[1] In other words, the Legislature is as much the interpreter of its own powers as in the unitary Constitutions of France and Belgium.

In Switzerland the Constitution is guarded characteristically by reference to the electorate. The Supreme Federal Tribunal is by an express provision of the Constitution bound to give effect to every Statute passed by the Federal Assembly; the only mode of challenge is by the demand of 30,000 electors, or eight cantons, for a *referendum*. The Statutes of the Cantons are subject to review in the Federal Tribunal if contrary to the Federal Constitution, but cannot be questioned in the Courts of the Cantons.

The system under which the valid exercise of legislative power is treated as a judicial question belongs to the history of the relation of courts of law to public power. In the reign of James I. the Courts succeeded in making good their claim to entertain legal causes though they involved the prerogatives of the Crown, whether in the nature of property or executive power. Thus they effectually prevented the establishment of any practical distinction in the administration of public and private law; and if on the one hand questions of power are treated judicially in suits between individuals, on the other, it is not to be forgotten that all justice is with us "public justice" and that the term "private justice" is not known amongst us. If executive power was thus a subordinate power subject to judicial review, it was by no means clear that legislative power was not subject to the same control, and there are dark hints in Coke of Acts of Parliament which had been declared invalid or at

[1] *E.g.* see *The German Judiciary*, by J. W. Garner, Pol. Sc. Quarterly 1903, p. 524; Howard, *The German Empire*, p. 120.

any rate might be so declared. The supremacy of Parliament indeed became unmistakeably established after the Revolution of 1689; but there were other legislatures as clearly subordinate. The American Colonies held charters of government from the Crown; and were constantly reminded that they must keep within the terms of the grant. Control by forfeiture of charter, by Act of Parliament, by judicial proceedings and an ultimate appeal to the Privy Council, whose action might be referred now to one, now to another of its high functions—these were the constitutional checks with which the colonies were familiar. A subordinate legislature being within the experience of all, the Revolution, though it removed some of the external checks, established a form of government which emphasised the subordinate character. It was not readily assumed in the Federal Constitution, that the judicial power in the Courts would be all-sufficient to deal with the possibilities of conflict. In the Philadelphia Convention it was successively proposed that the general government should have a negative on all the legislation of the States—the power which eighty years later was given to the general government in Canada; that the Governors of the States should be appointed by the United States and should have a negative on State legislation—a condition also established in Canada; that a Privy Council to the President should be appointed composed in part of the judges; and that the President and the two Houses of Congress might obtain opinions from the Supreme Court. But these expedients were discarded; the Constitution and the laws of Congress were declared the supreme law of the land and binding on the Judges of the several States. It was not without some hesitation on the part of the Courts, and some resistance on the part of the Legislatures, that the further steps were taken by the Courts of holding, in the case of both the States Constitutions and

the Federal Constitution, that the Courts must as a matter of judicial duty hold invalid laws which were inconsistent with the distribution of powers within the respective governments.[1]

It is interesting to observe how questions similar to those which agitated the framers of the United States Constitution were dealt with by the Australian Convention. In the early history of the Australian colonies, the Legislature and the Supreme Court were brought into curiously close relation by the part which was assigned to the Chief Justice in the Legislative Council of the Governor of New South Wales by 4 Geo. IV. c. 96, sec. 29; and by the compulsory submission of all Acts of the Legislative Councils to the Supreme Court for the consideration of their validity under 9 Geo. IV. c. 83, sec. 22. But these examples did not influence the deliberations of the Convention. The members of the Convention were, however, thoroughly acquainted with the prevalence and the nature of judicial control as developed in the United States, a control experienced in some small degree by the Colonies themselves, notably in the early days of Responsible Government in South Australia. The tendency was in fact rather to exaggerate than to underrate the controlling power of the Courts. In general, the power was regarded with singularly little jealousy or suspicion, a phenomenon entirely in accord with the tendency of the day to submit to judicial authority problems which are more economical or political than legal. Two substantive proposals were submitted as to unconstitutional laws. In the first place it was moved that when any law passed by the Commonwealth Parliament was declared *ultra vires* by any decision of the High Court of

[1]See *Rutgers* v. *Waddington*, (1784) N.Y., Thayer, p. 63; *Trevett* v. *Weeden*, (1786) Rhode Island, Thayer, p. 73; *Cooper* v. *Telfair* (1800) 4 Dall., 14, Thayer, p. 105; *Marbury* v. *Madison*, (1803) 1 Cranch, 137, Thayer, p. 107; *Eakin* v. *Raub*, (1852) Pennsylvania, 12 S. & R., 330, Thayer, p. 133.

Australia, the Executive might, upon the adoption of a resolution by absolute majorities in both Houses, or, as was suggested, in one House alone, refer the law to the electors for their approval. The other proposal was of a more sweeping kind. It was to the effect that the plea that a law of the Commonwealth or of a State was *ultra vires* should not be raised in any Court except, in the case of a Commonwealth law, by or on behalf of any State; or in the case of a State law, by or on behalf of the Commonwealth, but without prejudice to the power of the Courts in any litigation to deal with conflicts of Commonwealth and State law. The proposal received no support, and the maintenance of the individual right to impugn laws is the more significant because in other respects the Constitution differs markedly from the Constitution of the United States in not establishing rights of individuals against governmental interference.

The duty of passing upon the validity of Acts whether of the Commonwealth or of the State Parliament exists purely as an incident of judicial power. It belongs not to any one Court, or any system of Courts, but to all Courts within the Commonwealth, whatever their degree, whenever in a matter in litigation before them, some Act of the one Legislature or of the other is invoked. It is the duty of every Court to administer the law, of which the Constitution is a part and a superior part. "The Judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never directly pronounces any opinion whatever upon an Act of Congress. What the Court does do is simply to determine that in a given case A. is or is not entitled to recover judgment against X.,

but in determining that case the Court may decide that an Act of Congress is not to be taken into account, since it is an act beyond the constitutional power of Congress."[1]

When the matter has become the subject of judicial investigation, the judicial interpretation binds the Legislature only in indirect fashion. The decision becomes an *authority*, raising a probability ranging, according to many circumstances forming part of the practice of our Courts, from practical certainty on one side to the gravest uncertainty on the other, that that Court and other Courts will decide the same question in the same way. The Legislature being aware of this probability will generally refrain from passing Acts which would thus be ineffective by reason of the refusal of the Courts to enforce them.

No principle is better established than that the Courts will not consider the validity of a legislative Act except at the instance of one whose rights are touched by such Act; and the case must be one in which the Courts can give relief. It may not be easy for those who desire to impugn such legislation to show that their interest amounts to a right which the Statute invades, and the Courts will not proceed to the consideration of these matters upon feigned issues and as abstract questions.[2] Again, the only persons who have a *locus standi* may deem it impolitic to attack the Statute, either through fear of further governmental action of less doubtful validity and more hurtful in itself, or from fear of the loss of some contingent benefit, or from regard to public opinion.

It is possible, of course, that the principal object of a suit

[1] Dicey, *Law of the Constitution*, p. 155. It is, perhaps, going too far to say that the Court never directly expresses any *opinion* upon an Act of Congress.

[2] See *Bruce* v. *The Commonwealth Trade Marks Label Association and others*, (1907) 4 C.L.R. 1569; *A.-G. for New South Wales* v. *Brewery Employés Association of New South Wales*, (1908) 6 C.L.R. 469.

may be to obtain a judgment upon the constitutionality of a Statute. The immediate matter in dispute may be trifling in amount; but the suit is a "test case." That is no ground upon which the Court can refuse jurisdiction. But it must be a real and not a fictitious suit; the Courts will not permit issues on feigned facts. Between these cases lies the "friendly" or "collusive" action, *i.e.*, one in which are present all the facts which ordinarily give jurisdiction to the Courts and raise an issue, but the suit is a "friendly" one, and there is a substantial identity of interests of the parties, or the facts which give rise to the action have been done for the purpose of creating an issue to be tried. Such a course is not uncommon; in England and the Colonies some of the most important constitutional questions have been determined in collusive actions. It is obvious that as authorities such cases may rightly be regarded with suspicion, but the Supreme Court of the United States has gone the length of declaring that the Courts will not in such a cause consider the validity of a Statute. In 1891, in the *Chicago and Grand Trunk Railway Company* v. *Wellman*,[1] the Court said:—"The theory upon which apparently this suit is brought is that the parties have an appeal from the Legislature to the Courts, and that the latter are given an immediate and general supervision of the constitutionality of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another there is presented a question involving the validity of any Act of any Legislature, State or Federal, and the decision necessarily rests on the competency of the Legislature to so enact, the Court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not, but such an exercise of power is the ultimate and supreme

[1] 143 U.S. 339.

function of Courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest and vital controversy between the individuals. It never was thought that by means of a friendly suit a party beaten in the Legislature could transfer to the Courts an inquiry as to the constitutionality of the legislative Act." The English practice seems more favourable to friendly suits, if, at any rate, they are brought and conducted in good faith. In *Powell* v. *Kempton Park Racecourse Co.*,[1] the suit was avowedly a friendly suit, the purpose of which was to obtain a decision of the highest judicial tribunal as to the construction of an Act of Parliament. It is true that to ask the Court to construe an Act of Parliament is not quite the same thing as to ask the Courts to declare that a Statute is invalid, but each is the judicial determination of a question of law in a matter where the parties have rights. Lord Halsbury said (p. 157):—"I think it is right to say that in my view it is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court before whom it comes must decide according to law, and the construction of an Act of Parliament is a pure question of law, and must be decided according to its legal construction whatever may be the motives and wishes of the respective litigants." And Lord James, of Hereford, said (p. 190):—"It seems clear that the action was brought in good faith for the purpose of obtaining an authoritative and final judgment. Probably the plaintiff will regard with satisfaction his want of success in the action. But the judgment whatever it may be will and must be acted upon. This, therefore, is not a case where the judgment of a judicial tribunal is sought for the purpose of determining a right for mere abstract purposes."

[1] (1899) A.C. 143.

The consideration of constitutional questions purely as an incident of judicial power has one great advantage: "the judicial control"—Mr. Bryce objects to the expression altogether—is exerted with the least possible amount of friction. But it has two considerable defects. The practical importance of a decision of the Courts lies in its authority as precedent; and it may well be for the public interest that a cause involving great constitutional questions should not be left wholly in the hands of the parties. The parties may not be able to command the best legal assistance, or they may be content with the decision of a Court which is not the Court of ultimate appeal. These inconveniences may of course be mitigated by the public authority concerned taking up and carrying on the case,[1] or by the intervention of such authority as an interested third party where the circumstances admit it. The High Court of Australia has in several instances allowed the State Government or the Commonwealth Government to intervene in suits in which it was not a party on the record, *e.g.*, *The State Railway Servants Case*,[2] where the State of Victoria was heard on the ground of community of interest; *The King* v. *Barger*,[3] where Victoria was again an intervenant, the case being one which raised the whole question of the relation between Commonwealth and State Governments, not in one particular only, but generally; *Baxter* v. *Commissioner* and *Flint* v.

[1] As in *A.G. for Ontario* v. *Mercer*, (1883) A.C. 767, where the contest was virtually as to whether certain prerogative rights in land belonged to the Crown in right of Ontario, or of the Dominion of Canada. The defendant was content with the judgment of the Court of first instance, but the Dominion of Canada appealed in the name of the defendant and was heard in the Supreme Court and in the Judicial Committee. The latter treated the public character of the case as a reason for making no order as to costs. And see Todd, *Parliamentary Government in the Colonies*, p. 541.

[2] (1906) 4 C.L.R. 488.

[3] 6 C.L.R. 41.

Webb (the Income Tax Cases),[1] where the Commonwealth was an intervenant; the *Woodworkers Case*,[2] where the Commonwealth and the State of New South Wales intervened. In *Webb* v. *Outtrim*,[3] the Privy Council permitted the Commonwealth to intervene in the appeal.

The other defect of the system belongs to the accidental character of litigation,[4] an inconvenience which belongs to all judiciary law. In England the authority of Parliament is now available to settle disputed questions of law. But this was not always the case; Parliament was normally divided rather than united, and Parliamentary action requires unity. The great importance of judicial determinations in the seventeenth century lay in the fact that as disputes concerned the powers of the constituent parts of Parliament itself, these parts could not co-operate to settle or change the law. The opinion of the judges, whether judicially or extra-judicially expressed, was a powerful weapon, which the King was eager to turn to his own advantage. He was not disposed to wait, nor did law or custom then require him to wait, until litigation should arise. In a Federal Constitution, the circumstances are somewhat analogous. The Constitution is in no case readily alterable; it is quite likely that the very nature of the dispute precludes the necessary co-operation of powers. In any case there may be many uncertainties which may embarrass the Government and paralyse its action. The Government desires to know not whether it has done right, but whether it may do this or that thing. Very early in the history of the United States Constitution, the judges of the Supreme Court had to decide upon their attitude

[1] (1907) 4 C.L.R. 1087.
[2] (1909) 8 C.L.R., 15 A.L.R.
[3] (1907) A.C. 81.
[4] See Bryce, *The American Commonwealth*, Part I., Chapter XXIV.

towards questions of law addressed to them by the Executive. In 1793, Washington sought the opinion of the judges of the Supreme Court as to various questions arising under treaties with France, but after some delay the judges, "considering themselves merely as a legal tribunal for the decision of controversies brought before them in a legal form, deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them."[1] In several of the States of the Union, the Constitutions have provided that the Judges shall give opinions when called on by the Executive or the Legislature. Such opinions are never regarded by the Judges themselves as authoritative, and may be departed from by the Courts even when constituted by the same Judges who have given the opinion. Such opinions are given under an obvious disadvantage, since the Judges have not the assistance of the arguments of counsel. In Canada, by the *Supreme Court Act* 1875 (R.S.C. c. 135), extended by 54 & 55 Vict. c. 25, the Governor-General in Council may refer to the Supreme Court various specified matters including questions touching provincial legislation and the constitutionality of any legislation of the Parliament of Canada, and generally any other matter with reference to which the Executive sees fit to exercise this power; and in certain limited cases the Senate or House of Commons may seek the assistance of the Court. These references are modelled closely upon the form of judicial proceedings. It is the duty of the Court to hear and consider the matter referred to it; parties interested, whether Provincial Governments, associations or individuals, are cited, and are represented by counsel, and the finding of the Court is practically a declaratory judgment, on which an appeal may be taken to the King in Council. The power may be compared both with the power of the

[1] Marshall's *Life of Washington*, vol. v. 441.

House of Lords to consult the Judges, and the power of the Crown under 3 & 4 Will. IV. c. 41, sec. 4, to refer to the Judicial Committee for hearing or consideration any such matters whatsoever as the Crown shall think fit. The power has been very freely exercised, and many of the important constitutional questions which have come from Canada to the Privy Council during recent years have been submitted under it. The inconvenience of determining certain matters as abstract questions has been referred to,[1] but the Court is able to guard itself, and the power of reference seems to have been exercised with advantage. It may be noted that the proposal submitted to but rejected by the Australian Convention for prohibiting any challenge of a Statute as *ultra vires* save on behalf of the Commonwealth or a State, assumed that a substantive proceeding might be taken in the Court by the Attorney-General of the one or the other for the determination of the validity of such a Statute.

In Canada, as in other colonies, the Judiciary is organized under the Parliament which fully determines its functions. In the Commonwealth, as in the United States, it is judicial power which is vested in the Courts, and it is clear that the advisory function is not included in the power, even when the Court may hear evidence and arguments to aid it in giving advice.[2]

[1] *A.-G. for Dominion* v. *A.-G. for Ontario*, (1898) A.C. 700, at p. 713.

[2] By the *Local Government Act* 1888, sec. 29, any question arising or about to arise as to whether any business, power, duty or liability passes to a County Council under the Act, may, without prejudice to any other mode of trying it, on the application of certain persons be submitted for decision to the High Court of Justice, and the Court after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question. In *Ex parte the County Council of Kent* v. *Council of Dover*, (1891) 1 Q.B. 725, the Court of Appeal held that such an application was purely consultative and not judicial, that it "could only be decided in the sense of expressing the opinion of the Court how it ought to be decided" when the question should arise in an actual determination of an existing dispute in which a private right was involved.

CHAPTER II.

THE VALIDITY OF LAWS: PRINCIPLES OF INTERPRETATION.

When a properly authenticated Act of the Parliament of the Commonwealth is invoked in any Court, the Court must be satisfied that it is an exercise of some power which has been granted to the Parliament. The determination of this matter involves two things—the interpretation of the grant of power, and the consideration of the nature of the Act purporting to be in pursuance of the power.

The Interpretation of the Grant.—The general nature of the power of the Parliament and its limitations have been considered in a previous chapter. The particular subjects committed by enumeration in any federal Constitution are so various in character that we may take note at the outset of judicial warnings against entering "more largely upon the interpretation of the Statute than is necessary for the particular question in hand;"[1] and while the Commonwealth Constitution avoids some of the most troublesome of the difficulties that have confronted the interpreters of the Canadian Constitution (*e.g.*, the specific enumeration of the powers of each as exclusive, and such vague matters as "criminal law," "property and civil rights," and "all matters

[1] *Citizens Insurance Co. of Canada* v. *Parsons*, (1881) 7 A.C. 96, at p. 109.

of a merely local and private nature"), it undeniably presents certain difficulties of its own.

In fact, a certain generality and breadth of description belongs to the very nature of a Constitution. As was pointed out long ago by the Supreme Court of the United States in what has become the leading case in American Constitutional Law, "a Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature requires, therefore, that only its great outlines should be marked, its more important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."[1] Unless this is the main character of the powers conferred by a Constitution, it will assuredly lack that flexibility and power of development which alone enables a "rigid" Constitution to serve and promote a healthy national life.[2]

In the Australian Constitution there are wide differences in the nature of the enumerated powers. Some, like "taxation," "trade and commerce with other countries and among the States," "external affairs," are expressed in the broadest terms, and obviously extend over a wide and very indefinite field. Great "substantive and independent powers" they point to an end and leave to the legislative discretion that unlimited choice of appropriate means which is the first great rule of constitutional interpretation. On the other hand, there are powers over subjects of a very

[1] Per Marshall C.J., *McCulloch* v. *Maryland*, (1819) 4 Wheat. 316, at p. 407. The principle is adverted to and approved by Griffith C.J. in *Baxter* v. *Commissioners of Taxation for N.S.W.*, 4 C.L.R. at p. 1105.

[2] See *The State Railway Servants' Case*, 4 C.L.R. 488, 534.

limited nature, suggesting rather a particular means of accomplishing a national end. Thus we have "quarantine," one of many means towards the preservation of public health; "the prevention and settlement of industrial disputes extending beyond the limits of any one State" may be attacked only through "conciliation and arbitration." "Copyrights," "patents of inventions and designs," and "trade marks" are a part only of property. Nevertheless, it may be taken that as to these subjects the doctrine of the legislative choice of means applies,[1] though its scope of course is limited.

It has been said of the Constitution of the United States,[2] and the principle has been judicially recognized as applicable to the Commonwealth Constitution,[3] that the safest rule for interpretation is "to look at the nature and objects of the particular powers, duties and rights with all the aids of contemporary history, and to give to the words of each just such operation and force consistent with their legitimate meaning as may fully secure and attain the ends proposed." This principle appears to be well illustrated by the *Union Label Case*,[4] which declared invalid Part VII. of the *Trade Marks Act* 1905, establishing "Workers Trade Marks." In Parliament it was contended that the subject was one of a varying nature, as indicated by the several definitions of it from time to time, and while it was admitted that Parliament could not, by its own interpretation of the grant in the Constitution, enlarge its own power, still as the legislative power undoubtedly covered restrictive definition, some latitude of extensive interpre-

[1] See *Jumbunna Coal Mine v. Victorian Miners' Association*, (1908) 6 C.L.R. 309.

[2] Per Story J. in *Prigg* v. *Pennsylvania*, 16 Peters 610.

[3] Per Isaacs J. in *Varden* v. *O'Loghlin*, (1907) 5 C.L.R. at 215.

[4] *A.-G. for New South Wales* v. *Brewery Employés Union*, (1908) 6 C.L.R. 469.

tation should also be conceded in accordance with the fluctuating needs of the community.[1] In the High Court an attempt was made to construe the grant as though it were of "marks relating to trade," but in the main the argument in support of the enactment was addressed to showing that all the *essentialia* of a trade mark as previously determined by law were to be found in the workers' mark, and what were not found were *accidentalia* merely, and that there was evidence of a use of the term "trade mark" before the Constitution was enacted to describe marks of the kind here in question. The Court held that the meaning of the term "trade mark" must be ascertained by its signification in 1900, and after a careful examination of the legal history of the term from 1862, came to the conclusion that, regard being had to legislation, international conventions and judicial decisions, the term did not include certain marks which presented some of the features of the mark in question, and did imply other elements which were not found in the mark.

The general interest of the case lies in showing that terms employed in the Constitution are to be interpreted according to the meaning which they bore at the time the Constitution was enacted, and this principle is now assumed as an ordinary rule of construction.[2] How far particular words in a Statute are to be construed as embracing matters which were not and could not have been in the contemplation of the authors is a question of difficulty not belonging to the interpretation of Constitutions alone. But as Constitutions are essentially designed to serve a permanent and not merely a temporary end, there is a strong temptation to

[1] See *e.g.*, Parliamentary Debates 1905, p. 6201. See also the dissenting judgment of Higgins J. in *A.-G. for New South Wales* v. *Brewery Employés Union*, (1908) 6 C.L.R. at p. 603.

[2] See *e.g. The Woodworkers' Case*, (1909) 15 A.L.R. at p. 380 (Griffith C.J.).

subject them to a "progressive" interpretation.[1] The reconciliation, so far as the subjects of federal power are concerned, is stated in the following passage from the judgment of Griffith C.J. :—"The Parliament cannot enlarge its powers by calling a matter with which it is not competent to deal by the name of something else which is within its competence. On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject-matters. So long as those new developments relate to the same subject-matter, the power of the Parliament will continue to extend to them. For instance, I cannot doubt that the powers of the Legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be very different from posts and telegraphs and telephones as known in the nineteenth century. An instance of a quite different kind of subject-matter is immigration, the meaning of which term cannot alter, however the methods of bringing persons within the geographical limits of the Commonwealth may be extended."[2] And, of course, when the limits of the subject-matter are ascertained, the legislative choice of means for accomplishing its objects in relation thereto is not bounded by those means which were known to and in the contemplation of the framers of the Constitution.

It has been pointed out that, regarding the Constitution as a whole, and viewing the relations of its several parts to each other, it must be taken to establish a federal scheme wherein each government—the Commonwealth and the State—has a sphere of action in which it is independent.

[1] See the discussion in Clark's *Australian Constitutional Law*, 2nd ed., pp. 19 *seq.*

[2] *A.-G. for New South Wales* v. *Brewery Employés Union*, 6 C.L.R. at p. 501.

The federal nature of the Union then imports this consequence—that the Constitution, being at pains to determine the sphere and the independence of each government, could not have intended that particular powers should receive a construction which would nullify or impair that determination. If, then, terms are used in the grant of particular powers to the Federal Government which, according to one interpretation, would, from their comprehensive nature, impair the federal character of the Union and establish in effect an unitary system of government, or which, according to one construction, are inconsistent with the maintenance of powers in the States which the Constitution elsewhere reserves to them, an interpretation is to be preferred which supports the federal scheme, or the reserved powers of the States respectively. "The Constitution must be considered as a whole and so as to give effect as far as possible to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If then it is found that to give a particular meaning to a word of indefinite and possibly large significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected."[1]

In determining the extent of power conferred by the power to make laws with respect to "taxation," and the exclusive power to impose duties of excise, the Court has taken notice of the fact that a Constitution which expressly enumerates a number of matters relating to the internal affairs of the States, and which in dealing with trade and commerce expressly limits that subject to trade and commerce with foreign countries, and amongst the States, forbids to the Commonwealth Parliament any con-

[1] *The King* v. *Barger*, (1908) 6 C.L.R. at p. 72. See also *A.-G. for New South Wales* v. *Brewery Employés Union*, 6 C.L.R. at p. 503.

trol over the internal affairs of the States except so far as thus granted, and that, therefore, the power of taxation does not extend to any direct interference with those affairs; and the States are not precluded from regulating industries, &c., by the customary mode of licensing, though those licenses may be commonly known as "excises."[1] In the *Union Label Case*,[2] the Court again refers to the fact that as to trade and commerce, the power of the Commonwealth is expressly limited to that which is with foreign countries and among the States, thereby implying a prohibition to impinge upon internal trade and commerce—the sphere of the State—except as a necessary means to carry out some other power expressly granted. The Chief Justice sums up the position thus:—"In my opinion it should be regarded as a fundamental rule in the construction of the Constitution, that, when the intention to reserve any matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise, the Constitution will be made to contradict itself, which upon a proper construction must be impossible."[3] More emphatically, in *Huddart Parker* v. *Moorhead*,[4] Griffith C.J. (Barton and O'Connor JJ. concurring), declares that the Constitution is "to be construed as if it contained an express declaration that power to make laws with respect to trade and commerce within the limits of a State, and not relating to trade and commerce with other countries and among the States, is reserved to the States, except so far as the exercise

[1] *The King* v. *Barger*, (1908) 6 C.L.R. 41; *Peterswald* v. *Bartley*, (1904) 1 C.L.R. 497. See also *Lyons* v. *Smart*, (1908) 6 C.L.R. 143, 147.

[2] *A.-G. for New South Wales* v. *Brewery Employés Union*, (1908) 6 C.L.R. 469, 502-3.

[3] At p. 533. See also per Griffith C.J., in *Huddart Parker* v. *Moorhead*, (1909) C.L.R. ; 15 A.L.R. at p. 248.

[4] 15 A.L.R. at p. 248.

of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament." This declaration is made a part of the headnote of the report of the case.

The principle thus reiterated by the Court has been applied to the attempted regulation of industrial relations by Excises (*R.* v. *Barger*),[1] to the scheme for registering a workers' mark upon goods (*A.-G. for New South Wales* v. *Brewery Employés Union*),[2] to the application of the *Australian Industrial Preservation Act* to corporations engaged in the domestic trade of a State (*Huddart Parker* v. *Moorhead*)[3]; and is invoked by the Chief Justice in the *Woodworkers' Case.*[4]

It has been vigorously assailed by Isaacs and Higgins JJ. Admitting that the Constitution is to be read as a whole so that its parts shall be consistent with each other, the learned justices contend that the proper course is to give to the several terms defining the grants of power, their natural and proper meaning, unaffected by any implications of restraint based upon the supposed powers of the States; and in the rejection of implied restraints upon powers, there is claimed the support of the Privy Council, and (in the case of the taxing power), the Supreme Court of the United States. The powers of the States reserved by the Constitution are merely what is left to them after the Commonwealth power has received its full interpretation; to construe the special grant by the residuary disposition is a clear inversion of the position, and is rather a judicial limitation upon than an interpretation of the grant of powers.[5]

[1](1908) 6 C.L.R. 41.

[2](1908) 6 C.L.R. 469.

[3](1909) 15 A.L.R. 241.

[4](1909) 15 A.L.R. 374, 381-2.

[5]See the dissenting judgments in *The King* v. *Barger*, and the *Union Label Case.* In *Huddart Parker* v. *Moorhead*, Higgins J. concurs with the majority.

On the other hand, it must be observed that no principle is better established in the United States than that the preservation of the integrity of State powers is a necessary part of the constitutional system: "it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the union and the maintenance of the National Government."[1] The most signal illustration which the principle has received is the construction put by the Supreme Court upon the amendments in the Constitution made after the civil war of 1861. These amendments declared that no State should make or enforce any laws abridging the privileges or immunities of citizens of the United States, nor should any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; and Congress was given power to enforce these prohibitions by appropriate legislation. In the *Slaughter House Cases*,[2] it was contended that a State law establishing a trade monopoly was a violation of these provisions; but the Court, rejecting the contention, pointed out that if sustained, it would constitute a practical supervision by federal organs, legislative and judicial, of the most ordinary and usual functions of the State. The Court added[3]:—"The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit

[1] *Texas* v. *White*, 7 Wallace 700, 725. Cf. also *County of Lane* v. *Oregon*, 7 Wallace 76; *U.S.* v. *E. C. Knight Co.*, 156 U.S. at p. 13; *Northern Securities Co.* v. *U.S.*, 193 U.S. at p. 348.

[2] (1872) 16 Wallace 36.

[3] p. 78.

of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both those governments to the people, the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt."[1] Even the Privy Council, whose *dicta* are especially relied on by Isaacs J. in opposition to restraint by implication, has, when called on to ascertain the respective powers of Dominion and Province in Canada, affirmed the practice as a rule of necessity, and it is settled that in order to construe the general terms, in which the classes of subjects in secs. 91 and 92 of the *British North America Act* 1867 are described, both sections and the other parts of the Act must be looked at, in order to ascertain whether language of a general character must not by necessary implication or reasonable intendment, be modified and limited.[2]

In view of some opinions expressed in recent debates in Parliament,[3] it appears necessary to point out that the principle is not that every power of the Commonwealth Parliament is arrested when it reaches the domestic commerce or the industries of a State. It does not require us to say that the power to make laws with respect to banking, or bills of exchange, or corporations, cannot affect those operations or persons except so far as they come within foreign and inter-State commerce. It admits that the operations of banking and the currency and obligations of bills of exchange may

[1] The principle of these cases is affirmed in *Hodges* v. *U.S.*, (1906) 203 U.S. 1. See also *The Civil Rights Cases*, (1882) 109 U.S. 1, at pp. 11, 13.

[2] Lefroy, *Legislative Power in Canada*, pp. 477 *et seq*; *Citizens Insurance Co.* v. *Parsons*, 7 A.C. at p. 110; *Russell* v. *The Queen*, 7 A.C. at p. 839.

[3] P.D. 1909, pp. 1939 *et seq*.

be wholly governed by federal law, though existing solely for intra-State business; and that the federal law extends to the audit of accounts and the winding up of companies carrying on business in one State only. But it does require us to be assured that the federal Act is, according to its true nature and character, a law with respect to banking, to bills of exchange, or to corporations, as the case may be, and not a regulation of domestic trade or industry by means of bills of exchange, banking, or corporations. In this sense it is accepted by Higgins J. in *Huddart Parker* v. *Moorhead*.[1]

The Interpretation of the Federal Statute.—From the interpretation of the constitutional power of the Legislature, then, we proceed to the consideration of the true nature and character of the legislative enactment. Parliament cannot by affecting to legislate upon that which is within its power, really make laws upon that which has not been committed to it. Here the difficulty lies largely in the fact that an Act may have several aspects, in one of which, if solely regarded, it might be an exercise of power over one of the enumerated matters; while in another it would be the exercise of power over some matters remaining within the exclusive power of the States Parliaments. The same difficulty may, of course, arise in regard to State legislation—an Act of a State Parliament may in one view be an exercise of authority upon some matter within the residuary power of the State Parliament, in another it may be an enactment on one of the subjects of the exclusive power of the Commonwealth Parliament. These questions have been of great importance in Canada,[2] where the powers of Dominion and Province are generally exclusive powers, and in the United States have given rise to a large number of cases in which the Courts have had to determine whether

[1] 15 A.L.R. at p. 271.

[2] See Lefroy, pp. 372-424, and *Quebec* v. *Queen Insurance Co.*, 3 A.C. 1090.

Acts of the States legislatures affecting trade and commerce among the States are in substance enactments of commercial regulation, in which case they would be inoperative as impairing the freedom of commerce, or are within the police power of the States—*i.e.* their general power of providing for the peace and welfare of the community. Federal laws prohibiting the transmission by mail or the carriage on interstate railways of lottery tickets or other things deemed injurious to public health or morals, illustrate one class of case; State laws prohibiting the admission of paupers or criminals the other. The best illustration is perhaps to be found in the temperance legislation of Canada, as to which Lord Watson says: "There may be a great many objects, one behind the other. The first object may be to prohibit the sale of liquor and prohibition the only object accomplished by the Act. The second object probably is to diminish drunkenness; the third object to improve morality and good behaviour of the citizens; the fourth object to diminish crime, and so on."[1]

In all such cases, "the true nature and character of the legislation in the particular instance under discussion must always be determined to ascertain the class to which it belongs."[2] In the *Liquor Prohibition Case*,[1] already cited, Lord Watson, delivering the judgment of the Privy Council, said: "We are always inclined to stand on the main substance of the Act in determining under which of these provisions (of the *British North America Act* 1867) it really falls. That must be determined *secundum subjectam materiam*, according to the purpose of the Statute as that can be gathered from its leading enactments." Then, having recited as above the several possible objects involved in the legislation under discussion, his Lordship proceeds: "These

[1] *The Liquor Prohibition Case*, 1896 A.C. 348.
[2] *Russell* v. *The Queen*, L.R. 7 A.C. 829, at p. 840.

are all objects. What is the object of the Act? I should be inclined to take the view that that which is accomplished and that which is its main object to accomplish, is the object of the Statute; the others are mere motives to induce the Legislature to take means for the attainment of it." The "mere motive" of the legislator is irrelevant[1]; if the true nature of his Act as disclosed by its contents is within his power, its validity cannot depend upon the motive which may be imputed to him, though common knowledge or even the legislator's own statement in the preamble may leave no doubt as to what that motive was. For instance, if the Legislature has power to impose taxation, the validity of a Customs Act cannot depend on whether the motive of the Legislature was the raising of a revenue or protection of industries; and a land tax will be good, even though the object aimed at is the "bursting up of large estates" rather than the raising of money. On the other hand, if the Act itself contains a scheme of legislation upon some substantive and independent matter not committed to the Legislature, its true nature and character must be determined by reference to that scheme, and not by the fact that, as auxiliary means of accomplishing this foreign purpose, it has utilized, by way of sanction, a power such as the power of taxation, committed to it by the Constitution.[2] Courts are astute to prevent the use of means for doing indirectly what may not be done directly,[3] and in dealing with the validity of legislation will regard the substance rather than the form.[4]

[1] Lefroy, p. 273; *Cooley's Constitutional Limitations*, 257; *Kingston* v. *Gadd*, 27 V.L.R. 417, 428, per Holroyd J. For an illustration, see *Veazie Bank* v. *Fenno*, (1869) 8 Wallace 533.

[2] Cf. *Quebec* v. *Queen Insurance Co.*, 3 A.C. 1090.

[3] Lefroy, 372, 388; *Madden* v. *Nelson and Fort Sheppard Railway*, (1899) A.C. 626, at p. 628.

[4] Per the High Court of Australia in *Deakin* v. *Webb*, 1 C.L.R. at p. 611; *Peterswald* v. *Bartley*, 1 C.L.R. at p. 511.

These considerations have been strikingly illustrated in the Commonwealth by the cases of *Commonwealth* v. *McKay* and *The King* v. *Barger*,[1] in which the High Court had to determine the true nature of an Act which purported to impose a duty of excise, but which was impugned as in substance a regulation of certain manufactures. The same principle is involved in the application of the *Australian Industries Preservation Act* to corporations.[2] The cases are considered *postea* under the head of Taxation and Corporations respectively.

[1] (1908) 6 C.L.R. 1.

[2] *Huddart Parker* v. *Moorhead*, 15 A.L.R. at p. 271.

CHAPTER IV.

UNCONSTITUTIONAL LEGISLATION.

An Act of Parliament which deals wholly with matters not granted to the Legislature or with matters withheld from it, or exercises power in a forbidden way, is void. But it very commonly happens that the Statute merely trenches upon the forbidden ground amongst a number of other things which, taken by themselves, would be *intra vires*. The question in such cases is how far the taint extends, for it is well settled that a Statute may be *ultra vires* as to part only. The test is the severability of the subject-matters dealt with. Is the scheme of forbidden legislation part of and interwoven with the lawful scheme, so that the elimination of the first makes the second incomplete or substantially alters its nature? If so, to sustain the second in the absence of the first would be to convert the scheme into something other than Parliament devised, and to establish a substituted scheme for the scheme of the Legislature. Thus, when it is once established that some part of an Act of Parliament is invalid, the ordinary presumption in favour of the validity of a legislative Act gives way; the presumption then is that the whole constituted a single scheme, and it has to be shown affirmatively that there is such an inde-

pendence of the parts as will enable what remains to be sustained without doing something which Parliament did not intend.

In the *Union Label Case*[1] the Court held that the provisions of Part VII. of the *Trade Marks Act* 1905 establishing a worker's mark were *ultra vires* as invading the State power over domestic commerce and industry. It was argued that, as Part VII. contained a distinct and specific prohibition of the importation of goods to which a worker's label was applied without authority, and as this provision if it stood alone would be clearly within the power of the Commonwealth over foreign trade, this provision should be separated from the rest of Part VII. and sustained, and with it, of course, all the auxiliary machinery of registration, &c. The Court rejected the contention on the ground that the result would be to bring into operation a law entirely different in its purpose and character from that which the Legislature enacted.

On the other hand, in *Baxter* v. *Commissioner of Taxation*[2] the Court had to deal with sec. 39 of the *Judiciary Act* 1903, whereby federal jurisdiction was committed to the State Courts subject to various conditions, one of which was that every decision of the Supreme Court of a State exercising jurisdiction under the section should be final and conclusive except so far as an appeal might be brought to the High Court. It was argued that, assuming that the

[1] *A.-G. for New South Wales* v. *Brewery Employés Union of New South Wales*, (1908) 6 C.L.R. 469. See judgment of O'Connor J. (pp. 545-548). Isaacs J. on this point concurs with the majority of the Court: "The same trunk, the same main idea and purpose supports them all. Sub-sec. (*c*) is a very important enactment, but it is clearly intended to guard against evasion of the proprietary rights in a trade mark, and would not have been enacted if it were thought the main purpose was unlawful. If the principal fails, its accessory, I conclude, cannot stand" (p. 559).

[2] 4 C.L.R. 1087, 1140. See also the *Jumbunna Coal Mine and others* v. *Victorian Coal Miners' Association*, (1908) 6 C.L.R. 309.

condition was *ultra vires*, as excluding the appeal to the King in Council, the grant of jurisdiction so depended upon it as to avoid the whole scheme contained in the section. The High Court, however, held that the provisions were severable and independent. If the provision were *intra vires* an appeal to the Privy Council would lie with special leave, if it were *ultra vires* the appeal would lie without special leave. The validity of the grant of jurisdiction to the State Courts, with its consequential appeal to the High Court, could not be regarded as depending on such a subsidiary provision.

The most difficult class of case with which the Courts are called on to deal is where the Statute uses terms of generality which, literally construed, would apply the Act to matters beyond the power of the Legislature. In such a case it is commonly contended, first, that the general words should by construction be restricted to matters within the power, the presumption being that the Legislature intended to act within its powers; secondly, that if they cannot in the circumstances be so limited by construction, the Act should be treated as valid and operative to the extent of the federal power, and the excess only should be treated as *ultra vires*. Both arguments are fortified by a consideration of the respect due from the judiciary to a co-ordinate branch of the Government which is by its constitutional functions bound for its own purposes of action to determine provisionally the extent of its powers.

Illustrations may be drawn from two cases in the High Court of Australia arising under the *Commonwealth Conciliation and Arbitration Act* 1904. In the first of these cases, the *State Railway Servants Case*,[1] the High Court

[1] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés' Association*, (1906) 4 C.L.R. 88.

held that the specific inclusion of "disputes in relation to employment upon State railways" was *ultra vires* as an invasion of the exclusive powers of the States. It was clear that the application of the Act to other cases of industrial disputes was not dependent on its application to State railways, and the effect therefore would simply be to write out the offending words. But it was then argued that the words in question would have been valid if limited to State railways as instruments of inter-State commerce, and that the provision though not limited to or in terms referring to inter-State commerce, might and ought to be construed as applicable only thereto, and therefore valid and operative. The Court rejected the contention and cited the principal American cases on the subject.[1] In the *Jumbunna Coal Mine* v. *The Victorian Coal Miners Association*,[2] it was argued that the sections of the Acts permitting the incorporation and registration of associations of employers and employés were so widely framed as to confer a right of registration upon associations which could not possibly be concerned in an industrial dispute *extending beyond the limits of any one State*; that there was nothing in the Act to confine the application of the general words within constitutional limits; that therefore the whole section, and (because the section underlay the working of the whole Act) the whole Act, were invalid. The Court held that the presumption in favour of an intention by the Legislature to use general words in a sense within its constitutional powers was applicable to Commonwealth legislation; the Act clearly contemplated that an association, when registered, would be a party to a dispute within the meaning of the Act, and by definition in the Act itself, that meant a dispute extending beyond the limits of any one State.

[1] S.C. at p. 546-7.
[2] (1908) 6 C.L.R. 309.

Text-books and reports are full of cases which depend upon the presumption in favour of the validity of Statutes, and which assert that Statutes must, if possible, receive a construction which will make them operative.[1] This may mean either of two things—that the Court should bow to the Legislature's construction of the Constitution, if possible; or that, making its own independent construction of the Constitution, it should if possible so interpret the Statute as to bring it within the Constitution. Expressions which refer to the presumptions to be made in favour of the validity of a legislative Act are commonly used loosely without distinguishing the two senses. The most distinguished advocate of the first doctrine is Professor Thayer,[2] who declares that a Court "can only disregard the Act when those who have the right to make the laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question. That is the standard of duty to which the Courts bring legislative Acts, that is the test which they apply—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the Constitution has charged with making it." The analogy suggested is not the interpretation of a written instrument, but the attitude of a Court towards the verdict of a jury. With all the deference due to so high an authority, it is submitted that this does not correctly describe either the ideal or the actual function of the judiciary. Practically, it involves, as Professor Thayer admits, a different view in the construction of Federal and State Statutes, for State Legislatures are not, in the National Courts, co-ordinate branches of government;

[1] See Cooley, *Constitutional Limitations*, 7th ed., pp. 252-257; Lefroy, *Legislative Power in Canada*, pp. 260 *et seq.*

[2] *The American Doctrine of Constitutional Law*, 7 Harvard Law Review, 129.

and it appears to introduce confusion as to the respective functions of National and State Courts in dealing with State Statutes. It involves, also, the determination of a different question, according as a Court may be giving an advisory opinion or a judicial decision. Further, Australian experience amply confirms the difficulties suggested by Daniel Webster[1] —that a measure may pass the Legislature because members who consider that it is of doubtful validity have voted for it in order that the Courts should determine the question of power, while on the doctrine suggested the Judge holds it valid not because he considers it is *intra vires*, but because the Legislature has passed it. Even if considerations of respect for the Legislature are to enter into the matter it is not so obvious that it is more offensive for the Court to say in effect: "We disagree with the opinion you have formed in this matter," than to say: "The interpretation which you have put upon the Constitution is one which could not possibly be put on it by reasonable men." And if Professor Thayer's principle were the true one, we might expect to find that, where the opinion of Congress is shared by three or four members of the Supreme Court, as has been the case in many of the constitutional cases in recent years, the majority of six or five Judges who are of opinion that the Act is *ultra vires* would feel themselves bound to withdraw their opinions and sustain the Act. It is needless to say that we do not find this. The true view, it is submitted, is that the Courts, having to determine the matter before them according to law, are charged with the independent duty of interpreting for themselves the meaning and extent of the power conferred by the Constitution. If after this independent consideration, the Court is unable to determine as between two competing constructions of the

[1] *The Charles River Bridge Case*, 7 Pickering 344 (Mass.).

power, the presumption in favour of validity will operate to give effect to that construction which sustains, rather than to that which avoids, the Act under review.

The more common application of the doctrine of presumptive validity is to the Statute rather than to the Constitution. Perhaps no more striking illustration can be found than the decision of the Privy Council in *McLeod* v. *A.-G. for New South Wales*.[1] In that case, a provision in a Statute of New South Wales relating to bigamy, copied from an English Act, declared that the offence was constituted "wheresoever such second marriage takes place," and the Privy Council, holding that a Colonial Legislature had no power to give jurisdiction to its Courts over crimes committed outside its territory, and that every presumption must be made in favour of the validity of an Act, considered that the words quoted must be limited to New South Wales.[2]

The rule concerning the favourable construction of general words was laid down in the *Employers Liability Act Cases*[3] in terms which derive additional force from the fact that they were uttered in a dissenting judgment affirming the validity of an Act which was held to be *ultrâ vires* by a majority of the Court. Moody J.[4] admitted that the cases established the proposition that "a single statutory provision is void if it is expressed in general words so used as clearly to manifest the intention to include within these words subjects beyond the constitutional power of the law making body. The Courts have no power to read into such a provision an exception for the purpose of saving that which is

[1](1891) A.C. 455.

[2]The same words in the English Act were in the *Trial of Earl Russell*, (1901) A.C. 446, held to extend to marriage outside the British Dominions, and *McLeod's Case* was explained by reference to the limited powers of a Colonial Legislature.

[3](1907) 207 U.S. 463.

[4]p. 515.

left from condemnation."[1] But he considered that in all cases where general words had been construed as embracing matters *ultrâ vires*, the Act was one which could not be limited without violating the obvious intent of Congress as ascertained by the necessary meaning of the language employed, they were cases in which "no other meaning was possible." In the opinion of the learned Justice, general words may, in view of the context and with the aid of the light of the Constitution, be restrained in their meaning with the purpose and effect of giving them such a construction that the Act may be sustained as a legitimate exercise of the legislative power; and that they should be so treated is not a mere rule of construction, but is a rule of policy and law. Accordingly, the learned Justice, with Harlan, M'Kenna and Holmes JJ., was of opinion that the general words of the Federal *Employers Liability Act*, applying it to all persons engaged in inter-State commerce, must be understood to apply to such persons only in so far as they were engaged in that commerce, and did not extend to them as and while engaged in the internal commerce of a State. The majority of the Court, on the other hand, considered that Congress had expressly declared the class of persons to whom the Statute was to apply, that it had done so in unambiguous terms, which, according to their nature and proper interpretation, extended to cases beyond the power of Congress; and that these terms could only be limited by introducing an exception which Congress had not thought fit to insert.

In this case the difference between the majority and the minority is occasionally expressed in terms which suggest a difference in principle. But probably no such difference existed. The majority would certainly accept the proposition that, in construing a legislative Act, regard must be had

[1]See also *A.-G. for New South Wales* v. *Brewery Employés Union of New South Wales*, 6 C.L.R. 469, per Isaacs J.

to the powers of the Legislature; the minority with equal certainty would agree that an interpretation plainly differing from the intent of the Legislature may not be resorted to to force a Statute within constitutional limits.

The question then becomes one of particular application, and even there the whole Court was probably agreed that there must be something in the terms of the Act sufficiently connecting it with some federal power to enable the Court to construe the Act by that power, for the minority distinguish the case at bar from a prior and very recent decision in *Illinois Central Railroad* v. *McKendree*[1] on the ground that in that case there was nothing in the enactment in question to indicate the invocation of any power of Congress, while in the *Employers Liability Act* there was an express advertence to the inter-State commerce power, from which reference they considered it proper to infer an intention to limit the enactment by that power. So also in the *Jumbunna Case*,[2] the general words sustained were found in a Commonwealth enactment which was plainly referable to the constitutional power over industrial disputes extending beyond the limits of any one State, and the presumption was that Parliament intended its words to operate within the limits of that power. The case is different from that in which the legislature casts its net at large, and leaves to the Court the task of finding some power to which the words used can be applied in a restricted sense. This was the attempt which failed in the *State Railways Servants Case*,[3] where the Act in itself had no apparent relation to inter-State commerce, and where, therefore, there was no reason to suppose that Parliament intended that its general words should be applied to inter-State commerce only.

Where the Court determines that general words do accord-

[1] (1906) 203 U.S. 514.
[2] (1908) 6 C.L.R. 309.
[3] (1906) 4 C.L.R. 488.

ing to their proper construction embrace matters beyond the constitutional power of the Legislature, it does not appear that there is any room for the application of the rule of severance; consequently the whole provision fails. It is impossible to give legal effect to the terms employed by the Legislature in the sense which the Legislature intended. To give them any other meaning would be to re-write the Statute, to separate what the Legislature united. In the *Employers Liability Cases*,[1] the whole Court was agreed that the only question was one of construction, and that it was impossible to sustain the Act in relation to inter-State commerce, if its general terms as properly construed embraced intra-State commerce as well. In the *Union Label Case*,[2] the same principle was observed. In the case of *United States* v. *Ju Toy*,[3] the rule is laid down clearly and unambiguously. The general words of an Act of Congress had been applied by the Supreme Court in more than one case to matters within the admitted control of Congress. The case at bar was one in which it was sought to make a new application of the Act to facts which were clearly within the general words, but it was argued that these facts were beyond the control of Congress, and that *pro tanto* the Act was void. To this it was replied that the general provision having been already sustained by the Court, it must be treated as good to the whole extent of its ambit; that it could not be treated as partly good and partly bad. The Court said:—"It is established by the cases cited that the relevant portion of the Act . . . . is not void as a whole. The Statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as

[1] 207 U.S. 463.
[2] (1908) 6 C.L.R. 469. See per O'Connor J. at pp. 546 *et seq.*
[3] 198 U.S. 259, 263.

to all that it embraces or altogether void. An exception of a class constitutionally exempted cannot be read into these general words merely for the purpose of saving what remains."

The case of *Fox* v. *Robbins*,[1] presented the question of the extent of invalidity in a peculiarly difficult form. A West Australian Statute makes it an offence to sell any liquor without a proper licence, and establishes three kinds of licences—a general publican's licence at a fee of £50, giving the right to sell beer, wines and spirits; and two licences restricted to the sale of the produce of West Australia—a wine and beer licence at a fee of £5, and a Colonial wine licence at a fee of £2. The defendant, a person having a Colonial wine licence, was charged with selling Victorian wines without having a general publican's licence, and the case was dismissed on the ground that the law, in so far as it discriminated between the produce of different States, was prohibited by sec. 92 of the Constitution. What then is the position of persons desiring to sell in West Australia wine produced in other parts of the Commonwealth? Ought they to get a Colonial wine licence, paying £2 therefor? Or, on the other hand, can they sell such wines without any licence at all? Higgins J. takes the first view; Isaacs J. the second; the other members of the Court abstain from expressing any opinion, save that Griffith C.J. thinks that a good deal may be said in support of either contention. The opinion of Higgins J. is based on the fact that the sole vice of the legislation is its discrimination, and that the most that can be contended for by sellers of wine is that they shall be put on as good a footing as sellers of Australian wine. But this construction savours rather of the invention of a new licence never contemplated by the Legislature at all. Isaacs J. contemplates another possibility—that the

[1](1909) 8 C.L.R. 115.

provision for Colonial wine licences is by reason of its discrimination, wholly void, so that all sellers of wine, West Australian or other, would be required to obtain the general publican's licence with its fee of £50. But he points out that the vice of discrimination springs not from this provision alone (which by itself merely imposes a burden on sellers of West Australian wine), but from the combined effect of the licensing provisions. To take some of these, enacted for one set of conditions, and apply them to a different set of conditions, was to undertake the task of remodelling legislation. The Act must operate in accordance with its terms as far as it could constitutionally do so; so far as it could not, it was inoperative. In the result, there was no lawful provision in the Act relative to licences for the sale of wine, the produce of other States than Western Australia.

The fact that the validity of Statutes is brought under the consideration of the Courts, not in virtue of any direct power of review, but merely as incident to the administration of justice, involves (as already observed) the rule that the constitutional character of the Statute can be raised only in some litigation competently before the Court in which it is sought to apply the Statute as a law governing the case. It may not, in all cases, be easy to establish such a direct interest as constitutes a right to have the adjudication of the Court, and it is established in Australia, as in the United States, that the Court "will not entertain abstract questions of law or give an opinion as to the power of the Commonwealth to enact certain legislation where the opinion cannot be followed up by an effective order." Therefore, when an action was brought to restrain the registration of a workers' trade mark, the withdrawal of the application for registration precluded the consideration of the question whether Part VII. of the *Trade Marks Act* was *intra vires*, in spite

of the power of the Court, under its Rules, to make declaratory orders.[1] Some time afterwards an action was brought by the Attorney-General for New South Wales, at the relation of four brewery companies, who were also joined as plaintiffs, against the Brewery Employés Union of New South Wales and the Registrar of Trade Marks for the Commonwealth, for an order cancelling the registration of the defendant union's mark, and an injunction to restrain the defendant Registrar from keeping a register of workers' trade marks. In this case,[2] there were plaintiffs claiming an order which, if made, would be operative and effective against the defendants, and the question was whether the plaintiffs—the brewing companies as individuals affected, or the Attorney-General as representing the public—had a *locus standi* to initiate litigation for the purpose of obtaining the words prayed. A majority of the Court (Isaacs and Higgins JJ. dissenting) held that the legislation, if valid, did in fact impair certain common law rights of the brewing companies, first, as interfering with their freedom to carry on their business in their own way, by compelling them to elect whether they would or would not use the mark registered by the defendant union, with its attendant consequences; secondly, as preventing the plaintiffs from registering, should they desire to do so, a mark similar to that of the defendants. These rights of the plaintiffs were protected by law, and the plaintiffs were accordingly entitled to the decision of the Court on the question whether acts which amounted to an interference with them were legally justified. The decision of the Court also sustained the *locus standi* of the Attorney-General for New South Wales. The

[1] *Bruce* v. *Commonwealth Trade Marks Label Association*, (1907) 4 C.L.R. 1569, where a number of American cases are referred to.

[2] *A.-G. for New South Wales* v. *Brewery Employés Union of New South Wales*, (1908) 6 C.L.R. 469.

case was not one in which the State of New South Wales, as a juristic or corporate entity, claimed any right. The Attorney-General claimed to appear in his capacity of representative of 'the public' or 'the community,' on the same ground on which he is heard when corporate bodies or public officers and authorities are assuming powers in excess of those committed to them. The difficulty in this position lies in the fact that in a unitary government the Attorney-General appears on behalf of the sovereignty or community which has created the power alleged to have been transcended; the grant of the Crown, or of a Statute, has been abused, and the officer representing the community from which the authority springs interferes on its behalf. In the present case neither the office of Registrar nor his functions of registering marks sprang from State law, and it was strongly urged that the only competent representative of the public in the present circumstances was the Attorney-General of the Commonwealth. The majority of the Court (Higgins J. dissenting), however, considered that where the question was not whether the authority committed by the Statute was exceeded, but whether the Statute itself was competent to grant the authority, then as the case became one whether there was not an assumption of power which the States alone could give, and had not given, the Attorney-General of the State was competent to come in on its behalf and challenge the authority. The case was thus put by Isaacs J. (who on this point concurred with the majority):—

"If under the assumed powers of a federal Statute in fact invalid, some usurpation of State administrative or judicial authority is attempted in the State, it would be a trespass on State territory, and the Attorney-General of the State, as representing the King, could apply to restrain it. His rights in this respect would not be lessened merely because a similar usurpation was asserted over the territory of

other States. And if there is a legislative usurpation, if an Act of the Commonwealth Parliament unauthorized by the Federal Constitution occupies part of the legislative field exclusively reserved for the State of New South Wales, and by its commands, operative in all parts of Australia, prescribes to the citizens of that State the rules of conduct they must follow under penalty, I am of opinion that the case is parallel with that of administrative and judicial intrusion upon State territory. The Attorney-General for a State in such case does not depend upon the infringement of rights possessed by individuals as Australians under a federal Statute, but protects on behalf of the Crown those rights and functions with which the King, guided solely by his State representatives and advisers, is invested in respect of the State" (pp. 557-8).

CHAPTER IV.

THE COURTS AND EXECUTIVE ACTION.

It is a characteristic of the English and American system of public law that public officers are in respect to their official acts subject to judicial control. They are subject to the ordinary laws of the land, and enjoy no personal immunity from proceedings civil or criminal, if, transcending the bounds of their lawful authority, they invade some private right or commit a crime. This is the "rule of law" which Professor Dicey's *Law of the Constitution* has made a commonplace amongst us. But even more significant is the kind of control which the Courts may exercise over the *official act*—compelling its execution by *mandamus*, forbidding it by *injunction*, annulling it by *certiorari* (a process the extent of which has been very recently demonstrated),[1] in the special case of persons in custody, releasing them on *habeas corpus*, and determining the title to office upon *quo warranto*. In these cases the Courts exercise a jurisdiction which is extraordinary and peculiar, comparable rather with the controlling and supervisory powers in an administrative hierarchy than with the ordinary powers of a Court in the determination of conflicting rights in the course of litigation. This special character of English Courts has received less notice than it deserves, and here as

[1] *Rex* v. *Woodhouse*, (1906) 2 K.B. 501.

in some other matters connected with our public law it is American writers who have shown the way. It may be permitted to mention the works of Professor Goodnow on *Comparative Administrative Law* and *American Administrative Law*. In this place no more is required than to consider how far the exercise of judicial control is affected by the existence of a dual system of government over the same persons and territory.

So far as concerns the merely remedial and punitive action of judicial proceedings, it was hardly affected by the Constitution itself. The laws of the States in respect to civil wrongs and crimes remained, and with them the jurisdiction of the State Courts.[2] In the United States, if a federal officer was alleged to have committed a tort or a crime he might be sued or prosecuted in a State Court, notwithstanding that his act was committed under the alleged authority of the Constitution or of an Act of Congress, unless Congress either committed the matter exclusively to the federal Courts or provided for its removal from the State to a Federal Court, as one arising under the Constitution or the laws of the United States.[3] So, in the Commonwealth, the States Courts had cognizance of such matters under their ordinary jurisdiction until the *Judiciary Act* 1903, sec. 39, transformed the jurisdiction belonging to them under State law into a federal jurisdiction exercised by them on behalf of the Commonwealth.

In America the general rule is limited by the necessity of preserving the independence and supremacy of federal action. The operations of the Federal Government may

[1] On this subject in the United States reference may usefully be made to 9 *Columbia Law Review* (May, 1909), p. 397, "The Jurisdiction of State and Federal Courts over Federal Officers," by James L. Bishop.

[2] *R.* v. *Bamford*, (1901) N.S.W. 1 S.R. 337 ; 7 A.L.R. 89 (Current Notes).

[3] See Hare's *Constitutional Law*, p. 1193 ; *Tennessee* v. *Davis*, (1879) 100 U.S. 257.

not be interfered with by State authority. As early as 1821 it was held by the Supreme Court of the United States that a State Court could not issue a *mandamus* to federal officers to perform a federal duty,[1] and this principle extends to prevent the issue of injunctions to federal officers claiming to act under the authority of the Constitution or federal laws.[2] Similarly, a State Court "cannot issue any process tending to suspend the execution of an Act of Congress or take goods or persons that have been seized under an authority from the general (*i.e.*, Federal) Government."[3] The immunity of the federal executive from the interference of the State Courts is best exemplified by the case of the writ of *habeas corpus*. Here it is well settled in America that the State Courts are powerless to release any person held under federal restraint, whether it be judicial or (as in the case of persons under military discipline) executive. That is to say, it being made to appear to the State Court that the person is held under colour of federal authority, the State Court has no power to inquire further as to the lawfulness of the restraint. It then "knows that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States."[4] It is immaterial that there is no Federal Court

[1] *M'Clung* v. *Silliman*, 6 Wheaton 598.

[2] See *Brewer* v. *Kidd*, (1871) 23 Michigan 440, 446; *In re Turner*, (1902) 119 Fed. Rep. 231, cited 9 *Columbia Law Review*, at p. 416.

[3] Hare, *American Constitutional Law*, at p. 1211.

[4] *Tarble's Case*, (1871) 13 Wallace 397, 409-10. It had been previously held in *Ableman* v. *Booth*, (1858) 21 Howard 506, that State Courts could not discharge persons in custody under the order of any Federal Court. The State Courts, keeping within the limits of that decision, considered themselves entitled to release persons improperly in federal custody in any other case than that of detention by order of a Court. *Tarble's Case* holds that this jurisdiction also is unlawful. See 9 *Columbia Law Review* 404-406.

with authority to order release. It is not matter for surprise that the State Courts were for long unwilling to acquiesce in a position which required them, armed with the writ of *habeas corpus*, to stay their hand on the mere claim or colour of authority and refrain from investigating the actual legality of detention.

In the Commonwealth the principle of the American cases was accepted by the Supreme Court of New South Wales in *Ex parte Goldring*,[1] holding that it had no power to issue a *mandamus* to a federal officer to discharge a duty that he owed to that government. But we are fortunately released from the embarrassments and inconvenience of the American system by the fact that the Constitution empowers the Commonwealth to invest the State Courts with federal jurisdiction, and that by the *Judiciary Act* 1903 this power is exercised to its fullest extent, except where exclusive jurisdiction is actually committed to the High Court.[2] The High Court alone can issue a *mandamus* or a prohibition to an officer of the Commonwealth or a Federal Court (*Judicature Act*, sec. 38). But to all other cases—injunction, *certiorari*, *habeas corpus*, and *quo warranto*—the federal jurisdiction of the appropriate State Court would attach under sec. 39 of the *Judiciary Act*. Thus there is no gap in judicial control over the executive—no case analogous to that existing in the United States, where no *mandamus* or *certiorari* can issue to federal executive authorities, the State Courts being excluded under the doctrine just considered, the Supreme Court excluded because Congress may not commit to it any original jurisdiction other than that given in the Constitution;[3] while as to other Federal Courts, Congress has not in fact conferred on them power to issue these writs.[4]

[1] (1903) 2 S.R. (N.S.W.) 260. See also *Ah Sheung* v. *Lindberg*, (1906) V.L.R. 323, per Cussen J. at p. 326.

[2] *Ah Sheung* v. *Lindberg*, (1906) V.L.R. 323.

[3] *Marbury* v. *Madison*, (1803) 1 Cranch 137; Thayer 107.

[4] See 9 *Columbia Law Review* 399, 400, 418.

The power of the Commonwealth Judicature over the official acts of officers of the States is, of course, determined in the first place by the fact that the original jurisdiction of the Commonwealth is limited to specific matters; secondly, by the extent to which the Constitution or the Commonwealth Parliament has committed jurisdiction to the particular Court. It will be seen[1] that the Commonwealth has little power to impose official duties upon State officers, and therefore the occasion for the issue of a *mandamus* to executive officers of the State to perform duties towards the Federal Government is rarely likely to arise. But it may frequently happen that the Commonwealth Government is concerned to prevent or annul acts by State officers in alleged infraction of the Constitution or Commonwealth laws, and for this purpose the *certiorari*, the injunction and the *habeas corpus* would be appropriate means of which that Government might avail itself. In such cases it cannot affect the matter that the officer was acting under the authority of the supreme Executive or the Legislature of the State, or that the substantive effect of the order is to control the political action of the State itself.[2] And in America if the matter be one in which the State is not exempt from jurisdiction (as when sued by another State), a suit for injunction against unlawful acts done by agents who are merely pursuing an alleged authority conferred upon them by the State, may be properly brought against the State itself; "the action complained of is State action and not the action of State officers in abuse or in excess of their powers."[3] This in Australia is a matter of a good deal of importance, for in place of the Eleventh Amendment, which in America ex-

[1] Part VII.—Relations of Commonwealth and States.

[2] *Osborn* v. *U.S. Bank*, 9 Wheaton 738; *Pennoyer* v. *McConnaghy*, 140 U.S. 1; *Belknap* v. *Schild*, 161 U.S. 10.

[3] *Kansas* v. *Colorado*, 185 U.S. 125, 142; *Missouri* v. *Illinois*, 180 U.S. 208.

pressly recognizes the immunity of the States from suits by individual citizens, the Commonwealth Constitution declares that the Parliament may make laws conferring rights "to proceed against a State in respect of matters within the limits of the judicial power" (sec. 78), and this power has been exercised in the *Judiciary Act* 1903, Part IX. The question whether a person is really an officer or agent of the State, so as to make his action that of the State itself, is another and difficult question which is elsewhere referred to.[1]

From this fact—that in Australia the States are more completely justiciable than they are in the United States—there is in the Commonwealth less significance in the rule that where the State is not under the Constitution a justiciable party, actions and suits against her officers will not be entertained where their true nature and effect is to control the use or possession of property in the hands of the State through its officers, or to compel the observance by the State of its obligations.[2] The principle is, however, common to both systems, that where the law imposes a duty upon the Government, that duty is not to be enforced by proceedings against the officer or servant unless there is also an independent relation between himself and the complainant imposing a duty towards the complainant distinct from that duty which the officer owes to his government.[3] "The general principle, not merely applicable to *mandamus*, but running through all the law, is that when an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting

[1] See pp. 415 *et seq.*

[2] *Belknap* v. *Schild*, 161 U.S. 10, and cases there cited. See also *Columbia Law Review*, vol. 7, p. 609, and vol. 8, p. 183.

[3] *The Queen* v. *Lords Commissioners of the Treasury*, (1872) L.R. 7 Q.B. 387; *Armytage* v. *Wilkinson*, (1878) L.R. 3 A.C. 355.

as servant."[1] This doctrine applies, therefore, not merely where the remedy against the servant, if given, would be a means of attacking a principal who is not justiciable (as in America, by proceedings against State officers), but also where the principal—the State—may himself be liable to proceedings to compel the fulfilment of his duties,[2] as in Australia.

In conclusion, it may be remarked that, great as is the control exerciseable directly or indirectly by British Courts over acts based upon alleged authority, and over neglect or failure to perform a legal duty, it is a power which has some limitations. It has been already pointed out, in considering the action of the Courts in relation to legislation, that it is not in all cases easy to bring doubtful legislation to the test of judicial decision. There are cases in which, though the Constitution or a law may impose a duty upon an organ of government, there are no means of compelling the performance of that duty by action in the Courts. Thus, the provision of sec. 88 in the Constitution that uniform duties of customs should be established within two years, was plainly directory, a "duty of imperfect obligation." No Court, it is submitted, could be called on to enforce the duty of the Commonwealth, under sec. 119, to "protect every State against invasion," and no action could be maintained for failure of performance. In such cases, the sanction is political merely. Again, the duties of a State Governor, under sec. 12 of the Constitution, are imposed upon him as the constitutional head of the State, and their performance is secured by political sanctions merely.[3] The cases upon *mandamus* afford abundant illustration of the limits which

[1] *Ib.*, per Blackburn J., at p. 398.

[2] *In re Nathan*, (1884) 12 Q.B.D. 461.

[3] *The King* v. *The Governor of South Australia*, (1907) 4 C.L.R. 1497, see esp. 1511.

are set to the use of this coercive jurisdiction. In *Ex parte Wallace*,[1] the Supreme Court of New South Wales refused a *mandamus* to Customs officers to release goods of an importer, held by them for non-payment of duty which had no other warrant than the ordinary resolution of the Legislative Assembly for the protection of the revenue, though it is clear law that no tax may be taken except by the authority of Parliament. In *Horwitz* v. *Connor*,[2] the High Court held that *mandamus* would not lie to the Governor in Council of a State. And it is well established that *mandamus* will not lie to the Crown itself, or (as has been seen) to officers of the Crown to compel them to pay money due from the Crown to claimants, though the Court is satisfied that the claimants are entitled to the money as against the Crown, and that there is no other means by which the money can be obtained.[3]

[1](1892) 13 N.S.W. 1.

[2](1908) 6 C.L.R. 38.

[3]*R.* v. *Commissioners of the Treasury*, (1872) L.R. 7 Q.B. 387. See *ante*, pp. 403-4.

PART VII.—COMMONWEALTH AND STATES.

CHAPTER I.

FEDERAL AND STATE RELATIONS: THE SUPREMACY OF COMMONWEALTH LAW.

In a federal Constitution it is inevitable that the two governmental authorities should touch each other at many points. There is consequently some friction, which may be lessened, though it can never be entirely removed, by the accurate definition of their spheres. The great achievement of the federal form of government is that it has been able to reconcile the conflicts of independent governments by an appeal to law which both the parties recognize as binding, and that it has provided means for the authoritative determination and enforcement of that law. It is in this respect that the conflicts in a federal government differ from the otherwise not dissimilar conflicts of the Middle Age—that they recognize the supremacy and unity of the state and of law.

The first and most obvious of the conflicts is that between the two governments as organs of legislation; another is the incidence of the legislation of the one upon the political organs and agents of the other, or upon the other considered

as a juristic entity. There are conflicts of their executive authorities, complicated in Australia by their respective relations with the Imperial Government; and finally there are the relations between the judicial organs of the Federal Government and of the State Government.

THE SUPREMACY OF COMMONWEALTH LAW.—The most marked feature of a federal government as distinguished from the confederate type is that it acts through all its organs directly upon the individual citizen, and not through mandates addressed to the State Governments. The Statutes of the Federal Legislature, therefore, are laws establishing immediately rights and duties (see *Commonwealth Constitution Act*, sec. v.); and as there cannot be two concurrent authorities upon one and the same matter it follows that the federal power is, so far as it extends, either exclusive or paramount. In the case of the Commonwealth Constitution, some of the powers of the Commonwealth Parliament are of the one class, some of the other. In a few cases the nature of the power granted is such as to be capable of existing concurrently in both governments; of this, the power to impose taxation is the most obvious, though not the only, example.

The main principle of the Constitution on this matter is that the mere grant of a power of legislation over any subject to the Commonwealth Parliament does not derogate from the power of the State Parliament to deal with the same subject. If, then, any law of a State which is in question is one which would have been valid and operative if passed by the Parliament of a Colony before federation, it will have the same validity and the same extent of operation that it would then have had, except so far as the Constitution declares the power of the Parliament of the Commonwealth to be exclusive or withdraws the power from the States (sec. 107). Where both Legislatures have exercised power

over a subject which is common to both of them, the position is dealt with by sec. 109, whereby "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."[1] In such a case the State law fails, not because it is *ultrâ vires* or unconstitutional, but because its operation is over-ridden, barred by the paramount authority of the national Legislature.[2]

The rule, clear enough in itself, is not without some difficulties in its application.[3] In the first place, it was suggested at one time in the United States that the rule of supremacy only applied where both Legislatures were acting under the same head of power. For instance, Congress makes a law which is valid as a regulation of foreign or inter-State commerce, and that rule is paramount over all commercial regulations of the State. But if the law comes into conflict with a State Statute which is valid, not as a regulation of commerce, but as an exercise of "police power," the case, it was said, is different. Congress is given no power over police, and the case is one of two independent authorities each acting within its own sphere. Hence arises a "conflict of equal opposing forces." This was one of the arguments in *Gibbons* v. *Ogden*,[4] and was disposed of by the decision that the supremacy of the laws of Congress extends over all laws of the State made in whatever capacity or under whatever head of power.[5]

[1] See *D'Emden* v. *Pedder*, 1 C.L.R. at pp. 96, 111; *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), (1907) 4 C.L.R. at p. 1129. Cf. *The Woodworkers' Case*, 15 A.L.R., per Isaacs J., at p. 398.

[2] See Hare, *American Constitutional Law*, p. 98.

[3] *E.g.* the position suggested by the decision in the *Federated Sawmillers Association* v. *James Moore & Son* (*The Woodworkers' Case*), (1909) C.L.R., 15 A.L.R. 374, of different minimum rates of wages fixed by different authorities. See also per Isaacs J. at pp. 395-6.

[4] 9 Wheaton 1, 210.

[5] See also *Sinnot* v. *Davenport*, 22 Howard 227; *The Woodworkers' Case*, 15 A.L.R., per Isaacs J., at pp. 396-7, 398.

While it is declared to be a settled rule that "a Statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an Act of Congress passed in the execution of a clear power under the Constitution unless the repugnance or conflict is so direct and positive that the two Acts cannot be reconciled or stand together,"[1] it is clear that there may be "inconsistency" without a conflict of the very terms of the Acts. "The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the injunctions of the other; and yet the will of the one Legislature may be in direct collision with that of the other."[2] When the Commonwealth Parliament has made a law on some matter committed to it, it may well be intended that the law should be exhaustive of regulation on that subject. In such a case, the whole field of legislation is covered, and State laws making further regulation of the subject are inconsistent with the exclusive purpose of the Parliament as disclosed in its legislation, and are inoperative. Thus, where an Act of Congress required vessels engaging in the coastal trade to take out a licence and enrol, and a State Act required the masters of vessels navigating the waters of the States to furnish statements of the name of the vessel, her owner, his residence, and the nature of the interests in her, it was held that there was an inconsistency between the evident intention of Congress that its con-

[1] *Missouri &c. Rly.* v. *Haber*, (1897) 169 U.S. at p. 623, citing *Sinnot* v. *Davenport*, 22 Howard at p. 243.

[2] Per Washington J., *Houston* v. *Moore*, 5 Wheaton 1, 21-22. See also *Prigg* v. *Pennsylvania*, 16 Peters 617. It may be that, where the State Act is plainly referable only to the same head of power as the Act of Congress, and can be regarded only as the exercise of a concurrent power over the same subject, the exhaustiveness and exclusiveness of the federal law may be more readily inferred than where the State Act is enacted under the police power. This difference may possibly account for the different language employed in the passages cited in the text.

ditions should be the sole conditions upon the privilege of trading, and the additional regulations imposed by the State.[1] The question in all such cases is one of interpretation, whether the paramount Legislature has in fact sufficiently expressed its exclusive intent.[2] No universal rule can be laid down; we must look in each case to "the nature of the power, the effect of the actual exercise, and the extent of the subject-matter."[3] Not a few of the subjects over which the Parliament has power, though they are not exclusive in the strict sense, are such that the legislation of the Parliament, almost necessarily, to use the language of Story, "suspends the legislative power of the States over the subject-matter." Thus the grant of letters of naturalization, the issue of patents, the registration of trade marks and copyrights, are matters in which the mere exercise of power by the Commonwealth involves practically the assumption of functions which can hardly be exercised at one and the same time by two distinct authorities. In all such cases it might have been argued that where a Commonwealth law embraced the subject, the State authority was, from the nature of the matter, in abeyance. The suspension of the operation of State laws, however, is not in those cases left to inference, but is expressly provided for in the Commonwealth Statutes.[4]

[1] *Sinnot* v. *Davenport*, 22 Howard 227. See also *Prigg* v. *Pennsylvania*, 16 Peters at pp. 617-8; *White Bank* v. *Smith*, 7 Wallace 646; *The Commonwealth* v. *New South Wales*, (1906) 3 C.L.R. 807, per O'Connor J., at p. 826. *D'Emden* v. *Pedder*, (1904) 1 C.L.R. 91; *Deakin* v. *Webb*, (1904) 1 C.L.R. 619.

[2] This is the foundation of the American doctrine of the "exclusiveness" of the power of Congress in inter-State commerce. The peculiarity of the doctrine is that the silence of Congress on the particular subject is treated as an expression of the will of Congress that commerce should be free. But even this may be regarded as depending on the fact that there are in existence various regulations of commerce imposed by Congress, which Congress has intended to be the sole regulations on the subject.

[3] Story, *Constitution of U.S.*, sec. 441.

[4] *Naturalization Act* 1903, sec. 13; *Patents Act* 1903, sec. 8; *Trade Marks Act* 1905, sec. 6; *Copyright Act* 1905, sec. 8.

The form which declares that State laws on a given subject shall "cease to apply" is adopted in view of the doubt whether federal legislation can repeal or annul the laws of a State. In the case of Canada, the Privy Council has said that the Dominion Parliament has no power to repeal (as distinguished from the power to supersede by paramount legislation) the enactments of the Provincial Legislatures;[1] and in the *Woodworkers Case* Isaacs J. cites the Canadian authorities in support of the same rule in the Commonwealth.[2]

Saving of State Laws.—In all cases where State laws operated in a place or over a subject-matter prior to the establishment of the Constitution, the State law, unless in a particular case the operation is excluded by the Constitution, continues to operate until it is superseded by the exercise of competent legislative authority (sec. 108).[3] This is so in the case of matters within the exclusive power not less than those wherein the legislative powers of the States are merely subject to the paramount power of the Commonwealth.[4] The limitations of the saving to "matters within the power of the Commonwealth" must be noted.[5] Moreover sec. 108 declares that "until provision is made in that behalf by the Parliament of the Commonwealth the Parliament of the State shall have such power of alteration and repeal in respect of any such law as the Parliament of the colony had until the colony became a State." This enactment creates some difficulty in respect to the exclusive powers of the Commonwealth. Until the

[1] *A.-G. for Ontario* v. *A.-G. for Dominion*, (1896) A.C. 348.

[2] *Federated Sawmillers Association* v. *James Moore & Son*, (1909) 15 A.L.R. at p. 399. See also *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), (1907) 4 C.L.R. at p. 1129.

[3] *McKelvey* v. *Meagher*, 4 C.L.R. 265.

[4] *R.* v. *Bamford*, (1901) 1 S.R. (N.S.W.) 337.

[5] *Municipal Council of Sydney* v. *Commonwealth*, 1 C.L.R. at p. 232.

colony became a State, the power to "repeal or alter"[1] existing laws included the power to supplement them and to substitute others for them, a fullness of power which is contradictory of the exclusive power of the Commonwealth Parliament. The difficulty must be met by holding that matters within the exclusive power are excepted from the latter part of sec. 108.[2]

[1]Cf. "make or alter"; *Ex parte Siebold*, 100 U.S. 71.

[2]See Quick and Garran, p. 938; Clark's *Australian Constitutional Law*, 2nd ed., p. 95-6.

CHAPTER II.

THE INCIDENCE OF COMMONWEALTH LAWS.

"THE great and radical vice in the construction of the existing Confederation is the principle of legislation for States or Governments in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist . . . We must extend the authority of the Union to the persons of the citizens—the only proper objects of government."[1] Thus Alexander Hamilton distinguishes the confederate from the federal type, the one "the coercion of arms," the other "the coercion of laws"; and the people of Australia, like the people of the United States, have established a form of government which operates directly upon the individual citizens as a paramount law, and does not merely address itself to the State Governments.

A question of considerable importance thence arises—whether the States, as such, are in any respect the subjects of the Commonwealth, either in their political, or what may be called their corporate or juristic character. This is not a question to which any single comprehensive answer can be given, and generalisations from particular aspects of the

[1] *Federalist*, No. 15.

subject are mainly responsible for the contradictory answers that are given to it.

In one sense, of course, the State, as a political entity, is bound by the Constitution and the laws of the Commonwealth; within the sphere of federal authority, any law or authority set up by the States, must give way to a Commonwealth law: "This Act (*i.e.*, the *Constitution Act*) and all laws made by the Parliament of the Commonwealth under the Constitution shall be binding on the Courts, Judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State" (sec. v.).[1] But the question is whether the Commonwealth, in a matter within the federal sphere, can exercise its general authority by means of special direction, control and supervision of the States Governments, making them the objects, or the instruments for the execution, of the federal power, or can impose its authority on the States as juristic persons *inter ceteros*. The question is the more important because, under sec. 75 of the Constitution, the States are justiciable *personæ* over whom the federal judicial power extends.

It is probably true that federal legislation may not address itself directly to the political organs of the States, and impose upon them obligations in that character. Thus, the Commonwealth Parliament could not prohibit the States from making laws on any subject, and declare that any State contravening the prohibition shall be subject to a penalty. Nor could it by direct act repeal or annul the law of any State,[2] save in the particular case of inspection laws (sec. 112).

What it could do and has done is to declare that all State

[1] See *Bayne* v. *Blake*, (1908) 5 C.L.R. 497, 506.

[2] Cf. Lefroy, *Legislative Power in Canada*, p. 365; *Gibbons* v. *Ogden*, 9 Wheaton at pp. 30-36 (arg.); *Federated Sawmillers Association* v. *James Moore & Sons*, per Isaacs J., 15 A.L.R. at p. 329.

laws on a subject shall be inoperative, and thereafter no person could claim any right or privilege under the State laws so put in abeyance or justify any act under the authority of those laws. Subject to any exemption arising under the doctrine of the "immunity of instrumentalities," this applies to acts purporting to be official acts of the State, and done in its name and on its behalf not less than to private acts done on their own behalf by individuals resting on the supposed sanction of State laws.[1] Thus, it can require State ships to conform to its navigation laws, and State lighthouse authorities to observe its regulations as to coastal lights. Whether in such a case the State itself may be made responsible for the acts of its servants by any judicial proceedings is more doubtful. Our law has had some difficulty in finding an official and public equivalent for *respondeat superior* in the private relation, and has tended to regard acts done under the cloak or claim of an authority which is not lawful as substantially private and personal acts, creating rights and liabilities solely on that basis.[2] The State having no natural as distinguished from political personality, it is arguable that acts done under its pretended authority merely, are deprived of their public character and become simply the acts of the individuals who either as principals or agents were concerned in them. This view obtains some countenance from history and policy as well as from purely legal considerations. In a political sense it may be wise to insist that acts done in unlawful resistance to the supreme power are no more than the illegalities of concerting individuals, and this was in fact the established doctrine in America as to the unlawful acts done

[1] *E.g.*, see *The King* v. *Sutton*, (1908) 5 C.L.R. 789.

[2] Cf. *Tobin* v. *The Queen*, 16 C.B.N.S. 310; *Enever* v. *The King*, (1906) 3 C.L.R. 969; and *Baume* v. *The Commonwealth*, (1906) 4 C.L.R. 97. See also *A.-G.* v. *Bishop of Manchester*, L.R. 3 Eq. 436.

under the assumed authority of the seceding States during the Civil War.[1]

The case may be illustrated by an example. When by the order of the New South Wales Government wire netting was forcibly carried away by State officers from the custody of the Commonwealth Customs officers, the Commonwealth Government prosecuted the individual officers concerned in the seizure. If the seizure was wrongful, they were undoubtedly wrongdoers, and so were the individuals, from the Premier downwards, who ordered and planned the execution of the act. But could the Commonwealth have treated the act as the act of the State of New South Wales and prosecuted the State for penalties or sued her for damages for trespass, as it might have prosecuted or sued any corporation whose servants had carried out the seizure? According to the view presented above, the answer would be that the Commonwealth could not proceed against the State, for the wrongful act was not the act of the State but of the individual ministers, officials and policemen.

The whole subject of the liability of the State in tort is one which is novel to English lawyers and on which one must express any opinion with diffidence. In the Commonwealth we have the initial fact that the State may be a defendant in Commonwealth Courts (Constitution sec. 75). By sec. 78 the Parliament may confer rights to proceed against a State in respect of matters within the limits of the judicial power, and Part IX. of the *Judiciary Act* 1903 makes provision for the exercise of jurisdiction over claims against a State "whether in contract or in tort" in respect of matters within secs. 75 or 76 of the Constitution. Further, the doctrine that a corporate entity existing for purposes of government, bears its juristic character only so far as is

[1] *Texas* v. *White*, 7 Wallace 700; *Poindexter* v. *Greenhow*, 114 U.S. 270, 291, and cases there cited.

necessary to fulfil lawfully the objects for which it exists, has long since been abandoned in the case of subordinate governmental institutions, which are now freely recognized as liable for the acts of their servants on the same principle as other corporations.[1]

As soon as we recognize the liability of the state in tort, we must, if that liability is to be real, recognize that there are some persons who so far represent the state that their acts though unlawful are the corporate acts of the state. How the fact of representation is to be determined constitutes the main difficulty of the situation. In one sense every minister of the Crown, every municipal body, every police constable represents the state, *i.e.*, he is an organ of state government. But these organs are not necessarily the agents of the state in the sense of private law. Just as the state legislates to create rights, so it exercises the same authority to create powers in bodies and individuals which then hold those powers independently, not by delegation but by force of law. In such a case the relation of the state to the public authority is not the relation of principal and agent in private law; there is no room for the application of the doctrine *respondeat superior*; and the state is no more liable for the acts of the officer because it is the source of his powers and is his political superior than it is liable for the miscarriages of a trading corporation upon which it has conferred a franchise. This seems to be in accord with the decision of the High Court of Australia in *Enever* v. *The King*[2] where it was held that the State of Tasmania was not liable for an unlawful arrest by a peace officer. On the other hand in *Baume* v. *The Commonwealth*[3] the Court says

[1] Compare *Duncan* v. *Findlater*, (1839) 6 Cl. & Fin. 894, with *Mersey Docks Trustees* v. *Gibbs*, (1866) L.R. 1 H.L. 39.

[2] (1906) 3 C.L.R. 969.

[3] (1906) 4 C.L.R. 97.

that the provisions of the *Judiciary Act* apply whenever the person whose conduct is complained of is performing a ministerial duty merely, on behalf of the Commonwealth or State.

Recurring to the particular illustration taken—the seizure of wire netting from federal custody—the case presents itself as one of an assertion of the property rights of a State. Such rights in the case of the State, as of other juristic entities, can be asserted only by agents, and it could not be contested here that the persons acting were those whose duty it would be to protect rights of this nature, and assert them by all proper means. If, acting in the behalf and in the supposed interests of the State, and not in any private interest of their own, they have acted wrongfully, it would appear that their act is the act of the State, and one for which the State could be called on to answer in any Court in which it was liable to be sued for tort.

The incidence of Commonwealth power upon the State Courts is in some important respects different from its incidence upon other organs of State sovereignty. In the first place, it is a part of their duty as State Courts to give effect to Commonwealth laws applicable to matters competently before them—this is provided by sec. v. of the *Constitution Act*, a provision which is in substance identical with that in the Constitution of the United States whereby the Constitution and all laws made in pursuance thereof are the supreme law of the land.[1] Secondly, the State Courts are subject to a special exercise of federal authority in that the federal judiciary exercises over them a direct supervision in all matters within their jurisdiction, through the appellate power. Even in the United States, where there is no general appellate power and the judicial power of the

[1]See *Baxter* v. *Commissioners of Taxation*, 4 C.L.R. at 1125, and *Bayne* v. *Blake*, 5 C.L.R. 497.

United States extends only to specified matters, the authority of the federal judiciary in these matters extends to hearing appeals from the State Courts, varying and reversing their judgments, and remitting causes to them to be dealt with as directed by the federal court. This is the important matter determined in *Martin* v. *Hunter's Lessee*[1] and *Cohens* v. *Virginia*,[2] as to cases within the judicial power of the United States. In these cases it was strenuously urged that the appellate power of the Supreme Court embraced only decisions of inferior tribunals of the same sovereignty, *i.e.*, Courts of the United States; "that such an appellate jurisdiction over State Courts is inconsistent with the genius of our Governments and the spirit of the Constitution. That the latter was never designed to act upon State sovereignties but only upon the people and that if the power exists it will materially impair the sovereignty of the States and the independence of their Courts." (1 Wheaton at p. 343; see also 6 Wheaton, pages 312-3, 421-2). In rejecting the contention, the Court in *Martin* v. *Hunter's Lessee* declared emphatically that "it was a mistake (to assert) that the Constitution was not designed to operate upon States in their corporate capacities," that it did in fact impose many duties on the States, and that the federal judiciary was under it constantly called upon to revise the executive and legislative proceedings of the States, and if they were found to be contrary to the Constitution to declare them to be of no validity; surely the exercise of the same right over judicial tribunals was not a higher or more dangerous act of sovereign power."[3] In the Commonwealth Constitution, the relation of the High Court to the State Courts has been the subject of judicial determination in *Peacock* v. *Osborne*[4] and

[1] 1 Wheaton 304.
[2] 6 Wheaton 395.
[3] Cf. *Tennesse* v. *Davis*, 100 U.S. 257.
[4] (1907) 4 C.L.R. 1564.

Bayne v. *Blake*,[1] in which the High Court asserts the duty of the Supreme Courts and their officers to act in execution of the judgments of the High Court.[2] Finally, the State Courts may under sec. 77 (iii.) be "invested with federal jurisdiction" and thus become *quoad hoc* organs and instruments of the Commonwealth itself. When so invested the State Courts are not merely *enabled* to take jurisdiction as arbitrators, but are required to adjudicate under the authority committed to them.

[1] (1908) 5 C.L.R. 497.

[2] *Ante*, pp. 241-2.

CHAPTER III.

THE DOCTRINE OF THE IMMUNITY OF INSTRUMENTALITIES.

THE principles of federal government laid down in Part II., Chapter I., exhibit the meaning of the common imputation of "sovereignty" to the several governments in a federal system.[1] Tried by the absolute standards of constitutional law or politic science neither the Federal nor the State Government is sovereign; tried by the standards of international law, each government is a mere agency of the sovereignty. But considered in their relation towards each other, each is independent in its own sphere; it neither derives its power from the other nor is controlled by it in the exercise of power. It acts or abstains from action according to its discretion; and is completely equipped for effectuating every purpose which belongs to it without having to depend upon the co-operation of the other.

In this scheme it is peculiarly important to construe the several parts of the instrument in relation to each other so as to give a harmonious operation to the whole. If then our foundation is sound—that the scheme of the Constitution is the establishment of separate quasi-sovereign govern-

[1] *E.g.*, *D'Emden* v. *Pedder*, (1904) 1 C.L.R. at p. 109.

ments—every particular power of each must be construed as limited and restricted so as not to impair the independence of the other. Independence means absence of control; so far as a government is subject to control it is dependent and subordinate. This leads to some important conclusions—first, the doctrine of "the immunity of instrumentalities"; secondly, a principle which is really an expansion of the first, that where terms of grant are capable of two constructions, one of which would in effect destroy or impair the federal scheme as here conceived, while the other would maintain the federal system in its integrity, the latter construction must be preferred. The second principle has been already considered in Part VI., Chapter II.

The doctrine of instrumentalities was first stated in the United States in the case of *M'Culloch* v. *Maryland*.[1] In that case the Supreme Court, having held that the incorporation of the National Bank was within the implied powers of Congress as a means whereby that Government fulfilled its own purposes, held that it was beyond the power of the States to impose a tax on a note issue of the Bank. The principle of the decision was that the Bank's operations were substantially the operations of the Federal Government, and that to admit the right of the States to tax those operations was inconsistent with the supremacy of the Federal Government in those matters committed to it by the Constitution. Taxation was a power of sovereignty, and its extent co-extensive merely with the sovereignty; it could not therefore be extended to matters which existed independently of State authority. "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance between conferring on one government a power to control the constitutional measures

[1] 4 Wheaton, 316.

of another, which other with respect to those very measures is declared to be supreme over that which exerts the control, are propositions not to be denied."

The principle thus enunciated in respect to State taxation of the operations of what may be regarded as a federal department of government is applicable to all control, whether by taxation or regulative legislation over the operations of the Federal Government.[1] Conversely, the State being as to its reserved powers as sovereign and independent as the Federal Government in its sphere, the same necessity requires that the operations of the State Government should be exempt from federal control, so that (*e.g.*) Congress may not tax the salaries of State officers or the process of State Courts. "The exemption rests upon necessary implication and is upheld by the great law of self-preservation, as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government."[2]

In Australia the principle of *M'Culloch* v. *Maryland* was unsuccessfully invoked in the Supreme Court of Victoria in *Wollaston's Case*,[3] where the Court held that a federal officer was bound to pay income tax to the State on his official salary. The Court was of opinion that even if *M'Culloch* v. *Maryland* did apply in the case of the Australian Constitution, the case in question, and the American cases relied on in support of the particular exemption claimed, were cases to which the principle could not be applied. But the Chief Justice (and later the Supreme Court of Tasmania in the case of *D'Emden* v. *Pedder*) took the broader ground that the doctrine of *M'Culloch* v. *Maryland* was forced on the

[1] *E.g.*, see *Easton* v. *Iowa*, 188 U.S. 220.

[2] Per Nelson J., *Collector* v. *Day*, 11 Wallace, at p. 124.

[3] (1902) 28 V.L.R. 57.

Courts by political necessity and a consideration of the evils which must follow the abuse of power by independent authorities, and that there was an essential difference between the American Constitution and any existing Constitution under the Crown of Britain, a difference recognized by the Privy Council when in *The Bank of Toronto* v. *Lambe*, 12 App. Cas. 575, it refused to apply the doctrine of *M'Culloch* v. *Maryland* as between the Dominion and the Provinces of Canada. In the words of the Chief Justice "The power of disallowance by the Imperial Government of any legislation by any self-governing State within its Empire which might be likely to subvert either its own Constitution or the constitutional existence or authority of any other such State or of the Imperial Government, or which is calculated to conflict with the interest of the latter, is regarded by the Privy Council as an all-sufficient safeguard against the probability of the happening of the evils which Chief Justice Marshall desired to guard against, because no such safety valve existed under the conditions in which the American union arose and exists."[1]

Wollaston's Case was determined before the constitution of the High Court, but an opportunity arose in the first year of the existence of that Court to review the subject in a case which placed fairly in issue the applicability of the American doctrine to the Commonwealth. A Tasmanian Statute required that every receipt for sums of money over £5 and under £50 should bear a duty stamp of 2d., and the question was raised whether this enactment did and could apply to receipts given in accordance with federal laws by Commonwealth officers for payments of salary to them. It was held (reversing the Supreme Court of Tasmania) in *D'Emden* v. *Pedder*[2] that the operation of such a provision of

[1] *Wollaston's Case*, 28 V.L.R. at p. 387. See also p. 388.

[2] (1904) 1 C.L.R. 91.

State law on the acts of Commonwealth officers would interfere with federal officers in the performance of their official duties. The Federal *Audit Act* having required them to give a receipt, the State law in effect declared that if they did so, without paying the State tax, they would commit an offence for which they were liable to fine, and in default imprisonment. The attempt to attach such a condition was in itself control and interference, and this being so, the Court could not inquire into the degree or propriety of the interference. The Court cites at length the pregnant parts of the judgment in *M'Culloch* v. *Maryland* and affirms the principle in relation to the Commonwealth, both on the ground of its logical necessity in the case of two governments, each intended to be independent in its own sphere, and on the ground that where the Constitution contained provisions undistinguishable in substance from provisions in the United States Constitution, which had been judicially interpreted by the Supreme Court of the United States, it was a reasonable inference that its framers intended that like provisions should receive a like interpretation. The principle in its application to the Commonwealth was formulated by the Court in the following terms:—"When a State attempts to give to its legislative or executive authority an operation which if valid would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative. And this appears to be the true test to be applied in determining the validity of State laws and their applicability to federal transactions" (p. 111.)

In the case of the particular Statute under consideration, it was not necessary to hold that it was invalid, since it was proper to treat the general words used in the Tasmanian Act as intended to operate only to the extent of the

powers of the enacting Legislature, and therefore as not applicable to the matter in question.

It will be observed that in *D'Emden* v. *Pedder* the case might have been disposed of by relying on the conflict between the Federal *Audit Act* and the State *Taxing Act* —the first imposing conditions intended to be exhaustive on a federal operation; the second imposing an additional condition, and therefore inconsistent under sec. 109 of the Constitution. But the substantive ground of the decision is the principle of *M'Culloch* v. *Maryland*, which applies irrespective of such conflict of Statutes. Thus, to take obvious cases, State Statutes prescribing hours of labour or declaring public holidays would not be applicable to the Departments of the Commonwealth Government, though such Departments were not governed by Commonwealth Statutes, but were organized wholly by administrative regulation.

The question of the liability of federal officers to State income tax in respect of their official salaries had by this time become a matter of political friction as between the Commonwealth and States, and the States Governments continued to demand income tax on the ground that whether the principle of *M'Culloch* v. *Maryland* was or was not applicable in Australia, this immunity of individuals was not within the American principle as properly understood and applied. Proceedings were taken in Victoria against Mr. Deakin and Sir William Lyne in respect of their salaries as Ministers of the Crown and their allowances as members of the Commonwealth Parliament, and the Full Court of Victoria,[1] distinguishing the actual matter in issue from that determined by the High Court in *D'Emden* v. *Pedder*, followed its previous decision in *Wollaston's Case.*

[1](1904) 29 V.L.R. 748.

On appeal,[1] the High Court reversed the judgment of the Supreme Court of Victoria, re-affirmed the principles enunciated in *D'Emden* v. *Pedder*, and refused a certificate for appeal to the Privy Council applied for under sec. 74 of the Constitution. Subsequently new proceedings were begun in Victoria, in which the Supreme Court then followed the decision of the High Court, and an appeal was taken direct from the State Court to the Privy Council. In *Webb* v. *Outtrim*[2] the Privy Council held that there was no analogy between the United States and Commonwealth Constitutions which would support the implied restraint upon the State's powers, and held that the federal officers were liable to income tax. The final stage of the matter was reached in *Baxter* v. *Commissioners of Taxation*[3] and *Flint* v. *Webb*.[4] In these cases the Income Tax Commissioners of New South Wales and Victoria sought to recover income tax from federal officers residing in those States respectively, and the main question came to be whether the High Court was bound to follow the Privy Council decision, a matter which has been considered in relation to the judicial power. A majority of the Court, consisting of the three original Justices (Griffith C.J., Barton and O'Connor JJ.) affirmed the immunity of federal officers, while Isaacs and Higgins JJ., Justices recently appointed to the Court, dissented. All the members of the Court concurred in refusing a certificate for appeal to the Privy Council; and on an application to the Privy Council itself for special leave to appeal, leave was refused, "the amount at stake being inconsiderable and the controversy having been closed."[5]

[1](1904) 1 C.L.R. 585.

[2](1907) A.C. 81. A criticism of this judgment by the present writer appeared in 23 *Law Quarterly Review*, p. 373.

[3](1907) 4 C.L.R. 1087.

[4](1907) 4 C.L.R. 1178.

[5]*New South Wales Taxation Commissioners* v. *Baxter*, (1908) A.C. 214.

This refers to the fact that an Act had been passed by the Commonwealth Parliament subjecting members of the Commonwealth Parliament and federal officers to the State income tax laws under certain conditions. The larger question of the applicability of the doctrine of *M'Culloch* v. *Maryland* to the Commonwealth was, of course, not affected by this, and the High Court remains in possession of the field.

The judgment of the majority of the High Court in *Baxter* v. *Commissioners of Taxation* is, first, a vindication of the principle of *M'Culloch* v. *Maryland* as a logical necessity of the federal system, and not merely a political necessity imposed on the Courts of the United States by the absence of any common superior capable of reconciling the differences of Federal and State Governments. Differing from the Privy Council in *Webb* v. *Outtrim*, the High Court insists upon the analogy between the relation of the Governments in Australia and in America, and rejects the notion that the Constitution intended to establish a system at once so destructive of that self-government to which Australians were accustomed, and so novel and impracticable, as to carry to the Imperial Government complaints by each Government against the other, founded not on any excess of power, but on the policy involved in the exercise of the powers of either. Restraint by necessary implication was quite familiar in the interpretation of British Colonial Constitutions, and the considerations referred to entirely outweighed any inference against implication to be drawn from the various restrictions expressly imposed upon either Government for particular objects by the Constitution. In any case the maxim *expressum facit cessare tacitum* was "a valuable servant but a dangerous master."

The doctrine has been adverted to or applied in numerous cases in Australia, notably in *Municipal Council of Sydney*

v. *Commonwealth*;[1] *Roberts* v. *Ahern*;[2] *The Commonwealth* v. *New South Wales*;[3] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The New South Wales Railway Traffic Employés Association*[4] (*the State Railways Servants' Case*); *The King* v. *Barger*, and *Commonwealth* v. *M'Kay*;[5] *The King* v. *Sutton*;[6] *Attorney-General for New South Wales* v. *Collector of Customs*.[7] Of these cases, the most important in this aspect is the *State Railways Servants' Case*, in which the High Court held that the doctrine was reciprocal, applying equally to interference by the Commonwealth with State instrumentalities, and that it was not limited to taxation.

In America, the doctrine of the immunity of instrumentalities has become axiomatic, and the modern cases serve merely to mark its application and to point to the limits to its authority. In its application the doctrine has in the case of federal powers been extended beyond the services conducted by or on behalf of government itself, to all operations which are carried on under the authority of the Federal Government. Of this, the best example is to be found in the position of inter-State commerce,[8] where the principle of the immunity of instrumentalities has been most systematically worked out. The principle itself can hardly be stated more clearly than by the High Court of Australia in *D'Emden* v. *Pedder*[9] in the passage already cited: "When a State attempts to give to its legislative

[1] 1 C.L.R. 208.
[2] 1 C.L.R. 406.
[3] 3 C.L.R. 807.
[4] 4 C.L.R. 488.
[5] 6 C.L.R. 41, 72.
[6] 5 C.L.R. 789.
[7] 5 C.L.R. 818.
[8] See *Brown* v. *Maryland*, 12 Wheaton 419.
[9] 1 C.L.R. 91, at p. 111.

or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative." A right which is the creature of federal law cannot be made dependent upon State regulation, so that *e.g.*, no State tax could without the assent of the Federal Government be levied on the exercise of patent rights or upon the negotiation of a bill of exchange.

The application of the principle in favour of the States is less simple, and less extensive. There it would appear that the doctrine of exemption is limited to the operations which are carried on on behalf of the Government itself, including of course all its local agencies, such as municipalities ;[1] and it does not embrace the protection of private rights enjoyed by individuals merely because those rights are created by State and not by Federal law. The implied restraint must of course be read consistently with the Constitution itself, and that Constitution clearly imports that a federal authority which may over-ride State laws, may also over-ride rights which are created by those laws. This limitation—which hardly appears to require authority—was emphatically asserted by the Supreme Court of the United States in *Knowlton* v. *Moore*,[2] where it was held that an inheritance tax was within the power of Congress, though the right of succession is a privilege conferred by State law: the burden was not cast upon the power of the State to regulate successions. More striking is the earlier decision in *Veazie Bank* v. *Fenno*,[3] a case which differs from *M'Culloch* v. *Maryland* only in that the banks were

[1] *U.S.* v. *Railroad Co.*, (1873) 17 Wall. 322.
[2] (1899) 178 U.S. 41 ; see especially, pp. 58-9.
[3] 8 Wall. 533, 547.

chartered by the States and issuing notes under State authority, and the tax on the note issue was imposed by the Federal Government: the converse case, therefore, to which the principle might have been deemed immediately applicable. It was held however that the tax was *intra vires*, and the case is the more interesting because the tax was destructive in its incidence and purpose—"the power to tax is the power to destroy."

In the United States a distinction has been adopted in the application of the rule, between functions which are essentially governmental, and trading or other private enterprises carried on by the Government. In the case of *South Carolina* v. *United States*,[1] it was held that a federal tax on liquor saloons applied to saloons carried on by the State Government, though they existed as a government monopoly and could only so exist because they were a means of exercising the police power of the State over a trade which closely touched the material and moral welfare of the people. Where a similiar distinction was advanced in Australia in justification of the attempt of the Commonwealth to apply its *Arbitration Act* to State railways, the High Court met the argument with the observation that no rule can be formulated which shall prescribe what functions the State shall undertake in the supposed exercise of its duty to promote the well-being of its people; that the means of communication, at any rate, were amongst the first and most obvious functions of government, and that, apart from this, the maintenance and management of railways were, at the foundation of the Constitution, recognized functions of government in Australia.[2]

The case of *Veazie Bank* v. *Fenno*, above referred to,

[1] 199 U.S. 437.

[2] *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association*, 4 C.L.R. at pp. 538-9.

depends in part at any rate upon the principle that the doctrine of immunity, being based on necessity, must be limited by necessity; and if the effective exercise of some power committed to the federal authority would be impaired by the immunity of the State, even the activities of the State Government itself in the execution of its functions may equally with the acts of private individuals be controlled by the federal law. There are some federal powers which from their nature essentially demand the uniform observance of the rules which they establish. The Federal tax on the State note issue was sustained in *Veazie Bank* v. *Fenno* as an essential part of the means chosen by Congress to regulate currency; and "currency" is amongst the power of the Commonwealth Parliament mentioned by the High Court to illustrate the rule in question. Weights and measures, immigration, quarantine, are other such cases.[1] So in the United States it was held that navigation laws established by Congress were obligatory upon vessels employed in the police service of the State;[2] and upon the same principle laws of the Commonwealth under their powers over "lighthouses, lightships, beacons and buoys" can recognize no exception of the States from their operations.

Another illustration of the limitations of the doctrine of immunity is to be found in the decisions of the High Court of Australia in *The King* v. *Sutton*[3] and *The Attorney-General for New South Wales* v. *The Collector of Customs*.[4] In those cases it was laid down that as to places and subjects

[1] *Per* Griffith C.J. in the *State Railway Servants Case*, 4 C.L.R. at p. 536; and *A.-G. for New South Wales* v. *Collector of Customs*, 5 C.L.R. at p. 533.

[2] *Oyster Steamers of Maryland*, 31 Fed. Rep. 763; *Governor Robert McLean* v. *U.S.*, 35 Fed. Rep. 926.

[3] (1908) 5 C.L.R. 789.

[4] (1908) 5 C.L.R. 818.

which are within the exclusive power of the Commonwealth the Constitution does not recognize the political character of the States and State Governments, and that consequently they are as juristic entities in such places and as to such subjects bound by Commonwealth legislation in the same way as are corporations and private persons. In *The King* v. *Sutton*, "a quantity of wire netting which had been purchased in England and imported into the Commonwealth by the Government of New South Wales was landed at the port of Sydney. Without any entry having been made or passed, and without the authority of the Customs officers, the defendant, acting under the authority of the Executive Government of the State, removed the goods from the place where they were stored." It was contended that the *Customs Act* did not and could not control importation by State Governments; but the Court held that for purposes of customs administration, the State Governments are in no better position than private persons, and that the Commonwealth laws regulating importation applied to goods the property of a State Government as well as to those of private persons, and it was quite immaterial whether the goods were dutiable or not.

The facts in *The Attorney-General for New South Wales* v. *The Collector of Customs*,[1] made a stronger case in favour of the State Government, for the goods imported, as to which the Commonwealth claimed customs duty, were steel rails to be used in the construction of State railways, and were thus connected with a service which the Court had already held to be protected against Commonwealth legislation. It was contended "that the importation of railway material from beyond the Commonwealth is or may be (as to which the State is the sole judge) necessary for the efficient construction and carrying on of State rail-

[1] 5 C.L.R. 818.

ways, and that the imposition of duties of customs upon such importation is consequently a control of or interference with a State function" (p. 832)—a contention which would, of course, apply equally to all goods which any State might think fit to import for the purposes of any of its departments. In deciding against the contention, the Court pointed out that the doctrine relied on was a rule of construction founded on necessity; and that if a power conferred upon the Commonwealth was of such a nature that its effective exercise manifestly involved a control of some operation of a State Government, the doctrine had no application to that operation (p. 833). Barton J. pointed out that the possession of such a right by the States would enable each of them, by its importations, to defeat that uniformity of regulation and equality of conditions which it was the purpose of the Constitution to establish, as well as to deprive the Commonwealth indefinitely of its revenues from customs (pp. 834-6); and O'Connor J., after declaring that the Constitution conferred on the Commonwealth the power of controlling, in all respects, the relations of Australia with the outside world, said it could not be supposed that it was intended that this control should be subject to the exception that it should have no operation in so far as State Governments in the exercise of their governmental functions were concerned. If the power of the Commonwealth were to be taken as so restricted, then, in regard to any goods which a State deemed necessary for the carrying out of its governmental functions, not only would the importation be free of duty, but the Customs control and and examination of goods would be at an end, general prohibitions on importation could not be applied, and, on the same reason, neither quarantine laws nor immigration laws could be allowed to stand in the way of the State. If the exercise of Commonwealth power were to be so restricted,

it was difficult to see how Commonwealth control could be comprehensive and effective, how it could ever frame or carry out any general policy in respect to the finances, the industry, the health, or the trade of the whole Commonwealth. In other words, the power could not be effectively exercised unless State dealings with countries outside Australia were within the control of the Commonwealth (pp. 842-3).

On another ground, also, the Court held that the immunity did not apply. The State's political power, on the effectuation of which the claim was founded, did not extend beyond its territory, and could not be invoked as to operations taking place abroad. The power and the consequent protection from interference attached to things lawfully within the territory of the State, but did not require that things might be brought into the State so as to become a means or instrumentality.

The case of the *A.-G. for N.S.W.* v. *The Collector of Customs*[1] illustrates a rule of great importance in the application of the doctrine generally. The control which the Commonwealth could exert over the importation of railway material would no doubt affect the State Government Railways, might make the acquisition of rails costly and in various ways embarrass the conduct of their operations. But such effect was consequential merely—the result not of the exercise of power over the instrumentality itself but over that which might enter into it. It is well established that the doctrine is limited to direct control or interference with the instrumentality by the law itself and does not extend to mere incidental or consequential effects, though these may in fact embarrass action of the other government or diminish its revenue, or impair the value of rights arising under a law. Taxation Acts particularly have far-

[1] 5 C.L.R. 818.

reaching social and economic effects; in determining their competence the Courts can consider only the direct operation, and not mere incidental results. State laws may prohibit the use of a commodity and thereby diminish the federal revenue arising from the customs duty on importation or the excise upon production, yet they are not an invasion of the exclusive power of the Commonwealth over customs and excise.[1] The owner of a valuable patent granted by the Federal Government may be disappointed of his expectation of profit by the States refusing to permit the use of the product of his invention.[2] The immunity of inter-State commerce from State taxation or regulation requires that the State should not prohibit any person from engaging therein, or require a licence or impose a tax upon the operations of such commerce. It does not require that the inter-State carrier should enjoy a personal immunity from the laws of the State, or that his property in the State should be exempt from State taxation,[3] though he will no doubt endeavour to pass the tax on, so that the tax may ultimately tend to raise the cost of transit, a matter beyond State control.[4] "It is often a difficult question whether a tax imposed by a State does in fact invade the domain of the general Government or interfere with its operations to such an extent or in such a manner as to render it unwarranted. It cannot be that a State tax which remotely affects the efficient exercise of a federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States

[1] Cf. *A.-G. of Manitoba* v. *Manitoba Licence Holders Association*, (1902) A.C. 73.

[2] *Patterson* v. *Kentucky*, 92 U.S. 501.

[3] *National Bank* v. *Commonwealth*, 9 Wallace 353; *State Tax on Gross Receipts*, 15 Wallace 284; *Union Pacific Railway Co.* v. *Peniston*, 18 Wallace 5.

[4] *Union Pacific Railway Co.* v. *Peniston*, 18 Wallace 5; and see *The King* v. *Barger*, (1908) 6 C.L.R. at pp. 26-7.

all power to tax persons or property. Every tax levied by a State withdraws from the reach of federal taxation a portion of the property from which it is taken, and to that extent diminishes the subject upon which federal taxes may be laid. The States are, and they must ever be, co-existent with the National Government. Neither may destroy the other. Hence, the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise."[1]

[1] *Union Pacific Railway Co.* v. *Peniston*, 18 Wallace 29, per Strong J.

CHAPTER IV.

THE STATE AS AN AGENT OF THE COMMONWEALTH GOVERNMENT.

THE Commonwealth has the completest power of providing for the execution of its powers. It is not dependent on the States, and in general it may not require the organs of State Governments to act as its agents or instruments. These have their own functions to fulfil, and the admission of a paramount power in the Commonwealth Government to cast upon State organs the execution of Commonwealth objects without the consent of the State would be in the end to destroy the independence of the States. A Government whose arrangements were constantly liable to dislocation by new burdens being cast upon its officers by a paramount power would become a mere subordinate authority.

In the United States this has been determined in the case of the executive officers of the State in a peculiarly striking way. The Constitution required the surrender of fugitive criminals on the demand of the executive authority of the State from which the criminal came; and Congress under a power to frame laws to carry this provision into effect, passed an Act declaring that it should be the duty of the executive authority of the State to arrest and deliver up the fugitive. On application for a *mandamus* to the Governor

of Ohio to perform this statutory and ministerial duty, the Supreme Court held that "the Federal Government under the Constitution had no power to impose on a State officer as such any duty whatever and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the State and impose on him duties of a character imcompatible with the rank and dignity to which he was elevated by the State."[1]

In the Commonwealth Constitution, sec. 12, the Governor of a State is made the authority for issuing writs for Senate elections, and in *The King* v. *The Governor of the State of South Australia*[2] an application was made to the High Court for a *mandamus* to compel the issue of a writ. The Court held that the duty imposed by the Constitution on the State Governor was not imposed upon him as an officer of the Commonwealth and did not make him an officer of the Commonwealth. It was imposed upon him as the constitutional head of the State, and as part of the duty owed by him to the State and the Crown, a duty of imperfect obligation resting upon political sanctions and not enforceable by the Courts. "The States are not subordinate to the Commonwealth, and the Commonwealth Courts cannot command the Constitutional Head of a State to do in that capacity an act which is primarily a State function," (p. 1511).

But these rules are of course rules of interpretation, and where the Constitution clearly makes the States the instruments for accomplishing federal purposes and commits to the Commonwealth Parliament the power of making this provision effective, the State authorities must submit to

[1] *Kentucky* v. *Denison*, 24 Howard 66, 107-8. Cf. *Prigg* v. *Pennsylvania*, 16 Peters at pp. 615-616.

[2] (1907) 4 C.L.R. 1497.

federal control. In one case at any rate such express provision is made by the Constitution. Sec. 120 declares that "every State shall make provision for the detention in its prisons of persons accused or convicted of crimes against the laws of the Commonwealth and for the punishment of persons convicted of such offences, *and the Parliament of the Commonwealth may make laws to give effect to this provision.*[1]

The Federal Government, in determining on the instruments for executing its laws, can no doubt select the officers of the States, and if the State consent or do not object, no constitutional objection arises. This is affirmed in the United States in the case of *Kentucky* v. *Dennison*;[2] and in the *United States* v. *Jones*[3] the Supreme Court says: "That Government (*i.e.*, the United States) can create all the officers and tribunals required for the exercise of its powers. Upon this point there can be no question: *Kohl* v. *U.S.* 91 U.S. 367. Yet from the time of its establishment that Government has been in the habit of using, with the consent of the States, their officers, tribunals and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the Federal Government; but as a matter of convenience and as tending to great saving of expense." Of this power of co-operation with the States the Commonwealth has in numerous cases availed itself.[4]

The question of the legality of delegating to the States

[1] Cf. the provisions of the 14th Amendment to the U.S. Constitution, and *Ex parte Virginia*, 100 U.S. 339, where it was held that as the constitutional prohibition was addressed only to governmental action by the States, the auxiliary power of Congress necessarily extended to State officers as such.

[2] 24 How. 66.

[3] 109 U.S. 513, at p. 519.

[4] *E.g.*, See the Memorandum of the Attorney-General on a Commonwealth Bureau of Agriculture (No. 194 of 1908).

Parliaments powers vested by the Constitution in the Commonwealth Parliament is less simple; but from the fact that the grant of power by the Constitution to the Commonwealth Parliament is in general not an exclusive but merely a paramount grant, it is not likely to be of great practical importance.

Of Canada it has been said that "in any case where in the distribution of powers by the *British North America Act* certain powers are assigned to the legislative authority of the Dominion Parliament, it is not competent for that body to delegate its powers to the local Legislature, so as by an absolute grant of discretionary power to enable the local authority to deal with the matter itself."[1] In the United States, doctrine is opposed to delegation generally, and it has been expressly laid down that "Congress cannot transfer legislative power to a State nor sanction a State law in violation of the Constitution."[2] On the other hand, it is settled, first, that Congress may extend and apply to federal matters the present and prospective laws made by the States upon subjects within the scope of State power;[3] secondly, that in that class of case where the silence of Congress is treated as an indication that State laws shall not attach to the matter, Congress may declare its will that the State laws shall operate and that such a declaration is *intra vires*.[4]

As was pointed out by Marshall C.J. in *Wayman* v. *Southard*,[5] the adoption of State laws may often be peculiarly convenient in matters of detail—the application of the established machinery of the State may be the best

[1] Todd, 2nd ed., p. 570.

[2] *In re Rahrer*, (1890) 140 U.S. 545, at p. 560.

[3] *Gibbons* v. *Ogden*, (1824) 9 Wheaton 1; *Wayman* v. *Southard*, (1825) 10 Wheaton 1, 47-8. The like has been decided in Canada: Lefroy, p. 694.

[4] *In re Rahrer*, 140 U.S. 545.

[5] 10 Wheaton, at p. 43.

means of meeting local conditions, and it may avoid the intricacy and cost of separate federal administration. In the Commonwealth *High Court Procedure Act* 1903 and the *Judiciary Act* 1903 there are numerous cases of the application of State laws to federal judicature.[1]

The second doctrine may be illustrated from the commerce power and the rule which exempts the instrumentalities of one government from interference by the other. The American decisions upon the relations of Congress and the States in matters of foreign and inter-State commerce present a greater divergence of theory than is to be found in any other part of American Constitutional Law; but this, at any rate, has been settled—that the authority and recognition of Congress may make operative thereon legislation of the States which, but for that sanction, would have no effect. This is justified on the ground that the restriction upon State action comes not from any withdrawal of the subject from the States by the Constitution, as by the establishment of an exclusive power in Congress, but merely because the national character of the subject requires that the absence of any enactment by Congress should be treated as an indication of the will of that body that commerce should be free. But Congress is perfectly competent to will otherwise, and if it expresses its will with sufficient clearness, the barrier to the operation of the State laws is removed. These State laws were never *ultra vires* in the proper sense; they were simply prevented from operation by the implied and constructive expression of the paramount will.[2]

Whatever doubts may arise in Australia as to the application of these doctrines by reason of the terms of sec. 92,

[1] *High Court Procedure Act* 1903, secs. 15, 18, 26, 28, 29; *Judiciary Act* 1903, secs. 68, 79.

[2] *In re Rahrer*, (1890) 140 U.S. 545, at pp. 561, 563, 565.

which bind the Commonwealth and State, the position in regard to instrumentalities seems to be the same in Australia as in America. Where the Government establishes agencies and instrumentalities for effectuating its purposes, it thereby impliedly declares its intention that they shall be free of all interference by other authority. But it may declare its will that they shall be submitted to the other authority, and if it does so, that will be valid, not as conferring new powers upon the other Government, but as removing a barrier to the operation of existing powers.[1]

We may reasonably conclude that the Commonwealth Parliament may, as in the *Judiciary* and *High Court Procedure Acts*, adopt and apply to federal matters laws made by the States in virtue of their inherent powers; and as in the *Commonwealth Salaries Act* 1907, remove any barrier to the operation of State laws which is set up by its own will. Whether it may go further and invest the State Parliament *de novo* in any matter with legislative power is doubtful. The only case in which such a question can arise is where the power of the Commonwealth Parliament is an exclusive power, and there is force in the argument that the Constitution by making the power of the Commonwealth Parliament exclusive instead of simply giving it a paramount operation, did intend to exclude the State Parliament entirely from the field; and there is no question that the Commonwealth Parliament could not authorize action by a State in any matter from which the State is prohibited by the Constitution; *e.g.*, it could not authorize it to coin money

[1] *Van Allen* v. *The Assessors*, 3 Wallace 574; *Austin* v. *The Aldermen*, 7 Wallace 699; *Owensboro' National Bank* v. *Owensboro'*, (1898) 173 U.S. 664; *Home Savings Bank* v. *des Moines*, (1906) 205 U.S. 503: State control of federal instrumentalities. See the Debates on the Bill to enable the States to tax salaries of Commonwealth public servants. P.D. (1907), pp. 3866 *et seq.*; and see *Baxter* v. *Commissioners of Taxation*, (1907) 4 C.L.R., at p. 1133; and *Flint* v. *Webb*, (1907) 4 C.L.R., at p. 1187.

in defiance of sec. 115. Again there are some matters in which the Constitution expressly or inferentially requires uniformity in federal legislation, *e.g.*, the imposition of duties of customs and excise, uniformity of bounties (sec. 51 (iii.)) absence of discrimination in taxation (sec. 51 (ii.)) and of preference in trade, commerce and revenue (sec. 99), coinage (secs. 51 and 115). But there may well be cases in which the interests of the Commonwealth may require that differing rules should be applied to conditions differing in the several parts of the Commonwealth, *e.g.*, the regulation of the telegraph or telephone administrative services which belong exclusively to the Commonwealth Parliament (secs. 69 and 52). These conditions would best be provided for by some authority with local knowledge. The Commonwealth Parliament could no doubt commit a wide discretion to its departmental authorities in the State or district. But it may not be limited to such authorities. It might consider that the State Executive or the State Parliament was the fittest authority to exercise the power; and as has been pointed out[1] the distinction between delegation of legislative power and the adoption of present and future laws of the States is a very fine one.

[1] Lefroy, *Legislative Power in Canada*, p. 694.

PART VIII.—THE SUBJECTS OF THE POWER OF THE COMMONWEALTH.

CHAPTER I.

THE SUBJECTS OF THE LEGISLATIVE POWER OF THE COMMONWEALTH PARLIAMENT.

The Constitution grants powers to the Commonwealth Parliament over subjects by way of simple enumeration without any attempt at classification. But the character and extent of authority, the conditions under which it arises, and its effect in relation to the powers of the States, are not uniform and vary according to the subject. It may be useful to call attention to certain differences which do in substance establish more than one classification of powers.

The Constitution, by declaring that certain powers shall belong exclusively to the Commonwealth Parliament (sec. 52), establishes the distinction between those powers which are exclusive and those which are not. But it has been well pointed out by Mr. Justice Inglis Clark[1] that, thus regarded, the powers of the Commonwealth Parliament really fall into three categories, the first embracing all matters placed by the Constitution under the exclusive power; the second

[1] *Australian Constitutional Law*, 2nd ed., p. 73.

embracing those matters over which the power of the Commonwealth Parliament operates by way of paramount legislation merely, over-riding any exercise by the State of its own power (sec. 109); and the third embracing matters "in respect of which the Parliament of the Commonwealth and the Parliaments of the States have concurrent and independent jurisdictions." These last are the only powers which are truly "concurrent," though that term is popularly used in Australia as in America to describe all powers which are not exclusive. The most obvious but by no means the only instance is the power over "Taxation," which does not import any control by the Commonwealth over the powers of taxation exercised by the States for State purposes;[1] the power is one exercised independently by each Government for its own purposes.

In the next place, an examination of the subjects enumerated in sec. 51 discloses that some of them are primarily matters of public administration and service, to which the legislative power is ancillary, a means of defining the executive powers and effectuating their use. Instances of these matters are to be found in the postal, telegraphic, and telephone services, defence, lighthouses, &c., customs, quarantine, astronomical and meteorological observations, census and statistics, external affairs. The essentially administrative character of this class of matters is shown by the fact that, under sec. 69, in the case of the most important of them, the administrative departments of the States are transferred to the Commonwealth, and the legislative power of the Commonwealth relating thereto is made exclusive (sec. 52). On the other hand, others of the enumerated powers are primarily matters of legislation, involving generally and

[1] *E.g.* see *Municipal Council of Sydney* v. *Commonwealth*, 1 C.L.R. at p. 232, where the Commonwealth power is described by Griffith C.J. as "federal taxation for federal purposes."

normally the establishment of rights, the imposition of duties, and the regulation of the conduct of citizens. In this class of case it is the executive power which is auxiliary, and the enforcement of the law will mainly be sought in the course of the administration of justice. Illustrations of such matters may be found in the power to make laws as to trade and commerce with other countries and amongst the States; banking; insurance; copyrights, patents of inventions and designs, and trade-marks; bills of exchange and promissory notes; bankruptcy and insolvency; the influx of criminals. In a third class of case, the primary object of the power appears to be the expenditure of money upon certain purposes or services. The most obvious examples of this are "Bounties on the production and export of goods," and "Invalid and old age pensions." But "The acquisition with the consent of a State of any railways of the State," and "Railway construction and extension in any State with the consent of that State," may probably be referred to the same head. In other cases, the legislative and administrative nature of the matter is more evenly balanced.

The distinctions here adverted to are not without practical importance, when it is remembered that the nature and object of particular powers is a principal element to be taken into consideration in determining the meaning and extent of the grant.[1]

[1] For example, there may often be a question as to the inference to be drawn from the enumeration of some matter which would *primâ facie* be included in a more general power also enumerated. Thus, "quarantine," as ordinarily understood, would be included in the commerce power and in the United States belongs to Congress simply as being so included. In the Australian Commonwealth it is expressly granted to the Parliament, whence the inference might be drawn that it is used in a sense which would embrace matters lying outside the commerce power, or that that power itself must receive a limited construction. But the true reason for the special mention of quarantine appears to be its essentially administrative character and the intention that the State department should be transferred to the Commonwealth (sec. 69).

A convenient grouping of powers of the Commonwealth Parliament is according as they are direct or indirect, *i.e.*, can be exercised by the Parliament of its own authority under the Constitution, or can be exercised only with the consent or after grant by a State Parliament. A third heading may be made for those powers which are not substantive, but are incidental merely, or appear to be inserted *ex cautela*.

Direct Powers.

A.—*Administrative Services transferred to the Commonwealth.*

The first group of matters demanding attention is that relating to subjects wherein the administrative departments of the States are or may be transferred to the Commonwealth by sec. 69. Over matters relating to any department so transferred the power of the Commonwealth Parliament is exclusive (sec. 52 (ii.)).

1. Defence.

Sec. 51 contains two articles dealing immediately with this matter.

(vi.) The naval and military defence of the Commonwealth, and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

(xxxii.) The control of the railways with respect to transport for the naval and military purposes of the Commonwealth.

By sec. 114 a State may not without the consent of the Commonwealth raise or maintain any military force, and by sec. 119 the Commonwealth shall protect every State against invasion and on the application of the Executive Government of the State against domestic violence.

2. Posts, Telegraphs, and Telephones. Sec. 51 (v.).

These subjects are submitted to the control of the Commonwealth, not merely for foreign and inter-State, but also intra-State purposes. They were transferred on 1st March, 1901.

3. Lighthouses, Lightships, Beacons, and Buoys. Sec. 51 (vii.).

4. Quarantine. Sec. 51 (ix.).

The *Quarantine Act* 1908 passed by the Commonwealth Parliament is noteworthy in two respects: first, that it does not contemplate any immediate transfer of the Quarantine Departments of the States to the Commonwealth, but rather the co-operation of the Commonwealth and State authorities; secondly, that it extends far beyond the scope of the State Quarantine Departments in embracing measures for the isolation and stamping out of diseases of persons, animals, or plants, whether introduced into or breaking out in any part of the Commonwealth.

5. The State Departments of Customs and Excise became transferred to the Commonwealth immediately on its establishment (sec. 69), and thereupon the Commonwealth legislative power in relation thereto became exclusive. Under sec. 90, on the imposition of uniform duties of customs, the power of the Parliament to impose duties of customs and excise became exclusive. Otherwise the power over customs and excise is not the subject of specific grant, but falls under the general power of Taxation (sec. 51 (ii.)), where it will be treated, or of Trade and Commerce.

B.—*Miscellaneous Services.*

Under this head may be placed certain services, the very nature or the effective operation of which depends upon the exercise of governmental authority.

1. Currency, coinage and legal tender. Sec. 51 (xii.)

The *jus cudendæ monetæ* is everywhere recognized as one of the prerogatives of government. The words "and legal

tender" exclude the doubt entertained in the United States as to whether Congress could, under a power to "coin money," make paper legal tender.[1] It is further fortified, in the case of the Commonwealth, by the fact that by sec. 51 (xiii.) the power with respect to "banking" extends to "the issue of paper money." These powers must be read in conjunction with sec. 115, whereby "A State shall not coin money, nor make anything but gold and silver a legal tender in payment of debts."

2. Weights and Measures. Sec. 51 (xv.).

This is another prerogative power, which sufficiently explains itself.

3. Astronomical and Meteorological Observations. Sec. 51 (viii.).

4. Census and Statistics. Sec. 51 (xi.).

This case is an illustration of the "concurrent and independent" legislative powers already spoken of. The Commonwealth is given full power to provide for these services; but any provision which may be made does not legally supersede, and may exist concurrently with, the provision made by the States.

5. Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State. Sec. 51 (xxxv.).

It may be assumed that this includes the power to make compulsory the submission of disputes and to enforce awards. For the rest, what is most noteworthy about the subject is its careful restriction. What is committed is merely a particular mode of dealing with industrial disputes; and it has yet to be determined whether the imposition of a "common rule," as well as the very extensive objects and machinery of the *Commonwealth Conciliation and Arbitration Act*

[1] See Cooley, *Constitutional Law*, p. 91; and the *Legal Tender Cases*, 12 Wall. 457.

1904, suggested by the enactments of Parliaments which are not under any limitation of means, are truly incidental to "conciliation and arbitration." What is the force of "prevention," and what is a "dispute extending beyond the limits of any one State" were much discussed in Parliament during the passage of the Bill.[1] The questions what is an "industrial dispute" and what a dispute "extending beyond the limits of any one State" resolve themselves so much into inferences to be drawn from facts which may present infinite variation, that it is impossible to answer them in general. Further, the form in which the most important cases have come before the High Court, and the differences of opinion indicated by the members of the Court, make it peculiarly difficult to state the results of those cases with certainty.

In the *Railway Servants' Case*,[2] arguments were addressed to the Court on the question of disputes extending beyond the limits of any one State; but in the circumstances of that case the Court considered it unnecessary to express any opinion on the point (p. 539). In the *Jumbunna Coal Mine* v. *The Victorian Coal Miners' Association*,[3] it was held that the incorporation and registration of associations of employers and employed under the Act were valid as incidental to the power to make laws with respect to arbitration, though doubts were expressed as to whether all the purposes to which under the Act such incorporation may extend, were valid.[4] In the same case it

[1] *Parliamentary Debates* 1903-4 *passim*. See especially P.D. 1903, pp. 3183, 3190, 3381, 3467, 4140-1, 4738; and P.D. 1904, pp. 2259-60, 2261, 2263, 2266, 2347, 2352, 2478-9.

[2] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *The New South Wales Railway Traffic Employés Association*, (1906) 4 C.L.R. 488, at pp. 499, 505, 510-512.

[3] (1908) 6 C.L.R. 309.

[4] S.C. p. 337 (*e.g.* holding land).

was also held that an association is competent to register, though it consists exclusively of persons engaged in industry in one State, and in the employment of persons whose business is confined to a single State. This ruling negatives the view that the Constitution requires the condition that the disputants, employers and employed, shall be engaged in more than one State, as where there are through contracts by sea and land from State to State, or where seamen are engaged in inter-State navigation;[1] it is recognized that there may be circumstances in which a body of employés engaged in coal mining in Victoria, in the employment of a company whose operations are carried on solely in Victoria, would be parties to a dispute extending beyond the limits of one State.[2] What these circumstances are the case does not determine, but is was assumed that "common cause," made by a combination of employers on the one hand and of employés on the other, would fulfil the condition;[3] and it is clear that the combination need not be a permanent combination.[4] Whether it is essential that there should be a combination on both sides was considered in the *Woodworkers' Case*,[5] and in that case a majority of the Court (O'Connor, Isaacs, and Higgins JJ.) held that there might be a case within the Constitution where the employés in different States combined to make demands on employers who were not combined. O'Connor J. reiterated the general statement made by him in the *Jumbunna Case* as to the nature of an industrial dispute extending beyond the limits of any one State:—"If all the workmen of an employer in a particular trade take concerted action in

[1] Cf. Isaacs J., at p. 372.

[2] Per Griffith C.J., at p. 340; O'Connor J., at p. 354.

[3] See Isaacs J., at p. 372; Barton J., at p. 342.

[4] Griffith C.J., at p. 332; O'Connor J., at p. 352.

[5] *Federated Sawmillers' Association* v. *James Moore*, (1909) C.L.R.; 15 A.L.R. 374.

demanding and endeavouring to enforce from him some alterations in their conditions of employment, there is an industrial dispute. If all the workers throughout the State in the same trade unite in the making and endeavouring to enforce the same demand from their respective employers, there is an industrial dispute involving the whole trade throughout the State. If the workers so united obtain the co-operation of their fellow workers in the same trade in another State in such a way that the combined workers in both States take concerted action against their respective employers in both States for the making and enforcing the same demands, there is an industrial dispute extending beyond the limits of one State."[1] There might thus be a case within the Constitution when employés combined to make and enforce a claim against employers who were not combined. But it was not decided that a dispute came within the Constitution by the mere fact that the employés had combined; and the Chief Justice[2] and O'Connor J.[3] held that if the only evidence that a dispute extended beyond the limits of a State were that the employés had combined to make demands which employers acting without combination had refused, the case would not fall within the Constitution—it would not be a "real dispute." There must then apparently be something in the relation of the parties or the conditions of the industry to make the dis-

[1] 15 A.L.R. at p. 386. The *Jumbunna Case*, 6 C.L.R. at p. 352.

[2] 15 A.L.R. at pp. 381, 382-3.

[3] S.C., at p. 387. According to the report in *The Times*, July 28th, 1909, the judgments of the House of Lords in the case of *Conway* v. *Wade* consider some questions similar to those in the Australian cases. The question there was whether the conduct which was the subject-matter of the action was in contemplation or furtherance of a trade dispute within the *Trade Disputes Act* 1906. The Lord Chancellor points out that "a mere personal quarrel, or grumbling or agitation will not suffice. It must be something fairly definite and of real substance." It will be noticed that in the judgment of O'Connor J. in the *Woodworkers' Case*, 15 A.L.R. at pp. 385-6, he treats "trade dispute" and "industrial dispute" as identical in meaning.

pute one which extends to another State. Such a condition is found in the *Broken Hill Case*,[1] where the Broken Hill Proprietary Company was mining and treating ores in New South Wales and treating ores mined in New South Wales in South Australia; and it was proved that not merely were the operations of the Company thus connected with each other, but the wages of the men in the two States had always borne a proportionate relation to each other, rising and falling together, and that the Company had recognized the connection between the industrial conditions of the two places in the present dispute. In all cases there must be some real community of interest, as distinguished from mere sympathetic action;[2] there must be unity in the subject-matter of the dispute—that is, the same sort of thing must be demanded (wages, hours, &c.), though it is not necessary that the *same* wages, the *same* hours, &c., should be demanded in each case;[3] and there must be some community of action. In the opinion of the Chief Justice, a "dispute" is not created by mere demand and refusal; there must be some element of persistency, and the dispute must be one which is likely, if not adjusted, to endanger industrial peace.[4] An "industrial dispute" involves the idea of numbers,[5] and this has been expanded to the view that it is the "industry" and its possible dislocation which is the central figure in the determination of the problem of jurisdiction. "'An industrial dispute' under the Act, and within the constitutional power, is a dispute in some 'industry.'

[1] *The King* v. *The Commonwealth Court of Conciliation and Arbitration*, (1909) 15 A.L.R. 416.

[2] The *Jumbunna Case*, 6 C.L.R. at p. 342 (Barton J.) and the *Woodworkers' Case*, per Griffith C.J., 15 A.L.R. at p. 381.

[3] The *Woodworkers' Case*, 15 A.L.R., per Griffith C.J., at pp. 381, 383, O'Connor J., at pp. 386-387.

[4] The *Woodworkers' Case*, 15 A.L.R. at p. 380.

[5] The *Jumbunna Case*, 6 C.L.R. at p. 332 (Griffith C.J.), p. 341 (Barton J.); see also the *Woodworkers' Case*, 15 A.L.R. at pp. 380 (Griffith C.J.) and 386 (O'Connor J.).

It may be between employers and employés, or employés and employés, as for instance the well-known demarcation disputes in the shipping trade. It must, of course, have reference to industrial conditions. The connecting link is the industry, and not the particular contract of employment between specific employers and specific employés. The Constitution and the Act alike look to a dispute that dislocates or may dislocate a particular industry—the extent of dislocation being immaterial; but the governing idea is primarily the preservation of peace in the industry generally, and its uninterrupted progress, and not the settlement of individual quarrels as such."[1] Thus, in the opinion of Isaacs J., organization of parties is immaterial; the public inconvenience—the dislocation and interruption of ordinary relations—is the same whether there is the most elaborate organization or none; and the purpose of the Constitution is to remove this inconvenience by restoring and preserving peace in the industry. This consideration appears important in its bearing upon the validity of the "common rule."

As to this point it is to be noticed that the Constitution does not confine the power to cases in which a single industry is concerned, a single dispute may include more than one industry.[2]

The fact that the power under the Constitution is directed to "prevention" as well as "settlement" of disputes, has caused difficulty, and has encouraged some extreme opinions as to the extent of the power. In the *Jumbunna Case* it was "suggested but not pressed that the settlement by arbitration of an intra-State dispute might be a means of preventing the extension of the dispute beyond the limits of the State." As the Chief Justice observes, "this contention

[1]The *Jumbunna Case*, 6 C.L.R. at p. 372-3.

[2]The *Broken Hill Case*, (1909) 15 A.L.R. 416; the *Woodworkers' Case*, 15 A.L.R., at p. 381.

would involve the consequence that any domestic industrial dispute whatever would fall within the power, since it might possibly under some circumstances extend beyond the State—a consequence inconsistent with the retention by the States of the exclusive power to deal with the regulation of their own internal trade, and which would give no effectual meaning to the words 'extending beyond the limits of any one State'" (p. 334).

The very important question of the relations of the Arbitration Court to the industrial laws and authorities of the States was considered in the *Woodworkers' Case*. The question arises in two ways, as affecting the federal jurisdiction and as affecting the operation of the award. Where wages or other industrial conditions had been adjusted by State Wages Boards or arbitration awards, or industrial agreements registered under the State laws and having the force of awards, and either party was dissatisfied therewith, could there be a "dispute" of which the Federal Court could take cognizance, and if it did, would its award over-ride those conditions? The Chief Justice is clear that a dispute must be one which the parties were capable of settling by agreement,[1] the Court was not competent to entertain claims which were against the law itself; and any award of the Court, consistently with the notion of "arbitration," must be in accordance with and not contrary to law, including therein the law of the State governing the matter.[2] O'Connor J. holds that a real dispute may exist though the demands are inconsistent with the law, but agrees that in the exercise of jurisdiction, the Federal Arbitration Court must administer the law.[3] It could set aside mere contractual

[1] At p. 380.
[2] At p. 382.
[3] At pp. 388-9.

rights of parties and State arbitration awards,[1] but it would be bound by State laws generally, or State regulations having the force of law, such as the determinations of Wages Boards, subordinative legislative authorities of the State, though (the learned Judge added) it was not easy to see how any conflict could arise between scales of minimum wages.[2] Isaacs and Higgins JJ. held that the jurisdiction and the award alike were independent of State laws. Agreeing with O'Connor J. that there might be a real dispute as to some matter governed by State law, they held that the Court's jurisdiction once called into operation was as free from the interference of the State as any other power of the Commonwealth. Isaacs J. compares it with the commerce power which, though it applies only to extra-State commerce, is plenary over that commerce, and overrides legislative, executive or judicial interference by the States.[3] The claim was nothing less than that State legislation within the limits of the State power should oust Federal legislation validly passed under a Federal legislative power. The learned Justice adds—"To my mind, such a contention is in absolute and hopeless contradiction to the plainest words of the Imperial Parliament, [*i.e.*, see sec. V. of the *Constitution Act* and sec. 9 of the Constitution] and if it be correct, then there is practically no Federal Constitution at all. The Commonwealth in that case would only legislate upon sufferance. A few exclusive powers would remain, but even then only so far as the enactments did not cross State Statutes."

The difference between their Honours appears to come back to the incidents and implications arising from "conciliation and arbitration." Are they limited to a power to

[1] Griffith C.J. agrees (p. 384).
[2] At p. 389.
[3] At p. 392.

establish a Court, to define its constitution and (within the limits of the sub-section) jurisdiction, to furnish its procedure and the means for enforcing its awards? Or do they extend to a power of giving to the Court the substantive law which it is to administer in its jurisdiction? In either case the awards of the Court must conform to law. But, in the first case, the substantive law applicable would be that of the State; in the second, that of the Commonwealth. In either case, again, there might be no authoritative declaration of law governing the matter before the Court, in which case, familiar enough in the experience of Courts, the Court would exercise its own judgment in the matter.

6. Invalid and old-age pensions. Sec. 51 (xxiii.).

This is primarily a power to grant such pensions from the Commonwealth funds, to declare the persons to whom, and the conditions upon which, they shall be payable. The history of the subject makes it clear, for instance, that it does not extend to the provision or control of pensions from other sources, whether from the States, from benefit societies, or from employers or elsewhere. Considered in its relations to the powers of the States, the power is "concurrent and independent." Practically, however, Commonwealth pensions supersede State pensions, and result in the transfer of an important service to the Commonwealth. "Invalid and old-age pensions" can, no doubt, be dealt with more effectively by the Commonwealth than by the State Parliament. If a State is not to be burdened with pensioners who have resorted to it merely for the pension, it must require a considerable term of residence within its limits as one of the qualifying conditions. But with the migratory habits of the Australian people such a requirement necessarily excludes from the benefit of the pension large numbers of persons who have lived in various parts of

the Commonwealth. The Commonwealth Parliament, acting for the whole, can deal with the subject on the basis of residence in the Commonwealth, without regard to changes from one part to another.

7. Copyrights, patents of designs and inventions, and trade-marks. Sec. 51 (xviii.).

This is a subject, or group of subjects, which it is not easy to classify. From one point of view, it is merely a branch of the law of property. But from another, it is—at least in the case of patents and trade-marks—in the nature of a privilege restricting the common rights of other subjects, and, as such, depending in a peculiar way upon the creation and grant of the State.[1] It is therefore a matter of minute legislative regulation, and of considerable administrative arrangement. The Commonwealth Parliament has exercised its powers under each of the heads in the group by means of the *Copyright Act* 1905, the *Patents Acts* 1903 and 1906, and the *Trade Marks Act* 1905.

The powers contained in article xviii. are not exclusive; but the enactment of uniform laws on the subjects for the whole Commonwealth might well be regarded as a law for each and every part thereof, so as to exclude the grant of mere local rights in copyrights, patents and trade marks for the several States. Whether this would or would not arise by mere implication, it cannot be doubted that the Commonwealth has the power to make the field its own and to declare that no grant but its own shall establish, and no machinery but its own control, the peculiar class of rights here in question. Accordingly, the Commonwealth legislation limits the operation of State laws to rights existing at the time of the commencement of the Commonwealth Acts, and the *Patents Act*, sec. 8, expressly declares that no new

[1] For some of the legal consequences of this, see *Potter* v. *Broken Hill Proprietary Co.*, (1906) 3 C.L.R. 479.

application for a patent shall be made under State laws. The Acts also provide for the transfer of the State administration to the Commonwealth, with all records.

Singularly enough, the group has, both in Canada and in Australia, furnished a subject for constitutional controversies of the utmost importance. In the Commonwealth, the *Trade Marks Act* 1905 contained two provisions (Parts VII. and VIII.) which provoked a severe political struggle, and raised questions of much constitutional difficulty. Part VII. "Workers' Trade Mark" enables individual Australian workers, or associations of workers, to register a mark indicating that the goods to which it is applied are the exclusive production of the individual or association; while Part VIII. provides for a Commonwealth Trade Mark consisting of a distinctive device or label bearing the words "Australian Labour Conditions," which may be applied to goods included in a resolution of both Houses of Parliament that, in their opinion, the conditions as to the remuneration of labour in connection with the manufacture thereof are fair and reasonable.

In *Attorney-General for New South Wales* v. *Brewery Employés Union*,[1] the High Court decided against the validity of Part VII. of the Act. The arguments and judgments in the case have been already considered.[2]

c.—*External Matters.*

1. External Affairs. Sec 51 (xxix.).

This is perhaps of all the powers of the Commonwealth Parliament, that which is the least capable of definition. The most important external matters which have engaged Australian attention are with a few exceptions, subjects of specific enumeration; and the "external affairs" of the

[1] (1908) 6 C.L.R. 469.

[2] At pp. 371 *et seq.*

Commonwealth, like the foreign affairs of the Empire, are primarily matters of negotiation and administrative policy rather than of legislation. So far however as the conduct of external affairs may require the co-operation of the legislative power, the authority of the Parliament extends. The question how far International Law is a part of the law of the land is a complex one to which no single answer can be given;[1] but at any rate, in very many cases, legislation may be necessary to give effect to international obligations, or to assert international rights. So far as the exercise of such a power is consistent with the unity of the Empire, and the responsibility of the Imperial Government in respect to foreign affairs—a matter which may give rise to trouble hereafter, notwithstanding the King's power of disallowance —the Commonwealth Parliament would appear to have power to make provision.[2]

The enactment of laws for the execution of treaties made by the Imperial Government affecting the Commonwealth or to which the Commonwealth has adhered, or made by the Commonwealth itself under such powers as the Imperial Government may commit to it, is perhaps the most obvious subject for the operation of the power.[3] Extradition between the Commonwealth and foreign countries or the Commonwealth and other parts of the Empire is probably another such matter.[4]

The power to give effect to international arrangements must, it would seem, be limited to matters which *in se* con-

[1] See for an examination of the question an article by Mr. Westlake in 22 L.Q.R. p. 14 (1906).

[2] A difficulty of the kind suggested is perhaps foreshadowed by Griffith C.J. in *Chia Gee* v. *Martin*, (1905) 3 C.L.R. at p. 653.

[3] See per Barton J. in *McKelvey* v. *Meagher*, (1906) 4 C.L.R. at p. 286.

[4] *Ib.*, at p. 278, Griffith C.J. expresses the opinion, without deciding that the power extends to legislation under the (Imperial) *Fugitive Offenders Act* 1881.

cern external relations; a matter in itself purely domestic, and therefore within the exclusive power of the States, cannot be drawn within the range of federal power merely because some arrangement has been made for uniform national action. Thus, there is at the present time an international movement for the amelioration of labour conditions, and the International Union has arrived at some agreements for uniformity of legislation. It is submitted that the Commonwealth could not by adhering to an international agreement for the regulation of factories and workshops, proceed to legislate upon that subject in supersession of the laws of the States.[1]

2. Trade and Commerce with other countries and among the States. Sec. 51 (i.). (See "Finance and Trade.")

3. Fisheries in Australian waters beyond territorial limits. Sec. 51 (x.).

This is one of the powers which was possessed by the Federal Council of Australasia; and it was exercised to regulate the pearl, shell, and bêche-de-mer fisheries in Australian waters adjacent to Queensland (51 Vict. No. 1) and Western Australia (52 Vict. No. 1). In each of the Acts a schedule declared what were to be deemed Australian waters under the Act. It is not without interest to note that the United States invoked these Acts in support of their claim to regulate the seal fisheries in the Behring Sea, but overlooked the limitation that the Act applied only to British ships and boats attached to British ships.

4. Naturalization and Aliens. Sec. 51 (xix.).

5. The people of any race other than the aboriginal race

[1]The limits of the national power in the United States are discussed in two interesting articles in the *American Journal of International Law*, vol. i.:—"Real Questions under the Japanese Treaty," by Mr. Elihu Root, at p. 279; and "The Extent and Limitations of the Treaty-making power under the Constitution," by Mr. C. P. Anderson, at p. 636. See also Butler's *Treaty Power in the United States.*

in any State, for whom it is deemed necessary to make special laws. Sec. 51 (xxvi.).

In regard to the article "Naturalization and Aliens" in sec. 91 of the *British North America Act*, the Privy Council has said:—"The truth is that the section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—*i.e.*, it is for the Dominion to determine what shall constitute the one or the other, but the question as to what consequence shall follow is untouched" (*Cunningham* v. *Tomey Homma*[1]). In the Commonwealth the power is not declared exclusive in the Commonwealth, but the same considerations would appear to govern the extent of the power. The case was one in which the Court upheld an electoral disability imposed by a Provincial Statute on naturalized Chinamen. It must be compared and perhaps contrasted with the case of the *Union Colliery Co.* v. *Bryden*,[2] where the Privy Council declared that a Provincial Statute disqualifying Chinamen from working underground in mines was *ultra vires* as an invasion of the exclusive power of the Dominion over "naturalization and aliens." The Privy Council declared that the legislative power of the Dominion extended to all matters which directly concerned the rights, privileges, and disabilities of Chinamen resident in Canada, and that naturalization *primâ facie* appeared to include the power of enacting what should be the consequences of naturalization, or, in other words, what should be the rights and privileges pertaining to residents in Canada after they have been naturalized. The High Court has held in *Robtelmes* v. *Brenan*[3] that the grant of power over "naturalization and

[1](1903) A.C. 151, at p. 156.
[2](1899) A.C. 580.
[3](1906) 4 C.L.R. 395.

aliens" includes the sovereign power of expelling and deporting foreigners from the country, and Griffith C.J. observes that the power over "aliens" must "surely, if it includes anything, include the power to determine the conditions upon which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they can be deported from it" (p. 404).

In Australia the class of law in question in the case of the *Union Colliery Co.* v. *Bryden* appears rather to be embraced in sec. 51 (xxvi.). That article recalls the various race problems which arise in different parts of Australia, and enables the Parliament to establish laws concerning the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market-gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia.

Under one heading or the other, or perhaps under the head of "external affairs," it may be presumed that the Commonwealth has power to remove disabilities of aliens existing at common law, and to secure to aliens, whether in pursuance of treaties or otherwise, the ordinary common rights of inhabitants. An exception must probably be made in the case of the electoral franchise of the States and eligibility for the State Parliament; and any public body or office organized by the States would, it is submitted, be governed wholly by State laws.

The Parliament has availed itself freely of these powers, as witness the *Naturalization Act* 1903, the *Immigration Restriction Act* 1901 and *Amendment Act* 1905, the *Pacific Islands Labourers Acts* 1901 and 1906, and the *Commonwealth Franchise Act* 1902, sec. 4.

The *Naturalization Act* declares by sec. 13 that "from the commencement of this Act the right to issue certificates of naturalization shall be exclusively vested in the Government of the Commonwealth, and no certificate of naturalization or letters of naturalization issued after the commencement of this Act under any State Act shall be of any effect." The power over naturalization and aliens is not declared by the Constitution to belong exclusively to the Commonwealth Parliament; but it is clearly intended that the power shall be plenary. What is the plenary exercise of a power must in each case depend upon the nature of that power itself. While in general the power of the Commonwealth Parliament operates upon the conduct of citizens and does not address itself to the action of the State Government, yet if the subject is one the very essence of which lies in some grant or concession from Government, the plenitude of authority in that matter must extend to declaring that no grant or concession shall be effective except such as is permitted by the paramount Legislature. It may be taken, therefore, that so long as this legislation remains in force, any local letters of naturalization which may purport to be granted under State legislation will be inoperative.

6. Immigration and Emigration. Sec. 51 (xxvii.).

This power would extend to measures for restriction or encouragement, and the determination of the conditions upon which either may take place. A question of some difficulty has arisen as to what is immigration or emigration. Is it mere entry into or departure from the Commonwealth? Is a person ordinarily resident in the Commonwealth an emigrant when he takes a six months' trip to Europe and an immigrant when he returns, or do the terms apply only to some kind of permanent settlement or renunciation of permanent settlement in the Commonwealth? In *Chia Gee*

v. *Martin*,[1] the High Court held that the term "immigrant" did not necessarily mean "one who arrives in the Commonwealth with the intention of becoming a permanent resident;" that the particular provision of the *Immigration Restriction Act* under consideration dealt with entry into the Commonwealth irrespective of intention; and (by inference) that it was within the power of the Commonwealth. In *Ah Sheung* v. *Lindberg*,[2] Cussen J. considered the subject at length, and expressed the opinion that, while the history of the laws of immigration in Australia deprived the term of its ordinary significance as referring to permanent settlement, a person ordinarily living and having his home in Australia could not on returning thereto from abroad be properly described as an immigrant, and that consequently immigration was not synonymous for all purposes with mere entry (p. 333). On appeal, the High Court[3] was disposed to agree with Cussen J. that "immigration" did not include the case of "Australians" returning to Australia, but considered that the case did not require the decision of the point, nor of the question who were "Australians" in this sense. In *Ah Yin* v. *Christie*,[4] the Court held that the power did not depend on the nationality of the person affected, nor was it excluded by the fact that for purposes of civil status he was domiciled in Australia or any part of it; therefore the child of a Chinaman coming to Australia to join his father domiciled there, might be a prohibited immigrant under the Commonwealth law. Griffith C.J. (p. 1431) observes that "the Commonwealth has under the Constitution power to exclude any person, whether an alien or not," and (p. 1432) expresses the opinion that "any

[1] (1905) 3 C.L.R. 649.
[2] (1906) V.L.R. 323.
[3] (1906) 4 C.L.R. 949.
[4] (1907) 4 C.L.R. 1428.

person who seeks to enter the Commonwealth from abroad is *primâ facie* an immigrant within the meaning" of the *Immigration Restriction Act*. But the Court carefully refrains from entering on the questions left undetermined in the *Attorney-General* v. *Ah Sheung*.[1]

Parliament has made noteworthy exercise of this power in the *Immigration Restriction Act* 1901, and *Amendment Act* 1905, the *Contract Immigrants Act* 1905, and the *Pacific Island Labourers Acts* 1901 and 1906. In considering the limitations of this power, it must not be forgotten that it may be reinforced by the power to make laws with respect to "Trade and commerce with other countries and among the States" (sec. 51 (i.)).

7. The influx of criminals. Sec. 51 (xxviii.).

This clause speaks for itself. It was one of the heads of power belonging to the Federal Council, and its particular enumeration in a Constitution which includes "immigration and emigration" and "external affairs" is to be explained historically rather than by actual legal necessity. It recalls the anxiety of the Colonies to protect themselves against a particular class of "undesirable immigrants," whether arriving directly from Europe, or from other parts of Australia, or from foreign penal settlements in the Pacific.

8. The relations of the Commonwealth with the islands of the Pacific. Sec. 51 (xxx.).

This power also has historical interest. It was a head of "legislative authority" in the *Federal Council Act*, which was the outcome of the "Australasian Convention" of 1883, called to consider the "Annexation of neighbouring islands and the Federation of Australasia." The position of the Pacific Islands was, before the advent of Japan as a world power, the most important matter of foreign or

[1] 4 C.L.R. 949.

external policy with which Australasia concerned herself; and like "external affairs" in general, the matter was one to be dealt with rather by diplomacy than legislation. At the Convention of 1883 Australian Ministers promulgated her "Monroe Doctrine" by declaring that "the further acquisition of Dominion in the Pacific south of the Equator, by any foreign power, would be highly detrimental to the safety and well-being of the British possessions in Australasia and injurious to the interests of the Empire." Australian statesmen had often, and very recently,[1] expressed the opinion that Australasian interests in the Pacific were over readily sacrificed by Imperial Ministers; and it was possibly hoped that the Governor-General might receive the powers of a High Commissioner in the Pacific, with instructions to exercise those powers on the advice of his Australian Ministry. This is a hope, however, which must wait upon the attitude of New Zealand, who, so long as she stands outside the Commonwealth, is unlikely to acquiesce in such an arrangement, while of her availing herself of the power contained in the Constitution of joining the federation, there is less and less prospect. The acquisition of New Guinea, the sole important step towards the assumption of authority in the Pacific, has already been referred to.[2]

The present article of legislative power contemplates the regulation of relations with, rather than the assumption of authority over, Pacific Islands, *e.g.*, the direction of the trade particularly the control of the labour traffic (*Pacific Island Labourers Acts* 1901 and 1906).

D.—*Mercantile Law.*

1. Trade and commerce with other countries and amongst the States. Sec. 51 (i.). (See Finance and Trade).

[1]Since this was first written, in 1900, the incident of the New Hebrides Convention has occurred to confirm and emphasize the statement. See *Proceedings of the Colonial Conference* 1907 (Cd. 3523), pp. 548-563.

[2]See *Papua Act* 1905.

2. Banking, other than State banking, also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money. Sec. 51 (xiii.).

Compare *British North America Act* 1867, sec. 91 (15), (Banking, Incorporation of Banks and the issue of Paper Money); and the interpretation by the Judicial Committee in *Tennant* v. *Union Bank of Canada*.[1] "The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the Province does not and cannot attach to it. It also comprehends 'bænking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker."

3. Insurance, other than State insurance; and also State insurance extending beyond the limits of the State concerned. Sec. 51 (xiv.).

4. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth. Sec. 51 (xx.).

The subject of "foreign corporations" has always been of especial importance in Australia, because many of the largest companies carrying on business there had been formed in England, while of the companies formed in Australia, a large number carried on operations in several Colonies. The result was that there was much legislation in the various Colonies relating to "foreign corporations."

The scope and extent of a legislative power granted with respect to persons natural or juristic is peculiarly difficult to define. On the one hand, it may be argued that it extends

[1](1894) A.C. 31, 46.

to the exercise of every kind of authority to which such a person can be subjected: to the enactment of a separate code of laws in regard to him. If it be urged that the law is familiar with a "law of persons or status" which comprehends not the whole but only a limited part of the field of law, the answer may be made that the extent of that subject depends upon the extent of the actual discrimination that the law makes between classes of persons. These considerations have additional force in the case of those "persons" whom English law, at any rate, appears to consider "artificial," deriving their whole existence in law from the grant or licence of the State,[1] and extinguishable by the same authority.[2] On the other hand, we must regard, in the case of every power, its object and purpose.[3] In this light, it is not reasonable to suppose that the Constitution contemplated the revival of a mediæval system of personal laws. Corporations differ in many well-defined respects from individuals. The most obvious subject-matter of the clause is first the recognition of foreign companies, and the definition of the conditions upon which they may be admitted to carry on business in Australia. Next, in the case of companies formed within Australia, *i.e.* (it would seem) under the laws of any State, the like definition of the conditions upon which they may carry on business throughout the Commonwealth. Thirdly, the control of the constitu-

[1] As to foreign corporations, see "Status of Foreign Corporations and the Legislature," by E. Hilton Young, 23 L.Q.R. 151.

[2] A useful comparison may be made with ships, as to which see *White Bank* v. *Smith*, 7 Wallace 646.

[3] "Perhaps the safest rule of interpretation after all is to look at the nature and objects of the particular powers duties and rights, with all the lights and aids of contemporary history, and to give to the words of each just such operation and force consistent with their legitimate meaning as may fairly secure and attain the ends proposed." *Prigg* v. *Pennsylvania*, 16 Peters at p. 610, cited and applied to the Commonwealth Constitution by Isaacs J. in *Vardon* v. *O'Loghlin*, (1907) 5 C.L.R. at p. 215.

tion and administration of corporations formed within Australia for the purpose of carrying on business in any part thereof or elsewhere. The recognition, the field of operations, and the management, the winding up and dissolution—all the inherent qualities which distinguish the juristic from the natural person, would thus be submitted to federal law. But there the Commonwealth law would leave it; and the actual carrying on of business by the corporation, and the legal relations with outsiders to which it gives rise —its property, its contracts, and its liabilities—would be under the sole control of the State laws.

This is partly decided, partly supported by the majority of the High Court in *Huddart, Parker & Co.* v. *Moorhead*,[1] a case decided under the *Australian Industries Preservation Act* 1906. That Act aimed at the repression of monopolies, and prohibited contracts and combinations with intent to restrain trade to the public detriment, or with intent to destroy or injure by means of unfair competition Australian industries advantageous to the Commonwealth. So far as individuals were concerned these things were illegal only if done in the course of "trade and commerce with other countries and amongst the States"; but in the case of corporations they were made illegal even if in the domestic trade of the States. The question was whether the latter provision was within sec. 51 (xx.).

The Court (Isaacs J. dissenting) applied to the case the principle already well established[2] that the Constitution must be read consistently with itself; that the grant of a power over trade and commerce, limited to external and inter-State commerce, implied a denial of power over domestic commerce and business unless it was made clearly

[1] (1909) 8 C.L.R. 330, 15 A.L.R. 241.

[2] *R.* v. *Barger*, (1908) 6 C.L.R. 41; *A.-G. for N.S.W.* v. *Brewery Employés Union*, (1908) 6 C.L.R. 469.

and unequivocally to appear as incident to some subject expressly granted. In the present case the matter regulated was contracts and combinations governed by State law, and if conceded would cover every operation and every part of the business carried on by a corporation. The Act was not one dealing with the capacity of corporations in any proper sense—defining their competence to enter a particular field of operations; it was rather a regulation of their conduct when acting within their capacity (Griffith C.J.) Briefly, in the language of Higgins J., the enactment under consideration was not a law "with respect to corporations," but with respect to combinations—its substantial subject matter was *trade*, not corporations (p. 271). In the opinion of O'Connor J. (p. 257), the Commonwealth power embraced everything that related to the recognition of the corporation in Australia as a legal entity, but there its limit was reached. As a legal entity the corporation would then become subject to the law of the Commonwealth and of the States according to their several spheres, and in respect of trade carried on entirely within the limits of any one State, it was subject to State, not Commonwealth law. As to so much of the argument as was based on the view that the power to create is a power to impose conditions on the creature, the Court considered that article xx. was not a power to create corporations; it assumed the establishment of a corporate body under the law of some foreign country or a State, or of the Commonwealth in those cases where under some other power in the Constitution the Commonwealth could establish corporations for particular purposes, as was held, for instance, in the *Jumbunna Case*.[1]

The dissenting judgment of Isaacs J. attacks the principle of construction upon which the judgment of the Court is founded. Admitting that the whole instrument must be

[1](1908) 6 C.L.R. 309.

regarded in interpreting every part of it, he considered that it was also a received canon of interpretation at the establishment of the Commonwealth, that Courts must be guided alone by the language as applied to the subject-matter, and must guard themselves against the introduction of implied restrictions upon these terms, a principle reiterated by the Privy Council in relation to this Constitution itself in *Webb* v. *Outtrim*.[1] The words of grant in the present case were plain in themselves, admittedly authorizing the exercise of the power in question, and he could not admit the suggestion of the reserved powers of the States as an implied prohibition or restriction. The power given by the Constitution was not, indeed, a power to create and establish corporations under article xx.; but, viewing them as bodies ready to exercise their capacities, the Commonwealth was empowered to control the outward exercise of their capacities towards the public.

5. Bills of Exchange and Promissory Notes. Sec. 51 (xvi.)

6. Bankruptcy and Insolvency. Sec. 51 (xvii.).

Commenting upon a similar power of the Dominion of Canada, the Judicial Committee in the *A.-G. of Ontario* v. *the A.-G. for the Dominion of Canada*,[2] says:—"It is not necessary in their Lordships' opinion nor would it be expedient to attempt to define what is covered by the words 'bankruptcy' and 'insolvency' in sec. 91 of the *British North America Act*. But it will be seen that it is a feature common to all the systems of bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they should be so distributed or not. Although provision may be made for a voluntary

[1] (1907) A.C. 81.

[2] (1894) A.C. 189.

assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships, the learned counsel for the respondent was unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate. In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the *British North America Act.*" See also *Cushing* v. *Dupuy*[1] and *L'Union St. Jacques de Montreal* v. *Belisle.*[2]

E.—*Family Law.*

1. Marriage. Sec. 51 (xxi.).

2. Divorce and matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants. Sec. 51 (xxii.).

Here the terms of the grant may be taken to assume the essential nature of marriage, which has been defined as "the voluntary union of one man and one woman for life to the exclusion of all others" (*Hyde* v. *Hyde*[3]). The plenary power over "marriage" would not extend to the establishment or recognition of polygamy, or to any union which did not require the consent of the parties, or to one which was designed to be of a temporary character merely. But it enables the Commonwealth to determine what marriages shall be recognized in the Commonwealth, the forms for the celebration of marriage, the consents of parents, guardians, &c., the capacity of the parties, and the establishment or removal of disabilities on inter-marriage. Whether it goes further, and enables the Commonwealth Parliament to legislate as to the effect of marriage on the property of the

[1](1894) A.C. 31, 46.
[2](1874) L.R. 6 P.C. 31.
[3]L.R. 1 P. 130.

spouses, their contractual and tortious responsibility, and their rights of succession *inter se* may be doubted. There is a good deal of diversity in the divorce laws of the States; and it is quite possible, so long as the States remain separate law districts, that parties may be married persons in the view of one State and single persons according to the law of another. The matter is complicated by the fact that the relation is principally governed by domicil, and in countries like Australia the conditions of life make it peculiarly difficult to ascertain the domicil. It is to be observed that "parental rights and the custody and guardianship of infants" is not a substantive power, but is only "in relation" or incident to "divorce and matrimonial causes."

F.—*Administration of Justice.*

The characteristic feature of the constitutional provisions to be considered under these heads is that they are essentially of an Inter-State nature. They are to be distinguished from those matters which have been dealt with under the head of the judicial power of the Commonwealth by the fact that they are dealing with the exercise of State jurisdiction as such, while the "judicial power" describes a jurisdiction which belongs to the Commonwealth, but which the Commonwealth may delegate to the States, and in the exercise of which the State Courts act as instruments of the Commonwealth. There is here, then, no question of "federal jurisdiction;" the matter is the recognition and effectuation of State laws and jurisdiction.

The intimate social and economic relations of the Australian Colonies intensified the inconvenience which belonged to their separate existence as foreign countries for purposes connected with the administration of the law. Though all had the common law of England, the law of one had to be

proved in another as foreign law. No process of one colony would run in another, and the arrangements which independent states may make to supplement the limitations of territorial power were deemed to be beyond the power of mere "local and territorial legislatures." The Imperial Acts dealing with the matters—6 & 7 Vict. c. 34, and 16 & 17 Vict. c. 118—were modelled upon extradition, and were confined to treason and felony. The mischief and scandal of criminals finding a refuge by crossing an imaginary line, early engaged the attention of Australians, and abortive attempts in intercolonial councils and elsewhere were made to deal with the matter. The Imperial Government was urged in 1867 to extend the Acts to misdemeanours, but protracted negotiations only ended in 1870 in a refusal by the Colonial Secretary (Earl Granville) to propose legislation until the Colonies should have come to a common understanding, and in a suggestion that a solution of the problems "would be facilitated if it were possible for the Australian Colonies to enact in concert a common criminal code based on the Imperial law, a measure which Her Majesty's Government would see with much pleasure both from its intrinsic convenience and its tendency to consolidate the great Australian group." It was not until the *Fugitive Offenders Act* of 1881, that the special conditions of groups of colonies were recognised and provision made for meeting the want that had so long been urgent in Australia.

The laws of the Colonies themselves did something, though not by uniform or concerted action, to recognize the judgments, the probates, the inquisitions in lunacy, and some other proceedings in other Colonies of Australia, while it was very general to provide for an extension of jurisdiction by permitting service out of the jurisdiction. *The Federal Council of Australasia Act* 1885 included

among the few subjects on which direct power was given to the Council—(*d*) "The service of civil process of the Courts of any Colony within Her Majesty's possessions in Australasia out of the jurisdiction of the Colony in which it is issued"; (*e*) "The enforcement of judgments of Courts of law of any Colony beyond the limits of the Colony"; (*f*) "The enforcement of criminal process beyond the limits of the Colony in which it is issued and the extradition of offenders (including deserters of wives and children and deserters from the Imperial or Colonial naval or military forces)"; (*g*) "The custody of offenders on board ships belonging to Her Majesty's Colonial Governments beyond territorial limits." In its first session the Federal Council passed three Acts which were in pursuance of the powers —No. 2. An Act to facilitate the proof throughout the Federation of Acts of the Federal Council, and of the Parliaments of the Australasian Colonies, and of Judicial and Official Documents, and of the Signatures of certain Public Officers; No. 3. An Act to authorize the service of civil process out of the jurisdiction of the Colony in which it is issued; No. 4. An Act to make provision for the enforcement within the Federation of Judgments of the Supreme Courts of the Colonies of the Federation. These Acts, it must be remembered, applied only to those Colonies which became members of the Federal Council. There was also a Federal Act—the *Australasian Testamentary Process Act* 1897—limited to four of the Colonies, which in a very limited way made them auxiliary to each other. A few Imperial Acts did something to bring the Courts of the Australian Colonies into touch with each other as well as with other parts of the British Dominions, *e.g.* the *Evidence Act* 1851, sec. xi., the *Evidence by Commission Act* 1859, the *British Law Ascertainment Act* 1859, and sec. 118 of the *Bankruptcy Act* of 1883. Finally, some of the Colonies

had gone far on the road to require their Courts to take judicial notice of the laws and public acts of other Australasian Colonies. In 1898, Victoria (Act No. 1554), Queensland (62 Vict. No. 15), and Western Australia passed practically identical Acts for this purpose; while by 55 Vict. No. 5, sec. 11, New South Wales required its Courts to take notice of the Statute law and the unwritten law of other countries authenticated in the manner prescribed by the laws of such countries respectively.[1]

Turning now to the Constitution, we find that the legislative power extends over :—

1. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States. Sec. 51 (xxiv.).

2. The recognition throughout the Commonwealth of the laws, the public acts and records and the judicial proceedings of the States. Sec. 51 (xxv.).

These provisions must be read with sec. 118, whereby "Full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State."

We may compare these provisions with the United States Constitution, Art. iv., sec. 1 :—"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." This clause in the Constitution of the United States has often received judicial construction. While it "implies that the public acts of every State shall be given the same effect by the Courts of another State that they have by law or usage at home" (*Chicago and Alton*

[1]See thereon *Homeward Bound G.M. Co.* v. *Macpherson*, (1896) 17 N.S.W. Rep. 281.

Railroad v. *Wiggins Ferry Co.*),[1] the provision and the Act of Congress upon it "establish a rule of evidence rather than of jurisdiction" (*Wisconsin* v. *Pelican Insurance Co.*).[2] The laws of a State have not under it any ex-territorial operation, they must be proved in other States as matters of fact, the Courts there will not take judicial notice of them.[3] Judge Cooley says[4] :—"By this provision a rule of comity becomes a rule of constitutional obligation. It also becomes a uniform rule, and the common authority is empowered to pass laws whereby the Courts may govern their action in receiving or rejecting the evidence presented to them of the public acts, records and judicial proceedings of other States." The provision has operated, and its limitations have been defined, principally in relation to the judgments of other States.[5] It is held that judgments recovered in a State of the Union "differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties."[6] In the words of Story (*Conflict of Laws*, sec. 609) cited and approved by the Supreme Court in *Thompson* v. *Whitman*:[7] "The Constitution did not mean to confer any new powers upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only

[1](1886) 119 U.S. 615. See also *Haddock* v. *Haddock*, (1905) 201 U.S. 562, where the law on the subject is well summarized.

[2](1887) 127 U.S. 265.

[3]*Chicago &c.* v. *Wiggins*, *sup.*; *Hanley* v. *Donohue*, (1885) 116 U.S. 1, 4.

[4]*Principles of Constitutional Law*, p. 203.

[5]See Dicey, *Conflict of Laws*, 1st ed., cap. xvi., American Notes, p. 434.

[6]*Hanley* v. *Donohue*, 116 U.S. 1, 4.

[7]18 Wallace, 457, 462, 463.

gave a general validity faith and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments." And it has been held that the rule that one country will not enforce the penal laws of another holds as between States of the Union, and extends to judgments recovered under such penal laws.[1]

The most general conclusion to which the cases point is that the provision does not carry us much further than the doctrines of the common law—now well-established, but in their infancy in 1789—embodied in what is called Private International Law. In a sovereign State, however, these doctrines may be varied or excluded by the action of the Legislature ; the provision in the United States Constitution prevents such action, and therein lies the aptness of Judge Cooley's observation, cited above, that by the provision "a rule of comity becomes a rule of constitutional obligation." A further consequence of inserting this provision in the Constitution is that the observance is brought under the protection of the federal judicial power.

In the first session of the Commonwealth Parliament two important Acts were passed upon this subject. The *State Laws and Records Recognition Act* 1901, embodies the American doctrine in sec. 18, which declares that "all public acts, records and judicial proceedings of any State, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office within the Commonwealth as they have by law or usage in the Courts and public offices of the State from

[1](1887) *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265 ; (1892) *Huntington* v. *Attrill*, 146 U.S. 657.

whence they are taken." It provides that all Courts within the Commonwealth shall take judicial notice of all Acts of the Parliament of any State (sec. 3); of the seal of any State (sec. 4), and of the signature of various State officials (sec. 5); it prescribes modes of proof of certain public documents (secs. 6-11), and matters (secs. 12-16), and of judicial proceedings (sec. 18). Finally, the provisions of the Act are to be in addition to and not in derogation from any powers existing at common law, or given by any law at any time in force in any State (sec. 19).

The *Service and Execution of Process Act* 1901[1] deals with three matters—process other than the execution of judgments; execution of warrants and writs of attachment; enforcement of judgments. As to service of process, while sec. 4 declares that a writ of summons issued in any part of the Commonwealth may be served in any other part of the Commonwealth, sec. 11 limits further proceedings in cases where no appearance is made on behalf of the defendant to a number of specific cases already sufficiently familiar in that branch of procedure known as "Service out of the Jurisdiction." A judgment given in such a case is declared to have the same force and effect as if the writ had been served in that State or part of the Commonwealth in which it was issued (sec. 12). Sec. 13 cautiously provides that this part of the Act shall not enlarge the jurisdiction of any Court; therefore, when the residence or presence of the defendant within a given territory is a condition of the jurisdiction of a Court—as it commonly is in the case of inferior Courts—the Act will effect nothing. Where, on the other hand, the jurisdiction is deemed to be general, as in

[1]This Act is the subject of an interesting article in the *Commonwealth Law Review*, October, 1903, p. 18, by Mr. D. G. Ferguson, who questions the validity of some of its provisions. The subject is further considered by Mr. Paris Nesbit in *Commonwealth Law Review*, June, 1904, and Mr. T. R. Bavin in *Commonwealth Law Review*, November-December, 1904.

the case of the superior Courts of common law,[1] the Act, though it may not extend to any cases not provided for by State laws, gives to service out of the jurisdiction a new character: every such service is converted from a mere notice of proceedings into an official act of the same nature, and giving rise to the same consequences, as if it took place in the territory from which the writ issues. By secs. 14-16 provision is made whereby other process in courts of record, writs of summons for alleged offences, and subpœnas in civil or criminal proceedings, may be served in any part of the Commonwealth, guarded however, in the case of subpœnas by the requirement of the leave of the Court.

By Part III. of the Act warrants issued in any State or part of the Commonwealth for the apprehension of a person charged with any offence there, or against whom an order for the maintenance of wife or children has been made, may be endorsed in any other State or part of the Commonwealth for execution there.[2] The person apprehended shall be brought before a justice of the peace, who may order his return or admit him to bail; if it be made to appear to the justice of the peace, or to any Judge of the State, that the charge is of a trivial nature, or that the application for return is not made in good faith in the interests of justice, or that for any reason it would be unjust or oppressive to return the person either at all or until the expiration of a certain period, the Justice or Judge may discharge the person or make such other order as he thinks just[3] (sec. 18).

This part of the Act may be compared with the (Imperial)

[1] As to Courts of Equity, we must not forget that "equity acts *in personam*" has been treated as a maxim of jurisdiction. But see *Duder* v. *Amsterdamsch Trustees Kantoor*, (1902) 2 Ch. 132.

[2] See also *Service and Execution of Process Act* 1905—provisional warrants.

[3] For an illustration of the exercise of this power by a Judge, see *King* v. *Boyce & Roberts*; *Ex parte Rustichelli*, (1904) S.R. (Queensland) 181.

Fugitive Offenders Act 1881, Part II., which was made applicable to the Australasian colonies as a group of contiguous British possessions in 1883, and appears to be still in force.

By sec. 19 of the *Service and Execution of Process Act*, writs of attachment issued by a Court of record or any Judge thereof for contempt or disobedience to any order, may, by leave, be executed in other parts of the Commonwealth. It has been held that this provision does not apply to attachment in the nature of execution of final judgments.[1]

Part IV. of the Act deals with the "Enforcement of Judgments." It is pointed out by Griffith C.J. in the case just cited, that while the Act makes provision for the enforcement of the mesne process of the States, it makes none for enforcement of the process of execution. In the case of judgments, the course provided is to register the judgment itself in the State in which it is desired to enforce it, and then to proceed to execution according to the laws of that State. This is the scheme contained in secs. 20-26.

It will be observed that this goes far beyond the ordinary practice of Private International Law in regard to foreign judgments, since it is no longer necessary to bring actions upon the judgments comprised in the Act, and further that the Act is not limited to a particular class of judgment (as, for a debt) but includes, by virtue of sec. 3 (*h*), "any judgment, decree, rule or order given or made by a Court in any suit whereby any sum of money is made payable, or any person is required to do or not to do any act or thing other than the payment of money." An important question remains whether the Act applies to all judgments of State Courts, or only to those in cases where the Court has a jurisdiction which, upon the ordinary principles of Private

[1] *Lewis* v. *Lewis*, (1902) S.R. (Q.) 115.

International Law as administered in our Courts, would entitle the judgment to recognition elsewhere: in other words where the Court whose judgment is in question is, in the language of Professor Dicey, a Court of competent jurisdiction in the international sense. A Court is competent in common law and equity when the defendant was within its territory at the commencement of the suit, and it may be conceded that where there has been service out of the jurisdiction in accordance with Part II. of the Act, no further inquiry into the competence of the Court would be permissible. But many cases may be imagined in which a State Court might have jurisdiction under its own law without being internationally competent. In the case of similar Acts passed by the State Parliaments for the reciprocal enforcement of judgments, international competence has been insisted upon.[1] But these Acts are not the Acts of a common legislature, and in the analogous case of the *Judgments Extension Act* 1868 for the United Kingdom, Professor Dicey has urged that the Court of enforcement cannot consider the competence of the Court whose judgment is brought into it.[2]

NOTE.—Sec. 21 (2) provides that from registration a certificate of judgments "shall have the same force and effect as a judgment of such Court (*i.e.* in which it is registered), and the like proceedings may be taken upon such certificate as if the judgment had been a judgment of such Court." On this provision questions have arisen as to whether the judgment may be the basis of a fraudulent debtor's summons or of a petition in insolvency. In *Macnamara* v. *Miller* (1902 28 V.L.R. 327), *Hodges* J. held that a

[1] *Seegner* v. *Marks*, (1895) 21 V.L.R. 491; *Elkan* v. *Juveney*, (1900) 25 V.L.R. 718; 26 V.L.R. 186.

[2] *Conflict of Laws*, p. 426. In *Mackenzie* v. *Maxwell*, (1903) 20 W.N. (N.S.W.) 18, Pring J. ordered leave to register a Western Australian judgment to be set aside on the ground that it was a nullity in New South Wales. In *Ex parte Penglase*, (1903) 3 S.R. (N.S.W.) 680, it was held that whether or not a judgment of the County Court of Victoria against a non-resident was or was not a nullity in New South Wales, the officers giving the certificate in the one State and acting upon it in the other are bound to treat it as valid; if it is challenged, the proper course is to apply under sec. 25 for a stay of proceedings.

summons under the *Fraudulent Debtors Act* was essentially a punitive proceeding rather than one for the enforcement of a judgment, and was therefore not available under the Act. It should be noted that the governing word in the Constitution, sec. 51 (xxiv.), appears to be "execution," a term narrower than enforcement ; and in England it has been held under a provision limited to "so far only as relates to execution under this Act" that procedure by way of a debtor's summons (*In re Watson*, 1893 1 Q.B. 21) or of bankruptcy notice (*In re a Bankruptcy Notice*, 1898 1 Q.B. 383) is not available. For this reason the distinction drawn between the English Act and the Commonwealth Act by Walker J. in *Re Richards*; *Ex parte Maloney* (1902 2 S.R. (N.S.W.) 133) does not appear material. Compare also Fletcher Moulton L.J. in *Re a Bankruptcy Notice* (1907 1 K.B. at 482), that a bankruptcy is not a method of enforcing a judgment, but the commencement of proceedings of far wider effect.

Indirect Powers.

These are powers wherein the action of the Commonwealth Parliament depends on the initiative or the consent of the States.

1. The acquisition and construction of railways with the consent of the States concerned (sec. 51 (xxxiii.) and (xxxiv.)), are considered under the head of "Railways."

2. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law. Sec. 51 (xxxvii.)

This section may be compared with the provision in sec. 15 of the *Federal Council Act* 1885 under which legislative power was given to the Federal Council over a number of enumerated matters, whenever the Legislatures of two or more Colonies should refer such matters. It differs from that provision in that reference may be made by a single Legislature, so that the Parliament may legislate for that State. It offers a convenient method of extending the range of legislative subjects without resorting to an amendment of the Constitution.

Questions of much difficulty may arise as to whether a State may withdraw a power which it has granted under

this article, and if it may withdraw the power, whether it can then make laws inconsistent with any which the Commonwealth Parliament has made on the subject. But until the power is withdrawn, enactments of the Commonwealth Parliament thereunder must, it would seem, have the ordinary operation of federal laws and prevail over State laws inconsistent therewith.[1]

At the Premiers' Conference, 1909, an arrangement was come to whereby the States Parliaments are to pass the necessary legislation for enabling the Commonwealth Parliament to confer jurisdiction on the Inter-State Commission to adjust labour conditions as between the States in cases where divergences in the determination of State industrial authorities might affect the industries of the one prejudicially as against the other; and the Inter-State Commission Bill now (October, 1909), pending before the Senate, makes provision for carrying out this arrangement wherever a State has referred the matter to the Commonwealth. The object is to secure that the freedom of Inter-state trade established by the Constitution shall not have the tendency to beat down conditions of industrial production to those existing in the State where those conditions are least favourable to the employed.

3. In Chapter vi. of the Constitution, "New States," the Parliament may make laws for territory surrendered by any State (sec. 122), and for the formation of a new State from an existing State or by an union of States with the consent of the Parliaments of the States concerned (sec. 124). By sec. 123, the Parliament may with the consent of the Parliament and a majority of the electors of the State concerned, alter the territorial limits of any State.

4. The exercise within the Commonwealth at the request

[1]Cf., *Cooper* v. *Commissioner of Income Tax*, (Queensland) (1907) 4 C.L.R. 1304, and pp. 256-257 herein.

or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia: sec. 51 (xxxviii).

This is a very remarkable and, on the face of it, far-reaching power. Literally construed, it appears to enable the Commonwealth Parliament with the co-operation of the States to assume the full measure of Imperial power within the Commonwealth, and to repeal without limitation of any kind Imperial Acts of Parliament in operation there. The only thing reasonably certain about it is that it will not be construed to grant such a general power.

Auxiliary and Incidental Powers.

1. The acquisition of property on just terms from any State or person for any purpose in respect to which the Parliament has power to make laws: sec. 51 (xxxi.).

This is a recognition of the power of "eminent domain." It means that the Parliament may, by act of legislation, provide for the acquisition of property against the will of the owner whether a State or a private person. The conditions are (1) that the Commonwealth must acquire "on just terms," *i.e.*, not at a price arbitrarily determined by itself; and (2) that the purpose of acquisition must be some purpose in respect to which the Parliament has power to make laws. This does not, of course, set any limit to the power to acquire property; it applies only to compulsory acquisition. The provision may be compared with that in Fifth Amendment to the United States Constitution—"nor shall private property be taken for public use without just compensation," a prohibition reproduced in many of the American States' Constitutions. The power has been exercised by the *Lands Acquisition Act* 1906, repealing the

Property for Public Purposes Acquisition Act 1901, as to which see *Commonwealth* v. *New South Wales.*[1]

2. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides: sec. 51 (xxxvi.).

The Constitution establishes many things "Until the Parliament otherwise provides." This Article is equivalent to a declaration that in such a case the Parliament shall have power to provide from time to time for the matters in question—that its power over the matter is not exhausted by a single provision.

3. Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth: sec. 51 (xxxix.).

Of the corresponding provision in the Constitution of the United States, Judge Cooley says:—"The import of the clause is that Congress shall have all the incidental and instrumental powers . . . to carry into execution all the express powers. It neither enlarges any power specifically given, nor is it a grant of any new power to Congress, but it is merely a declaration for the removal of all uncertainty that the means for carrying into execution those otherwise granted are included in the grant."[2]

The general effect of the clause has been considered under the general head of "the Legislative Power of the Parliament of the Commonwealth."

[1] (1906) 3 C.L.R. 807.

[2] *Principles of Constitutional Law*, p. 105.

CHAPTER II.

THE SUBJECTS OF FEDERAL JURISDICTION.

THE scope of the several matters enumerated in secs. 75 and 76, which, as already pointed out, are the measure of federal jurisdiction, must be shortly considered.

1. Arising under any treaty. Sec. 75 (i.).

This matter, like that which follows it, is taken from the Constitution of the United States, and corresponded with an article of legislative power, "external affairs and treaties." The reference to treaties under the head of legislative power was dropped, but was retained under the judicial power. Treaties come very rarely under the consideration of the Courts. In the United States, indeed, treaties are part of the law of the land. This, however, is not the case in the British Constitution save in special circumstances; even if they expressly deal with matters of private right, the most recent authoritative declaration is that that is "only a bargain which can be enforced by Sovereign against Sovereign in the ordinary course of diplomatic pressure."[1]

[1] *Cook* v. *Sprigg*, (1899) A.C. 572, 578; *West Rand Central Mining Co.* v. *Rex*, (1905) 2 K.B. 391. See as to the prerogative of treaty-making, the *Parlement Belge*, (1877) 4 P.D. 129, 5 P.D. 197; and *Walker* v. *Baird*, (1892) A.C. 491; Moore, *Act of State in English Law*, p. 84; and *Law Quarterly Review*, vol. xxii., p. 14.

The operation of many Acts of Parliament is, however, dependent upon the conclusion of conventions between His Majesty and foreign powers; in such cases, questions as to the operation of the law might fitly be described as arising under the treaty. In some cases, the treaty itself becomes incorporated in the law, *e.g.*, the International Copyright Convention, 1886, and the Extradition Acts.[1] These may be taken as cases typical of those arising *directly* under any treaty which alone are committed to the exclusive jurisdiction of the High Court by the *Judiciary Act* 1903: sec. 38 (*a*).

2. Affecting consuls or other representatives of other countries. Sec. 75 (ii.).

This article may be compared with "cases affecting ambassadors, other public ministers and consuls" in the Constitution of the United States. The provision extends to cases affecting such representatives in their private capacity; but *quære* whether it extends to others than the representatives in Australia of such other countries.

3. In which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party. Sec. 75 (iii.).

It must be pointed out that this provision confers no right to sue the Commonwealth. The legal personality of the Commonwealth, as of other parts of the King's Dominions is in the Crown,[2] and not the Governor-General, or the Executive Government; and the Crown cannot be sued save by its own consent. The provisions made by the Colonies for enabling their Courts to entertain claims

[1] *R.* v. *Wilson*, (1878) 3 Q.B.D. 42. See, generally, on *Treaties and Acts of Parliament*, the judgment of Sir Robert Phillimore in the *Parlement Belge*, and Holland, *Law Quarterly Review*, vol. ix., p. 136, re-published in *Studies in International Law*, 1898.

[2] Cf. *Sloman* v. *Governor and Government of New Zealand*, L.R. 1 C.P.D. 563.

against the Crown in right of the colony, would not enable their Courts to assume jurisdiction over claims against the Crown in right of the Commonwealth.[1] By sec. 78, the Parliament may confer rights to proceed against the Commonwealth, but the Crown may sue in any right in any of its Courts which has jurisdiction of the parties and the cause.[2] The Commonwealth therefore may freely sue in the State Courts, as does the United States in the State Courts in America; but by sec. 39 of the *Judiciary Act*, the State Court would in such a case be exercising federal jurisdiction. "A person suing or being sued on behalf of the Commonwealth" anticipates the common practice of designating some Minister, Department, or officer of Government, as the appropriate person to sue or be sued for the Government.

By the *Claims against the Government Act* 1902, temporary provision was made whereby proceedings might be taken against the Commonwealth in the Supreme Court of a State. This temporary provision was superseded on the constitution of the High Court by Part IX. of the *Judiciary Act* 1903, whereby any person making a claim against the Commonwealth, whether in contract or in tort, might bring suit in the High Court or in the Supreme Court of the State in which the claim arose.[3] Suits by the Commonwealth against a State, and by a State against the Commonwealth, are, by sec. 38 of the *Judiciary Act*, within the exclusive jurisdiction of the High Court.

(4). (*a*) Between States; or (*b*) between residents of different States; or (*c*) between a State and a resident of another State. Sec. 75 (iv.).

[1]See *Holmes* v. *Reg.*, 10 W.R. 39, 31 L.J. Ch. 58; *Frith* v. *Reg.*, L.R. 9 Ex. 365; *Palmer* v. *Hutchinson*, 1881 6 App. Cas. 621; Cf. *The Commonwealth* v. *Baume*, (1905) 2 C.L.R. 405.

[2]*In re Bateman's Trusts*, L.R. 15 Eq. 355; *In re Oriental Bank Corporation, ex parte The Crown*, (1884) 28 Ch. Div. 643.

[3]See 1 *Commonwealth Law Review*, p. 241, "Actions against the Commonwealth for Tort," by A. P. Canaway.

All these cases belong to the class described by Kent as presuming that "State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice." Cases between residents of different States are of so common occurrence, and are so much in the ordinary experience of the Courts that there seems no particular reason for giving the High Court original jurisdiction over them, or even for making them matters of federal jurisdiction at all, especially as the appellate jurisdiction of the High Court and the King in Council offers a sufficient protection. The Commonwealth jurisdiction is more limited than the United States jurisdiction; it does not extend to suits "between a State or the citizens thereof, and foreign States, citizens or subjects."

Under the head of controversies "between two or more States" and "between a State and citizens of another State," frequent attempts have been made to induce the Courts in America to extend the area of judicial cognizance; and to turn matters which, in the condition of independent States, are moral or political, into matters of legal right. The jurisdiction of the federal Courts has sometimes been thought to stand for all State disputes as the constitutional substitute for war and diplomacy, and consequently to extend to all disputes which might endanger the peace of the Union, or the cordial relations of the States. But the Courts have declined to undertake the discussion of merely political issues, and have in general construed their jurisdiction as limited to cases in which, before the Revolution, jurisdiction was exercised by some Court. "The truth is that the cognizance of suits and actions unknown to the law was not contemplated by the Constitution when establishing the judicial power of the United States. Some things undoubtedly were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines. And yet the

case of *Penn* v. *Baltimore*[1] shows that some of these unusual subjects of litigation were not unknown to the Courts even in Colonial times; and several cases of the like character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those articles. The establishment of this new branch of jurisdiction seems to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which on the settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction."[2]

Thus the Supreme Court refused to entertain an application by the State of Kentucky for the extradition of a fugitive criminal,[3] and generally "has declined to take jurisdiction of suits between the States to compel the performance of obligations which if the States had been independent nations could not have been enforced judicially but only through the political departments of their governments." When in 1876 the State of South Carolina filed a bill in equity to restrain the State of Georgia and other persons from obstructing the free navigation of the Savannah River, it was left an open question whether a State must not aver and show that it will sustain some special and peculiar injury such as would enable a private person to maintain a similar action in another Court.[4]

The most recent cases of *Missouri* v. *Illinois*[5] and *Kan-*

[1] 1 Ves. Sen. 444.

[2] *Hans* v. *Louisiana*, (1889) 134 U.S. 1, 15. See also *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265. It may be added that the adjustment of boundary disputes was before the Revolution one of the matters undertaken by the King in Council.

[3] *Kentucky* v. *Dennison*, 24 How. 66.

[4] *S. Carolina* v. *Georgia*, 93 U.S. 4; *Wisconsin* v. *Pelican Insurance Co.*, *supra*.

[5] 180 U.S. 208.

sas v. *Colorado*[1] go far in the assumption of jurisdiction. In the first case the Court entertained a suit by a State as *parens patriæ* to restrain another State and all persons acting under its authority from polluting the waters of rivers in the plaintiff's territory. In the second, the Court over-ruled a demurrer to a bill in equity claiming an injunction against deprivation of the plaintiff State and its citizens of waters of rivers accustomed to flow through its territory. The competence of the plaintiff State to sue on behalf of the injury to its citizens was recognized, as well as the liability of the defendant State to an injunction for acts done under its legislative authority. Both cases are interesting—the latter especially—as to the law applicable to disputes between States, the doctrine as to which is summed up by Fuller C.J. in these words:—"Sitting as it were as an international as well as a domestic tribunal, we apply Federal law, State law and International law as the exigencies of the particular case may demand."[2] *Kansas* v. *Colorado* is peculiarly interesting to Australians since it deals with the respective rights of riparian States for which irrigation waters are desired or necessary, and glances also at the relation of navigation to irrigation, and the powers of the federal authority as guardian of navigation.[3]

Suits between States are as already pointed out committed to the exclusive jurisdiction of the High Court (*Judiciary Act* 1903, sec. 38).

"*Matters between a State and a resident of another State.*"—A State is an extensive owner of property, it makes contracts, and the acts of its agents may cause damage. All these are matters which give rise to legal relations between private persons and those relations are enforced by the

[1](1901) 185 U.S. 125; (1906) 206 U.S. 46.

[2]185 U.S. 146. See also 206 U.S., at p. 97.

[3]See 2 *Commonwealth Law Review*, p. 241, "The Judicial Power and Inter-State Claims," by P. McM. Glynn.

Courts. But in such matters, the State is an abnormal person, and its immunities are commonly expressed in our law by the maxim that "the King can do no wrong." A common law remedy, the petition of right, enabled the Courts to do justice between the King and his subjects where the former was in possession of land, goods or money of the latter who sought restitution or damages; and of late this remedy has been held to extend to cases of contract. It is, however, very far from applying to all cases in law or equity which would be justiciable if between subject and subject; nor when the case is justiciable, does it follow that the Court in determining the liability of the Crown applies the same rules as in cases between subject and subject. It is well settled that in England the petition of right, whether at common law, or as regulated by Statute, does not extend to torts.[1] The Crown has in the States the same immunities and is subject to the same procedure as in England. But in addition to the provisions of the common law, most of the States have made statutory provision for proceedings against the Crown, or some public officer or department on its behalf.[2] In varying degrees, proceedings for torts of some kinds may be brought against the government in all the States; the constant presence of the government in spheres which in England and America are occupied by private enterprise, would make the maintenance of the old doctrine in its integrity, intolerable.

Where there is a right to pursue claims against the State under the State law—whether the common law or Statute —such claims will be cognizable by the High Court under sec. 75 whenever they are made by a resident in another

[1] *Tobin* v. *The Queen*, (1864) 16 C.B.N.S. 310.

[2] New South Wales.—*Claims Against the Government and Crown Suits Act* 1897 (and see *Farnell* v. *Bowman*, 12 App. Cas. 649); Victoria.—*Crown Remedies and Liability Act* 1890; Queensland.—*Claims Against the Government Act* 1866; South Australia.—Act No. 6, 1853; Tasmania.—*The Crown Redress Act* 1891; Western Australia—*Crown Suits Act* 1898.

State. This will be equally the case whether the proceeding is against the Crown, or against some nominal defendant appointed to represent the Crown or the State Government. But in this respect, as in others, the jurisdiction given by sec. 75 is dependent on the existence of a right—it does no more than enable the High Court to adjudicate upon claims which were cognizable in the Courts of the Colony or which may be converted into claims of right by some State law. And it must be remembered that the Colonial Executive cannot lawfully or effectually bar the submission of claims to the Courts—that the petitioner may go behind the Colonial Executive and on a petition of right obtain a *fiat* from the Secretary of State. So at any rate the Law Officers of the Crown in England have held in quite recent years. But constitutional custom is progressive, and it is certain that such intervention in the Dominions would be resented as an improper interference in local affairs.

The question whether the mere grant of jurisdiction in "controversies between a State and citizens of another State" deprived a State of its immunity from suit save with its own consent, was determined by the Supreme Court of the United States in 1793 in *Chisholm* v. *State of Georgia*.[1] The Court held, contrary to the view that had been urged by Hamilton in the *Federalist* and by John Marshall (afterwards Chief Justice) in the Virginia Convention of 1788, that an action did lie under the Constitution. A strong dissenting judgment was delivered by Iredell J., who held that as no action of the nature of that before the Court could have been sustained against the State before the Constitution was adopted, and as Georgia, in common with other States, had not provided by law for any compulsory proceedings against itself, the claim could not be made in the Supreme Court of the United States.

[1] 2 Dallas 419.

The judgment of the Court led immediately to the Eleventh Amendment of the Constitution to the effect that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Later judicial expressions have confirmed the views of Iredell J., and the *ratio decidendi* of *Chisholm* v. *Georgia* was expressly disagreed with by the Supreme Court in 1889.[1]

But unlike the Constitution of the United States, the Commonwealth Constitution confers an important power on the Legislature in respect to proceedings against State or Commonwealth. By sec. 78

"The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the judicial power."

This section was the subject of a keen debate in the Convention at Melbourne,[2] and there was a great difference of opinion as to the meaning of a right to proceed. It obviously includes the provision and regulation of the machinery of suits. Thus the *Claims against the Commonwealth Act* 1902 and the provisions of Part IX. of the *Judiciary Act* relating to the bringing of suits against Commonwealth or State are held to be an exercise of the powers given by sec. 78.[3] But it has been judicially observed that "there is no power given by the section of the Constitution to affect any right of the Commonwealth outside procedure.[4] The same limitation must of course apply to rights to proceed against States. But it may be doubted

[1] *Hans* v. *Louisiana*, 134 U.S. 1.

[2] *Official Report of Debates*, Melbourne Session 1898, pp. 1653-1679.

[3] *The Commonwealth* v. *Baume*, (1905) 2 C.L.R. 405.

[4] S.c., per O'Connor J., at p. 418.

whether the section is really so limited, and it will probably have to be read distributively according to the nature of the particular subject of judicial power under consideration. In the case of the Commonwealth, the Parliament can (presumably) define whether it shall be liable in tort as well as in contract. In the case of the State, it can probably do so where the subject arises under some head of legislative power. But it could hardly do so where the "judicial power" arises merely because the person complaining of State action resides in another State; such cases should, it would seem, be determined according to the rights existing under the State law, and the question whether the State was in such a case liable in tort, should not depend on the residence of the plaintiff. In this sense, it would seem, must be read sec. 58 of the *Judiciary Act* providing for the bringing of suits against the States "in contract or in tort." New substantive rights unconnected with any subsisting liability do not appear to be aptly described as "rights to proceed."

Thus, assuming that there is no liability apart from Statute—a doubtful matter—it is conceived that the Parliament could not under this section provide that the State of New South Wales should be answerable in damages to a riparian owner on the Murray in South Australia, for waters abstracted to his hurt by the Government of New South Wales as a riparian owner on the upper river, and that even though under the law of New South Wales, a riparian owner in New South Wales might have an enforceable claim against the Government for infringing his riparian rights. Still less, it would seem, could the Parliament give a right to proceed for breach of political duties by the State, as for failure by an efficient police to protect non-residents against mob violence.

The same principles will in general govern the right to

proceed in matters between State and State. The Parliament may get rid of the obstacle which arises from the fact that the Crown personifies each, but it could not create new rights of a substantive kind. The Courts may be called on some day to determine whether the powers of the riparian States over the rivers are similar to the rights of individual riparian owners living under a single government, but the Parliament could not under sec. 78 declare what are the respective rights of the States in the rivers, whatever may be its powers under other parts of the Constitution as the guardian of inter-State navigation (sec. 100).

"Matters in which the Commonwealth is a party" would include proceedings in which the Commonwealth and a State are disputants. The controversies which have arisen in Canada between the Dominion and the Provinces as to proprietary rights in territory are typical of matters between the Governments which are fit for judicial determination, and it is clear that the Parliament may provide that they may be raised directly in a suit between Commonwealth and State, and not merely in actions between their respective grantees, or between one Government and the grantee of the other.[1] Again, the financial relations between Commonwealth and States established by the Constitution are akin to proprietary rights and contractual obligations, and they, too, may be made the subject of judicial determination under a "right to proceed."

5. In which a writ of *mandamus* or prohibition is sought against an officer of the Commonwealth. Sec. 75 (v.).

The power to command or prohibit federal officers and Courts belongs in the United States exclusively to the federal jurisdiction;[2] and the reasons which have denied juris-

[1] C.f., *St. Catharine's Milling Co.* v. *Reg.*, (1888) 14 A.C. 416; *A.-G. for Ontario* v. *Mercer*, (1883) 8 A.C. 767.

[2] *McClung* v. *Silliman*, 6 Wheat. 598.

diction to State Courts there apply with equal force in the Commonwealth.[1] The United States Constitution does not expressly refer to the matter, leaving it to the Legislature and the Courts to work out appropriate remedies and the incidents of judicial power ; and it has not been doubted that Congress, in distributing the judicial power, may constitute Courts with power to issue these writs against executive officers. The cases in which the writs will issue are well defined by rules of common law. They will never issue to direct or control a discretion in the officer ; they are reserved for cases in which "a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused," or when a "duty is threatened to be violated by some positive official act." In either case the person claiming the benefit of the writ must show an injury for which an adequate compensation cannot be had in damages ; and he must show not merely that there is an official duty in the officer, but that the duty correlates a right in the applicant.

The reason for the special inclusion of this provision in the Commonwealth Constitution is the intention that the writs shall be within the original jurisdiction of the High Court. In the United States, the Supreme Court decided, in the famous case of *Marbury* v. *Madison*[2] —the first which declared an Act of Congress to be unconstitutional—that the original jurisdiction of the Supreme Court was limited by the Constitution to "cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party," and could not be added to by Congress. It may be added that the provision in the Commonwealth Constitution in no way affects the class of cases in which the writs will issue.

[1] *Ex parte Goldring*, (1903) 3 S.R. (N.S.W.) 260.

[2] 1 Cranch 137.

The *Judiciary Act* 1903, sec. 38, puts this matter within the exclusive jurisdiction of the High Court.

6. Arising under this Constitution or involving its interpretation. Sec. 76 (i.).

7. Arising under any laws made by the Parliament. Sec. 76 (ii.).

In the interpretation of these clauses, the High Court in *Baxter* v. *Commissioners of Taxation*[1] adopted the leading American cases. Griffith C.J. says :—"The rule is concisely stated in the judgment of Strong J., delivering the opinion of the Supreme Court of the United States in the case of *Tennessee* v. *Davis*[2] :—'A case under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton,'" *Cohens* v. *Virginia*.[3] "It is not only one where a party comes into Court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress whether they constitute the right or privilege or claim or protection or defence of the party in whole or in part by whom they are asserted." And again by Chief Justice Waite, delivering the opinion of the same Court in *Starin* v. *New York*.[4] The character of a case is determined by the questions involved : *Osborn* v. *The Bank of the United States*.[5] If from the questions it appears that

[1] (1907) 4 C.L.R., at p. 1136.
[2] 100 U.S. 257, at p. 264.
[3] Per Marshall C.J., at p. 379.
[4] 115 U.S. 248, at p. 257.
[5] 9 Wheaton 737, at p. 824.

some title, right, privilege or immunity on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States within the meaning of that term as used in the Act of 1875; otherwise not."[1] Accordingly the High Court held in the case before it that proceedings by a State authority in a State Court to recover income tax were matters of federal jurisdiction where the taxpayer's defence was a claim of immunity in respect to his salary as a federal officer.

In America it is held that in order to give a federal Court jurisdiction on appeal from a State Court, it must appear not merely that a question under the Constitution or laws of the United States was presented for consideration, but that its determination was actually necessary to the decision of the case.[2] Therefore if the decision of a case depended on two independent grounds, one of them a federal question and the other not, the federal Courts will not entertain an appeal. By analogy to this rule the High Court has held that the question whether a State Court was in a given case acting in its State or federal jurisdiction—on which may depend the question of an immediate appeal to the High Court—depends on whether it was necessary for the Court to decide the federal question. "If, whether that question is answered rightly or wrongly, the Court answers another question, not arising under the Constitution or involving its interpretation, and their answer to that other question enables them to decide the case, the Court does not exercise

[1] See also "Story's Constitution of the United States," secs. 1647-8; *Miller* v. *Haweis*, (1907) 5 C.L.R. 89, at p. 93.

[2] *Bolling* v. *Larsner*, 91 U.S. 594; *De Sassure* v. *Gaillard*, 127 U.S. 216; *Hale* v. *Akers*, 20 Wallace 590.

federal jurisdiction, and therefore no appeal lies to the High Court from that decision."[1]

8. Of admiralty and maritime jurisdiction. Sec. 76 (iii.).

This again follows the Constitution of the United States, as to which Story observes that "the word 'maritime' was doubtless added to guard against any narrow interpretation of the preceding word 'admiralty.'" The power of the Parliament under this provision must, it would seem, be read in connexion with the *Colonial Courts of Admiralty Act* 1890, so far as it is not inconsistent therewith. By that Act the jurisdiction is generally that of the Admiralty Division of the High Court in England, and the Colonial Court shall have the same regard as that Court to international law and the comity of nations (sec. 2); and no Colonial law shall confer any jurisdiction which is not conferred by the Act upon a Colonial Court of Admiralty (sec. 3).

9. Relating to the same subject-matter claimed under the laws of different States. Sec. 76 (iv.).

This covers cases in which there are competing claims of the class described as to ownership or possession. It is more extensive than the provision in the United States Constitution as to claims of land under the grant of different States.

[1] *Miller* v. *Haweis*, (1907) 5 C.L.R. 89.

PART IX.—FINANCE AND TRADE.

CHAPTER I.

FINANCE: TAXATION.

THE subject of finance claims attention under several heads of the Constitution. It is joined with trade as the subject of Part IV. of the Constitution. But it meets us in the relations of the two Houses of Parliament, and a special procedure in matters of revenue and expenditure has been designed to govern those relations. It enters into the relations of the Executive to the Legislature, for the initiative and lead in Parliament, which modern practice assigns to the Cabinet, exists as a matter of law in the case of grants of supply. In Executive Government, one of the departments of administration taken over from the States is the great revenue department of Customs and Excise, the control of which is one of the exclusive powers of the Commonwealth Parliament. In the internal economy of the Commonwealth Government, we have to consider the arrangements for the collection, custody, disbursement of and accounting for the public funds. Under the head of legislative power we must consider the power of taxation, while some express or implied restraints upon it might be dealt with (and some of them in the Constitution are dealt with)

under the head of the States. Finally, we have to consider the financial relations of Commonwealth and States.

TAXATION.—Sec. 51. The Parliament shall subject to this Constitution have power to make laws for the peace order and good government of the Commonwealth with respect to:—

(i.) . . . .

(ii.) Taxation, but so as not to discriminate between States or parts of States.

The power which is the sinews of all government is thus granted in the most unqualified terms, separately and not as a mere incident to other powers of the Commonwealth. The many definitions which have been submitted by lawyers and economists substantially agree in this—that a tax is a compulsory contribution imposed upon the subject to meet the service of government.[1] Where it is given in general terms "the power to impose taxes is so unlimited in force and so searching in extent, that the Courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it."[2]

Here, however, as elsewhere, we must distinguish between the plenary nature of the legislative power within the subject-matter and the limits of the subject-matter itself. With the latter the Courts are and must be concerned wherever the Legislature is not a self-determining body. The very fact that, in the oft repeated words of Marshall

[1] For definitions, see Cooley on *Taxation*, p. 1; Cooley, *Constitutional Limitations*, p. 678 and note; Sutherland, *Notes on U.S. Constitution*, p. 80; *Loan Association* v. *Topeka*, 20 Wall. at p. 664. See also Bastable on *Public Finance*, pp. 248 *et seq.* "The primary meaning of taxation is raising money for the purposes of government by means of contributions from individual persons," per *Cur.*, *The King* v. *Barger*, (1908) 6 C.L.R. 41, 68.

[2] Cooley, *Constitutional Limitations*, p. 208.

C.J., "the power to tax is the power to destroy,"[1] makes it peculiarly necessary to determine the limits of the subject, since otherwise a power granted to a government of enumerated powers would carry with it in substance all other powers of government. The significance of Marshall's words is too often forgotten, they are directed to point the necessity of defining the ambit of an authority which, unrestricted, would be sovereign.

Admitting, then, the plenitude of the power within the subject-matter of "taxation," the Courts are called on from time to time to consider whether Acts of the Legislature purporting to be an exercise of the power of taxation are in truth measures of taxation, just as in cases where the power of taxation is withheld they are called on to determine whether some pecuniary sum purporting to be exigible under other heads of power is not rather a tax. It belongs to the rudiments of the subject that the grantee of a power cannot determine the nature of his act merely by choosing for it a name which corresponds with the grant.[2]

Several causes have required the Courts in the United States to consider the nature and extent of the taxing power as such; and a number of cases have established that taxation must be distinguished from confiscatory appropriation of property,[3] from the power of eminent domain,[4] from the police power of regulation by means of licences or

[1] *M'Culloch* v. *Maryland*, 4 Wheaton 316.

[2] *A.-G. for N.S.W.* v. *Brewery Employés' Union*, (1908) 6 C.L.R. 469, 522. "We have to deal with things and we cannot change them by changing their names": *Mugler* v. *Kansas*, (1887) 123 U.S. 623. The substance not the form of legislation is to be regarded: *Deakin* v. *Webb*, 1 C.L.R. at p. 611; *Peterswald* v. *Bartley*, 1 C.L.R. at p. 511; *Davies & Jones* v. *The State of Western Australia*, 2 C.L.R. 29; *The King* v. *Barger*, 6 C.L.R. at p. 37. See also *Morgan* v. *Louisiana*, 118 U.S. at p. 462; and *Fairbank* v. *U.S.*, 181 U.S. at pp. 295-6.

[3] See Cooley, *Constitutional Limitations*, p. 695.

[4] Cooley on *Taxation*, pp. 411, 413.

penalties,[1] and from charges for services.[2] It is distinguished from the first and the second in that it establishes a contribution from several according to some *rule* of apportionment.[3] It is distinguished from the third by its primary purpose, which is revenue as opposed to regulation or prohibition;[4] and from the fourth in that it is not the price of a service or measured by the cost of the service.

Thus, the Courts have held that while the States are forbidden from taxing inter-State commerce, they may impose fees and charges reasonably necessary for meeting expenses occasioned by such commerce; whether the thing is the one or the other—a compulsory contribution to the revenue of the State based upon presumed subjection to its authority or a mere reimbursement for the cost of services—must be determined by a consideration of all the circumstances of the case.[5] Upon the same principle, the Supreme Court has pronounced upon the character of Acts of Congress imposing "taxes." Thus, in the case of *U.S.* v. *Helwig*,[6] where an Act had declared that an "additional duty" should be payable in cases of attempted evasion, it was held that as the purpose here was not a purpose of

[1] Cooley on *Taxation*, pp. 5, 1125 *et seq.*

[2] *Ib.*

[3] Cooley on *Taxation*, pp. 411, 412. "Taxation differs from exaction in that the obligation to contribute depends upon prescribed differentiations as to the persons from whom or the things in respect to which the contribution is to be made": per *Cur.*, *The King* v. *Barger*, 6 C.L.R. at p. 68.

[4] Cooley on *Taxation*, pp. 1125 *et seq.* "The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue." The distinction between a licence fee imposed in the way of regulating the carrying on of a business and an excise tax was drawn by the High Court of Australia in *Peterswald* v. *Bartley*, 1 C.L.R. 497.

[5] *Pace* v. *Burgess*, 92 U.S. 372; *Morgan* v. *Louisiana*, 118 U.S. 455; *Postal Telegraph Co.* v. *Taylor*, (1904) 192 U.S. 64.

[6] 188 U.S. 605.

revenue but of punishment, the additional duty was to be regarded, not as an original imposition of a tax, but as a penalty for non-payment. The most striking instances, however, are to be found in the case of the *Veazie Bank* v. *Fenno*[1] and *The Head Money Cases*,[2] in both of which what purported to be " taxes," and would therefore as such have been subject to certain qualifications expressly imposed by the Constitution on the exercise of the taxing power, were held to be valid though the qualifications were not observed, on the ground that they were not an exercise of the substantive power of taxation, but were merely incidents in the exercise of definite powers of regulation granted by the Constitution—in the one case over currency and coinage, in the other over foreign commerce.

This determination of the true nature of an impost has to be made by the Courts consistently with the equally well established principle that they are not concerned with the motive or expediency of an Act, its oppressive or destructive incidence, or its indirect effects.[3] In every provision for revenue the legislature, upon whom lies the determination of the subject of taxation,[4] must exercise a discretion, not merely as to the productiveness of the various possible means, but as to their effect upon trade, upon social conditions and generally upon the national welfare. These considerations are legitimate, and the choice of a particular mode of raising revenue is not to be reviewed either because it produces certain social or economic effects, or because it is founded in an expectation that it will restrict a trade which is deemed obnoxious (*e.g.*, the liquor trade) or encourage a trade which is deemed beneficial (*e.g.*, protective duties).

[1] 8 Wall. 548.
[2] 112 U.S. 580.
[3] *The King* v. *Barger*, 6 C.L.R. at p. 66, 67.
[4] *Ib.* at p. 68, 71.

As a matter of practical operation this leads to the result that where a Statute contains nothing to disclose that its primary object is not the obtaining of revenue, but protection or regulation or prohibition, the Courts will take it at its face value and treat it as an exercise of that power which would make it valid.

These considerations apply generally whenever the power of taxation is granted *eo nomine* to or withdrawn from a subordinate authority. In the case of the Commonwealth Constitution, they apply to the power committed to the Commonwealth Parliament; and they are reinforced by a consideration of the federal nature of the Constitution, as declared in its own terms.[1] What is imported by the declaration that the Commonwealth is a "Federal Commonwealth" has been already considered. Here it is enough to add that the purpose of the Constitution to establish a federal and not an unitary government must be treated as a fundamental principle dominating the construction of every part of it. The like principle was laid down in the United States by Marshall C.J. in *McCulloch* v. *Maryland*,[2] has been repeatedly affirmed since,[3] and is the foundation of the construction put upon the very general terms in which additional powers of legislation were granted to Congress by the amendments which followed the Civil War.[4] The

[1] *The King* v. *Barger*, 6 C.L.R. 41, at pp. 71 *et seq.*

[2] 4 Wheaton 315. "No political dreamer was ever wild enough to think of breaking down the lines which separated the States, and of compounding the people into one common mass." "Should Congress under the pretext of exercising its powers pass laws for the accomplishment of objects not entrusted to the Government, it would become the painful duty of this Court to say that such an Act was not the law of the land."

[3] *E.g.*, *Texas* v. *White*, 7 Wallace 700, 725; *Union Pacific R. R. Co.* v. *Peniston*, 18 Wallace 29.

[4] *Slaughter House Cases*, (1873) 16 Wallace 36, 77-8; *Civil Rights Cases*, (1883) 109 U.S. 3, 11-13. See also the recent case of *Hodges* v. *U.S.*, (1906) 203 U.S. 1. Cf. Part VI. Chapter II. herein.

two main sources of the legislative power of the Commonwealth Parliament, secs. 51 and 52, expressly grant the powers over matters enumerated "subject to this Constitution."

We proceed to the application of these principles to the construction of the power over "Taxation."

A power to make laws for the peace, order and good government of the Commonwealth with respect to "Taxation," is *primâ facie* more than a power to raise money by taxation, and to prescribe the matter, manner, measure and time thereof; it is capable of embracing the whole subject of taxation by whatever authority, throughout the Commonwealth. While the States would retain the power of imposing taxation, as before the establishment of the Commonwealth, their laws thereon would be subject to the paramount law of the Commonwealth. Such a controlling power would not be without some convenience. The State laws of taxation may be, and in some cases are, based upon different principles. Income tax and death duties may be collected upon one basis in New South Wales, upon another in Queensland—one State may levy a tax according to the situation of property, another according to the domicil of the owner, thus in some cases creating a liability to double tax, in others allowing an escape from taxation altogether. Again, the clash of Commonwealth and State interests might be avoided if the Commonwealth possessed the power to define the limits of State taxation. All this, however, would be secured by the dependence of the State upon the Commonwealth in the most vital matter of self-government; and a system in which such a controlling power existed, would properly be described as unitary rather than federal. The federal purpose of the Constitution—which, as has been seen, involves the independence of each government in its own sphere—forbids such a con-

struction; and when it was suggested to the High Court in the *Municipal Council of Sydney* v. *Commonwealth*, it was met by the answer that what the Constitution meant was "federal taxation for federal purposes."[1] The State power of taxation for its own purposes is something quite distinct which does not legally (though of course it may economically) compete with the Commonwealth power, they are what have been called "concurrent and independent powers."

The nature of the Commonwealth power of "Taxation" was brought directly for determination before the High Court in *The King* v. *Barger* and *Commonwealth* v. *M'Kay*.[2] Following upon the imposition of protective customs duties, the Commonwealth Parliament proceeded to enact legislation giving effect to what was popularly known as "the new protection," a policy which aims at a compulsory distribution of the benefits of protection among employers and employed by making the protection dependent upon the payment of wages according to prescribed standards. To effect this in a particular industry, an Act was passed entitled *The Excise Tariff* 1906, which in the case of agricultural implements[3] imposed "duties of excise" on the manufactured article, but declared that it should not apply to goods manufactured under certain conditions as to the remuneration of labour.

In support of the Act, it was pressed by counsel and by the dissenting justices (Isaacs and Higgins), that the question of the extent of the Commonwealth power was to be measured by the terms of the grant untrammelled by any consideration of its effects on the independent exercise of State powers; any other course would invert the whole

[1] (1904) 1 C.L.R. at p. 232, per Griffith C.J.

[2] (1908) 6 C.L.R. 41.

[3] *The Excise Tariff* 1906, another Act, adopted the same policy, by a means which did not differ materially, in the case of spirits.

scheme of the Constitution, which merely left the residuary power to the States. "It is contrary to reason to limit the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residue."[1] The Act did lay a tax which, when payable, would find its way as revenue into the Consolidated Revenue Fund. For the rest, it merely exercised the undoubted power of Parliament to select the persons and things taxable and to determine who and what should be exempt from taxation. The Act neither authorized the carrying on of a trade under certain conditions nor made it unlawful to carry it on without those conditions, and this demonstrated its true nature as a "tax" as distinguished from a "regulation." The exemption was a bounty to those who chose to comply with its conditions, and on the authority of Austin a "reward" was not a "sanction." It might well be that the result of such legislation was practically to compel the manufacturer to comply with the conditions laid down or go out of business; but that was merely a consequence of the operation of the Act, differing not in kind but only in degree from the economic consequences which invariably attend the incidence of taxation. It might also be that such a result was designed by the Legislature; but that again belonged to the policy which guided the imposition of the tax and the selection of the subjects of taxation, a matter of motive into which the Courts were not competent to inquire. Reliance was put on the plenary nature of Parliamentary authority over the subjects committed to it (*R.* v. *Burah*)[2] and on the upholding of "taxes" imposed by Congress with the object of prohibiting or destroying the thing taxed (*Veazie Bank* v. *Fenno*[3]: a prohibitive tax upon the note circulation of

[1] Per Isaacs J. at p. 84.
[2] L.R. 3 A.C. 889, 905.
[3] 8 Wallace 548.

State banks: *McCray* v. *United States*[1]: the *Oleomargarine Act* 1886 imposing a tax of $\frac{1}{4}$ of a cent per lb. on oleomargarine not artificially coloured to look like butter, and a tax of 10 cents per lb. on oleomargarine which was so coloured). It was further argued that as Parliament had undoubted power to protect industries by fiscal legislation, it must be within its power to define the conditions of that protection, and to secure that its benefit should not be confined to the employer.

The Act was attacked by the manufacturers and the State of Victoria, and held invalid by the majority of the Court (Griffith C.J., Barton and O'Connor JJ.), on an assertion and application of the principles already laid down. The powers of each government should be construed consistently with the federal nature of the Constitution, and any construction which would in substance transform the grant of enumerated matters into one extending control to all subjects whatsoever, must be rejected. If the power of taxation could be used as it was used here, a simple means was provided whereby in substance the Commonwealth Parliament could control and regulate all those internal matters which were carefully reserved to the States. Admitting that the incidental effects on the one hand, and the motive or policy of an Act on the other, were irrelevant in determining its validity, it was the duty of the Court to ascertain from the terms of the Act its true nature. In this case without going beyond the Act, it was plain that it was primarily an Act to compel all persons engaged in this industry to pay certain rates of wages, and the imposition of the "tax" was a mere incident to this substantive purpose, the means employed to secure the observance of the Act. It was in fact "an Act to regulate the manufacture of agricultural implements" subject to a sanction which took the form of a

[1](1904) 195 U.S. 27.

pecuniary liability. It was immaterial whether that liability was made enforceable in one Court as a debt, or in another Court under the name of a penalty. The sanction was the same in substance and equally effectual in either case. "If this were not so the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on every one who did not conform to specified rules of action, and calling that obligation not a tax, but a penalty."[1]

As has been pointed out, the general power of taxation exists in the Commonwealth concurrently with and independently of the like power in the States. There is, however, one mode of taxation which is exclusively assigned to the Commonwealth Parliament and prohibited to the States (secs. 86, 90), viz., duties of customs and excise. "Duties of customs" evidently means duties imposed upon the importation of goods into the Commonwealth from parts beyond the Commonwealth,[2] and the freedom of inter-State commerce from taxation is secured by the express provision of sec. 92.

It has been stated already that a power to charge for expenses actually incurred is to be distinguished from "taxation." Consistently with this distinction, the Constitution permits the States to "levy such charges as may be necessary for executing the inspection laws of the States" (sec. 112). As, however, such a power is liable to abuse, the States are put out of the reach of temptation by the provision that "the net produce of all charges so levied shall be for the use of the Commonwealth"; and the com-

[1] Per *Curiam*, 6 C.L.R. at p. 77.

[2] See secs. 92, 93, 95, dealing with goods *imported* into any State, and *passing* thence into some other State. Cf. in the United States, *Woodruff* v. *Parham*, 8 Wall. 140.

plete control of importation and of inter-State trade by the Commonwealth is accomplished by the provision that "any such inspection laws may be annulled by the Parliament of the Commonwealth."

"Duties of excise," taken by itself, is a term of very extended meaning. Its primary meaning was to describe a tax on commodities produced at home, in opposition to the duties of customs payable on importation from abroad. But the term has been extended to cover the duties payable by way of licence fee on a large number of occupations as well as the taxes levied on certain modes of individual expenditure treated as *indicia* of wealth or taxable capacity.[1] In *Peterswald* v. *Bartley*,[2] the question was raised whether the primary or the more extended meaning was to be given to the term as used in the Constitution. The law of New South Wales required that persons engaged in the occupation of brewing beer should have an excise licence for which a fee was payable, and payment was resisted by the taxpayer on the ground that under the Constitution a State could not impose any "duty of excise." The Supreme Court of New South Wales held that the tax was within the constitutional prohibition. The High Court reversed that judgment on the ground that, used in the Constitution in association with duties of customs, and in one instance specifically described as "duties of excise paid on goods produced or manufactured in a State" (sec. 93 (i.)), the inference was almost inevitable that it was intended to mean a duty analogous to a customs duty imposed upon goods, either in relation to quality or value when produced or manufactured, and not in the sense of a direct or personal tax. The Court could see no reason, in a Constitution which left the regulation of occupations

[1] See *Encyclopædia of English Law*, title "Excise"; and Anson's *Law and Custom of the Constitution*, vol. 2, pp. 291-292.

[2] 1 C.L.R. 497.

and industries to the States, for giving to the term a meaning which would deprive them of a usual mode of regulation and transfer it to the Commonwealth. Similarly, in *The King* v. *Barger* and *Commonwealth* v. *M'Kay*,[1] the "duty of excise," as being in substance a regulation of the occupation, was held not to be an excise within the meaning of the Constitution.

It remains to consider the restrictions which the Constitution imposes upon the exercise of the taxation power.

1. The grant itself is coupled with the qualification "so as not to discriminate between States or parts of States." As originally drawn, it followed the terms of the Constitution of the United States as to duties, imposts and excises, and provided that taxation should be "uniform throughout the Commonwealth." But this was more than the federal spirit required; it prevented not merely discrimination among the States, but discrimination in the case of individuals; and the Convention, warned by the discussions in the Supreme Court of the United States in *Pollock* v. *The Farmers' Trust* (*The Income Tax Case*)[2] adopted terms of geographical limitation.

The provision must be compared with sec. 99 of the Constitution, whereby:

"The Commonwealth shall not by any law or regulation of trade, commerce, or revenue give preference to one State or any part thereof over any other State or part thereof."

Two important questions have arisen on this restriction. First, is the restriction one of a class which may be described as "federal," *i.e.*, designed merely to prevent distinctions between States or parts of States *as such*, but

[1] 6 C.L.R. 41.

[2] 157 U.S. 593. In 1899—after the Convention—the Supreme Court of the United States held that "uniform" was a term of geographical limitation (*Knowlton* v. *Moore*, 178 U.S. 41).

otherwise leaving the Commonwealth free to distinguish between localities? Secondly, whichever construction is adopted on the first question, does the provision relate to discriminations appearing in the legislation itself, or does it enable or require the Commonwealth so to adjust its legislation as to equalise the incidence of the burden having regard to the different conditions prevailing in different parts of the Commonwealth?

Both questions were raised in *Commonwealth* v. *M'Kay* and *The King* v. *Barger*,[1] and the division amongst the members of the High Court on the main question in the case appeared also in this subsidiary matter. According to the opinion of the majority (Griffith C.J., Barton and O'Connor JJ.), the words "States or parts of States" must be read as synonymous with "parts of the Commonwealth" or "different localities within the Commonwealth;" the condition is one requiring geographical uniformity throughout the Commonwealth. The minority (Isaacs and Higgins JJ.) disagreed. Isaacs J. called attention to the avoidance of the use of the term "uniform" in this connection, which must be regarded as deliberate, having regard to the fact that that term was employed in the corresponding provision of the United States Constitution as well as in other cases (duties of customs, bounties), in the Commonwealth Constitution. He considered that the prohibition was directed against differentiation in measures of taxation between States and parts of States, because they were particular States or parts of States.

On the second point the members of the Court were probably agreed in principle that the discrimination or preference prohibited is one made by the Act itself—that Parliament may not vary the impost from place to place, even with the view of establishing what is, in its opinion,

[1](1908) 6 C.L.R. 41.

equality of burden or sacrifice as between the taxpayers in different localities—real uniformity as distinguished from nominal uniformity. Every locality was entitled to the benefit of its natural advantages. But they differed in the application of the principle to the circumstances of the present case. The decision of the Privy Council in *Colonial Sugar Refining Co.* v. *Irving*[1] was cited on both sides. In that case a Commonwealth Excise Act had imposed a certain rate of duty on all sugar which had not paid customs or excise duty under some State law, and it was objected that the Act established a discrimination or preference because in some States the rates of duty had been higher than in others, and in Queensland no excise duty had existed at all, whence it followed that the actual burden of excise duty was unequal in the several States. This contention was rejected by the Privy Council on the ground that the inequality was not imposed by the Act, but was brought about by extrinsic facts—the different conditions existing in the several States under the State laws. The majority of the High Court in *The King* v. *Barger* held that the provisions of the *Excise Tariff* 1906, under which the conditions of exemption would vary according to the circumstances of different localities and the determination of various authorities exercising jurisdiction over particular areas, contravened the principle here laid down. The minority, on the other hand, held that as the same rate of tax was imposed upon all persons who did not fulfil the condition imposed—viz., the payment of fair and reasonable wages—the Act itself did not discriminate, and any discrimination arising in fact was merely the result of different local conditions, and of the views of the several authorities charged with determining what was a fair and reasonable wage.

[1](1906) A.C. 360.

2. The Commonwealth (*i.e.* the Parliament of the Commonwealth) may not impose any tax on property of any kind belonging to any State. Sec. 114.

This is a reciprocal provision corresponding with the like restriction on the power of the States; and may be compared generally with sec. 125 of the *British North America Act* 1867, under which no lands or property belonging to Canada, or any Province, shall be liable to taxation. It is obvious that the restriction applies equally to any authority to which either Government commits any part of its taxing power, *e.g.*, to municipalities in the exercise of their rating power.[1] The question is whether the tax is substantially a "tax on property" in the sense in which those words are commonly understood. Municipal rates are a tax on property in this sense, and it is immaterial that they do not constitute a charge on the land in the nature of an incumbrance.[2] On the other hand, a stamp duty on receipts is not a "tax on property."[3] In *A.-G. for New South Wales* v. *Collector of Customs*[4] it was argued that duties of customs were taxes on property, and that therefore the Commonwealth could not impose duties upon imports the property of any State. The majority of the Court held that, though the power with respect to "taxation" included the levying of customs duties, the Constitution never spoke of customs duties as a tax, but used distinctive terms; that even as a tax they were laid upon operations or movements (in this case the importation) of property rather than upon property itself, thus falling into the class with succession duties, stamp duties and other forms of indirect taxation, which were never

[1] *Municipal Council of Sydney* v. *Commonwealth*, 1 C.L.R. 208.
[2] S.C., at p. 232.
[3] *D'Emden* v. *Pedder*, 1 C.L.R. 91, 108.
[4] 5 C.L.R. 818.

deemed to be taxes on property; and that finally the States could claim the benefit of the section only on property within the Commonwealth and not in respect of property which was not yet subject to their governmental authority, and which might be admitted or excluded at the will of the Commonwealth. Isaacs J. dissented from the view that a customs duty was merely a tax on the act of importing as distinguished from a tax on property, and rested his judgment on the ground that the duty was not a *tax* within the meaning of sec. 114.

The proper inference to be drawn from the section in its bearing upon the application of the doctrine of the immunity of instrumentalities was one of the subjects of difference between the Privy Council in *Webb* v. *Outtrim*[1] and the High Court in *Baxter* v. *Commissioners of Taxation*.[2] The section was referred to by the Privy Council as showing that the protection of the Commonwealth and State against each other was not lost sight of by the framers of the Constitution, and as therefore pointing to the exclusion of any further protection arising by implication. The High Court points out that the section has an application beyond the doctrine in question, extending the protection beyond instrumentalities of government to all property, even though held in the carrying on of an ordinary business or investment, and that in any case *expressum facit cessare tacitum* is a valuable servant but a dangerous master.

3. The Commonwealth may not tax any agency or instrumentality of the States.

This is another reciprocal restriction existing equally in the case of State taxation in favour of the Commonwealth Government. It is the most common application of the general principle first affirmed in the United States in

[1](1907) A.C. 81.
[2](1907) 4 C.L.R. 1087, 1126.

M'Culloch v. *Maryland*,[1] and considered herein under the title "The Doctrine of the Immunity of Instrumentalities."

4. By sec. 92, on the imposition of uniform duties of Customs, trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, was made absolutely free. The Commonwealth Parliament can therefore impose no tax upon such commerce. The effect of the clause is considered under the head of "Commerce," Part IX., Chapter V.

5. Sec. 55 requires that laws imposing taxation shall deal only with the imposition of taxation. This clause, together with the provisions governing procedure in finance, has been considered in Part III., Chapter III. herein.

[1] 4 Wheaton 316.

CHAPTER II.

COLLECTION AND EXPENDITURE OF PUBLIC MONEY.

By sec. 81 of the Constitution all moneys raised or received by the Executive Government of the Commonwealth form one Consolidated Revenue Fund to be appropriated for the purposes of the Commonwealth, subject to the charges and liabilities imposed by the Constitution; and by sec. 83 no money is to be drawn from the Treasury of the Commonwealth except under appropriation made by law.

The Constitution thus adopts the results of English and Colonial experience. A Consolidated Fund has long commended itself in preference to the assignment of specific taxes to specific charges. For special reasons the Constitution does admit one exception to this principle in earmarking for a limited period the revenue from customs and excise (sec. 87).

Sec. 83 emphasizes the constitutional rule of the control of Parliament over expenditure and the issue of public money, as to the working of which there was at one time some misconception in Australia.

"Appropriation by law" excludes the once popular

doctrine that money might become legally available for the service of Government upon the mere votes of supply by the Lower House.

A very important question arises as to the extent of the power of appropriation. By sec. 81, the Consolidated Revenue Fund is "to be appropriated for the purposes of the Commonwealth." Unquestionably the Commonwealth may appropriate money for the maintenance of its government and for the execution of any of the objects which have been committed to any branch of it. Does the power of appropriation extend beyond this, so that the Parliament, having a general power of taxation, has an equally general power to expend the proceeds of that taxation as it thinks fit without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government ?[1] In the United States, after keen controversy, it is now agreed that "the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defence of the country or promote its welfare."[2] This, however, is under an express power to "provide for the general welfare." In Canada, the government whose powers are limited by enumeration —the provincial government—has power to raise a revenue by direct taxation "for provincial purposes"; and the Judicial Committee has held[3] that this includes direct taxation "for a local purpose upon a particular locality," and is

[1] The question is raised in the Memorandum of the Attorney-General on an Australian Bureau of Agriculture, P.P. 1908, No. 194. See also Parliamentary Debates 1903, pp. 1997-8 (The Naval Agreement Bill, views of Mr. (now Mr. Justice) Higgins).

[2] Hare, *American Constitutional Law*, vol. i., p. 245. See also Story, sec. 991. For criticism of this view, see *Tucker on the Constitution of United States*, vol. i., pp. 476 *et seq.*

[3] *Dow* v. *Black*, L.R. 6 P.C. 272.

not confined to general provincial purposes, and this notwithstanding that there is another article under which the Provincial Legislature may impose licences "in order to the raising of a revenue for Provincial, Local, or Municipal purposes." It must be remembered, however, that amongst the matters of provincial power are "all matters of a merely local or private nature in the Province." The Commonwealth Government is without either of the attributes which seem material to the conclusion arrived at in the United States and in Canada.

There is, moreover, what appears a vital distinction between the United States and the Commonwealth Constitutions in that, in the former, the proceeds of taxation are the unqualified property of the Federal Government, subject to no claim by anyone else. The result is that no one—neither State nor citizen[1]—has that definite legal interest in the subject matter which, upon settled principles, is essential to any party seeking to impugn the validity of a legislative act. In the Commonwealth the proceeds of taxation are not the unqualified property of the Commonwealth Government; they are subject to the provision of the Constitution whereby "surplus revenue" belongs to the several States, and in fact a considerable part of Chapter IV. of the Constitution is devoted to the adjustment of the financial relations of the Commonwealth and the States. This right of the States[2] at once suggests a limitation upon the objects of appropriation, and gives the States a *locus standi* for challenging appropriations which may appear *ultra vires*. Some other facts appear also to point to the interpretation of the power as one to appropriate merely for

[1] In *Millard* v. *Roberts* (1905) 202 U.S. 429, the right of the citizen was assumed for the purposes of the case, but the Court expressly refrained from expressing an opinion.

[2] "An absolute vested right"—per *Curiam* in *Tasmania* v. *Commonwealth and Victoria*, 1 C.L.R. 329, 340.

federal purposes. The power is not, as in the United States, given in the enumeration of powers over specific objects. In the Commonwealth Constitution the substantive and independent matters of legislative power for the "peace, order and good government of the Commonwealth" are enumerated in sec. 51 ; and in general the provisions of Chapter IV. are consequential and subsidiary to the grants of sec. 51. The fact, also, that amongst the subjects of express grants in sec. 51 are several which are primarily powers to authorize expenditure of money on particular objects—bounties, borrowing money (and consequently repayment) invalid and old-age pensions, the acquisition and construction of railways with the consent of a State—strengthen the view that the power of the Commonwealth to appropriate money is no exception to the rule that the Commonwealth Government is one of specific and not general powers. Sec. 96—authorising financial assistance to any State—and sec. 105—providing for taking over the public debts of the States—may be accounted for independently, but at least point in the same direction.

At the time of writing, however, there has been brought forward by the Government, with the assent of the State Governments, a scheme for freeing the Commonwealth surplus revenue from the residuary claim of the States by establishing in favour of the States a right to a fixed sum of 25s. per head of population, and it is proposed to alter the Constitution accordingly. If the scheme is adopted, the Commonwealth will be practically free to expend its revenue upon any object which seems good to it, whether within the enumerated objects or not: it will be in the same position as the Government of the United States.

The only definite "charge" imposed by the Constitution is the provision of sec. 82 that "the costs charges and expenses incident to the collection management and receipt

of the Consolidated Fund shall form a first charge thereon." There is a similar provision in several Colonial Constitutions adopted in accordance with what used to be the ordinary practice in England, but was abandoned there in 1854.[1] According to the opinion of the English Law Officers of the Crown in 1878, this provision makes the moneys "legally available for and applicable to the purposes mentioned . . . . because they are in fact specifically appropriated by the Statute in question." Other specific appropriations of the Consolidated Revenue Fund by the Constitution are the salary of the Governor-General (sec. 3) and the salaries of the Ministers of State (sec. 66).

The "liabilities" imposed by the Constitution will include the allowance to Members of Parliament (sec. 48) and the remuneration of Justices of the High Court fixed by Parliament (sec. 72). As incident to the transfer of public departments to the Commonwealth, the Commonwealth assumed all the current obligations of the States in respect of such department (sec. 85 (iv.)), was subject to certain existing liabilities of the States to officers of the transferred departments (sec. 84), and was bound to compensate the States for any property passing to the Commonwealth for the purposes of such departments (sec. 85 (iii.)). Finally, there are the rights of the States to their balances of receipts and expenditure as ascertained under secs. 89 and 93, or "surplus revenue" under sec. 94, and the temporary limitation put upon the application of the net revenue from customs and excise by sec. 87. These rights of the States will demand separate consideration.

By sec. 82 "the revenue of the Commonwealth shall, in the first instance, be applied to the payment of the expenditure of the Commonwealth." The expression "expenditure

[1] May's *Parliamentary Practice*, 10th ed., p. 516.

of the Commonwealth" is used or adapted in secs. 87, 89, and 93 so as clearly to exclude the State balances or the payment of interest on State debts, though those are, no doubt, purposes of the Commonwealth (sec. 81). The expenditure incurred must, as already seen, have been the subject of appropriation by the Constitution or by Parliament.

CHAPTER III.

FINANCIAL RELATIONS OF THE COMMONWEALTH AND THE STATES.

It has been seen that a principal purpose of federation was to substitute an uniform customs tariff with intercolonial free trade for the fiscal independence of the several Colonies. Accordingly, on the establishment of the Commonwealth, the collection and control of duties of customs and excise and the control of the payment of bounties passed to the Executive Government of the Commonwealth (sec. 86), and the departments of customs and excise in each State were transferred to the Commonwealth. All property of the States used exclusively in connection with the departments vested in the Commonwealth for such time as the Governor-General in Council should declare to be necessary, the Commonwealth coming under an obligation to pay compensation therefor, and assuming in respect to the department the current obligations of the States (sec. 85). As a consequence of the transfer of administration, the legislative power of the Commonwealth became exclusive with respect to all matters relating to the department (sec. 52), and in 1901 the Commonwealth passed several Acts substituting its own laws for those of the States upon the subject matter.[1]

[1] *Customs Act* 1901 ; *Beer Excise Act* 1901 ; *Distillation Act* 1901 ; *Excise Act* 1901.

The next step was the establishment of an uniform tariff, as to which the Constitution directed that uniform duties of customs should be imposed within two years of the establishment of the Commonwealth (sec. 88). The *Customs Tariff Act* 1902 received the Royal Assent on September 16th 1902; but in accordance with the usual practice adopted for the protection of the revenue, duties of customs under the new tariff were collected from the date of its introduction to the House of Representatives, and the collection of these duties was expressly validated by the Act (sec. 6). In this case, however, an unusual complication arose from the fact that the imposition of uniform duties marks the termination of the first stage in the financial relations of Commonwealth and States prescribed by the Constitution (sec. 89), and that "on the imposition of uniform duties of customs the power of Parliament to impose duties of customs and of excise and to grant bounties on the production and export of goods" became exclusive (sec. 90). Admitting that the Parliament might by retrospective Act validate the collection as against the importer,[1] there would be an independent question as to which date was to be taken as that upon which the condition of the imposition of uniform duties was fulfilled. Clearly there was no imposition within the meaning of the Constitution until the *Customs Tariff Act* became law, and it is difficult to see how the ascertainment of this particular matter of fact could be affected by any declaration of the Parliament thereon. Nevertheless the *Customs Tariff Act* does, by sec. 4, declare that "the time of the imposition of uniform duties of customs is the eighth day of October 1901, at 4 o'clock in the afternoon, reckoned according to the standard time in force in the State of Victoria, and this Act shall be deemed to have come into operation at that time."

[1] *Colonial Sugar Refining Co.* v. *Irving*, (1906) A.C. 360.

We have now reached the stage, therefore, in which the whole power of the States in relation to their principal source of revenue has been withdrawn, for though the States have still a limited power of imposing inspection charges, the net produce of such charges belongs to the Commonwealth, and the inspection laws themselves may be annulled by the Commonwealth (sec. 112). On the other hand, the greater number, if not the more important services of government, remained to be provided for by the States as heretofore.

The first financial problem which lay before the framers of the Constitution was how to secure to the colonies—Victoria, South Australia, Tasmania and Western Australia—which had depended largely upon customs and excise, such a return of revenue from those sources as would enable them to provide for their needs without dislocating their finances and requiring a resort to new methods of taxation. The second problem was how to find a fair and acceptable basis of distribution among the several States. The difficulty was increased by the fact that New South Wales had already come largely to depend on direct taxation, and was concerned to secure to the Federal Parliament a free hand in determining economic policy. She was thus opposed to any provisions in the Constitution—whether in the shape of a direct guarantee to the States of a certain proportion of revenue or of a compulsory assumption of State debts—which would practically necessitate the raising of a large revenue from customs and excise. Her representatives were also of opinion that during the transition period the contributions of her citizens to the customs and excise revenue would be relatively higher than that of several of the States, and that therefore any early distribution of revenue on a population basis would benefit the inhabitants of the other States at the expense of those of New South Wales.

Western Australia, again, stood in a peculiar position, because her economic condition made it practically impossible to depend on anything but customs and excise for her expanding needs, and because a large proportion of her imports was from other parts of Australia, and would, with the establishment of intercolonial free trade, no longer be available for duty. All these problems had to be discussed with very deficient information in respect of facts, with the knowledge that the years immediately preceding had been subject to disturbing influences which could not be exactly measured, and with the merest conjecture as to the financial effects of intercolonial free trade.

In the end, the course adopted was to make temporary provision in the Constitution and to leave the ultimate adjustment to the Commonwealth Parliament when the course of years had furnished the necessary experience.[1]

Three stages are taken—the first is, "until the imposition of uniform duties of customs" (sec. 89) which were to be imposed within two years after the establishment of the Commonwealth (sec. 88). This was the event on which the power of the Commonwealth to impose duties of customs and of excise and to grant bounties on the production and export of goods became exclusive (sec. 90) and on which trade, commerce, and intercourse among the States became "absolutely free"[2] (sec. 92).

[1]The history of the protracted discussions and the several schemes suggested is very clearly set out in the Historical Introduction to Quick and Garran's *Annotated Constitution*.

[2]The "absolute" freedom of inter-State trade was qualified by two temporary provisions. In the first place it was feared that in the States with a low tariff, notably New South Wales, large importations would be made in anticipation of the federal tariff, and these goods would, on the establishment of inter-State free trade, be distributed through other States in detriment of the revenue and of traders in those States where there had been a higher tariff. This was provided for by sec. 92, whereby goods imported into any State before the imposition of uniform duties should on passing thence into another State within two years after the imposition of

This period was governed by what was generally known as a "book-keeping" system, whereby each State was credited by the Commonwealth with all revenue (from whatever source) collected therein, and debited—(*a*) with "the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance as at the time of transfer of any department transferred from the State to the Commonwealth; (*b*) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth"; and the Commonwealth was required to pay to each State month by month the balance (if any) in favour of the State (sec. 89).

The second period was the five years following the imposition of uniform duties of customs. During that period the same book-keeping system was in operation; but the interest of those States whose import trade was largely not direct from foreign countries but through some distributing centre, such as Sydney or Melbourne, within the Commonwealth, was protected by a provision that, where imported goods passed into other States for consumption, the duty should be taken to have been collected in and therefore be credited to the consuming State (sec. 93).

The third stage is reached at the close of this period of five years. Thereupon, the book-keeping system endures so long only as the Parliament pleases (sec. 93); and by sec. 94 "the Parliament may provide on such basis as it deems fair for the monthly payment to the several States of all surplus revenue of the Commonwealth."

such duties be liable to the Commonwealth tariff, less any duty paid upon importation. Secondly, the special conditions of Western Australia in relation to inter-State trade were met by sec. 95, whereby during the first five years after the imposition of uniform duties, that State might impose duties of customs on goods produced in other States of the Commonwealth, such duties, however, not to exceed the duties in force at Western Australia at the date of the imposition of uniform duties and diminishing by a sliding scale until at the end of the five years they disappeared altogether.

The Constitution thus confers on the States a definite legal right[1] to the "balance" of revenue over expenditure, and ultimately to "surplus revenue," and determines provisionally the basis of distribution. But so far the scheme described imposed no restraint on the Commonwealth power of expenditure for its own purposes, and therefore afforded no guarantee against financial dislocation in the States. This question of guarantee was most strenuously contested in the Convention, in the Colonial Parliaments, and in the country. The Adelaide draft contained a provision (sec. 91) whereby during the first three years after the establishment of the Commonwealth the total annual expenditure of the Commonwealth "in the exercise of the original powers given to it by this Constitution" should not exceed £300,000, and "in the performance of the services and the exercise of the powers transferred from the States to the Commonwealth," £1,250,000. Eventually, the Convention adopted the proposal of Sir Edward Braddon, ear-marking the revenue from customs and excise by the provision that not more than one-fourth of the net amount thereof should be applied annually by the Commonwealth towards its expenditure. The further contest on this provision led to its limitation to "a period of 10 years after the establishment of the Constitution and thereafter until the Parliament otherwise provides" (Constitution, sec. 87).

Finally, the possibility of exceptional conditions in any State in the early years of the Commonwealth was met by sec. 96, under which, during a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

[1] "An absolute vested right," per Griffith C.J., *State of Tasmania* v. *Commonwealth and State of Victoria*, 1 C.L.R. 329, 340.

The financial scheme contains one other important feature. The cause of federation found strong support amongst business men and politicians from a belief that the financial credit of the Commonwealth must necessarily be better than that of the several States, and accordingly it was proposed that the Commonwealth should assume the public debts of the Colonies, a course which had the further recommendation that it would solve the question of the disposition of the Commonwealth surplus revenue. A closer consideration of the matter, however, disclosed difficulties of adjustment which, if the scheme were to be embodied in the Constitution, would indefinitely postpone federation. An immediate assumption of the debts, too, would mean that the present creditors alone would secure the immediate advantage of any higher credit the Commonwealth might enjoy in the world of finance, and the country would reap no benefit until the time came for the conversion of the loans. As already pointed out, New South Wales was averse from the imposition of any financial obligation upon the Commonwealth Government which would require a high tariff.

In the result, then, the assumption of the State debts by the Commonwealth was made optional. By sec. 105, "the Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there

is no surplus, then the deficiency or the whole amount shall be paid by the several States.

The "book-keeping" system here described involved, from the Commonwealth point of view, one serious inconvenience. "The strict system of crediting revenue, debiting actual expenditure, and paying monthly balances to the States means that whatever the financial obligations of the Commonwealth for the coming month or the coming year may be, the Treasury must be emptied of cash at the end of each month."[1] To remove this inconvenience, Parliament took an early opportunity, on the expiration of the book-keeping period, to alter the purely "cash" system of accounts established by the Constitution. The *Audit Act* 1906 had authorized the establishment of Trust Accounts by the Treasurer, to which should be carried all moneys appropriated for the purposes thereof by Parliament. The *Surplus Revenue Act* 1908, sec. 4 (4) (*d*), now provided that "all payments to Trust Accounts established under the *Audit Acts* 1901-6 of moneys appropriated by law for any purpose of the Commonwealth should be deemed to be expenditure," and that any such appropriation should not lapse at the close of the financial year for the service of which it was made (sec. 5). In other words, the debit to the States in respect of Commonwealth expenditure was now to be based on the Parliamentary appropriations and not on the actual payment of money from the Treasury. Further, the Act contemplated that the Parliament might authorize the accumulation of funds in respect of services to be undertaken in subsequent years.

This new project was challenged in Parliament as contrary to the Constitution. On the one hand it was argued

[1] Treasurer's Memorandum accompanying *Surplus Revenue Bill* 1908 (C. 54).

[2] *Audit Acts* 1901-6, sec. 62A.

that the book-keeping period having expired, the Commonwealth was (save for the temporary provisions of sec. 87) subject to no limitations in respect of its expenditure, and might proceed to appropriate money for Commonwealth purposes as and how it would. When it had thus, according to its discretion, provided for its needs present and prospective, any surplus beyond such provision would belong to the States. Any other construction, it was urged, would perpetuate the cash system of the book-keeping period, and would seriously embarrass Commonwealth finance by preventing the Parliament from making the most ordinary arrangements dictated by prudence for meeting prospective requirements.[1] On the other hand, it was contended that under the Constitution the States were entitled to all "surplus revenue" (sec. 94); that this meant the excess of revenue over expenditure; and that "expenditure" was different from "appropriation," and was either money actually paid, or liabilities actually incurred. It was further contended that the familiar constitutional practice of Parliament must be called in aid in the interpretation of the Commonwealth Constitution, and that, therefore, nothing could be treated as part of the "expenditure" of any year which was not voted by Parliament to the Crown for the actual service of that year. A mere direction that money in the Treasury should be carried to a particular account was not even an appropriation in the Parliamentary sense, since it did not in itself make the money available to the Executive Government for issue. The interpretation upon which the Bill was based would defeat altogether the right of the States to surplus revenue, for it would enable the Commonwealth Parliament to hold all the funds that came into its Treasury by the simple

[1] See P.D. 1908, Mr. Glynn, p. 11,798 *et seq.*; Mr. W. H. Irvine, p. 11,814.

process of transferring them to some Trust Account nominally devoted to a purpose on which future expenditure was alleged to be contemplated, but actually serving as a Commonwealth hoard.[1]

The legality of the *Surplus Revenue Act* 1908, in which the scheme of the Government was embodied, was brought to judicial determination in an action by the State of New South Wales against the Commonwealth.[2] The High Court held that the elaborate devices of the *Audit Act* and the *Surplus Revenue Act* in the constitution of "trust funds" were unnecessary, and that the "expenditure" of the Commonwealth which might be debited against the States included all appropriations lawfully made by Parliament whether money had been disbursed on account of them or not, and whether the authority to disburse was one which the Executive might or not exercise during the current financial year. When, therefore, specified sums in the Consolidated Revenue Fund were set apart or diverted for some Commonwealth purpose, that was expenditure until the authority was withdrawn, and it was entirely in the discretion of the Parliament to fix the period at which actual disbursement should take place.

From the first, the financial relations of Commonwealth and States engaged the attention of Federal and State Ministers, the matter becoming one of increasing urgency as the time during which the security of the Braddon clause operated approached its close, and the Commonwealth was faced, through the assumption of the liability for old-age pensions, and the necessity for more extensive provision for defence, with a largely increased expenditure. From November 1901 to August 1909, no fewer than eleven

[1] See P.D. 1908, especially Mr. Bruce Smith, p. 11,810 *et seq.* ; Mr. Reid, p. 11,833 *et seq.*

[2] (1908) 14 A.L.R. 625, 6 C.L.R. 214.

conferences of State Ministers discussed schemes for the settlement of their relations, and on several of these occasions, Commonwealth Ministers attended and took part in the conference. On one occasion—October 1906—the leaders of the Opposition in the State Parliaments also attended the Conference, the object of course being to divorce the subject from party warfare and to facilitate any Parliamentary arrangements that might be necessary.[1]

The first important step was taken at the Premiers' Conference at Sydney 1903, which adopted a memorandum by Mr. Irvine, then Premier of Victoria, calling attention to the dangers of a system whereby the Commonwealth, possessing a revenue vastly in excess of its requirements, would be encouraged to embark on unnecessary expenditure, steadily depleting the surplus revenue payable to the States and forcing upon them the necessity of imposing drastic direct taxation. To prevent this evil, the Premiers urged that steps should be taken to bring into operation the provisions of the Constitution for the taking over of the State debts by the Commonwealth.

Responding to this invitation[2] the Commonwealth Treasurer, Sir George Turner, at a conference in Melbourne in 1904, proposed that all State debts then existing should be taken over by the Commonwealth and that all future loans should be raised through the Commonwealth. In return the Commonwealth was to have the right to use its surplus revenue, and the gross railway revenue of each State was to pass through the Commonwealth Treasury in order to be available to the Commonwealth for the excess of interest over the surplus revenue due to the State. In case of

[1] A paper published by the Government of Victoria entitled *Notes on the Financial Problems of the Commonwealth and the States*, by T. G. Watson, C.M.G., contains an excellent account of the subject down to the Brisbane Conference 1907.

[2] *Parliamentary Papers*, (Victoria) 1904, No. 37, p. 135.

future loans, the Commonwealth was to be able to call for control over further State revenue if it should think necessary. The State Treasurers met this scheme with a counter proposal, favouring the taking over of the debts by the Commonwealth, and the devotion of the surplus revenue to the payment of interest, any shortage to be made good by payments from the State to the Commonwealth. As a condition precedent to the taking over of the debts, they demanded the repeal of the time limit to the Braddon clause. With this nominal concurrence, however, there was really a wide difference of opinion, New South Wales being opposed to the transfer of the debts, Western Australia agreeing only upon conditions which evidenced her hostility to the plan; and Tasmania and South Australia agreed to the perpetuation of the Braddon clause only on condition of the distribution of revenue on a *per capita* basis. The Federal Treasurer replied insisting upon the necessity for the Commonwealth having some such security as he had proposed, but offering to forego his claim to railway revenue until satisfied that it was required, and offering to accept any other satisfactory revenue in lieu thereof; objecting to the perpetuation of the Braddon clause, but offering an extension for 15 years from its expiration under the Constitution or, during the currency of existing loans, the actual $\frac{3}{4}$ for any year or on an average of ten years, whichever was the smaller sum—the object being to leave a margin for increased Commonwealth expenditure.

This scheme was submitted at a Conference at Hobart in 1905, at which the State Ministers resolved that the time for taking over the State debts had not yet arrived; that the States were more concerned in securing to each State a guarantee of a fixed proportion of customs and excise revenue, in view of the serious dislocation of State finances which would follow if the customs and excise were per-

mitted to pass under the sole control of the Commonwealth; "that it would not conduce to the interests of the States nor to the good Government of the Commonwealth if the Federal Parliament were secured in a position giving it control of revenues derived from taxation altogether beyond its actual requirements, as the inevitable consequence would be extravagant expenditure by the Federal Government and disastrous financial embarrassment to the States." They therefore resolved that the Constitution ought to be amended by the removal of the 10 year limit to the Braddon clause.[1]

A number of further proposals were made on both sides, and the Conference ended with Victoria, South Australia, Western Australia, and Tasmania ready to accept a compromise on the Federal proposals; New South Wales and Queensland, however, refused to agree.

At a Conference held in April 1906 at Sydney, the Prime Minister laid before the State Ministers the scheme of the Treasurer (Sir John Forrest) whereby for a definite period the States should receive a definite sum annually, based upon the average customs receipts of the preceding years. This was unacceptable to the States as securing them no share in the increased customs revenue, and as offering in any case merely a temporary settlement; and their response was a reiteration of their demand for a repeal of the time limit on the Braddon clause, with the return of the surplus to the States or its application to the payment of interest on the debts, in the terms of the scheme of the Convention in 1897.[2] This was coupled with an expression of opinion that the time was ripe for the taking over of the State debts under the Constitution.

A further Conference at Melbourne in October 1906,

[1] *Parliamentary Papers*, (Victoria) 1905, No. 29, Appendix F.

[2] *Parliamentary Papers*, (Victoria) 1906, No. 23, p. 4.

brought the parties near to an agreement. After passing resolutions which declared that before any alteration of the Constitution increasing the powers of the Commonwealth over the State debts, it was desirable that an agreement should be arrived at which should (*a*) give financial security to the States, (*b*) leave the Commonwealth and the States financially independent each within its own sphere, the Conference substantially agreed to a scheme of the Commonwealth Treasurer (Sir John Forrest) whereby, from the expiration of the Braddon clause, for 10 years thereafter and until further alteration of the Constitution, each State should receive annually an amount equal to the average annual amount of $\frac{3}{4}$ of the customs and excise revenue contributed by it during the 10 years preceding December 31st 1910 (not including the special revenue in the case of Western Australia), with the provision that if in any year $\frac{3}{4}$ of the net revenue from customs and excise exceeded the guaranteed amount the excess should be distributed among the States upon a per capita basis. In pursuance of the policy of separating State and Commonwealth Finance, and leaving the Commonwealth free to raise revenue limited by its own requirements, it was agreed that the Commonwealth should be freed of the obligation of the Braddon clause to the extent that it might impose new duties for specific purposes without returning any of the proceeds thereof to the States; and at a further Conference in May 1907 this was enlarged so as to include additions to existing rates of duty for specific purposes. At the Conference, a further very material alteration was made, whereby the arrangement after the expiration of 10 years was alterable by Parliament without an amendment of the Constitution. The amount of revenue returnable to the States under the scheme here adopted (as under Sir George Turner's) for the year 1910-11 was estimated at

£8,041,000.[1] The Treasurer's scheme for the gradual assumption of the State debts by conversion before maturity or redemption at maturity, the Commonwealth to be reimbursed for interest out of surplus revenue supplemented if necessary by payments from the States, was generally approved; and it was resolved that details should be dealt with at a special Conference, which, however, deferred the subject until the settlement of the surplus revenue question. Western Australia dissented from the scheme on the ground that her contribution was greatly in excess of the proportionate share which would come to her on the mode of distribution proposed.

The succession of Sir William Lyne to Sir John Forrest as Commonwealth Treasurer, was marked by a change of policy on the part of the Federal Government. In a memorandum for Parliament, laid before the Inter-State Conference held at Melbourne in April and May 1908,[2] Sir William Lyne condemned previous proposals in that they did not provide for an early separation of the finances of Commonwealth and States, and he laid down two further principles, viz., that the loss to the States of customs and excise revenue should be made up as far as possible by the gradual assumption by the Commonwealth of State debts, and that full advantage should be taken of the superior credit of the Commonwealth by the substitution of a Commonwealth stock for the State stocks. He therefore proposed the assumption of the whole of the State debts and their administration by a Council of Finance, which should control a sinking fund, and through which new loans should be obtained as required. Parliament would appropriate an amount sufficient to pay the interest on the debts, viz. £8,753,000, and other charges connected therewith. The

[1] *Parliamentary Papers* (Commonwealth), 1909, No. 44, Table No. 4.

[2] *Parliamentary Papers* (Victoria), 1908, No. 21, Appendix A.

Commonwealth would be recouped out of surplus revenue, supplemented by annual payments by the States, diminishing after the first five years according to a sliding scale, and terminating altogether at the end of 30 years, when the liability of the States for their transferred debts was to be extinguished. Drastic provision was made for the default of any State—the Commonwealth was to have power on the certificate of the Council of Finance to impose a special tax on the State, and the Council itself might suspend for ten years the State's power to raise a loan. In consideration of release from their indebtedness, the States were to hand over to the Commonwealth the "transferred properties" (Constitution, sec. 85), free of charge.

The "surplus revenue" under this scheme was fixed at six millions per annum, leaving the States to find £2,753,000 per annum to make up the total amount of interest on the State loans. As already pointed out, this contribution by the States was to diminish after the first five years according to a sliding scale which would extinguish it altogether in 30 years. As during the currency of the debts the Commonwealth would have to make good the amount of the diminution, there would be in effect a gradual increase of the "surplus revenue" credited to the States, raising it (according to calculations) to £6,568,000 in 1920-21.[1] When at the end of 30 years the State liability for the transferred debts was extinguished and the Commonwealth became solely liable to the public creditor, the Commonwealth contribution to the States would be equivalent to the total interest charge, viz., £8,753,000, in perpetuity. To this extent the States would share in the increased customs and excise revenue expected from the increase of population. But the credit would be represented exclusively by the provision of interest, and the States would have no claim

[1] *Parliamentary Papers* (Commonwealth), 1909, No. 44, Table 4.

to cash payments in excess thereof if the Commonwealth effected a saving by conversion or by paying off the debts. Nor would the States be able to claim any share in the growing increase of customs and excise revenue after the lapse of the 30 years. On the other hand, the great public works—railways, waterworks, &c.—for the provision of which the debts were mainly incurred, would remain to them as sources of revenue unencumbered by their interest charge. Thus, the separation of Commonwealth and State finance would be complete.

The contrast between this scheme and Sir John Forrest's —the present loss of revenue, the prospective disappearance of a claim to any surplus revenue, and the novelty of control by a Council of Finance—called from the State Ministers a protest which declared that the proposals threatened the financial independence and solvency of the States. After reciting the principal onerous services of government for which the States remained responsible, obligations which would inevitably increase with the growth of population, they affirmed that no financial scheme could be assented to by the States which did not provide for their receiving (*a*) a fixed annual sum, and (*b*) a proportionate part of all increases in revenue from customs and excise. They insisted that the States should remain the sole judges of their loan requirements without any interference from other authority; and while recognizing that the transfer of debts to the Commonwealth might eventually lead to economies, they considered that that matter should stand over until the settlement of the surplus revenue question. As to the mode of distributing the surplus revenue, they required that the *per capita* contribution of each State should be considered and allowed for.

The Conference re-assembled at Hobart in March 1907, [1]

[1] *Parliamentary Papers* (Commonwealth), 1909, No. 48.

the financial position having in the meantime been submitted to the Parliament of New South Wales, which had approved the action of the State Ministers. The Conference was attended by Mr. Fisher, the Commonwealth Prime Minister, and two of his colleagues, a Labour Government having succeeded the Deakin Ministry; but no proposals were submitted by the Commonwealth. The old claim for the perpetuation of the Braddon clause in its integrity was now abandoned, and a concession was made to Commonwealth néeds by the substitution of three-fifths for three-fourths of the customs and excise revenue returnable to the States. But there must be a minimum of £6,750,000, and the arrangement was to operate without limit as to time and to be alterable only by an alteration of the Constitution. The distribution was to be on a *per capita* basis, Western Australia receiving special consideration by an additional annual payment of £250,000, diminishing by £10,000 a year. Special arrangements were offered to meet the temporary exigencies caused by the assumption of responsibility for old-age pensions by the Commonwealth.

The objections of the Commonwealth Government to this scheme were expressed by the Prime Minister in his policy speech at Gympie on March 30th.[1] Briefly, they were that the increased revenue available under the scheme—£1,313,000—would not enable the Commonwealth to meet an additional annual expenditure estimated at nearly three millions; and that there was no provision for raising additional revenue for Commonwealth purposes through customs and excise duties, otherwise than by raising £5 for every £2 required. Regretting that the States made no proposal in regard to the assumption of their debts by the Commonwealth, the Prime Minister proposed that future relations should be

[1]See the Melbourne *Argus*, March 31st 1909.

governed under the terms of sec. 94 of the Constitution, by the return of surplus revenue to the States, without the guarantee of the Braddon clause. For his own government, he was prepared to guarantee £5,000,000 per annum to the States with an additional £250,000 to Western Australia, the latter diminishing on a sliding scale. This amount was based on the average customs and excise revenue for five representative years up to 1910, less the average Commonwealth expenditure on non-productive services during the same years + £2,000,000 for old-age pensions + £1,000,000 estimated for expanding necessities of the Commonwealth. The basis of distribution was to be according to population, and under this scheme, the amount returnable to the States would be £1·205 per head of population. The sum thus payable to the States would be a minimum, and the Commonwealth would endeavour, as it had done in the past, to supplement the amount payable to the States as far as possible.

The defeat of the Fisher Government at the beginning of the session of 1909, brought Mr. Deakin again into office, with Sir John Forrest again at the Treasury. A meeting with the States' Ministers was held in Melbourne in August 1909, and at last an agreement was arrived at between the Commonwealth and all the States.[1] This agreement recites that:—"In the public interests of the people of Australia, to secure economy and efficiency in the raising and spending of their revenues, and to permit their governments to exercise unfettered control of their receipts and expenditure, it is imperative that the financial arrangements of the Federal and State Governments—which under the Constitution were determined only in part and for a term of years —should be placed upon a sound and permanent basis." It

[1] *Parliamentary Papers* (Commonwealth), 1909, No. 44.

provides that to fulfil the intention of the Constitution by providing for the consolidation of the debts, and to ensure economical management of future loans, a complete investigation shall be undertaken; that to give freedom to the Commonwealth in levying duties of customs and excise, and to ensure to the States a certain annual income, the Commonwealth agrees to pay to the States £1 5s. per head of population per annum; and that in view of the large contribution, *per capita*, made by Western Australia to the customs revenue, that State should receive a special allowance of £250,000, diminishing by £10,000 per annum, the allowance to be provided by deduction made on a *per capita* basis from the shares of all the States. Temporary arrangements were agreed on to enable the Commonwealth to provide for the heavy obligations undertaken by it in respect to old-age pensions. The estimated amount returnable to the States under this agreement in 1910-11 is £5,668,000.[1] As compared with Sir Wm. Lyne's scheme, the Commonwealth has a present advantage; but the agreement allows the States a more liberal share in the increase of revenue expected from increase of population. Unlimited in duration, it relieves the States from the fear that the financial power of the Commonwealth may be used to augment its powers and diminish the powers and status of the States. The Commonwealth gains by a release from the trammels of the Braddon clause, and a freedom to raise by customs and excise that revenue which it needs without also raising money which it does not require. A practical separation is effected between Commonwealth and State finance in the fact that the Commonwealth Treasurer knows definitely what he has to provide, and State Treasurers know what they have to expect; and in place of many possible difficulties as

[1] *Parliamentary Papers* (Commonwealth), 1909, No. 44, Table 4.

to their respective rights and obligations in respect to "surplus revenue," the new scheme is simple and definite. The measure for the alteration of the Constitution to give effect to the agreement had a stormy passage through the House and the Senate, the principal criticism being directed to the absence of any time limit to its operation, with the result that it could be amended only by an alteration of the Constitution. Not till the last vote was taken in the Senate was there any certainty that the absolute majority required by the Constitution would be secured. The Constitution Alteration (Finance) 1909 will be submitted to the people, with the Constitution Alteration (State Debts) 1909 at the general election of 1910.

CHAPTER IV.

TRADE AND COMMERCE.

On April 13th 1910, the general election of members of the House of Representatives, and of Senators to fill the place of those retiring by expiration of their term of service, was held throughout Australia, and at the same time the poll of the electors was taken on the two Constitution Alterations—Finance and State Debts. The result of the election was the return of a large majority of Labour members to the House, and a large increase in the Labour Senators. The Deakin Ministry at once resigned.

The Constitution Alteration (Finance), containing the scheme arranged between the Deakin Ministry and the State Treasurers, securing the States the sum of 25/- per head of population, failed to secure the required majority of electors of the Commonwealth and the approval of four States. Neither of the two essential conditions was fulfilled, as there was a majority of the electors, and three States—New South Wales, Victoria and South Australia—against it. The Constitution Alteration (State Debts) on the other hand, was carried by a large majority, New South Wales being the only State that declared against it. The final figures are not yet (April 1910) available, but will not affect the general result. Approximately the result is as follows :—

CONSTITUTION ALTERATION (FINANCE).

	Yes.	No.
New South Wales ...	218,938	244,898
Victoria	199,276	239,720
Queensland ...	79,194	64,731
S. Australia ...	48,439	50,357
W. Australia ...	48,730	30,557
Tasmania	30,071	20,235
	624,648	650,498

CONSTITUTION ALTERATION (STATE DEBTS).

	Yes.	No.
New South Wales ...	152,291	307,639
Victoria	277,363	152,545
Queensland ...	90,487	48,771
S. Australia ...	72,194	26,540
W. Australia ...	57,202	21,714
Tasmania	41,541	9,689
	691,078	566,898

to their respective rights and obligations in respect to "surplus revenue," the new scheme is simple and definite. The measure for the alteration of the Constitution to give effect to the agreement had a stormy passage through the House and the Senate, the principal criticism being directed to the absence of any time limit to its operation, with the result that it could be amended only by an alteration of the Constitution. Not till the last vote was taken in the Senate was there any certainty that the absolute majority required by the Constitution would be secured. The Con-

CHAPTER IV.

TRADE AND COMMERCE.

THE subjects of finance and trade meet in the taxes on trade, whereof the duties of customs are referred to the one or the other according as they are regarded as means of raising revenue or of regulating and controlling commerce with other countries and fostering local industries.[1]

The Commonwealth power is derived from the grant in sec. 51 (i.): "Trade and commerce with other countries and among the States," which by sec. 98 is declared to "extend to navigation and shipping and to railways the property of any State." The Constitution, therefore, in limiting the federal power to foreign and inter-State commerce, follows the United States Constitution, and not the Canadian Constitution which comprehends "trade and commerce" as a whole.

The power is essentially a "great substantive power," not lending itself to precise definition, and imparting the utmost of discretion as to the occasion and the mode of its exercise. Nevertheless, here, as elsewhere, the Courts are faced with the task of interpreting a power which, however extensive, has some limits, while the Constitution itself gives some directions and imposes some restrictions on the exercise of the power. Australians have an advantage in this—that the similar power in the Constitution of the

[1] See the *Lottery Cases* (*Champion* v. *Ames*), (1902) 188 U.S. at p. 341.

United States has from 1824 onwards called forth a vast body of case law containing some of the most striking enunciations of the American bench. This is a part of our inheritance, and on several occasions the High Court has emphatically asserted the weight, if not the authority, of the decisions of the Supreme Court of the United States preceding the federation of the Australian colonies in matters wherein the two Constitutions are alike.[1] These decisions are accessible in the reports and in well-known text books on the subject. All that is possible here is to set out their most prominent features.

The determination of the extent of the "commerce power" requires the consideration of each of its parts: first, "trade and commerce;" secondly, that trade and commerce which is "with other countries and among the States."

"Commerce" in its most obvious sense describes an operation or transaction—buying and selling, the interchange of commodities; and inter-State commerce therefore comprehends "the sale of an article lying in one State to be transported in execution of the contract to another State."[2] But as early as 1824 the decision of the Supreme Court in *Gibbons* v. *Ogden*[3] established that it was not limited to these operations, but extended to commercial intercourse. "Buying, selling, and the transportation incidental thereto constitute commerce."[4] *Commerce* is dis-

[1] Cf. *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association*, (1906) 4 C.L.R. at p. 540; *Fox v. Robbins*, 8 C.L.R. 115, 126.

[2] *Addyston Pipes Co.* v. *U.S.*, (1899) 175 U.S. at p. 246.

[3] 9 Wheaton 1.

[4] *Kidd v. Pearson*, (1898) 128 U.S. 1, 20. See also *Wabash St. L. & P. Railway* v. *Illinois*, 118 U.S. 574: "Commerce . . . strictly considered consists in intercourse and traffic, including in those terms navigation and the transportation and transit of persons and property as well as the purchase, sale and exchange of commodities." How far transit between State and State which is not incident to commerce is within the federal power is a matter in which there is still some difference of opinion amongst American lawyers. See 21 *Harvard Law Review*, 595, 597.

tinguished from *production*: "commerce succeeds to manufacture and is not a part of it."[1] Consequently, the conditions of production (*e.g.*, combinations of manufacturers) are not within the commerce power, though the manufactured article is in fact an article of export, and though there be a present intention to send the articles or some of them out of the State of manufacture.[2] Further, there are transactions and operations which are merely collateral incidents which attend the carrying on of commerce without forming part thereof. Such, for instance, are contracts of insurance.[3] Similarly, the right to acquire and to hold property, and the conditions under which property is held,

[1] *U.S.* v. *E. C. Knight Co.*, (1894) 156 U.S. 1, 12. See also *Veazie* v. *Moor*, 14 Howard 568, 574.

[2] S.c., and *Kidd* v. *Pearson*, 128 U.S. 1. "The power applies only to commerce in being and not to what may become commerce"—*per Cur.*, *Federated Amalgamated Railway Service Association* v. *N.S.W. Traffic Employés Association*, (1904) 4 C.L.R. at pp. 540-1.

[3] *Paul* v. *Virginia*, 8 Wallace 168: "Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration." *Hooper* v. *California*, 155 U.S. 648, applies the same rule to contracts of marine insurance, and White J. says (p. 655) that the attempt to set up a contract of this kind as inter-State commerce, ignores "the difference between inter-State commerce or an instrumentality thereof on the one hand, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been observed and is clearly defined by the authorities. If the power to regulate inter-State commerce applied to all the incidents to which such commerce might give rise and to all the contracts which might be made in the course of this transaction that power would embrace the entire sphere of mercantile activity in any way connected with the trade between the States." See also *Citizens' Insurance Co.* v. *Parsons*, L.R. 7 A.C. 111. In the Commonwealth Constitution, "insurance" is a substantive power of the Commonwealth Parliament: sec. 51 (xiv.).

are the basis of all commerce, but do not form a part of commerce.[1]

Adopting the language of Marshall C.J., in *Gibbons* v. *Ogden*,[2] we may say that commerce "with other countries" comprehends every species of commercial intercourse with countries outside the Commonwealth. "No species of trade can be carried on between this country and any other to which this power does not extend." "Among the States" means "intermingled with." The commerce denoted is that which "concerns more States than one," as distinguished from the purely internal or domestic commerce of a single State.

"The commerce of a State which Congress may control must in some stage of its progress be extra territorial. It can never include transactions wholly internal, between citizens wholly of the same community, or extend to a policy and laws, whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such a community."[3]

It has been said of the commerce power in the United States Constitution that it "presents the problem of projecting a physical boundary line as an economic distinction," and hence the line of division must be elusive, and in many cases appear arbitrary. If the subject be "commerce with other countries and among the States," the power does not stop at the boundary lines of the States, but attaches to the matter from its inception to its termination.[4] In the case of transportation, we have to distinguish between

[1] *Railroad Co.* v. *Peniston*, (1873) 18 Wallace 5; *Railroad Co.* v. *Maryland*, (1874) 21 Wallace 456; and the dissenting judgment in the *Northern Securities Case*, (1904) 193 U.S. at pages 393-5. The chief criticism upon this last case is that it infringes this principle.

[2] (1824) 9 Wheaton 1.

[3] Cooley, *Constitutional Law*, p. 68.

[4] E. P. Prentice, 19 *Harvard Law Review*, p. 171.

intentions and preparations on the one hand and the commencement of the operation of foreign transit on the other. The line has been drawn at the moment when the traffic commences its final movement for transportation from the State of origin to that of destination.[1] The character once constituted remains until not merely the end of transit but until the subject of carriage has been so dealt with as to become incorporated and mixed up with the mass of property in the State.[2] When this takes place is a question upon which the Courts in general were for long careful to guard themselves against laying down any universal rule.[3] The test adopted in *Brown* v. *Maryland*—the goods in the hands of the importer in the "original package"[4]—was very frequently criticised, but was at last accepted for inter-State as well as foreign commerce by the majority of the Supreme Court, in default of any more satisfactory test.[5] In the special case of intoxicating liquids passing into a State the Commonwealth Constitution does in effect define the limits of the commerce power by providing that they shall be subject to the laws of the State as if they had been produced therein (sec. 113).

The commerce power embraces not only the thing transported and the actual operation of carriage, but the means

[1] *Coe* v. *Errol*, 116 U.S. 517 :—"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State."

[2] *Brown* v. *Maryland*, 12 Wheaton 442.

[3] See *Welton* v. *Missouri*, 91 U.S. 275. The whole subject is very well treated in Prentice and Egan's *Commerce Clause*, chapter III., where the authorities are set out and examined.

[4] *Brown* v. *Maryland*, 12 Wheaton 419 (foreign commerce).

[5] *Leisy* v. *Hardin*, 135 U.S. 100.

and instrumentalities whereby commerce is carried on.[1] The highways of commerce by land and by water and the vehicles of communication of whatever kind are included in the power.[2]

This leads to some striking developments and eventually to "a competition of opposite analogies"—to use *Paley's* phrase—about which beat the great forces and interests furnishing the constitutional problems of to-day. On the one side we have the principle which includes in the federal power the "instruments of commerce," on the other, the principle which excludes the mere collateral incidents of commerce. Railways and shipping are instruments of commerce. The federal power will extend to the contract between the carrier and the passenger, the facilities to be given for traffic, and the conditions to be observed for securing safety, whether those conditions relate to the provision of appliances, the qualifications of employés, or the liabilities of the carrier for breach of his duty. Does it extend to the relations between the carrier and his servants? The *Railway Safety Appliances Act* requiring companies engaged in the inter-State trade to use particular appliances for the safety of the traffic is clearly within the federal power, and the Supreme Court has held that a railway servant injured by the Company's failure to comply with the Act, is entitled to recover damages against the Company.[3] The *Employers Liability Act* passed by Congress would probably have been held good if it had been limited

[1] *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U.S. 196, 204.

[2] These means "extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth:" *Pensacola Telegraph Co.* v. *W. U. Telegraph Co.*, (1877) 96 U.S. 1. See also *W. U. Telegraph Co.* v. *Pendleton*, (1886) 122 U.S. 347.

[3] *Johnson* v. *Railroad*, (1904) 196 U.S. 1.

to the employment of persons in inter-State commerce.[1] An Act of Congress prohibited advances by shipowners to sailors on foreign-going vessels, and the Supreme Court held the Act to be *intra vires*.[2] On the other hand, the High Court of Australia, declaring that the ambit of the commerce power could not extend to embrace matters the effect of which on commerce was not direct, substantial and proximate, expressed the opinion that conditions of employment were not of this character, and added that as at present advised they considered that the legislative power of Parliament under this head did not extend further—if it extended so far—than to forbid for causes affecting inter-State traffic, specific persons from being employed in such traffic.[3] Lastly, the Supreme Court of the U.S. has held[4] that a provision in the *National Arbitration Act* imposing penalties for dismissing an employé on account of membership of a labor organization is *ultra vires*.

This question—where the line is to be drawn between commerce and its instruments on the one side, and the incidents which precede, attend or consequentially affect commerce on the other—is one of the forms in which the problem of power over "trust and combinations" presents itself in American constitutional law.[5] It thus becomes a question of the application of the law, which in many cases equally sound and impartial lawyers are likely to answer differently. But there is another principle which enters into these cases. The "commerce power" not merely imports the regulation of commerce, but extends to the pro-

[1] *Employers' Liability Cases*, (1907) 207 U.S. 463.

[2] *Patterson* v. *Bark Eudora*, (1902) 190 U.S. 169.

[3] *Federated Amalgamated Railway Service Association* v. *N.S.W. Traffic Employés Association*, (1904) 4 C.L.R. at p. 545.

[4] *Adair* v. *U.S.*, (1907) 208 U.S. 161.

[5] *Hooper* v. *California*, (1895) 155 U.S. 648; *Addyston Pipes Co.* v. *U.S.*, (1899) 175 U.S. 228; *Northern Securities Cases*, (1904) 193 U.S. 197.

tection of commerce, and particularly to the removal of all obstructions to commerce. Congress may order the removal of any physical obstacle to the navigation of a channel. But the federal power is not limited to dealing with natural obstructions; it will include any forcible attempt by persons to interfere with the actual transit, and it is on this principle that it has intervened in strikes[1] :— "A strike of men employed on an inter-State railroad is not in restraint of trade between the States if it is confined to the contract of employment; but if as a means of making the strike more effective the strikers seek to obstruct the movements of trains from State to State, they become amenable to the provisions of the *Federal Act*"[2] against combinations in restraint of trade. In this class of case there is a direct interference, present or threatened, with "commerce in being." Combinations of workmen not to handle inter-State traffic,[3] or combinations of carriers to refrain from or to limit competition in inter-State carriage,[4] are a degree more remote, but still in such a case the subject matter of the agreement is the inter-State transit itself, and the bearing of the combination and the acts done thereunder is direct and immediate and not merely consequential. We move further again when we find that agreements or combinations between manufacturers in one State not to sell in competition with other manufacturers in another State are treated as within the federal power.[5] Here the subject is not commerce in being,

[1] *E.g.*, *In re Debs*, (1895) 158 U.S. 564.

[2] Freund, *Police Power*, p. 355.

[3] *Thomas* v. *C., N.O. & T.P. Railroad Co.*, 62 Fed. Rep. at p. 803; *Toledo A.A. & M.R. Co.* v. *Pennsylvania Co.*, 54 Fed. Rep. 730, 738.

[4] *U.S.* v. *Trans-Missouri Freight Association*, (1897) 166 U.S. 290; *U.S.* v. *Joint Traffic Association*, (1898) 171 U.S. 505.

[5] *Addyston Pipes Co.* v. *U.S.*, (1899) 175 U.S. 211. See also *Bement* v. *National Harrow Co.*, (1902) 186 U.S. 70; *Montague* v. *Lowrey*, (1904) 193 U.S. 38.

and the agreement effects no more than each individual has a right to do—*i.e.*, to refrain from engaging in commerce. It is true that acts done in combination may have a different complexion from acts done by single individuals without concert; but it is plain that we are here approaching, if we have not passed, the border line which separates obstructions to inter-State commerce from those consequential and incidental effects upon commerce which admittedly lie outside the federal power. Of the last, an illustration is found in the case of *Hopkins* v. *U.S.*,[1] where an agreement of salesmen in different States to charge a certain rate of commission on the sale of cattle coming from other States, was held to be a subject lying outside the federal power, for though no doubt it had an effect on Inter-state commerce, that was not direct and immediate, but merely incidental and consequential.

The case of the *Northern Securities Co.* v. *U.S.*[2] represents the last stage reached in the process of stretching out the commerce power. The company was what is called a "holding corporation," *i.e.*, one formed for the acquisition of the whole stock of certain other companies whose stock holders received in return stock in the new corporation. The companies whose stock was so acquired were railroad companies owning and working two of the principal roads competing for the east and west traffic of the United States. A declaration was sought that the corporation was an illegal combination in restraint of trade within the *Sherman Act* 1890, and of course the application of that Act raised the question whether an operation of the kind here undertaken was within the federal power over "commerce among the several States" within the meaning of the Constitution.

[1](1898) 171 U.S. 578. Numerous illustrations of "incidental" effects are contained in the judgments

[2](1904) 193 U.S. 197.

Here, it will be observed that the incorporation of the company is not "commerce," and whether or not the attendant acquisition of the shares of the railroad companies is "commerce," neither of the operations in themselves contained any element which transcended the limits of one State. There was nothing in the transaction which bore upon the control and management of the traffic, nothing which related to rates of carriage or pooling of receipts. It was simply a transfer of the property of the individual stockholders to a corporate stockholder. In this aspect, the matter lay clearly on the further side of the line which bounded the federal power. It resolved itself into a matter of the acquisition of property, which upon settled principles was governed by State law alone. If it did prove to affect inter-State commerce, that was a resulting, indirect and consequential effect merely. This was the view taken by four of the nine members of the Supreme Court, who observed that the effect, if any, on inter-State commerce was so remote and problematical that to admit this case within the federal power was to extend it so indefinitely as to leave very little outside it, since most transactions might be shown to have some possible effect on inter-State commerce. Agreeing that the commerce power extended to the instrumentalities of commerce, and that railways were such an instrumentality, the dissenting Justices refused to take the next step in the argument—that therefore the acquisition and ownership of railroad stock belonged to Congress.[1] The power over the instrument-

[1] *Loc. cit.*, p. 393. "The same distinction exists between the two which exists between the power of Congress to regulate the movement of property in the field of inter-State commerce, and its want of authority to regulate the acquisition and ownership of the same property." The contention of the U.S. was that "Congress has not only authority to regulate the exercise of inter-State commerce, but under that power has the right to regulate the ownership and possession of property if the enjoyment of such rights would enable those who possessed them if they engaged in inter-State commerce to exert a power over the same" (p. 395).

alities was only that such things, when and so far as employed in inter-State commerce, might be regulated by Congress as to their use in such commerce.

The five Justices constituting the majority of the Court rested their decision mainly on the ground that the federal power extended to keeping open the avenues of commerce, and consequently to removing every restriction upon the freedom of that commerce. Having held in preceding cases that combinations in direct restraint of competition amongst inter-State carrying companies were such restrictions as Congress might deal with, they considered that in substance the present combination was only another mode of attaining the same end, and that the restraint was not merely consequential, but the very object, as it would be the direct result, of the incorporation.

In considering the application of these cases to the Commonwealth Constitution, two things at any rate must be observed. First, the decisions of the Supreme Court of the United States after the date of the Constitution have not the same quasi-authority in Australia as those which preceded it, and of which the High Court has held that a knowledge may be imputed to the framers of the Constitution.[1] Now, it will be seen that the greater number of the difficult cases of application arising in respect to combinations in the United States have been decided since the establishment of the Commonwealth or—what appears more strictly relevant—since 1897, which is the latest date of which it is possible to impute a knowledge to the Convention, which finished its labours in March 1898. Secondly, some of the most important cases in the United States relate to railways. So far as these cases lay

[1] *D'Emden* v. *Pedder*, 1 C.L.R. at pp. 112-113; *Deakin* v. *Webb*, 1 C.L.R. 585; *Baxter* v. *Commissioners of Taxation*, 4 C.L.R. 1122.

down general principles applicable to commerce generally or to intercourse other than by means of railways, the only question appears to be how far we approve of the *ratio decidendi*. But in the particular case of railways, the Commonwealth Constitution contains a number of distinct provisions which are not only important in themselves, but have a bearing on the extent of the commerce power in relation to the State railways. This requires that the railways in the Commonwealth should be separately considered.

Navigation and Shipping.

The control over the instruments of commerce may, and in some respects must, bring under the operation of the federal power, persons and things not themselves engaged in trade with foreign countries or among the States. Statutes laying down rules of navigation, or prescribing the lights to be carried by vessels at sea, to take a plain example, must be observed uniformly or they are valueless. They apply therefore to vessels engaged in the domestic commerce of a particular State if they are on the high seas or in inland waters accessible for foreign or inter-State commerce.[1] The power in such cases may be regarded as one of necessity, and it has in the case of navigation on the high seas been imputed to the responsibility of the National Government in all matters of external concern: though not necessarily "trading" with foreign nations, a vessel on the high seas is "navigating" with them.[2]

In the United States the federal power has extended itself over the whole range of "shipping law," so far as concerns shipping upon the high seas and "the public

[1] *Waring* v. *Clerk*, (1847) 5 Howard 441. See the numerous cases collected in *Prentice and Egan*, pages 101 *et seq.* The federal Statute will apply even to "State Instrumentalities"—*Oyster Police Steamers of Maryland*, 131 Fed. Red. 763; *Governor Robert McLean* v. *U.S.*, 35 Fed. Rep. 926.

[2] *Lord* v. *Steamship Co.*, (1880) 102 U.S. 541.

navigable waters of the United States," which include such waterways as "form by themselves or in connection with others a continuous highway over which commerce may be carried on between our own States or with foreign countries in the customary way of carrying on commerce by water."[1] This extension is ascribed not to the commerce power itself, but to the grant to the federal courts of "all cases of admiralty and maritime jurisdiction" as to which it is held, first, that the jurisdiction itself is not limited by the English bounds of Admiralty jurisdiction, but applies, as stated above, in all public navigable waters of the United States; secondly, that the jurisdiction necessarily connotes a corresponding legislative power in Congress to ensure uniformity in a matter which from its nature requires an uniform rule.[2] "It is the character of the traffic as internal, inter-State or foreign, and not whether it takes place over a road or river, by boat or railway, which must be considered in applying the commercial power; but admiralty jurisdiction has a wider scope, and may be exercised over all boats using the navigable waters of the United States. Vessels use the same waters whether they are engaged in foreign or domestic trade; and as disorder and litigation would result if they were governed by different rules, Congress may make and the admiralty enforce such regulations as are requisite to give certainty to title, maintain order and prevent the collisions which may be as disastrous on a river as at sea. The craft which is plying to-day between places in the same State may to-morrow extend her voyage to another, or proceed to sea; and it is therefore essential that she in common with all others which are

[1] *The Montello*, 11 Wallace 411, 415.

[2] *Waring* v. *Clark*, (1847) 5 How. 441; *White Bank* v. *Smith*, (1868) 7 Wallace 646; *In re Garnett*, (1890), 141 U.S. 1.

or may be engaged in coasting or foreign trade, shall be governed by the same rule."[1]

The Commonwealth Constitution commits to the Federal Judicature matters of "admiralty and maritime jurisdiction" (sec. 76 (iii.)). It commits to the Commonwealth Parliament power to make laws with respect to "external affairs" (sec. 51 (xxix.)); it declares that the commerce power extends to "navigation and shipping" (sec. 98); and establishes that "the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth" (sec. v.) In these circumstances, it is not likely that the Commonwealth power in respect to the modes and instruments of navigation will be more restricted than the power of Congress. The great practical difficulty of drawing a geographical line in matters of navigation and shipping,[2] together with the importance of establishing a single authority thereon, would be strong reason for concluding that the whole matter belongs to the Federal Legislature.[3]

[1] Hare, *American Constitutional Law*, p. 1009.

[2] *Lord* v. *Steamship Co.*, (1880) 102 U.S. 541.

[3] On the subject of *Maritime Law and Jurisdiction in Australia*, see two articles in the *Commonwealth Law Review*, vol. ii., (1905) by F. L. Stow, who takes a narrower view of federal authority than is here submitted.

CHAPTER V.

THE EXERCISE OF THE COMMERCE POWER: EXCLUSIVE OR CONCURRENT—FREEDOM OF TRADE AND COMMERCE.

THE Constitution contains several provisions which operate as limiting or directing the exercise of the commerce power. The most elaborate of these are considered in relation to the Railways. They are supplemented by the provisions relating to the Inter-State Commerce Commission.

Sec. 99, which applies to laws or regulations of trade and commerce, as well as to revenue laws, the prohibition against giving preference to any State or any part thereof over another State or any part thereof, has been dealt with under the head of taxation.

Sec. 100 declares that the Commonwealth shall not by any law or regulation of trade or commerce abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. This section assumes that the only power which the Commonwealth has to affect the matter arises under trade and commerce; and the only ground of federal control over these waters is as the guardian of inter-State navigation. Navigation is committed to the Commonwealth, irrigation belongs to the States, and the federal power must dominate and prevail over the State power. This is determined by the Supreme Court of the United States in *U.S.* v.

Rio Grande Dam and Irrigation Co.,[1] and *Kansas* v. *Colorado*.[2] Sec. 100 complicates this position by requiring the Commonwealth in the exercise of its power of protecting and promoting navigation, to respect the reasonable user of the waters for conservation and irrigation. What is a "reasonable user" must be determined by the Courts, at least in the last resort; and "reasonable" will mean here as elsewhere "reasonable in all the circumstances of the case." The American cases just referred to—*U.S.* v. *Rio Grande Co.* and *Kansas* v. *Colorado*—show that the right of a State to abstract waters is in any case subject to the right of other States to do the same, and that a balance has to be struck between them on grounds of reasonableness.[3] It remains to be determined whether, apart from legislation altogether, similar reasons do not prevent an abstraction of water to the impairment of ordinary navigation; the section does not determine that there is a subsisting right of reasonable user for conservation and irrigation which is paramount to all rights of navigation.[4]

The commerce power is also limited by sec. 92 of the Constitution, the effect of which must now be considered.

Freedom of Inter-State Trade and Commerce.—Sec. 92 declares that—"On the imposition of uniform duties of customs, trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free."[5]

[1](1899) 174 U.S. 690.

[2](1906) 206 U.S. 46, 85-86.

[3]See 206 U.S. at p. 100 and following pages for an illustration of the factors which enter into the consideration of such a case.

[4]The subject is fully discussed in Quick and Garran, pp. 890 *et seq.*, and in Clark's *Australian Constitutional Law*, Chapter 6.

[5]The opinion of the Attorney-General (Hon. P. McM. Glynn) given in relation to the South Australian *Fruit and Vegetable Protection Act*, and the proclamations thereunder, appears to be in accord with the views expressed herein. See *Parliamentary Papers* (Commonwealth), 1909, No. 63.

The section is general in its form, imposing restraint both on Commonwealth and State action. It was commended to the Convention as "a bit of layman's language on which no legal technicalities can be built." The case was an unfortunate one for the illustration of the layman's art, for of all vague and question-begging terms in the political vocabulary, "free" is perhaps the worst.

The first aid to interpretation is the context—*noscitur a sociis*. The provision occurs in a group of sections, beginning with sec. 86, which deals with customs, excise and bounties, their imposition, collection and distribution. The most obvious application of sec. 92 is to prohibit the imposition of any like duties upon inter-State trade.

But its terms extend beyond this case; and it may confidently be assumed that they prohibit every charge, by whatever name it may be called or on whatever pretext it may be levied, which is in substance a tax or restraint on the intercourse of persons or the commerce in goods amongst the States. Thus, in the one case under the section which has come before the High Court—*Fox* v. *Robbins*[1]—a West Australian Act imposed a licence fee of £2 for the sale of wine the product of fruit grown in Western Australia, while the only licence that could be obtained for the sale of wine made from fruit grown in any other part of Australia, cost £50. It was held that this was an infringement of sec. 92; and Griffith C.J. observed that the provision of the Constitution would be quite illusory if a State could impose disabilities upon the sale of products of other States which were not imposed on the sale of home products.[2] Barton J. calls attention to the two-fold restriction which the Constitution puts on the States. They must not tax the article so long as it remains a subject of inter-State commerce; and while, on that character ceasing by the end of transit

[1](1909) 8 C.L.R. 115.

[2]S.C. at pp. 119-120.

and the incorporation of the object with the domestic commerce of the State, it becomes a proper object of State taxation, still the tax must be laid equally on all goods of the kind to be taxed without discrimination by reference to origin. "And what I say of taxes applies to other imposts or burdens."[1]

From the acceptance of leading American authorities by the High Court in *Fox* v. *Robbins*, it is clear that we may be guided by the mass of case law which has grown up in the United States, defining a tax upon inter-State commerce within the implied prohibition upon State power. The difference in the two Constitutions in respect to taxation appears to lie in the fact that while the absence of an express prohibition in the United States has led to the establishment of an implied restraint upon the States only, the Commonwealth Constitution expressly lays a prohibition in general terms not distinguishing between the Commonwealth and the States Legislatures. Charges for services rendered are not *ejusdem generis*; they are in promotion and not in hindrance of commerce. Charges for railway services, reasonable tolls for the use of ports and improved waterways may be imposed. But a charge for services may become a tax if the charge is unreasonable, or if it is used as a pretext for impeding inter-State intercourse. The vexed matter of charges for inspection is specifically dealt with by sec. 112, which admits the State power to impose such charges, but puts it under the complete control of the Commonwealth Parliament.

In a Tasmanian case[2] it was held by Clark J. that an income tax on business done in Tasmania, which was fixed at a minimum amount of £50 in the case of foreign companies, was not an infringement of sec. 92, as it was not in

[1] S.C. at pages 123-4.

[2] In *re Australasian Automatic Weighing Machine*, (1905) 1 Tas. L.R. 113.

substance equivalent to a tax upon the importation or exportation of goods, or a tax on the passage of persons from one State to another, or a tax upon the transmission of information from one State to another; the business which was the subject of taxation did not necessarily involve any intercourse with another State in the daily conduct of it.

In attempting to realize the further significance of sec. 92, we are warranted, according to decisions of the High Court, in considering the decisions of the United States Courts in regard to cognate matters, with which it must be taken that the framers of the Constitution were familiar.[1]

After long controversy, the Supreme Court in 1851 decided in the case of *Cooley* v. *Board of Wardens of the Port of Philadelphia*[2] that the power of Congress to regulate commerce with foreign nations and among the several States, is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the States except in matters of local concern only, is repugnant to such freedom.

But the power to regulate commerce covers a vast field, containing many and exceedingly various subjects, quite unlike in their nature, some demanding a single uniform rule, others as imperatively demanding diversity; in the latter case, in the absence of legislation by Congress, the State Legislature may properly make provision, though the

[1] *Fox* v. *Robbins*, (1909) 8 C.L.R. 115, at p. 112. See also *D'Emden* v. *Pedder*, (1904) 1 C.L.R. 91 at p. 112; *Municipal Council of Sydney* v. *Commonwealth*, 1 C.L.R. at pp. 237, 240; *Baxter* v. *Commissioners of Taxation (N.S.W.)*, 4 C.L.R. at pp. 1122 *et seq.*

[2] (1851) 12 Howard, 299.

matter is one of inter-State commerce. Finally, State legislation for the protection of the life, liberty, safety, health, and comfort, of its people, and for the protection of their property—the exercise of what is known as the "police power"—is not invalid merely because it affects inter-State commerce, if it does not extend beyond what is reasonably necessary for its legitimate purpose. But in all cases, of course, the legislation of the State so far as it affects inter-State commerce is liable to be over-ridden by an exercise of the paramount power of Congress.[1]

The main difficulty of these principles lies in their application—in determining what matters are of national concern requiring one uniform set of regulations, and what are proper for local regulation,[2] though the statement of the principles themselves is not wholly free from doubt.

[1]The principles are stated and the cases collected in *Robbins* v. *Shelby County Taxing District*, (1887) 120 U.S. 489.

[2]The statement of the difficulty suggests a question which is considered by Professor Thayer, *Cases on Constitutional Law* (p. 2190). The learned author says that "the question whether or not a given subject admits of only one uniform system or plan of regulation is primarily a legislative question, not a judicial one. For it involves a consideration of what on practical grounds is expedient, possible or desirable; and whether, being so at one time or place, it is at another. . . . It is not in the language itself of the clause of the Constitution now in question, or in any necessary construction of it that any requirement of uniformity is found in any case whatever. That can only be declared necessary in any given case as being the determination of some one's practical judgment. The question then appears to be a legislative one; it is for Congress and not for the Courts—except indeed in the sense that the Courts may control a legislative decision so far as to keep it within the bounds of reason, of rational opinion. If this be so, then no judicial determination of the question can stand against a reasonable enactment of Congress to the contrary. . . . It would seem to follow that the Courts should abstain from interference except in cases so clear that the legislature cannot legitimately supersede its determinations; for the fact that the legislature may do this in any given case shows plainly that the question is legislative and not judicial. . . . If it be thought that Congress will very likely be dilatory or negligent, or that it may even purposely allow and connive at what should be forbidden—that is quite possible. But the objection is a criticism upon the arrangements of the Constitution itself, in giving so much power to the legislature and so

In the first place, although it is usual to affirm the exclusiveness of the power of Congress,[1] it is exclusive in a rather special sense, and the freedom of trade and commerce rests not upon an immediate declaration in the Constitution, but upon an inference from the silence of Congress. It follows that Congress is fully competent to submit inter-State commerce to regulation or restriction by the States.[2]

In the next place, a good deal of authority can be found for a statement of the rule in the form that the regulation of the operation of commerce itself belongs exclusively to Congress, while the control of the agent or instrument of commerce belongs to the State, subject only to the paramount power of Congress. According to this view, any attempt on the part of the State to exercise control over "commerce" —"intercourse for the purpose of trade in all its forms, including the transmission of intelligence, the transportation by land and water of persons and commodities, and the purchase, sale, and exchange of the commodities"—as distinct from its agents or instruments would fail.[3] It would be immaterial that the State purported to be exercising a power of police, rather than a power over commerce; the will of Congress having been sufficiently (though only little to the Courts. It is to be observed, however, that the great object which the makers of the Constitution had in view, as to this subject, was to secure power and control to a single hand, the general government, the common representative of all, instead of leaving it divided and scattered among the States; and that this object is clearly accomplished by the control of Congress." These are weighty arguments which have received some measure of recognition, for the Supreme Court has held that its classification of a subject as amongst those imperatively demanding a uniform rule cannot stand against the express determination of Congress submitting that matter to the diverse regulations of the several States (*In re Rahrer*, 140 U.S., 545.

[1] Cf. *Asbell* v. *Kansas*, 209 U.S., at p. 254.

[2] *In re Rahrer*, 140 U.S. 545.

[3] See generally two articles by David Brown Scott on "The Exclusive Power of Congress to Regulate Inter-State and Foreign Commerce," 4 *Columbia Law Review*, p. 490, and 5 *Columbia Law Review*, p. 298.

by implication) expressed, prevails over every hindrance set up by State law, under whatever head of power. The difficulty about the view lies in the fact that it is established that certain classes of State laws which appear to be restraints of commerce itself, *e.g.*, prohibiting the introduction of diseased cattle,[1] or adulterated goods,[2] are supported except so far as they conflict with the actual legislation of Congress.

The recent decision of the Supreme Court of the United States in *Asbell* v. *Kansas*,[3] brings out very clearly what appears to be the true position. Adverting to the observations of Marshall C.J. in *Gibbons* v. *Ogden* that "the same measures or measures scarcely distinguishable from each other may flow from distinct powers," the Court points out that a State law which restricts the freedom of inter-State commerce by regulating the introduction of cattle, may be a measure for checking intercourse *simpliciter*, or it may be a means for preventing the introduction of disease. In the first aspect, it is void; in the second, it is a valid exercise of police power. Whether it is the one or the other depends upon the determination of its true nature according to all the circumstances of the case. In such a case the foundation of the State action must be found "in a governmental power entirely distinct from the power to regulate inter-State commerce."[4]

Now, in the case of the Commonwealth Constitution, sec. 92 establishes specifically that freedom of trade, commerce and intercourse which the implied will of Congress imposes in the United States. In that it is explicit and not implicit,

[1] *Rasmussen* v. *Idaho*, (1901) 181 U.S. 198; *Kimmish* v. *Ball*, (1889) 129 U.S. 217; *Asbell* v. *Kansas*, (1908) 209 U.S. 251.

[2] *Plummer* v. *Massachusetts*, (1894) 155 U.S. 461. See *ante*, "The Police Power," p. 343.

[3] (1907) 209 U.S. 251.

[4] S.C. at p. 255.

it is stronger than the American Constitution.[1] It is secured also against any impairment by the Commonwealth Parliament; that Parliament cannot, like Congress, remit the obligation of the States to respect the freedom.

For the rest it is submitted that the police power of the States, so far as it relates to the introduction of persons or goods, is not less than in America, and it may be noted that sec. 112 does not confer a power to establish and execute inspection laws, but is a distinct recognition of the independent existence of such a power, while section 113, subjecting intoxicating liquors to the laws of the States immediately on passing therein, is designed to exclude the operation of a particular decision of the Supreme Court of the United States,[2] and therefore itself strengthens the view that the American authorities generally have a special relevance to this matter.

It has been already observed that sec. 92 differs from the implied restraint of the American Constitution in that it is superior to the will of the Commonwealth Parliament, which cannot authorise impairment by the States. It also imposes restrictions upon the Parliament, which cannot by any Act of its own impair freedom. In one sense, every condition or regulation laid upon inter-State commerce is a restriction of its freedom. But in the case of the Commonwealth Parliament, the Constitution itself gives an express power to make laws with respect to trade and commerce among the States, and sec. 92 must be read in such a way as to give scope to this power. That it undoubtedly prevents the Commonwealth Parliament from imposing any tax on this commerce has been shown above. It follows

[1] *Fox* v. *Robbins*, (1909) 8 C.L.R. 115. S.C. p. 123 and cf., *In re Rahrer*, 140 U.S. 545.

[2] *Leisy* v. *Hardin*, (1890) 135 U.S. 100. Sec. 113 does not authorise directly or indirectly the taxation of extra State liquor—*Fox* v. *Robbins*, (1909) 8 C.L.R. 115.

that it equally prevents such discrimination by the Commonwealth as was attempted by the State in *Fox* v. *Robbins*.[1] If the freedom of trade, commerce and intercourse, under sec. 92, still leaves scope for the operation of the police power of the States, it must it would seem leave scope also, not indeed for a police power of the Commonwealth *eo nomine*, but for the imposition of whatever restraint may appear reasonably incident to any power of the Commonwealth, as well as for the commerce power to over-ride the restraints of the State police power. Thus, if the Commonwealth power of quarantine extends to inter-State movements, it can be exercised notwithstanding sec. 92. At what stage legitimate regulation becomes unjustifiable restraint may furnish some very difficult problems, just as it does in defining the limits of the police power of the States. A typical case of doubt seems to be the requirement by the Commonwealth Parliament of a licence to engage in inter-State trade or any branch of it, *e.g.*, the coasting trade.

The last consideration to be borne in mind in connection with sec. 92 is that it does not relate to trade with foreign countries; it is confined to trade, commerce and intercourse among the States.

[1] (1909) 9 C.L.R. 115.

CHAPTER VI.

THE INTER-STATE COMMISSION.

SEC. 101 declares that there shall be an Inter-State Commission with such powers of adjudication 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.

In that the section looks to the "execution and maintenance" of the Constitution and laws of the Commonwealth, repeating the words by which the executive power of the Commonwealth is defined by sec. 61, it suggests that the main character of the Commission is to be sought under the head of Executive Power, and in the cases of *Huddart Parker* v. *Moorhead, Appleton* v. *Moorhead*,[1] it was argued that the section established distinct administrative machinery for the enforcement of the provisions of the Constitution and laws relating to trade and commerce, thereby derogating from the otherwise unrestricted discretion of Parliament in determining the mode and the means of executing its laws. The High Court, without entering into the interpretation of the section more largely than the occasion required, held that the section could not be treated as absolutely exclusive of all other executive power over the subject, which would

[1](1909) 15 A.L.R. 241 ; 8 C.L.R. 330.

amongst other things involve that the whole administration as to trade and commerce was in abeyance until the Commission was constituted. O'Connor and Higgins JJ. regarded the section as mandatory so far as the establishment of the Commission was concerned, but as to its powers, they were such merely as Parliament conferred upon it,[1] leaving the Parliament its general power of disposing according to its discretion for the administration of laws of trade and commerce. A further objection to the construction suggested was that the Commission's powers include adjudication as well as administration, and if its powers were exclusive in one direction it was hard to avoid the conclusion that they were exclusive in the other. The position is briefly put by Isaacs J.[2]: "It is hard to perceive the limit of such a contention. Ministerial control, and to a great extent judicial action, would be entirely superseded in the ordinary operation of government, by a body entirely independent of the Executive, and not responsible to Parliament, and not necessarily trained in the law. Its duties could not be fulfilled without an immense staff all over Australia operating side by side with, but altogether separate from, the regular members of the Public Service."

The Commission was suggested by the Inter-State Commerce Commission in the United States, and the Railway and Canal Commission in the United Kingdom, and may be expected to exercise powers of each of those bodies. The Inter-State *Commerce Act* 1887 (U.S.) provided for the appointment of a Commission to carry out the objects of the law, which were in the main to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or un-

[1](1909) 15 A.L.R. 241, at pp. 257-8, 274; 8 C.L.R. at pp. 376, 418.
[2]15 A.L.R. at p. 262; 8 C.L.R. at p. 387.

reasonable preferences to persons, corporations, and localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. The Commission is a special tribunal whose duties though largely administrative are sometimes semi-judicial; but it is not a Court empowered to render judgments and enter decrees.[1] It investigates facts; reports and makes orders upon them; but to enforce those orders it must resort to the Courts, and the Courts may investigate the whole merits of the controversy, and form an independent judgment.

The Railway and Canal Commission in England constituted by the Act of 1888, is empowered to order the Railway Companies to obey the provisions of numerous Acts of Parliament, under which they are bound amongst other things to afford reasonable facilities for traffic, and are forbidden to give undue or unreasonable preference or advantage in favour of any person, company, or description of traffic. Such undue preference may arise from a difference in treatment to any trader or class of traders, or to the traders in any district in respect of the same or similar merchandise or of the same or similar services. The Commission may intervene, not merely at the request of an individual alleging the infringement of his right, but also on the complaint of the Attorney General, the Board of Trade, and various local authorities, or associations of traders or freighters, without proof that the body is aggrieved by the matter complained of, if the Board of Trade has certified the body to be a proper one. In addition to ordering the Company to redress the wrong for the future, the Commission may award damages to a person aggrieved in full satisfaction of any claim which the party would have had by reason of the matter of complaint. The Commission

[1] Rorer, *Inter-State Law*, p. 421*n*.

has now full power to carry out its awards, and is armed with the powers of a court of record.

In the Commonwealth Constitution the character of the duties which can be exercised by the Commission exclusively (see succeeding chapter), as well as the fact that some of its functions are judicial, accounts for the mode of its constitution. The members of the Commission hold office under the same protection against removal and against diminution of salary as the justices of the federal Courts, but their appointment is for seven years only and not for life (sec. 102). There is nothing in the Constitution, however, to prevent their re-appointment.

NOTE.—In the Session of 1909 an Inter-State Commission Bill was introduced by the Government to the Senate. The Commission was to be constituted of three members with power to entertain complaints of any person in contravention of the commerce provisions of the Constitution or of the Bill. The persons who might be complainants were defined and included States and State authorities. The relief that might be given included damages, injunction, the annulment of improper regulations and the prescription of future action, as by the fixing of rates for services. The Commission was to be a Court of record, with power to enforce its orders. The Bill declared that all rates charged by common carriers should be just and reasonable, and exercised the power under sec. 102 of the Constitution to forbid discrimination and preferences by State railway authorities, and in the case of other persons forbade discriminations and preferences to States, persons, localities or descriptions of traffic. The Commission was also charged with the duty of investigating and diffusing information in respect to a large number of matters affecting trade, including the operation of any Tariff Act. It might also when required by the Government inquire into measures affecting the rivers whether in relation to navigation or irrigation. Finally, the Bill contained provisions in execution of the agreement made between the Federal and States Governments at the Conference held in August, 1909, for enabling States to refer to the Commonwealth the settlement of industrial questions "for the purpose of preventing unfair competition in one State, whereby the establishment or maintenance of fair industrial conditions in another State is hindered." The Bill did not get beyond the Senate, and lapsed when the prorogation was succeeded by the dissolution of Parliament.

CHAPTER VII.

THE STATE RAILWAYS.

THE railways of Australia may be considered from many points of view. Not only are they, in a country of vast distances and few navigable rivers, almost the sole means of internal commerce, but, owned by the State, they are at once sources of public revenue, the principal object on which the State debts have been incurred, and assets on which the credit of the Government in some sort depends. They are also the means whereby the resources of the country, including a great part of the public estate, are developed. We must add to this their importance in relation to defence and the internal police of the country. In these circumstances it is not surprising that we find several provisions in the Constitution concerning them.

Of the legislative powers of the Commonwealth Parliament the following apply in terms to railways.

1. Trade and commerce with other countries and among the States. Sec. 51 (1). This article is the subject of authoritative explanation or commentary under "Finance and Trade," as follows:—Sec. 98. "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

Sec. 102. The Parliament may by any law with respect

to trade or commerce forbid as to railways any preference or discrimination by any State or any authority constituted under a State if such preference or discrimination is undue and unreasonable or unjust to any State, due regard being had to the responsibilities incurred by any State in connection with the construction and maintenance of its railways. But no preference or discrimination shall within the meaning of this section be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

Sec. 104. Nothing in the Constitution shall render unlawful any rate for the carriage of goods upon a railway the property of a State if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

It will be observed that secs. 98 and 102 relate expressly to the trade and commerce power, and therefore are limited to trade and commerce with other countries and among the States, while sec. 104, in so far as it vests power in the Inter-State Commission, is subject to the provisions of sec. 101, which in constituting the Commission limits its functions to the execution and maintenance of the commerce power and the laws made thereunder.

2. The control of railways with respect to transport for the naval and military purposes of the Commonwealth. Sec. 51 (xxxii.).

3. The acquisition with the consent of a State of any railways of the State on terms arranged between the Commonwealth and the State. Sec. 51 (xxxiii.).

4. Railway construction and extension in any State with the consent of that State. Sec. 51 (xxxiv.).

In addition to these express provisions, sec. 92, establish-

ing the freedom of trade, commerce and intercourse among the States, must be kept in mind.

The proper conclusions to be drawn from the enumeration of powers form some of the most difficult problems of construction which the Constitution presents, particularly in the bearing which this enumeration has in relation to other powers in the Constitution which may possibly affect the railways, *e.g.*, the carriage of the mails, defence, conciliation and arbitration. The *State Railway Servants' Case* [1] afforded the occasion for a consideration of some of these problems. In that case the question was whether the Commonwealth Parliament had power to apply the *Commonwealth Conciliation and Arbitration Act* 1904, to disputes arising between a State Government and its railway employés. The High Court held, first, that, in a Constitution presented for acceptance to the whole community, where a particular matter relating to the respective powers of the Commonwealth and States was specifically dealt with, it was proper to infer an intention to invite the attention of the electors to that subject-matter, and the proposed manner of dealing with it; that consequently the maxims of interpretation *expressum facit cessare tacitum* and *expressio unius est exclusio alterius* were applicable in a higher degree than in the construction of ordinary contracts or ordinary Statutes.[2] Hence, the fact that State railways were in various cases the subjects of specific grants of power to the Commonwealth Parliament, was strong reason for thinking that they were not included in the general terms of sec. 51

[1] *The Federated Amalgamated Government Railway and Tramway Service Association* v. *N.S.W. Railway Traffic Employés Association*, (1906) 4 C.L.R. 488.

[2] P. 534. See also p. 519, where Griffith C.J. cites the remark of Jessel M.R. in *Ex parte Stephens*, 3 Ch. Div. 659, 660, calling attention to the well-known rule that "where there is a special affirmative power given which would not be required because there is a general power, it is always read to import the negative, and that nothing else can be done."

(xxxv.):—"Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

Secondly, the Court held that both because the State was a self-determining power not subject to any arbitrary distinction between governmental and non-governmental functions (p. 539), and because at the time of the adoption of the Constitution the railways were owned and worked by the State Governments (p. 539), the railways were instrumentalities of the States. Thirdly, they applied to the present case the principle of *D'Emden* v. *Pedder*,[1] in favour of the immunity of instrumentalities, holding that the authority of the Commonwealth Parliament to interfere with State instrumentalities extends only so far as it is conferred in express words or by necessary implication; that the alleged power was not in the present instance conferred by express words, and that any implication that might otherwise arise was excluded by the counter-implication that it was not intended by the framers of the Constitution to authorize any such interference except for the specific purposes and within the specific limits expressed or necessarily implied from the nature of the special power in question, such as for instance the power to regulate currency, weights and measures, and bankruptcy. The power to make laws with respect to conciliation and arbitration (sec. 51 (xxxv.)) on these principles did not extend to the State Railways (p. 539). The commerce power on the other hand was expressly declared to extend to State railways (sec. 98) but (*a*) it was of course limited to those railways as instruments of inter-State commerce while the Act under consideration was not so limited (p. 546), (*b*) the matter here dealt with—the general conditions of employment—was neither commerce nor such that its

[1](1904) 1 C.L.R. 91.

effect upon commerce was direct, substantial and proximate (p. 545).

From this judgment it may be concluded that the Commonwealth may not embark on railway construction or extension in any State without the consent of the State,[1] whether for defence, the carriage of mails, inter-state commerce or any other purpose. It is clear also that the power of expropriation for national purposes, given generally by Article XXXI., and expressly applied to property of the State, does not apply to State railways. Whatever the purpose of such acquisition, the State railways, or any part of them, can be acquired only with the consent of the States concerned on terms arranged between the Commonwealth and State (XXXIII.)

The inference to be drawn from Article XXXII. is less clear. The High Court gives to "control" a very wide interpretation—it embraces not merely "physical control," but "regulation;"[2] and it may fairly be inferred that in neither sense may it be exercised over State Railways as incident to any particular power of the Commonwealth which does not in terms apply to the State Railways. Thus, it would appear that the Commonwealth could not under its postal power claim to run its own trains upon State Railways, or require that trains should be run at special times, or arbitrarily determine the rates at which postal matter should be carried by the States. But the High Court appears to go further, and to infer from Article XXXII. an intention that no "control," in the enlarged sense of the term, should be exercised over the State Railways even under the commerce power. Here,

[1] In the United States Congress may authorize the construction of inter-State railroads: *California* v. *Central Pacific Railroad Co.*, (1888) 127 U.S. 1; *Luxton* v. *North River Bridge Co.*, (1894) 153 U.S. 525.

[2] *Federated Amalgamated Government Railway and Tramway Service Association* v. *N.S.W. Traffic Employés Association*, (1906) 4 C.L.R. at p. 545.

however, we are dealing with a power which is by sec. 98 expressly made applicable to the State Railways. It is clear that this provision must have some scope, and the High Court itself indicates one matter in which it might operate—"the prohibition for causes affecting inter-State traffic specific persons from being employed in such traffic." It cannot be doubted that the Commonwealth could apply to the State Railways such general power as sec. 92 may leave to it of determining what may or may not be the subjects of inter-state commerce.

The distinction between commerce itself, the control over which is complete, and the instrument or means by which commerce is carried on, control over which is limited to what is reasonably incident to that commerce, has already been referred to. Transportation is commerce; the railway is an instrument of commerce merely, and therefore the subject of the more restricted power. This is not altered by sec. 98. That section is not a substantive grant of power to make laws with respect to railways, even inter-State railways. Its effect is that so far as railways are instruments of foreign or inter-State trade and commerce they shall be within the power of the Commonwealth, notwithstanding that they are the property of the State and are Governmental instrumentalities.

But as instruments of commerce, railways are affected by laws in all sorts of ways. The carrier is required or forbidden to carry classes of goods or persons; he is required to furnish conveniences and facilities for the passenger or trader, including facilities for the forwarding and handling of traffic from or to other lines. The requirements of public safety may demand that a line shall be constructed under supervision, that it shall not be opened for traffic, or a particular species of traffic, unless approved by authority; the same requirements may demand many things in the

way of equipment or in the qualification of the staff. To secure observance of these rules, the carrier may have to submit to inspection of his permanent way, and of his rolling stock. Rates and fares have to be determined, discriminations and preferences to be prohibited or controlled, rates to be apportioned between carriers, pooling arrangements to be supervised in the interest of the public. All these matters, and many others, are the subject of control by legislatures, partly in pursuance of their general duty to provide for the welfare of their subjects, partly as the custodian of public franchises, in conferring which they make bargains with the grantees. There are also cases in which it is the carrier himself who is protected, *e.g.* against boycott or physical interruptions of traffic; sometimes he is the delegate of governmental powers, as where he may make by-laws and regulations, or employ his own police officers. In all these ways, the State railways might conceivably come under the Commonwealth power as instruments of inter-State commerce. All that is here possible is to indicate some considerations which have to be borne in mind, in dealing with any of these various manifestations of power, realizing that different minds will doubtless be disposed to attach different weight to them.

In the case of unitary governments it is generally unnecessary to consider under what power they are acting, though this is sometimes material in the interpretation of Acts of Parliament, and in no case so frequently as that of railway companies, where in dealing with private Acts, the Courts frequently emphasize their contractual nature. But in the case of governments with limited powers, the question may be important. The State railways are not made under the grant of federal franchises, nor is their monopoly enjoyed under federal law, for, as already seen, the Commonwealth cannot authorize railway construction save with

assent of the States. Nor is their right to engage in inter-State commerce, the result of a federal grant; it is enjoyed under the guarantee of sec. 92 of the Constitution, whereby trade commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, are absolutely free. So far then as the regulation of carriers may be founded on the fact that they are in the enjoyment of a franchise or right which springs from the controlling authority, and on the enjoyment of which therefore that authority may impose terms and conditions as the price of the concession, it has no application to the relation of the Commonwealth to the State railways unless sec. 98 can be read as conferring whatever power might belong to this head. On the other hand, it is probable that sec. 92 itself controls the States as managers of railways as well as in the exercise of other functions of government, and that it prevents them from arbitrarily denying the facilities of railway carriage to any person or class of persons engaging in inter-State commerce.

The most important consideration is probably the inferences to be drawn from the express provisions of secs. 102 and 104. The effect of these sections was discussed in the argument in the *State Railway Servants' Case*, but the Court does not in its judgment suggest any view upon them. Sec. 102 is *primâ facie* a grant of power to the Parliament, and as such leads to the inference, first, that without it Parliament would not have had the power granted, and secondly, that save so far as there granted, Parliament has no power over the sort of thing there dealt with. The subject matter is preferences and discriminations on railways, whence it may be inferred that but for sec. 102 the Parliament would have had no power over it, and secondly that it has no power over the subject except to the

extent there indicated.[1] If secs. 51 (1) and 98 do not in themselves give power to deal with preference and discriminations by the States, it is clear that their operation in regard to State Railways is very restricted; and in substance secs. 101-104 would be construed as a statutory definition of the powers given by sec. 98. On the other hand, though sec. 102 confers a power, it does so subject to certain important conditions; and it is quite possible to regard the section as less a grant than a limitation of power, through the enumeration of these conditions. The particular subject is essentially "federal"—a matter with its own history of grievance and wrong, with a political as well as a commercial aspect. It contains in effect the terms of the submission of this much vexed matter to the arbitrament of the Commonwealth. In this view sec. 102 would be less significant in determining the extent of the commerce power over the railways; it would stand by itself as a distinct provision governing a distinct subject-matter selected for special treatment, either by way of exception from the general power given by sec. 98, or as including something not embraced within sec. 98.

Even so considered, it has, however, some importance in its relation to the commerce power. A much disputed matter in the United States is the power of Congress under the commerce power to fix maximum rates of carriage.[2] Sec. 102 does not expressly deal with rates of carriage, but the most common and most obvious matter of discrimination and preference is rates; and sec. 104, which must apparently be taken as a qualification of the powers of the Commission

[1] Cf. *Ex parte Stephens*, 3 Ch. Div. 659, 660, *per Jessel* M.R., cited by *Griffith* C.J. in the *State Railway Servants Case*, 4 C.L.R., at p. 519.

[2] See 20 *Harvard Law Review*, p. 127: "The Power of Congress to prescribe Railway Rates," by Frank W. Hackett, and 18 *Harvard Law Review*, by Victor Morawetz. The question was left open in the *Northern Securities Case*, 193 U.S. at p. 343.

under sec. 102, expressly deals with rates. It seems a proper conclusion that no control may be exercised over State railway rates, except under and subject to the limitations of these two sections. But neither section gives any power to establish rates; the power is supervisory and censorial merely. To prescribe maximum rates is a legislative act, and the powers of the Inter-State Commission are administrative and judicial merely.[1]

[1]The proposal in 1909 to establish the Inter-State Commission, and to clothe it with powers to deal with the matters here mentioned, is referred to in the preceding chapter.

PART X.—CONCLUSION.

CHAPTER I.

TERRITORIAL ALTERATIONS—THE SEAT OF GOVERNMENT.

THE future of the Commonwealth, so far as concerns its organization for purposes of government, may involve either a re-arrangement of territory, or a re-adjustment of powers as between the Commonwealth and the States.

NEW STATES AND TERRITORIES.—The Commonwealth of Australia started on its career in circumstances different from those of the United States or the Dominion of Canada, in that its territory was co-terminous with the territory of the States, and that the partition of the Continent amongst the members of the Union left no part of it outside the federal system. Some of the Colonies, however, were of unwieldy size and possessed a vast unsettled territory, and it has been seen in the History of Federation, that the re-adjustment of territory was mooted from time to time. Thus, with eyes on Western Australia and South Australia, it was suggested that such Colonies should consent to a partition which would place their unsettled and distant territory in the hands of a

central government for the benefit of all Australia. Again, in the Colony of Queensland, separate and conflicting interests were developed, and produced political conditions which were believed to require a division of that Colony into two or three Colonies. The re-adjustment of the boundaries of New South Wales and Victoria so as to include the Riverina in the latter Colony, the erection of a new Riverina Colony, and the claims of aggrieved areas for separation from an unsympathetic capital, were among the political murmurings. In a country as yet so sparsely settled as Australia, it is improbable that the present political divisions are final.

In these circumstances the Constitution naturally contained provision for the surrender of territories to the Commonwealth, the re-adjustment of the boundaries of existing States, and the erection of new States either by union or sub-division of existing States or by establishment out of territories which have been surrendered to the Commonwealth (secs. 111, 121-124). But as it is a fundamental principle of the union that the "territories of the several existing Colonies shall remain intact," it is made clear that no State is to be deprived of its territory for any of these purposes without its consent. Two other matters must be remembered. There were two Colonies—Queensland and Western Australia—whose present acceptance of federation was uncertain, and one—New Zealand—which had for years dissociated itself from the federal movement. It was considered that the doubtful Colonies would be more likely to come in at the outset if they ran the risk of getting less favourable terms by delay. Accordingly the Act, unlike the Constitution of 1891, and despite the protests of New Zealand at the London Conference, distinguishes between Original States and Colonies which may be subsequently admitted (sec. VI.). Finally, it was recognized that

the Commonwealth might, like some of the Colonies, have dependencies; that it might be entrusted by the Crown with the government of dependent communities not included within the territorial limits of Australia, Tasmania or New Zealand.

TERRITORIES. — The possible territorial arrangements involve, in the first place, an increase in the area of the Commonwealth itself. This, it would appear, can only happen as a consequence of the exercise by the Parliament of its power to admit to the Commonwealth new States (sec. 121), as New Zealand (sec. vi.). The Commonwealth may however accept any territory placed under its authority by the Crown, and may make laws for its government (sec. 122). The territory may be governed directly by the Commonwealth exercising all the powers of an unitary government over it; or it may be governed as a dependency with a subordinate government subject to the paramount authority of the Commonwealth; or finally, it may be admitted as a State (sec. 121). Only in the last case, it is submitted, does it become a "part of the Commonwealth" within the meaning of the Constitution.[1] Under the powers of sec. 122, the Parliament has passed an Act "for the acceptance of British New Guinea as a territory under the authority of the Commonwealth, and for the Government thereof"— the *Papua Act* 1905. Preparations were also made for assuming the government of Norfolk Island.

Within the limits of the Commonwealth, the acquisition of territory by the Commonwealth means the elimination of State authority from some part of its area, and the submission of the territory to the exclusive authority of the Commonwealth Parliament. This can be effected by the

[1]See *ante*, p. 75. As to the meaning and status of "territories" in the U.S. Constitution, see 12 *Harvard Law Review*, articles by Prof. Langdell, Mr. Randolph and Prof. Baldwin.

surrender of territory by a State Parliament and acceptance by the Commonwealth under sec. 111. An Act for the acceptance of the Northern Territory in pursuance of an arrangement[1] with South Australia, was passed in the Session of 1909 (No. 23 of 1909).

The long story of the attempts to determine the seat of Government under sec. 125 of the Constitution forms a hardly less important part of the political history of the Commonwealth since 1901 than did the question in the pre-federation days; and the removal of the federal capital from a great city to a purely political settlement to be established in the country is bound for good or for ill to have important consequences. Neither the one matter nor the other, however, can be discussed here, beyond saying that the question of determining a capital is one of that class which does not show Parliamentary institutions at their best, especially when it is thought necessary to release Parliament from the guiding hand of the Ministry. A *Seat of Government Act* 1904 determined that the seat of Government should be within 17 miles of Dalgety, should contain an area of not less than 900 square miles and have access to the sea. This was not acceptable to New South Wales, which complained of the determination as a breach of the spirit of the Constitution in fixing upon a part of the State remote from Sydney. The matter easily became involved in intricacies both political and legal, since neither the powers nor the procedure applicable were very clearly defined in the Constitution. In 1908, the Deakin Government undertook "for the third time" an attempt at settlement, and a Bill was introduced which, accepting the determination of the district in the Act of 1904, proceeded to define the area of the seat of government within the district, with a

[1]The legal position is considered in a memorandum by Mr. R. R. Garran, *Commonwealth P.P.*, 1909, No. 20, p. 36.

view to calling on New South Wales to grant the area so fixed upon.[1] The whole question was reopened, however, by a motion carried in the House of Representatives that an open exhaustive ballot should be taken before the matter was disposed of.[2] Eleven places were nominated, and after the ninth ballot the district of Yass-Canberra was found to be preferred to Dalgety.[3] This decision was accepted by the Fisher Government, which introduced a Bill in similar terms to the Act of 1904 but substituting Yass-Canberra; and for the first time a Bill on the subject was made a Government measure in the sense that all the members of the Government supported it.[4] This Bill became the *Seat of Government Act* 1908. The next step was to determine the site of the capital within the district, and to arrange for its grant by New South Wales; and the Commonwealth Government proceeded to make a topographical investigation for this purpose.[5] This being done, negotiations were opened up with New South Wales, and here the course was made easy by the fact that Yass-Canberra, on account of its nearness to Sydney, was approved by the Government and Parliament of New South Wales. A new Bill, the Seat of Government Acceptance Bill 1909, was introduced, substituting for the vague designation of a district in the Act of 1908, the exact territorial limits of the seat of government, and authorizing the fixing of a day when the territory, having been surrendered by New South Wales, should be accepted by the Commonwealth for the seat of Government. An agreement between the two Governments was scheduled to the Bill, which, besides providing for the surrender, protected

[1] P.D. (1908) p. 268.
[2] *Ib.* p. 675.
[3] *Ib.* pp. 938-9.
[4] *Ib.* pp. 5,225 *et seq.*
P.P. 1909, No. 6.

the sources of the water supply of the area, gave the State's consent to the construction of a railway from the Seat of Government to Jervis Bay, agreed to the surrender to the Commonwealth of two square miles at Jervis Bay, and sanctioned the conduct of electrical power by the Commonwealth to the Seat of Government. The mode of governing the area is of course left to future provision, but the State laws in operation are preserved subject to the paramountcy of federal law, while the State jurisdiction over any State line of railway in the proclaimed area is also preserved. A last attempt to re-open the whole matter failed and the Bill was passed through both Houses. The necessary legislation on the part of New South Wales was enacted in the *Seat of Government Surrender Act* 1909.

The Constitution by sec. 52 declares that "all places acquired by the Commonwealth for public purposes" are like "the seat of government" subject to the exclusive legislative power of the Commonwealth Parliament. According to American authority, such a provision carries exclusive jurisdiction of Courts and executive authorities.[1] As the Commonwealth has power to acquire compulsorily such property as it requires (sec. 51 (xxxi.)), the Commonwealth may to this extent, it would seem, excise territory from State control without State consent; this, indeed, seems to be acknowledged by the term "or otherwise acquired by the Commonwealth" in sec. 122.

In one respect the "territories" of the Commonwealth, whether within or without its limits, are more favourably placed than are "territories" of the United States. In America the territories can not return members to Congress, though they are suffered to send delegates who may lay their views before the Legislature. Sec. 122 of the

[1] See *Rex* v. *Bamford*, (1901) 1 S.R. (N.S.W.) 337, and cases there cited. See also *ante*, p. 289.

Commonwealth Constitution definitely includes in the power to make laws a power to allot representation in either House of the Parliament to the extent and on the terms which Parliament thinks fit.

NEW STATES.—By sec. 121 the Parliament may admit to the Commonwealth or establish new States. "Admit to the Commonwealth" obviously relates to communities without the Commonwealth, over which the Parliament has no power, viz., Colonies such as New Zealand or Fiji. In this class of case the power of admission is of course subject to the agreement of the community admitted, as signified by the authority competent to act therefor. "To establish new States" relates to communities within the Commonwealth, *e.g.*, the territories which it may be determined to raise to the dignity of States (sec. VI. of the Act). It is probable that the Parliament can not convert the seat of government or places acquired for public purposes into a State. The power to convert a territory into a State, or to establish a State in a territory, may be exercised by the Parliament without the concurrence of any other authority.

By sec. 124 the Parliament may form a new State by separation of territory from any State of the Commonwealth, but only with the consent of the Parliament thereof, or may form a new State by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected.

In admitting or establishing new States the Parliament may make and impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit (sec. 121). Except so far as otherwise agreed or determined, upon such admission or establishment, the Constitution will apply to such new State.

ALTERATION OF THE LIMITS OF STATES: FORMATION OF NEW STATES.—It has been seen that the preservation of

the territory of the federating Colonies was a primary condition of the union, and intercolonial suspicion led to this security being sought in very remarkable terms.

Sec. 123 confers power upon the Parliament to increase, diminish or otherwise alter the limits of a State, but requires that for such alteration, as well as for the arrangements incident thereto, the consent shall be obtained not merely of the ordinary authority therein—the Parliament of the State—but of the electors of the State. The result is very curious. The State Parliament may without any consent of electors diminish its territory, for it is expressly authorized by sec. 111 to surrender any part of the State to the Commonwealth. The Commonwealth Parliament may immediately transfer the territory so surrendered to another State, but in order to make the transfer good, the electors as well as the Parliament of the State receiving the accession of territory must assent to the "increase" of "its limits." Again, by sec. 124 a State without any approval of electors may be cut asunder and made into two or more States, or may lose its separate existence altogether by union with another State—in either case no more than the concurrence of the State Parliament and the Commonwealth Parliament is required.

Finally, sec. 128 secures that the safeguards of State territory shall not be removed by an ordinary exercise of the power of amending the Constitution, for in addition to the authority ordinarily required, an alteration of this class must be assented to by the electors of the States concerned.

There were prior to the establishment of the Commonwealth a number of statutes in existence under the authority of which an alteration might be made in the boundaries of the Australian Colonies. Thus, by 5 & 6 Vict. c. 76, sec. 51, the Crown was empowered by Letters Patent to define the limits of New South Wales north of the 26° of south latitude and to establish new Colonies there; by 13 & 14 Vict. c. 59, secs. 30 and 34,

on the petition of New South Wales or Victoria, the Crown in Council may alter their boundaries so as to transfer to one territory of the other; by 18 & 19 Vict. c. 54, sec. 5, it is competent to New South Wales and Victoria by laws passed in concurrence with each other to define in any different manner from that prescribed in the Act the boundary line of the two Colonies along the course of the River Murray; by 24 & 25 Vict. c. 44, secs. 2, 5 and 6, the Governors of contiguous Colonies on the Australian Continent may, with the advice of their Executive Councils, determine or alter the common boundaries of such Colonies, and on the proclamation of the Crown such boundaries so agreed on, shall become the true boundaries of the Colonies; and the Crown is empowered to attach to any other Australian Colony any territory which might have been detached from New South Wales under 5 & 6 Vict. c. 76. By the *Western Australian Constitution Act* 1890, sec. 6, the Crown has power to annex one portion of a Colony to another.

Finally, the *Colonial Boundaries Act* 1890 authorized the Crown to alter the boundaries of any Colony, provided that in the case of a self-governing colony this should not be done except on the petition of the Legislature of the Colony.

In this wealth of enactment there is room for some doubt as to the present position. The *Colonial Boundaries Act* is expressly dealt with by the *Constitution Act*, sec. viii., which declares that the Act shall not apply to any State of the Commonwealth. For the rest, the Crown has exhausted its power under 5 & 6 Vict. c. 76 by the establishment of Queensland and the annexation of territory to Queensland, South Australia and Western Australia. But the provisions of 13 & 14 Vict. c. 59, 18 & 19 Vict. c. 54, the powers of Governors of contiguous colonies under 24 & 25 Vict. c.

44, and the power of the Crown under the *Western Australian Constitution Act* 1890, probably remained unimpaired to the establishment of the Commonwealth. The question is what effect that event had upon them. As already seen, there are numerous provisions in the Constitution itself touching the territorial limits of the States, and in face of such an enactment as that in sec. 123 it is difficult to suppose that the framers of the Constitution contemplated the existence of powers of altering the limits of the State outside the Constitution itself. In other words, creating a special power and creating it subject to restrictions, they intended it to be the sole power over the subject. This view is strengthened by a consideration of the nature of the new union. The territorial limits of the States are no longer the sole concern of the States whose limits are in question. The States are units of territory for many purposes of federal government, and any alteration of their limits not only disturbs electoral and jurisdictional arrangements within the Commonwealth, but might entirely alter the balance of political power in the Commonwealth.

The case is less clear as to the power to determine an uncertain or imperfectly defined boundary under 24 & 25 Vict. c. 44. The Constitution contains no provision for such a case; the distinction between the determination of an existing boundary and the substitution of a new boundary is well recognized,[1] and the same dangers do not belong to it. In 1908, Victoria and South Australia proposed to settle their difference in regard to their common boundary, by action under the Act.

[1] *Virginia* v. *Tennessee*, (1893) 148 U.S. 503.

CHAPTER II.

THE ALTERATION OF THE CONSTITUTION.

THE adjustment of constitutional powers between the Commonwealth and States Governments is most obviously governed by the provisions concerning the alteration of the Constitution (sec. 128).

The spirit of federalism requires that the federal pact shall not be at the mercy of the central government. Therefore in no federal system is the power of constitutional amendment left in the principal organ of that government —the federal legislature—save in the German Empire, where however the predominant Chamber, the Bundesrath, both in its constitution and mode of action, is a perpetual memorial of confederatism and affords ample protection to State rights. There may be in the constitution itself an organization of the state behind the government or "the founders of the polity may have deliberately omitted to provide any means for lawfully changing its basis." A signal instance of the latter course is to be found in the case of the Dominion of Canada, where the fundamental provisions of the *British North America Act* 1867 are alterable only by the Imperial Parliament.

In Australia it was as necessary as elsewhere to establish the federal system upon a basis which should not be disturbed by the legislature. But it was no less an object of

the founders of the Commonwealth to enlarge the power of self-government. The existing colonies had the power of amending their own Constitutions; the Commonwealth must have the power of amending the Commonwealth Constitution. One of the most difficult tasks which the Convention had to perform, was to devise a mode of amending the Constitution which should make that instrument sufficiently rigid to protect the rights of the several States, to secure deliberation before action, and to discourage a "habit of mending" which might become a "habit of tinkering," but which should at the same time leave it flexible enough to recognize that development is as much a law of state life as existence, and to harmonize with the spirit of a people with whom "majority rule" is the first principle of government, and who have grown up under a political system which knows little more of the distinction between constituent and legislative power than the British Constitution itself.

In no other matter was so much careful attention bestowed upon the methods of other Constitutions, and on the lessons to be gained from the experience of the United States and Switzerland. The compromise ultimately adopted is interesting both from what it adopts and from what it rejects of these models.[1]

The opening words of sec. 128, "This Constitution shall not be altered except in the following manner," make it

[1]The American system of amendment is eulogised by Story (*Commentaries on the Constitution*, secs. 1826-1831), and Judge Cooley (*Constitutional Law*, p. 218) speaks of the "simple, easy and peaceful" method of modifying the provisions of the Constitution. On the other hand Professor Burgess (*Political Science and Constitutional Law*, vol. i., pp. 150-154) criticizes the Constitution for its over great rigidity. See also *The Political Science Quarterly*, vol. 20, p. 203, "*The Rigid Constitution*," by Mr. H. B. (now Mr. Justice) Higgins. Mr. Bryce discusses the Amending Power in *The American Commonwealth*, vol. i. c. xxxii. For the Swiss System and its working see Lowell's *Governments and Parties in Continental Europe*, vol. 2.

clear that there is no alternative method of amendment such as might otherwise perhaps have been considered to belong to the Parliament under the *Colonial Laws Validity Act* 1865, and establish the provisions of the section as mandatory and not merely directory.

The principles of Parliamentary government, of democracy, and of federalism which run through the Constitution, are all recognized in sec. 128. The tradition of Parliamentary Government and of ministerial responsibility, leaves the sole initiation of amendments with either House of the Parliament, and neither the States legislatures as in the United States, nor the electors as in Switzerland, have any direct means of setting the machinery to work. The proposed law for the alteration of the Constitution must be passed by an absolute majority of each House of Parliament, a provision common to the Constitution Acts of the several Colonies and distinguishing measures of constitutional amendment in that one respect from ordinary legislation. In providing merely for an absolute majority throughout this clause and in sec. 57, the Constitution avoids the reproach of the "excessively artificial majorities" required for each stage in the amendment of the Constitution of the United States; experience shows that the two-thirds majority in each House of Congress and the concurrence of three-fourths of the States legislatures can rarely be obtained. But not even the concurrence of the two Houses is essential in the Commonwealth. In Switzerland where one Chamber of the Federal Assembly demands a revision of the Constitution and the other will not agree thereto, the question of revision or not is submitted to the electors, and if a majority declares for revision the Chambers of the legislature have to set themselves to the task. In Australia, if one House rejects a proposed amendment passed twice by the other with an interval of three months in the same or

the next session, the Governor-General may submit the amendment to the electors for their approval. The means provided by sec. 128 for dealing with differences between the Houses on amendments of the Constitution are much simpler than those in sec. 57 relating to ordinary legislation. The reason is that ordinary legislation is essentially a Parliamentary function, and the reference to the people is made only as a last resort after the failure of all other means of reconcilement. Constitutional amendment on the other hand is a power enjoyed by the people in the ordinary course, and not merely as the arbiter between the Houses. It was the people of the Colonies who adoped the Constitution—it is the people who should amend it. If they share the power with the Houses of the Parliament it is as predominant partners. Another distinction between secs. 57 and 128 must be noticed. Sec. 57 applies only to measures originating in the House and rejected by the Senate, a fact which, it has been observed, is significant of the parts which they are respectively expected to play in legislation. But the alteration of the federal pact is a matter in which theoretically the House of the States may well move; accordingly the "deadlock" provision of sec. 128 applies to proposed laws originating in either House and rejected by the other.

When a proposed law has passed the two Houses, it has to be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives not less than two nor more than six months after its passage, times fixed to afford sufficient time for the electors to inform themselves of the issue and to prevent undue delay.

It has been seen that the Senate as well as the House is unitary or national in action in matters of constitutional amendment as well as in matters of ordinary legislation.

The federal principle received its recognition as in the Swiss Constitution in the provisions relating to submission to the electors. "If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent." There is to be a national majority and a federal majority—a majority of the electors of the Commonwealth who have recorded their votes, and a majority of the States acting by their electors.

In determining the national majority provision was made for the fact that so long as the electoral qualification was governed by the laws of the States, and even after a federal franchise was established by the Commonwealth Parliament under the saving of sec. 41, the proportion of electors to population in States which had adopted Woman's Suffrage would be about double the proportion in other States. Accordingly it was provided that "until the qualification of the electors of members of the House of Representatives becomes uniform throughout the Commonwealth only one half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails." Since the enactment of a federal franchise, which embraces adult suffrage, this provision is no longer of practical importance.

The section provides that the proposed law for the alteration of the Constitution shall be presented to the Governor-General for the Royal Assent, and it advisedly omits the declaration common to Colonial Constitutions, and embodied in the Constitutions of the States, under which Bills for amending the Constitution are to be reserved for the Royal Assent. In this, it emphasizes the progress of self-government; the power of constitutional amendment is no longer regarded as an extraordinary power, but as an especial

mark of self-government. The making of the Constitution and its interpretation have been seen to be jealously preserved to Australia, and the same policy is apparent in respect to its alteration. *Primâ facie*, the alteration of the Constitution is an Australian matter, and falls within the ordinary practice in respect to such matters. But in law, the case appears to fall within the procedure defined in secs. 58-60 concerning the Royal Assent; the Governor-General *may* reserve, and the Crown may disallow the law.

Sec. 128, so far as we have considered it, provides facilities not to be found in any other Federal Constitution. But this facility has to be paid for by the reservation of matters for which an additional consent is required. By Article V. of the Constitution of the United States "no State, without its consent, shall be deprived of its equal suffrage in the Senate." As in the amendment of the Commonwealth Constitution the States have conceded more to the national principle than have the States in America, the Constitution reserves more matters for the special approval of the electors of the State concerned. It provides that "no alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law."

There is no definition of an "alteration of the Constitution," but it is reasonable to conclude that the term "alteration" was used in preference to the more familiar "amendment" in order to denote the widest power of change including the unlimited power of addition to the instrument. Broadly, the powers of the Commonwealth as

organized behind the Parliament may be compared with the powers of constitutional amendment possessed by the representative Legislatures of other Colonies. All constitutional alteration, like all ordinary legislation, must be "for the Commonwealth," and no alteration of the Constitution may be repugnant to any Imperial Act in operation in the Commonwealth unless expressly or by implication power over such Act has been given by the Imperial Parliament.

One Imperial Act operating in the Commonwealth over which the Commonwealth has no power is the *Commonwealth of Australia Constitution Act* itself from the beginning to the introductory words of sec. ix.—"The Constitution of the Commonwealth shall be as follows:—." Some of these sections are spent, but others remain in force. The Commonwealth is established in virtue of this part of the Act, and it would appear to be dissoluble only by Imperial Act, and so far as the preamble may throw light on the Act it supports this view. The name of the Commonwealth, and the operation of the Constitution and the laws of the Commonwealth throughout the Commonwealth are also fixed. "States" and "Original States" are defined, and in as much as the Act speaks of union in a "Federal Commonwealth" some doubt may be entertained whether anything may be done which destroys the federal character. But the description "Federal Commonwealth" is too vague, it is submitted, to be available as a limitation of power, and indeed the Constitution itself, by sec. 111 and Chapter VI., provides means whereby the dual system may be virtually extinguished by dealings between the Parliament and all the States without any resort to the provisions of sec. 128.

No part of "The Constitution" is withdrawn from the power of the Commonwealth. Indeed, there is no doubt that the whole Constitution could be repealed under sec. 128,

and that without any provision being made to substitute anything for it. Some years ago the Home Rule proposals of Mr. Gladstone gave great interest to the effect of surrenders of power by a sovereign body.[1] It seems an irresistible conclusion that, as Professor Dicey (*Law of the Constitution*, 5th ed., p. 65), says—"The impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit either logically or in matter of fact, the abdication of sovereignty."

The special provision protecting the representation and the territory of the States presents some difficulties—might not the clause itself be repealed by the ordinary process of constitutional alteration, thus leaving the road open for a further alteration diminishing the representation or the territory? To prevent such a course, from which—if we might adopt the principles applicable to the Articles of Companies and other Associations—the character of the Constitution as a compact would not protect it, are added the words "or in any other manner affecting the provisions of the Constitution relating thereto" the effect of which appears to be to put the clause itself under the protection which is afforded by requiring the assent of the electors of all the States affected.

It is to be observed that the last clause of sec. 128 relates only to alterations of the Constitution. It is obvious that the "proportionate representation" of States in one sense of the term will be affected by the operation of the Constitution itself. Thus, every admission of a new State with representatives in the Parliament, diminishes the proportion of the whole number of members returned by any particular State to Senate and House. Again, the natural increase of population will serve to increase the representation of some

[1] See articles by Sir William Anson and Professor Dicey in the *Law Quarterly Review*, vol. 2, and the speeches of Sir Henry James and Mr. James Bryce, *Hansard's Debates*, vol. 305.

States in the House and diminish that of others, so that the "proportionate representation" of a State, whether we regard that term as describing a relation to the whole number or a relation to the other States, will be affected. But such a result is in accordance with the Constitution, and it is only the mode by which this adjustment is effected (sec. 24) which is protected by the last clause of sec. 128.

Similar observations apply to the provisions concerning the limits of States. We have seen that the Constitution confers several powers of affecting the States' limits. These require the assent or the action of the State Parliament, and in one case the electors of the State (sec. 123), and there was some apprehension that the integrity of States territory might be invaded by an alteration of the Constitution repealing the requirement of the consent of the State. Accordingly it is provided that any such alteration of the Constitution is valid only with the consent of the State to be affected.

In accordance with its power to prescribe the manner in which the vote of the electors is to be taken (sec. 128). Parliament passed the *Referendum (Constitution Alteration) Act* 1906.[1] The proposed law is submitted under a writ issued by the Governor-General addressed to the Chief Electoral Officer for the Commonwealth and the Commonwealth Electoral Officers for the several States. To the writ is to be attached a copy of the proposed law, or a statement setting out (*a*) the text of the proposed law; (*b*) the text of the particular provisions (if any) of the Constitution proposed to be textually altered by the proposed law, and the textual alterations proposed to be made therein (sec. 6). Otherwise, the law governing the referendum is an adaptation of the law of Parliamentary elections. The

[1] No. 11 of 1906. An Act was passed in 1909 making some amendments in detail to bring the scheme into accord with changes made by the *Commonwealth Electoral Act* 1909.

interest of the States in the matter is recognized by the power of the Governor of a State to appoint a scrutineer at each place within the State where a scrutiny is conducted (sec. 18), and by his power to request a re-count (sec. 23), and by the provision that a copy of the return for any State shall be sent to the Governor of the State (sec. 26). The validity of any referendum, or of any return or statement, may be disputed by the Commonwealth or any State on petition to the High Court (sec. 27), which shall hear and determine the petition (sec. 29). But no referendum and no return or statement shall be avoided on account of any delay in relation to the taking of the votes of the electors, or in relation to the making of any statement or return or on account of the absence or error of any officer which is not proved to have affected the result of the referendum (sec. 33).

The alteration of the Constitution in 1906 in relation to the election of Senators (Constitution Alteration (Senate Elections) 1906) has been referred to.[1]

At the Conference of Ministers of the Commonwealth and the States held in Melbourne in August 1909, as has been seen in the consideration of the Financial Relations, agreements were arrived at for important alterations of the provisions of the Constitution in Finance. These agreements were embodied in two Bills or "proposed laws," one "To alter the provisions of the Constitution relating to the Public Debts of the States" by omitting from sec. 105 the words which limit the power of the Commonwealth to take over State debts to those debts "as existing at the establishment of the Commonwealth"; the other "To alter the provisions of the Constitution relating to Finance" in the manner described in a preceding chapter.[2] These proposed alterations will be submitted to the electors at the general election of 1910.

[1] *Ante*, p. 113.

[2] Part IX., Cap. III.

CHAPTER III.

CONCLUSION.

THE Constitution of the Commonwealth of Australia contains few evidences of that experimentalism for which the politics of the Colonies have become famous. Far from disdaining precedent, the founders of the Constitution availed themselves to the full of the opportunities offered by modern literature for a comparison of existing Constitutions, and the Constitution throughout bears the impress of this study. The absence of any obvious cause imperatively calling for immediate union, such as has in every other instance of federal union determined action, allowed her a singular freedom of choice in working from her models.

The natural model for the union of a group of British Colonies would have been the Dominion of Canada, whose Constitution, in its preamble, recites the desire of the Provinces to be united into one Dominion "with a Constitution similar in principle to that of the United Kingdom." But the form of Canadian union was determined by special circumstances both internal and external, very different from any which existed in regard to Australia. In the first place the fundamental character of the Dominion—the possession of the residuary power by the Dominion Legislature and the subordination of the Provinces to the

Dominion Government—was the natural outcome of the existing consolidation of the Provinces of Upper and Lower Canada. Just in the same way if the policy of "Home Rule all round" were applied in the United Kingdom, we should expect to find residuary power and some controlling power in the Imperial Parliament and the Imperial Government. In the second place, it must be remembered that the years 1864-1867, during which the Canadian Constitution was taking shape, were years full of lessons from the neighboring union. The War of Secession had discredited the principles of disintegration upon which the Constitution of the United States was based, and the victorious States of the North were engaged in re-establishing their Constitution upon a basis which greatly increased the central power, and might indeed, but for the restrictive interpretation of the Supreme Court, have given to Congress a general controlling power over the States.

The history of the Constitution in the Courts since the establishment of the High Court of Australia in 1903 has served to emphasize the importance of the United States Constitution in everything that pertains to the federal nature of the Constitution. In affirming the doctrine of the immunity of instrumentalities, the High Court insisted on the regard that must be paid to a model which was notoriously before the minds of the framers of the Constitution, a model which embraced not merely the text of the American Constitution, but also the construction which it had received in the Courts.[1] Less explicitly, but no less completely in substance, the Court has accepted the American guide in its construction of the power of the Commonwealth Parliament to devise the means for the execution of

[1]See *ante*, pp. 422 *et seq.* *D'Emden* v. *Pedder*, 1 C.L.R. 91, 112; *Municipal Council of Sydney* v. *Commonwealth*, 1 C.L.R. 208, 237, 240; *Baxter* v. *Commissioner of Taxation*, 4 C.L.R. 1087.

its powers,[1] in insisting on the regard to be paid to the reserved powers of the States,[2] and in interpreting the freedom of inter-State trade.[3] It is unnecessary to press further the existence of a debt which is recognized in every constitutional case which has come before the High Court. When we pass from the federal relation to consider matters which touch the organization of the Federal Government itself, as in the distribution of powers between the legislative, executive, and judicial organs of government, the American model is less controlling. The Constitution itself recognizes Cabinet government, which contradicts the complete separation of Executive and Legislature which exists in the United States, and this has, no doubt, influenced a departure from American decisions here;[4] while in regard to the judicial power of the Commonwealth there are so many differences, both in form and substance, that peculiar care has to be shown in the application of American authorities.[5] But even where the Australian Constitution departs most from the American, that departure has generally been conscious and advised, as an appreciation of the results of American experience, so that in interpretation we must not ignore but adapt. The Australian task, as compared with the American, has thus been a light one, and the result, it must be confessed, detracts somewhat from the interest with which the student of government would have regarded a more free development of national growth.

If the federation of Australia is the federation of the United States, and not that of Canada, the Parliamentary Government which England has given to her Colonies and to Europe is firmly rooted in the Constitution. That Cabinet

[1] *Ante*, pp. 277, 279.
[2] *Ante*, pp. 369 *et seq.*
[3] *Fox* v. *Robbins*, (1909) 8 C.L.R. 115.
[4] Cf. *ante*, p. 98.
[5] *Ante*, pp. 313-4.

Government prevents singular difficulties as applied to the federal system is obvious, and at the Convention of 1891 there were grave doubts whether it could be a durable institution even in the several colonies. But between 1891 and the sitting of the final Convention, a great change came over the politics of Australia and New Zealand. Long tenure of office and stability of government had superseded the kaleidoscopic movements of a few years before; and there was no more notable feature in which the Convention of 1897-8 differed from the Convention of 1891 than in its unquestioning acceptance of the Cabinet system. Since the establishment of the Commonwealth, Australia has again become familiar, in the Commonwealth Government as in most of the States Governments, with instability. To consider the causes of this is to probe deep into the political and social conditions of Australia; to suggest a remedy demands something of prophetic foresight, and neither can be attempted here. When a Chamber has a general confidence in a Ministry, but objects to a particular measure, or insists upon the acceptance of some measure to which the Ministry objects, a way may be found, and in practice not infrequently is, by an increase in the number of "open questions." But experience shows that "open questions" mean a disorganized and ultimately a demoralized Chamber, the abdication of leadership means a loss of followers, and the road is open to intrigues which will soon displace the holders of office. If the Ministry resorts to dissolution, it is without a policy upon which it can claim the support of the people. "Open questions" of course offer no remedy when the Ministry is without the general confidence of the House, which may mean nothing more than that a temporary combination has been successfully engineered to "boost those chaps." Elective Ministries, unless associated with a fixed tenure of office, to which there are obvious objections and

which legislative chambers are very unlikely to concede, do not appear to solve any difficulties, while they clearly raise some new ones.

One other fact may be noted. It is often charged against Party Government that it deliberately excludes from office a large part of the ability of the House. Probably there is but a superficial truth in this. It may be doubted whether any other system would secure better talent for office, and the charge itself overlooks the fact that the Opposition is the complement to the Ministry in the system, and must be efficiently manned. But in a federal system, a Prime Minister is necessarily affected in his distribution of offices by the importance of recognizing the claims of States to representation and by the jealousy of any undue preponderance of a particular State. This consideration has had less weight in Australia than might have been expected, but it has had some weight, and has been a source of some weakness to Ministries, both from within and without. This personal weakness is aggravated when a Ministry is formed exclusively from a party which is in a minority in the House, or when a Ministry is formed by a fusion of various groups whose claims have to be weighed against each other. From these causes the Commonwealth Ministries have suffered from the exclusion of some of the ablest of their supporters, whose counsel in Cabinet would have added to their collective wisdom and whose voice in debate would have been an accession of strength. As it is, Ministries have been and are, frequently the objects of criticism from the quarter from which criticism is always most effective.

One cause of instability, the advent of the Labour Party as a "third party," has passed away, and with it the strategic advantage of that position. The Labour Party, whether in office or in opposition, is almost the only factor

in Australian political life which recalls some of the conditions upon which Party Government depends—permanence, organization, discipline, and a common aim. In the importance of the Party Caucus as compared with the Parliamentary representatives in determining policy, the Australian Labour Party presents features which contrast sharply with the relations of Parliamentary leaders in England to Party organizations there. On the other hand the responsibility of office will tend to diminish the dependence of the Parliamentary representatives on the Caucus. But it is probably safe to say that if the Australian Labour Party re-invigorates the Party system in Australia it will also tend to modify that system.

The federalism of Australia is the federalism of the United States; her democracy is her own; and the prevalence of the democratic principle is unopposed by anything except the necessity for making a compromise with the principle of State right.

The American Constitution was born in distrust. To possess power was to abuse it; therefore in devising the organs of government the first object was less to secure their co-operation than to ensure that each might be a check upon the natural tendencies of the other. Large States, where the central power was far off, were more dangerous to liberty than small States, where popular control was more readily exerted, therefore central power was to be no greater than was absolutely necessary for security against external attack and internal dissension. And the maxim "trust in the people" carried the Fathers of the Constitution but a little way on the democratic road. Direct participation by the people in the ordinary functions of central government seemed equally impracticable and mischievous. The people could at most be choosers, and even here they were to act at second-hand. There was to be a

college of electors who should exercise a free judgment in the choice of a President, the Senators were to be chosen by the legislatures of the States. Thus the most important offices in the union were to be filled without the pressure of popular clamour. The Constitution was accepted not by direct vote, but by State Conventions, and amendments were to be approved either by the States Legislatures or by States Conventions.

The Constitution of the Commonwealth of Australia bears every mark of confidence in the capacity of the people to undertake every function of government. In the constitution of the Parliament, in the relation of the Houses, and in the amendment of the Constitution, the people play a direct part. There are no intermediaries in the formation of the Senate; the electors are the arbiters between the Houses; there are no Conventions of select men to approve alterations of the Constitution. The system governing the qualifications of members and electors is dictated by a desire to rest those qualifications upon the widest possible basis.

The attempt to combine the federal and the democratic principles in the constitution of the Senate will probably be found to add one more to the failures to solve the problem of the "Second Chamber." In the contests which preceded the adoption of the Constitution, the Senate was denounced as anti-democratic in the inequality of the individual which was involved in the equality of States. It was justified in the necessity for representing the States "as such," to present a security for State rights and interests against the zeal of party majorities. But the Senate has entirely failed to represent the States as organized political communities, it represents them merely as electoral districts. It is doubtful, however, whether any constitution of the Senate as a legislative chamber would have enabled it to perform exactly these delicate functions which were involved in the

representation of the States during the years of transition in which the Commonwealth was taking over functions from the States Governments, and in which there were complicated relations to be adjusted. These functions were essentially those of the deliberative council rather than of the popular assembly, and it is not amiss to remember that this was the original view of the Senate in the United States, and remains the characteristic of the Bundesrath in Germany. Moreover, the main problems were essentially problems of finance, in which a Second Chamber is traditionally restricted wherever Cabinet Government exists. It is not surprising, then, that the exigencies of the situation forced frequent conferences between the States Governments and between the Commonwealth and the States Governments, and that the Inter-state Conference, in one form or another—for the mode of its constitution has been very varied—has passed from an event to an institution, which through its appointment of an "executive officer" simulates the organization of a permanent body. The Conference has indeed been denounced as "unconstitutional," but that at some stage has been the condition of most things in our evolutionary government. In the future it may be pointed to as evidence of the political capacity of our people to produce even out of a "rigid" Constitution the conventional institutions demanded by practical needs.

In one notable matter the Australian Constitution differs markedly from that of the United States. In America the checks and balances devised by the Fathers of the Constitution, were deemed an insufficient restraint of power and were immediately supplemented by a comprehensive Bill of Rights, which placed the liberties of the citizen under the protection of the Constitution and secured them against any attack by the Federal Government. More remarkable still, in a federal constitution, there were a few provisions

protecting the rights of the citizens of the States against their own State Government. It need hardly be said that this spirit of distrust has grown; that the States Constitutions put many and varied rights of the citizen beyond the reach of the legislature, and that the amendments of the Federal Constitution which followed the War of Secession afford further security to individual right. From the Australian Constitution such guarantees of individual right are conspicuously absent. When the Constitution left the Adelaide Convention it provided that no State should make any law prohibiting the free exercise of any religion (sec. 109—Adelaide Draft) and that a State should not deny to any person within its jurisdiction the equal protection of its laws (sec. 40). These provisions however disappeared and with hardly an exception all restraints imposed by the Constitution upon Commonwealth Parliament or State may be referred to federal needs.

Sec. 116, forbidding the Commonwealth Parliament to make laws touching religion, is an exception and a singular one, which finds a hardly sufficient explanation in the fears excited by the words in the preamble "humbly relying on the blessing of Almighty God." Again, sec. 123 departs from the customary policy of treating the Parliament of a State as possessing all the powers of the State, by requiring that alterations of the limits of a State shall be approved by the electors thereof. Sec. 51 (1) has received from the majority of the High Court, an interpretation which prevents discrimination, not merely as between States but as between localities in the same State.[1]

When it was found in the Convention that the section prescribing uniformity of Commonwealth taxation might be read to protect individuals or classes against discrimination care was taken to substitute words of geographical descrip-

[1] *The King* v. *Barger*, (1908) 6 C.L.R. 41. See *ante*, p. 517.

tion. The great underlying principle is that the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power.

Passing from the organization of government to the distribution of functions, we find that in the number and character of the matters assigned to the Federal Parliament the Australian Constitution follows the Dominion of Canada rather than the United States. The fathers of the American Constitution, Mr. Bryce says, "had no wish to produce uniformity amongst the States in government or institutions and little care to protect the citizens against abuses of State power. Their chief aim was to secure the National Government against encroachments on the part of the States and to prevent causes of quarrel both between the central and State authorities and between the several States."[1] But in the 19th century distance was constantly shrinking, and divergence of laws and institutions in two great countries whose inhabitants have perpetual intercourse is to-day vastly more inconvenient than the divergences of custom in neighboring localities a few centuries ago. The century saw the growth of a whole body of law for the settlement of the conflict of laws and jurisdictions, but it is obviously simpler and more convenient to go to the root of the matter and establish an uniform law under a central government. Hence the great national states which the political movements of the century called into existence made "the law" to a great extent a national law. In Germany, there is a high degree of legal centralization; the legislative power of the Empire extends over the whole domain of ordinary civil and criminal law, and this power has recently given an uniform code of laws for the empire. Canada was quite alive to the defects of the United States system in respect to the criminal and private law, and accordingly vested in

[1] Bryce, *American Commonwealth*, vol. i., p. 423.

the Dominion Parliament power over criminal law and procedure, over the laws of marriage and divorce and over a large part of commercial law.

Neither Canada nor Australia has adopted the legal centralization of Germany, save in the provision of a supreme appellate tribunal. But it is just in the sphere of the ordinary civil and criminal law that uniformity throughout Australia would be most desirable, and where there are few differences which require special local treatment. The subject seems eminently one for the central authority. There would, indeed, be some difficulty in expressing the grant in terms which would be readily interpreted by English lawyers. The German is familiar with the scope and limitations of "bürgerliches Recht" and "Strafrecht," the Frenchman, with "droit civil" and "droit penal." "Civil law" suggests the "peculiar law" of "peculiar Courts and jurisdictions," though Mr. Jenks has recently done something to give it a new currency by his *Digest of English Civil Law*. But everything that belongs to the recognition of a formal distinction between private law and public law is foreign to the English lawyer in spite of the terms of the Act of Union with Scotland. Still, Canada does not seem to have found especial difficulty in assigning definite limits to the "criminal law" (*British North America Act* (1867, sec. 91 (27)); and a way may be found for completing that uniformity of the ordinary law of man and man which the prevalence of the common law secures in general throughout Australia. Subject, as are most rules in the art of government, to many exceptions, it may be said that where the law operates directly upon the conduct of the citizen and is enforced solely or mainly through proceedings in the Courts, it may most fitly be dealt with by a central Legislature. Where, on the other hand, the matter is one in which *administration* is the predominant activity of gov-

ernment, there must be some power of adaptation to local conditions. Australia possesses much political talent, both political and official, but it is hardly capable of administering efficiently for a whole Continent, or of laying down the varying conditions of that administration through all the parts of Australia. In a federal system of government those matters in which the administrative predominates over the legislative element find their appropriate place in the State or Provincial Government.

Mr. Bryce has pointed out that local self-government and federalism are distinct, and that it is perfectly possible to have a very high degree of centralization in a federal community.[1] Australia is a signal illustration of this truth. Notwithstanding the extensive powers of the Commonwealth Government, the States are capable of exercising most of the powers of sovereignty, and these extensive powers are exercisable over vast areas inhabited in some cases by over a million of people, and capable in all cases of sustaining a population vastly greater. As Mr. Bryce observes, the sort of local interest which local self-government evokes, and the sort of control which a township can exercise is quite a different thing from the interest men feel in the affairs of a large body like a State and the control exercisable over the affairs of a community with a million of people. In the Colonies of Australia such local government as there was, was established by the central authority and existed as a highly artificial and not very robust product. In addition to undertaking many of the functions which elsewhere belong to local governments, the central government also concerned itself with works which in other lands fall to private hands. Thus there existed all the conditions of a highly centralized government, and the mere transfer of some of the functions of the several States

[1] Bryce, *American Commonwealth*, vol. i., p. 466.

to a single authority is, of course, not a step towards decentralization. For some time the States of Australia must be classed with centralized governments.

One undoubted difficulty which faced the advocates for federation was the fact that it was not possible to appeal to the classes who ordinarily take the most continuous and active interest in Australian politics, by any direct prospect of progressive measures of social and industrial reform from a Federal Government, and the inclusion of "invalid and old-age pensions," and "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State," did not at the time assume at all the importance which these matters have since attained in Commonwealth politics. The fact that the States retain the powers upon which experimental legislation is generally based, while the constitution of the States Governments is less favourable than that of the Commonwealth Government to undertaking experiments, has led to the exercise of some ingenuity in applying "extensive interpretation" to Commonwealth powers, and a reliance on "incidental" powers which a number of adverse decisions in the High Court have probably now discouraged. In two matters of importance the arrangements of the Constitution have disclosed defects. The policy of the "new protection" demands that some security should be provided by law that the workers in protected industries shall share directly in the "benefits" or the "spoils" of fiscal policy—that protection should be conditional on the observance of approved labour conditions. The attempt to establish this by means of remissible excises, and its failure have been considered.[1] The other defect is the consequence of the establishment of Inter-State free trade, which renders State industrial legislation hazardous by reason of the

[1] *Ante*, pp. 511 *et seq.*

opening of the markets to goods produced in other States under less onerous conditions. The agreement between the Commonwealth and the States Governments in August, 1909, is intended to cover both defects.[1] It affirms the importance of each State establishing tribunals for regulating the conditions of labour uniform as far as practicable in jurisdiction and powers. This, in the main, is a call to the State of Tasmania to make some provision of the kind which is already made in the other States. It then proceeds to devise a scheme whereby, when conditions existing in one State lead to a competition which is unfair, the matter should be adjusted by Commonwealth authority; and provides that "when the Court of a State determines on the complaint of an industrial tribunal that (*a*) injury is caused to an industry carried on within that State; (*b*) such injury is caused by competition of persons engaged in the same industry in another adjoining State or States; (*c*) such injury is caused solely by the conditions of labour under which employés in the competing industry work; (*d*) such conditions, whilst making allowances for local circumstances, are unfair to the complaining State; (*e*) the industrial tribunals of the States concerned have failed, either jointly or by separate action, to alter the conditions of labour which caused such injury: such Court may order that the conditions which are the cause of the unfair competition shall be referred to a Commonwealth tribunal for adjustment." To give effect to this agreement, the States Parliaments are to avail themselves of the power inferentially conferred upon them by sec. 51 (xxxvii.) to refer matters to the Commonwealth Parliament, and as already stated, the Inter-State Commission Bill introduced in the latter part of the session of 1909 gave power to the Commission to determine the matter referred to it (clause 43).

[1] *Commonwealth Parliamentary Papers*, 1909, No. 50.

The Bill was, however, amongst the measures abandoned by the close of the session. The operation of the scheme, should it be enacted, depends, of course, upon the State Parliaments passing the necessary Acts of reference, and in some of the States Parliaments, Bills for the purpose were introduced before the close of 1909.

This incident suggests a possible function of the Inter-State Conference in the future. Sec. 51 (xxxvii.) provides a means whereby the Commonwealth powers may be augmented without any alteration of the Constitution, and the Conference is a natural and proper body for determining upon common action in the exercise of the power of reference in cases which experience has proved to be suitable for control by the Commonwealth. Whether the power will be extensively availed of will depend principally upon the establishment and maintenance of a good understanding between the Commonwealth and State authorities.

It is the experience of federal government in the United States, in Germany and in Switzerland, that the national government tends to grow in power as compared with the State governments. In the United States, the development has been by way of judicial construction, rather than by formal amendment, a construction given under a deep responsibility which came from the knowledge that the decisions of the Court were, in face of the difficulty of amending the Constitution, for all practical purposes final. Combining, in Marshall's phrase, the lawyer's rigour with the statesman's breadth of view, the Supreme Court for more than a century has had to reconcile the needs of national strength with the claims of provincial autonomy and of individual right. For long the steady course of judicial interpretation not only satisfied the American spirit, but shared the veneration which belonged to the Constitution itself. There are indications that this satisfaction is

passing away before the needs created by the expansion of the scale of business operations, which have no regard to artificial State boundaries, and yet may not be "commerce among the several States." In America, too, as elsewhere, the citadel of natural rights has been stormed, and the securities demanded by the citizen of the eighteenth century, against the impairment of his liberties are likely to be more and more regarded in the twentieth century as hindrances to social welfare. In these circumstances, the difficulty of altering the Constitution gives cause for anxiety, and not least to those who fear that the demand for a new interpretation may lead the Courts to interpret opinion rather than law.

In Australia, judicial construction has been important mainly as guarding the federal pact against invasion, whether by Commonwealth or State. It may probably be assumed that the principles of the immunity of instrumentalities, and of the consideration which attaches to the reserved powers of the States in determining the extent of federal powers, are finally established. But the dissentient Justices (Isaacs and Higgins JJ.) have intimated from the Bench[1] that, sitting in the Full Court, they consider the latter principle as open to re-consideration at any time. It is, therefore, possible that a change in the constitution of the Bench might lead to revolutionary changes in the interpretation of the law, which would give an impulse to federal action exceeding anything which has been seen in the United States. The High Court has not declared itself to be bound by its own decisions, and has, guardedly indeed, admitted that there may be cases in which the Court ought to review a previous decision. The passage

[1] During the argument in *Huddart Parker* v. *Moorhead*, (1909) 15 A.L.R. 241. The observations referred to are not reported.

from the judgment of the Chief Justice[1] is especially worthy of note, because the opinion was delivered before the indication of the sharp differences of opinion disclosed in *The King* v. *Barger*:[2] "There must be some finality in the decisions of this Court, especially on constitutional questions, unless the decision in any particular case is to depend upon the accidental constitution of the Bench in that case. There may be cases in which the Court ought to review a previous decision, but a mere change in the constitution of the Bench ought not to be regarded as a sufficient reason for doing so. The danger of such a doctrine has been the subject of much comment in the United States. In the present case, the only reason which we can admit for reviewing the previous decision of this Court is the fact that the Judicial Committee in the case of *Webb* v. *Outtrim* disagreed with it."

[1] *Baxter* v. *Commissioners of Taxation* (*N.S.W.*), (1907) 4 C.L.R., at p. 1,120.

[2] 6 C.L.R. 41.

APPENDIX.

A.

(1)

Commonwealth of Australia Constitution Act.

63 & 64 VICT. CHAPTER 12. A.D. 1900.

An Act to constitute the Commonwealth of Australia.

[*9th July*, 1900.]

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established: And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

I. This Act may be cited as the Commonwealth of Australia Constitution Act.

Act to extend to the Queen's successors.

II. The provisions of this Act referring to the Queen shall extend to Her Majesty's Heirs and Successors in the Sovereignty of the United Kingdom.

Proclamation o Commonwealth

III. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after the Proclamation, appoint a Governor-General for the Commonwealth (76).

Commencement of Act.

IV. The Commonwealth shall be established (76), and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several Colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

Operation of the Constitution and laws.

V. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth (67) (212) (242), notwithstanding anything in the laws of any State (407); and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth (74) (80) (261) (281).

Definitions.

VI. "The Commonwealth" (73) shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or Territories as may be admitted into or established by the Com-

monwealth as States ; and each of such parts of the Commonwealth shall be called "a State."

"Original States" shall mean such States as are parts of the Commonwealth at its establishment.

VII. The Federal Council of Australasia Act, 1885, (76) is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth. Repeal of Federal Council Act. 48 & 49 Vict. c. 60.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any Colony not being a State by the Parliament thereof.

VIII. After the passing of this Act the Colonial Boundaries Act, 1895, (76) shall not apply to any Colony which becomes a State of the Commonwealth ; but the Commonwealth shall be taken to be a self-governing Colony for the purposes of that Act (595). Application of Colonial Boundaries Act. 58 & 59 Vict. c. 34.

IX. The Constitution (77) of the Commonwealth shall be as follows :— Constitution.

THE CONSTITUTION.

This Constitution is divided as follows :

Chapter I.—The Parliament :
Part I.—General :
Part II.—The Senate :
Part III.—The House of Representatives :
Part IV.—Both Houses of the Parliament :
Part V.—Powers of the Parliament :
Chapter II.—The Executive Government :
Chapter III.—The Judicature :
Chapter IV.—Finance and Trade :
Chapter V.—The States :
Chapter VI.—New States :
Chapter VII.—Miscellaneous :
Chapter VIII.—Alteration of the Constitution.
The Schedule.

CHAPTER I.

THE PARLIAMENT.

PART I.—GENERAL.

Legislative power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament (105), which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called "The Parliament," or "The Parliament of the Commonwealth."

Governor-General.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him (86) (107) (159 *et seq.*) (299) (346).

Salary of Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue Fund of the Commonwealth, for the salary of the Governor-General, an annual sum which, until the Parliament otherwise provides, shall be Ten Thousand Pounds.

The salary of a Governor-General shall not be altered during his continuance in office (160) (526).

Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth (70) (160).

Sessions of Parliament.
Prorogation and dissolution.

5. The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs. Summoning Parliament.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth. First session.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session. Yearly session of Parliament.

PART II.—THE SENATE.

7. The Senate shall be composed of senators for each State, directly chosen by the people (113) of the State, voting, until the Parliament otherwise provides, as one electorate. The Senate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators (111).

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives ; but in the choosing of senators each elector shall vote only once (113) (124). Qualification of electors.

Method of election of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform (115) for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Application of State Laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State (116).

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution (116) (404) (439).

Rotation of senators.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first

three years

C.A 1906, sec. 2. class shall become vacant at the expiration of ~~*the third year*~~, and the places of those of the second class at the expiration

six years

C.A. 1906, sec. 2. of ~~*the sixth year*~~, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

The election to fill vacant places shall be made ~~*in the*~~ within one year before ~~*year at the expiration of which*~~ the places are to become vacant. C.A. 1906, sec. 2

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of ~~*January*~~ July following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of ~~*January*~~ July preceding the day of his election (113). C.A. 1906, sec. 2.

C.A. 1906, sec. 2.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation (113). Further provision for rotation.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens (114) (156). Casual vacancies.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

Qualifications of senator.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives (113) (127).

Election of President.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General (116).

Absence of President.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Resignation of senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant (116).

Vacancy by absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be notified.

21 Whenever a vacancy happens in the Senate, the President, or if there is no President, or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened (114).

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers (112).

23. Questions arising in the Senate shall be determined by a majority of votes (112), and each senator shall have one vote. The President shall in all cases be entitled to a vote; and when the votes are equal the question shall pass in the negative (116). Voting in Senate.

PART III.—THE HOUSE OF REPRESENTATIVES.

PART III. HOUSE OF REPRESENTATIVES.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth (117), and the number of such members shall be, as nearly as practicable, twice the number of the senators. Constitution of House of Representatives.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

i. A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:

ii. The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State (118).

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted (118). Provision as to races disqualified from voting.

Representatives in first Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows (119):—

New South Wales	...	...	twenty-three;
Victoria ...	...	...	twenty;
Queensland ...	...	...	eight;
South Australia	...	...	six;
Tasmania ...	...	...	five;

Provided that if Western Australia is an Original State, the numbers shall be as follows:—

New South Wales	...	...	twenty-six;
Victoria ...	...	...	twenty-three;
Queensland ...	...	...	nine;
South Australia	...	...	seven;
Western Australia	...	...	five;
Tasmania ...	...	...	five.

Alteration of number of members.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives (120).

Duration of House of Representatives.

28. Every House of Representatives shall continue for three years (122) from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Electoral divisions.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

In the absence of other provision, each State shall be one electorate (120).

Qualification of electors.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once (124).

Application of State laws.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Writs for general election.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

Writs for vacancies.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-General in Council may issue the writ.

Qualifications of members.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

i. He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

II. He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a Colony which has become or becomes a State, or of the Commonwealth, or of a State (127).

Election of Speaker.

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker.

The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General (123).

Absence of Speaker.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Resignation of member.

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant (123).

Vacancy by absence.

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House (123).

Quorum.

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers (122).

Voting in House of Representatives.

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote (124).

Part IV.—Both Houses of the Parliament.

Right of electors of States.

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth (124) (126).

Oath or affirmation of allegiance.

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the form set forth in the Schedule to this Constitution.

Member of one House ineligible for other.

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House (127).

Disqualification.

44. Any person who—

I. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power : or

II. Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer : or

III. Is an undischarged bankrupt or insolvent : or

IV. Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth : or

V. Has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a member and in com-

mon with the other members of an incorporated company consisting of more than twenty-five persons :

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section IV. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half-pay, or a pension by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth (116) (128) (168).

Vacancy on happening of disqualification.

45. If a senator or member of the House of Representatives—

I. Becomes subject to any of the disabilities mentioned in the last preceding section : or

II. Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors : or

III. Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State :

his place shall thereupon become vacant (116) (128).

Penalty for sitting when disqualified.

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of One hundred pounds to any person who sues for it in any court of competent jurisdiction (128).

Disputed elections.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in

either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises (136) (316).

Allowance to members.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of Four hundred pounds a year, to be reckoned from the day on which he takes his seat (138) (526).

Privileges &c. of Houses.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth (138A) (316).

Rules and orders.

50. Each House of the Parliament may make rules and orders with respect to—

I. The mode in which its powers, privileges, and immunities may be exercised and upheld :

II. The order and conduct of its business and proceedings either separately or jointly with the other House (138B).

PART V.—POWERS OF THE PARLIAMENT.

PART V. POWERS OF THE PARLIAMENT.

Legislative powers of the Parliament.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to—

I. Trade and commerce with other countries, and among the States (467) (505) (549 *et seq.*) (577 *et seq.*) :

II. Taxation (505 *et seq.*) ; but so as not to discriminate between States or parts of States (283) (444) (516 *et seq.*) :

III. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth (283) (244) :

iv. Borrowing money on the public credit of the Commonwealth (525) :

v. Postal, telegraphic, telephonic, and other like services (448) :

vi. The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth (329) (448) :

vii. Light-houses, light-ships, beacons and buoys (449) :

viii. Astronomical and meteorological observations (450) :

ix. Quarantine (449) :

x. Fisheries in Australian waters beyond territorial limits (462) :

xi. Census and statistics (450) :

xii. Currency, coinage, and legal tender (449) :

xiii. Banking, other than State banking ; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money (469) :

xiv. Insurance, other than State insurance ; also State insurance extending beyond the limits of the State concerned (469) :

xv. Weights and measures (450) :

xvi. Bills of exchange and promissory notes (473) :

xvii. Bankruptcy and insolvency (473) :

xviii. Copyrights, patents of inventions and designs, and trade marks (459) :

xix. Naturalization and aliens (462) :

xx. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (469) :

xxi. Marriage (474) :

xxii. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (474):

xxiii. Invalid and old-age pensions (458):

xxiv. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States (478):

xxv. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States (478):

xxvi. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (463):

xxvii. Immigration and emigration (465):

xxviii. The influx of criminals (467):

xxix. External affairs (349) (460):

xxx. The relations of the Commonwealth with the islands of the Pacific (467):

xxxi. The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws (289) (487) (581):

xxxii. The control of railways with respect to transport for the naval and military purposes of the Commonwealth (448) (578):

xxxiii. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State (485) (578):

xxxiv. Railway construction and extension in any State with the consent of that State (485) (578):

xxxv. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State (451) (580):

xxxvi. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides (488):

xxxvii. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law (465) (485) (621):

xxxviii. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia (487):

xxxix. Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth (103) (199) (242) (274) (323) (446) (488) (525).

Exclusive powers of the Parliament.

52. The Parliament shall, subject to this Constitution, (510), have exclusive power (70) (274) (288) (330) (444) (528) to make laws for the peace, order, and good government of the Commonwealth with respect to—

i. The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes (592):

ii. Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth (448):

iii. Other matters declared by this Constitution to be within the exclusive power of the Parliament.

Powers of the Houses in respect of legislation.

53. Proposed laws (246) appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws (140) (246).

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation (140) (246).

Tax Bill.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect (140) (246).

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated (138D) (140) (246).

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and

if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent (155) (600).

Royal assent to Bills.

58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure (108) (602).

Recommendations by Governor-General.

The Governor-General may return to the House in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Disallowance by the Queen.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known (110) (246) (602).

Signification of Queen's pleasure on Bills reserved.

60. A proposed law (247) reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent (602).

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

Chapter II. The Government.

Executive power.

61. The Executive power of the Commonwealth is vested in the Queen and is exerciseable by the Governor-General

as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth (79) (158) (296).

Federal Executive Council.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure (165).

Provisions referring to Governor-General.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council (166).

Ministers of State.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish (103) (165).

Ministers to sit in Parliament.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives (168).

Number of Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs (168).

Salaries of Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year (168).

Appointment of civil servants.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority (158) (167).

Command of naval and military forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative (161) (176) (329).

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth :—

Posts, telegraphs, and telephones (444) :
Naval and military defence (329) :
Light-houses, light-ships, beacons, and buoys (449) :
Quarantine (449).

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment (448).

Certain powers of Governors to vest in Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

CHAPTER III.

THE JUDICATURE.

Chapter III. The Judicature.

Judicial power and Courts.

71. The judicial power (198) (303) of the Commonwealth shall be vested in a Federal Supreme Court, to be called the

High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other justices, not less than two, as the Parliament prescribes.

Judges' appointment, tenure, and remuneration.

72. The Justices of the High Court and of the other courts created by the Parliament—

I. Shall be appointed by the Governor-General in Council (200):

II. Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity (103) (200) (216*n*):

III. Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office (200).

Appellate jurisdiction of High Court.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals (221 *et seq.*) from all judgments, decrees, orders, and sentences—

I. Of any Justice or Justices exercising the original jurisdiction of the High Court:

II. Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

III. Of the Inter-State Commission, but as to questions of law only:

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

Appeal to Queen in Council.

74. No appeal (234 *et seq.*) shall be permitted to the Queen in Council from a decision of the High Court 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, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure (111) (215).

Original jurisdiction of High Court.

75. In all matters—

I. Arising under any treaty (489) :

II. Affecting consuls or other representatives of other countries (490) :

III. In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (490) :

IV. Between States, or between residents of different States, or between a State and a resident of another State (491) :

V. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (499) :

the High Court shall have original jurisdiction (207) (211).

Additional original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction (199) (207) (211) (489) on the High Court in any matter—

I. Arising under this Constitution, or involving its interpretation (501) :

II. Arising under any laws made by the Parliament (501) :

III. Of admiralty and maritime jurisdiction (503) :

IV. Relating to the same subject-matter claimed under the laws of different States (416) (503).

Power to define jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws (199) (209)—

I. Defining the jurisdiction of any federal court other than the High Court (209) :

II. Defining 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 (210) :

III. Investing any Court of a State with federal jurisdiction (211) (420).

Proceedings against Commonwealth or State.

78. The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power (403) (416) (497).

Number of judges.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes (199).

Trial by jury.

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes (199).

CHAPTER IV.

FINANCE AND TRADE.

Consolidated Revenue Fund.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund (181), to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution (522).

Expenditure charged thereon.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth (525).

Money to be appropriated by law.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law (183) (522).

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

Transfer of officers.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of a State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth (526).

Transfer of property of State.

85. When any department of the public service of a State is transferred to the Commonwealth (289)—

1. All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary.

II. The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

III. The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament (526):

IV. The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred (526).

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth (514) (528).

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth (522) (533).

[On the approval by the electors, the Constitution Alteration 1909, sec. 2, to be enacted as sec. 87A of the Constitution, declares that sec. 87 ceases to have effect on June 30th, 1910, and makes substituted provision. See below.]

Uniform duties of customs.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth (404) (529).

Payment to States before uniform duties.

89. Until the imposition of uniform duties of customs—

I. The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

II. The Commonwealth shall debit to each State—

(*a*) the expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(*b*) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth.

III. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State (526) (532).

Exclusive power over customs, excise, and bounties.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, One thousand eight hundred and ninety-eight, and not otherwise (514) (529).

Exceptions as to bounties.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed

by resolution, any aid to or bounty on the production or export of goods.

Trade within the Commonwealth to be free.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free (330) (342) (393) (564 *et seq.*) (584).

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation (531*n*).

Payment to States for five years after uniform Tariffs.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides :—

I. The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State :

II. Subject to the last sub-section, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs (515) (526) (532).

Distribution of surplus.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair, for the monthly payment to the several States of all surplus revenue of the Commonwealth (526) (532).

[On the approval of the electors, secs. 93 and 94 will be superseded by sec. 3 of the Constitution Alteration (Finance) 1909, to be enacted as secs. 94A, 94B and 94C of the Constitution. See below.]

Customs duties of Western Australia.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance to States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit (533).

Audit.

97. Until the Parliament otherwise provides, the laws in force in any colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of

money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned (180).

Trade and commerce includes navigation and State railways.

98. The power of the Parliament to make laws with respect to trade and commerce (549) extends to navigation and shipping (560 *et seq.*), and to railways the property of any State (577 *et seq.*).

Commonwealth not to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof (283) (444).

Nor abridge right to use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation (499) (563).

Inter-State Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder (573 *et seq.*).

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission (578 *et seq.*).

Commissioners' appointment, tenure, and remuneration.

103. The members of the Inter-State Commission—

I. Shall be appointed by the Governor-General in Council:

II. Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

III. Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office (576):

Saving of certain rates.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States (578 *et seq.*).

Taking over public debts of States.

*Words to be omitted by Constitution Alteration (State Debts) 1909 on approval by electors. See below.

105. The Parliament may take over from the States their public debts *as existing at the establishment of the Commonwealth*,* or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, *and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.*

[By the Constitution Alteration (Finance) 1909, section 4, to be submitted to the electors, the words in italics are to be omitted and the words therein provided inserted. See below.]

CHAPTER V.
THE STATES.

Saving of Constitutions.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State (70) (326).

Saving of power of State Parliaments.

107. 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 (330) (354) (407).

Saving of State laws.

108. Every law in force in a colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State (354).

Inconsistency of laws.

109. 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 (70) (408) (426) (446).

Provisions referring to Governor.

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.

States may surrender territory.

111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth (75) (291) (588 *et seq.*).

States may levy charges for inspection laws.

112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth (414) (514) (530).

Intoxicating liquids.

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage shall be subject to the laws of the State as if such liquids had been produced in the State (344) (553).

States may not raise forces.

Taxation of property of Commonwealth or State.

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State (329) (448) (519).

States not to coin money.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts (330) (355) (444) (450).

Commonwealth not to legislate in respect of religion.

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (287).

Rights residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State (287) (330) (342).

Recognition of laws, &c., of States.

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public Acts and records, and the judicial proceedings of every State (478).

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence (297) (338) (404) (448). Protection of States from invasion and violence.

120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision (440). Custody of offenders against laws of the Commonwealth.

CHAPTER VI.
NEW STATES.

Chapter VI. New States.

121. The Parliament may admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of the Parliament, as it thinks fit (588 *et seq.*). New States may be admitted or established.

122. The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fits (283) (291) (486) (588 *et seq.*). Government of territories.

123. The Parliament of the Commonwealth may, with the consent of the Parliament of a State, and the approval of the majority of the electors of the State voting upon the question, increase, diminish, or otherwise alter the limits of the State, upon such terms and conditions as may be agreed on, and may, with the like consent, make provision respecting the effect and operation of any increase or diminution or alteration of territory in relation to any State affected (486) (588 *et seq.*). Alteration of limits of States.

Formation of new States.

124. A new State may be formed by separation of territory from a State, but only with the consent of the Parliament thereof, and a new State may be formed by the union of two or more States or parts of States, but only with the consent of the Parliaments of the States affected (69) (486) (588 *et seq.*).

CHAPTER VII. MISCELLANEOUS.

CHAPTER VII.

MISCELLANEOUS.

Seat of Government.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney (289) (590).

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

Power to Her Majesty to authorize Governor-General to appoint deputies.

126. The Queen may authorize the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function (160).

Aborigines not to be counted in reckoning population.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.

Mode of altering the Constitution.

128. This Constitution shall not be altered except in the following manner :—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of

all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law (68) (111) (120) (157) (247) (597 *et seq.*).

SCHEDULE.

OATH.

I, A.B., do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law. So Help me God!

AFFIRMATION.

I, A.B., do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(Note.—*The name of the King or Queen of the United Kingdom of Great Britian and Ireland for the time being is to be substituted from time to time.*)

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(2)

CONSTITUTION ALTERATION (SENATE ELECTIONS.)

No. 1 of 1907.

An Act to alter the provisions of the Constitution relating to the Election of Senators.

(*Assented to 3rd April*, 1907.)

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the

Commonwealth of Australia, with the approval of the electors, as required by the Constitution, as follows :—

Short title.

1. This Act may be cited as *Constitution Alteration (Senate Elections)* 1906.

Rotation of senators.

2. Section thirteen of the Constitution is altered—

(*a*) by omitting the words "the third year," and inserting in lieu thereof the words "three years";

(*b*) by omitting the words "the sixth year," and inserting in lieu thereof the words "six years";

(*c*) by omitting the words "in the year at the expiration of which," and inserting in lieu thereof "within one year before";

(*d*) by omitting the word "January" wherever it occurs, and inserting in lieu thereof the word "July".

Extension of terms of service of certain senators.

3.—(1) The terms of service of the senators whose places would, but for this Act, become vacant at the expiration of the year One thousand nine hundred and nine are extended until the thirtieth day of June one thousand nine hundred and ten.

(2) The terms of service of the senators whose places would, but for this Act, become vacant at the expiration of the year One thousand nine hundred and twelve are extended until the thirtieth day of June One thousand nine hundred and thirteen.

Beginning of term of service of senators elected in 1906 not altered.

4. This Act shall not be taken to alter the time of beginning of the term of service of any senator elected in the year One thousand nine hundred and six.

The two Constitution Alterations following have been passed by the Senate and the House of Representatives by the necessary majorities, and will be submitted for the approval of the electors in 1910.

(3)

(PROPOSED) CONSTITUTION ALTERATION (STATE DEBTS) 1909.

An Act to alter the provisions of the Constitution relating to the Public Debts of the States.

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, with the approval of the electors, as required by the Constitution, as follows :—

Short title.

1. This Act may be cited as *Constitution Alteration (State Debts)* 1909.

Alteration of s. 105.

2. Section one hundred and five of the Constitution is altered by omitting the words "as existing at the establishment of the Commonwealth."

(4)

(PROPOSED) CONSTITUTION ALTERATION (FINANCE) 1909.

An Act to alter the provisions of the Constitution relating to Finance.

Preamble.

BE it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, with the approval of the electors, as required by the Constitution, as follows :—

Short title.

1. This Act may be cited as *Constitution Alteration (Finance)* 1909.

2. The Constitution is altered by inserting, after section eighty-seven thereof, the following section :— Expiration of sec. 87.

"87A.—(1.) Notwithstanding anything in section eighty-seven of this Constitution, the Commonwealth may in the year beginning on the first day of July One thousand nine hundred and nine, out of the net revenue of the Commonwealth from duties of customs and of excise, apply towards its expenditure for the service of that year any sum not exceeding Six hundred thousand pounds over and above one-fourth of the said net revenue.

"(2.) From and after the thirtieth day of June, One thousand nine hundred and ten, section eighty-seven of this Constitution shall cease to have effect."

3. The Constitution is altered by inserting, after section ninety-four thereof, the following sections :—

"91A. From and after the thirtieth day of June, One thousand nine hundred and ten, sections ninety-three and ninety-four of this Constitution shall cease to have effect." Expiration of book-keeping Clauses.

"94B. From and after the first day of July, One thousand nine hundred and ten, the Commonwealth shall pay to each State, by monthly instalments, or apply to the payment of interest on debts of the State taken over by the Commonwealth, an annual sum amounting to Twenty-five shillings per head of the number of the people of the State as ascertained according to the laws of the Commonwealth." *Per Capita* payment to States from 1st July, 1910.

"94C.—(1.) The Commonwealth shall, during the period of twenty-five years beginning on the first day of July, One thousand nine hundred and ten, pay to the State of Western Australia, by monthly instalments, an annual sum which in the first year shall be Two hundred and fifty thousand pounds and in each subsequent year shall be progressively diminished by the sum of Ten thousand pounds. Payment to Western Australia for 25 years from 1st July, 1910.

"(2.) One-half of the amount of the payments so made shall be debited to all the States (including the State of Western Australia) in proportion to the number of their people as ascertained according to the laws of the Commonwealth, and any sum so debited to a State may be deducted by the Commonwealth from any amounts payable to the State under the last preceding section or this section."

Public debts of States.

4. Section one hundred and five of the Constitution is altered—

(*a*) by omitting the words—

"and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States;" and

(*b*) by adding at the end thereof the following paragraph :—

"The interest and charges payable by the Commonwealth, in respect of the debts of a State taken over, may be deducted and retained from any moneys payable to the State under this Constitution, and shall, to the extent to which they are not so deducted and retained, be paid by the State to the Commonwealth."

B.

Commonwealth Documents.

(1) Proclamation of the Commonwealth of Australia.

BY THE QUEEN.[1]

A PROCLAMATION.

VICTORIA R.

WHEREAS by an Act of Parliament passed in the sixty-third and sixty-fourth years of Our reign, intituled "An Act to constitute the Commonwealth of Australia," it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that on and after a day therein appointed, not being later than one year after the passing of this Act, the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, *Tasmania*, and also, if Her Majesty is satisfied that the people of *Western Australia* have agreed thereto, of *Western Australia*, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia:

And whereas we are satisfied that the people of *Western Australia* have agreed thereto accordingly:

We, therefore, by and with the advice of our Privy Council, have thought fit to issue this Our Royal Proclamation, and we do hereby declare that on and after the

[1]Commonwealth of Australia Gazette, No. 1, January 1st, 1901.

first day of January One thousand nine hundred and one the people of *New South Wales*, *Victoria*, *South Australia*, *Queensland*, *Tasmania*, and *Western Australia* shall be united in a Federal Commonwealth under the name of The Commonwealth of Australia.

Given at Our Court at Balmoral this seventeenth day of September in the year of Our Lord One thousand nine hundred and in the sixty-fourth year of Our Reign.

GOD SAVE THE QUEEN!

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(2) Letters Patent passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia.[1]

Letters Patent, Dated 29th October, 1900.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these Presents shall come, Greeting:

Preamble.

Recites Imperial Act 63 & 64 Vict. c. 12 and Proclamation of 17th September, 1900.

WHEREAS, by an Act of Parliament passed on the Ninth day of July, 1900, in the Sixty-fourth year of Our Reign, intituled "An Act to constitute the Commonwealth of Australia," it is enacted that "it shall be lawful "for the Queen, with the advice of the Privy Council, to "declare by Proclamation that, on and after a day therein "appointed, not being later than one year after the passing "of this Act, the people of New South Wales, Victoria, "South Australia, Queensland, and Tasmania, and also, if "Her Majesty is satisfied that the people of Western "Australia have agreed thereto, of Western Australia, "shall be united in a Federal Commonwealth under the "name of the Commonwealth of Australia. But the Queen "may, at any time after Proclamation, appoint a Governor-"General for the Commonwealth:"

[1]Commonwealth of Australia Gazette, No. 1, January 1st, 1901.

And whereas we did on the Seventeenth day of September One thousand nine hundred, by and with the advice of Our Privy Council, declare by Proclamation that, on and after the First day of January One thousand nine hundred and one, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also Western Australia, should be united in a Federal Commonwealth under the name of the Commonwealth of Australia: And whereas by the said recited Act certain powers, functions, and authorities were declared to be vested in the Governor-General: And whereas We are desirous of making effectual and permanent provision for the Office of Governor-General and Commander-in-Chief in and over Our said Commonwealth of Australia, without making new Letters Patent on each demise of the said office: Now know ye that We have thought fit to constitute, order, and declare, and do by these presents constitute, order, and declare, that there shall be a Governor-General and Commander-in-Chief (hereinafter called the Governor-General) in and over Our Commonwealth of Australia (hereinafter called Our said Commonwealth), and that the person who shall fill the said Office of Governor-General shall be from time to time appointed by Commission under our Sign Manual and Signet. And We do hereby authorize and command Our said Governor-General to do and execute, in due manner, all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of "The Commonwealth of Australia Constitution Act 1900," and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through one of our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Commonwealth.

Office of Governor-General and Commander-in-Chief constituted.

Governor-General's powers and authorities.

Great Seal.

II. There shall be a Great Seal of and for Our said Commonwealth which Our said Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that until a Great Seal shall be provided, the Private Seal of our said Governor-General may be used as the Great Seal of the Commonwealth of Australia.

Appointment of Judge, Justices, &c.

III. The Governor-General may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Commonwealth, as may be lawfully constituted or appointed by Us.

Suspension or removal from office.

IV. The Governor-General, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, may remove from his office, or suspend from the exercise of the same, any person exercising any office of Our said Commonwealth, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in Our name or under Our authority.

Summoning, proroguing or dissolving the Commonwealth Parliament.

V. The Governor-General may on Our behalf exercise all powers under the Commonwealth of Australia Constitution Act 1900, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of Our said Commonwealth.

VI. And whereas by "The Commonwealth of Australia Constitution Act 1900" it is amongst other things enacted that We may authorise the Governor-General to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our Commonwealth, and in that capacity to exercise, during the pleasure of the Governor-General, such powers and functions of the said Governor-General as he thinks fit to assign to such Deputy or Deputies, subject to any limitations expressed or directions given by Us: Now We do hereby authorise and empower Our said Governor-General, subject to such limita-

tions and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our said Commonwealth of Australia, and in that capacity to exercise, during his pleasure, such of his powers and functions as he may deem it necessary or expedient to assign to him or them : Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power or function.

Power to appoint Deputies.

VII. And We do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of Our said Commonwealth, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by us under Our Sign Manual and Signet to be Our Lieutenant-Governor of Our said Commonwealth ; or if there shall be no such Lieutenant-Governor in Our said Commonwealth, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same. No such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor-General of Our said Commonwealth, and in the manner provided by the Instructions accompanying these Our Letters Patent.

Succession to the Government.

Proviso. Oaths of office to be taken.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Commonwealth, to be obedient, aiding, and assisting unto Our said Governor General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters Patent, administer the Government of Our said Commonwealth.

Officers and others to obey and assist the Governor-General.

Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or them shall seem meet.

Publication of Letters Patent.

X. And we do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Commonwealth of Australia.

In witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, the Twenty-ninth day of October, in the Sixty-fourth Year of Our Reign.

By Warrant under the Queen's Sign Manual,

MUIR MACKENZIE.

LETTERS PATENT constituting the Office of GOVERNOR-GENERAL and Commander-in-Chief of the COMMONWEALTH OF AUSTRALIA.

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(3) Instructions passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Commonwealth of Australia.[1]

VICTORIA R. I.

Dated 29th October 1900.

INSTRUCTIONS to Our Governor-General and Commander-in-Chief in and over our Commonwealth of Australia, or in his absence, to our Lieutenant-Governor or the Officer for the time being administering the Government of our said Commonwealth.

Given at Our Court at Saint James's, this Twenty-ninth day of October, 1900, in the Sixty-fourth year of Our Reign.

[1] *Commonwealth Parliamentary Papers* 1901, A2.

Preamble.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General), in and over Our Commonwealth of Australia (therein and hereinafter called Our said Commonwealth). And We have thereby authorized and commanded our said Governor-General to do and execute in due manner all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the said Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us through One of Our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Commonwealth. Now, therefore, We do, by these Our Instructions under Our Sign Manual and Signet, declare our pleasure to be as follows :—

Recites Letters Patent constituting the office of Governor-General.

Publication of first Governor General's Commission.

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General to be read and published in the presence of Our Governors, or in their absence of Our Lieutenant-Governors of Our Colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia, and such of the members of the Executive Council, Judges, and members of the Legislatures of Our said Colonies as are able to attend.

Oaths to be taken by first Governor-General, &c.

II. Our said Governor-General of Our said Commonwealth shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled "An

Act to amend the Law relating to Promissory Oaths ;" and likewise the usual Oath for the due execution of the office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice ; which Oaths Our said Governor and Commander-in-Chief of Our Colony of New South Wales or, in his absence, our Lieutenant-Governor or other officer administering the Government of Our said Colony, shall and he is hereby required to tender and administer unto him.

Imperial Act and 32 Vict. c. 72.

Revoked August 11th, 1902.

Publication of Governor-General's Commission after the first appointment.

III. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General, to be read and published in the presence of the Chief Justice of the High Court of Australia, or some other Judge of the said Court.

Oaths to be taken by Governor-General, &c., after the first appointment.

IV. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled "An Act to amend the Law relating to Promissory Oaths ;" and likewise the usual Oath for the due execution of the Office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice ; which Oaths the Chief Justice of the High Court of Australia, or some other Judge of the said Court, shall and he is hereby required to tender and administer unto him or them.

Imperial Act, 31 and 32 Vict. c. 72.

Oaths to be administered by the Governor-General.

V. And We do authorize and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every persons or person, as he shall think fit,

who shall hold any office or place of trust or profit in Our said Commonwealth, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

Governor-General to communicate Instructions to the Executive Council.

VI. And We do require our said Governor-General to communicate forthwith to the Members of the Executive Council for Our said Commonwealth these our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service to be imparted to them.

Laws sent home to have marginal abstracts.

VII. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws; and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of Our said Commonwealth, which he is to require from the clerks, or other proper officers in that behalf, of the said Parliament.

Journals and Minutes.

Grant of pardons.

VIII. And we do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Our Commonwealth has been committed for which the offender may be tried within Our said Commonwealth, to grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate within our said Commonwealth, a pardon, either free or subject

to lawful conditions, or any respite of the execution of the sentence of any such offender for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Commonwealth. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of Our said Commonwealth, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

Remission of fines.

Proviso—Banishment from the Commonwealth prohibited.

Exception—Political offences.

IX. And whereas great prejudice may happen to Our service and to the security of Our said Commonwealth by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit our said Commonwealth without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of Our Principal Secretaries of State.

Governor-General's absence.

V.R.I.

INSTRUCTIONS to the Governor-General and Commander-in-Chief of the COMMONWEALTH OF AUSTRALIA.

(4) Additional Instructions, passed under the Royal Sign Manual and Signet, to the Governor-General and Commander-in-Chief of the Commonwealth of Australia.[1]

EDWARD R. & I. *Lated 11th August*, 1902.

ADDITIONAL INSTRUCTIONS to our Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia or in his absence to Our Lieutenant-Governor, or the Officer for the time being administering the Government of Our said Commonwealth.

Given at Our Court at Saint James's, this Eleventh day of August 1902, in the Second year of Our Reign.

WHEREAS by certain Letters Patent bearing date the Twenty-ninth day of October 1900, Her late Majesty Queen Victoria did constitute the Office of Governor-General and Commander-in-Chief (therein and hereinafter called the Governor-General) in and over Our Commonwealth of Australia:

And whereas by the third and fourth clauses of certain Instructions under the Royal Sign Manual and Signet, accompanying the said Letters Patent and bearing even date therewith, Her said late Majesty was pleased to direct that every Governor-General and every other officer appointed to administer the Government of Our said Commonwealth after the first appointed Governor-General should cause the Commission appointing him to be read and published in the manner therein prescribed and should also take the Oaths of Office and Allegiance in the manner likewise therein prescribed:

And whereas it has been found necessary to make further and other provision in respect of the said matters:

[1] Presented to both Houses of Parliament 1902, not ordered to be printed.

I. Now, therefore, We do, by these Our additional Instructions under Our Sign Manual and Signet revoke the aforesaid Third and Fourth Clauses of the aforesaid Instructions and instead thereof We do declare Our pleasure that the following clauses shall be substituted :

Publication of Governor-General's Commission after the first appointment.

"III. Every Governor-General, and every other officer "appointed to administer the Government of Our said "Commonwealth after Our said first appointed Governor-"General, shall, with all due solemnity, cause Our Commis-"sion, under Our Sign Manual and Signet, appointing Our "said Governor-General, to be read and published in the "presence of the Chief Justice of the High Court of "Australia, or some other Judge of the said Court, or in "the presence of the Chief Justice or some other Judge "of the Supreme Court of any of the States of Our said "Commonwealth."

Oaths to be taken by Governor-General, &c., after the first appointment.

"IV. Every Governor-General, and every other officer "appointed to administer the Government of Our said "Commonwealth after Our said first appointed Governor-"General, shall take the Oath of Allegiance in the form "provided by an Act passed in the Session holden in the "thirty-first and thirty-second years of Our Reign, intituled "'An Act to amend the Law relating to Promissory "Oaths;' and likewise the usual Oath for the due execution "of the Office of Our Governor-General in and over Our "said Commonwealth, and for the due and impartial "administration of justice; which Oaths the Chief Justice "of the High Court of Australia, or some other Judge of "the said Court or the Chief Justice or some other Judge of "the Supreme Court of any of the States of Our said "Commonwealth, shall and he is hereby required to tender "and administer unto him or them."

Imperial Act, 31 & 32 Vict. c. 72.

II. These Our Additional Instructions shall be deemed to have been given and to have come into operation as

from the Fourteenth day of July 1902 in the Second year of Our Reign, and every such Commission as aforesaid published and every oath taken and administered as aforesaid in the manner hereinbefore directed from and after the said Fourteenth day of July shall be deemed to have been duly and lawfully published, taken, and administered, as the case may be.

E.R.

ADDITIONAL INSTRUCTIONS to the Governor-General and Commander-in-Chief, COMMONWEALTH OF AUSTRALIA.

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(5) Commission passed under the Royal Sign Manual and Signet, appointing the Right Honorable the Earl of Hopetoun, P.C., K.T., G.C.M.G., G.C.V.O., to be Governor-General and Commander-in-Chief of the Commonwealth of Australia.[1]

VICTORIA R. *Dated 29th October*, 1900.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India; To Our Right Trusty and Right Well-beloved Cousin and Councillor, John Adrian Louis, Earl of Hopetoun, Knight of Our Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said John Adrian Louis, Earl of Hopetoun, to be, during Our pleasure, Our Governor-General and Commander-in-Chief in and over

Appointment of the Right Hon. the Earl of Hopetoun, P.C. K.T., G.C.M.G., G.C.V.O., as Governor-General.

[1]Commonwealth of Australia Gazette No. 1, January 1st, 1901.

Our Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

Recites Letters Patent constituting the Office of Governor-General.

II. And We do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October, 1900, constituting the said Office of Governor-General and Commander-in-Chief, or in any other Our Letters Patent adding to, amending, or substituted for the same and according to such Orders and Instructions as you may receive from Us.

Officers, &c., to obey the Governor-General.

III. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Commonwealth, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's this Twenty-ninth day of October, 1900, in the Sixty-fourth year of Our Reign.

By Her Majesty's Command,

J. CHAMBERLAIN.

COMMISSION appointing The Right Honorable the EARL OF HOPETOUN, P.C., K.T., G.C.M.G., G.C.V.O., to be Governor-General and Commander-in-Chief of the COMMONWEALTH OF AUSTRALIA.

State Documents.

[The following instruments were issued in relation to the State of Victoria. Instruments similar to 1 and 2 were issued in the case of each of the other States.]

VICTORIA.[1]

(1) Letters Patent passed under the Great Seal of the United Kingdom constituting the Office of Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.

Letters Patent, dated 29th October, 1900.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these presents shall come, Greeting.

Preamble.

WHEREAS, by certain Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-first day of February 1879, We did constitute the Office of Governor and Commander-in-Chief in and over Our Colony of Victoria as therein described, and its Dependen-

Recites Letters Patent of 21st February, 1879.

[1] Victoria Government Gazette, January 2nd, 1901.

Recites Imperial Act 63 & 64 Vict., c. 12, Proclamation of 17th September, 1900, and Letters Patent of 29th October, 1900.

cies: And whereas, in virtue of the provisions of the Commonwealth of Australia Constitution Act, 1900, and of Our Proclamation issued thereunder, by and with the advice of Our Privy Council on the Seventeenth day of September, 1900, We have by certain Letters Patent under the said Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even date herewith, made provision for the Office of Governor-General and Commander-in-Chief in and over Our Commonwealth of Australia: And whereas it has become necessary to make permanent provision for the Office of Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia, without making new Letters Patent on each demise of the said Office. Now know ye

Revocation of Letters Patent of 21st February, 1879.

that We do by these presents revoke and determine the said first-recited Letters Patent of the Twenty-first day of February 1879, and everything therein contained, from and after the proclamation of these Our Letters Patent as hereinafter provided; And further know ye that We do by

Office of Governor constituted.

these presents constitute, order, and declare that there shall be a Governor in and over Our State of Victoria (comprising

Boundaries.

the territories bounded on the west by Our State of South Australia, on the south by the sea, and on the east and north by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the Eastern Boundary of Our State of South Australia) and its Dependencies, in the Commonwealth of Australia (which said State of Victoria and its Dependencies are hereinafter called the State), and that appointments to the said Office shall be made by Commission under our Sign Manual and Signet.

Governor's powers and authorities.

II. We do hereby authorize, empower, and command Our said Governor to do and execute all things that belong to his said Office, according to the tenor of these Our Letters Patent and of such Commission as may be issued

to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us, through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the State.

III. We do also by these Our Letters Patent declare Our will and pleasure as follows :—

Publication of Governor's Commission.

IV. Every person appointed to fill the Office of Governor shall with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice, or some other Judge of the Supreme Court of the State, and of the Members of the Executive Council thereof, which being done, he shall then and there take before them the Oath of Allegiance, in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of Our Reign, intituled an Act to amend the Law relating to Promissory Oaths; and likewise the usual Oath for the due execution of the Office of Governor, and for the due and impartial administration of justice: which Oaths the said Chief Justice or Judge is hereby required to administer.

Oath to be taken by Governor.

Imperial Act 31 & 32 Vict. c. 72.

Public Seal.

V. The Governor shall keep and use the Public Seal of the State for sealing all things whatsoever that shall pass the said Public Seal: and until a Public Seal shall be provided for the State the Public Seal formerly used in Our Colony of Victoria shall be used as the Public Seal of the State.

Executive Council: constitution of.

VI. There shall be an Executive Council for the State, and the said Council shall consist of such persons as were, immediately before the coming into force of these Our Letters Patent, Members of the Executive Council of Vic-

toria, or as may at any time be Members of the Executive Council for Our said State in accordance with any Law enacted by the Legislature of the State, and of such other persons as the Governor shall, from time to time, in Our name and on Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the State to be Members of Our said Executive Council for the State.

Grant of lands.

VII. The Governor, in Our name and on Our behalf, may make and execute, under the said Public Seal, grants and dispositions of any land which may be lawfully granted and disposed of by Us within the State.

Appointment of Judges, Justices, &c.

VIII. The Governor may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of the State as may be lawfully constituted or appointed by Us.

Grant of pardons.

IX. When any crime or offence has been committed within the State against the laws of the State, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court of the State, or before any Judge or other Magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures due or accrued to Us: Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any

Remission of fines.

Political offenders.

pardon or remission of sentence that the offender shall absent himself or be removed from the State.

Proviso. Banishment from State prohibited.

X. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place under the State, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.

Suspension or removal from office.

XI. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative Body, which now is or hereafter may be established within Our said State.

Summoning, proroguing, or dissolving any Legislative Body.

XII. In the event of the death, incapacity, or removal of the Governor, or of his departure from the State, Our Lieutenant-Governor, or, if there be no such Officer in the State, then such person or persons as We may appoint, under Our Sign Manual and Signet, shall during Our pleasure, administer the Government of the State, first taking the Oaths hereinbefore directed to be taken by the Governor, and in the manner herein prescribed; which being done, We do hereby authorize, empower, and command Our Lieutenant-Governor, and every other such Administrator as aforesaid, to do and execute during Our pleasure all things that belong to the Office of Governor according to the tenor of these Our Letters Patent, and according to Our Instructions as aforesaid, and the Laws of the State.

Succession to the Government.

Lieutenant-Governor.

Administrator.

Proviso.

Lieutenant-Governor, &c., to take Oaths of office before administering the Government.

Duties and authorities under Letters Patent.

XIII. In the event of the Governor having occasion to be temporarily absent for a short period from the Seat of Government or from the State, he may in every such case, by an Instrument under the Public Seal of the State, constitute and appoint Our Lieutenant-Governor, or, if there be no such Officer, or if such Officer be absent or unable to

Governor may appoint a Deputy during his temporary absence from seat of Government or from the State.

act, then any other person to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor, by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that by the appointment of a Deputy as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

Officers and others to obey and assist the Governor.

XIV. And We do hereby require and command all Our Officers and Ministers, and all other the inhabitants of the State, to be obedient, aiding and assisting unto the Governor, or to such person or persons as may from time to time, under the provision of these Our Letters Patent, administer the Government of the State.

Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.

XV. And We do hereby reserve to Ourselves, Our heirs and Successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to Us or Them shall seem meet.

Publication of Letters Patent.

XVI. And We do direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places within Our said State as the Governor shall think fit.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourself at Westminster, this Twenty-ninth day of October, in the Sixty-fourth year of Our Reign.

By Warrant under the Queen's Sign Manual.

MUIR MACKENZIE.

(2) Instructions passed under the Royal Sign Manual and Signet to the Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.[1]

VICTORIA R.I.

INSTRUCTIONS to Our Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia, or to Our Lieutenant-Governor, or other Officer for the time being administering the Government of Our said State and its Dependencies. Dated 29*th October*, 1900.

Given at our Court at St. James's, this Twenty-ninth day of October 1900, in the Sixty-fourth year of Our Reign.

Preamble. Recites Letters Patent constituting the Office of Governor.

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia (which said State of Victoria and its Dependencies are therein and hereinafter called the State):

And whereas We have thereby authorized and commanded the Governor to do and execute all things that belong to his said Office, according to the tenor of Our said Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under our Sign Manual and Signet or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the State:

Recites instructions of 9*th July*, 1892.

And whereas We did issue certain Instructions under Our Sign Manual and Signet to Our Governor and Commander-in-Chief in and over Our Colony of Victoria and its Dependencies bearing date the Ninth day of July, 1892:

[1] Victoria Government Gazette, January 2nd, 1901.

Revokes aforesaid Instructions.

Now know you that we do hereby revoke the aforesaid Instructions, and We do by these Our Instructions under Our Sign Manual and Signet direct and enjoin and declare Our will and pleasure as follows:

Interpretation.

I. In these Our Instructions, unless inconsistent with the context, the term "the Governor" shall include every person for the time being administering the Government of the State, and the term "the Executive Council" shall mean the members of Our Executive Council for the State who are for the time being the responsible advisers of the Governor.

Oaths to be administered.

II. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Law in force in the State. The Governor is to administer such Oaths or cause them to be administered by some Public Officer of the State.

Governor to communicate Instructions to Executive Council.

III. The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as he shall find convenient for Our service to impart to them.

Governor to preside.

IV. The Governor shall attend and preside at the meetings of the Executive Council, unless prevented by some necessary or reasonable cause, and in his absence such member as may be appointed by him in that behalf, or in the absence of such member the senior member of the Executive Council actually present, shall preside; the seniority of the members of the said Council being regulated according to the order of their respective appointments as members thereof.

Governor to appoint a President.

Senior Member to preside in the absence of the Governor and President.

Seniority of Members.

Quorum.

V. The Executive Council shall not proceed to the despatch of business unless duly summoned by authority of the Governor nor unless two members at the least

(exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched.

Governor to take advice of Executive Council.

VI. In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any Member of the said Council to require that there be recorded upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

Description of Bills not to be assented to.

VII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes :—

1. Any Bill for the divorce of persons joined together in holy matrimony.

2. Any Bill whereby any grant of land or money or other donation or gratuity may be made to himself.

3. Any Bill affecting the currency of the State.

4. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.

5. Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.

6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us ;

Powers in urgent cases.

Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

Regulation of power of pardon.

VIII. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers ; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the State, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

Judges, &c., to be appointed during pleasure.

IX. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers shall, unless otherwise provided by law, be granted during pleasure only.

Governor's absence.

Temporary leave of absence.

X. The Governor shall not quit the State without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of our Principal Secretaries of State, except for the purpose of visiting the Governor of any neighbouring State or the Governor-General, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the State.

XI. The temporary absence of the Governor for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with Our said Letters Patent, be deemed a departure from the State within the meaning of the said Letters Patent. Governor's absence and departure from State. Interpretation clause.

V.R.I.

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(3) Commission passed under the Royal Sign Manual and Signet, appointing Sir John Madden, K.C.M.G., Chief Justice of Victoria, to be Lieutenant-Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.[1]

VICTORIA R. Dated 29th October, 1900.

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To Our Trusty and Well-beloved Sir John Madden, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Chief Justice of the Supreme Court of Victoria, Greeting.

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Sir John Madden, to be during Our pleasure Our Lieutenant-Governor of Our State of Victoria and its Dependencies, in the Appointment of Sir J. Madden, K.C.M.G., to be Lieutenant-Governor.

[1] Victoria Government Gazette, January 2nd, 1901. On the appointment of Sir George Sydenham Clarke as Governor, the operation of this Commission so far as it authorises the exercise of the powers of the Governor, became dormant, and revives from time to time in case of the death, incapacity or removal of the Governor for the time being. It will be observed that the office of Lieutenant-Governor is personal in that it is not, like that of Governor, permanently constituted.

Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

To administer Government during Governor's absence.

II. And further, in case of the death, incapacity, or removal of Our Governor of Our said State, or of his departure from Our said State, We do hereby authorize and require you to administer the Government thereof, with all and singular the powers and authorities contained in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October 1900, constituting the Office of Governor in and over Our said State of Victoria and its Dependencies, in Our Commonwealth of Australia, or in any other Our Letters Patent adding to, amending, or substituted for the same, and according to such Instructions as Our said Governor for the time being may receive from Us, or through one of Our Principal Secretaries of State, and according to such Laws as are now or shall hereafter be in force in Our said State.

Recites Letters Patent constituting Office of Governor.

Powers and authorities.

Commission of 29th April 1899, superseded.

III. And We do hereby appoint that this Our present Commission shall supersede Our Commission under Our Sign Manual and Signet bearing date the Twenty-ninth day of April, 1899, appointing you the said Sir John Madden to be Lieutenant-Governor of Our Colony of Victoria and its Dependencies.

Officers, &c., to take notice.

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said State and its Dependencies, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's, this Twenty-ninth day of October 1900, in the Sixty-fourth year of Our Reign.

By Her Majesty's Command,

J. CHAMBERLAIN.

БИБЛІОТЕКА
Ученаго Комитета Мин. Фин.

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