

Studies in Australian Constitutional Law

Clark, A. Inglis (Andrew Inglis) (1848-1907)

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Studies in Australian Constitutional Law Judge of Supreme Court, Tasmania
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I HAVE not any prefatory observations to make in reference to the contents of this little book, but I desire to acknowledge my great obligation to my friend Professor Harrison Moore, of the University of Melbourne, for his generous assistance in reading the proofs, and for his valuable criticisms and suggestions during the passage of the book through the press.

A. INGLIS CLARK.
HOBART,
14th September, 1901.

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Errata.

Page 107, note (c), for 123 N.S., read 123 U.S.

„ 128, last line but one, for 138 U.S., read 136 U.S.

„ 146, note (b), for 100 U.S., read 102 U.S.

„ 207, note (a), supply vol. 9.

„ 345, note (c), supply p. 266.

„ 354, note (b), for S.H. & N. 656, read 3 H. & N. 656.

(These errors are corrected in the Table of Cases, pp. XI.-XV.)

Page 90, line 8 from foot, for word “former,” read “latter.”

Studies in Australian Constitutional Law

1. Introduction.

Before the establishment of the Commonwealth no compact body of constitutional law was uniformly in force in all the colonies except that portion of the common law which limited the extent and regulated the exercise of the executive powers of the Crown and its servants, and was applicable to colonial circumstances.

BEFORE the establishment of the Commonwealth of Australia there was not any compact body of constitutional law which was uniformly authoritative in all the Australian colonies, excepting that portion of the common law of England which limited the extent and regulated the exercise of the executive powers of the Crown and its servants, and which was applicable to colonial circumstances. The principles and usages of constitutional and parliamentary government which had been evolved in the course of the establishment of a government of that type in England had been adopted in the several colonies, but the adoption of them in each colony had taken place independently of the course followed in regard to them in the other colonies. In each of the colonies a bi-cameral legislature had been established, either by an Act of the Imperial Parliament or by colonial legislation which had received the assent of the Crown, and in each case the Act which established the bi-cameral legislation was called the Constitution of the colony. Each of these Constitutions contained many provisions that were substantially identical with provisions that were contained in each of the other Constitutions, but they did not collectively introduce into Australia any legal relations and consequences which substantially distinguished the constitutional law of the several colonies from the constitutional law of those other portions of the British Empire in which parliamentary government had been established. In short, the constitutional law of the Australian colonies prior to the establishment of the Commonwealth was the constitutional law of England so far as it was applicable to colonial communities with such modifications and additions as the imperial or colonial legislation which referred to particular colonies had introduced into it. But the Constitution of the Commonwealth has introduced a totally new and compact body of constitutional law into Federated Australia. A large part of it has been taken from the Constitution of the United States of America and from the legislation of the American Congress; some of it has been copied from the Constitution of the Dominion of Canada; and other portions of it are purely Australian in their origin. The time has not yet arrived for a comprehensive and elaborate commentary upon it, and all that will be attempted in this volume will be a consideration of some of its fundamental and more prominent features.

Constitutional law defined.

The constitutional law of a country may be defined as that portion of its fundamental law which prescribes or determines the structural character of the various governmental organs included in its total political organisation, their relations *inter se*, and the particular powers and functions of each of them. The Constitution of the Commonwealth of Australia has embraced the previous political organisations of the six States which constitute the Commonwealth in one comprehensive political organisation of that composite kind which is known and described as “federal.” The federal form of political organisation exists whenever a number of separately organised communities are embraced in one comprehensive community and the whole field of legislative and executive authority is definitely divided between the legislative and the executive organs of the larger and comprehensive community on the one hand, and the legislative and the executive organs of each of the component communities on the other. In the more perfect examples of a federal organisation the judicial authority is also divided between the judicial organs of the comprehensive community and the judiciary of the component communities. But a federal organisation may exist in which the same courts of judicature exercise the judicial powers of the federal government and of the component communities, as is substantially the fact in the case of the Dominion of Canada.

The division of the field of governmental authority between the Commonwealth and the States necessitates a limitation of the powers of their respective governmental organs.

Under the Constitution of the Commonwealth of Australia, the legislative, the executive and the judicial powers exercisable within the territorial limits of the Commonwealth are all definitely divided between the legislative, the executive and the judicial organs of the Commonwealth, and the legislative, the executive and the judicial organs of each of the component States of the Commonwealth. This division of the field of governmental authority implies and necessitates a limited area of jurisdiction within which the governmental organs of the Commonwealth can exercise their authority and a correspondingly limited jurisdiction for the governmental organs of each of the separate States. These limitations are imposed by the Constitution of the Commonwealth, and they are therefore legal limitations in the strictest sense of the word, because the Constitution supplies the fundamental and organic laws of the Commonwealth. Any doubt or dispute as to the extent of the jurisdiction of the Parliament of the Commonwealth or of the jurisdiction of the Parliament of any State of the Commonwealth is a matter of constitutional law to be determined by the Judiciary of the Commonwealth or by the Judiciary of a State whenever the intervention of either of them may be invoked, but subject in the case of the Judiciary of a State to an appeal to the High Court of the Commonwealth.

This dependence upon the Judiciary for the restraint and practical abrogation of legislation by the Federal Parliament or by the Parliament of a State in excess of the limitations imposed upon its powers by the Constitution is inseparable from the federal form of political organisation if its essential features are to be preserved from gradual obliteration by successive encroachments on the part of the legislative department of the Federal Government upon the legislative domain of the States, or by encroachments on the part of legislative departments of the several governments of the States upon the domain of the federal legislative power. Hence it has been pertinently and forcibly observed by Professor Dicey that federalism means legalism and the supremacy of the Judiciary in the Constitution (*a*).

A federal constitution will always include a distinctive body of constitutional law, under which numerous questions that never could arise under a unitary constitution will from time to time be raised in reference to the powers and functions of the different governmental organs exercising governmental powers within the territory over which the federal constitution extends. But in the case of the Constitution of the Commonwealth of Australia, the reproduction of portions of the historical and unwritten Constitution of the mother country in definite terms imports into Australian constitutional law under the Commonwealth many legal relations and consequences which have their origin in the English common law. The constitutional law of the mother country will therefore continue to be a guide and a fountain of knowledge and authority on many matters included in the constitutional law of Australia, but in regard to many other portions of it the historic decisions of the Supreme Court of the United States which were delivered by Chief Justice Marshall and his associates during the first half century of the Republic cannot fail to be followed in Australia wherever the language to be interpreted is substantially the same as that to which the irresistible reasoning of those decisions was applied. In the decisions of the Judicial Committee of the Privy Council upon many of the provisions of the Canadian Constitution, and in the decisions of the same tribunal in a number of Australian and Indian appeals, the student of Australian constitutional law will find a large amount of authoritative material for his instruction; and a storehouse of legal learning upon the fundamental principles and doctrines of the English common law relating to the prerogatives of the Crown and their applicability to colonial circumstances is to be found in the opinions of the law officers of the Crown in England and in the colonies which have been made available for general use by publication. At a future day the judgments of the High Court of Australia will doubtless provide expositions of all the important provisions of the Constitution of the Commonwealth which are specially referable to Australian circumstances and to the new problems and questions which will arise

out of them.

The federal form of government necessitates a written constitution.

The federal form of government under which the powers of the several governmental organs are subject to definite and prescribed limitations necessarily involves a record of the limitations, or, in other words, a written constitution. But under every written constitution which endures for any long period of time, and provides sufficient channels for the political activity of a progressive nation, there will inevitably grow up a supplementary and unwritten constitution, consisting of usages which are evolved in the application of the written constitution to the political facts of the nation's life and history. These usages do not form part of the constitutional law of the country in the sense of law which is recognised by the courts and enforced in accordance with their declaration of it, excepting such of them as may affect or establish definite legal relations, and it is extremely doubtful if any such usages as those lastly mentioned can be evolved in a country where a written constitution is both the source and the measure of the legal power of all the governmental organs in it. The evolution of such usages may be said to have substantially ceased in England, and it does not seem probable that any such usages will become incorporated in the constitutional law of Australia.

The fundamental types of federal government.

The federal form of government permits numerous variations in the division of the whole area of governmental activity between the governmental organs of the comprehensive political community which is constituted by the federation of the separate communities embraced in it and the governmental organs of the several component communities. But there are two fundamentally distinctive patterns of federalism to one or the other of which it seems that it is practically inevitable that every federal nation or community must substantially conform in the distribution of political authority. The distinctive feature of the first pattern is that it allots a limited and enumerated number of legislative, executive and judicial powers to the governmental organs of the larger and comprehensive community, and leaves the component communities in possession of all the residue of political power and authority exercisable through the medium of law. The distinctive feature of the second pattern of federalism is that it allots a limited and enumerated number of governmental powers to the several component communities, and vests the whole residue of political power and authority in the governmental organs of the larger and comprehensive community. The Dominion of Canada is an example of federalism of the second pattern. The United States of America, the Swiss Republic, and the Commonwealth of Australia are all examples of federalism of the first pattern. The Constitution of each of these three federal communities contains also the following

three important features, which may be properly alleged to be fundamental guarantees of the preservation of the distinctive pattern of federalism which they have adopted, viz.:—

- (1) The equal representation of all original States in the Senate;
- (2) The prohibition of any reduction or increase in the area of any State without the consent of its Parliament;
- (3) The requirement of the consent of a majority of States, as well as the consent of a majority of the total number of votes polled in all the States, to any amendment of the Constitution.

Solution of the problem of a satisfactory form of federal government by the framers of the Constitution of the United States.

The framers of the Constitution of the United States of America were the first builders of a federal government who were compelled to deliberately consider the question of the necessity or desirability of including these important provisions in the political organisation of a federal nation. The problem which they had to solve was the union of a number of separately organised communities into a composite community, in which each component community should preserve and should be guaranteed in the preservation of its separate political existence, for the purpose of protecting the lives and property and enforcing the contracts of its members, and in which the members of every component community should be simultaneously subject to the jurisdiction of one government, which should regulate and control all their intercourse with other nations and all the intercourse of the members of each of the component communities with the members of each of the other component communities. The problem was solved by providing for the existence of two distinct citizenships, viz., a citizenship of each component community and a citizenship of the composite community, and defining their mutual boundaries, and providing also for the protection of the mutual boundaries of the two citizenships by giving to a majority of the component communities as such, and to a majority of the total population of the composite community, concurrent powers of veto upon any proposed legislation, or any proposed amendment of the constitution. The same problem presented itself to the members of the Convention which framed the Constitution of the Commonwealth of Australia, and they arrived at the same solution of it, because they desired to make the fundamental features of the Constitution of the Commonwealth of Australia as permanent as the fundamental features of the Constitution of the United States have proved to be. A federation without concurrent powers of veto vested in a majority of the component communities, and in a majority of the whole population of the composite community respectively, will retain its original character only so long as the uncounterpoised majority of component communities, or of the total population of

the composite community, is willing to leave it unaltered. The verbal limitation of the respective boundaries of the separate jurisdictions of the States and the Nation in a federal constitution is not sufficient to prevent encroachments by the federal legislature upon a sphere of action impliedly reserved to the States in a form that will preclude the interference of the judiciary to restrain them. In such cases the only remedy will be a political one; and the equal representation of each State in the Senate is the most reliable hope that the remedy will be found and applied in the subsequent repeal of the objectionable legislation. But a more effective and a satisfactory result of the equal representation of each State in the Senate will be the defeat of attempts to make such encroachments as those above mentioned (*a*).

The equal representation of the States in the Senate.

Under a federal constitution, in which the representation of the entire composite community in the House of Representatives, and the representation of the States in the Senate, are both proportional to population, a majority of the total population of the composite community can at all times obtain whatever legislation it desires upon any subject within the powers of the federal parliament, irrespective of the number of States in which the majority might be distributed, or of any circumstances connected with its temporary composition which indicated detriment to the Commonwealth in its demands. But truly representative and constitutional government, although in its most perfect form it will provide machinery to enable every effective member of the community to take part in the composition of the legislative authority, is never an equivalent of the exclusive rule of a simple numerical majority of the voters, and its legislative machinery is not an expedient for avoiding the necessity of submitting every proposed law directly to the decision of the whole people. It has become a trite observation that civil society is not a simple collection of human animals who are individually using all their energies and capacities to satisfy their corporal necessities and appetites, but is a complex organisation of human beings who possess intellectual and moral, as well as physical, faculties, and whose relations to the social organisation of which they are members makes them partakers in a collective and ultra-corporal life in which a variety of forces and interests are embraced. But the body social, like the body of the single human animal, may have lodged within it from time to time unhealthy and disintegrating forces which the machinery of government ought, as far as practicable, to exclude from any participation in the control or direction of legislation. To secure this result it is necessary that legislation should be produced by the concurrence of a plurality of authorities, in which the reflective judgment, and all the social forces that compose the healthy and progressive life of the community, shall find distinct expression. The excess of the simple numerical

majority above the numerical minority may at any time represent the unhealthy and disintegrating forces of the community; and legislation obtained by their assistance must always be doubtful in its character.

Constitutional government.

The concurrence of a plurality of authorities in legislation is a necessary condition of truly constitutional government in any community, whether it is federal or unitary. If the whole legislative power is vested in a single authority it is a form of absolutism, whether the authority be a single man, or the majority of a single assembly. But if provision is made in the composition of the legislative authority for securing the concurrence of distinct majorities representing distinct social forces and interests, the government is constitutional. In a federal commonwealth, many of the numerical majorities of different portions of some of its component States will frequently represent forces and interests which will be identical in character with the forces and interests represented by numerical majorities in various portions of other States. But the collective and corporate life of each State will embrace the influences flowing from historical and geographical and other conditions peculiar to the State, and which make its collective and corporate life a distinct and separate force in the national life of the commonwealth. As such it ought to find a voice in the national legislature. But the extent and value of its contribution to the national life of a federal commonwealth cannot be measured by the number of the population of a State. Nor is the amount and value of the property possessed in a State a true measure of the importance of its separate corporate existence to the commonwealth; and the only logical alternative to the equal representation of each State in the Senate is a refusal to recognise the separate existence of any State in the composition of the federal legislature, in which case the government ceases to be federal in the truest sense of the word, and it is transformed into a government which only differs from the government of a perfectly unified commonwealth in the fact that the sphere of its legislative power is limited. But it is not the limitation of the sphere wherein it can exercise legislative authority, which is the essential feature of a truly federal government. Its essential and distinctive feature is the preservation of the separate existence and corporate life of each of the component States of the commonwealth, concurrently with the enforcement of all federal laws uniformly in every State as effectually and as unrestrictedly as if the federal government alone possessed legislative and executive power within the territory of each State.

Advantages of the federal form of government.

Professor Freeman has told us that the distinguishing advantage of the federal form of government is the multiplication of adequate arenas and conditions for the political education of the citizens of a common country, and for implanting in them

an active patriotism. But the only solid security for the continuance of this advantage is an assiduous preservation of the separate corporate life of each component State in the Federation; and if the constitution of any federal commonwealth does not provide a sufficient protection of the several States against any attempt by a numerical majority of the total population of the composite community to reduce the area of separate political existence which the constitution reserves to each State, it fails to supply an adequate guarantee that the distinguishing advantage of the federal form of government will be a permanent possession of the people who live under it.

(a) Law of the Constitution, 5th ed., p. 160.

(a) The provision of the Constitution of the United States of America which requires an amendment of the Constitution to be ratified by the legislatures or conventions of three-fourths of the States was clearly intended to secure a concurrence of a majority of the States and a majority of the total population of the union. At the present time a majority of the population is contained in a minority of the States, and it is conceivable that at some future time the total population might be distributed among the States in such proportions that an amendment of the Constitution might be ratified by three-fourths of the States which contained a minority of the total population of the union. This contingency would be contrary to the expectations of the framers of the Constitution; but a preliminary proposal of an amendment by two-thirds of the members of both Houses of Congress would necessarily be made by the representatives of a majority of the total population in the House of Representatives; and the same result would be secured by the alternative method of electing a convention to propose amendments.

2. The Interpretation of a Written Constitution.

The Constitution of the Commonwealth of Australia is an Act of the Imperial Parliament.

THE Constitution of the Commonwealth of Australia is contained in a written document which is an Act of the Imperial Parliament of the United Kingdom of Great Britain and Ireland, and the ultimate authority for all the legislation enacted by the Parliament of the Commonwealth, and for every official act performed by the Governor-General, must be found in it. It confers upon the Parliament of the Commonwealth plenary legislative power within any territory in which that Parliament alone shall have legislative jurisdiction, but it confers upon the same Parliament within the territorial limits of the several States of the Commonwealth a legislative power which is distinctly limited by a specific enumeration of the matters in respect of which it can be exercised. The Constitution of each of the several States of the Commonwealth is also contained in a written document which is an Act of the Imperial Parliament, or an Act of the local Parliament which has been enacted in the exercise of specific power conferred by the Imperial Parliament for that purpose, and which confers upon the Parliament of the State plenary legislative power in general terms, but subject to specific restrictions in regard to a few enumerated matters. But the Constitution of the Commonwealth has removed from the Parliaments of the States a large part of the legislative power which they previously possessed, and has transferred it to the Parliament of the Commonwealth. The Parliaments of the States have therefore ceased to possess a plenary general legislative power, but the restrictions imposed upon them by the Constitution of the Commonwealth leave them in possession of an undefined residuum of legislative jurisdiction under the general terms in which legislative authority was originally conferred upon them. In the case of the Parliament of the Commonwealth there is not any such residuum of legislative power vested in it with respect to the territory comprised within the boundaries of the States, and the question whether it has at any time exceeded the limits of its jurisdiction over the residents of the States will have to be determined by the directly affirmative or directly negative language of the Constitution in respect of the legislative powers of the Parliament.

The language of the Constitution subject to judicial interpretation.

But the language of the Constitution will be construed by the Courts of the Commonwealth in accordance with the fundamental principles and rules of political and legal hermeneutics, and it is inevitable that the Constitution will in this manner be supplemented in the course of time by a body of judicial decisions, which may either extend or restrict the application of the language used in some of its

provisions beyond or below the literal and primary meanings of the words employed. In every case in which the language used is grammatically or etymologically capable of varying interpretations, the particular meaning to be given to it must be determined by the applicability of that meaning to the purposes indicated by the whole of the context.

Isolated decisions.

The numerous forms in which legislation may be shaped for the accomplishment of similar purposes will frequently enable the courts from time to time to diminish very largely the apparent authority of a previous decision which experience has proved to be based upon an interpretation of the Constitution which is not concordant with the proper scope of some of its provisions, or is inconsistent with the fundamental character of the document. The previous decision will not necessarily be impugned by the subsequent decisions which may be based upon broader or stricter rules of construction, but it will be isolated and its authority will be restricted to the particular facts upon which it was founded. To reach this result it may be frequently necessary to magnify differences of form and method into differences of substance and purport, but the form and substance of legislation, and the method prescribed by a particular law to carry it into execution, are often so intimately related to the purport of the law, that the essential character and full effect of doubtful legislation may be frequently determined by the form of it and by the method by which the purport of it is to be effectuated.

Reversals of previous decisions by courts of final resort.

The question whether a court of final resort has a legal or a constitutional power to reverse any of its previous decisions has evoked conflicting expressions of judicial opinion in England. The House of Lords appears to have finally acted upon the doctrine that a previous decision of the House is binding upon it until reversed by legislation; but the Judicial Committee of the Privy Council has declined to adopt it (*a*).

The Supreme Court of the United States of America has on several occasions directly reversed its previous decision in an exactly similar case, and the courts of final resort in the several States in America hold themselves free to follow a like course. The Judicial Committee of the Privy Council and the Supreme Court of the United States occupy very analogous positions as appellate tribunals. Both are courts of final resort from judgments of the highest courts in a large number of separate territorial jurisdictions in which separate legislatures exercise independent legislative authority. The House of Lords, on the contrary, is the court of final resort from judgments of courts which exercise their functions within the limits of a single legislative jurisdiction, and it never determines a question affecting the validity of

any legislation which proceeds from a source higher than such subordinate governing authorities as County Councils and municipal and other corporations in the United Kingdom which have power to make by-laws and regulations. The High Court of Australia occupies a position similar to that of the Judicial Committee of the Privy Council, and to that of the Supreme Court of the United States. It is a court of final resort from judgments of the Supreme Courts of the several States of the Commonwealth, subject to the prerogative right of the Crown to grant special leave of appeal to the Queen in Council as provided in section 74 of the Constitution of the Commonwealth; and for this reason it ought not to preclude itself from reconsidering and reversing any decision which it may give upon an appeal from a judgment of the Supreme Court of any State, and which may involve the interpretation of any legislation of the State or the interpretation of any law of the Commonwealth; nor ought it to preclude itself from declining to follow any decision of the Privy Council upon an appeal from a judgment of the Supreme Court of any State in a matter in which the interpretation of such legislation shall be involved. The aspect under which a case was presented to the court below, and the manner in which the court dealt with it, consequent upon the manner in which it was presented to the court, may frequently have a determining influence on the manner in which the appellate tribunal will deal with it; and a different presentation of a similar case subsequently made to another court of final resort in another territory may reveal important features in the case which were not observed in the previous case. The different aspect in which the subsequent case is presented may have been disclosed by the different concatenation of facts in the midst of which the subsequent case arose in another jurisdiction. Unforeseen concatenations of facts frequently disclose unforeseen possibilities of interpretation and application of legislation; and an appellate tribunal which is invested with the high and momentous function of determining the limits of the authority of a number of separate legislatures having separate and independent territorial jurisdictions, in which different social, industrial and historical conditions may exist, would defeat the most momentous purpose of its creation if it precluded itself from reviewing a decision once given by it in circumstances which subsequent events had proved to have excluded from observation important possibilities in the application of it.

Fundamental rule of interpretation.

It has been repeatedly stated that the fundamental rule for the interpretation of a written law is to follow the intention of the makers of it as they have disclosed it in the language in which they have declared the law. In cases in which the intention of the lawmakers was clearly limited to a specific purpose by the use of explicit and direct language which is not capable of application to any other purpose, there

cannot be any difficulty in applying the rule. But where the intention of the makers of the law was to provide a general rule of conduct to be observed in a multiplicity of circumstances, and the rule is necessarily expressed in general terms, the question of the intention of the lawmakers constantly resolves itself into an inquiry whether a particular act or a particular set of circumstances is within the general language which they have used. In many cases it will be perfectly evident that the particular act or the particular set of circumstances in respect of which the question is to be determined could not have been in the contemplation of the makers of the law, and therefore it cannot be said, in the strictest sense of the words, that the makers of the law have expressed any intentions in regard to the matter. In every such case it becomes necessary to apply to the language of the law a method or process of interpretation which is usually described as *construction*, and which consists in examining the language of the law for the purpose of ascertaining whether it is such as we may reasonably believe the makers of the law would have regarded as sufficient to embrace the particular act or set of circumstances in question if it had been foreseen by them. If a critical examination of the language of the law leads to the conclusion that the makers of the law would not have felt it necessary to vary it in order to embrace the particular acts or circumstances in question if they had foreseen them, and that, on the other hand, they would have felt it necessary to vary the language of the law if they had wished to exclude them from its purview, then the language of the law is construed to embrace them. A pertinent example of the application of this principle of interpretation to the language of the Constitution of the United States is found in the judgment of the Supreme Court of the United States of America in the famous case of *Dartmouth College v. Woodward* (a), in which Marshall, C. J., said—“It is not enough to say that this particular case was not in the mind of the Convention when the article (b) was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that had this particular case been suggested the language would have been so varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument as to justify those who expound the Constitution in making it an exception.”

[The Federal Constitution to be construed as having reference to varying circumstances and events.](#)

This method of interpreting a written constitution cannot be properly said to be characteristic of either a liberal or a strict construction of the instrument. The basis of it is the recognition of the fact that the Constitution was not made to serve a temporary and restricted purpose, but was framed and adopted as a permanent and

comprehensive code of law, by which the exercise of the governmental powers conferred by it should be regulated as long as the institutions which it created to exercise the powers should exist. But the social conditions and the political exigencies of the succeeding generations of every civilized and progressive community will inevitably produce new governmental problems to which the language of the Constitution must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the Constitution and have the power to alter it, and who are in the immediate presence of the problems to be solved. It is they who enforce the provisions of the Constitution and make a living force of that which would otherwise be a silent and lifeless document. Every community of men is governed by present possessors of sovereignty and not by the commands of men who have ceased to exist. But so long as the present possessors of sovereignty convey their commands in the language of their predecessors, that language must be interpreted by the judiciary consistently with a proper use of it as an intelligible vehicle of the conceptions and intentions of the human mind, and consistently with the historical associations from which particular words and phrases derive the whole of their meaning in juxtaposition with their context. If the present possessors of sovereignty discover that the result so produced is contrary in particular cases to their will in regard to future cases of a like character, they will amend the language which they previously retained as the expression of their will. If they do not amend it they must be presumed to accept the interpretation put upon it by the judiciary as the correct announcement of their present commands.

Matters incidental to the execution of powers vested in the Federal Parliament.

The particular provision of the Constitution of the Commonwealth of Australia in regard to the purport of which a large amount of discussion may take place in the future is that which empowers the Parliament of the Commonwealth “to make laws for the peace, good order and government of the Commonwealth with respect to

“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.”

The corresponding provision in the Constitution of the United States of America empowers Congress “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer

thereof.” The meaning of the words “necessary and proper” as they are used in this connection was made the subject of judicial decision in the Supreme Court of the United States in the year 1819 in the case of *McCulloch v. Maryland (a)*, in which Marshall, C.J., delivered the unanimous opinion of the court, and in the course of his judgment he said—“We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties 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.” The word “incidental” which is used in the Constitution of the Commonwealth of Australia to indicate the matters not expressly specified in respect of which the Parliament of the Commonwealth may exercise its legislative power is in itself a wider and more comprehensive expression than the word “necessary” which is used in the Constitution of the United States; but it seems impossible to suggest a wider interpretation for it as descriptive of the legislation that may be enacted within the scope of it than the interpretation which the Supreme Court of the United States has given to the word “necessary” in *McCulloch v. Maryland* and in subsequent decisions of the same Court in which the judgment in that case has been approved and followed.

The determination of the question whether a matter is incidental to the execution of any power is substantially a decision upon a question of fact.

The determination of the question whether an Act of the Parliament of the Commonwealth is a legitimate exercise of the legislative power conferred upon it in respect of matters incidental to the execution of any other power expressly vested in it or in another department or organ of the government of the Commonwealth will inevitably in each case involve a consideration of the prospective results of the legislation under review. It is therefore evident that in a case in which that question is raised the decision of the judiciary will not be confined to a declaration of the logical, or etymological or historical meaning of so many words or sentences in the Constitution, and that the decision will be substantially a declaration of concurrence with the action of the legislature or a dissent from it as being relevant or irrelevant to the accomplishment of a purpose which is admitted to be legitimate, and to which the legislation in question is alleged to be incidental. It is therefore evident that the decisions of the judiciary in all such cases will be largely decisions as to matters of fact; not in the sense of being decisions as to the existence and nature of past events,

but as being decisions as to the relations of prospective facts and circumstances either to present facts and circumstances or to other prospective facts and circumstances. The ground of the concurrence of the court with the action of the legislature or of its dissent is always alleged to be found in the language of the Constitution, but in its final analysis it is found to be the opinion of the court upon the alleged necessity or incidentality of the law to the accomplishment of a particular object. In the determination of successive questions of this character that arise under a written constitution which confers a limited jurisdiction on the legislative organs of government, the judiciary substantially decides the question whether particular enlargements of the body of law by which the people living under the Constitution are to be governed shall take place. But the judiciary does not possess any initiatory or spontaneous authority to regulate or control the action of the legislative organs of government. It cannot interpose until the exercise of its authority is invoked by litigation, and its decisions are confined to the determination of the rights and liabilities of the parties to the litigation, and the rights and liabilities of all other persons who could invoke its interposition by litigation of a like nature. Moreover the enforcement of its decisions is the duty of the depositaries of the executive power, and hence the strength of the judiciary is dependent upon the confidence in its impartiality, integrity, and ability which its judgments create in the public mind and in the executive and legislative departments of the Government.

The following observations by the late Judge Cooley in reference to the influence of events upon the interpretation of the Constitution of the United States of America set forth very clearly the inevitable result of the practical application of the language of every such instrument to the national life and historical experiences of the people who live under it. "The peculiar excellence," says he, "of the American Constitutions was supposed to consist in the fact that they had been deliberately framed as written charters of government, so that they expressed all that was within the intent of the framers, and would stand as agreed upon without being subject to that gradual modification and change which is an inherent quality when the Constitution is unwritten. In the latter case, as in the conspicuous instance of the Constitution of England, there will be a gradual building up and growth which may at the time be wholly imperceptible, and only apparent in its results; but the written instrument comes into existence with the understanding and purpose that its several paragraphs and provisions shall mean for ever exactly what they mean when adopted, and if a change is to take place in the Constitution, it must be brought about by the steps which in the instrument itself are provided for, and must consist in such modification of the language and provisions of the instrument, or of such emendations or additions as shall be formally and deliberately made. By this means

we are supposed to have at all times a written instrument which embodies the whole Constitution; and when we reach a proper interpretation of the powers it confers and the limitations it imposes upon those powers, as they stood in the minds of the people when adopting it, we are to give effect to that interpretation, in whatever may be done under the Constitution at any time in the future.

“Such is the theory underlying American governments. But the theory can be true only in the most general sense. No instrument can be the same in meaning to-day and forever, and in all men's minds. Its interpretation must take place in the light of facts which preceded and led to it; in the light of contemporaneous history, and of what was said by the actors and the ends they had in view. And as men will differ upon facts and differ in mental constitution, so will they differ in interpretation; and in the case of a written constitution, the divergencies are certain to increase when it comes to receive practical application. And if at any time the people are subjected to a great constitutional crisis, they are not thereafter precisely the same in ideas, sentiments, desires, hopes and aspirations that they were before; their experience works changes in their views and in their habits of thought, and these may be so radical that they seem altogether a new people. But as the people change, so does their written constitution change also: they see it in new lights and with different eyes; events may have given unexpected illumination to some of its provisions, and what they read one way before they read a very different way now. Then the logic of events may for all practical purposes have settled some questions before in dispute; and nobody, in his contemplation of the constitution, can separate it, if he would, from the history in which its important provisions have had a part, or be unaffected in his own views by that history” (a).

(a) See Pollock's First Book of Jurisprudence, Chap. VI., and the cases there cited; also *London Street Tramways Co. v. London County Council*, L.R. [1898] A.C. 375.

(a) 4 Wheaton, 518.

(b) The provision against impairing the obligation of contracts.

(a) 4 Wheaton, 316.

(a) *Michigan-American Commonwealths*, pp. 345–7.

3. The Distribution of Governmental Powers in the Constitution of the Commonwealth.

Distribution of governmental powers among the governmental organs of the Commonwealth.

THE Constitution of the Commonwealth expressly and distinctly distributes between the Parliament of the Commonwealth, the Crown, and the Federal Judiciary together with such courts of the States as shall be invested with federal jurisdiction, the legislative, the executive and the judicial powers exercisable under its authority. A similar distribution of legislative, executive and judicial powers is made by the Constitution of the United States of America. But within the limits of the British Empire it is only in the Constitution of the Commonwealth of Australia that such a distribution of governmental functions is made by a written organic law. In *The British North America Act 1867*, which establishes the Dominion of Canada, the expressions “Executive Power” and “Legislative Power” are used as titles for the Third and Fourth Divisions of the Act; and in the ninth section the “Executive Government and authority of and over Canada” are declared “to continue and to be vested in the Queen.” The title of the Sixth Division of the Act is “Distribution of Legislative Powers,” and in that division the area of legislative authority is divided between the Parliament of the Dominion and the Provincial Legislatures. But the Act does not contain a direct, explicit and specific grant of legislative power in language parallel to that which is used in regard to the executive power in section nine; and the expression “judicial power” is not used anywhere in the Act. The title of the Seventh Division is “Judicature,” but all the sections covered by that title, except the last one, refer to the appointment of judges and their salaries. The last section empowers the Parliament of Canada to erect a General Court of Appeal for Canada and any additional courts for the better administration of the laws of Canada. But the High Court of the Commonwealth of Australia is established by the Constitution of the Commonwealth, and a minimum number of judges is fixed for it, and “the judicial power of the Commonwealth” is explicitly vested in it and in such other federal courts as the Parliament creates together with such other courts as the Parliament invests with federal jurisdiction, and the language used is parallel to that in which “the legislative power of the Commonwealth” and the “executive power of the Commonwealth” are respectively vested in the Parliament of the Commonwealth and in the Queen. It cannot be disputed that all the legislative power exercisable under the authority of *The British North America Act 1867* is vested in the Parliament of the Dominion of Canada and in the Provincial Legislatures in distributed portions; but there is not any simultaneous grant of

judicial power to any other governmental organ, and no court is established by the Act or placed expressly under its protection in regard to its permanence or its constitution. There is therefore not any organic law binding upon the Parliament of Canada which would prevent it from empowering itself or either of its Houses to act as a court and to perform judicial functions (a).

No express distribution of governmental powers in the British Constitution but separation secured in practice.

So far as the location of the legislative and the executive and the judicial powers exercisable under the British Constitution is proclaimed by the laws and the administrative documents in which the exercise of these powers is exhibited, all of them are vested in the Crown. It is the King in Parliament who makes the laws; it is the King in Council who executes them; and it is the King's courts that interpret and declare the laws. But a separation of the legislative and the executive powers in the exercise of them is secured under the British Constitution by the unwritten but fundamental law which requires that all laws shall be enacted by the advice and with the concurrence of the two Houses of Parliament, and that every executive and administrative act which does not by its intrinsic character require for the performance of it a personal intervention of the monarch, or of a representative directly appointed by him for that purpose, shall be performed by an executive or administrative officer, who must accept the responsibility of it. In regard to the exercise of judicial functions, the distinctly separate and independent position which the British Constitution secures for the superior courts of law and for the judges attached to them is an authoritative recognition and application of the fundamental principle expressed by the Earl of Chatham in his great speech on the arbitrary proceedings of the House of Commons in connection with the expulsion of Wilkes, in which he said "*legem facere* and *legem dicere* are powers clearly distinguishable from each other in the nature of things." Therefore the distribution of governmental functions which is made by the Constitution of the Commonwealth of Australia is not an innovation upon British constitutional practice; but the provisions of the Constitution of the Commonwealth which distributively and categorically vest the legislative, the executive, and the judicial powers in three separate organs of government, impose upon the legislative authority of the Parliament of the Commonwealth a legal limitation which does not exist in regard to the Parliament of any other portion of the British Empire.

No distribution of governmental powers in the constitutions of the States.

Immediately previous to the establishment of the Commonwealth of Australia, the Parliaments of the several colonies which have become States of the Commonwealth had authority under imperial legislation "to make laws for the peace, welfare and good government" of the same colonies respectively, subject to a

power reserved to the Crown to disallow within two years after its enactment, any law made by any one of the same Parliaments, and subject also to the paramount legislative authority of the Imperial Parliament over all and every part of the British Empire, but without any limitation of the legislative power of the colonial parliaments by specific enumeration of the matters in respect of which it could be exercised. The exercise of the executive powers of the Crown in each of the same colonies was vested in the Governor of the colony, and provision was made by imperial legislation for the establishment of courts of judicature in each of them. But by the Act of the Imperial Parliament 28 & 29 Vict. Cap. 63, sec. 5, it was declared that “Every colonial legislature shall have and shall be deemed at all times to have had full power within its jurisdiction to establish courts of judicature and to abolish and reconstitute the same and to alter the constitution thereof and to make provision for the administration of justice therein. . . .” This Statute clearly places the distribution and the exercise of judicial functions in each colony under the immediate control of its parliament, and thereby makes the parliament the immediate source of all judicial authority in the colony. The Imperial Parliament is the immediate organ of sovereign power in the British Empire, and is therefore not restricted by any superior authority from exercising either executive or judicial functions. A colonial parliament is not an immediate organ of sovereign power, but when it has been invested by the Imperial Parliament with plenary legislative authority, and there has not been any separate and distinct grant of judicial power to another governmental organ within the same territory, the colonial parliament is not restrained by any command or prohibition of a superior authority from assuming and exercising judicial functions. But the Imperial Parliament has by an explicit and distinct grant conferred upon the Parliament of the Commonwealth a limited legislative authority, and has by equally explicit and distinct grants conferred the executive and the judicial powers exercisable under the authority of the Constitution of the Commonwealth upon the Crown and the Federal Judiciary respectively; and if this explicit distribution of distinct governmental powers is to have any legal and substantial results in the exercise of them, the Parliament of the Commonwealth is clearly prohibited from assuming either executive or judicial functions.

Presumption in favor of validity of apparent exercise of legislative power.

The question whether a particular governmental power exercisable under the authority of the Constitution of the Commonwealth is legislative or executive or judicial in its nature, is finally determinable by the High Court of the Commonwealth, subject to whatever right of appeal there may be on the question to the Crown in Council, and the High Court is therefore the final arbiter within the Commonwealth of the limits of its own functions and of the question whether any

encroachment upon its jurisdiction has been made or attempted by the Parliament or the Crown. But in considering the question of an alleged or apparent encroachment upon its own functions, the Federal Judiciary will at all times be guided by the fundamental rule the constant observance of which is the foundation of public confidence in its decisions affecting its own position under the Constitution, and which requires that the validity of any apparent exercise of legislative authority which has been promulgated in proper form is always to be presumed until the alleged law is clearly demonstrated to be in excess of the contents of the legislative power conferred by the Constitution, and if at any time the question is a doubtful one, the decision must be in favour of the validity of the impugned law. This rule has been repeatedly asserted and applied to impugned legislation by American and Canadian courts, and by the Judicial Committee of the Privy Council in England. In the case of *Valin v. Langlois (a)*, which was an appeal from the Supreme Court of Canada, the Judicial Committee of the Privy Council said—“It is not to be presumed that the Legislature of the Dominion has exceeded its powers unless upon grounds really of a serious character.” In the case of *Reg. v. Wason (a)*, it was said by Burton, J., that “in cases of doubt every possible presumption and intendment will be made in favour of the constitutionality of the act.” In the case of *People v. Supervisors of Orange (b)*, Harris, J., in delivering the judgment of the Court of Appeals of the State of New York, said:—“A legislative act is not to be declared void upon a mere conflict of interpretation between the legislative and the judicial power. Before proceeding to annul by judicial sentence what has been enacted by the law-making power, it should clearly appear that the act cannot be supported by any reasonable intendment or allowable presumption.” The same rule was declared by Marshall, C.J., in the case of *Fletcher v. Peck (c)*, to be binding on the Supreme Court of the United States in respect to any impugned legislation. “The question,” said he, “whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a strong conviction of their incompatibility with each other.”

Relations of the executive power to the legislative.

It is very difficult, if not impossible, to imagine a case of an alleged intrusion by the Parliament of the Commonwealth into the sphere of executive functions which

could be submitted to the Federal Judiciary for adjudication; because such an alleged usurpation of executive power by the Parliament would necessarily assume the form of legislation to which the Crown would be a party, and which could not be a subject of judicial investigation until the Crown had proceeded to enforce it. In such a case the question of an alleged usurpation of executive power by the Parliament would be merged in the question of the competency of Parliament to legislate upon the particular matter which was asserted to be outside of its legislative capacity. If the Federal Judiciary should decide that the matter was not within the legislative power of the Parliament, the attempt to make it a subject of legislation would be declared invalid on that ground, and not because it was an illegal assumption of executive authority. If, on the contrary, the Federal Judiciary decided that the matter was within the legislative capacity of the Parliament, the Judiciary could not proceed further in its investigation of the question.

Encroachments of the organ of the legislative power upon the province of the judiciary.

If the Constitution permitted the two Houses of Parliament to legislate without the concurrence of the Crown, legislation so enacted which encroached upon the royal prerogative or otherwise intruded into the sphere of purely executive functions might be properly made subject to review by the Federal Judiciary, if it should be challenged as invalid; but in that case also the question for determination would be whether the impugned legislation was or was not within the legislative power of the Parliament. The conclusion, therefore, to which we are led seems to be that an alleged assumption of executive authority by the Parliament of the Commonwealth, as distinct from the question of the legislative capacity of the Parliament, cannot be made a ground for impugning any of its legislation.

But the question of an alleged encroachment by the Parliament of the Commonwealth upon the province of the Federal Judiciary is in a very different position as a ground for challenging the validity of any federal legislation, because the relations of the Federal Judiciary to the Parliament and the Crown under the Constitution of the Commonwealth are totally different from the relations of the Crown to the Houses of Parliament in reference to legislation. The Crown and the two Houses of the Parliament of the Commonwealth co-operate in all federal legislation, and the Constitution requires that the two Houses of the Parliament shall assemble annually to confer with the Crown for legislation, and that the persons appointed by the Crown to administer the executive departments of the government shall not hold office for a period longer than three months if they are not members of the Parliament. The relations of the Crown to the Houses of Parliament are therefore those of periodical consultation and co-operation, and the executive functions of the Crown are complementary to the legislative functions of the

Parliament. But the Constitution does not provide for any consultation or co-operation between the Crown and the Judiciary, or between the Parliament and the Judiciary, in the exercise of the judicial power of the Commonwealth, and therefore any attempt on the part of the Parliament or the Crown to exercise functions which are essentially and distinctly judicial must be as invalid as any attempt to legislate upon a matter clearly outside of the legislative power conferred upon the Parliament by the Constitution.

Essential distinction between legislative and judicial functions.

The area and the contents of the judicial power of the Commonwealth are not descriptively and collectively defined by the Constitution, and the Parliament has authority to extend or restrict from time to time the jurisdiction of particular courts within the limits prescribed by the Constitution. But the absence in the Constitution of any descriptive definition of the nature, or area, or contents of the judicial power exercisable under its provisions does not make the distinction between that power and the legislative and the executive powers exercisable under the authority of the Constitution a matter of doubt or controversy. On the contrary, by vesting the three powers separately in the Crown, the Parliament and the Federal Judiciary, without any further descriptions of the three powers than such as are contained in the three words “legislative,” “executive,” and “judicial,” the Constitution necessarily indicates that the ambit of each power shall be determined by the essential and intrinsic meaning of the single descriptive word applied to it. The legislative power conferred by the Constitution upon the Parliament of the Commonwealth is therefore clearly a power *to make* laws; and the executive power which the Constitution declares to be vested in the Crown is the power *to execute*, that is to enforce, the laws of the Commonwealth. By the same rule of interpretation the judicial power conferred by the Constitution upon the Federal Judiciary is primarily the power *to declare* the laws of the Commonwealth.

The Constitution also empowers the Federal Judiciary to declare the laws of the States in matters in which the rights or liabilities of persons resident in different States are involved. The High Court of the Commonwealth is also invested by Section 73 of the Constitution with jurisdiction as an appellate tribunal to declare the local laws of a State upon an appeal from the Supreme Court of the State in any matter which has arisen and has been adjudicated entirely under the laws of the State. But with this exception, the judicial power exercisable by the High Court or by any other Federal Court does not extend to matters arising entirely under the laws of a State and exclusively between persons resident in the State.

Limitations of the legislative power in regard to previous legislation.

It is evident that the legislative power of the Commonwealth must be exercised by

the Parliament of the Commonwealth before the executive or the judicial power of the Commonwealth can be exercised by the Crown or the Federal Judiciary respectively, because the executive and the judicial powers cannot operate until a law is in existence for enforcement or exposition. But after a law has been made and promulgated the Parliament cannot control its operation otherwise than by altering it. The Parliament can at any time alter or repeal any law which it has made; but the alteration or repeal must be effected by an exercise of the legislative power, because that is the only power possessed by the Parliament, and any attempt on the part of the Parliament to do anything which would not be an exercise of legislative power would not be a law, and therefore would not be binding on the Judiciary or on any person in the Commonwealth. A law of the Commonwealth is a rule of conduct prescribed by the Parliament in regard to any matter in respect of which the Parliament is authorised by the Constitution to make laws. Hence the question whether the Parliament has in any case attempted to encroach upon the province of the Judiciary is to be determined by ascertaining whether any alleged law prescribes a rule of conduct in reference to any matter within the legislative power of the Parliament, or is an exposition of an existing law, or a declaration that any rights or liabilities have been created or have arisen under an existing law. A new rule of conduct may be prescribed by the Parliament by the repeal or the alteration of an existing law, but any exposition of the purport of the language of an existing law, or any declaration of the existence of any rights or liabilities as the result of its enactment, is not an exercise of legislative power; and if any such exposition or declaration is made by the Parliament in the shape of apparent legislation, it is an attempted encroachment on the province of the Judiciary and is therefore invalid, if the explicit distribution of the legislative, the executive and the judicial powers made by the Constitution is to be enforced as a part of the supreme law of the Commonwealth.

The distribution of governmental powers implies a limitation on the power of Parliament.

The restriction of the governmental authority of the Parliament of the Commonwealth to the exercise of legislative functions imposes a generic limitation upon its otherwise unlimited capacity to enforce obedience from all the residents of the Commonwealth to any command it might choose to promulgate in reference to any matter within the scope of its legislative authority. The Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws; and none of the Constitutions of the States imposes any such prohibition upon the Parliament of the State. But by limiting the governmental authority of the Federal Parliament to the exercise of legislative functions the Constitution of the Commonwealth has indirectly but effectually prohibited to the Parliament any

legislation similar in character to some of the legislation which has been enacted in some, if not all, of the colonies which have become States of the Commonwealth.

Judicial legislation by colonial parliaments. The legislation to which this statement refers has been usually enacted to remedy defects in previous legislation which have been discovered in the course of litigation and have defeated the expectations of the promoters of the previous law. In some of the instances in which such legislation has been enacted, the courts had decided that a tax which had been partially collected under the supposed authority of the previous law was not payable under it, and the amending law has declared that the portion of the tax which had been collected should be deemed to have been legally payable, and that the uncollected portion of it had been legally imposed by the previous law and was payable under it. Such amending laws have been repeatedly declared by the American courts to be invalid because they were encroachments upon the exclusive province of the Judiciary under a constitution which conferred separately upon different departments of the government the legislative, the executive and the judicial powers exercisable under it (*a*). The underlying principle of the decisions of the American courts upon this subject was concisely stated by Thompson, J., in the case of *Dash v. Van Kleeck* (*a*) in which he said— “To declare what the law *is* or *has been* is a judicial power; to declare what the law *shall be* is legislative.”

In any case in which the fundamental principle of equality of treatment of all persons in the matter of taxation requires an amendment of a defective law under which a tax has been collected from a portion only of the community, before the defect in it was authoritatively declared by the courts, there is nothing in the Constitution of the Commonwealth to prohibit the Parliament from imposing an exactly similar tax and making it payable in the immediate future, and declaring at the same time that all persons who have paid under the supposed authority of the defective law a sum equal to that which they would otherwise be liable to pay under the amending law, shall be deemed to have paid the tax under the amending law. But the depository and organ of the legislative power cannot be permitted, as it has been forcibly expressed by an eminent American jurist, “to retroact upon past controversies and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be the exercise of it in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the courts” (*b*).

Delegation of Powers.

In connection with the subject of the distribution of governmental powers, the question of the capacity of a governmental organ to delegate the exercise of a power

which has been separately vested in it by the Constitution has been frequently considered by the American courts; and the particular question of the capacity of a colonial legislature to delegate its authority has been considered in three cases by the Judicial Committee of the Privy Council. The first of the three cases was *The Queen v. Burah (a)*, which was an appeal from the High Court of Bengal upon the validity of an Act of the Council of the Governor-General of India by which the Lieutenant-Governor of a territory was empowered to extend to that territory any law or any portion of any law in force in other territories under his command or which might be enacted thereafter by the Council of the Governor-General. In that case the Judicial Committee of the Privy Council declared that where plenary powers of legislation exist in a provincial legislature in respect of a particular subject they may be well exercised either absolutely or conditionally, and when exercised conditionally the provincial legislature may vest in a subordinate authority a discretion as to the time and manner of carrying its legislation into effect, as also the area over which it is to extend. In the two subsequent cases of *Hodge v. The Queen (b)* and *Powell v. Apollo Candle Co. (c)*, it was declared that a provincial legislature exercising plenary legislative authority which has been conferred upon it by the Imperial Parliament was not in any sense a delegate or agent of that Parliament, and that, within the area of its territorial jurisdiction and upon all matters over which it has legislative power, the provincial legislature is supreme and has the same authority as the Imperial Parliament, subject of course to the paramount legislative authority of the Imperial Parliament whenever it might be exercised. The case of *Powell v. Apollo Candle Co.*, was an appeal from the Supreme Court of New South Wales, and the question involved in it was the power of the Colonial Parliament to authorise the Governor of the colony, upon the opinion and advice of the Collector of Customs, to levy a specified duty upon any article which in the opinion of the Collector possessed properties which enabled it to be used for any purpose similar to that for which another article specifically liable to such duty was used. The Judicial Committee of the Privy Council declared that it was within the power of the Parliament of New South Wales to authorise the Governor to levy the duty, and that in so doing the colonial legislature was not delegating the legislative power conferred upon it by the Imperial Parliament, because the Governor was only the medium by which the directly expressed will of the legislature in regard to a specific matter was effectuated. The facts in this case and the facts in the case *The Queen v. Burah* were clearly within the principle which has been enunciated by the Supreme Court of the United States in several cases in which the validity of an Act of Congress conferring discretionary powers upon the President has been involved. In the case of *Field v. Clark (a)* that Court decided that

it was within the power of Congress to make the President its agent “to ascertain and declare the event upon which its expressed will was to take effect”; and the same court has repeatedly declared that Congress has the power to erect local legislatures in territories not formed into States, and to confer upon such legislatures plenary legislative powers (a).

The case of *Hodge v. The Queen* was an appeal from the Court of Appeal of Ontario, and in that case the Judicial Committee of the Privy Council upheld the validity of an Act of the Parliament of Ontario which empowered Boards of Commissioners to regulate the retail traffic in spirituous and fermented liquors in the localities for which they were appointed, and to impose penalties for breaches of the resolutions made by the Boards in the exercise of the powers conferred upon them. The principal question involved in the case was whether the regulation of the traffic was vested in the Provincial Legislatures or in the Parliament of the Dominion. The Judicial Committee of the Privy Council decided that the Parliament of Ontario had acted within the powers conferred upon the Provincial Legislatures by section 92 of *The British North America Act 1867* in subsections 8, 15 and 16, and that the legislation which was impugned was not in conflict with any legislation of the Parliament of the Dominion. Section 92 of *The British North America Act 1867* confers upon the Provincial Legislatures in subsection 8 the exclusive power to make laws upon the subject of “municipal institutions.” The power to establish local administrative authorities and to delegate to them power to make by-laws and regulations in respect of purely local matters has always been regarded as inherent in legislatures upon which plenary legislative powers have been conferred by the sovereign legislative authority which has created them. But the Provincial Legislatures of Canada are not possessed of plenary legislative powers, and it is only by virtue of the specific grant contained in section 92 of *The British North America Act 1867* that they are authorised to create local administrative authorities and confer limited legislative powers upon them. The Parliament of the Commonwealth is not possessed of plenary legislative powers in regard to the whole Commonwealth, and the power to create subordinate legislative bodies is not specifically conferred upon it by the Constitution. Power is expressly conferred upon the Parliament by section 51 of the Constitution 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 Judiciary, or in any Department of the Commonwealth;” and whatever comes properly within this provision is within the legislative power of the Parliament. But the creation of a subordinate legislative body is clearly not a matter incidental to the execution of any specific power vested in the Parliament by the

Constitution. Among the subjects enumerated in section 51 are “Marriage and Divorce and Matrimonial Causes.” Can it be contended that the Parliament of the Commonwealth has power to direct the periodical election of a body of delegates from the several States to make and promulgate laws on these subjects which would be enforceable by the Federal Courts? The same question may be asked with respect to each of the other subjects enumerated in section 51, and if the answer is in the negative in the one case, it must be equally in the negative in all the other cases.

Plenary legislative power of the Federal Parliament.

Under section 52 of the Constitution the Parliament of the Commonwealth has “exclusive power to make laws for the peace order and good government of the Commonwealth with respect to the seat of Government of the Commonwealth and all places acquired by the Commonwealth for public purposes.” The language of this section is clearly intended to confer upon the Parliament of the Commonwealth plenary legislative power over all territories under its exclusive jurisdiction, and therefore includes the power to establish municipal institutions within any such territory. But in respect to all such territories the Parliament is the depositary and the organ of a legislative power which has been distinctly and separately conferred upon it; and if the proposition that the Parliament has not the power to transfer to any subordinate legislative body or to any co-ordinate organ of government in the Commonwealth the whole of its legislative power over any one of the matters enumerated in section 51 is correct, it must be equally without power to confer upon any subordinate or co-ordinate authority the whole of its legislative power over any of the additional matters in respect of which it has authority to legislate under section 52.

Power to create municipal institutions.

The direct question whether the depositary and organ of a plenary legislative power specifically conferred by a paramount and sovereign legislative authority possesses the constitutional capacity to delegate any substantial and essential portion of the power so conferred upon it was not discussed by the Judicial Committee of the Privy Council in any of the three cases above mentioned in which the nature of the plenary power of legislation possessed by a colonial legislature was declared. The counsel for the appellant in the case of *Hodge v. The Queen* appears from the report of the case to have quoted some passages on the subject from *Cooley on Constitutional Limitations*, but there is not any reference to the quotations in the judgment of the court; and in that part of the judgment in which the Provincial Legislature of Ontario is declared to be supreme within the limits of the subjects and the area over which it has jurisdiction, and to have “the same authority as the Imperial Parliament or the Parliament of the Dominion would have

had under like circumstances,” the authority in question and in regard to which the language used by the court is directly applied, is the authority “to confide to a municipal institution or body of its own creation *authority to make by-laws or resolutions as to subjects specified in the enactment and with the object of carrying the enactment into operation and effect.*” The court proceeds to add—“It is obvious that such an authority is ancillary to legislation and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail” (a). These propositions were amply sufficient to cover the facts in the case before the court, and the court therefore did not find it necessary to discuss the ulterior question of the power of a colonial legislature to delegate entirely its legislative power over any one or more subjects to any other legislative organ. If that question should at any time come before the High Court of the Commonwealth for decision, whether in regard to the constitutional capacity of the Parliament of the Commonwealth or of a Parliament of a State, it would be incumbent upon the assertors of such a capacity to demonstrate its existence from the terms in which the legislative power has been conferred by the Imperial Parliament, and if the power of delegation cannot be proved to have been specifically granted, it cannot be presumed to have been granted by implication any more than any other substantial and separate power not specifically conferred or directly involved in the nature and substance of the legislative power *per se* can be presumed to have been granted in the same manner. In this connection the following observations by the same eminent American jurist whose words have been previously quoted merit particular attention:—“One of the settled maxims in constitutional law is that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust” (a).

[Section 114 of the Constitution of the Commonwealth.](#)

There is one significant provision of the Constitution of the Commonwealth which has an important connection with the question of the capacity of the Parliament of the Commonwealth to delegate any portion of its legislative power to any other governmental organ within the Commonwealth. That provision is contained in section 114, which declares that “A State shall not without the consent of the

Parliament of the Commonwealth raise or maintain any naval or military force . . .” If the language used in this section could be construed independently of any other provision of the Constitution it would not import anything more than a restriction upon the legislative power of the Parliaments of the several States in regard to the matter mentioned in it. But the legislative authority of the Parliament of the Commonwealth in regard to the naval and military defence of the whole Commonwealth and the several States is made exclusive by the previous provisions of sections 52 and 69. It therefore becomes necessary to inquire whether the words “consent of the Parliament of the Commonwealth” in section 114 empower the Parliament of the Commonwealth to authorise the Parliaments of the States to legislate for the raising and maintenance of naval and military forces as amply as the Parliaments of the several Colonies had power to do so before the establishment of the Commonwealth, or only empower the Parliament of the Commonwealth to authorise the Governors of the several States to raise and maintain naval and military forces in the several States in accordance with such legislation of the Parliament of the Commonwealth as shall prescribe the strength, the character, the organisation and the discipline of the forces to be raised. If the words “consent of the Parliament of the Commonwealth” are to be construed as only empowering the Parliament of the Commonwealth to authorise the Governors of the States to raise and maintain naval and military forces under such legislation of the Parliament of the Commonwealth as that above mentioned, then section 114 does not empower the Parliament of the Commonwealth to delegate any portion of its legislative power in respect of the defence of the Commonwealth and the States to the Parliaments of the States. The intervention of the Parliaments of the States would always be necessary to provide the requisite funds for maintaining and equipping the forces raised in the several States by the Governors under the authority conferred upon them by the Parliament of the Commonwealth for that purpose, but the simple grant of a sum of money by the Parliament of a State for expenditure by the Governor in the execution of that purpose would not be an exercise of a substantive legislative power in respect of the defence of the Commonwealth and the States. On the other hand, if the words “consent of the Parliament of the Commonwealth” are to be construed as authorising the Parliament of the Commonwealth to empower the Parliaments of the States to legislate for the raising, maintenance, equipment, organisation, strength and discipline of naval and military forces in the several States, then section 114 confers upon the Parliament of the Commonwealth a direct authority to delegate to the Parliaments of the States a portion of the legislative power which the Constitution has primarily vested in that Parliament alone. The strongest argument which appears to militate against this construction of the words

is that it converts a qualification or a conditional relaxation of a restriction upon the powers of the Parliaments of the States into a direct grant of a power of delegation of legislative authority to the Parliament of the Commonwealth; but there is not any restriction placed upon the nature or form of “the consent of the Parliament of the Commonwealth,” and it seems difficult to import any implied restriction into it without begging the whole question whether the words contain a grant of authority to delegate legislative power or do not.

(a) In regard to the provincial parliaments see *Fielding v. Thomas*, L.R. [1896] A.C., 600.

(a) L.R. 5 Appl. Cases, p. 115.

(a) 17 O.A.R., p. 221.

(b) 17 N.Y., 235-41.

(c) 6 Cranch, 87-128.

(a) See *People v. Board of Supervisors*, 16 N.Y., 424; *Governor v. Porter*, 5 Humph., 165; *Mayor &c. v. Horn*, 26 Md., 294.

(a) 7 Johns., 477.

(b) Cooley's Constitutional Limitations, 6th ed., p. 112.

(a) L.R. Appl. Cases, vol. 3, p. 889.

(b) L.R. Appl. Cases, vol. 9, p. 117.

(c) L.R. Appl. Cases, vol. 10, p. 282.

(a) 143 U.S., 649-693.

(a) See *Vincennes University v. Indiana*, 14 How., 268; *United States v. Reynolds*, 98 U.S., 145; and *National Bank v. Yankton*, 101 U.S., 129.

(a) p. 132.

(a) Cooley's Constitutional Limitations, 6th ed., p. 137.

4. The Governor-General.

Office of Governor-General created by the Constitution.

SECTION 2 of the Constitution of the Commonwealth declares that:—

“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.”

Section 61 declares that:—

“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.”

No provision made in the Constitution of Canada for the appointment of a Governor-General.

The British North America Act 1867 does not contain any similar provisions for the appointment of the Governor-General of the Dominion of Canada and for his exercise of executive authority in the Dominion; nor does the Constitution Act of any one of the States of the Commonwealth contain any such provisions in regard to the Governor of the State. They are peculiar to the Constitution of the Commonwealth, and they confer upon the Governor-General of the Commonwealth a statutory position which has not been conferred by the Imperial Parliament upon the Governor-General of Canada, or upon the Governor of any other part of the Empire to which local autonomy has been granted. The Governor or Governor-General of any colony or other part of the British Empire is the local representative of the Crown, which is the supreme depository of the executive authority of the Empire, and which has always been a constituent part of the British Constitution, and was anterior in existence to the Imperial Parliament, of which it is also a part. The statutes of the Imperial Parliament which provide for the creation of colonial legislatures frequently confer upon the Governor particular powers and functions in relation to the legislature of the colony in which he holds his office, and the local legislature frequently confers upon him particular powers and functions in relation to local matters. But with these exceptions the whole of the powers and functions exercisable by the Governor or Governor-General of any part of the British Empire, except the Governor-General of the Commonwealth of Australia, are conferred upon him by the Letters Patent which create the office which he holds, and by the Commission by which he is appointed to fill it.

Doubtful legality of the Letters Patent which purport to create the office of Governor-General of the commonwealth.

The appointment of a Governor-General for the Commonwealth of Australia is clearly provided for by section 2 of the Constitution of the Commonwealth, and the third introductory section expressly declares that the Queen may at any time after the proclamation of the Commonwealth “appoint a Governor-General for the Commonwealth.” But the Letters Patent which have been issued for the purpose of assigning to the Governor-General the powers and functions which section 2 of the Constitution of the Commonwealth expressly declares he “shall have and may exercise in the Commonwealth during the Queen's pleasure,” purport to “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.” If the objections urged by the late Chief Justice Higinbotham of Victoria (*a*) against some of the instructions which were issued to the Governors of the Australian colonies previous to the year 1892, and which he regarded as purporting to grant powers already vested in the Governor of Victoria by the Constitution of that colony, were well founded, the words above quoted from the Letters Patent are of doubtful legality, and *primâ facie* inconsistent with the subsequent command to “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.’ ” The words last quoted clearly recognise the statutory position of the Governor-General, and it is certainly difficult to reconcile the continued existence of an independent right in the Crown to create and constitute the office of Governor-General of the Commonwealth with the express declaration of the Constitution of the Commonwealth that “A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth” and with the authority expressly conferred upon the Queen by the third introductory section to appoint the Governor-General after the proclamation of the Commonwealth.

Statutory powers of the Governor-General.

In addition to making statutory provision for the appointment of the Governor-General of the Commonwealth and his exercise of executive authority in the Commonwealth, the Constitution contains a number of subsequent provisions which expressly confer upon him important powers and functions which are always conferred by the Crown itself upon its representatives in all other parts of the Empire.

Section 64 provides that:—

“The Governor-General may appoint officers to administer such departments of State of the

Commonwealth as the Governor-General in Council may establish.”

And the same section further provides that:—

“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.”

Section 67 provides that:—

“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.”

Section 68 provides that:—

“The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.”

In the face of these explicit declarations of the Constitution those portions of the Letters Patent which purport to constitute the office of Commander in Chief of the Commonwealth, and to empower the Governor-General to appoint such judges, commissioners, justices of the peace and other necessary officers and ministers as the Crown may lawfully constitute and appoint in the Commonwealth are open to the same criticism which has been previously made upon that part of the document which purports to create the office of Governor-General of the Commonwealth.

Section 70 provides that:—

“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.”

It is evident that the powers and functions transferred to the Governor-General by this section are powers and functions which are vested in a Governor of a colony or other authority in the colony by the local statutory law of the colony. Whatever powers may be requisite for the proper administration of the executive government of the Commonwealth by the Governor-General and which are not exercisable by him under any statutory authority must be expressly conferred upon him by the Crown. The powers and functions to be conferred upon the Governor-General directly by the Crown are referred to in section 2 as “such powers and functions of

the Queen as Her Majesty may be pleased to assign to him”; but it is declared by the same section that they shall be held and exercised by him “subject to this Constitution”; and inasmuch as the Constitution expressly and directly empowers him to hold and exercise those powers and functions during the Queen's pleasure he will hold and exercise them under a primary or preliminary statutory authority, although they are not powers and functions which are expressly enumerated and defined by any statutory law. The grant of these powers and functions by the Crown will import into the constitutional law of the Commonwealth a portion of the common law of England which would not otherwise find a place there. They are described by section 2 of the Constitution as “powers and functions of the Queen,” and it is very clear that they are powers and functions inherent in the Crown under the common law as the supreme executive authority in the Empire. The question whether in addition to that portion of the royal prerogative which will be exercisable by the Governor-General in the Commonwealth under his commission from the Crown, any other portion of the common law of England will be in force in the Commonwealth under the authority of the Constitution will be made the subject of a separate inquiry.

The prerogative of mercy.

Among the prerogative powers of the Crown which have hitherto been exercised by all its representatives in the dependencies of the Empire under authority conferred directly and immediately by the Crown itself, is the power to remit the whole or any part of the punishment which any person may be liable to suffer upon his conviction of any crime or offence under any law in force in the dependency in which he is convicted. In the case of the Governor of each State of the Commonwealth this power is conferred upon him by the Letters Patent which constitute the office of Governor in the State. But in the case of the Governor-General of the Commonwealth the power to pardon crimes and offences against the laws of the Commonwealth is conferred upon him by the Instructions issued to him by the Crown, and not by the Letters Patent which purport to create the office of Governor-General.

Instructions to the Governor-General.

The Instructions which have been issued to the Governor-General do not make any reference to the Constitution of the Commonwealth, and they proceed upon the assumption that the office of Governor-General and Commander-in-Chief of the Commonwealth has been created by Letters Patent bearing even date with the Instructions, and that his several powers and authorities are derived from such Letters Patent and not from any other source. The Preamble to the Instructions runs as follows:—

“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 authorised 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.”

The power to grant pardons for crimes and offences is conferred by the Instructions in the following words:—

“VIII. And We do further authorise 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 the Executive Council for Our said Commonwealth, 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 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.”

It will be observed that the above extracted section of the Instructions is substantially a transcript of the corresponding section which finds a place in the Letters Patent which constitute the office of Governor in each State of the Commonwealth, with the addition of that portion of the Instructions issued to each Governor which requires him to exercise the power of pardon under the advice of

his Ministers. The form in which the power to pardon crimes and offences is conferred upon the Governor of each State of the Commonwealth in his Instructions was denounced by the late Chief Justice Higinbotham as a piece of “flagrant illegality”; but whether he intended to condemn it as an attempt to confer upon the Governor a power already vested in him by law, or only meant to condemn the manner in which the Governor is instructed to exercise it, is not perfectly clear. He asserted that the prerogative of mercy is a prerogative essentially necessary to the administration of the criminal law, and if this assertion was intended to be made by him as a statement of law it would seem as if he was of opinion that the power and authority to administer the criminal law by inflicting the prescribed punishments for offences included the power to pardon. In the case of the Governor-General of the Commonwealth the determination of the question of his statutory authority to exercise the power of pardon in the Commonwealth is clearly involved in the determination of the question of the nature and extent of the powers embraced in the authority vested in him by section 61 of the Constitution of the Commonwealth, which declares that—“The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative.” If the executive power of the Commonwealth which is vested by the Constitution in the Crown includes inherently the power of pardon then it is clearly exercisable by the Governor-General under the direct authority of the Constitution.

The source of the prerogative of mercy.

In the course of the judgment delivered by him in the case of *Attorney-General of Canada v. Attorney-General of Ontario (a)*, Strong, C.J., made the following observations in reference to the exercise of the prerogative of pardon by the Crown and its representatives:—“By the law of the Constitution, or, in other words, by the common law of England, the prerogative of mercy is vested in the Crown, not merely as regards the territorial limits of the United Kingdom, but throughout the whole of Her Majesty's dominions. The authority to exercise the prerogative may be delegated to Viceroys and colonial Governors representing the Crown. Such delegation, whatever may be the conventional usage established on grounds of political expediency, a matter which has nothing to do with the legal question, cannot, however, in any way exclude the power and authority of the Crown to exercise the prerogative directly by pardoning an offence committed anywhere within the Queen's dominions. I take it to be the invariable practice, in the case of colonial Governors, to delegate to them the authority to pardon in express terms, either by the commission under the great seal, or in the instructions communicated to them by the Crown. This being so, and this practice having prevailed, as far as I can discover, universally and for a long series of years, I should have thought that it

at least implied that in the opinion of the law officers of the Crown—an authority on such a point second only to that of a judicial decision—that the prerogative of pardoning offences was not incidental to the office of a colonial Governor, and could only be exercised by such an officer, in the absence of legislative authority, under powers conferred by the Crown.” The observation made in this judgment with respect to the prerogative of pardon, that it is not incidental to the office of a colonial Governor, is equally applicable to all the powers conferred by the Crown upon its representatives throughout the Empire whose offices are created by the commissions by which the occupants of the offices are appointed to occupy them. In the case of every such representative of the Crown his total authority to exercise any portion of the royal prerogative is derived from his commission and is limited to the powers therein expressly or impliedly entrusted to him (*a*). But when provision is expressly made by statute for the appointment of a Governor or a Governor-General in any part of the Empire in the manner in which such provision has been made by the Constitution of the Commonwealth of Australia (*b*), and when it is also expressly declared by the statute (*c*) that the executive power of the community in which the Governor or Governor-General holds office is vested in the Queen and is exercisable by the Governor or Governor-General as the Queen's representative, the question whether any powers and functions are inherent in the office of the Governor or the Governor-General in such a case assumes a very different aspect. All the prerogative powers of the Crown are inherent in it as the supreme, and in the ultimate analysis of the law, the sole executive authority in the Empire. Mr. Dicey has defined the royal prerogative as “the discretionary authority of the executive,” and as “the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the Queen herself or by her Ministers” (*a*). “The executive power of the Commonwealth” which is declared by section 61 of the Constitution to be vested in the Queen includes the discretionary authority of the Crown within the Commonwealth, and it is declared by the same section to extend “to the maintenance and execution of the Constitution and of the laws of the Commonwealth.” The language of that section, so far as it refers to the Queen, must be read as a declaration of an existing fact, and not as an original grant of executive authority to her within the Commonwealth, which could not be alleged to be made to her without the untenable presumption that she did not previously possess it, or without clear and positive predication which deprived the Crown of all executive authority within the Commonwealth under the common law and made the Constitution of the Commonwealth the sole source of the powers and functions to be possessed and exercised by the Crown or its representative within the territorial limits of that part of its dominions. The Constitution of the

Commonwealth does not contain any such predication in respect to the executive authority of the Crown, and the language of section 2 is directly contradictory of any supposition in that direction. The power to pardon offenders and to remit punishments for crimes and offences is a part of the discretionary authority of the Crown in its executive capacity, and it extends to the Commonwealth of Australia in common with all other portions of the Crown's dominions. But section 61 of the Constitution of the Commonwealth declares that the executive power of the Commonwealth which is vested in the Queen is exercisable by the Governor-General as the Queen's representative. It is indisputable that the Crown can pardon any offender against any law of the Commonwealth and remit any punishment imposed by a law of the Commonwealth; and if the exercise by the Crown of that prerogative and discretionary authority would be an exercise of the executive power of the Commonwealth which is vested in the Crown, it is exercisable by the Governor-General under the authority of section 61 of the Constitution as much as any other part of the royal prerogative is exercisable by him under the authority conferred upon him by that section. It cannot be consistently contended that the authority conferred upon the Governor-General by section 61 is limited or controlled by the provisions of section 2, because if such a proposition could be successfully established it would reduce section 61 to a nullity or make surplusage of it. If there is any apparent conflict between the two sections the later, according to the well established rule for the construction of statutes, will prevail; and the words "during the Queen's pleasure" in section 2 are immediately followed by the words "subject to this Constitution." It cannot be suggested that the powers and functions directly and expressly vested in the Governor-General by sections 64, 67, 68, and 70, are not exercisable by him if they are not assigned to him directly by the Queen under the authority of section 2; and therefore the words "powers and functions of the Queen" which are used in section 2 apparently refer to such powers and functions as the Queen may from time to time deem it desirable to confer upon the representative of the Crown in the Commonwealth in addition to those specifically vested in him by particular description, and in addition to those included in the words "executive power of the Commonwealth." Some such additional powers and functions may from time to time be created and conferred upon the Crown by the Imperial Parliament, and the extension of them to the various dependencies of the Empire may be expressly left by the Parliament to the discretion of the Crown. Other such additional powers and functions may be such as the Crown possesses at common law in regard to international relations, or in regard to its subjects in other parts of its dominions, and which are not strictly included in the words "executive power of the Commonwealth." The words "executive power

of the Commonwealth” are large enough to include all the powers and functions conferred upon the Governor-General by sections 64, 67 and 68 of the Constitution, and the provisions of these sections might appear *primâ facie* to be surplusage. But the insertion of them in the Constitution places the matters mentioned in them beyond the control of the Parliament of the Commonwealth, except in the cases in which that control is expressly reserved as it is in section 67. In this view of them, sections 64, 67 and 68 of the Constitution make more definite and prominent the statutory position of the Governor-General under the Constitution, and make more doubtful the validity of those portions of the Letters Patent which purport to vest in him the powers and functions which are particularly mentioned in the sections.

Power of the Governor-General to appoint deputies.

Section 126 provides that:—

“The Queen may authorise 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.”

This section is substantially a transcript of section 14 of *The British North America Act 1867*, and it seems to have been suggested as a proper provision in both Constitutions by the wide extent of the territory over which the Governor-General would exercise executive authority. It does not affect the statutory position and powers of the Governor-General which are directly conferred upon him by the Constitution so long as they are exercised by himself. But the words “subject to any limitations expressed or directions given by the Queen,” clearly confer upon Her Majesty the power to limit the extent to which the Governor-General shall delegate his statutory authority to a deputy. The Letters Patent which purport to constitute the office of Governor-General of the Commonwealth of Australia recite the section and empower the Governor-General to appoint any person or persons to be his deputy or deputies in any part of the Commonwealth, “subject to such limitations and directions as aforesaid,” but no limitations or directions are expressed or given in the document.

Position of the Governor-General of Canada.

It has already been noted that *The British North America Act 1867* does not contain any provision for the appointment of a Governor-General of Canada, nor any provisions relating to him similar to sections 2 and 61 of the Constitution of the Commonwealth of Australia; yet in his work entitled *The Law of the Canadian*

Constitution, Mr. W. H. P. Clement, of Toronto, has expressed the opinion that “the prerogatives of the Crown, so far as they are exercisable in Canada, or in any province thereof, must be exercised in Her Majesty's name by the officer who by *The British North America Act* is entrusted with carrying on the government, and cannot be exercised by the Queen, *i.e.*, through the Imperial authorities, except in matters over which none of the legislatures in the Dominion have legislative power” (a). And again on pp. 252-3, he says:—“The question has been mooted, although perhaps not of much practical importance, whether Her Majesty could in person, carry on the government of Canada, or of one of the provinces; it is submitted that without repeal of *The British North America Act*, she could not legally do so. All the powers and functions necessary to carrying on the government of the Dominion and of the respective provinces are, by the express terms of the *British North America Act*, vested in the Governor-General, or the Lieutenant Governor, as the case may require; and by no Act of Imperial *executive* authority could these express provisions of this Imperial Statute be overridden.” Clearly if the representation of the Crown in the Dominion of Canada is regulated and controlled by the provisions of *The British North America Act 1867* which refer to the Governor-General of the Dominion, its representation in the Commonwealth of Australia is much more expressly and definitely regulated and controlled by the provisions of the Constitution of the Commonwealth which refer to the Governor-General of the Commonwealth.

Provisions relating to Governor-General applicable to any person whom the Crown may appoint to administer the government of the Commonwealth.

Consistently with the statutory provision which is made in section 2 of the Constitution of the Commonwealth for the appointment of a Governor-General, section 4 provides that—

“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.”

A similar section (a) is found in *The British North America Act 1867*, and its insertion in that Act is strongly confirmatory of Mr. Clement's opinion as to the statutory position of the Governor-General of the Dominion. In the case of the Constitution of the Commonwealth of Australia, the explicit declaration of section 61 that the executive power of the Commonwealth is exercisable by the Governor-General as the Queen's representative, together with the declaration of section 2 that

the powers and functions vested in the Governor-General by the Queen should be exercised by him “subject to this Constitution,” made it imperative that a provision in the nature of section 4 should find a place in the Constitution, if a substitute for the Governor-General should at any time be appointed by the Crown to administer the Government of the Commonwealth during any vacancy in the office of Governor-General. In the absence of any such provision, every person acting as administrator of the executive government of the Commonwealth must have been appointed Governor-General of the Commonwealth for the term of his service.

(a) See Memoir of George Higinbotham, by Professor Morris, pp. 209-22.

(a) 19 O.A.R., 31.

(a) See *Musgrove v. Pulido*, 5 Appl.Cases, p. 102.

(b) Sec. 4.

(c) Sec. 61.

(a) Law of the Constitution, 5th ed., p. 355.

(a) p. 143.

(a) Sec. 10.

5. The Powers of the Federal Parliament.

Matters subject to the legislative power of the Federal Parliament divisible into three categories.

THE matters in respect of which the Constitution of the Commonwealth has conferred legislative power upon the Parliament of the Commonwealth are divisible into three categories. The first category embraces all the matters which have been placed by the Constitution under the exclusive jurisdiction of the Parliament of the Commonwealth. The second category comprises all those matters which remain subject to the legislative power of the Parliaments of the States until the Parliament of the Commonwealth exercises its legislative power over them. The matters included in the second category may be totally removed from the jurisdiction of the Parliaments of the States by the legislative action of the Parliament of the Commonwealth, or may be left partially under their jurisdiction by the limited extent to which the Parliament of the Commonwealth exercises its power in regard to them. In either case the jurisdiction of the Parliaments of the States is only suspended, and will revive if the Parliament of the Commonwealth repeals its legislation, and does not substitute other legislation for it. The third category covers those matters in respect of which the Parliament of the Commonwealth and the Parliaments of the States have concurrent and independent jurisdictions.

Matters in respect of which the legislative power of the Federal Parliament is exclusive.

The exclusive jurisdiction of the Parliament of the Commonwealth flows in some instances from the essential character of the matter over which the legislative power of the Parliament is exercisable. In other instances exclusive jurisdiction is vested in the Parliament of the Commonwealth by an explicit declaration to that effect in the Constitution; and again, in other instances, it is clearly established by express prohibitions against the exercise of any legislative power by the Parliaments of the States in respect of matters specifically mentioned in that connection. The matters in respect of which exclusive legislative power is vested in the Parliament of the Commonwealth by explicit declaration to that effect are those mentioned in section 52 of the Constitution, which declares that:—

“The Parliament shall, subject to this Constitution, have 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:
- 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:

III. Other matters declared by this Constitution to be within the exclusive power of the Parliament.”

Under subsection II. the Parliament of the Commonwealth has exclusive legislative power in regard to matters relating to the following departments of the public service in each State immediately after they are transferred to the Commonwealth, viz.:—

- (1) Customs and excise;
- (2) Posts, telegraphs and telephones;
- (3) Naval and military defence;
- (4) Light-houses, light-ships, beacons and buoys (*a*);
- (5) Quarantine.

The only other section of the Constitution which declares explicitly that the legislative power of the Parliament of the Commonwealth shall be exclusive in respect of any matter is section 90, which declares that on the imposition of uniform duties of customs the power of the Parliament of the Commonwealth to impose duties of customs and excise and to grant bounties on the production or export of goods shall become exclusive, subject to a reservation in favour of any grant or agreement for the grant of any bounty lawfully made by or under the authority of the Government of any State before the 30th day of June, 1898.

Matters subject to the legislative power of the Federal Parliament divisible into specific and generic.

Although all the legislative powers conferred by the Constitution upon the Parliament of the Commonwealth in respect of whatever portion of the territory of the Commonwealth is comprised within the boundaries of the States may be properly described as specific, because limited to particular matters which are definitely enumerated, yet the matters to which those powers extend may be not improperly divided into two classes which may be respectively described as specific and generic. The matters which may be described as generic are those in respect of which a large amount of very varied legislation may be enacted and which are collected and enumerated in section 51 of the Constitution. The matters which may be distinguishably described as specific are those in regard to each of which the Constitution has made definite provision, but in respect of which the Parliament of the Commonwealth is empowered, by a distinct declaration in reference to each of them, to alter the provision made by the Constitution. The legislative powers of the Parliament in regard to such last-mentioned matters are for the most part conferred in each case by a declaration that the particular matter shall remain as it is fixed by the Constitution “until the Parliament otherwise provides.” In this manner power is

conferred upon the Parliament of the Commonwealth to legislate upon specific matters connected with its own composition and election, and upon specific matters connected with the organisation and jurisdiction of the Federal Judiciary, and to determine from time to time, under specific limitations, the number of the Ministers of State in charge of Departments of State of the Commonwealth, and to fix the salary of the Governor-General (*a*). All such matters are mentioned collectively in subsection XXXVI. of section 51, and the legislative power conferred upon the Parliament of the Commonwealth in respect of these matters is *ex necessitate* exclusive of any concurrent power in the Parliaments of the States in regard to them.

Matters within the exclusive authority of the Federal Parliament in consequence of their character.

The matters in respect of which legislative authority is conferred upon the Parliament of the Commonwealth by section 51 of the Constitution, and in respect of which the jurisdiction of that Parliament is necessarily exclusive in consequence of their essential character, appear to be the following:—

- I. Trade and commerce with other countries, and among the States:
- IV. Borrowing money on the public credit of the Commonwealth:
- X. Fisheries in Australian waters beyond territorial limits:
- XIII. State banking extending beyond the limits of the State concerned:
- XIV. State Insurance extending beyond the limits of the State concerned:
- XXIV. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States:
- XXV. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States:
- XXVII. Immigration and emigration:
- XXIX. External affairs:
- XXX. The relations of the Commonwealth with the islands of the Pacific:
- 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:
- XXXII. The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
- XXXV. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
- XXXVI. Matters in respect of which this Constitution makes provision until The Parliament otherwise provides:
- 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:
- 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.

The legislative power of the Federal Parliament with respect to trade and commerce.

Section 98 of the Constitution declares that—“The power of the Parliament with respect to trade and commerce extends to navigation and shipping and to railways the property of any State.” It has been firmly settled by a series of decisions of the Supreme Court of the United States of America, that the power conferred by the Constitution of that country upon Congress “to regulate commerce with foreign nations and among the several States,” includes the power to regulate navigation and traffic by railways; and it cannot be doubted that the legislative authority of the Parliament of the Commonwealth with respect to trade and commerce would be held by the Federal Judiciary to extend to navigation and traffic by railways without the declaration contained in section 98 of the Constitution. But section 98 removes the question from the realm of judicial interpretation, and places it beyond the possibility of controversy about it.

The comprehensive character of the power “to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States” necessarily makes it exclusive of any concurrent power in the Parliaments of the States to enact any legislation that would directly and immediately affect trade and commercial intercourse with other countries or between the States. This statement is made in full view of the provisions of section 107, which declares that “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.” At the first blush this section appears to leave the Parliaments of the States in possession of legislative power in respect of every matter which has not been placed exclusively within the legislative power of the Parliament of the Commonwealth by direct and explicit language to that effect, or which has not been explicitly and expressly withdrawn from the jurisdiction of the Parliaments of the States. In accordance with this interpretation of the section, the only matters relating to trade and commerce with other countries and among the States which are immediately placed by the Constitution within the exclusive jurisdiction of the Parliament of the Commonwealth are the matters mentioned in sections 69 and 90, and which are the following:—

- (1) Duties of customs and of excise;

- (2) Bounties on the production or export of goods;
- (3) Posts, telegraphs and telephones;
- (4) Light-houses, light-ships, beacons and buoys;
- (5) Quarantine.

Result of conceding to the States a concurrent power to regulate commerce.

If the matters which are mentioned in sections 69 and 90 are the only matters relating to “trade and commerce with other countries and among the States” which are placed immediately by the Constitution under the exclusive jurisdiction of the Parliament of the Commonwealth, then the Parliaments of the States will have a concurrent jurisdiction in respect of all other matters connected with “trade and commerce with other countries and among the States” until that jurisdiction is displaced by federal legislation. But this interpretation of the Constitution involves some startling results. It will permit the Parliaments of the States, until they are restrained by federal legislation, to impede from time to time in numerous ways, the commercial intercourse between the States, and to create discriminations between the products and manufactures of different States, which will be contrary to the explicit declaration of section 92 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.” A large amount of light is thrown upon this aspect of the question by a number of cases which have come before the Supreme Court of the United States of America, in which the separate attempts of several States to prohibit the importation of particular articles of merchandise produced or manufactured in other States have been declared to be contrary to the provision of the Constitution of that country, which grants to Congress the power “to regulate commerce with foreign countries and among the States.”

Illustrations from American cases. In the case of *Ward v. Maryland (a)*, a law of the State of Maryland which prohibited the sale of the products of other States in certain districts by persons not resident in Maryland, who had not obtained a special licence for that purpose, was declared void as an obstacle to interstate commerce. In the case of *Welton v. Missouri (b)* the validity of a law of the State of Missouri, which imposed a tax upon all persons selling as pedlars within the State the products and manufactures of other States, was challenged on the ground that it discriminated between the products and manufactures of the State of Missouri and those of other States; and the court declared the law to be invalid as an attempt on the part of Missouri to regulate commerce between the States. In delivering the judgment of the court, Mr. Justice Field said:—“If Missouri can require a licence tax for sale by travelling dealers of goods which are the growth, product or manufacture of other

States or countries, it may require such licence tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion. The power of the State to exact a licence tax being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favourable to the interests of one State and injurious to the interests of other States and countries which existed previous to the adoption of the Constitution might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States.” In the case of *Voight v. Wright (a)* the court declared to be invalid, because it was an attempt to discriminate between the products of different States, and therefore a regulation of interstate commerce, a law of the State of Virginia which required all flour brought into the State to be “reviewed and have the Virginia inspection marked thereon,” and required a payment to the inspector of two cents a barrel, and did not require, although it permitted, inspection of flour produced in the State. In the case of *Schollenberg v. Pennsylvania (b)* the validity of a law of the State of Pennsylvania which prohibited the importation of oleomargarine from other States was impugned and the court pronounced the law to be void because it was an attempt to regulate commerce between the States. More recently the Legislature of the State of Washington enacted a law which prohibited all sales of certain kinds of game within the State, and the Circuit Court of the United States declared the law to be invalid as an attempt to regulate commerce among the States (*a*).

It is well known that the laws of the several American States which have prohibited the sale of oleomargarine have been enacted to protect the dairymen of those States from competition with the manufacturers of the excluded article; and if the legislative power over trade and commerce among the States of the Australian Commonwealth is not vested exclusively in all directions in the Parliament of the Commonwealth, the Parliaments of the States may be found enacting laws in relation to mercantile transactions which will indirectly protect the local industries of particular States. The provisions of section 112 directly prevent any attempt by a State to obtain a revenue by such laws, but the American cases which have been cited show very clearly that the provisions of that section alone will not prevent legislation by a State which discriminates in favour of its own traders and its own products. To these consequences of admitting a concurrent power in the States to legislate in reference to matters connected with inter-state commerce it is not a sufficient answer to say that the Parliament of the Commonwealth has the power to displace such legislation by legislation of its own. Excepting inspection laws, the

Parliament of the Commonwealth has not the power to annul any legislation of a State in any other manner than by the enactment of a law for the whole Commonwealth which will contain positive provisions in reference to the particular matter; and the process of preserving the freedom of commercial intercourse between the States by such remedial legislation might burden the statute book of the Commonwealth with a succession of laws enacted for no other purpose than to restore between the States a relation which the Constitution itself says shall always exist between them. It therefore appears to be an irresistible conclusion that when section 108 speaks of a power which “is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of a State” it includes any power the retention of which by the Parliaments of the States would enable them to defeat in any measure, or for any period of time, a positive provision of the Constitution, or the exercise of which would compel the Parliament of the Commonwealth to enact contrary legislation to preserve the jurisdiction which the Constitution has expressly conferred upon it in respect of any matter which clearly requires uniform regulation throughout the whole Commonwealth in order to preserve perfect freedom of commercial intercourse among the States.

Power of the Parliament of the Commonwealth to annul inspection laws of the states.

The only laws of a State which the Parliament of the Commonwealth can annul by a simple declaration to that effect are inspection laws, and the power to abrogate them is specially conferred by section 112, which also expressly provides that “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.” The purpose of these provisions and of the grant of the power to the Parliament of the Commonwealth to annul any inspection law of a State is clearly to secure to the Parliament of the Commonwealth the complete control of all matters directly affecting trade and commercial intercourse with other countries and among the States. And when these provisions and this specific power of the Parliament of the Commonwealth are found to be reinforced by the explicit declaration contained in section 98 that “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”; and by the equally explicit declaration contained in section 92 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”; and when the power of the Parliament of the Commonwealth in respect of trade and commerce with other countries and among the States is declared to be a power “to make laws for the peace, order and good government of the

Commonwealth” in reference to the matter; it seems impossible that the High Court of the Commonwealth will ever have imposed upon it the task of travelling over the ground covered by the numerous able judgments of the Supreme Court of the United States of America which have declared that the power conferred upon Congress to regulate trade and commerce with foreign countries and amongst the States is exclusive in regard to all matters which operate directly on either foreign or inter-state commerce. But in determining the question whether a particular law of a State is an attempted contravention of the exclusive power of the Parliament of the Commonwealth in respect of trade and commerce or a legitimate exercise of a power reserved to the States, the Judiciary of the Commonwealth cannot fail to derive light and guidance from the long series of decisions pronounced by the American Supreme Court in reference to the authority of Congress over foreign and inter-state commerce; and the following extract from the judgment of that Court in the case of *Robbins v. Shelby County Taxing District (a)* will be found to contain an able and comprehensive statement of the fundamental principles which the previous decisions of the Court upon the question had established and references to all the important cases in which they were applied:—

“1. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation. This was decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*, 12 How., 299, 319, and was virtually involved in the case of *Gibbons v. Ogden*, 9 Wheaton, 1, and has been confirmed in many subsequent cases, amongst others, in *Brown v. Maryland*, 12 Wheat., 419; *The Passenger Cases*, 7 How., 283; *Crandall v. Nevada*, 9 Wall., 35,42; *Ward v. Maryland*, 12 Wall., 418, 430; *State Freight Tax Cases*, 15 Wall., 232,279; *Henderson v. Mayor of New York*, 92 U.S., 259, 272; *Railroad Co. v. Husen*, 95 U.S., 465, 469; *Mobille v. Kimball*, 102 U.S., 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S., 196, 203; *Wabash &c. Railway Co. v. Illinois*, 118 U.S., 557. “2. Another established doctrine of this court is that 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, as hereafter mentioned is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat., 1, 222; by Mr. Justice Grier in the *Passenger Cases*, 7 How., 283, 462, and has been affirmed in subsequent cases. *State Freight Tax Cases*, 15 Wall., 232, 279; *Railroad Co. v. Husen*, 95 U.S., 465, 469; *Welton v. Missouri*, 91 U.S., 275, 282; *Mobille v.*

Kimball, 102 U.S., 691, 697; *Brown v. Houston*, 114 U.S., 622, 631; *Walling v. Michigan*, 116 U.S., 446, 455; *Picard v. Pullman Southern Carr. Co.*, 117 U.S., 34; *Wabash &c. Railway Co. v. Illinois*, 118 U.S., 557.

“3. It is also an established principle, as already indicated, that the only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; or when it does those things which may otherwise incidentally affect commerce, such as the establishment and regulation of highways, canals, railroads, wharves, ferries and other commercial facilities; the passage of inspection laws to secure the due quality and measure of products and commodities; the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community; the imposition of taxes upon persons residing within the State or belonging to its population and upon avocations and employments pursued therein, not directly connected with foreign or inter-state commerce, or with some other employment or business exercised under the authority of the Constitution and laws of the United States; and the imposition of taxes upon all property within the State, mingled with and forming part of the great mass of property therein. But in making such internal regulations, a State cannot impose taxes upon persons passing through the State, or coming into it merely for a temporary purpose, especially if connected with inter-state or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad, or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulations adversely to the persons or property of other States, and no regulations can be made directly affecting inter-state commerce. Any taxation or regulation of the latter character would be an unauthorised interference with the power given to Congress over the subject. For authorities on this last head it is only necessary to refer to those already cited.”

Matters affecting the whole Commonwealth necessarily within the exclusive legislative power of the Federal Parliament.

The other matters enumerated in section 51 which come within the exclusive power of the Parliament of the Commonwealth in consequence of their essential character are all clearly matters which affect the whole Commonwealth, except xxxvii., which may in some instances affect only two or more States. But whenever more than one State is to be affected by the same legislation it is manifest that such legislation must proceed from the Parliament of the Commonwealth. The Parliaments of the several States have not any territorial jurisdiction beyond the boundaries of the several States. Hence any matter which requires legislation that

affects the whole Commonwealth in order to give effect to the purpose for which it was placed within the legislative power of the Parliament of the Commonwealth is necessarily within the exclusive jurisdiction of that Parliament.

The matters enumerated in section 51 in regard to which the Parliaments of the States are directly and expressly prohibited from exercising spontaneous legislative authority in any circumstances whatever are the following:—

“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:

“XII. Currency, coinage, and legal tender.”

The exercise of any legislative power by the Parliament of a State in regard to currency, coinage or legal tender is peremptorily forbidden by section 115; and the several States are directly forbidden by section 114 to raise or maintain any naval or military force without the consent of the Parliament of the Commonwealth. The legislative authority of the Parliament of the Commonwealth in regard to the military and naval defence of the Commonwealth and the several States is made exclusive by the combined operation of subsection II. of section 52, and section 69; and if any additional provision is made in regard to the matter by section 114, it is to add an additional power to the Parliament of the Commonwealth in regard to it; and that additional power is a power to authorise the Parliaments of the States to legislate upon the matter.

Matters which remain subject to the legislative power of the Parliaments of the States until the Federal Parliament exercises its legislative power in regard to them.

The matters enumerated in section 51 which remain subject to the legislative power of the Parliaments of the States until the Parliament of the Commonwealth exercises its legislative authority in regard to them appear to be the following:—

XIII. Banking other than State banking, and the incorporation of banks and the issue of paper money:

XIV. Insurance other than State insurance:

XV. Weights and measures:

XVI. Bills of exchange and promissory notes:

XVII. Bankruptcy and insolvency:

XVIII. Copyrights, patents of inventions and designs, and trade marks:

XIX. Naturalization and aliens:

XX. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

XXI. Marriage:

XXII. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

XXVI. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

XXVIII. The influx of criminals.

Matters in respect of which the Federal Parliament and the Parliaments of the States have concurrent and independent jurisdictions.

The matters enumerated in section 51 in respect of which the Parliament of the Commonwealth and the Parliaments of the States have concurrent and independent jurisdictions appear to be the following:—

II. Taxation:

VIII. Astronomical and meteorological observations:

XI. Census and statistics:

XXIII. Invalid and old-age pensions.

In addition to these there are several matters enumerated in section 51 which require combined legislative action by the Parliament of the Commonwealth and the Parliament of a State, viz.:—

XXXIII. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

XXXIV. Railway construction and extension in any State with the consent of that State.

Taxation.

In regard to the matter of taxation, the legislative power of the Parliament of the Commonwealth is subject to the restriction that there shall not be any discrimination between States or parts of States in the exercise of it. With this exception, the jurisdiction of the Parliament of the Commonwealth with respect to taxation is unlimited. But the States are precluded from obtaining revenue by duties of customs and excise, and they cannot impose any other kind of taxation which interferes with the freedom of trade and commerce with other countries, and among the States. Hence the jurisdiction of the Parliaments of the States in respect of taxation is not equal in extent to the jurisdiction of the Parliament of the Commonwealth but, so far as it extends, it is concurrent with and independent of the jurisdiction of the Parliament of the Commonwealth. The free exercise of whatever power of taxation is reserved to the States by the Constitution is absolutely necessary for the free exercise of all the other legislative powers possessed by them, and may, therefore, be properly regarded as necessary to the separate political existence of the States. If

the Parliament of the Commonwealth had the power to control the Parliaments of the States in the matter of taxation, it would have the power to indirectly but effectually dictate the fiscal legislation of all the States, and thereby substantially control all the other legislation of the States and thus to change the whole character of the federal form of government established by the Constitution of the Commonwealth.

Except in the annulment of inspection laws the Federal Parliament is not empowered to control the Parliaments of the States in the exercise of their legislative powers.

In regard to one matter only the Constitution of the Commonwealth has conferred upon the Federal Parliament the power to intervene directly between the Parliament of a State and the persons subject to its jurisdiction by legislation expressly directed to that purpose. That matter is the execution of the inspection laws of a State, which the Parliament of the Commonwealth may prevent by the exercise of the power conferred upon it by section 112 to annul any such law. Section 109 declares that "When a law of a State is inconsistent with a law of the Commonwealth, the latter to the extent of the inconsistency shall prevail." But that section does not confer upon the Parliament of the Commonwealth any authority to restrain the Parliaments of the States from exercising their legislative power in respect of any matter within their jurisdiction, and does not in any degree empower the Parliament of the Commonwealth to remove the residents of any States from the jurisdiction of the Parliament of the State in regard to any other matters than those in respect of which the Parliament of the Commonwealth has power to substitute its own legislation for the legislation of the State. The Constitution has placed a number of restrictions and prohibitions upon the Parliaments of the States, but it has not empowered the Parliament of the Commonwealth to add to them.

Astronomical observations, &c.

For these reasons the Parliament of the Commonwealth cannot restrain the Parliaments of the States from exercising their legislative powers in regard to astronomical and meteorological observations, or in regard to census and statistics, or in regard to invalid and old age pensions. The enactment of a law by the Parliament of the Commonwealth upon any of these matters does not have the effect of removing the matter from the jurisdiction of the Parliaments of the States. Each State may enact a law to provide for the taking of astronomical and meteorological observations for its own purposes, or for taking a census of the inhabitants of the State, or for collecting statistics within the State. Each State may also grant pensions to its aged and invalid residents in addition to any pension granted to them by the Parliament of the Commonwealth. It is, of course, open to the Parliament of the Commonwealth to declare that no person entitled to claim or being in receipt of a

pension for old age or infirmity under a law of a State shall be entitled to a similar pension under a law of the Commonwealth; as it is also open to the Parliament of a State to declare that no person entitled to claim or being in receipt of a pension for old age or infirmity under a law of the Commonwealth shall be entitled to a similar pension under a law of the State. But in the absence of any such declaration in either case, the same person could receive a pension under each law.

Distinctive characteristics of the matters in respect of which the Federal Parliament and the Parliaments of the States have concurrent and independent jurisdictions.

The visible distinction between the matters in respect of which the jurisdiction of the Parliaments of the States may be *pro tempore* curtailed or suspended by legislation of the Parliament of the Commonwealth and those matters in respect of which the Parliaments of the States possess a jurisdiction concurrent with that of the Parliament of the Commonwealth and independent of it, is that in the one case the nature of the matters permits the existence of two separate laws in regard to them, each of which may embrace the whole matter, and both of which may be simultaneously observed by the same persons, but in the other case the matters do not permit a similar duplication of jurisdiction.

Operation of sections 107 and 108.

The respective powers of the Parliament of the Commonwealth and the Parliaments of the States in regard to matters which are not within the exclusive jurisdiction of the Parliament of the Commonwealth are directly declared in sections 107 and 108. Section 107 declares that—

“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.”

If this section could be read without reference to any other section of the Constitution, and without reference to the fifth of the introductory sections prefixed to the Constitution, it would apparently render nugatory any legislation of the Parliament of the Commonwealth which was contrary to the legislation of the Parliament of a State in respect of any of the matters enumerated in section 51 and which are not within the exclusive jurisdiction of the Parliament of the Commonwealth, or expressly withdrawn from the jurisdiction of the Parliaments of the States. But it must be read and construed subject to section 109, which gives predominance to the laws of the Commonwealth in all cases of conflict between them and the laws of a State, and subject also to the fifth of the introductory sections prefixed to the Constitution, which declares that—

“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; 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.”

Section 108 declares that—

“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.”

The words “any matter within the powers of the Parliament of the Commonwealth” are wide enough in themselves to include matters within the exclusive jurisdiction of that Parliament, and, if they could be read in that sense, a literal construction of the second part of section 108 would give to the Parliament of a State, until the Parliament of the Commonwealth legislated in respect of the matter, power to alter or repeal any law of the State which was enacted before the establishment of the Commonwealth, and which related to any matter placed by the Constitution within the exclusive jurisdiction of the Parliament of the Commonwealth. The words “subject to this Constitution” in the first part of the section do not in themselves prevent this construction of the second part of it, because they only qualify the declaration that the laws of a State relating to any matter within the powers of the Parliament of the Commonwealth shall continue in force; and the second part of the section expressly declares that all such laws so far as they remain in force may be altered or repealed by the Parliament of the State “until provision is made in that behalf by the Parliament of the Commonwealth.” Moreover, laws of a colony that relate to matters in respect of which the Parliaments of the States retain their legislative power until the Parliament of the Commonwealth legislates upon them would remain in force, and could be altered and repealed by the Parliaments of the States concordantly with the Constitution, without the declaration to that effect contained in the section. But laws of a colony that relate to the departments which are transferred by the Constitution from the States to the Commonwealth must be held *ex necessitate* to remain in force and to be exempt from the power of the Parliaments of the States, because they are the only laws available to the Executive Government of the Commonwealth for the administration of those departments, until the Parliament of the Commonwealth substitutes other laws for them. The continuing validity and operation of such laws,

and their exemption from the legislative power of the Parliaments of the States, are directly contemplated by section 70, which declares that—

“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.”

All the powers and functions mentioned in this section are exercisable in the several States under particular local laws of the States until the Parliament of the Commonwealth substitutes other laws for them; and the exercise of such powers by the Executive Government of the Commonwealth in the several States necessarily requires the continuance of those local laws, subject to the provisions of the Constitution relating to any matter within the purview of such laws. But if the Parliaments of the States retained the power to alter or repeal any of those laws, the Executive Government of the Commonwealth might at any time be deprived for an indefinite period of all legal authority to perform the functions essential to the administration of one or more of the departments transferred to it by the Constitution. It is therefore evident that the purport of section 108 is not to empower the Parliaments of the States to alter and repeal those laws; and the purport of the section, when read, as it must be, in conjunction with section 107, seems to be twofold; firstly, to declare that all such laws as those lastly mentioned shall continue in force until altered by the Parliament of the Commonwealth; and, secondly, to declare the position of the laws in each State which remain within the jurisdiction of the Parliaments of the States until the Parliament of the Commonwealth exercises its legislative power in regard to them. This appears to be the only interpretation of section 108 which will make it read consistently with sections 70 and 107, and the result is that the second portion of section 108 must be read as if there had been inserted in it, after the words “Parliament of the State,” the additional words *in respect of any matter within its legislative power*.

Naturalization of aliens.

There is one matter which is placed within the legislative power of the Parliament of the Commonwealth by section 51 and which does not appear to be included among the matters expressly placed under the exclusive jurisdiction of that Parliament by section 52, or by any other provision of the Constitution, but which, in the absence of sections 108 and 118, might have been supposed to be necessarily exempt from the jurisdiction of the Parliaments of the States as soon as the

Commonwealth was established. That matter is the naturalization of aliens, which is undoubtedly a matter of national concern in which the whole Commonwealth is politically and socially interested, and which, consistently with the whole purport and character of the Constitution of the Commonwealth, ought to be exclusively regulated by federal legislation. In the absence of sections 108 and 118 it might have been very forcibly argued that the laws of the separate States which related to the naturalization of aliens necessarily became inoperative upon the establishment of the Commonwealth, because the separate States thereupon became one territory in regard to all matters within the exclusive jurisdiction of the Parliament of the Commonwealth, and the attempted naturalization of an alien with respect to a portion only of the territory of the Commonwealth would be a legal impossibility and a nullity. But if the power of the Parliaments of the States to naturalize aliens has not been expressly withdrawn from them, and if it is not included beyond all doubt among the matters embraced in section 52, it cannot be excluded from the large and positive language of section 108; and the result seems to be that until the Parliament of the Commonwealth legislates upon the matter, the naturalization of aliens within the Commonwealth is to be accomplished through the laws of the States relating to the matter.

The objection which might have been otherwise urged against the continuing operation of the separate laws of the several States, under which the power of naturalization was exercised before the establishment of the Commonwealth, viz., that they never had any ex-territorial validity, and the Constitution does not contain any provision which extends the operation of them beyond the boundaries of the several States which have enacted them, seems to be removed by section 118, which declares that "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." The naturalization of an alien under the law of a State is a public act of the State in which it takes place, and it is made a matter of public record in that State, and therefore full faith and credit must be given to it under section 118 in every other State of the Commonwealth. But it is difficult to see in what manner full faith and credit can be given in one State to the naturalization of an alien which has taken place as a public act, and has been publicly recorded, in another State, other than by according to the person who has undergone the process of naturalization in the other State the same status as a subject of the Crown which he occupies in the other State. Under section 118 the legal status acquired by a person under the laws of any State in regard to the questions of marriage, divorce, and legitimacy will be accorded to him in every other State of the Commonwealth, notwithstanding the fact that the laws of the State under which he acquired the status have not any ex-territorial force

or validity; and there does not appear to be any valid reason why the application of the section should be limited to an extraterritorial recognition of the definite legal consequences of transactions and proceedings authorised by some particular laws of the States, and be restrained in regard to transactions and proceedings authorised by other laws of the States, so long as questions of public morality or public safety do not arise and afford a valid ground for making a distinction (*a*).

The Constitution of the Commonwealth clearly contemplates the naturalization of aliens with respect to the whole Commonwealth as a single territory; and, in the absence of section 108, the naturalization laws of the separate States would necessarily cease to have any validity upon the establishment of the Commonwealth, because they relate to a matter which would otherwise become subject immediately to the exclusive control of the Parliament of the Commonwealth; and until that Parliament legislated upon the matter there would not be any law relating to it. In the parallel instance of the United States of America the Supreme Court decided in the case of *United States v. Villato* (*b*) that the law of the State of Pennsylvania which provided for the naturalization of aliens, and which was enacted before the adoption of the Constitution, became thereupon obsolete and inoperative. This decision must be regarded as having abrogated the authority of the previous case of *Collett v. Collett* (*a*) which recognised a concurrent power of naturalization in the Legislatures of the States (*b*). But section 108 of the Constitution of the Commonwealth of Australia not only continues the operation of the naturalization laws of the separate States, but also makes the duration of their validity dependent upon the will of the Parliament of the Commonwealth, with the result that whenever an alien is naturalized under the law of a State it must be held to be done in accordance with the will of that Parliament, because that Parliament has the power to supersede the law of the State whenever it chooses to do so. In this view of the question it seems difficult to arrive at any other conclusion than that the naturalization of aliens in respect of the whole Commonwealth as a single territory, until the Parliament of the Commonwealth enacts a uniform law upon the matter, is to be accomplished through the media of the separate naturalization laws of the several States and the combined operation of sections 108 and 118 of the Constitution. The naturalization of an alien in respect of only a part of the Commonwealth is inconsistent with the political unity of the Commonwealth, and incompatible with the plain purport of the Constitution in regard to the matter, and with section 117, which declares that “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.”

The purport of the last-mentioned section is to ensure and protect uniformity of political status and privilege in each State, against any legislation of a State which attempts to discriminate between the residents of the State and the residents of other States; and it cannot be supposed that, in the face of such a provision, the Constitution itself would simultaneously make the political status and privileges of any resident of the Commonwealth, in regard to any matter in respect of which the whole Commonwealth is made by the Constitution one territory, dependent upon his domiciliation in any particular State until the Parliament of the Commonwealth provided by legislation for the removal of the anomaly. Any such inference in regard to the naturalization laws of the States is expressly rebutted by sections 16 and 34 of the Constitution, which declare that naturalization under the law of a State, “or of a colony which has become or becomes a State,” shall have equal effect to that of naturalization under a law of the Commonwealth, or under a law of the United Kingdom, to qualify for the position of senator or member of the House of Representatives any resident of the Commonwealth who possesses the other qualifications for the position which are prescribed by the Constitution. But if naturalization under the law of a State is recognised by the Constitution as valid throughout the Commonwealth in relation to any matter with respect to which alienism would be a disqualification, an equal recognition of such naturalization by the several States under section 118 seems to be the only consistent result of the combined operation of that section and section 108, and those sections of the Constitution which directly refer to such naturalization and make it equal to naturalization under a law of the Commonwealth in relation to the matters within their purview.

(a) See chapter on The Federal Power over Commerce and the Police Powers of the States.

(a) See sections 7, 9, 22, 29, 31, 34, 39, 46, 47, 48, 65, 67, 71, 72, 73, 78, and 79.

(a) 12 Wall, 418.

(b) 91 U.S., 275.

(a) 141 U.S., 62.

(b) 171 U.S., 1.

(a) *In re Devonport*, 102 Fed. Rep., 540.

(a) 120 U.S., 489.

(a) The rule governing the inter-state recognition of divorces in the United States of America is stated in Rorer's *Inter-State Law* (p. 248) as follows:—“A decree of divorce, valid and

effectual according to the laws of the State in whose courts it is rendered, if jurisdiction attached, is valid and effectual in every other State where it comes in question, when properly evidenced under the laws and Constitution of the United States. It is then entitled to the same effect and has the same force as that which pertains to it in the State where it was rendered.”—*Cheever v. Wilson*, 9 Wall., 108, 123; *Slade v. Slade*, 58 Me., 157. The rule in regard to the inter-state recognition of marriages was stated by Devens, J., in *Cunnington v. Belcherton*, (148 Mass., 223, 226) as follows:—“The validity of a marriage depends upon the question whether it was valid where it was contracted. To this rule there are but two exceptions; marriages which are deemed contrary to the law of nature as generally recognised in Christian countries, and those marriages which the legislature of the Commonwealth (State) has declared shall not be valid because contrary to the policy of our own laws.”

(b) 2 Dallas, 370.

(a) 2 Dallas, 294.

(b) See *Pomeroy's Constitutional Law*, 10th ed., p. 339; and *Story's Commentaries*, 5th ed., vol. II., p. 46.

6. Federal Control of the Rivers of the Commonwealth.

The rights of the residents of the several States to the use of the waters of the rivers of the Commonwealth.

SECTION 100 of the Constitution of the Commonwealth 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.”

It is clear that this provision of the Constitution is intended to impose a restriction upon the legislative power of the Parliament of the Commonwealth, and it therefore implies that if it did not find a place in the Constitution the Parliament of the Commonwealth would possess a larger power to control the use of the waters of the rivers of the Commonwealth in the exercise of other powers conferred upon it. The domain within which this larger power would be exercisable, in the absence of the restriction, is indicated by the explicit application of the restriction to the legislative power of the Parliament in regard to trade and commerce. It is therefore necessary to ascertain the nature and extent of the control over the use of the waters of the rivers in the Commonwealth which is included in the power of the Parliament “to make laws for the peace, order and good government of the Commonwealth with respect to trade and commerce with other countries and among the States,” in order to determine the nature and extent of the restriction imposed by section 100 in reference to it.

Power of the American Congress over navigable rivers. It has been repeatedly decided by the Supreme Court of the United States of America that the power conferred upon Congress by the Constitution of that country “to regulate commerce with foreign nations and among the several States,” includes authority to regulate the use of all navigable rivers which flow through more than one State, for all purposes of commercial intercourse and the passage of travellers between the States.

The rule of the common law in regard to rivers. The rule of the English common law with regard to the public right to the use of rivers for navigation is that all tidal rivers are navigable by common right as far as their waters rise and fall with the flow and ebb of the tide, but that in regard to fresh water rivers, whose waters are not affected by the tides, the right of public navigation is dependent upon usage (*a*). The property in the beds of all tidal rivers and waters is vested by the English common law in the Crown. Under the same law the property in the beds of all fresh water rivers is vested in the riparian proprietors of the banks of the rivers. But wherever the public right of navigation exists in regard to a fresh water river it is paramount to the proprietary

rights in the bed of it (*b*). In accordance with the rule of the common law in reference to the right of public navigation independent of usage, the jurisdiction of the courts of admiralty in England was confined to the sea and tidal rivers.

The rule in the United States of America in regard to the jurisdiction of the courts of admiralty. The same territorial limitation to the jurisdiction of the courts of admiralty was observed in the United States of America until the year 1851, when the Supreme Court, in the case of *The Genesee Chief v. Fitzhugh* (*a*) overruled previous decisions of the Federal Judiciary and declared that the jurisdiction of the federal courts of admiralty in that country extends to all waters, whether fresh or salt, which are navigable and are capable of being used as means of commercial intercourse between any two States or with foreign nations. The decision in that case was not based upon the power conferred by the Constitution upon Congress to regulate trade and commerce between the States and with foreign nations, but upon the declaration in the Constitution that the judicial power of the United States should extend “to all cases of admiralty and maritime jurisdiction.” The Constitution of the Commonwealth of Australia does not contain any description or enumeration of the contents of the judicial power of the Commonwealth; but section 76 declares that the Parliament may make laws conferring original jurisdiction on the High Court in any matter of admiralty and maritime jurisdiction; and section 77 empowers the Parliament to define the jurisdiction of any federal court other than the High Court with respect to any of the matters mentioned in sections 75 and 76; and under these sections the power of the Parliament of the Commonwealth is equal to the power of the American Congress to declare to what rivers and waters the jurisdiction of the courts of admiralty in the Commonwealth shall extend. But neither the power of the Congress of the United States of America nor the power of the Parliament of the Commonwealth of Australia to control the use of navigable rivers is dependent upon its power to confer upon federal courts jurisdiction in admiralty and maritime cases. In the case of *The Lottawanna* (*a*) the Supreme Court of the United States declared that “The power to regulate commerce is the basis of the power to regulate navigation and navigable waters and streams,” and section 98 of the Constitution of the Commonwealth of Australia expressly declares that—

“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.”

The trade and commerce with respect to which the Parliament of the Commonwealth has legislative power includes trade and commerce “among the States,” and it therefore extends to navigation upon rivers between the States. If it were possible to suggest a doubt upon the matter the extension of the power to

“railways the property of any State” would conclusively dissipate it.

Navigable character of a river not determined by the instruments or methods of navigation used upon it.

It has been repeatedly decided in the United States that the navigable character of a river, by virtue of which it is subject to the power of Congress in relation to trade and commerce, does not depend upon the instruments or methods of navigation by which commerce may be conducted upon it. If it is capable of use for the purposes of trade by the employment of any instrument or method of transportation, its use for that purpose is subject to the control of Congress (*a*). But the control of Congress does not extend to navigation conducted wholly upon the internal waters of a State which are not accessible by navigation from any other State (*b*).

A State may improve the passage of a river within the boundaries of the State.

It has also been decided by the Supreme Court of the United States that the power of Congress to control the use of navigable rivers for the purposes of navigation does not exclude the power of a State to improve, within the boundaries of the State, the passage of any navigable river, and to impose tolls for the use of the river within the State for the purpose of providing funds to pay the interest upon the money expended in improving the passage of it (*c*). A State may also lawfully establish within its boundaries ferries over navigable rivers, and grant licenses to boats and boatmen to carry goods and merchandise across them, and may forbid unlicensed persons or boats from using the ferries, although the river is a highway for commerce between several States or for foreign commerce (*d*).

A State may erect bridges &c. which do not obstruct commerce.

In the absence of any controlling legislation by the Parliament of the Commonwealth, the regulation of the use of a navigable river which is entirely within the boundaries of a State is necessarily within the legislative power of the State, because the river is a part of the territory of the State, and the State may authorise the erection of bridges over it, or other public facilities for travel, or trade, or industry, which do not substantially obstruct foreign or inter-state commerce. But in all such cases, apart from the restriction imposed upon the Parliament of the Commonwealth by section 100 of the Constitution, the jurisdiction of the State is subject to the paramount legislative power of the Commonwealth to regulate the use of every river that is capable of being used as a medium of foreign or inter-state commerce, and the decisions of the Federal Courts in the United States of America support the proposition that the power of the Parliament of the Commonwealth to control the use of navigable rivers as channels of commerce includes the power to improve their navigation and to declare what shall be deemed to be obstructions, and to require their removal (*a*). It has also been decided by the same courts that the power of Congress to control the navigation of rivers includes the power to take

private property for the construction of facilities for navigation and to impose tolls for the use of them (*b*).

The restriction imposed upon the Parliament of the Commonwealth by section 100 of the Constitution is not confined to navigable rivers. But non-navigable rivers are not primarily within the legislative power of the Parliament over trade and commerce; and it was very truly said by the Supreme Court of the United States in the case of *The Montello (a)*—“It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is to be deemed navigable;” and in order to give it the character of a navigable stream “it must be generally and commonly useful to some purpose of trade or agriculture.”

A State may not authorise the diversion of the waters of a river to the detriment of riparian proprietors.

The consideration of the extent of the restriction imposed upon the Parliament of the Commonwealth by section 100 of the Constitution involves the consideration of the question of the power of a State to authorise the diversion of the waters of a river flowing through it, or a diminution of their quantity, to an extent which would affect the rights of riparian proprietors in another State. There is not any restriction directly and expressly imposed by the Constitution upon the several States in respect of their use of the rivers of the Commonwealth for the purposes of conservation or irrigation, but it would be an anomalous result if each State has the power under the Constitution to divert the water of a river for the benefit of the residents of the State, or to diminish the quantity of it, to the detriment of the residents of another State, whether the river is navigable or not, and that the Parliament of the Commonwealth cannot for any purpose that would be beneficial to all the States, or to a majority of them, do the same thing. It has already been stated that the imposition of the restriction imposed on the Parliament of the Commonwealth by section 100 implies that, in the absence of any such restriction, Parliament would have a larger power to control the use of the waters of the rivers of the Commonwealth than that which the Constitution has conferred upon it; and the terms in which the restriction is imposed indicate that such larger power would be exercisable by the Parliament of the Commonwealth as a part of its legislative power with respect to trade and commerce between the States and with other countries. But the Constitution has not conferred any legislative power upon the States with respect to such trade and commerce; and the power of the Parliament of the Commonwealth with respect to that matter is from the nature of the power necessarily exclusive. If the several States were so many independent nations, any interference in one of the States with the waters of a river that flowed through that State and another State, to an extent that would produce any damage to the riparian proprietors in the other State, would be a matter of international complaint for

which redress in the last resort would be sought by war. But the States of the Commonwealth are constituent parts of the same nation, and any act on the part of any one of them which inflicts injury on the residents of another State of the Commonwealth, and which would be a matter of international complaint, if the two States were separate and independent nations, is a matter for redress in the High Court of the Commonwealth under the provision of the Constitution which confers upon that Court jurisdiction in all matters between States. It has been decided by the Supreme Court of the United States of America that under the provision of the Constitution of that country which extends the judicial power of the United States to "controversies between two or more States," one State may file a bill in equity against another State to determine the question of a disputed boundary (*a*). Under the Constitution of the Commonwealth the High Court has clearly jurisdiction to determine a similar dispute between two States of the Commonwealth, and it must as a logical sequence have jurisdiction of the question whether any portion of the territory within the boundaries of one State can be deprived of all that makes that portion of its territory valuable by the aggressive legislation of another State.

Riparian proprietor in one State may invoke the aid of the Federal Judiciary to redress injury produced by interference with riparian right in another State.

The Constitution of the Commonwealth also confers original jurisdiction upon the High Court in all matters between a State and a resident of another State, and therefore a private riparian proprietor in one State may invoke the intervention of the Court for redress of an injury to his riparian rights produced by the interference of another State with the waters of a river to which his riparian rights are attached. If the interference which produces the injury is the act of a private person or of any public body acting under the legislation of a State, a suit for redress may be brought against such private person or public body. In the case of *Holyoke Water Power Co. v. Connecticut River Co.*, which was decided in the United States in the year 1884 (*a*), the Legislature of Connecticut had authorised the Connecticut River Company to raise their existing dam across a river in Connecticut to improve the navigation and to maintain the water power of the company. The Connecticut River Company's dam was about sixteen miles below the dam and factories of the Holyoke Water Power Company in Massachusetts. The Connecticut River Company proposed to raise its dam in Connecticut so high that it would cause a diminution in the fall of the river above the dam for six or seven months of the year to the detriment of the Holyoke Company. The Holyoke Company filed a bill in equity in the Circuit Court of the United States for the district of Connecticut, praying for an injunction restraining the Connecticut River Company from raising its dam to the proposed height. The court granted the injunction, and the concluding portion of the judgment

of Shipman, J., runs as follows:—

“The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State; but it seems to me that the State obtains, by virtue of its governmental powers, no governmental control over, or right to injure, land without its jurisdiction. Jurisdiction confers the power and right to inflict consequential injury, but where no jurisdiction exists the right ceases to exist. It is a recognised principle that the statutes of one State in regard to real estate cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land, *or to rights connected with land* in Massachusetts, Connecticut is acting extra-territorially. Let there be a decree enjoining the defendants against any further raising of its present dams to a greater height than the height occupied by the respective portions of the present structure.”

The same principle of inter-state law was enunciated and applied by Treat, J., in the case of *Rutz v. City of St. Louis (a)*. “Missouri (said he) cannot pass a law to govern Illinois, its citizens and their property situate in Illinois; and if, pursuant to a statute of Missouri, a dyke was erected destructive of property in Illinois belonging to citizens of that State, such statute cannot be pleaded against them, for the statute of Missouri could not operate extra-territorially.”

In conformity with these declarations of inter-state law under the Constitution of the United States, the State of New Hampshire has enacted a law authorising the Governor to institute and prosecute suits at law, or in equity, in the name of the State, whenever, in his judgment, such course shall be necessary to prevent the injurious diversion of the waters of rivers which flow from other States into the State of New Hampshire (*b*).

Powers of the States over the rivers within their boundaries.

Inasmuch as the power of the Parliament of the Commonwealth to control the use of the rivers of the Commonwealth is derived from its legislative power in respect of trade and commerce between the States and with other countries, it extends primarily to such rivers only as are navigable and which are therefore capable of being used as channels of such trade and commerce. With respect to all other rivers and streams, the legislative power of a State is plenary within its boundaries. It has also been decided by the Supreme Court of the United States that where a stream is of small value for navigation and of great importance as a source of water-power, a State may devote it to that use; and in particular circumstances a State may destroy

the navigability of a stream in order that its waters may be used for irrigation (a).

In reference to the legislative power of a State in such cases it was said by the Supreme Court of the Territory of New Mexico in the case of *The United States v. Rio Grande Dam Co.* (b)—“Here the paramount interest is not the navigation of the streams but the cultivation of the soil by means of irrigation. Even if by the expenditure of vast sums of money in straightening and deepening the channels, the streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be served by it. Ample facilities for transportation, adequate to all the requirements, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity.” In this case the bill of complaint alleged that the appropriation of the waters of the Rio Grande which was proposed by the defendants would seriously obstruct the navigability of the river from the place where the dam of the defendants would be constructed to the mouth of the river. The defendants denied the allegation and the bill was dismissed for want of equity. The plaintiffs appealed to the Supreme Court of the United States, and the decree of the Court below was reversed, and the case remanded with instructions to set aside the decree of dismissal, to order an inquiry into the question whether the intended appropriation of the waters of the river by the defendants would substantially diminish the navigability of the river within the limits of its present navigability, and if so to enter a decree restraining the proposed operations of the defendants to the extent to which they would produce that result. The Court acknowledged the power of a State to alter the rule of the common law as to the rights of riparian proprietors, and to permit the appropriation of waters of rivers within the boundaries of the State for such local purposes as the State might deem proper. But the Court declared that the power of a State in all such cases was limited by the superior power of the Federal Government to secure the uninterrupted navigability of all rivers within the United States, and that a recognition by Congress of the appropriation of waters in contravention of the common law rule regarding navigable rivers did not confer upon the States the right to appropriate all the waters of the tributary streams which unite in a navigable watercourse, and so destroy the navigability of it, in derogation of the interests of all the people of the United States (a).

“Reasonable use” is a question of fact.

The restriction imposed by section 100 of the Constitution upon the power of the

Parliament of the Commonwealth to control the use of the navigable rivers of the Commonwealth is confined to the reservation of the right of a State and of the residents therein to the reasonable use of waters for conservation or irrigation. The question of “reasonable use” is one which ultimately resolves itself into a question of fact, and its determination in each case must depend upon the concomitant circumstances of the alleged conflict between the impugned legislation of the Parliament of the Commonwealth and the right reserved to the States by the restriction imposed upon the legislative power of the Parliament. It is only after the Parliament has exercised its legislative power in regard to the use of a navigable river as a medium of trade and commerce that any question of the extent of the restriction imposed upon it by section 100 of the Constitution can arise for judicial decision. In the absence of any legislation to which the restriction could apply no controversy can take place between the Commonwealth and a State in regard to the right of the State and its residents to conserve the waters of a navigable river or to use them for irrigation. But in the event of a State or any of its residents constructing, for either of those purposes, a dam or other works which would totally obstruct the navigation of a river which flowed through two or more States, the question of the right of the State to deprive the residents of another State of the use of the river as a natural highway and channel of communication and travel between the two States would be a matter “between States” in respect of which the Constitution has conferred original jurisdiction upon the High Court in section 75, and in respect of which the Parliament is empowered by section 77 to define the jurisdiction of any federal court other than the High Court, and to invest any court of a State with federal jurisdiction.

It is impossible to forecast the character of any legislation which the High Court would deem to be contrary to the restriction imposed upon the legislative power of the Parliament of the Commonwealth by section 100 of the Constitution. But it cannot be supposed that any legislation would be declared invalid by virtue of the restriction simply because it required the several States, and the residents therein, to exercise the right reserved to them by section 100 in a manner that would preserve, for the residents of all the States, the unrestrained use of any navigable river for the purposes of trade and commerce between the States and with other countries. Such an interpretation of the restriction would enable any State to exempt whatever portion of any navigable river was within its boundaries from the operation of all legislation of the Parliament of the Commonwealth which purported to regulate the use of the river as a highway for trade and commerce between the States and with other countries. Moreover it is to be noted that the right reserved to the States and their residents by section 100 is expressly confined to “the reasonable use of the

waters of rivers for conservation and irrigation,” and it does not grant any right to occupy any part of the bed of a river for the purposes mentioned. It is therefore evident that the right reserved does not include the right to obstruct the navigation of a river by dams or other structures erected in the bed of the river, or on its banks, which are a part of the bed (a).

(a) See *King v. Montague*, 4 B. & C., 96; *Bristow v. Cormican*, L.R. 3 A.C., 641; *Orr Ewing v. Colquhoun*, L.R. 2 A.C., 839; *Hargreaves v. Diddams*, L.R. 102 B., 582.

(b) See *Anon*, 1 Camp., 517; and *Colchester v. Brook*, 7 Q.B., 339.

(a) 12 How., 443.

(a) 21 Wall., 557, 558.

(a) See *Carter v. Thurston*, 58 N.H., 104; and *The Montello*, 20 Wall., 430, 441.

(b) *Veazie v. Moor*, 14 How., 568.

(c) *Huse v. Glover*, 119 U.S., 543; *Sands v. Manistee River Imp. Co.*, 123 U.S., 288.

(d) *Conway v. Taylor*, 1 Black, 603; *Wiggins Ferry Co. v. East St. Louis*, 107 U.S., 365.

(a) *Coonley v. Albany*, 132 N.Y., 145; *Opinions of Attorney-General*, vol. 15, p. 284.

(b) *United States v. Oregon Railway and Navigation Co.*, 16 Fed. Rep., 524; *United States v. Louisville and Portland Canal Co.*, 1 Flip., 260.

(a) 20 Wall., 430-9.

(a) *Rhode Island v. Massachusetts*, 12 Peters., 657.

(a) 22 Blatch., 131.

(a) 7 Fed. Rep., 428.

(b) Laws of New Hampshire, Session of 1895, p. 336.

(a) *St. Anthony Falls Water Power Co. v. Board &c., of St. Paul*, 168 U.S., 349; *State v. City of Eau Claire*, 40 Wis., 533.

(b) 51 Pac. Rep., 674.

(a) 174 U.S., 690.

(a) *Howard v. Ingersoll*, 15 How., U.S., 415; *Height v. Keokuk*, 4 Iowa, 199.

7. The Federal Power Over Commerce and the Police Power of the States.

Nature and scope of the police power of the States.

THE phrase “police power” has acquired a firmly fixed place in American constitutional law, but it has not yet received from the Supreme Court an authoritative definition which clearly and concisely expresses the contents and limits of the power which is indicated by it, in a manner which would enable such a definition of it to be used as a test whenever a question as to the legitimacy of any alleged exercise of it arises. The phrase appears to have been used for the first time by the Supreme Court in the judgment delivered by Marshall, C.J., in the case of *Brown v. Maryland* (a). In delivering the judgment of the majority of the Supreme Court in *The Slaughter House Cases* (b), Miller, J., said— “The power is and must be from its very nature incapable of any very exact definition or limitation.” Many years previously Chief Justice Shaw of Massachusetts had said that—“It is much easier to perceive and realize the existence and sources of this power than to mark its boundaries, or prescribe limits to its exercise” (a). But other eminent American judges have ventured at different times to define the nature and scope of the police power of the States, and among the most successful of such attempts is that of Chief Justice Redfield of Vermont, who said that “It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State” (b). Probably the most concise, and at the same time the most comprehensive, definition of the police power which has been yet given, or suggested, in addition to those which have come from the judiciary, is that given by Mr. W. R. Howland in the *Harvard Law Review*, vol. 4, p. 22, where he describes it as “the power possessed by a government to protect its citizens from danger, disease and vice.” It is evident that the exercise of the police power as thus defined may frequently impose legislative restrictions upon the conduct of the inhabitants of a State in their pursuit of their daily vocations, and in their commercial and social intercourse with one another, and with the inhabitants of other States or foreign countries. In the earliest and immediately subsequent periods in the history of political societies, trade and commerce occupy much smaller spaces in the life of the people, and are conducted in much simpler methods, than the spaces which they fill, and the methods by which they are pursued, when they come to absorb as large a portion of the time and energy of a majority of a community as they do in the cases of all the great nations of the world to day. Consequently in the earlier periods of the political organisation of a community, there is very little legislation required

for the regulation of its mercantile transactions with other communities. But when a number of communities have become intimately associated in a daily commercial intercourse, the necessity for the regulation of that intercourse increases with its volume and its complexity. If these communities are politically independent of one another, and are not subject to any political superior, there cannot be any regulative code of their mercantile transactions with one another imposed upon them collectively; and therefore each community adopts such local legislation as it thinks best for the protection of its own interests and the advancement of its own commercial prosperity. But when a number of distinct but contiguous communities agree to be politically united under a single legislative authority which is invested with an exclusive power to regulate their commercial intercourse with one another and with other nations, and each community retains its separate legislative power to enact laws for the protection of the lives, health, and property of its members, the concurrent exercise of these two legislative powers, one of which is vested in the legislative organ of the federal organisation, and the other in the several legislative organs of the component communities, will frequently raise the question of the limits of the area within which each of the two powers is paramount or exclusive of the other. The juridical history of the United States of America is full of cases in which this question has been submitted to investigation by the Federal Judiciary, and it might have been supposed that the decisions in those cases would have clearly and satisfactorily determined the nature and extent of the police powers of the several States, and of the federal control over the commercial intercourse of the several States with one another. But the decisions in some of the cases which have been submitted to the American Supreme Court are more or less inconsistent with the principles and distinctions which have been repeatedly declared by that Court to be fundamental for the determination of the respective areas of the legislative powers of Congress and of the several States. The causes of this fluctuation in the application of those principles and distinctions to particular facts is to be found in the political history of the American Republic.

Before the Civil War the slaveholding States vigorously maintained the doctrine of State sovereignty as the bulwark of slavery, and jealously watched and condemned every apparent infringement of it by Congressional legislation in reference to any matter however remote it might be from the question of slavery. The political doctrines of the slaveholding States were always ably represented by some of the members of the Supreme Court, and it was inevitable that their strong political opinions and sympathies should influence their conceptions of the respective powers of Congress and of the legislatures of the several States under the Constitution. The fundamental question debated in the Supreme Court for half a

century was whether, in the absence of Congressional legislation in restriction of it, there was a concurrent power in the States to regulate commerce among the States and with foreign nations, so far as such commerce came within the scope of the police powers of the States, or whether the Constitution had imposed an original restriction on the police powers of the States in relation to the regulation of such commerce. Some of the more pronounced advocates of the doctrine of State sovereignty among the members of the Court did not hesitate to assert that, in the absence of Congressional legislation, the States retained a concurrent power to regulate trade and commerce between themselves and with foreign countries independently of the exercise of their police powers. But a majority of the members of the Court have never concurred in resting a decision upon that foundation.

American decisions upon the relation of the police power of the States to the power of Congress to regulate commerce.

The first case in which the question of the nature and extent of the federal control over trade and commerce was raised in the Supreme Court was *Gibbons v. Ogden* (a), in which Chief Justice Marshall delivered the judgment of the Court, and he declined to enter upon an inquiry whether, in the absence of any repugnant or controlling legislation by Congress, the several States had a concurrent power to legislate in respect of matters within their territorial jurisdiction in a manner which might affect inter-state or foreign commerce; because the legislation of the State of New York which was impugned in the case then before the Court clearly collided with Congressional legislation upon the subjection of navigation, and he said that the sole question to be decided was, "Can a State regulate commerce with foreign nations and among the States while Congress is regulating it?" But Mr. Justice Johnson in a concurring opinion asserted that the power conferred upon Congress to regulate foreign and inter-state commerce was exclusive of any concurrent power in the States that could affect such commerce, and that irrespective of any legislation by Congress the impugned legislation of New York was *ultra vires* and invalid.

In the subsequent case of *Brown v. Maryland* (a), the judgment of the Court was also delivered by Chief Justice Marshall, and he re-affirmed the propositions he had advanced in his judgment in *Gibbons v. Ogden*, and pronounced the impugned legislation of the State of Maryland to be repugnant to the law of Congress which regulated the importation of merchandise from foreign countries. Two years later came the case of *Wilson v. The Blackbird Creek Company* (b), in which a law of the State of Delaware empowering a Company to erect a dam across a navigable creek, for the purpose of reclaiming a tract of marshy land, was impugned as being contrary to the legislation of Congress which provided for the licensing of vessels engaged in coasting trade. The judgment in this case also was delivered by Chief Justice Marshall, and the validity of the law of the State of Delaware was affirmed

on the ground that it was not in conflict with any law of Congress, and that the recovery of marshy land, and the consequent preservation of the health of the inhabitants of the locality, and the improvement in the utility and value of the land, were matters within the powers reserved to the States. The judgment of the Court in that case was relied upon in a number of subsequent cases which were decided after Marshall's death, and in which the validity of various laws of several States was maintained. But the opinions of the judges in these later cases varied greatly upon the question whether the impugned laws were valid as legitimate exercises of the police powers of the States, or as exercises of a concurrent power to regulate commerce in the absence of any controlling or conflicting legislation by Congress in reference to it.

In the case of *New York v. Miln* (a) which was decided in the year 1837, a law of the State of New York which required every master of a vessel arriving in New York City from a foreign country, or from a port in any other State, to make a report of the names, ages and last place of residence of every passenger within twenty-four hours after the arrival of the vessel, was sustained as a valid exercise of the police power of the State. Ten years later (1847) three cases usually known as *The Licence Cases* (b) were decided together, and separate laws of the States of Massachusetts, Rhode Island and New Hampshire, which prohibited the sale of spirituous liquors without a licence, were declared to be valid and operative upon the sale of liquor imported from another State and sold upon its arrival into the State (c). Two of the members of the court were absent and took no part in the decision. Three of the remaining judges appear to have held that, in the absence of any repugnant or conflicting legislation by Congress, there is a concurrent power in the several States to regulate foreign and inter-state commerce. The other four judges, with more or less distinct declaration of the matter, sustained the laws of the States as legitimate exercises of their police powers (a).

In the following year (1848) three cases known as *The Passenger Cases* (b) came before the Supreme Court for adjudication, and the court by the narrowest possible majority (five to four) decided that a law of the State of New York which purported to provide for the support of marine hospitals, by imposing a tax upon all passengers arriving from a foreign port, and a law of the State of Massachusetts which purported by the imposition of a penalty or a tax to prevent the influx of alien lunatics or aged or infirm aliens who were unable to support themselves, were not legitimate exercises of the police powers of the States and that they were attempts to regulate foreign and inter-state commerce.

American rule as to the silence of Congress upon any matter within its exclusive jurisdiction.

In the year 1851 it was decided by the Supreme Court in the case of *Cooley v. The*

Wardens of the Port of Philadelphia (c), that a law of the State of Pennsylvania relating to the pilotage of vessels was valid in the absence of any Congressional legislation upon the matter. The law was not sustained as a direct exercise of the police power of the State in respect of a matter essentially within the scope of that power, although reference was made in the judgment to the fact that a pilot “is the temporary master charged with the safety of the vessel and cargo and of the lives of those on board, and intrusted with the command of the crew.” But the whole question of the nature and extent of the power of Congress to regulate foreign and inter-state commerce was elaborately reviewed in the judgment delivered by Mr. Justice Curtis, and the conclusion definitely expressed by the Court was that—“The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every port, and some like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation,” and the court held that such last mentioned subjects were within the legislative power of the States. This rule for determining whether any particular matter affecting trade and commerce is within the exclusive jurisdiction of Congress, or is within the legislative power of the States in the absence of Congressional legislation upon it, has been adopted and followed by the Supreme Court of the United States in all subsequent cases. But there has been superimposed upon it the additional rule that when Congress has refrained from legislation in any matter relating to trade and commerce which is within its exclusive control, its silence is to be taken as a declaration of its intention that the matter shall be free from any legislative regulation or restriction. See *Welton v. Missouri*, 91 U.S., 275; *County of Mobile v. Kimball*, 102 U.S., 591; *Escanaba Co. v. Chicago*, 107 U.S., 678; *Brown v. Houston*, 114 U.S., 622; *Smith v. Alabama*, 124 U.S., 465; *Bowman v. Chicago and North-Western Ry. Co.*, 125 U.S., 465; *Leisy v. Hardin*, 135 U.S., 100. In all of these cases the silence of Congress has been held to be as prohibitive of any attempt by a State to interfere with inter-state commerce by an exercise of its police power as a positive law of Congress would be.

In the *Licence Cases* which have already been mentioned (a) two of the judges² (b) who upheld the validity of the legislation of the States, as legitimate exercises of their police powers, advanced the proposition that in any case of conflict between Congressional legislation in reference to trade and commerce and a legitimate exercise of its police power by a State, the legislation of the State must prevail; and the reasons given for this proposition by Mr. Justice Grier were, that the health and morals of a people “are from their very nature of primary importance; they lie at the

foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on the subjects of secondary importance, which relate only to property, convenience or luxury, to recede when they come in conflict or collision.” And in the dissentient opinion given by Mr. Justice Harlan for himself and Chief Justice Waite and Mr. Justice Gray, in the case of *Bowman v Chicago & North-Western Ry. Co. (c)*, he affirmed the supremacy of the police powers of the States in the proposition that “the States have not surrendered, but have reserved the power to protect by police regulations the health, morals and safety of their people,” and “Congress may not prescribe any rule to govern commerce among the States which prevents the proper and reasonable exercise of this reserved power.” But the latest decisions of the Supreme Court have distinctly denied the supremacy of the police power of the States when the exercise of it comes into conflict with Congressional legislation upon foreign or inter-state commerce. See *Minnesota v. Barber*, 136 U.S., 313; and *Brimmer v. Rebman*, 136 U.S., 78.

The general result of the decisions of the Supreme Court of the United States upon the relation of the police power of the States to the power of Congress to regulate commerce with foreign countries and among the States appears to establish the proposition that the rule which declares that the silence of Congress upon any matter within its exclusive jurisdiction is equivalent to a declaration that the matter shall remain without legislative regulation, has not any application to matters that are primarily within the police power of the States, and that only positive legislation by Congress can restrain legitimate and necessary exercises of the police power which operate upon the conduct of trade and commerce with other countries and among the States.

Quarantine and pilotage. Many of the decisions which support this conclusion have referred specially to the laws of the several States relating to quarantine and pilotage. Both of these matters have been frequently declared by the Supreme Court to be covered by the power conferred upon Congress to regulate foreign and inter-state commerce. But all the legislation of Congress with respect to quarantine and pilotage has recognised the laws of the States in reference to those matters, and has directed the revenue and other officers of the United States to aid in the execution of them; and the Supreme Court has never expressed any doubt as to the validity of those laws or the legislation of Congress which referred to them. So far as they operate directly upon foreign and inter-state commerce, quarantine and pilotage are matters within the exclusive jurisdiction of Congress, and if the rule as to the effect of the silence of Congress in regard to such matters is applicable to them, it appears as if the legislation of Congress which has adopted the laws of the States with respect to quarantine and pilotage has been practically a delegation of its legislative

power over those two matters to the States, and therefore *ultra vires*. If the Constitution of the United States had contained a provision similar to section 108 of the Constitution of the Commonwealth, which continues the laws of the States, so far as they are not inconsistent with the Constitution, until they are altered by the Parliament of the Commonwealth, the question of the delegation of the legislative power of Congress over quarantine and pilotage to the States could not arise. But in the case of the United States the firmly established and unchallenged practice of more than a century has endowed this combined legislation of Congress and of the several States with a historical authority which the Federal Judiciary would never dispute; and it is very probable that the difficulty which the existence of this combined legislation presented to the court determined the line of argument adopted by Chief Justice Marshall in his judgment in *Gibbons v. Ogden*, and prevented any expression of opinion by the majority of the court upon the doctrine of the exclusive power of Congress over foreign and inter-state commerce which was unreservedly asserted in the concurring judgment delivered in that case by Mr. Justice Johnson. The existence of this legislation unchallenged during a period of half a century is distinctly and pointedly mentioned by Taney, C.J., in his judgment in the *Licence Cases*, as confirmatory of his interpretation of the power of Congress over commerce; and there can be little doubt that the same legislation also determined the line of argument adopted by Mr. Justice Curtis in the judgment delivered by him for the court in *Cooley v. The Wardens of Philadelphia*, in which case the compromise rule as to the exclusive power of Congress over foreign and inter-state commerce which has ever since been followed by the court was first formulated.

The recognition by Congress of the quarantine and pilot laws of the States was also held by the Supreme Court in the case *Morgan's Steamship Co. v. Louisiana Board of Health (a)* to be sufficient to sustain the validity of the quarantine laws of the State of Louisiana; but the Court also declared that, apart from any Congressional recognition of them, "quarantine laws belong to that class of State legislation which, whether passed with intent to regulate commerce or not, must be admitted to have that effect and to be valid until displaced or contravened by some legislation of Congress." This declaration in reference to laws relating to quarantine is supported by a reference to the case of *Cooley v. The Wardens of Philadelphia* and other cases where the rule laid down in that case was followed, but it also clearly exempts such laws from the operation of the rule as to the effect of the silence of Congress which, so far as such laws embrace matters within the power of Congress over foreign and inter-state commerce, might be consistently applied to them.

The Constitution of the Commonwealth has placed the matter of quarantine

explicitly within the exclusive jurisdiction of the Parliament of the Commonwealth (b), and therefore the Parliaments of the States cannot enact laws with respect to it as legitimate exercises of their reserved police powers, excepting always such laws as may be peremptorily necessary to prevent any imminent danger to the inhabitants of a State in circumstances for which the legislation of the Parliament of the Commonwealth may not have provided. The validity of such last-mentioned laws is discussed in the concluding pages of this chapter. The Constitution of the Commonwealth has also expressly declared that “the power of the Parliament of the Commonwealth to make laws with respect to trade and commerce extends to navigation and shipping” (a), and has also placed “lighthouses, lightships, beacons and buoys” under the exclusive jurisdiction of the Parliament of the Commonwealth (b); and therefore laws relating to pilotage are not within the reserved police powers of the States. All the laws of the States relating to quarantine and pilotage which were in existence at the date of the establishment of the Commonwealth are continued in force by section 108 of the Constitution, until they are altered or repealed by the Parliament of the Commonwealth; and the reasons for the conclusion that the second part of that section does not empower the Parliaments of the States to alter those laws have been previously given in the chapter on the Powers of the Federal Parliament (c). If that conclusion is correct, the question of the area within which the States of the Commonwealth may exercise their reserved police powers will not be complicated by any question of their legislative power with respect to quarantine and pilotage; and consequently the correlative question of the extent to which the legislative power of the Parliament of the Commonwealth with respect to “trade and commerce with other countries and among the States” is exclusive of any concurrent power in the Parliaments of the States over the same trade and commerce, by virtue of any relation of their police powers to pilotage and quarantine, will be exempt from a large amount of the difficulty which has surrounded the question of the extent to which the power of the American Congress to regulate foreign and inter-state commerce is exclusive of any subordinate power in the Legislatures of the States in regard to these two matters (a).

Commercial unity of the States of the Commonwealth under the Constitution.

The broad rule by which the legitimacy of any alleged exercise of the reserved police power of a State is to be tested, in any case in which the limit of the police power of a State in relation to the legislative power of the Parliament of the Commonwealth over foreign and inter-state commerce is involved, is that under the Constitution of the Commonwealth all the residents of the several States of the Commonwealth are politically one people with respect to all commercial intercourse

among themselves and with other countries, and that any exercise of governmental power by a State which disturbs the commercial unity established by the Constitution among the residents of the several States is invalid. The political unity of all the residents of the several States of the Commonwealth in relation to their commercial intercourse with one another, and with the residents of other countries, proceeds from and depends upon the existence of one supreme depository of legislative power which has exclusive authority to regulate that intercourse, and if, under cover of its reserved police power, a State may enact a law which discriminates, either between the residents of the legislating State and the residents of other States, or between the products of the legislating State and the products of other States, the political unity of the people of the whole Commonwealth in relation to trade and commerce among the States is destroyed, because the whole people of the Commonwealth are not any longer governed by the same laws with respect to trade and commerce between the residents of different States.

The provisions of the Constitution against discriminating legislation by the States.

In regard to discrimination between the residents of different States, whether in relation to trade and commerce or to civil rights and privileges, the Constitution of the Commonwealth has in section 117 directly prohibited the several States from enacting any legislation directed to that purpose. The Constitution does not contain any provision which, in similar language to that of section 117, directly prohibits a State from enacting laws which discriminate between the products or manufactures of the State and the products or manufactures of other States; and the safeguard against such discriminating legislation by a State is found in the exclusive legislative power of the Parliament of the Commonwealth over trade and commerce among the States, and in the declaration contained in section 92 that “on the imposition of uniform duties of customs, trade, commerce, and intercourse among the States whether by internal carriage or ocean navigation shall be absolutely free.” But the Constitution expressly permits two qualified or partial exceptions to that declaration. The first of these exceptions is permitted by section 112, which provides that—

“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.”

Inspection laws.

The provision that the net produce of all charges levied by a State upon goods

passing into or out of a State shall be for the use of the Commonwealth, will effectually prevent any State from attempting to raise a local revenue by means of its inspection laws. But the exclusive legislative power of the Parliament of the Commonwealth over inter-state commerce is the only safeguard against an attempt by a State to frame its inspection laws in a form that would discriminate between the products of the legislating State and the products of other States. An apposite illustration of such an inspection law is found in a law of the State of Minnesota which was declared invalid by the Supreme Court of the United States in the case *Minnesota v. Barber (a)*, on the ground that it was an attempt to regulate commerce among the States. The law in question prohibited the sale of any fresh beef, veal, mutton, lamb or pork for human food, except as therein provided, and it required all cattle, sheep and swine, which were slaughtered for human food, to be inspected by the proper local inspector appointed in Minnesota, within twenty-four hours before the animals were slaughtered, and that a certificate should be made by the inspector showing (if such were the fact) that the animals when slaughtered were found healthy and in a suitable condition to be killed for human food; and it proceeded to make it a misdemeanour punishable by fine or imprisonment for any person to sell, expose, or offer for sale for human food in the State, any fresh beef, veal, mutton or pork not taken from an animal inspected and certified before slaughter by the proper local inspector appointed under the law. Inasmuch as the law required the inspection of the animals to take place within twenty-four hours immediately before they were killed, its necessary operation was to practically exclude from the Minnesota market, although perfectly fit for human food, all fresh beef, veal, mutton, lamb and pork, which was taken from animals slaughtered in other States, with the result of restricting the killing of animals, whose meat was to be sold in Minnesota for human food, to those engaged in such business in that State. A similar law of the State of Virginia was declared to be invalid by the Supreme Court of the United States in the case of *Brimmer v. Rebman (a)*. The Virginian law made it unlawful and penal to offer for sale in the State any fresh beef, veal, or mutton slaughtered one hundred miles or more from the place where it was offered for sale, unless it had been previously inspected and approved by a particular officer of the county or city, who should be paid by the owner of the meat one cent. per pound for the inspection of it. In delivering the judgment of the Court, Mr. Justice Harlan said:—“The statute is in effect a prohibition upon the sale in Virginia of beef, veal or mutton, although entirely wholesome, if taken from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent. per pound to the inspector, as his

compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business whose meats, of a like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subject to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals from which the beef, veal, or mutton is taken, were slaughtered. Undoubtedly a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the Constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of its own or of other States. The owners of the meats here in question, although they were from animals slaughtered in Illinois, had the right under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void.”

Intoxicating liquors.

The second exception permitted by the Constitution of the Commonwealth to the declaration of section 92 that upon the imposition of uniform duties of customs trade and commerce among the States shall be absolutely free, is that which is contained in section 113, which declares that:—

“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.”

This section is substantially a transcript of an Act of the Congress of the United States of America commonly known as the *Wilson Act* which was enacted in consequence of the decision of the Supreme Court in the case of *Leisy v. Hardin (a)*. In that case the court pronounced to be invalid, because it was an obstruction to inter-state commerce, a law of the State of Iowa which forbade the manufacture for sale and the selling or keeping for sale, or giving away, or exchanging, or bartering, or dispensing, intoxicating liquor for any purpose other than the particular purposes permitted by the law. Permits for one year were allowed for pharmaceutical, medicinal, chemical and sacramental purposes only. The plaintiffs in error were

brewers in the State of Illinois, and they had transported a quantity of beer into the State of Iowa for sale there, and the beer was seized under the authority of the local law. The judgment of the Court was delivered by Chief Justice Fuller, and in discussing the question of the validity of the law of Iowa he said: "Under our decision in *Bowman v. Chicago &c. Railway Co.*, they (the plaintiffs in error) had the right to import the beer into the State, and in the view which we have expressed they had the right to sell it, by which act alone it would become mingled with the common mass of property within the State. Up to that point of time, we hold that, in the absence of Congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation or sale by the foreign or non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognises as subjects of inter-state commerce are not such, or that whatever articles are thus recognised can be controlled by State laws amounting to regulations, while they retain that character, although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State represented in the State legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

The effect of the *Wilson Act* was considered by the Supreme Court in the subsequent case of *Rhodes v. Iowa (a)*, and it was decided in that case that the Act did not permit the laws of a State to operate upon intoxicating liquor brought into a State until it had been delivered to the consignee; but after imported liquor has reached the consignee the law of the State operates upon it as fully as if it had been manufactured in the State, and the consignee cannot sell it or otherwise dispose of it except for his own use. This decision is in perfect accord with the compact and lucid statement by the late Professor Tucker of the fundamental rule of Congressional control over commerce, that "As long as the person or thing is *in transitu* the State cannot touch it, because it is under the regulations of Congress, and the State must so exercise its powers in respect to these as not to interfere with the essential right of Congress to regulate commerce. But before *transitus* has once begun, or, having begun, has ceased, Congressional power does not attach and the State power is exclusive" (a).

The validity of the *Wilson Act* was impugned on behalf of the State of Kansas in the case of *In re Rahrer (b)*, on the ground that it was a delegation to the States by Congress of a portion of its legislative power over inter-state commerce. But the Supreme Court sustained the validity of the Act, and declared that “It imparted no power to the State not then possessed, but allowed imported property to fall at once, upon its arrival, within the local jurisdiction.”

The inclusion of section 113 in the Constitution of the Commonwealth removes any possibility of disputing the applicability of the decisions in *Bowman v. Chicago &c. Railway Co.*, and *Leisy v. Hardin*, to the question of the relations of the police powers of the States of the Commonwealth to the legislative power of the Parliament of the Commonwealth over inter-state commerce; because its inclusion conclusively implies that the decisions in those cases correctly represent the nature and extent of the power over inter-state commerce which the Constitution has granted to the Parliament of the Commonwealth. The right to import merchandise was emphatically declared by Chief Justice Marshall in *Brown v. Maryland (c)* to include the right to sell it, and the decisions in all the subsequent cases in which the American Supreme Court has declared inspection or prohibitory laws of a State to be void, have been based upon the fundamental doctrine that inter-state commerce necessarily and essentially includes selling and buying merchandise transported from one State into another State for sale there. Any contrary doctrine, if applied to the Constitution of the Commonwealth, would reduce to a mockery the emphatic declaration of section 92 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.” Section 113, like the *Wilson Act*, permits the States to place a restriction on the freedom of sale of only one particular kind of merchandise, viz., intoxicating liquors; and therefore in relation to the legislative power of the States with respect to all other merchandise which is made a subject of inter-state commerce, the following observations made by Mr. Justice Matthews in delivering the judgment of the Court in *Bowman v. Chicago &c. Railway Co.* retain all their original force. “If the State of Iowa,” said he, “may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any other article, the use of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort or peace of the community. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction of any or all articles that it may select as coming into competition with those which it seeks to protect.”

The decisions of the Supreme Court in *Bowman v. Chigaco Railway Co.* and *Leisy*

v. Hardin were at one time severely criticised in the United States as imposing emasculating restrictions upon the legitimate police powers of the States; but the operation of the *Wilson Act*, and the subsequent case of *In re Rahrer*, in which its validity was upheld, have demonstrated the constitutional correctness and strength of the previous decisions of the court, and further that they were, in the language used by Mr. Lewis, in his treatise on the Federal Power over Commerce, “also eminently wise from a political and economic standpoint,” because, as the same writer observes, “To prohibit the sale of an import, a recognised article of commerce, even though the people of the State firmly believe that it is deleterious to the public or the public morals, is a step of great importance, profoundly affecting the commerce of the whole union. It is wise, just and in accordance with the true theory of Federal Government, that the consent of the central authority should be first obtained before a particular locality essays to embark on such legislation; but that once the whole nation decides that such local legislation may, in many instances, be desirable, the particular regulations should be enacted by the States who alone can be familiar with local conditions” (a).

The legislative power of the Commonwealth cannot invade the domain in which the police power of the States is exclusive.

In considering the boundaries between the reserved police powers of the separate States of the Commonwealth, and the legislative power of the Parliament of the Commonwealth over trade and commerce, it must not be forgotten that although, whenever they come into conflict, the legislative power of the Parliament of the Commonwealth must prevail, yet the area within which it can legitimately operate is limited, and it cannot invade the domain in which the police powers of the States are exclusive. It has been well said by the late Professor Tucker that “The delicate boundary between the Congressional and the State power may be drawn by the Judiciary upon the principle that the State may not *mala fide*, under colour of its reserved power, impinge on the commercial power of Congress, and Congress may not under colour of its granted power impinge on the reserved power of the State. . . . Where the Judiciary find that a State uses its reserved power as a pretext to regulate commerce, or that Congress under the commerce power invades the reserved jurisdiction of the State, it shall so adjust it in both cases as to maintain the supreme law of the land over Congress and the States” (a). A pertinent illustration of a restriction by the Supreme Court of the United States of an attempt on the part of Congress to invade the domain of the police powers of the States is found in the case of *United States v. Dewitt* (b), in which an Act of Congress that purported to control the sale of naphtha and illuminating oils, throughout the whole of the United States, was declared to be invalid and inoperative everywhere except in the District of Columbia where the legislative power of Congress extends to all the matters

within the reserved powers of the States.

Limited nature of the police power of the States— Cases of necessity.

The limited nature of the police power of the States was concisely stated by Mr. Justice McLean in *The Passenger Cases (c)* when he said—“The police power of the State cannot draw within its jurisdiction objects which lie beyond it.” But the exclusive character of the legislative power of the Parliament of the Commonwealth over trade and commerce with other countries and among the States does not deprive the Parliaments of the States of the power to enact laws to provide for the immediate protection of the lives, health, safety and property of the persons within their jurisdiction, in any contingency not directly covered by legislation of the Parliament of the Commonwealth, or arising out of any failure or neglect of the Parliament of the Commonwealth to legislate upon any matters within its exclusive control. Whenever the Parliament of the Commonwealth has directly legislated in respect of any matter within its legislative power, the Parliament of a State cannot, by an alleged exercise of its police power, directly contravene the legislation of the Commonwealth upon the same matter; but if the Parliament of the Commonwealth fails to legislate upon the matter in a manner sufficient to provide for the protection of life and property in a State, it cannot be presumed that the Parliament of the Commonwealth intended by its inaction that any detriment should accrue thereby to the inhabitants of any State, and therefore the silence of the Parliament can never be construed as a restriction upon any exercise of the police power of a State which is directed exclusively to the protection of the residents of the State from any immediate or probable danger or disaster. For example, lighthouses, lightships, beacons and buoys are placed by sections 52 and 69 within the exclusive jurisdiction of the Parliament of the Commonwealth. But if that Parliament fails to erect lighthouses, or to place buoys or beacons, in any place within a State where they are necessary for the safety of vessels, the State may erect them at its own cost, but it cannot impose charges in respect of them upon vessels coming into the State from other States or from other countries, because the imposition of such charges would be an exercise of legislative power which operated directly upon a matter over which the legislative power of the Parliament is expressly declared by the Constitution to be exclusive. A State may also in the event of the failure or deficiency of federal legislation, enact laws to prevent the entrance of diseased persons or infected articles of commerce into its territory; but all the provisions of such laws must be relevant to the protection of the health and lives of the inhabitants of the State, and must not place any burden or restriction upon inter-state or foreign commerce which is not necessarily involved in the prevention of the evil against which the law is directed (*a*). In the case of *Mobile v. Kimball (b)* Mr. Justice Field

uses language which clearly implies that the silence of Congress is not in any case to be regarded as prohibiting the States from adopting any measures to prevent immediate danger to their citizens. “Buoys and beacons,” he says, “are important aids, and sometimes are essential to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbours and in rivers, and their establishment by Congress is undoubtedly within its commercial power. But it would be extending that power to the exclusion of State authority to an unreasonable degree to hold that whilst it remained unexercised upon this subject, it would be unlawful for a State to provide the buoys and beacons required for the safe navigation of its harbours and rivers, and in case of their destruction by storms, or otherwise, it could not temporarily supply their places until Congress could act in the matter and provide for their re-establishment. That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health, and property of its people, would justify measures of this kind.”

The police power is a part of the common law.

This power of self-protection is recognised by the English common law as inherent in the community and as supreme over every legal restriction which is imposed upon its governmental organs or upon its separate members in ordinary circumstances. It was said in *The Saltpetre Case (a)*:—“For the Commonwealth a man shall suffer damage; as for saving a city or a town, a house shall be pulled down if the next be on fire; and the suburbs of a city in time of war shall be plucked down; and a thing for the Commonwealth every man may do without being liable for an action as it is said in 3 Henry VIII., fol. 15; and in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre*.” In a case which occurred in the State of New York, a building containing a number of small apartments, which were occupied by lodgers whose filthy habits threatened to breed infection and increase the ravages of Asiatic cholera, was pulled down by a number of residents of the neighbourhood who failed to produce sufficient evidence of the authority of the Board of Health under which they alleged that they had acted. But the Court said that the authority was not necessary to justify them, and that the legislation which authorised sheriffs or magistrates or other officers to pull down buildings in order to prevent the spread of a conflagration rested on the right of self-defence existent in the community, and simply regulated the exercise of it, and that individuals might in cases of necessity exercise it on behalf of the community without legislative authority (*a*). “Such cases depend on the right of the Commonwealth as an organic whole, and of individuals acting on her behalf, to do whatever is indispensable for the protection of life, liberty and property, which is

known in peace as the police power, and designated in war as martial law” (b). Therefore if the absence of sufficient legislation by the Parliament of the Commonwealth in respect of any matter within its jurisdiction produces immediate or imminent danger to the inhabitants of a State, the Parliament of the State may do all that is necessary to avert the danger. It cannot be doubted that, in the exercise of its legislative power over inter-state commerce, the Parliament of the Commonwealth may enact laws which require all persons who are in charge of locomotive engines, upon railway trains which are engaged in inter-state commerce, to be examined as to their qualifications for the position and to obtain certificates of their competency, and may enact similar laws for the examination of engineers in charge of the machinery of river steamers trading between two or more States. But if the Parliament of the Commonwealth fails to enact any legislation of that description, the Parliament of a State may enact a law requiring every person in charge of a locomotive engine, or of the machinery of a river steamer running into or through the State from another State, to be examined and to carry a certificate of his competency, in order to protect the residents of the State from danger in consequence of the unskilful conduct of any such person. This question came before the Supreme Court of the United States in the two cases of *Smith v. Alabama* (a) and *Nashville &c. Ry. Co. v. Alabama* (b), and the right of the State to enact such laws was affirmed in both cases. In delivering judgment in the last-named case Mr. Justice Field said: —“It is conceded that the power of Congress to regulate inter-state commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employés and others on railway trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognised by decisions of State and Federal Courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties to make provision against accidents likely to follow in such business so that the dangers attending it may be guarded against as far as practicable.” In the case of *Smith v. Alabama* the character of such laws in relation to the legislative power of Congress over inter-state commerce is well stated by Mr. Justice Matthews, who, in delivering the judgment of the Court, said:—“In conclusion, we find, therefore, first, that the statute of Alabama the validity of which is under consideration, is not, considered in its own nature, a regulation of inter-state commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of

the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of person and property; and thirdly, that, so far as it affects transactions of commerce among the States, it does so only indirectly, incidentally, and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.” Upon the same ground the legislation of a State requiring all boats to expose certain lights while riding at anchor in the ports and harbours of the State has been sustained as valid (*a*). And a State may enact regulations for the safe anchorage and mooring of vessels so as to prevent accidents and collisions. “The authority for establishing regulations of this character is found in the right and duty of the supreme power of the State to provide for the safety, convenient use and undisturbed enjoyment of property within its limits; and charges incurred in enforcing these regulations may properly be considered as compensation for the facilities thus furnished to the vessels” (*b*). But where no services are rendered no charges can be made (*c*).

When a State may impose charges for services rendered in the exercise of its police power.

In connection with the question of the power of a State to demand fees for services rendered in the execution of regulations made for the purpose of securing the safety of vessels in its ports and harbours and affording facilities for the discharge of cargoes, &c., some reference may seem to be required to be made to the statement, previously made in this chapter, that although a State may erect lighthouses and beacons, &c., it cannot impose any charges for the benefits derived from them, because such charges would be a burden upon inter-state and foreign commerce. The distinction between such charges and the fees which a State may demand and collect, in the exercise of its police power, in respect of the use of its ports and harbours, is that charges levied upon vessels for the maintenance of lighthouses and beacons, &c., erected by the State would be practically and substantially taxes levied upon vessels for the privilege of coming into the harbours and ports of the State, and would therefore be taxes upon maritime intercourse between the State and other States and with other countries; whereas the fees charged in connection with the execution of port regulations are charges levied for services rendered to vessels after they have come into the State and have become subject to its local jurisdiction over all persons and property within its boundaries. In the United States of America the separate States may obtain the consent of Congress, under the second and third clauses of the tenth section of Article I. of the Constitution, to levy taxes upon imports and exports, and upon the tonnage of

vessels; and many of the States have at different times obtained the consent of Congress to the imposition of such taxes for the special purpose of providing funds for the improvement of harbours and the erection of lighthouses, &c. (a). There is not any provision in the Constitution of the Commonwealth of Australia under which a State may obtain the consent of the Parliament of the Commonwealth for the imposition of taxes upon the tonnage or cargoes of vessels for such purposes. Section 112 expressly empowers a State to levy upon imports and exports such charges only as may be necessary for the execution of its inspection laws; and it expressly declares that all such charges shall be for the use of the Commonwealth, and that any such inspection laws may be annulled by the Parliament of the Commonwealth. The language of the section is partially similar to that of the second clause of the tenth section of Article I. of the Constitution of the United States, but it does not provide for a State obtaining the consent of the Parliament of the Commonwealth to the imposition of a tax by the State.

(a) 12 Wheaton, 419.

(b) 16 Wall., 36.

(a) *Commonwealth v. Alger*, 7 Cush., 84.

(b) *Thorpe v. Rutland, &c., R.R.*, 27 Vt., 140.

(a) (1824) 9 Wheaton, 1.

(a) (1827) 12 Wheaton, 419.

(b) (1829) 2 Pet., 245.

(a) 11 Pet., 102.

(b) 5 How., 504.

(c) The authority of the decision in the case of *Pierce v. New Hampshire*, has subsequently been declared by the Supreme Court to have been distinctly overthrown, see *Leisy v. Hardin*, 135 U.S., 100.

(a) The late Professor Pomeroy, in his Introduction to the Constitutional Law of the United States, says (p. 296) in reference to the judgments delivered in *The Licence Cases*, that “it would appear that five of the justices, Taney, Catron, Daniel, Nelson and Woodbury, concurred in the proposition that it requires at least a Statute of Congress in pursuance of the general grant of power in the Constitution to inhibit the State legislatures from enacting laws which regulate commerce;” and Mr. Lewis, in his work on *The Federal Power over Commerce*, after stating that Mr. Justice McLean and Mr. Justice Grier based their judgments on the supremacy of the police power of the States, says (p. 111) that—“Chief Justice Taney and Mr. Justice Catron, on the other hand, place their decision in the *Licence Cases* on the ground that the

power over commerce was concurrent.” But on referring to the several judgments delivered in those cases it will be found that the Chief Justice made several observations that seem to indicate that, without asserting the supremacy of the police power of the States, he nevertheless regarded the legislation which was under review as a valid exercise of police power. In one passage he says—“If any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.” And in another passage he says—“The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet in my judgment the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.” Mr. Justice Woodbury distinctly stated that he did not regard the legislation in question as regulations of foreign or inter-state commerce, but as “regulations of the police or internal commerce of the State itself.” And speaking in reference to “the reserved rights of the States,” he says—“The power to forbid the sale of things is surely as extensive, and rests on as broad principles of public security and sound morals, as that to exclude persons. And yet who does not know that slaves have been prohibited entrance to many of our States, whether coming from their neighbours or abroad? And which of them cannot forbid their soil being polluted by incendiaries and felons from any quarter?”

(b) 7 How., 283.

(c) 12 How., 299.

(a) Page 124.

(b) Grier and McLean.

(c) 125 U.S., 465.

(a) 118 U.S., 455.

(b) Section 52, subsection 2, and section 69.

(a) Section 98.

(b) Section 52, subsection 2, and section 69.

(c) See page 96.

(a) In referring to the pilot laws of the States in his judgment in the case of *Gibbons v. Ogden*, Marshall, C.J., said that “Although Congress cannot enable a State to legislate, Congress may adopt the provisions of any State upon any subject.” This statement must be taken to apply to matters within the legislative power of the States, and therefore, so far as it was intended to refer to the pilot laws of the States, it indicates an opinion that such laws were within the legislative power of the States, either as valid exercises of the police power, or as relating to

matters which remained within the jurisdiction of the States until Congress legislated upon them. This construction of Marshall's language is supported by his reference to the fact that the section of the Act of Congress which refers to the conduct of pilots appointed by the States is confined to pilots employed "in the bays, inlets, rivers, harbours and ports of the United States," which, as he observes, are "in whole or in part, also within the limits of some particular State." And he proceeds to add that "The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent . . ." Sixty years later Mr. Justice Miller referred to the pilot laws and the quarantine laws of the States as so analogous in most of their features that no reason can be seen why the same principles should not apply to both. (*Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U.S., p. 455). The necessity of a matter being within the legislative power of a State in order to enable Congress to adopt the legislation of the State upon it, is clearly stated in the judgment of Mr. Justice Curtis in *Cooley v. Board of Wardens of Philadelphia* (12 How., 299).

(a) 136 U.S., 313.

(a) 138 U.S., 78.

(a) 135 U.S., 100.

(a) 170 U.S., 42.

(a) *Tucker on the Constitution*, vol. 2, p. 536.

(b) 140 U.S., 545.

(c) 12 Wheaton, 419.

(a) p. 124.

(a) *Tucker on the Constitution*, vol. 2, p. 539.

(b) 9 Wall, 41.

(c) 7 How., 283.

(a) *Smith v. Turner*, 7 How., 283.

(b) 102 U.S., 82.

(a) 12 Coke, 12.

(a) *Meeker v. Van Rensselaer*, 15 Wend., 397.

(b) *Hare's American Constitutional Law*, vol. 2, pp. 907-8.

(a) 124 U.S., 469.

(b) 128 U.S., 96.

(a) *The James Gray v. The Ship John Frazer*, 21 How., 184; *Sherlock v. Alling*, 93 U.S., 99.

(b) *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S., 196-214.

(c) *Steamship Co. v. Port Wardens*, 6 Wall., 31.

(a) In a letter written by Madison to Professor Davis in the year 1832, he says:—"It appears from the laws of the United States, that beginning with the year 1790, and previous to the year 1815, the consent of Congress, on applications from Massachusetts, Rhode Island, Pennsylvania, Maryland, Virginia, South Carolina and Georgia, was, in pursuance of the tenth section, article one of the Constitution, granted or renewed, in not less than twenty instances, for State duties, to defray the expense of cleaning out harbours or rivers, erecting piers or lighthouses, or appointing health officers. . ." (*Writings of James Madison*, vol. 4, pages 254-5).

8. The Judicial Power of the Commonwealth.

Location of the judicial power of the Commonwealth.

SECTION 71 of the Constitution of the Commonwealth declares that:—

“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.”

The declaration of the location of the judicial power of the Commonwealth is made in the same form of language as that employed in section 1 in regard to the location of the legislative power exercisable under the Constitution. In both cases the language used is in the future tense, viz., “shall be vested.” But with respect to the location of the executive power of the Commonwealth, the language used is in the present tense.

Section 61 declares that:—

“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.”

The reason for the change in the form of the language used in section 61 is that the Commonwealth being a portion of the British Empire, all executive power exercisable in it is inherent in the Crown, and would have been exercisable by the representative of the Crown in the Commonwealth without any declaration to that effect in the Constitution. But the depositary of the legislative power of the Commonwealth and the organs of its judicial power were not in existence when the Constitution was framed; and the use of the future form of language in reference to the location of the judicial power does not imply that it was to be called into existence by any exercise of Imperial authority, whether legislative or executive in its nature, subsequently to the establishment of the Commonwealth, any more than the use of the same form of language in reference to the location of the legislative power of the Commonwealth implies that it was to be conferred upon the Parliament after the Parliament had been elected. The legislative power of the Parliament of the Commonwealth is conferred upon it immediately by the Constitution, and the High Court of the Commonwealth derives its existence and a definite original and a definite appellate jurisdiction directly from the same source.

Appellate jurisdiction of the High Court.

Section 73 of the Constitution provides that—

“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.”

The appellate jurisdiction conferred upon the High Court by subsection II. of section 73, in respect of all judgments, decrees orders and sentences of the Supreme Court of any State, is not a part of “the judicial power of the Commonwealth,” within the meaning of the words as they are used in section 71, when it is exercised in respect of any such judgment, decree, order or sentence which relates to any matter that became the subject of litigation, or of judicial decision, solely under the laws of a State and was heard and determined entirely under their authority. It is a distinct and additional jurisdiction which the Imperial Parliament could have conferred upon any court in Australia before the Commonwealth came into existence, and it is a duplication of a jurisdiction which was possessed by the Judicial Committee of the Privy Council before the Commonwealth was established, and which continues to be vested in that tribunal. As an appellate court with jurisdiction to hear and determine appeals from the judgments, decrees, orders and sentences of the Supreme Court of each State of the Commonwealth, in respect of matters which are submitted to judicial investigation and decision entirely under the laws of the State, the High Court is a part of the judicature of each State to the same extent, and in the same manner, as the Judicial Committee of the Privy Council is a part of the judicature of each State; and the possession of that jurisdiction does not invest the High Court with any portion of the judicial power of the Commonwealth which is mentioned in section 71 of the Constitution any more than the Judicial Committee of the Privy Council would have been invested with any portion of it, if the Constitution had prohibited any appeal to that tribunal from judgments of the High Court, or of any other court exercising federal jurisdiction, and had expressly continued the right of appeal to the Crown in Council from judgments of the Supreme Court of each State as it now exists.

The judicial power of the Commonwealth is a federal power.

The preamble to the Constitution of the Commonwealth recites that the people of the several colonies therein mentioned have agreed to become united in one indissoluble “Federal Commonwealth”; and the proclamation which, by the third

introductory section to the Constitution, the Queen is empowered to publish, is one which shall declare that on and after the day therein named the people of the several colonies therein mentioned “shall be united in a Federal Commonwealth.” The whole structure of the Constitution is federal in its character, and the judicial power of the Commonwealth is a federal judicial power. As a depositary of that judicial power, the High Court is strictly a federal court, and its jurisdiction is a strictly federal jurisdiction, in which a matter is cognisable either because it arises under a federal law, or because it arises between two or more persons resident in different States who are jointly or collectively within the territorial jurisdiction of the Court solely by virtue of the fact that the territorial jurisdiction of the Court is federal and, as such, it extends beyond the respective boundaries of the several States in which the parties respectively reside. As an appellate court with jurisdiction to hear and determine appeals from judgments and decrees of the Supreme Court of each State, in matters that arise between residents of the same State, and are adjudicated solely under the laws of the State, the High Court has not any organic connection with the federal structure of the Commonwealth, and its territorial jurisdiction is coterminous with the territorial jurisdiction of the Supreme Court of the State. It is, therefore, evident that the High Court of Australia occupies two distinct positions in relation to all persons within the territorial limits of the Commonwealth. In one of those positions it is the court of final resort in Australia for all litigants who reside in the same State and who are primarily litigants solely under the laws of that State. In the other position it is the court of final resort in Australia for all litigants who were primarily such in a federal court which had jurisdiction to adjudicate upon the matter in dispute between them, either directly under some provision of the Constitution or under the laws of the Commonwealth, and in that position only it is a depositary of the judicial power of the Commonwealth. If the laws are to be consistently and impartially enforced in any community, the judicial power must be coterminous with the exercise of the legislative power and ancillary to it. The judicial power of the Commonwealth must, therefore, be coterminous with the legislative power of the Commonwealth, and, as such, and as ancillary to the legislative power of the Commonwealth, it must be distributable by the Parliament of the Commonwealth among such courts as that Parliament may establish to exercise it, subject to the continuance of any original or appellate jurisdiction conferred upon any court by the Constitution, and any limitations imposed by the Constitution upon the Parliament of the Commonwealth in that connection. But the appellate jurisdiction conferred upon the High Court by the Constitution, in respect of judgments, decrees, orders and sentences of the Supreme Court of each State, in matters arising and adjudicated solely under the laws of the State, is not

coterminous with the legislative power of the Commonwealth, and is not distributable by the Parliament of the Commonwealth among any of the courts which it may establish to exercise the judicial power of the Commonwealth, or subject, in any other manner, to its legislative power.

Nature of the judicial power of the Commonwealth.

“The judicial power of the Commonwealth” is the power to declare and apply the laws of the Commonwealth in controversies arising under them, and to declare and apply the laws of a State in any matters in respect of which the Constitution of the Commonwealth has declared that the High Court shall have original jurisdiction, or has empowered the Parliament to make laws conferring original jurisdiction upon that court, or upon any other court of the Commonwealth. Such last mentioned matters are within the judicial power of the Commonwealth, because the judicial power of the Commonwealth is coterminous with the provisions of the Constitution and with the legislative power of the Parliament, in respect of all matters in relation to which an original jurisdiction can be exercised by a federal court, either under the immediate authority of the Constitution, or under a law of the Parliament enacted under a power conferred upon it by the Constitution for that purpose. The following observations, which were made in respect of the judicial power of the United States of America by Mr. Justice Iredell, in the case of *Chisholm v. Georgia (a)*, are equally applicable to the judicial power of the Commonwealth of Australia. “The judicial power of the United States,” he said, “is of a peculiar kind. It is, indeed, commensurate with the ordinary legislative and executive powers of the general 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 of the general government wherein the separate sovereignties of the separate 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 courts of the States are not organs of the judicial power of the Commonwealth.

It may at first sight appear as if the separate courts of the several States were made organs of the judicial power of the Commonwealth by the fifth introductory section to the Constitution, which declares that—

“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; 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.”

But when the courts of the States apply the provisions of the Constitution, or the laws of the Commonwealth made by the Federal Parliament, they apply laws which are parts of the law of each State, as a State in the Commonwealth, and their judgments in all such cases are enforced by the organs of the executive power of each State. Those laws do not proceed from the depositaries of the legislative powers of the States, but they proceed from an exercise of legislative power in which each State has participated; either by the presence of its representatives in the Convention which framed the Constitution and by the votes of the electors of the State when they adopted it; or by the presence of the representatives of the State in the Parliament of the Commonwealth; and such last-mentioned participation in the exercise of the legislative power of the Commonwealth is an essential element and condition of the status of the State in the Commonwealth. The provisions of the Constitution of the Commonwealth, and all laws made under its authority by the Federal Parliament, are in force within each State as a distinct territory within which the organs of the judicial power of the State, and the organs of its executive power, declare and enforce all the laws to which the residents of the State are subject; and when the courts of each State declare and apply any such laws, they exercise the judicial power of the State as clearly and as directly as the executive power of the State is exercised whenever a judgment of any such court which is founded upon a law of the Commonwealth is enforced in the State by the organs of the last mentioned power.

Under the authority of section 75 of the Constitution of the Commonwealth the High Court has original jurisdiction in all matters—

- 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.

The jurisdiction conferred upon the High Court in respect of matters “between States” (a) is a consequent necessity of the inclusion of the several States in one Federal Commonwealth of the character established by the Constitution, if it is to be legally indissoluble as stated in the preamble. In the absence of any tribunal with jurisdiction to hear and determine controversies between any two or more of the States, they would be remitted, in regard to matters in dispute between them, to the

positions which they occupied in relation to one another before the Commonwealth existed. But when they became constituent parts of one organised community, under a Constitution which imposes definite legal restrictions upon their governmental powers, they were placed in legal relations to one another in regard to all their future intercourse with one another, and a refusal on the part of any State to submit its conduct, in any case of alleged aggression upon another State, to the test of legality would be a repudiation of its legal position and relations under the Constitution. But legal relations cannot be authoritatively declared for the purpose of securing an observance of them without a tribunal having authority to declare them. Hence the necessity for conferring upon the Federal Judiciary a jurisdiction to hear and determine matters in dispute between States; and when a controversy occurs between any two or more States of the Commonwealth of a kind for which the Constitution has not made any definite provision, the Federal Judiciary is required to adjudicate upon it in accordance with the known and settled principles of international law or municipal jurisprudence as the particular case may demand.

The High court empowered to declare the laws of the States in specified cases.

The original jurisdiction conferred upon the High Court to adjudicate in matters between residents of different States empowers the High Court to declare and apply the laws of a State, whenever any such matter arises under the laws of a State, or the decision of it involves a cognisance of them, and the jurisdiction of the court is invoked in respect of it; and this statement applies equally to any other federal court when it exercises a similar jurisdiction. In every case in which the law of a State is declared and applied by the High Court, or by any other federal court, in the exercise of a jurisdiction conferred upon it by the Constitution, or by a law of the Parliament of the Commonwealth, the law of the State is declared, and if necessary enforced, under the authority of the law of the Commonwealth, in the same manner as the law of a foreign country is declared and applied by the courts in England, and if necessary enforced, under the authority of the law of England, whenever a declaration and application of the law of a foreign country is involved in the determination of any matter in respect of which the English courts have jurisdiction and which has been properly submitted to them for adjudication. The difference between an English court in such a case, and the position of a federal court of the Commonwealth, when it declares and applies the law of a State under the special authority conferred upon it for that purpose by the Constitution, or by a law of the Parliament of the Commonwealth, is that the English court does not adjudicate within the territory in which the foreign law has its origin, and cannot do so; and the law declared and applied by the English court must be proved to it by competent testimony; but under the authority of the Constitution the court of the

Commonwealth may go into the State and may adjudicate as freely and as authoritatively within the territory of the State as if it were a court of the State, and the law which it declares and applies is the local law of the State and not foreign law. Nevertheless the court in both instances declares and applies a law which derives its existence and its obligatory force from a legislative power which did not create the court, nor confer upon it the jurisdiction it exercises, and which is incapable of conferring upon it any jurisdiction whatever which the same legislative power could compel the court to exercise. This position of the federal courts of the Commonwealth, in relation to the separate laws of the several States, is very clearly illustrated by the rule observed by the federal courts of the United States of America, in reference to the declaration and application of the law of a State, when they are adjudicating in controversies between residents of different States, in the exercise of the jurisdiction which is expressly conferred upon them for that purpose by the Constitution of the United States, in the same words as those by which the like jurisdiction is conferred upon the federal courts of the Commonwealth by the Constitution of the Commonwealth. In the United States of America different applications of the rules of the common law and different applications of the same statutory language have been made by the Supreme Courts of different States, and when a federal court is required to apply the law of a State it applies it in accordance with the decisions of the Supreme Court of the State (*a*).

The special appellate jurisdiction conferred upon the High Court of Australia by the Constitution of the Commonwealth in respect of judgments, decrees, orders and sentences of the Supreme Court of each State of the Commonwealth will enable the High Court to establish a uniform interpretation of the same statutory language in the laws of the different States. But in the event of different interpretations being given of the same statutory language by the Supreme Courts of different States, and in the absence of any appellate decision by the High Court, it would seem to be incumbent upon any other federal court to follow the interpretation of the Supreme Court of the State whose laws were to be applied by the federal court. If the subordinate federal courts were to give independent interpretations of the laws of the several States, and if their decisions were at times divergent from the decisions of the Supreme Courts of some of the States, there would be discord in the administration of the laws of those States, until one or more litigants chose to incur the risk and expense of an appeal to the High Court, and it is an universally admitted proposition that certainty and uniformity in the administration of the separate law of each community is to be preferred to logical corrections of decisions which have been accepted and acted upon for any length of time.

The rule adopted by the federal courts of the United States of America in regard to

the declaration and application of the laws of the several States is strictly consistent with the position of those courts as organs of the judicial power of the United States, and its adoption by the federal courts of the Commonwealth of Australia would be equally consistent with their position as organs of the judicial power of the Commonwealth. They occupy the same position under the Constitution of the Commonwealth which the federal courts of the United States of America occupy under the Constitution of that country. Under both Constitutions the federal courts are authorised and required to administer the laws of the several States in specific cases. It has already been observed in reference to the laws of the several States of the Commonwealth of Australia that they are not foreign laws which require to be proved in the federal courts by expert testimony; but they are not the laws of the Commonwealth; and the federal courts are not organs of the judicial powers of the States. Under the Constitution of the Commonwealth the several States retain the right to appoint the authoritative organs of their judicial powers to the same extent to which the like right is retained under the Constitution of the United States of America by the States subject to it. The Constitution of the United States of America originally derived its authority solely from the voluntary acceptance of it by the people of the eleven States in which it first came into operation. The Constitution of the Commonwealth of Australia derives its legal force from its enactment by the Imperial Parliament; but the preamble to it recites that “the people of New South Wales, Victoria, South Australia, Queensland and Tasmania 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 proceeds to add “Be it *therefore* enacted,” &c. The preamble to the Constitution therefore acknowledges the historical fact that it was voluntarily adopted as an agreement by the people of the several colonies therein mentioned, and that the force of law was given to it by the Imperial Parliament in order to give effect to that agreement. The Constitution of the Commonwealth may therefore be legally read and construed as an agreement between the several States of the Commonwealth as properly as the Constitution of the United States may be read and construed as an agreement between the States that first adopted it. In each case the people in each State agreed to the creation of a federal judiciary, which in specified classes of cases should have authority to administer the laws of the State. But in both instances the several States retained the whole of the legislative power from which the laws to be administered by the federal courts in the classes of cases specified in the agreement can proceed; and they also retained a concurrent judicial power in regard to all those laws; and no reasonable interpretation of the agreement can read into it an authority conferred upon the subordinate federal courts to

introduce divergences and confusion in the interpretation and administration of those laws.

Suits against a State.

The jurisdiction conferred by the Constitution upon the Federal Judiciary of the Commonwealth to adjudicate in any matter “between a State and a resident of another State” (a) is conferred in the same language as that in which a like jurisdiction was originally conferred upon the Federal Judiciary of the United States of America by the Constitution of that country. But the eleventh amendment of that Constitution declares 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.” This amendment was proposed and adopted in consequence of the judgment of the Supreme Court in the case of *Chisholm v. Georgia* (b) in which it was decided by a majority of the court that the Constitution authorised the Court to entertain a suit brought against a State by a resident of another State. A powerful dissentient judgment was delivered by Mr. Justice Iredell, in which he concurred with the argument which Alexander Hamilton had previously advanced in the *Federalist* that the Constitution did not confer any right of action against a State by a resident of another State, in any case where the laws of the State did not permit the action to be brought. The opinions of Hamilton and the dissentient judges coincided with the sentiments of the majority of the people in the country, and the eleventh amendment of the Constitution was adopted to give effect to them.

If the judgment of the majority of the Supreme Court of the United States in the case of *Chisholm v. Georgia* was a correct interpretation of the language of the Constitution of that country previous to the adoption of the eleventh amendment, the same language in the Constitution of the Commonwealth of Australia must be taken to confer upon the Federal Judiciary of the Commonwealth jurisdiction to adjudicate in any suit brought against any State in the Commonwealth by a resident of another State, irrespective of any consent given by the law of the State for the prosecution of the suit. And in the case of the Constitution of the Commonwealth the language in question must be read in connection with section 78, which provides that:—

“The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of a judicial power.”

It must be noted that this section empowers the Parliament of the Commonwealth not only to confer a right to proceed against a State, but also to confer a right to proceed against the Commonwealth “in respect of matters within the limits of the judicial power”; and that the right which the Parliament may confer to proceed

against a State is not limited to residents of another State. It has already been observed that “the judicial power of the Commonwealth” is the power to declare and apply the laws of the Commonwealth, and the provisions of the Constitution, in matters arising under them; and therefore section 78 does not do more than empower the Parliament to confer rights to proceed against the Commonwealth or a State in respect of any matter within the provisions of the Constitution or arising under the laws of the Commonwealth. But in the case of *Chisholm v. Georgia* the majority of the judges of the Supreme Court of the United States declared that the language of the Constitution of that country, before the adoption of the eleventh amendment, conferred a right of action against a State upon a resident of another State in respect of any controversy arising under the law of a State. The argument of Hamilton and the dissentient judges was that immunity from legal process is an inherent element of sovereignty, and that contracts made between an independent nation and an individual cannot be enforced against the nation without its consent, and that there was nothing in the Constitution of the United States to prove that the several States had agreed to surrender the immunity from compulsory legal process which they all possessed before the adoption of the Constitution. “To what purpose,” argued Hamilton in the *Federalist*, “would it be to authorise suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.” The reply of Chief Justice Jay was that the people of the United States, “acting as sovereigns of the whole country, and in the language of sovereignty,” established “a Constitution by which it was their will that the State governments should be bound, and to which the State constitutions should be made to conform,” and that, as one State may sue another State, “suability and State sovereignty are not incompatible.”

If the question whether the Constitution of the Commonwealth of Australia confers upon a resident of any State a right to maintain a suit against another State, is to be settled by a consideration of the question of the position of the several States under the Constitution, and in relation to the powers and immunities inherent in political sovereignty, the determination of it will depend upon the answer to be given to the question, whether under the Constitution the Crown is amenable in each State to the judicial power of the Commonwealth. Before the establishment of the Commonwealth the several States were exempt from liability to legal process without their own consent, not because they were so many independent and sovereign communities, but because they were parts of the British Empire, and

whatever was done by or on behalf of any one of them as an organised political community was done in the name and as the act of the Crown in whom all the executive governmental power exercisable within the State was primarily vested. All the executive governmental power exercisable in each State of the Commonwealth as a separate community remains vested in the Crown; but under the Constitution of the Commonwealth each State is subject to specified restrictions, prohibitions and obligations which are binding on the Crown in each State, so far as they apply or may become applicable to the exercise of executive powers within the States. These restrictions, prohibitions and obligations are a part of the laws of the Commonwealth, because the Constitution itself is a part of them, and therefore the judicial power of the Commonwealth extends to them; otherwise they could never be enforced by judicial process, and the only other method by which the Executive Department of the Government of the Commonwealth could enforce them would be to regard any breach of them as an act of rebellion, and to compel obedience to them by physical force without the intervention of the Judiciary. But it cannot be supposed that the Constitution has placed the enforcement of these provisions of it in the unrestricted discretion of the Executive Department of the Government of the Commonwealth without any preliminary decision by the Federal Judiciary in reference to them. It therefore follows that so far as these restrictions, prohibitions and obligations are applicable to the Crown in each State, the Crown is in each State amenable to the judicial power of the Commonwealth. This conclusion is not invalidated by section 78, even if that section should be judicially declared to imply conclusively that no right of action against a State can be claimed under the Constitution by any litigant until the Parliament of the Commonwealth confers it; because section 78 only empowers the Parliament to confer such a right "in respect of matters within the limits of the judicial power," and if the restrictions, prohibitions and obligations imposed upon the States by the Constitution are not "matters within the limits of the judicial power," the Parliament cannot confer any right to proceed against a State in respect of them. But if the judicial power of the Commonwealth extends to these restrictions, prohibitions and obligations upon the States, the jurisdiction of the High Court in respect of matters between a State and residents of another State must correlatively extend to the Crown in each State; otherwise the Crown in each State is exempt from the judicial power of the Commonwealth. The Constitution does not contain any express exemption of the Crown in each State from the judicial power of the Commonwealth, and if such an exemption cannot be established upon the basis of the inherent immunity of the Crown from judicial process, there does not appear to be sufficient ground for asserting that the existence of any such exemption is recognised or implied in the

Constitution. Any argument for a recognition by the Constitution of an exemption of the Crown in each State from the judicial power of the Commonwealth, which is founded upon section 78, must apply as much to the jurisdiction conferred upon the High Court in respect of matters between States as to its jurisdiction in respect of matters between a State and the residents of another State. In a suit between two States it seems that the Crown would be both plaintiff and defendant, unless the Parliament of the Commonwealth makes a law to authorise such suits to be brought in the name of a Minister or other public officer of a State in order to avoid the incongruity of the Crown proceeding against itself. The appointment of a nominal plaintiff would not change the real character of the suit, and, whether such a form of proceeding is adopted or not, the jurisdiction conferred upon the High Court by the Constitution in respect of matters between States is a nullity, if the Crown cannot be brought within it as a defendant. But if that jurisdiction extends to the Crown in a State, it cannot be contended that the Crown in a State is exempt from the judicial power of the Commonwealth.

Power of the Parliament to confer original jurisdiction on the High Court.

Section 76 of the Constitution of the Commonwealth provides that—

“The Parliament may make laws conferring original jurisdiction on the High Court in any matter—

- 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 every community which is governed by definite and prescribed laws, the judicial power is necessarily co-extensive with the exercise of the legislative power, and therefore in the case of the Commonwealth of Australia matters “arising under the Constitution” and matters “arising under the laws made by the Parliament” are necessarily matters within the judicial power of the Commonwealth; and, in the absence of any reference in the Constitution to the nature and limits of the jurisdiction to be exercised by any court of the Federal Judicature, the distribution of original and of appellate jurisdiction among the federal courts would have been a matter entirely within the power and discretion of the Parliament of the Commonwealth. Under the Constitution of the United States of America the original jurisdiction of the Supreme Court is limited to “cases affecting ambassadors, other public Ministers and consuls, and cases in which a State shall be a party,” and there is not any power conferred upon Congress to extend the original jurisdiction of the

Court to any other cases. But, in the exercise of the power conferred upon it by section 76 of the Constitution of the Commonwealth, the Parliament of the Commonwealth may make the original jurisdiction of the High Court co-extensive with the whole judicial power of the Commonwealth.

The power conferred upon the Parliament, by section 76 of the Constitution, to confer an original jurisdiction upon the High Court in any matter of admiralty and maritime jurisdiction, is a power commensurate with the legislative power of the Parliament under section 51 in respect of (1) trade and commerce with other countries and among the States; (2) lighthouses, lightships, beacons and buoys; and commensurate also with its legislative power under section 98 in respect of navigation and shipping. In respect of all cases arising under its legislation upon these matters the Parliament of the Commonwealth has the power to confer an exclusive jurisdiction upon the federal courts, and thereby to supersede the admiralty and maritime jurisdiction which the Supreme Courts of several of the States now possess under the provisions of *The Colonial Courts Admiralty Act 1890* of the Imperial Parliament (a), because the legislative power of the Parliament of the Commonwealth in respect of all these matters is exclusive of the legislative power of the States. But until the Parliament of the Commonwealth exercises its exclusive legislative power in that direction the Supreme Courts of the several States will retain the admiralty and maritime jurisdiction conferred upon them by imperial legislation, and the Parliament of the Commonwealth may confer original jurisdiction upon the High Court in any matter of admiralty and maritime jurisdiction without disturbing the admiralty and maritime jurisdiction of the Supreme Courts of the several States.

The power granted to the Parliament of the Commonwealth to make laws conferring an original jurisdiction on the High Court, in any case in which the same subject matter is claimed under the laws of different States, is an extension of the judicial power of the Commonwealth similar to that by which it is made to embrace matters between residents of different States. In both instances federal courts are empowered to declare and apply the laws of the States, and in both instances the jurisdiction attaches to the court by virtue of the cognizance which it is empowered to take of the existence of a law or a fact beyond the territorial limits of the State in which the court adjudicates.

Powers of the Parliament of the Commonwealth to define the jurisdiction of federal courts.

Section 77 of the Constitution of the Commonwealth provides that—

“With respect to any of the matters mentioned in the last two sections, The Parliament may make laws—

- I. Defining the jurisdiction of any federal court other than the High Court:
- II. Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States:
- III. Investing any court of a State with federal jurisdiction.”

The power conferred upon the Parliament of the Commonwealth by this section to define the jurisdiction of any federal court other than the High Court, is a power to declare what portion of the whole judicial power of the Commonwealth shall be vested in any federal court other than the High Court; and in the exercise of this power the Parliament of the Commonwealth may confer upon any other federal court an original jurisdiction in any of the matters in respect of which the Constitution has directly conferred an original jurisdiction upon the High Court. The Constitution of the United States of America does not explicitly empower Congress to confer original jurisdiction upon any other federal court in any case in which the Constitution has directly conferred an original jurisdiction upon the Supreme Court; but the Supreme Court has decided that Congress has the power to do it (*a*). Congress has also created federal courts with appellate jurisdiction; and it cannot be doubted that the Parliament of the Commonwealth has power, under subsection I. of section 77 of the Constitution of the Commonwealth, to confer an appellate jurisdiction upon any federal court other than the High Court.

The power of the Parliament of the Commonwealth to define the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States, is not dependent upon the explicit grant of it contained in subsection II. of section 77 of the Constitution. A plenary legislative power in respect of any matter includes intrinsically the power to appoint or select, within the territorial limits of such legislative power, the courts which shall have jurisdiction to declare and apply the laws enacted in reference to the matter. But in the absence of any legislation by the Parliament of the Commonwealth which excludes the jurisdiction of the State courts, they will have jurisdiction to declare and apply the laws of the Commonwealth in all cases in which the judicial power of the Commonwealth is not necessarily exclusive of the judicial power of the States; because the laws of the Commonwealth are operative in every State and are declared by the fifth introductory section to the Constitution to be binding on the courts, judges and people of every State and of every part of the Commonwealth.

Matters in respect of which the judicial power of the Commonwealth is exclusive.

The matters in respect of which the judicial power of the Commonwealth seems to be necessarily exclusive of the judicial power of the States, in the absence of any legislation by the Parliament of the Commonwealth conferring jurisdiction upon the

courts of the States in respect of them, are the following:—

1. Matters in which the Commonwealth is a defendant:
2. Matters in which a State may be compelled under the Constitution to become a defendant:
3. Matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.

With regard to matters in which a State may be compelled under the Constitution to become a defendant, the State may of course authorize its own courts to exercise jurisdiction, and it may voluntarily submit itself to the jurisdiction of the courts of another State. The question of the power of a State court in the United States of America to issue a writ of mandamus to an officer of the United States to compel him to perform duties imposed upon him by a law of the United States came before the Supreme Court in the case of *McClung v. Silliman (a)*; and the Supreme Court decided that the courts of the States had not any jurisdiction in such cases.

The power conferred upon the Parliament of the Commonwealth to invest any court of a State with federal jurisdiction is a power to compel a court of a State to entertain any suit within the federal jurisdiction conferred upon it. In the United States of America the courts of the States have declined to take cognizance of crimes and offences against the laws of the United States, but they do not refuse to entertain civil actions arising under such laws. And it was at one time supposed that under the Constitution of the United States all cases against consuls or other representatives of other countries must be brought in a federal court, but Congress has empowered the Courts of the States to take cognizance of cases affecting consuls, although such cases are among those in respect of which the Constitution has conferred original jurisdiction on the Supreme Court (*b*).

Appeals to the Crown in Council from judgments of the High Court.

Section 74 of the Constitution of the Commonwealth declares that:—

“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 restriction placed by this section upon appeals from decisions of the High Court to the Crown in Council extends to all cases in which a State shall attempt to exercise any legislative or other governmental power in respect of any matter which is placed by the Constitution within the exclusive power of the Commonwealth, and to all cases in which there shall be involved any question of an alleged conflict

between the legislation of a State and a law of the Commonwealth in regard to any matter in respect of which the Parliament of the Commonwealth has the power to supersede and displace the legislative or other governmental power of the States. The restriction covers also all cases in which the Commonwealth shall attempt to exercise any legislative or other governmental power in regard to any matter over which the States have exclusive jurisdiction under the Constitution. But the restriction does not cover any case in which the Parliament of the Commonwealth or the Parliament of a State shall attempt to enact any law contrary to any legislation of the Imperial Parliament which is operative in the Commonwealth and paramount to the legislation of the Commonwealth and to the legislation of the States. In all cases not covered by the restriction contained in section 74, the same section provides that the Crown may by virtue of its royal prerogative grant special leave of appeal from the High Court to the Crown in Council. This is the only provision of the Constitution which refers to appeals that may be made from decisions of the High Court to the Crown in Council, and there is therefore not any appeal from decisions of the High Court to the Crown in Council as a statutory right similar to that which exists in regard to appeals from decisions of the Supreme Courts of the several States. The same section also provides that the Parliament may make laws limiting the matters in which special leave of appeal may be asked, but that proposed laws containing any such limitation shall be reserved by the Governor-General for the Crown's assent.

Contents of the judicial power of the Commonwealth compared with the contents of the judicial power of the United States.

The judicial power of the Commonwealth is not defined by a collocation of its contents in the same manner as the judicial power exercisable by the United States of America under the Constitution of that country is defined in that document. But a comparison of the specified contents of the judicial power of the United States with the matters in respect of which the Constitution of the Commonwealth provides for the exercise of judicial power by the Courts of the Commonwealth will show that the contents of the judicial power of the Commonwealth are substantially the same as the contents of the judicial power of the United States. The Constitution of the United States declares that “The judicial power shall extend to all cases in law and in equity arising under—

“(1) this Constitution;

“(2) the laws of the United States, and

“(3) treaties made or which shall be made under their authority;

“(4) to all cases affecting ambassadors, other public ministers and consuls;

“(5) to all cases of admiralty and maritime jurisdiction;

- “(6) to controversies to which the United States shall be a party;
- “(7) to controversies between two or more States;
- “(8) between a State and the citizens of another State;
- “(9) between citizens of different States;
- “(10) between citizens of the same State claiming lands under grants of different States;
- “(11) and between a State, or the citizens thereof, and foreign States, citizens and subjects.”

The matters in respect of which the Constitution of the Commonwealth provides for the exercise of the judicial power of the Commonwealth, if collated in the same manner and in the same order, are as follows:—

Matters—

- “(1) arising under the Constitution of the Commonwealth, or involving its interpretation (section 76, sub-section I.);
- “(2) arising under any law made by the Parliament of the Commonwealth (section 76, sub-section II.);
- “(3) arising under any treaty (section 75, sub-section I.);
- “(4) affecting consuls or other representatives of other countries (section 75, sub-section II.);
- “(5) of admiralty and maritime jurisdiction (section 76, sub-section III.);
- “(6) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party (section 75, sub-section III.);
- “(7) between States (section 75, sub-section IV.);
- “(8) between residents of different States (section 75, sub-section IV.);
- “(9) between a State and a resident of another State (section 75, sub-section IV.);
- “(10) relating to the same subject-matter claimed under the laws of different States (section 76, sub-section IV.);
- “(11) in which a writ of *mandamus*, or prohibition, or an injunction is sought against an officer of the Commonwealth (section 75, sub-section V.).”

It will be observed that the matters numbered (1) to (10) are substantially the same in both Constitutions. In the case of the Constitution of the Commonwealth, number (11) has been inserted in consequence of the decision of the Supreme Court of the United States, in the case of *Marbury v. Madison (a)*, in which it was declared that the Supreme Court had not original jurisdiction in the matter. Number (11), in the case of the Constitution of the United States, is not directly provided for in the Constitution of the Commonwealth, but the Parliament has power to legislate in reference to it under the authority of section 78.

This comparison of the respective provisions of the two Constitutions in reference to the exercise of judicial power clearly demonstrates that they are almost identical in both cases, and that the area and contents of the judicial power of the Commonwealth are as clearly and as definitely indicated in the Constitution of the

Commonwealth as the area and contents of the judicial power of the United States of America are indicated and defined in the Constitution of that country. It will also be apparent that the appellate jurisdiction conferred upon the High Court of Australia in respect of all judgments, decrees, orders and sentences of the Supreme Court of any State, in respect of matters arising and adjudicated solely under the laws of the State, is not part of the judicial power of the Commonwealth, because if it were added to the foregoing list of the contents of the judicial power of the Commonwealth, it would require to be described as a purely appellate jurisdiction which is vested in the High Court only and which the Parliament of the Commonwealth is powerless to confer upon any other federal court. But the judicial power of the Commonwealth is a power which the Parliament of the Commonwealth may distribute as it thinks fit among the courts of the Commonwealth, subject to the retention of original jurisdiction by the High Court in respect of all the matters in which such jurisdiction has been conferred upon it by the Constitution, in the same manner as the Congress of the United States of America, in accordance with the decisions of the Supreme Court of that country, may distribute the judicial power of the United States among the federal courts established by it subject to the retention by the Supreme Court of the original and the appellate jurisdiction conferred upon it by the Constitution in the cases in which the Constitution explicitly declares that it shall have such jurisdiction.

(a) 2 Dallas, 419.

(a) Subsection IV.

(a) *See Beauregard v. New Orleans*, 18 How., 497, 502; *Green v. Neal's Lessee*, 6 Pet., 29; *Railroad Co. v. Georgia*, 99 U.S., 359.

(a) Section 75, subsection 4.

(b) 2 Dallas, 419.

(a) 53 & 54 Vic., chap. 27. The Act has not been applied to New South Wales or Victoria, and the Supreme Court in those States has accordingly not superseded the Court of Vice-Admiralty.

(a) *See Börs v. Preston*, III U.S., 252.

(a) 6 Wheat. R., 598.

(b) 8 Stat., 318.

(a) 1 Cranch., 137.

9. The Inter-State Commission.

The appointment of an Inter-State Commission made imperative on the Parliament of the Commonwealth by the Constitution.

SECTION 101 of the Constitution of the Commonwealth provides 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 this Constitution relating to trade and commerce, and of all laws made thereunder.”

The language of the section makes the appointment of an Inter-State Commission imperative upon the Parliament of the Commonwealth, but the extent of the jurisdiction of the Commission and the character and scope of its administrative functions are dependent upon the determination of the Parliament, subject to the controlling declaration of the Constitution that the powers of adjudication and administration conferred upon the Commission by the Parliament shall be relevant to the execution and maintenance within the Commonwealth of the provisions of the Constitution relating to trade and commerce and the laws made under those provisions.

The Inter-State Commission will be a federal court of judicature if invested by the Parliament with any powers of adjudication.

So far as the Inter-State Commission shall be invested by the Parliament of the Commonwealth with powers of adjudication, it will be a court of judicature. But it will not be a court within the meaning of the word “court” as it is used in the Chapter of the Constitution which refers to the Federal Judicature. If the Constitution of the Commonwealth had used language which simply empowered the Parliament to establish an Inter-State Commission, and to confer upon it such powers of adjudication and administration in reference to the provisions of the Constitution relating to trade and commerce and to the laws made thereunder as the Parliament might think fit, the Commission as a court of judicature might then have been regarded as being included among the courts described in section 71 as “such other federal courts as the Parliament creates.” But the Inter-State Commission, like the High Court, is created by the Constitution of the Commonwealth, and its fundamental functions are substantially declared by the Constitution. It is also to be noted that by subsection III. of section 73 the High Court is expressly invested with jurisdiction to hear and determine appeals from the Inter-State Commission on questions of law, and this provision very strongly indicates that the phrase “other federal courts” does not include the Inter-State Commission, and that special provision was necessary to bring its decisions on questions of law within the

appellate jurisdiction of the High Court.

Primary powers and functions of the Inter-State Commission.

Section 102 of the Constitution of the Commonwealth provides that:—

“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.”

Section 104 provides that:—

“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.”

These two sections clearly indicate that the primary and characteristic powers and functions of the Inter-State Commission shall be administrative, and shall be primarily and particularly exercisable in reference to inter-state traffic conducted through the medium of railways; and the powers of adjudication which the Parliament may confer upon it are only such as shall be incidentally necessary to enable it to more completely perform its administrative functions. Nevertheless the powers of adjudication which the Parliament may from time to time confer upon the Inter-State Commission are *ex suis naturis* judicial powers, and they are therefore a portion of the total judicial power of the Commonwealth. By section 71 of the Constitution of the Commonwealth the judicial power of the Commonwealth is declared to be vested in the High Court and the other courts mentioned in the section. But in section 73 the Inter-State Commission is recognised as a tribunal which has jurisdiction to decide questions of law; and an appellate jurisdiction in respect of its decisions is conferred upon the High Court. It is therefore recognised as a part of the federal judicatory system; and the purport and effect of section 101 of the Constitution seems to be that it specially empowers the Parliament of the Commonwealth to vest concurrently in a tribunal which is not primarily and fundamentally a court of judicature a particular and limited portion of the judicial power of the Commonwealth for a particular and limited purpose.

The manifest utility and advantage of conferring ancillary powers of adjudication upon the Inter-State Commission is that it will be thereby enabled to enforce its decisions without resorting to the Federal Judiciary for that purpose. But it is

doubtful if it will possess, without an explicit grant from the Parliament, any of the powers which have always been held to attach to a superior court of judicature and to inhere in it as essential to its character and functions as a court. The powers of adjudication which the Inter-State Commission will possess will be only such as the Parliament of the Commonwealth shall directly confer upon it as being in the opinion of the Parliament necessary to enable it to fulfil the purposes of its creation. The powers which are held to be inherent in superior courts of judicature have been held to be necessarily included in the possession of a generic judicial authority, but in the case of a tribunal which is endowed with only particular and strictly ancillary powers of adjudication, it seems that explicit statutory authority will be required for all its acts, otherwise it might gradually extend its jurisdiction for itself by processes similar to the fictions by which the Courts of King's Bench and the Exchequer encroached upon the jurisdiction of the Court of Common Pleas.

10. The Constitution of the Commonwealth and the Common Law.

The prerogative powers of the Crown.

IN the course of the observations made upon the position of the Governor-General under the Constitution of the Commonwealth, it was stated that the authority conferred upon the Governor-General by the Constitution, to exercise in the Commonwealth, such powers and functions of the Crown as His Majesty may be pleased to assign to him, has introduced into the constitutional law of the Commonwealth a portion of the common law of England which would not otherwise have found a place there. In other words, if the Commonwealth of Australia had been established as an independent nation, and if the Constitution had provided for the election of a President, or any other supreme depository of executive authority in the Commonwealth in substitution for the British Crown, such depository of the executive powers of the Commonwealth would have possessed only such executive powers and functions as the Constitution of the Commonwealth and the laws of the Parliament of the Commonwealth would have expressly conferred upon him; and none of the powers of the British Crown which are included in the designation of royal prerogative would have attached to him without an express grant of it by the Constitution or the laws of the Commonwealth. But the supreme depository of executive authority in the Commonwealth is the King, and he possesses and may exercise within the Commonwealth all the prerogative rights and powers which are inherent in the British Crown, and which may be exercised by him under the provisions of the Constitution of the Commonwealth, and any statutes of the Imperial Parliament which are in force in the Commonwealth.

When it is said that the Crown possesses, and may exercise within the Commonwealth, such prerogative rights and powers as are above mentioned, the statement is made in reference to the Commonwealth as a single territory over which the Parliament of the Commonwealth has legislative jurisdiction, and not in reference to the Commonwealth as composed of a number of separate States, in each of which a separate parliament possesses legislative authority and a separate representative of the Crown is the organ of a concurrent executive authority within the limits of the State. As the depository of the executive power of the Commonwealth, the Crown does not possess any prerogative rights or powers in a State, in relation to its existence as a separate territory within which local organs of government are in existence. In each State of the Commonwealth the Crown

continues to be the supreme depository of executive authority in the government of the State, but its sphere of activity and authority in that relation is perfectly distinct from its sphere of activity and authority as the supreme organ of the executive power of the Commonwealth. In relation to the Commonwealth as a single territory, the Crown possesses prerogative rights and powers which have their source in the common law, and it is therefore evident that a portion of the common law attaches to the Constitution of the Commonwealth. But, except in relation to the executive powers of the Crown, it is submitted that there cannot be any federal common law in Australia and that the federal courts of the Commonwealth will not possess any jurisdiction under the common law.

The relation of the High Court to the common law in connection with appeals from the courts of the States.

As an appellate tribunal with authority to hear and determine appeals from judgments of the Supreme Courts of the States, in cases arising solely under the laws of a State, the High Court will have jurisdiction to decide questions arising under whatever portion of the common law will from time to time constitute a portion of the law of any State; but whenever the High Court, in the exercise of that appellate jurisdiction, will apply the rules and doctrines of the common law, its relation to the common law will not be any different from the relation of the House of Lords to the civil law when that tribunal exercises its appellate jurisdiction in respect of judgments of the Court of Sessions of Scotland in cases in which questions arising under the civil law are to be decided. The Supreme Court of the United States of America also finds itself in the same relation to the civil law when it exercises its appellate jurisdiction in respect of judgments of the Supreme Courts of the States of Louisiana and Florida.

The common law in territory acquired by the Commonwealth.

In the case of any territory acquired by the Commonwealth from any State, the laws of the State will continue in force in such territory until altered by the Parliament of the Commonwealth, and whatever portion of the common law was a part of the law of the State at the date of the acquisition of the territory will remain in force in the territory until altered by the Parliament of the Commonwealth. The power of the Parliament of the Commonwealth to alter any such portion of the common law within any such territory exhibits very clearly the relation of the federal courts of the Commonwealth to the common law. Whatever is the law of the whole Commonwealth as such, or of any territory within which the Parliament of the Commonwealth has exclusive legislative power, can be altered by that Parliament so far as such law is not a part of the Constitution of the Commonwealth; and therefore if the common law, or any definite portion of it, attaches to the jurisdiction of the federal courts of the Commonwealth, irrespective

of any provisions of the Constitution which confer upon those courts or any of them, or which empower the Parliament of the Commonwealth to confer upon them or any of them, any portion of their jurisdiction, the Parliament of the Commonwealth, in the absence of any restriction of its legislative power in that direction in the Constitution, must have power to alter it. There cannot be any law in force in the whole Commonwealth as such which is not subject to the legislative power of the Parliament of the Commonwealth, excepting the provisions of the Constitution itself, or any other Act of the Imperial Parliament which is an exercise of the paramount legislative power of that Parliament. But the Parliament of the Commonwealth has not any legislative power in respect of any matter which is not included among those which the Constitution has placed under the legislative power of the Parliament, and therefore before any federal court of the Commonwealth can assume to administer any portion of the common law, it must find either a direct authority to do it in the Constitution or in legislation of the Parliament of the Commonwealth enacted in the exercise of a power conferred by the Constitution. In the provisions of the Constitution which confer original jurisdiction upon the High Court in matters arising between residents of different States, and in the provisions which empower the Parliament of the Commonwealth to confer jurisdiction in such cases upon other federal courts, direct authority is found for the federal courts to administer in any such case, either immediately under the Constitution or under the legislation of the Federal Parliament, such portions of the common law as may be in force in any State under the law of which the case is to be decided. But in all such cases the portion of the common law which is applied is a portion of the law of the State, and it is not law which the Parliament of the Commonwealth can alter, except so far as it may be law relating to a matter in respect of which that Parliament has under the Constitution a dormant legislative power which it may exercise to displace the law of the State whenever it thinks fit to do so.

The relation of the federal courts of the Commonwealth to the common law is dependent upon their relations to the separate States.

The relation of the federal courts of the Commonwealth to the common law is thus seen to be dependent upon their relation to the separate States of the Commonwealth. In the exercise of a portion of the jurisdiction conferred upon them by the Constitution, or by the Parliament of the Commonwealth in the exercise of a power conferred by the Constitution, they are required to recognise the existence of the separate States and to apply the separate laws of the several States. If any portion of the civil law were in force in any State of the Commonwealth, as it is in the States of Louisiana and Florida in the United States of America and in some of the British colonies in South Africa, the federal courts of the Commonwealth would

be frequently required to adjudicate in accordance with it. But the civil law would not therefore be a part of the law of the Commonwealth. Neither is the common law a part of the law of the Commonwealth because it is in force in every State of the Commonwealth as a part of the law of the State; and whenever the federal courts of the Commonwealth are exercising a jurisdiction which does not require the recognition of the separate States and their laws, the common law, excepting that portion of it that relates to the Crown, does not exist for them, except so far as the use of its terminology in the Constitution may direct them to resort to it for the interpretation of the particular provisions of the Constitution in which that terminology is found.

The common law in the United States of America.

It has been repeatedly declared by the Supreme Court of the United States of America that there is not any common or unwritten law of the United States (*a*). Excepting to the extent to which it has been superseded or declared to be inoperative by local legislation, the whole of that portion of the English common law which relates to the proprietary and contractual rights of private persons and to the protection of persons and property constitutes the larger portion of the local law upon those matters in a majority of the States; but the federal courts have not any jurisdiction to administer any law which is not contained in the Constitution or in the legislation of Congress. The writer of the article on American Law in the Encyclopaedia of the Laws of England (*a*) observes that—“In contradistinction to the common law of the several States..there is growing up in the Federal Courts a common law of the United States, based equally upon the common law of England and of the several States. It is for the most part of recent development and has been occasionally criticised, not unnaturally with some severity, in the State Courts. The Federal Courts have a jurisdiction prescribed by the Constitution of the United States, which is in some sort superimposed upon the jurisdiction of the State Courts, sometimes conflicting, sometimes concurrent in a particular State with that of the State tribunals, and at other times exclusive and independent, but in every case defined and limited by the Constitution. In these Courts, both in civil and criminal matters, there has come to be recognised, along certain lines, a common law of the United States, which is certain to assert and reassert itself more and more as the federal jurisdiction grows and develops, particularly in cases involving the law merchant, the law of commercial paper, and the like. Thus, for example, in the case *In re Neagle* (1890), 135 U.S., 69, it is held that there is a peace of the United States, as distinguished from the peace of the individual State, a breach whereof is possible within the territorial limits of the State, as by an assault upon a federal officer or judge.” No exception can be taken to these observations, for they do not

assert the existence of any body of federal common law antecedent in origin to the existence of the Constitution of the United States and incorporated or adopted by it. But some American jurists have seemed disposed to contend that the Constitution of the United States necessarily presumes the existence of the fundamental rules and principles of the common law of England and their applicability to the exercise of the judicial power of the United States by the federal courts, to an extent which has not received the approval of the Supreme Court of that country. Among others, Story, in a note to section 158 of his *Commentaries on the Constitution* (a), observes that “The question whether the common law is applicable to the United States in their national character has been much discussed at different periods of the government with reference to the jurisdiction and punishment of common law offences by the courts of the United States. It would be a most extraordinary state of things that the common law should be the basis of the jurisprudence of the States originally composing the Union, and yet a government ingrafted upon the existing system should have no jurisprudence at all: If such be the result there is no guide and no rule for the courts of the United States, or indeed for any other department, in the exercise of any of the powers confided to them except so far as Congress has laid, or shall lay, down a rule. In the immense mass of rights and duties, of contracts and claims, growing out of the Constitution and laws of the United States (upon which positive legislation has hitherto done little or nothing), what is the rule of decision, and interpretation, and restriction? Suppose the simplest case of contract with the government of the United States, how is it to be construed? How is it to be enforced? What are its obligations? Take an Act of Congress, how is it to be interpreted? Are the rules of the common law to furnish the proper guide, or is every court and department to give any interpretation it may please according to its own arbitrary will?” The same learned jurist resumes the discussion of the question in his observations on the provisions of the Constitution relating to impeachments, particularly in reference to section 4 of Article II., which declares that “The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours.” In this connection he says (a):—“The doctrine indeed would be truly alarming, that the common law did not regulate, interpret and control the powers and duties of the court of impeachment. What otherwise would become of the rules of evidence, the legal notions of crimes, and the application of principles of public or municipal jurisprudence to the charges against the accused? It would be a most extraordinary anomaly that while every citizen of every State originally composing the Union would be entitled to the common law as his birthright, and at once his protector and guide, as a citizen of the

Union, or an officer of the Union, he would be subject to no law, to no principles, to no rules of evidence.” Very similar observations were made by Senator Bayard of Delaware in the debate in the Senate in the year 1802 upon the bill to repeal the Judiciary Act of 1801, in the course of which he said: —“I should scarcely go too far, were I to say that stript of the common law there would be neither Constitution nor government. The Constitution is unintelligible without reference to the common law. And were we to go into our courts of justice with the mere statutes of the United States not a step could be taken, not even a contempt could be punished. Those statutes prescribe no forms of pleadings; they contain no principles of evidence; they furnish no rule of property. If the common law does not exist, there is no law but the will of the judge.” These are very forcible arguments, but in the course of the same speech from which the last preceding quotation is taken the author of it said:—“I have never contended that the whole of the common law attached to the Constitution, but only such parts of it as were consonant to the nature and spirit of our government.” And in continuation of his observations on the subject of impeachments Story says:—“It seems, then, to be the settled doctrine of the high court of impeachment that though the common law cannot be a foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches and is exercised according to the rules of the common law; and that what are, and what are not, high crimes and misdemeanours is to be ascertained by recurrence to that great basis of American jurisprudence.” But if only such parts of the common law as are consonant with the nature and spirit of the government established by the Constitution of the United States attach to that Constitution, as was asserted by Senator Bayard, then it devolves upon the federal courts to determine which parts of the common law are of that character, and the law to be administered by those courts under the name of common law is in the end dependent on the construction placed by the particular court or judge upon the provisions of the Constitution which are supposed to impliedly recognise particular portions of the common law. And if it is conceded, as admitted by Story, that the common law cannot be a foundation of jurisdiction for the federal courts, it is difficult to understand how it “constitutes a part of the law of the United States,” as he seems to contend, “so far as it is applicable . . . as a guide and check and expositor in the administration of the rights, duties and jurisdiction conferred by the Constitution and laws,” in any other manner than the use of its nomenclature in the Constitution or in the laws of Congress authorises resort to it in the same manner and to the same extent as the use of the nomenclature of any other department of human knowledge and experience would authorise resort to it to give effect to the language employed in such a case. When the Constitution of the United States uses

the expressions “high crimes and misdemeanours” (*a*), “presentment or indictment of a grand jury” (*b*), and “trial by jury” (*c*), it employs language well understood by the people to whom it speaks, and refers to things with which they are well acquainted; but it does not follow that it therefore incorporates or adopts any separate and complete portion of the body of law in which those expressions had their origin, any more than the express authority conferred upon Congress to raise and support an army and to provide and maintain a navy implies the adoption of any portion of any existent system of military or naval organisation. When the Constitution directs a “trial by jury” in particular cases it includes everything which the Federal Judiciary shall declare to be necessary to give full and proper effect to the language used. But the persons who claim the benefits of the direction will claim it as a right distinctly and expressly conferred by the Constitution, and not as a right acquired by virtue of the previous and continued existence of the common law in the several States. So also in the case of any other provision of the Constitution which uses terms that derive their meaning from historical association with long established and well understood usages and institutions, they must be interpreted to include all that is necessary to give full effect to the use of them. But in every such case the Constitution alone prescribes the law, and the whole of the law is contained in the language in which it is prescribed. The scope and contents of the language used are questions for judicial determination.

In his *Commentaries on American Law* Chancellor Kent has ably and exhaustively discussed the whole question of the relation of the Constitution of the United States to the common law, and has reviewed the decisions of the American Supreme Court upon it. He suggests an instance in which Congress should by law authorise the federal courts to take cognisance of an attempt to obstruct or defeat a law of the United States, and should not prescribe any punishment for it, and he concludes that in such a case the courts would follow the common law in the definition, prosecution and punishment of the offence. In such a case it would be the language of Congress and not the language of the Constitution which the courts would have to construe, and if they followed the common law they would do so because they would take the language used by Congress as a direction to follow it. In other laws of Congress they would doubtless find references to various portions of the common law and directions to follow its forms of procedure in particular cases; and the existence of the common law in nearly all the States would be an extraneous fact which the courts would observe in seeking the intention of the written law which they were required to administer. It may be said that in taking notice of that fact, and in resorting to the common law to find a rule of interpretation to give effect to the intention of Congress, the courts would be importing the common law into their

jurisdiction before they had found statutory authority for doing so. But to adopt and apply a rule of interpretation from the common law, or from any other historical source of legal conceptions and principles, in such a case is not to recognise the source of the rule as an authority which the court is under a legal obligation to consult and to obey. The Court of Chancery in England adopted and applied many of the conceptions and rules of the Roman law in the construction of the body of legal rules and principles which are embraced under the name of equity; but it did not recognise any portion of the Roman law as an obligatory source of the rules and conceptions which it borrowed from that body of law.

In the extract which is quoted on page 196 from the article on American Law in the Encyclopaedia of the Laws of England, the case of *In re Neagle (a)* is mentioned as an example of the growth of a common law of the United States in support of the assertion that there is a peace of the United States which is concurrent with the peace of the separate States. But the judgment of the Court in that case is based upon section 3, article 2, of the Constitution, which requires the President to “take care that the laws be faithfully executed,” and upon the provision in section 788 of the Revised Statutes of the United States which declares that “The marshals and their deputies, shall have in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.” In declaring the legal effect of the provision, in the Constitution and the Act of Congress which are cited in the judgment, the court uses the language of the common law as that which most appropriately and most intelligibly describes that effect, but the common law is not invoked to support the judgment.

It is nevertheless true, as stated by the writer of the article above mentioned, that there has been growing up in the federal courts of the United States during the past century, a common law of the United States which derives its doctrines and rules from the English common law. The existence of this common law of the United States has been definitely recognised by the Supreme Court of that country in the case of *Smith v. Alabama (a)*, in which it was declared that “There is one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority.” This statement of the

matter makes it clear that where a common or unwritten law of the United States exists it is based upon the language of the Constitution and the laws of Congress and derives its authority from them and not from any pre-existent and extraneous source either in the several States or elsewhere.

By special legislation Congress has in several instances directly empowered the federal courts to apply portions of the common law. For example, by the Judiciary Act of 1789 all maritime cases are declared to be within the exclusive jurisdiction of the federal district courts, but “saving to suitors in all cases the right of common law remedy when the common law is competent to give it.” Congress has also by direct legislation declared that the jurisdiction in civil and criminal matters conferred upon the federal courts “shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the subject, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law as modified and changed by the Constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern such courts in the trial and disposition of the cause” (a). This enactment removes all difficulties out of the way of the federal courts of the United States of America in the exercise of the jurisdiction conferred upon them by the Constitution or Congress, and precludes the possibility of any such case arising as that suggested by Chancellor Kent and to which reference has been previously made in this discussion.

The federal courts of the Commonwealth will possess only such jurisdiction as the Constitution and the Parliament confer upon them.

It is submitted that the foregoing observations upon the jurisdictions and powers of the federal courts of the United States will be equally applicable to the jurisdiction and powers of the federal courts in the Commonwealth of Australia, and that they will possess such jurisdiction only as the Parliament of the Commonwealth shall confer upon them, excepting, in the case of the High Court of Australia, the original and the appellate jurisdiction conferred directly upon it by the Constitution. The jurisdiction conferred by the Parliament of the Commonwealth upon any federal court must be within the limits of the judicial power of the Commonwealth, and these are coterminous with the legislative and the executive powers conferred by the Constitution upon the Parliament of the Commonwealth and upon the Crown. The Constitution does not define the contents of the executive power of the Commonwealth, but declares that it “extends to the maintenance of this Constitution and the laws of the Commonwealth.” The Constitution is itself a law of the

Commonwealth, and the judicial power of the Commonwealth is the power to declare the contents of the laws of the Commonwealth and to apply them to matters litigated in the courts of the Commonwealth. It has already been observed that the power conferred by the Constitution upon the Governor-General to exercise in the Commonwealth, subject to the Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him has introduced into the Constitution of the Commonwealth that portion of the common law which invests the Crown with its prerogative rights and powers, and such portion of the common law is therefore a part of the law of the Commonwealth. The provisions of the Constitution of the Commonwealth relating to the Federal Judicature confer upon the Parliament of the Commonwealth power to invest the federal courts with a jurisdiction which will authorise them to take cognisance also of other portions of the common law in particular cases. This jurisdiction of the federal courts has already been noticed in this chapter, and reference has also been made to it in the chapter devoted to the Federal Judiciary.

The demise of the Crown and the duration of the Federal Parliament.

In connection with the question of the relation of the Constitution of the Commonwealth to the common law, a reference may be fitly made to the effect of the demise of the Crown on the periodical duration of the Parliament of the Commonwealth. The Constitution Acts of several of the States of the Commonwealth contain a provision that the demise of the Crown shall not affect the periodical duration of the Parliament of the State. But there is not any such provision in the Constitution of the Commonwealth in regard to the Federal Parliament, and an investigation of the matter seems to lead to the conclusion that any such provision was rightly omitted from the Constitution, and that the provision in reference to the demise of the Crown which is found in the Constitution Acts of some of the States of the Commonwealth is unnecessary. The question of the legal continuance of an Australian Parliament for the period for which it was elected in the event of the demise of the Crown after the election of the Parliament and before the expiration of the period was considered by the Judicial Committee of the Privy Council in the case of *Devine v. Holloway (a)*, in reference to the death of William IV. and its effect on the duration of the Legislative Council of New South Wales. The decision in that case was that the duration of the Legislative Council of that colony was not determined by the death of the King, because the Governor and the Council came conjointly within the provisions of the Succession Act 6 Anne c. 41 sec. 8, which provided that no civil or military office within the United Kingdom “or any of Her Majesty's Plantations” should become vacant by reason of the demise of the Crown, and that the person holding any such office at the time should

continue to hold it for a period of six months if not sooner removed. But it is submitted that neither the Parliament of the Commonwealth nor the Parliament of any State in the Commonwealth is dependent for its continued existence during the period for which it was elected, in the event of the demise of the Crown, upon any legislation other than that to which it owes its original creation. The House of Commons derives its existence from the common law of England, and until the Imperial Parliament enacted that the demise of the Crown should not terminate its periodical duration, the rule of the common law was that in as much as the continuation of its periodical existence depended at all times on the will of the King, it necessarily terminated with his death. But the Parliament of the Commonwealth and the Parliaments of all the States in the Commonwealth derive their existence from legislation of the Imperial Parliament or from local legislation enacted under the authority of the Imperial Parliament, and their periodical duration is regulated in all circumstances by such legislation and not in any event by the common law. They are all statutory Parliaments, and all the conditions of their existence and periodical duration must be sought in the statutes that brought them into being.

(a) *United States v. Worrall*, 2 Dallas, 384; *United States v. Hudson*, 7 Cranch., 32; *Wheaton v. Peters*, 8 Pet., 591; *Smith v. Alabama*, 124 U.S., 465.

(a) Vol. 1, p. 242.

(a) 5th ed., vol. 1, p. 111.

(a) 5th ed., vol 1., p. 582, sec. 758.

(a) Article II., sec. 4.

(b) 5th Amendment.

(c) 7th Amendment.

(a) 135 U.S., 69.

(a) 124 U.S., 465.

(a) Revised Statutes, U.S., 722.

(a) Weekly Reporter, vol 9, 642.

11. The Powers of the Parliament of the Commonwealth to Grant Financial Assistance to the States.

The provisions of the Constitution which empower the Parliament of the Commonwealth to grant financial assistance to the States.

THE provisions of the Constitution of the Commonwealth which direct or empower the Parliament of the Commonwealth to grant financial assistance to the States are the following:—

“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.

“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.

“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.

“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.

“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.

“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 combined operation of sections 87, 89, and 93.

Under the combined operation of sections 87, 89 and 93, the Commonwealth is required during the first period of five years after the imposition of uniform duties of customs to distribute annually among the States three-fourths of the net revenue collected by the Commonwealth from duties of customs and excise, and to make such distribution in accordance with the directions contained in section 89. Under section 94 the Commonwealth is relieved at the expiration of the period of five years immediately following the imposition of uniform duties of customs from the compulsory distribution of its surplus revenue from the sources above mentioned in accordance with section 89, and is empowered to distribute such surplus revenue among the States thereafter upon such basis as the Parliament of the Commonwealth shall prescribe. But under section 87 three-fourths of the revenue collected by the Commonwealth from duties of customs and excise must continue to be distributed among the States until the expiration of the period of ten years immediately succeeding the establishment of the Commonwealth. After the expiration of the last-mentioned period the Parliament of the Commonwealth will have full control over the disposal of the whole of the revenue collected from duties of customs and excise, and may appropriate the whole of such revenue in the expenditure of the Commonwealth.

The provisions of section 96. Under section 96 the Parliament of the Commonwealth may grant financial assistance to any State during the period of ten years immediately following the establishment of the Commonwealth, and thereafter until the

Parliament otherwise provides upon such terms and conditions as the Parliament thinks fit. The language of section 96 is peculiar. It refers primarily to a definite period within which financial assistance may be granted by the Parliament of the Commonwealth to any State, and at the same time declares that such assistance may be granted by the Parliament to any State after the expiration of that period “until the Parliament otherwise provides.” In one aspect of the language of the section, it has the same effect as if the section declared that the Parliament of the Commonwealth might, without any periodical limit to its power in that direction, grant from time to time financial assistance to any State, on such terms and conditions as it might prescribe. But in another aspect of its language the section seems to contemplate a termination to its operation by legislation of the Parliament of the Commonwealth for that purpose. If this is the correct interpretation of the language of the section, it empowers the Parliament to preclude itself at any time after the expiration of the period of ten years immediately following the establishment of the Commonwealth from granting financial assistance to any State at any time subsequent to the legislation which shall terminate the operation of the section. The same method of interpretation applied to the language of section 87 would empower the Parliament of the Commonwealth to preclude itself at any time after the expiration of the first ten years following the establishment of the Commonwealth from distributing among the States so much as three-fourths, or possibly any portion of the revenue collected from duties of customs and excise. The result of this interpretation of section 87, if applied to the whole power of the Parliament of the Commonwealth with respect to the distribution of any portion of the revenue collected from duties of customs and excise among the States, would be that any legislation of the Parliament which terminated the operation of section 87 would also terminate the operation of section 94. But this is a conclusion which only the impossibility of placing any other intelligible and reasonable interpretation upon the language of sections 87 and 96 would justify. We must therefore read the language of section 96 as empowering the Parliament of the Commonwealth to grant from time to time, without any periodical limit to its power to do so, financial assistance to any State that may require it. The mention of the particular period of ten years immediately succeeding the establishment of the Commonwealth makes it clear that the Parliament of the Commonwealth may grant financial assistance to any State during the same period within which the Parliament is required to distribute among the States three-fourths of the revenue collected from duties of customs and excise, and this is evidently the explanation of the form of language used in section 96.

The provision of section 96 is distinct from the provisions of the Constitution which refer to the distribution of surplus revenue.

The provision made in section 96 for the grant of financial assistance to any State by the Parliament of the Commonwealth is perfectly distinct from the provisions relating to the distribution of the surplus revenue of the Commonwealth among the States, and it clearly empowers the Parliament of the Commonwealth to grant to any State some financial assistance in addition to the share of the surplus revenue of the Commonwealth which any State shall receive under the distribution of such surplus revenue in accordance with the directions contained in sections 93 and 94. A contrary interpretation of the language of the section would make the whole section so much surplusage, and therefore nugatory so far as it was intended by its framers to grant any additional power to the Parliament of the Commonwealth. But during the period for which the distribution of the surplus of the revenue derived by the Commonwealth from duties of customs and excise is compulsory, the Parliament of the Commonwealth cannot apply any portion of that surplus revenue for the purpose of granting additional assistance to any State, because the whole of that surplus revenue will be absorbed in the distribution of it in accordance with the directions contained in sections 93 and 94. Under section 93 the distribution must be made during the first five years after the imposition of uniform duties of customs in proportion to respective amounts of revenue collected in the several States. Under section 94 the distribution may be made at the expiration of the last mentioned period upon such basis as the Parliament of the Commonwealth shall deem fair. But until the expiration of the first period of ten years after the establishment of the Commonwealth the distribution made under sections 93 and 94 must absorb three-fourths of the revenue collected by the Commonwealth from duties of customs and excise. There is not anything in the Constitution of the Commonwealth that prohibits the Parliament at the expiration of the first five years after the imposition of uniform duties of customs from devising a basis for the distribution of the surplus revenue of the Commonwealth among the States that would enable the States to receive shares in proportion to the losses which they had respectively sustained by the relinquishment of their power to impose duties of customs and excise for their own use. But if the Parliament of the Commonwealth desires in the exercise of the power conferred upon it by section 96 to grant out of the revenues of the Commonwealth, at any time before the expiration of the first ten years after the establishment of the Commonwealth, financial assistance to any State, in addition to its share in a proportionate distribution of the surplus revenue derived from duties of customs and excise, the Parliament of the Commonwealth must raise the necessary revenue for such additional assistance from other sources. It is not to be supposed that section 96 contemplates the imposition of direct taxation in any form for the special purpose of enabling the Parliament of the Commonwealth to grant financial

assistance to any State; and it therefore becomes necessary to ascertain, if possible, in what manner the Parliament of the Commonwealth can grant additional financial assistance to a State during the period within which the distribution among the States of three-fourths of the revenue collected by the Commonwealth from duties of customs and excise is compulsory.

In what form financial assistance may be granted to a State under section 96.

Under the power conferred upon it by section 96 the Parliament of the Commonwealth may grant financial assistance to a single State, or to several States, or to all the States; and a general scheme for granting additional financial assistance to all the States could be much more easily devised and applied during the period within which the distribution among them of the surplus revenue collected by the Commonwealth from duties of customs and excise is compulsory than any scheme for granting special financial assistance to a single State or to several States could be applied during the same period. A general scheme for granting additional financial assistance to all the States whereby the Commonwealth would take over an equitable portion of the debt of each State could, with the concurrence of all the States, be applied in a manner that would supersede the provisions of section 87, while it would at the same time fully effectuate the purpose of that section and secure the necessary additional assistance to those States which require more financial assistance than section 87 secures for them. It is a matter beyond all doubt that section 87 was inserted in the Constitution because the Convention that framed the Constitution clearly foresaw that a majority, if not all, of the States would require for an indefinite period financial assistance from the Commonwealth in consequence of their relinquishment of the revenues they had previously derived from duties of customs and excise; and the purport of section 87 is to secure to each State, for a definite period of ten years at the least, a continued revenue from those sources. But the necessity of a revenue for a majority of the States from duties of customs and excise is found in the extent of their debts.

Historical and economical relation of the debts to the tariffs of the States. An analysis of the statistics for the last forty years of the six States which constitute the Commonwealth discloses the fact that, with temporary and local fluctuations, the sums collected by those States from duties of customs and excise have, in the aggregate, closely approximated to the aggregate of the sums which the same States have paid in interest upon their debts. This fact indicates very clearly that there has been a historical and economical association of a very intimate character between the debts and the customs tariffs of the several States; and there cannot be any doubt in regard to the correlative fact that it has been the spontaneous increase in the revenues collected by the several States from the duties of customs and excise, consequent upon the

natural increase of their populations and upon immigrational accessions, which has enabled those States to borrow from time to time the large sums of money which they have expended in the construction of their roads and railways and other public works. The expenditure of these borrowed moneys has, in its turn, produced an increase of population by inducing immigration, and hence the customs tariffs and the debts of the several States have been, to a very large extent, the mutual causes and results of one another. In the light of these historical and economical facts, the provision made by section 87 of the Constitution of the Commonwealth for a continuation of a revenue to the States from duties of customs and excise is found to be substantially a provision for enabling or assisting the States to pay the interest upon their debts.

Section 105.

The provision relating to the debts of the States which is contained in section 105 of the Constitution of the Commonwealth does not contemplate any removal or reduction of the separate liability of each State to pay the interest upon its debt, because it requires each State to indemnify the Commonwealth in respect of whatever portion of the debt of the State shall be assumed by the Commonwealth, and to continue to pay the interest thereon either out of its share of the surplus revenue of the Commonwealth distributed among the States or out of its own revenue. It is therefore very doubtful if an assumption of the debts of the States by the Commonwealth upon the terms and conditions prescribed by section 105 of the Constitution would be a financial assistance to any State, and consequently the power conferred upon the Parliament of the Commonwealth by section 105 cannot be regarded as being essentially a power to grant financial assistance to the States. In some unseen future contingency the Parliament of the Commonwealth might be induced to exercise the power conferred upon it by section 105 solely for the benefit of the Commonwealth, irrespective of any benefit the exercise of the power might confer upon the States. But whether an assumption of the debts of the States by the Commonwealth in accordance with the provisions of section 105 would be a financial assistance to any State or not, the provisions of that section are distinct from and independent of the power conferred upon the Parliament of the Commonwealth by section 96 to grant financial assistance to any State; and the direction in which that power is to be exercised must be sought elsewhere than in any such assumption of the debts of the States by the Commonwealth as is authorised by section 105.

It has already been observed that there is not anything in the Constitution of the Commonwealth that prohibits the Parliament at the expiration of the first five years after the imposition of uniform duties of customs from distributing its surplus

revenue among the States upon a basis that would secure to each State a share proportionate to the financial loss it had sustained by the relinquishment of its power to raise a revenue from duties of customs and excise. If this method of providing financial assistance to the States is not adopted by the Parliament, and if the Parliament does not raise the additional revenue from other sources than duties of customs and excise for the purpose of granting financial assistance to the States, the only other method of granting such assistance to the States seems to be an assumption of a portion or the whole of the debt of each State by the Commonwealth in a manner that will reduce the total debt of the State and relieve the State from the payment of the interest upon the portion of the debt assumed by the Commonwealth.

The power conferred upon the Parliament of the Commonwealth by section 105 is not one which it is obligatory on the Parliament to exercise.

The power conferred upon the Parliament of the Commonwealth by section 105 of the Constitution is not a power which the Parliament of the Commonwealth is under any obligation to exercise, and being a power additional to all the other powers conferred by the Constitution upon the Parliament it cannot in accordance with any established rule of construction be held to reduce or restrict any other substantive and distinctly separate power conferred by the Constitution upon the Parliament. The power conferred upon the Parliament by section 96 of the Constitution is a substantive and separate power distinct from the power conferred by section 105, and the Parliament is therefore free to exercise it in whatever manner and in whatever direction it could legitimately exercise it if the power conferred by section 105 had not been granted to it. Because section 105 of the Constitution confers upon the Parliament of the Commonwealth a particular power to take over the debts of the States and to compel the States to indemnify the Commonwealth in respect of such debts it does not therefore restrict the exercise of any power which the Parliament would otherwise have to take over the debts of the States either under the authority of section 96, or under the authority of any other section of the Constitution which purported to confer upon the Parliament a power in that direction. When the question of the power of Congress under the Constitution of the United States of America to make treasury notes a legal tender for the payment of debts came before the Supreme Court in *The Legal Tender Cases (a)*, it was argued in denial of the existence of the power that the provision in the Constitution which empowered Congress “to coin money, regulate the value thereof and of foreign coin” declared the whole of the power of Congress over the currency of the United States, and therefore excluded any control or regulation of the currency in the exercise of any other power conferred by the Constitution upon Congress. But the

court rejected the argument and said—“If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that a power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relating to the same subject, less comprehensive. . . . To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court.”

The Parliament of the Commonwealth is not prohibited from assuming the debts of the States and discharging the liability of the States.

There is not any provision in the Constitution of the Commonwealth which expressly empowers the Parliament of the Commonwealth to take over the whole or a portion of the debt of each State and to discharge the State from all liability to provide for the payment of the interest thereon or for the redemption of the debt at any future time. But the Constitution has expressly conferred upon the Parliament of the Commonwealth the power to make laws in respect of “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.” In considering the purport of the corresponding provisions in the Constitution of the United States of America in the case of *McCulloch v. Maryland (a)*, Chief Justice Marshall said:—“The result of the most careful and attentive consideration bestowed upon this clause is that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.”

Result of the assumption of the debts of the States by the Commonwealth and the discharge of the liability of the States.

If the Parliament of the Commonwealth shall take over the whole or any portion of the debt of each State and shall discharge the States from all obligation to provide for the payment of the interest upon the transferred debts or for their redemption, the transferred debts will thereby become debts of the Commonwealth, and the interest upon them will be payable by the Commonwealth out of its own revenues as a part of its own expenditure for its own purposes. The Parliament of the Commonwealth

has unrestricted power to borrow money on the public credit of the Commonwealth “for the peace, order and good government of the Commonwealth,” and the Parliament is the sole judge of when and in what manner “the peace, order and good government of the Commonwealth” require the exercise of any substantive power conferred upon the Parliament by the Constitution. The general welfare and prosperity of the whole Commonwealth must be affected by the prosperity or financial distress of each of the States, and if the transfer of the whole or a part of the debt of each State will relieve the States or any of them from imminent financial embarrassment, the immediate benefit to them will certainly produce an ultimate benefit to the Commonwealth. If financial embarrassment comes to any State in consequence of the surrender of its power to raise revenue by duties of customs and excise, the establishment of the Commonwealth will be the cause of the embarrassment, and the financial resources of the Commonwealth would be legitimately used to provide any remedy which is within the legislative power of the Commonwealth. Any difficulty about the directions contained in sections 89 and 93 of the Constitution in regard to the distribution of three-fourths of the revenue collected by the Commonwealth from duties of customs and excise during the first ten years after the establishment of the Commonwealth could be legally obviated by uniform legislation of the several States by which each State would relinquish its claim under those sections in return for the transfer of its debts to the Commonwealth. If the transfer of the debts of the States to the Commonwealth is postponed until the expiration of the first ten years after the establishment of the Commonwealth, no legislation by the States would be required, because their claims under sections 89 and 93 would have terminated.

Assumption of the debts of the States of the American Union by Congress.

The Constitution of the United States of America does not contain any provision for the assumption of the debts of the States by the United States, nor any provision which directly empowers Congress to grant financial assistance to any State. Nevertheless the debts incurred by the several original States in the War of Independence were taken over by the United States within two years after the adoption of the Constitution by the States; and in the year 1843 a select committee reported to Congress in favour of an assumption of the subsequent debts of the States by the Federal Government, but the proposal was rejected in consequence of the opposition of the non-indebted States. The grounds upon which the report of the select committee justified its proposal as one within the power of Congress under its authority to “provide for the common defence and general welfare of the United States” was that the larger part of the contemporary debts of the States had been contracted to construct public works, and that these public works were “calculated

to strengthen the bonds of union, multiply the avenues of commerce, and augment the defences from foreign aggression.” In regard to the debts of the States which were assumed by the Federal Government immediately after the establishment of the Constitution the following observations taken from Bolles' Financial History of the United States ^(a) set forth very clearly the grounds upon which the assumption was made. “Obvious justice required the assumption of all the debts thus contracted. Congress, under the Confederation, had repeatedly promised to do full justice to all the creditors and States; and their successors had no right to repudiate the promise. The assumption of the claims of State creditors, to whom compensation was due for their efforts in aiding the common cause against Great Britain, was not so much an act of expediency as an act of open and express obligation. There was no honest way of escaping the fulfilment of it. Moreover, the States had granted the exclusive right to the government of collecting a revenue on imports, which was the richest source of public revenue. When the States relinquished the right of levying this tax, they expected that the Government would relieve them from their obligations incurred for the general welfare. To appropriate the richest fountains of taxation belonging to the States, and refuse the assumption of their war obligations, was harsh treatment and just ground for resentment.”

(a) 12 Wall., p. 457.

(a) 4 Wheat., 316.

(a) Vol. 2, p. 36.

12. The Power of the Crown to Appoint Commissions of Inquiry.

The case of the Commission appointed to investigate the affairs of the Bank of Van Diemen's Land, Tasmania.

IN the year 1888 an Act was passed by the Parliament of Tasmania by which Commissioners appointed by Letters Patent of the Governor to make any inquiry were empowered to summon witnesses and to administer oaths to them and to demand the production of books and documents. In the year 1892 a Commission of four persons was appointed by Letters Patent of the Governor to make inquiry into the affairs of the Bank of Van Diemen's Land, then in liquidation, and to make a report in writing of their proceedings and their discoveries concerning the said Bank and its affairs. After the Commissioners had held two sittings they were served with a notice that an application had been made that day to the Chief Justice in chambers on behalf of the defendant in an action then pending in the Supreme Court for an order restraining the Commissioners from compelling witnesses to appear before them or to proceed any further in their inquiry into the affairs of the said Bank or publishing any report of their proceedings pending the trial of the action, and that the Chief Justice had adjourned the further hearing of the application until the following day, and had ordered a notice of application to be served on the Commissioners. The hearing of the application was resumed on the following day and, after argument, was further adjourned *sine die* to enable the Attorney-General to appear for the Crown, upon the undertaking of the counsel for the Crown that the sittings of the Commissioners would be suspended in the meantime. The action in connection with which the application was made to the court was shortly afterwards settled, and the Commissioners resumed their sittings and completed their investigations of the affairs of the Bank and made a report in writing of their proceedings and discoveries to the Governor as directed. The defendant (Pearce) had been a director of the Bank of Van Diemen's Land, and the action against him was commenced by the plaintiff (Williams) to obtain compensation for loss sustained by him by the purchase of a number of shares in the Bank on the faith of a balance-sheet signed by the defendant and which was alleged to contain false statements.

The published reports of the proceedings which took place in connection with the application for the restraining order disclose that it was applied for on the ground that the inquiry which the Commissioners had been directed to make was substantially the same as that which would be made on the trial of the action above mentioned, and that any previous investigation made by the Commissioners would

be an interference with the ordinary administration of justice, because it would be calculated to prejudice and damage the defendant in that action, and would therefore be a contempt of court.

In the course of the argument upon the hearing of the application for the restraining order, the Chief Justice seemed to be of opinion that the publication of the report of the Commissioners would be a contempt of court so far as it contained any allegations or included any statements made by witnesses in reference to matters that would be necessarily investigated in the course of the trial of the action then pending in the court.

If the action *Williams v. Pearce* had been continued up to trial the jury would have been required to decide two questions, (1) Were the report and the balance-sheet published by the directors of the bank to the meeting of shareholders held on the 9th of July, 1891, true or false? (2) If that report and the balance-sheet accompanying it were false, did the defendant concur in the making or the publishing of them knowing them to be false? So far as the defendant would be affected by the final result of the trial, the second question was the essential and all-important one, and the first would have to be decided only as a necessary preliminary inquiry for the decision of the second. The report and the balance-sheet might both be false and fraudulent in every statement and item contained in them; but if the defendant did not have any share in the making or the publishing of them, or if, while concurring or taking part in the publication of them he was totally ignorant of the falsity of them, he would not incur any liability, and would be entitled to a verdict in his favour, notwithstanding that he was the chairman of directors at the time the report and balance-sheet were prepared, and in that capacity had attended the meeting of shareholders at which those documents were published, and had moved the resolution adopting them (*a*).

The Commission in relation to the courts of law.

It was erroneously stated by the counsel who appeared for the Crown that the object of the appointment of the Commission was to ascertain whether criminal proceedings ought to be instituted against any person in connection with the management of the Bank. There is nothing in the Act of the Parliament of Tasmania under which the Commissioners were empowered to take evidence on oath that limits or restricts the purposes for which Commissions of Inquiry may be appointed by the Governor. But the Commissioners were not directed to inquire whether the defendant Pearce or anyone else had prepared or published, or had taken any part in the preparation or publication of the report and balance-sheet in question. The entire scope of the investigation committed to them, as set forth in the words of the document by which they were appointed, was “to ascertain whether the reports,

balance-sheets, and profit and loss accounts issued by the directors of the said bank to the shareholders in the month of July, 1890, and in the months of January and July, 1891, correctly represented the true financial condition of the said Bank of Van Diemen's Land, Limited, on the dates to which such reports, balance-sheets, and profit and loss accounts refer respectively.” These words do not include any inquiry into the civil or criminal liability of any person, and therefore the appointment of the Commission was not the erection of a new tribunal to perform the functions of the courts already established by law to declare the guilt or innocence of persons charged with offences. None of those courts has jurisdiction to investigate any matter unless the determination of the civil or criminal rights or liability of some person is involved in its decision, and therefore the restricted and non-judicial inquiry which the Commissioners were directed to make was one which none of those courts was competent to execute. The counsel who appeared before the Chief Justice to apply for the order restraining the Commissioners from performing the task assigned to them freely admitted that the Supreme Court could not restrain the Crown from appointing a Commission of Inquiry under the royal prerogative, but supported his application for the restraining order on the ground that if individuals, although armed with authority from the Crown, did illegal acts which interfered with the proper administration of justice, the court would restrain, and, if necessary, punish them. This pertinent proposition, in which every competent lawyer would readily concur, would at all times constitute an ample and all-sufficient argument for granting such an order as that which was applied for on behalf of the defendant Pearce, if the task assigned by the Crown to the persons whom it was sought to restrain from executing it truly included anything illegal and prejudicial to the proper performance of its functions by any judicial tribunal. But it is not to be assumed that any person appointed by the Crown in the exercise of its prerogative to make an inquiry will perform the task imposed upon him in an illegal manner.

Contempt of court; what constitutes it.

It is, of course, evident that no question of interference with the due administration of justice could be raised in regard to the investigations made by any Commission of Inquiry appointed by the Crown except in the contingency of a case pending in one of the courts, and involving an investigation of one or more of the same matters embraced in the scope of the inquiry entrusted to the Commission; and it is only when interference with the ordinary course of justice is a contempt of court that the courts can exercise their summary jurisdiction to restrain or punish it. The disclosure of particular facts in the course of one judicial proceeding may lead to the defeat of the proper administration of justice in another proceeding; and in order to

prevent, as far as possible, any such result, the publication in the press of the evidence taken in a series of trials has frequently been prohibited by the courts until all the trials have been concluded. But the witnesses who gave the evidence taken in the first trial are not guilty of any contempt because the attorneys and counsel engaged in it, and who hear that evidence, make use of the knowledge so gained by them for the benefit of their clients in the subsequent trials. Nor can the attorneys and counsel in such cases be restrained from making such use of the knowledge gained by them in such circumstances, or be punished for so using it. In any circumstances contempt of court must include conduct coming within one of the following descriptions, viz.—(1) direct interference with the proceedings of the court; (2) interference with a judge or any officer of the court, or with a juror or witness or a party to a suit; (3) disregard or disobedience of any order or summons or other process of the court; (4) publication of any matter derogatory to the court or to any judge or officer of the court; (5) publication of any matter calculated or intended to influence the mind of a judge or of any other officer of the court, or the mind of any juror or witness, in reference to any case pending in the court. Therefore the Commissioners appointed to investigate the books of the Bank of Van Diemen's Land could not have been guilty of any contempt of court in making the inquiry committed to them so long as they did not publish any information obtained by them in the course of their labours, or any opinion or observations upon such information. All the reported cases of contempt of court not coming within any of the descriptions of conduct that have been numbered (1), (2), and (3) place it beyond dispute that there cannot be any contempt of court outside of those three descriptions of conduct, unless there is *a publication* of something likely or intended to interfere with the regular course of justice. It would not be a contempt of court on the part of any person to make use of all lawful methods available to him for the purpose of obtaining a knowledge of the facts involved in any judicial question upon which the judgment of a court or the verdict of a jury were to be subsequently given, and to form his own opinion in the meantime on the question to be so decided, so long as he did not publish those facts or the opinion he had formed upon them to other persons. It is therefore very evident that, except upon the ground that the knowledge to be obtained by the Commissioners in making their investigation was to be published by them, it could not be pretended that there was any question of contempt of court involved in their proceedings upon which the court would have jurisdiction to interfere with them; and the Chief Justice evidently felt the difficulty in the way of the Court assuming jurisdiction in regard to the application made to him on behalf of the defendant Pearce when he put forward the proposition that the Commissioners, in sending their report to the Governor, would

be publishing it. He was also reported to have said that “clerks would copy it, and that was publishing it.” As the Commissioners could not be responsible for anything done with their report after it had left them, and as the application then before the Chief Justice was confined to the Commissioners, it is to be presumed that when he spoke of clerks copying the report he meant clerks employed by the Commissioners to make a fair copy of their draft report for perusal by the Governor, and to transcribe the evidence to be attached to the report. But he declined to give a final opinion on the application made to him, and expressed a wish that the matter should be discussed by the Full Court, and it is difficult to believe that the Full Court would have come to the conclusion that either the employment of clerks by the Commissioners to copy their draft report and to transcribe the evidence to be attached to it, or the subsequent transmission of the report and the evidence to the Governor, would be such a publication of those documents as would give the court jurisdiction to regard it as a contempt upon the application then before him. One very serious consequence of a contrary decision by the Full Court would be that the work of every Royal Commission thereafter appointed to make any inquiry by which particular persons might be so affected as to make them desirous of baffling it could be delayed for an indefinite period, and ultimately made useless, by a series of collusive actions abandoned before trial. The 5th section of the Act of the Parliament of Tasmania (*a*), which regulates the taking of evidence by Commissioners, distinctly contemplates the examination of witnesses upon matters which may subsequently become subjects of investigation in either a civil or criminal proceeding in a court of law; and the whole purport of that Act, as well as the prerogative right of the Crown to appoint Commissions of Inquiry, might be practically frustrated in the manner indicated if the transcription by clerks of the evidence taken by Commissioners and the transmission of that evidence and the Commissioners' report to the Governor could be held to be such a publication of them as might become a contempt of court. A consequence so serious might well make the Supreme Court pause before committing itself to a decision from which the only consistent inference to be drawn as to the ultimate reason for it would be that the court assumed that the Crown itself intended to obstruct the course of justice by the publication of the evidence taken by the Commissioners and their report upon it. But we know that the court will not make any assumption derogatory to the honor and dignity of the Crown; and the only other reason that could be given for restraining the Commissioners from proceeding with their investigation would be that they or their secretary or clerks intended or would be induced to improperly and disobediently publish the result of it. Here, again, the conclusive answer to such a supposition is that the court will not assume a wrongful intention or a culpable

weakness on the part of any person. There is also direct judicial authority that the employment of clerks or printers to make written or printed copies of documents containing statements relating to a pending lawsuit is not such a publication of them as can be regarded as a contempt of court. Nearly every brief prepared in a solicitor's office for counsel is of such a character that if it were published as a pamphlet, or as an advertisement in a newspaper, with a view of influencing the judge or the jury at the trial, the person so publishing it would be held to be guilty of a contempt of court; and such briefs are daily copied by numerous clerks, and are frequently sent out to typewriters and law stationers for transcription. The proposition that such a practice is punishable as a contempt of court only requires to be stated to show its untenability. In the case of the printers of *The Champion and St. James Gazette*, reported in 2 Atkyns, p. 487, Lord Chancellor Hardwicke mentioned a case in which one of the parties, previous to the trial, had printed and published the brief prepared for his counsel and had been adjudged guilty of contempt of court for doing it. In referring to that case, Lord Hardwicke clearly recognised the distinction between such a publication to the world at large and the supply of the manuscript to the printer and his workmen for the limited purpose of making printed copies for the use of the counsel. "The offence," said he, "did not consist in printing, for a man may give a printed brief as well as a written one to counsel; but the contempt of this court was *prejudicing the world* with regard to the merits of the cause before it was heard." In the case of *Plating Company v. Farquharson (a)* it was decided that the insertion of an advertisement in a newspaper asking for evidence in a suit then pending in the court and offering a reward for it was not a contempt of court. Such an advertisement could not have any result without an exchange of communications upon the question involved in the suit, and these communications might be contained in letters or other documents copied by numerous clerks. The publication of these to the world at large would doubtless be a contempt of court, but so long as they were used only in a private manner no contempt would be committed. The decision in this case, therefore, confirms that of Lord Hardwicke in reference to the printing of a brief for counsel, and is another judicial authority against the doctrine that the copying by clerks of the evidence taken by the Commissioners would be such a publication of it as might become a contempt of court.

The prerogative right of the Crown to appoint Commissions of Inquiry.

The Act of the Parliament of Tasmania (*a*) which empowers Commissioners to take evidence on oath clearly recognises a prerogative right on the part of the Crown to appoint Commissions of Inquiry for some purposes, and it does not purport to confer any new right of that description or to enlarge any existing one. That the

Crown has a prerogative right to appoint Commissions of Inquiry for any purpose not contrary to positive law or to constitutional principles and practice is beyond dispute. The existence of that right has been recognised and its exercise approved and invoked by Parliament in innumerable instances during the last two centuries. But in every instance in which the Crown has appointed a Commission of Inquiry by which vested interests might be affected, or which was a preliminary step to legislation on a subject in regard to which there was a strong difference of opinion in the country, opponents of the Inquiry in Parliament and in the press have denounced the appointment of the Commission as unconstitutional, and as a disguised attempt to accomplish an object not authorised by law. Two notable examples of this line of conduct by opponents occurred in reference to the appointment of the Royal Commission of 1833, to inquire into the working of Municipal Corporations in England, and the appointment of the Royal Commission of 1850 to inquire into the discipline, studies, and revenues of the University and Colleges of Oxford. In both instances adverse opinions on the legality of such Commissions were obtained from eminent lawyers by the opponents of the Inquiry, and among the adverse opinions upon the legality of the Corporations Commission of 1833 was one obtained by the Merchant Tailors Company from Sir James Scarlett, which was published in the *Annual Register* of the same year (*a*). A perusal of that opinion shows that the fundamental objection which its author had to urge against the last-mentioned Commission was that it purported to confer on the Commissioners compulsory powers of disclosure which the Crown had not authority to impart to them. He also declared the Commission to be illegal, because it purported to authorise an inquiry outside of the regular course of law into the manner in which private property was held and enjoyed. An adverse opinion on the legality of the University Commission of 1850 was given on behalf of the University of Oxford by Sir G. J. Turner and Messrs. Bethell, Keating, and Bramwell. These eminent lawyers condemned that Commission on the same grounds on which Sir James Scarlett had condemned the Corporations Commission of 1833. But the Law Officers of the Crown, Sir J. Dodson, Sir A. E. Cockburn, and Sir W. P. Wood, defended the legality of the University Commission against the attacks of the advisers of the University of Oxford; and the resolutions of the judges in the case of a Commission appointed in the year 1608 to inquire into the depopulation of Bedfordshire, and reported under the head of "Commissions of Inquiry" in Lord Coke's Reports (*a*), were quoted by the counsel on both sides in support of their respective opinions. These appeals to the same authority in support and in condemnation of the University Commission of 1850 led to a critical examination in the *Law Magazine* for August, 1851, of the resolutions to which

such contrary interpretations had been given, with the result that one important portion of the Report in which they are contained was proved to be manifestly corrupt, and, in its uncorrected state, nonsensical. The emendations suggested by the reviewer were in favour of the legality of the Commission, but the objections reported by Lord Coke as having been made by the judges to the particular Commission mentioned in the Report remained intact. The first and second of those objections—viz., (1) that the Commission was in the English language, and (2) that the subjects of the inquiry were not stated in the body of the Commission, but in an appended schedule—would, of course, be dismissed without discussion at the present day. But the third objection is substantially the same as that which has been urged against many Commissions of Inquiry which have been appointed in later times—viz., that all kinds of false accusations and slanderous statements may be made against innocent persons by the witnesses who give evidence before the Commissioners, and the persons injured will have no remedy, because the witnesses not being examined on oath in a judicial proceeding cannot be prosecuted for perjury, and are protected against civil actions for slander, because the statements made by them to the Commissioners are privileged. This objection, which has always been recognised as a formidable one to many Commissions of Inquiry appointed in England, and the objection raised by Sir James Scarlett to the Corporations Commission of 1833—viz., that it purported to invest the Commissioners with compulsory powers of disclosure which the Crown had no authority to confer on them—have no validity in Tasmania since the passing of the Act 52 Vict. No. 26, which authorises Commissioners to compel the attendance of witnesses and the production of documents, and to take evidence on oath, and provides that every person examined under a Commission “shall have the same protection and be subject to the same liabilities in any civil or criminal proceedings as any person giving evidence in any case tried in the Supreme Court.” Those objections cannot therefore be made against the Commission which was appointed to investigate the books of the Bank of Van Diemen's Land, because it was appointed subsequent to the passing of that Act. Nor is the other objection raised by Sir James Scarlett against the Corporations Commission of 1833—viz., that it purported to authorise an inquiry into the manner in which private property was held and enjoyed—available against the Commission which was appointed to investigate the books of the Bank, because no attempt was made to confer any such authority upon it.

The only other objection that remains for consideration is, that the substantial purpose of the Commission was to ascertain whether a crime had been committed, and that the appointment of a Commission for such a purpose is unconstitutional

and unsupported by any precedent since the revolution of 1688. The assertion of the absence of precedents will be found to be erroneous. A number of Commissions have been appointed in England at different times within the last hundred years to inquire whether supposed crimes had been committed. It is, however, alleged that the last-stated objection, like those which have been already considered, is supported by the venerable authority of Lord Coke, who, after stating the resolutions of the judges containing the other objections to Commissions of Inquiry, adds, "and no such Commission ever was seen to inquire only" *i.e.* of crimes. It is around these words that the controversy regarding the legality of a large number of the Commissions appointed in England has revolved. The disputants on one side have always maintained that the words of Lord Coke condemn every Commission of Inquiry the object of which is to ascertain whether a crime has been committed, notwithstanding that there may be no direction in it to inquire as to the person by whom the crime was committed. The disputants on the other side argue that the Commissions condemned by Lord Coke were such as were directed to the discovery of the persons who had perpetrated particular crimes, and that such Commissions are illegal, because they purported to authorise the performance by an irregular tribunal of one of the fundamental functions of the regular courts of law, *viz.*, to determine the question of the guilt or innocence of accused persons. It is evident that Lord Coke could not have intended to make the unqualified statement that an inquiry into the circumstances attending a supposed crime, without a previous or simultaneous accusation of any person, and a concurrent investigation of the accused person's guilt or innocence, was unknown to the law of England, because the office of Coroner had existed in England for a period exceeding four centuries before Lord Coke wrote, and had substantially the same duties attached to it that belong to it at the present day; and the origin of the office in many parts of the kingdom was a Charter from the Crown, granted by virtue of its prerogative right to create franchises and corporations. But whatever may be the correct interpretation of Lord Coke's language, and notwithstanding repeated appeals to it in the British Parliament as an authority condemnatory of Commissions appointed to inquire into alleged offences, we find that a succession of Commissions to inquire into the circumstances attending alleged or supposed crimes have been appointed in England under the immediate advice and approval of some of the most eminent Lord Chancellors and judges who have sat upon the Bench in that country. It therefore appears that, if Lord Coke's dictum includes such Commissions, his words have not been regarded by some of the highest exponents of the law of England in recent times as containing a correct statement of that law on this subject.

Royal Commission of 1806.

In the year 1806 a Royal Commission, consisting of Lord Chancellor Erskine, Lord Ellenborough (Chief Justice), Lord Grenville and Earl Spencer, was appointed to investigate charges of adultery and infanticide which had been made against the Princess of Wales. The Solicitor-General (Sir Samuel Romilly), was appointed Secretary to the Commission, and in that capacity took down the evidence. The Commissioners examined a number of witnesses and reported to the King that they were of opinion that the Princess was innocent of the charges which had been made against her. Seven years afterwards the proceedings of the Commission were made the subject of debate in both Houses of Parliament, but the legality of the Commission was not challenged in either House (*a*). Half a century later Lord Campbell referred at some length to the matter in his Life of Lord Ellenborough (*b*), and challenged an assertion made by Lord Ellenborough of his right to put leading questions to witnesses on such an inquiry; but he gives no indication that the legality of the Commission was ever questioned; and it would be something very remarkable if a Lord Chancellor and a Chief Justice of England in the nineteenth century had consented to be members of an illegal Commission, and a lawyer of the attainments of Sir Samuel Romilly, and holding the responsible position of Solicitor-General, had allowed himself to act as Secretary to it; and that another Lord Chancellor, referring pointedly to the matter fifty years afterwards in a critical biography of that Chief Justice written shortly after the long controversy in Parliament and the press on the legality of the University Commission of 1850, should omit to notice the illegality of the earlier Commission to which he was referring.

Commissions appointed to investigate circumstances attending the perpetration of crimes in Ireland.

The unhappy condition of Ireland has necessitated the appointment of many Commissions to investigate the circumstances attending the perpetration of outrages and crimes in that country during the last sixty years, and several of them have been made the subjects of lengthy debates in the British Parliament, in which their legality has been fully discussed. One of those debates took place in the House of Lords in the year 1850 upon the appointment of a Commission in the preceding year to investigate an affray that occurred at a place called Dolly's Brae (*a*). The inquiry made in that instance led to the dismissal of the Earl of Roden from the magistracy of Ireland, and Lord Stanley brought the matter under the notice of the House of Lords, and quoted the opinion of Mr. Whiteside, who then occupied a prominent position at the Bar in Ireland, that the Commission was illegal. The opinion of Mr. Whiteside was based on the resolutions of the judges contained in Lord Coke's Reports, and on the dictum of Lord Coke himself, which has been already quoted; and the arguments used by Mr. Whiteside in support of his opinion were

substantially a repetition of those contained in the third of those resolutions, viz., that witnesses sworn and examined before the Commissioners could not be prosecuted for perjury, and that such an inquiry permitted the defamation of individuals, who would be without remedy for the wrong done to them. The latter argument derived the most of its force from the fact that the investigation in that instance had been conducted in open Court and had been reported and published in the press. This fact also enabled Lord Stanley to argue that the proceedings of the Commissioners were prejudicial to the administration of justice, and he stated that if the investigation had been conducted privately he would have had less objection to it.

In the year 1864 a Royal Commission was appointed to inquire into the riots that occurred in that year in Belfast; and in the following year a lengthy and animated debate took place upon the subject in the House of Commons. The legality of the Commission was attacked by Sir Hugh Cairns and by Mr. Whiteside, whose opinion on the illegality of the Commission to investigate the affray at Dolly's Brae in 1849 had been quoted by Lord Stanley in the House of Lords, and who since then had become a member of the House of Commons. Both these learned gentlemen quoted Lord Coke's Reports in support of their impeachment of the Commission, and their arguments against it were—(1) that the Commissioners had no power to administer an oath, and that they examined witnesses in open court without that safeguard; (2) that the unreliable evidence so obtained was published in the press while a number of persons implicated in the riots were awaiting trial, and was therefore an obstruction to the course of justice by the influence it would exert on the minds of witnesses and jurors (*a*).

Commissions appointed to investigate circumstances attending alleged crimes in England.

It is manifest that the objections urged by Lord Stanley and Sir Hugh Cairns and Mr. Whiteside against the legality of the two last-mentioned Commissions cannot apply to the proceedings of the Commissioners appointed to investigate the books of the Bank of Van Diemen's Land, because those proceedings were strictly private, and were conducted under the provisions of the Tasmanian Act 52 Vict. No. 26. It is therefore scarcely necessary to refer to the able reply made by the Home Secretary, Sir George Grey, to the speeches of Sir Hugh Cairns and Mr. Whiteside; but attention may be called to the two instances mentioned by him in which similar Commissions to that impugned by his opponents were appointed to inquire into disturbances that took place in England.

Commissions appointed to investigate circumstances attending alleged crimes in England. One of the instances was that in which a Commission was appointed to inquire into the conduct of magistrates at Birmingham. The other instance was that in which a Commission was

appointed to inquire into the complaints made of the use of unnecessary violence by the police in suppressing disturbances in Hyde Park, and which led to the prosecution of several constables. These two instances of the appointment of Commissions to inquire into alleged offences in England prove that the use of such Commissions is no part of an exceptional and arbitrary system of Government adopted for the peculiar condition of Ireland, but has always been regarded by Ministers of the Crown in England as a lawful exercise of the Crown's prerogative whenever circumstances arose that made it desirable.

Royal Commission appointed to investigate disturbances in Jamaica in 1865.

In the year 1865 the notable Royal Commission of Inquiry was appointed to investigate the circumstances attending the disturbances which had lately occurred in the Island of Jamaica, and the measures adopted for their suppression. The Legislature of Jamaica passed a special Act empowering the Commissioners to compel the attendance of witnesses and the production of documents, and to take evidence on oath; and the Report of the Commissioners shows that they inquired into the circumstances attending the perpetration of a large number of crimes, including several murders. The Earl of Derby, as leader of the Opposition in the House of Lords, questioned the legality of the Commission on the old ground that the evidence taken by the Commissioners would not have the sanction of an oath, and would therefore not be reliable, and would prejudice the public mind in England against Governor Eyre, whose conduct had already been challenged and might be made the subject of a judicial investigation. But this objection was totally removed by the above-mentioned Act of the Legislature of Jamaica, and no further challenge of the legality of the Commission was heard in either House of the British Parliament. The provisions of that Act were substantially the same as those of the Tasmanian Act 52 Vict. No. 26.

Royal Commission appointed to investigate alleged outrages in Sheffield in the year 1867.

The last precedent of an appointment of a Royal Commission to investigate alleged crimes in England to which it seems necessary to refer is the appointment of the Commission in the year 1867 to investigate the alleged outrages which were said to have been committed in Sheffield and other places under the direction of the Trades Unions. A special Act of Parliament (*a*) was passed to enable the members of that Commission to compel the attendance of witnesses and the production of documents, and to take evidence on oath, and this fact has created the erroneous impression on the minds of some persons that the Commission was appointed by virtue of that Act, and was not a Royal Commission appointed by the Crown by virtue of its prerogative. A reference to the Act itself and to the debates in the British Parliament will immediately dissipate any such notion. The preamble of the

Act recites that “A Commission has been issued by Her Majesty to inquire into and report on the Organisation and Rules of Trades Unions, . . . with power to investigate any recent acts of intimidation, outrage, or wrong alleged to have been promoted, encouraged, or connived at by such Trades Unions, &c.,” and it then proceeds to recite “that a case of outrage within the scope of the said Commission of Inquiry had been committed at Sheffield,” and that representations had been made on behalf of the workmen as well as the employers of labour in that town “that a searching inquiry on oath should be made into the circumstances of such outrage,” and that “the powers for the effectual conducting of such inquiry could not be conferred without the authority of Parliament.” The Act then proceeds to limit the extent of the inquiry, and then confers on the Commissioners the necessary compulsory powers of disclosure, and empowers them to administer oaths and to punish for contempt; and it provides that every person examined by the Commissioners, who shall make a full disclosure in regard to all matters respecting which he is examined, shall be entitled to a certificate of indemnity against any liability in any subsequent civil or criminal proceedings founded upon the same matters. The prerogative right of the Crown to appoint the Commission was distinctly recognised and acknowledged in both Houses of Parliament. In the House of Commons an amendment was proposed that the names of the Commissioners should be inserted in the Bill, whereupon Mr. Roebuck reminded the mover of the amendment that the Bill did not purport to appoint a Commission by the authority of Parliament, but only to give special powers to a Commission which had already been appointed by the Crown, and the mover of the amendment withdrew it (*a*). In the House of Lords the Lord Chancellor (Lord Chelmsford) “reminded their Lordships that the question before them was not whether a Commission should issue,” because “the Commission had already issued, and the question was whether Parliament should give the Commissioners certain powers to enable them to discharge the duty entrusted to them” (*a*). The enactment of that statute was therefore a distinct recognition and confirmation by Parliament of the prerogative right of the Crown to appoint the Commission recited in its preamble, and must be held to have conclusively removed the question from any dependence on such authorities as the case reported by Lord Coke and his observations on it. The powers conferred by that statute on the members of that Commission are exactly the powers conferred on Commissioners generally by the Tasmanian Act 52 Vict. No. 26. It is therefore manifest that if there had been an Act similar to the Tasmanian Act on the Statute Book in England at that date the British Parliament would never have been asked to pass any Act relating to that Commission in particular. The special Act passed on that occasion expired when the Commission completed its task, and no

general Act conferring the same or similar powers upon other Commissions has yet been passed in England.

Canadian legislation.

In the year 1886 an Act was passed by the Parliament of the Dominion of Canada declaring that “whenever the Governor in Council deems it expedient to cause an inquiry to be made into and concerning any matter connected with the good government of Canada, or the conduct of any part of the public business thereof, and such inquiry is not regulated by any special law, the Governor in Council may by the Commission in the case confer upon the Commissioners or other persons by whom such inquiry is to be conducted the power of summoning before them any witnesses, and of requiring them to give evidence on oath, orally or in writing, or on solemn affirmation, &c. . . . and to produce such documents and things as such Commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.” Here is a distinct recognition of an inherent power of inquiry in the Crown concurrent with the legislative power vested in the Parliament of the Dominion. The language used in the *British North America Act (a)* in defining the legislative powers of the Dominion Parliament is “to make laws for the peace, order, and good government of Canada.” It cannot be contended that the words “peace” and “order” confer any substantive powers of legislation which are not included in the phrase “good government,” and therefore the power “to cause inquiry to be made into and concerning any matter connected with the good government of Canada” must extend to every matter and to every interest not exempted from its operation by positive law. The language used in the Tasmanian Act (*b*) is “any inquiry,” without the addition of any descriptive or qualifying words whatever, and the use of such unqualified language imposes upon those who would restrict the Crown's right of inquiry in respect of any matter, the task of producing clear and positive law in support of such restriction.

Limits of the power of the Crown to direct inquiries. It would be contrary to law if the Crown were to direct an inquiry to be made into any matter of a purely private character, such as the contents of a deed of settlement of private property, or the nature of any secret process used in the manufacture of any goods made and sold by any private person in his ordinary business. But there are many matters that have both a public and a private aspect, and in regard to which the prerogative right of the Crown to make an inquiry has been repeatedly admitted by the highest authorities on constitutional principles and practice, and in regard to which that right has in some cases been exercised. With respect to such matters it must be remembered that a Select Committee of either House of Parliament does not possess any greater authority than the Crown to make inquiries, and the power of either House to make inquiries

by the medium of Select Committees is dealt with by Todd in his *Parliamentary Government in England* as being subject to the same constitutional rules that govern the exercise of the prerogative right of inquiry by the Crown. In this connection Todd quotes the statement of Sir Robert Peel that “where Parliament has given peculiar privileges to any body of men, as, for example, banks or railway companies, it has a right to ask that body for information upon points which it deems necessary for the public advantage to have generally understood” (a). On a subsequent occasion Mr. Gladstone said that a motion of Sir Morton Peto for the appointment of a Select Committee “to enquire into the means adopted by the London, Chatham, and Dover Railway Company for raising the share capital and exercising their borrowing powers under the various Acts of Parliament authorising the construction of the main line and its extensions and branches,” although not a motion to which it was desirable to agree for the purpose the mover of it had in view, might nevertheless be justified “on the ground that railway companies solicit special parliamentary powers.” The Bank of Van Diemen's Land was one of a class of institutions which are invested with special privileges by the Legislature with a view of creating facilities for trade that will be advantageous to the whole community as well as to the shareholders of those institutions. The operations of those institutions are also made subject by the Legislature to special regulations for the protection of the public and the shareholders. The circumstances attending the failure of one of those institutions to meet its obligations might therefore very properly be made the subject of a Royal Commission of Inquiry.

[Commission to inquire into the affairs of the Bank of Bombay in 1868.](#)

The prerogative right of the Crown to make an inquiry in such a case was distinctly claimed without challenge in the House of Commons in regard to the Bank of Bombay in the year 1868. Upon the failure of that Bank the Secretary of State for India directed the Governor-General of India to appoint a Commission of Inquiry to investigate the circumstances attending the failure of the bank, but it was found that the Commissioners would not have power without special legislation to compel the attendance of witnesses and the production of documents and to administer oaths. An Act was therefore passed by the Governor-General of India authorising the appointment of Commissioners with the necessary compulsory powers of disclosure (a). The Bank of Van Diemen's Land at the time of its collapse was a direct debtor of the Crown to the amount of £76,000, and was also a debtor of the Marine Board of Hobart for moneys deposited in the Bank by the Board, and for the expenditure of which the Board was accountable to the Crown, and the Crown might therefore legally claim a right on that ground alone to inquire into the financial condition of the Bank and the correctness of any balance-sheet issued by

its Directors so long as the Bank remained indebted to the Crown.

Fiduciary character of the prerogative powers of the Crown.

It is a fundamental principle of the British Constitution that all the prerogative rights of the Crown are held in trust for the benefit of the people, and that they can be exercised only upon the advice of Ministers who are responsible to Parliament (a). Hence we find that the exercise of any of those rights upon the occurrence of any unusual eventuality is always closely examined by Parliament, and that the legality of its exercise in such a contingency is frequently challenged by the opponents of the Ministers who have advised it. Protests of that character from the Opposition benches are an inevitable result of the existence of political parties in the legislature and in the country, and every Minister who does not wish to shrink from the responsibility imposed upon him in an unusual conjuncture must be prepared to meet them. On such occasions he will probably be charged by his antagonists with following discredited precedents and attempting to restore the arbitrary government of past centuries; and convenient quotations from the writings of legists and publicists of high repute will be used in support of the accusation. But the definition of the prerogative given by so strong an opponent of unlimited political power as Locke, and approved by Blackstone—viz., “the discretionary power of acting for the public good when the positive laws are silent,” (a) will always supply the test by which the legality of the Minister's advice may be determined. Was the course of action recommended by the Minister prohibited by law: If not, was it for the public good? The question whether an inquiry into a particular matter is for the public good or not, is not strictly a legal question. But an inquiry into a matter in which public interests were not involved would inevitably, in the absence of express statutory authority, become illegal as soon as private rights protected by law were invaded. Hence the final test of the legality of an inquiry by a Commission appointed by the Crown in the exercise of its prerogative is its recognition or its disregard of rights and interests recognised and protected by law. If these are not invaded or infringed otherwise than the law permits or authorises, no taint of illegality attaches to the inquiry.

(a) See *In re Denham and Co.*, L.R. 25, Ch. Div., p. 752.

(a) 52 Vict. No. 26.

(a) Law Reports, Chancery Division, vol. xvii., p. 49.

(a) 52 Vict. No. 26.

(a) p. 158.

(a) 12 Coke, 31.

(a) *See Hansard*, vol. 25, pp. 142-224.

(b) *Lives of the Chief Justices*, vol. IV., pp. 267-272.

(a) *Hansard*, vol. 108, pp. 886-968.

(a) *Hansard*, vol. 177, pp. 328-409.

(a) 30 Vic. chap. 8.

(a) *Hansard*, vol. 185, pp. 994-5.

(a) *Hansard*, vol. 185, p. 1440.

(a) 30 Vic. chap. 3.

(b) 52 Vic. No. 26.

(a) Vol. 1, p. 452.

(a) *Hansard*, vol. 191, p. 1223.

(a) *See Todd's Parliamentary Government in England*, 2nd ed., vol. 1, p. 384.

(a) *Kerr's Blackstone*, vol. 1, p. 245.

13. Governor and Governor in Council.

Powers conferred by legislation upon the Governor or the Governor in Council.

A LARGE number of the Acts of each of the Parliaments of the States in the Australian Commonwealth confer executive and sometimes legislative powers upon the Governor of the State, without making any reference to the Executive Council in connection with the grant of the powers conferred by them. Other Acts of the same Parliaments confer similar powers upon the Governor in Council. In some of the Acts in which such powers are conferred upon the Governor it is declared that the word "Governor," when used in the Act, shall mean "Governor in Council." In others of them the Governor and the Governor in Council are mentioned in different places without any apparent reason for the variation in the phraseology employed. In view of this frequent use of both phrases in Australian legislation, the student of Australian constitutional law cannot omit to inquire whether the legal position and functions of the Governor of a State in his capacity as the personal representative and agent of the Crown are distinct from his position and functions as the depositary and organ of the local executive authority which is necessarily co-extensive with the legislative authority of the Parliament of the State, and whether the separate use of each of the two phrases always corresponds with that distinction, or sometimes indicates a disregard of it.

Sources of the status and authority of a Governor of a State.

In the chapter devoted to a review of the position of the Governor-General under the Constitution of the Commonwealth, it was noted that provision is made for his appointment in section 2 of the Constitution, and that in section 61 the executive power of the Commonwealth is declared to be exercisable by him as the Queen's representative. But there is not any provision made in any of the Constitution Acts of the several States of the Commonwealth for the appointment of the Governor of the State. The Governor is frequently mentioned in the Constitution Acts of the several States, but the sources of his status and his authority in each State are the Letters Patent of the Crown by which the office of Governor of the State is created, and the Commission of the Crown which appoints the particular occupant to fill it. As the supreme and primary depositary of executive authority throughout the Empire, the Crown, under the common law, possesses prerogative powers which it can exercise in all parts of the Empire, and it can delegate these or any of them to its local representative in any portion of it. Local legislation which has been assented to by the Crown, or which has not been disallowed by it within the time prescribed for the exercise of its power of disallowance, may regulate or control the exercise of the

prerogative powers which have been delegated to a Governor; and within the limits prescribed by any such local legislation (if any) he exercises those prerogative powers in accordance with and subject to whatever rules of the common law control or regulate the exercise of them by the Crown itself in the United Kingdom of Great Britain and Ireland.

Prerogative powers exercisable by a Governor.

In the chapter upon the distribution of the governmental powers of the Commonwealth, it was stated that a fundamental rule of the common law required that every executive and administrative act of the Crown which does not by its intrinsic character necessitate a personal performance of it by the Monarch, or by a representative directly appointed by him to perform it, must be performed by an executive or administrative officer who must take the responsibility of it (*a*). The same fundamental rule of the common law regulates and controls the exercise of the prerogative powers of the Crown by a Governor of any portion or dependency of the Empire. But some of the prerogative powers of the Crown which are exercisable by a Governor must be exercised by him in a personal performance of the act in which the exercise of the power is exhibited. The acts of a Governor which the law requires to be personally performed by him are very few in number, and appear to be those which are immediately hereunder mentioned, viz.:—

- (1) The summoning of the local Parliament;
- (2) The opening of the local Parliament (*b*);
- (3) The prorogation of the local Parliament;
- (4) The dissolution of the local Parliament;
- (5) The assent or refusal of assent to any Bill passed by both Houses of the local Parliament;
- (6) The appointment of members of the Executive Council;
- (7) The appointment of the Ministers in charge of the several departments of the Public Service;
- (8) The removal of members of the Executive Council;
- (9) The dismissal of Ministers in charge of departments of the public service.

In the performance of any of these acts the Governor has legally a personal discretion within any limits that may be prescribed by imperial or local legislation. But under the system of parliamentary government which has been established in the several States of the Commonwealth, each of the above mentioned acts is always performed by the Governor after receiving the advice or opinion of his responsible Ministers and in accordance with such advice or opinion, but subject to any specific directions contained in the Instructions which accompany the Commission by which the Governor is appointed to his office. In the case of every

other exercise of a prerogative power of the Crown the Governor must act upon the advice of one or more of the members of his Executive Council who must accept the responsibility of having advised the exercise of the power. In the last mentioned cases the personal participation of the Governor is necessary to authorise the exercise of the power, but he does not personally perform the act which he authorises to be done.

The most frequent examples of the exercise of a prerogative power of the Crown by a Governor in accordance with the rule of Constitutional law which requires him to act upon the advice of members of his Executive Council are found in the appointments made by him of the persons employed in the public service within the territorial limits of his authority and the dismissal of them from such service; and in the exercise of the prerogative of pardon and mercy within the same area. The applicability of the rule to the exercise of the prerogative of mercy and pardon was at one time the subject of some dispute between the Governor and the acting members of the Executive Council in several of the Australian Colonies, and ultimately the responsible Ministers of the Crown in the Colony of Queensland resigned their offices because the Governor declined to accept their advice in reference to the release of a prisoner who was undergoing a term of imprisonment. The leader of the Opposition refused to attempt to form a Ministry, and the Governor was compelled to recall the Ministers who had resigned and to act in accordance with the advice which they had previously tendered to him. Since then the Instructions issued by the Secretary of State for the Colonies to all the Governors in Australia have been revised, and they now contain an explicit acknowledgment that the exercise of the prerogative power of mercy and pardon by a Governor is dependent upon the advice of one or more of his Ministers who are members of his Executive Council. The particular portion of the Instructions now issued to Australian Governors which refers to the subject is in the following words:—

“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.”

Executive acts of the Crown which require the personal interference of the Monarch.

The executive acts of the Crown which necessarily require a personal performance of them by the Monarch will be found upon a close examination of them to be those

acts which the law requires, or supposes, or permits him to perform as declarations of his personal will and decision. The character of the parliamentary government which has been established in England has substantially substituted for the personal will and decision of the Monarch, in the performance of such acts, the will and decision of those members of the Privy Council who by virtue of the support of a majority of the House of Commons are in charge of the several departments of the public service. These members of the Privy Council are the immediate advisers of the Crown and are collectively designated the cabinet. But the cabinet is not known to the law either in England or in Australia, and every act of the Monarch or of a Governor which the law requires to be personally performed by him is presumed by the law to be the result of his own discretion and decision. In regard to all other acts of the Crown the following observations which are contained in Hearn's *Government of England (a)* are applicable as much to the representative of the Crown in each State of the Australian Commonwealth as to the King in England. "The Royal will in the contemplation of the law is by no means the personal will of the King. It is his official will, enlightened by the advice and carried into effect through the agency of councillors and ministers recognised by the law and personally responsible both for their advice and their acts. . . . Every official act must be performed through the agency of some officer, often indeed of several officers, and must be attested in the mode required by law for each such transaction."

Effect of the establishment of Parliamentary and responsible government upon the discretion of the Crown.

The establishment of parliamentary and responsible government in the several States of the Commonwealth of Australia in a form which is substantially the same as that in which it exists in England has had very largely the same result which it has produced in England, in the matter of the substitution of the will and decision of the Ministers who have charge of the several departments of the public service for the personal will and decision of the Governor, in the performance of those acts which the law supposes to be declarations of his personal will and decision. But in the case of the Governor of each State in the Commonwealth of Australia, as also in the case of the Governor-General, his personal will and decision as the representative of the Crown are expressly reserved in particular cases by the Instructions which accompany the Commission by which he is appointed to his office. Those parts of the Instructions which reserve an exercise of personal discretion to the Governor are in the following words:—

“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.

“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:

“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 authorised 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.”

Position of a Governor when a particular office in relation to a department of the public service is conferred upon him by legislation.

The local legislation in each of the several States of the Australian Commonwealth has sometimes conferred upon the Governor a particular office in relation to some department of the public service. In all such cases it is the Governor in person who is empowered to exercise the functions of the office. He may seek the advice of his Executive Council in regard to all or any of the acts performed by him in the exercise of such functions, and doubtless he will always

consult his responsible Ministers in regard to such acts, but in all such cases the law permits him to exercise his personal discretion and decision with respect to the advice that may be given to him. It is in connection with legislation of this kind that the indiscriminate use of the phrases "Governor" and "Governor in Council" sometimes obscures the substantial distinction between the personal will and decision of the Governor which the law supposes or permits him to exercise in particular cases, and his official will and decision which in all other cases the law requires him to declare. Pertinent examples of such legislation are found in the several Acts which were enacted by the different Australian Parliaments to provide for the establishment and maintenance and discipline of military and naval forces in the several colonies before the establishment of the Commonwealth. An examination of the provisions relating to the Governor which are found in these Acts will disclose the confusion that frequently exists in reference to the dual position of the Governor.

Position of a Governor as Commander-in-Chief of the military forces of a colony under local legislation.

In the first section of *The Volunteer Force Regulation Act 1867* of the State of New South Wales the word "Governor" is defined as "The Governor with the advice of the Executive Council"; but this definition is made subject to the preliminary provision that all the words defined in that section shall have the respective meanings assigned to them "if not inconsistent with the context or the subject matter." The fourth section of the same Act declares that:—

"The Governor as the Queen's Representative shall be the Commander-in-Chief of all the local Forces raised in the Colony and all arrangements connected with the organization drill and discipline of such forces shall so far as the same shall come under the scope and operation of this Act be made by his authority by such officers as he may appoint."

It is evident that the purport of this section is to appoint the Governor in person Commander-in-Chief of all the local Forces raised in the Colony, and therefore the interpretation of the word "Governor" which is given in the first section of the Act, viz., "Governor with the advice of the Executive Council," is primarily inconsistent with the subject matter. But when section 4 declares that "all arrangements connected with the organisation, drill and discipline of such forces shall so far as the same shall come under the scope and authority of this Act be made by his authority by such officers as he may appoint," it immediately becomes necessary to examine closely the language of the section and to compare it with other portions of the Act before the question of what powers and functions it confers upon the Governor in person in his capacity as Commander-in-Chief can be definitely determined. Section 50 of the same Act provides that:—

“The Governor may from time to time make any regulations not inconsistent with this Act for general government discipline and management of the Volunteer Forces in the Colony and the several corps thereof and for all other purposes of this Act and may call for such returns as may from time to time seem requisite. And all such regulations shall upon being published in the Government Gazette be valid in law. Provided that a copy of every such regulation shall be laid before both Houses of Parliament within fourteen days after the making thereof if Parliament be then sitting and if Parliament be not sitting then within fourteen days after the commencement of the next Session of Parliament.”

The authority conferred upon the Governor by this section is legislative, and beyond all doubt it is conferred upon the Governor in Council and not upon the Governor in person, and it extends to “the general government, discipline and management of the Volunteer Forces of the Colony.” Therefore when section 4 directs that “all arrangements connected with the organisation, drill and discipline of such Forces shall so far as the same shall come under the scope and operation of this Act be made by his authority by such officers as he may appoint,” it cannot be construed to empower the Governor to exercise personally as Commander-in-Chief any of the authority conferred upon the Governor in Council by section 50; and the purport of section 4, when read with section 50, and other portions of the Act, seems to be simply to declare that there shall be unity in the command and management of the forces and that all administrative arrangements in connection with the organisation, drill and discipline of them shall have the Governor's approval in his capacity as Commander-in-Chief. As Commander-in-Chief the Governor is undoubtedly the supreme executive officer appointed to carry out the provisions of the Act, but in the execution of the Act he will be as much bound by the regulations made by the Governor in Council as any officer under him.

Opinion of Sir William Manning.

In the year 1869 the Attorney-General of New South Wales was requested by the Governor to advise him as to his personal powers and functions under the same Act in reference to some particular matters that had arisen in the administration of it, and the following opinion was given by the Attorney-General (Sir Wm. Manning) in reply to the questions submitted to him.

“COMMANDER-IN-CHIEF OF VOLUNTEER FORCE.

“Opinion of Attorney-General as to powers of Governor.

“1. From His Excellency's Minute of 5th December, I gather that three questions were then raised by him for consideration, namely:—

1st.—Whether, in cases of appeals against certain disciplinary decisions of the Officer commanding the Volunteer Force, such appeals should be decided by the Governor on

his own responsibility, or with the advice of the Executive Council?

2nd.—Whether such appeals should be submitted direct to His Excellency, or be forwarded through the Colonial Secretary? And incidentally thereto, whether, on being forwarded by the Colonial Secretary, they should be accompanied by a previous minute of that Minister?

3rd.—Whether recommendations for the appointment of Officers (not for the ‘Permanent Staff’) should be forwarded direct to the Governor, or through the Colonial Secretary? And incidentally to this question also, whether they should be accompanied by a previous minute of that Minister? (It being assumed that such appointments can only be made by the Governor in Council).

“My opinions upon these questions are as follows:—

1. I think such appeals should be decided by the Governor upon his own responsibility, as Her Majesty's Representative, exercising the functions of Commander-in-Chief of the Force. The nature of the duty is such as by all analogy belongs to the Commander-in-Chief, and not to the Queen or Governor in Council. Such is the case in respect of Her Majesty's Regular Forces, and such also with regard to the Volunteer Force at home. The despatches of His Grace the Duke of Newcastle and Mr. Secretary Cardwell, which form the basis on which our Volunteer Act was passed by the Houses of Parliament, and assented to on Her Majesty's behalf, indicate with tolerable plainness the expectations of Her Majesty's Government in this respect; and I must add that the view which I take appears to me that most consistent with Constitutional principles. The difficulty which has been thought to arise from the terms of the interpretation clause in the Act does not embarrass me, because it only says that the word “Governor” is to be construed as meaning “the Governor, with the advice of the Executive Council,” in cases where such construction would be not inconsistent with the context or subject matter; and in my opinion there would be such inconsistency in this case.

2. These appeals should, I consider, be submitted by the Officer commanding the Force direct to the Governor or Commander-in-Chief, and not through the Colonial Secretary; and they should not be accompanied by any minute of that Minister.

3. In my opinion, the course hitherto pursued of submitting recommendations for the appointment of officers (not on the Permanent Staff) direct to the Governor, and without any minute from the Colonial Secretary, is that which is most consistent with the position of His Excellency, relatively to Her Majesty on the one hand, and to the Volunteer Force, accepted on Her behalf, on the other. Assuming that such appointments can only be made with the advice of the Executive Council (which I am not called upon to consider), still I see nothing whatever in the Act which necessitates or contemplates that the Colonial Secretary, or any other Minister, should be the channel for conveying the recommendations for such appointments or that they should be filtrated through or be in any way preliminarily acted upon in the office of any such Minister.

“II. Having had a conversation with Mr. Secretary Robertson on the subject of these papers, in which he seemed to think that His Excellency's inquiry was not intended to be limited to the questions noticed in his minute of 5th December, and that a more general opinion was desired as to the proper course to be pursued in regard to the relations between the Governor, the Volunteer Force, and the Minister, I submit my further opinion as follows:—

I think that all matters concerning the Force, originating within it, or properly coming under the cognizance of the Commanding Officer in the first instance, should be submitted by him direct to the Governor. Other matters (though it may be impossible to draw a line abstractly) should be submitted by the Colonial Secretary. Thereupon, it will be for His Excellency to determine in each case whether the advice of the Executive Council is required, or whether to act prerogatively on Her Majesty's behalf.

It may often prove difficult to determine which course ought to be pursued, as the Legislature has thought fit to make the question depend upon the ‘context or subject matter’ in each case, instead of determining for itself in what cases the advice of the Council should be required. I may, however, take leave to suggest that the difficulty would be lessened by keeping in view the two distinctive characters in which the Governor is associated with the Volunteer Force—the one as specially representing Her Majesty and as Commander in-Chief, the other as Governor of the Colony in relation to its internal affairs.

I conceive that in all cases and matters in which the Governor is, by the terms of the Act, or by consequence of the position assigned to him under it, empowered or required to exercise any functions in relation of the Force, there should be a *bonâ fide* concurrence by him (as expressed by Mr. Secretary Cardwell) in what is done, and an actual exercise of ‘authority’ by him—whether with or without the advice of his Council, as the law may require in each case. Such appears to have been the view of the Secretaries of State whose despatches are before us, such the intention of the Legislature, and such the necessary inference from the special relation of the Force to Her Majesty in an Imperial sense. And I may here remark, in proof of the general concurrence of our Legislature in the views of the Duke of Newcastle, that the fourth section of the Act, which is the leading enactment, adopts the precise words of his despatch.

“I therefore, submit that anything like a prejudgment conveyed by a minute of the Colonial Secretary or of the whole Ministry out of Council, would be

illegal and unconstitutional.

W. M. MANNING, A.G.

Jany. 20/69.”

Legislation of Victoria.

In the *Defences and Discipline Act* 1890 of the State of Victoria it is declared that the word “Governor” when used in Part I. of the Act “shall mean and apply to the Governor in Council.” Part II. of the Act refers exclusively to the agreement previously made between the Imperial Government and the Governments of the several Australian Colonies for the maintenance of a squadron of war ships in Australian waters; and the word Governor does not occur in it. In Part III. the full expression “Governor in Council” is used in every section in which the Governor is mentioned excepting section 67, which provides that:—

“The commanding and other officers of the rank of commissioned officers in each corps shall be appointed by commissions under the hand and seal of the Governor; and all such officers shall rank with the officers of the regular troops in Her Majesty's service as juniors of their respective ranks.”

The change of language in this section does not raise any question relating to the personal powers of the Governor. Neither a commission to a military officer nor any other document can be “under the hand and seal” of the Governor in Council, and whenever any document is to be authenticated by the signature and seal of the Governor he necessarily signs and seals it in his personal name. But the fact or transaction which the document authenticates is not therefore his personal act. All commissions to military or naval officers appointed by a Governor under the authority of such colonial legislation as that lastly mentioned are countersigned by a colonial Minister of the Crown and are expressions of the official and not the personal will of the Governor whose name is attached to them, and the Governor's Ministers are responsible to the local Parliament for all such appointments.

Legislation of Queensland.

The *Volunteer Act* of 1878 of the State of Queensland declares in section 3 that:—

“The Governor, as Her Majesty's Representative, shall be Commander-in-Chief of all the Naval and Military Forces of Queensland.”

Section 31 of the same Act provides that:—

“Commissions of officers in the Defence Force shall be granted by the Governor. Warrant officers shall be appointed by the Minister. Sergeants in the Land Force shall be appointed by the Commandant, and all other noncommissioned officers therein shall be appointed by the commanding officer of the corps to which they belong. Petty officers in the Marine Force shall

be appointed by the senior Naval officer.

All officers shall hold their rank during pleasure.”

And section 33 declares that—

“The Governor may appoint staff officers of the Defence Force with such rank as from time to time may be found requisite or necessary for the efficiency of the service; and such staff officers shall have such rank and authority in the Defence Force as are held relatively in Her Majesty's service, and their duties shall be such as shall from time to time be prescribed.”

The Act does not contain any interpretation of the word Governor, and the phrase “Governor in Council” appears to be used only in section 12, which provides that:—

“The Governor in Council may from time to time by Proclamation appoint any part of the Colony to be a District for the purposes of this Act, and may divide any such District into Divisions, and direct what Force shall be established in such Districts and Divisions respectively.”

If the use of the phrase “Governor in Council” has been intentionally confined to section 12, then the purport of the Act would appear at first sight to be to confer upon the Governor “as Her Majesty's Representative and Commander in Chief of all the naval and military forces of Queensland” (section 3) all the powers vested in the Governor by the Act except the power conferred by section 12. But this is an impossible construction of the Act in view of such provisions as those contained in sections 25, 26 and 27 and in numerous other sections of it. Section 25 provides that:—

“The Governor may, at any time, disband any Active Corps, if he considers it necessary so to do.”

Section 26 declares that:—

“In order to provide for the care and protection of forts, magazines, armaments, warlike stores, and other such service, and to secure the establishment of a school for military instruction in connection with the Defence Force, the Governor may raise, station, and maintain one battery of artillery, the whole strength of which shall not exceed one hundred and fifty men. The officers of this corps shall be appointed during pleasure, and the men shall be enlisted in the prescribed manner for periods of three years continuous service.”

Section 27 provides that:—

“The Governor may also raise and maintain such and so many Officers and seamen as may from time to time be required to man any armed ships or vessels belonging to Her Majesty's Colonial Government. The officers of such ships shall be appointed during pleasure and the seamen shall be enlisted in the prescribed manner and for the prescribed period of service. All

such officers and seamen shall, for purpose of discipline, be deemed to be called out for active service, and be subject to the laws and regulations which under the provisions of this Act apply to officers, noncommissioned officers, and men of the Marine Force, called out for such service.”

The powers conferred by these sections are not powers which can be exercised by the Commander-in-Chief, and are not powers that can be exercised by the Governor without the advice of his Ministers. The same statement applies equally to the power conferred upon the Governor by section 91 “to make such Regulations as he thinks fit relating to any matters or things which may be necessary to be prescribed for carrying this Act into effect,” and to impose a penalty for a breach of any such Regulation. This is a legislative power, and it cannot be exercised by the Governor without the advice and concurrence of some members of the Executive Council, who must accept the responsibility of the manner in which the power is exercised.

It cannot be supposed that the Parliament of Queensland intended to place the Governor as the Representative of the Crown in any other position in relation to the command of the military forces of the State, and in relation to the execution of the statutory powers conferred upon him by *The Volunteer Act* of 1878, than the position occupied by the Crown itself in relation to the command of the Imperial Army and to the execution of the Acts of the Imperial Parliament relating to the military forces in the United Kingdom. The relation of the Crown to the military forces raised and maintained under the direct authority of the Imperial Parliament is fully stated in the following extract from Anson's *Law of the Constitution* (a).

The relation of the Crown to the military forces raised and maintained under the direct authority of the Imperial Parliament.

“The Secretary of State is responsible for the exercise of the royal prerogative in respect of the army, and every thing that is done in the army is done subject to his approval. For the use of these powers he is responsible to Parliament. He must answer to Parliament for the discipline of the army and its relations to the civil members of the community as well as for its distribution, efficiency, and cost, but he is also bound to prevent the interference of Parliament in the action of the executive and in the discretion of the Queen's servants as to the movements and disposition of the forces.

“The House of Commons may express its disapproval of a Minister directly by censure, or indirectly by refusing him a vote on a question which he thinks important in the business of his office, but while he holds office he is responsible for the exercise of the Queen's prerogative in respect of the army, and is bound to see that the prerogative is exercised by the Crown and not by Parliament. No one would desire to see the army the servant of a majority of the House of Commons, nor is it possible to conceive that the management of any Minister however incapable

would be so bad as the management of an indeterminate number of irresponsible politicians.

“Especially is the Secretary of State bound to maintain the discretionary prerogative of the Crown in the appointment and dismissal of officers, their promotion or reward, or the acceptance of their resignation. This prerogative is exercised through the Commander-in-Chief, though the Secretary of State is responsible for its exercise, and it is the more important that this prerogative should be exercised by a non-political officer such as the Commander-in-Chief, because our army, unlike the armies of other European countries, is not divorced from the political rights of citizenship. The soldier if duly qualified, may exercise the franchise, the officer may sit in the House of Commons. Plainly then, the King or a minister of the Crown might use or be pressed to use the powers of appointment, promotion, or dismissal for political and party ends. The history of the last century attests the reality of this danger.”

Legislation of Tasmania.

The Defence Act 1885 of the State of Tasmania is substantially a transcript of *The Volunteer Act of 1878* of the State of Queensland; and in the year 1887 the Governor of Tasmania with the advice of the Executive Council made a number of regulations under the power conferred upon him for that purpose by the Tasmanian Act, among which was one numbered 108 which provided that:—

“If the Commandant or any officer under his command from any cause become or be unable to perform his duties under his engagement, the Minister may, if he think fit, recommend to the Governor in Council that the said Commandant or such officer (as the case may be) be suspended or removed, and he may thereupon be removed by the Governor.”

An officer came from England to Tasmania under a contract made between him and the Agent-General of the Colony for a service in the Defence Force of the Colony for a period of five years. The agreement prescribed that the officer should faithfully and diligently employ the whole of his time in the service of the Government during the term of his engagement, and the Agent-General, on behalf of the Government, promised and agreed with the officer that, in consideration of the agreement of the officer to enter into the service of the Government as therein mentioned and of the due and faithful service to be rendered by him to the Government for the previously mentioned period of five years, the Government should pay his passage money from London to Tasmania, and return passage to London on a satisfactory termination of the engagement, and should pay him for his services at the rate of £450 per annum, and half pay at the same rate from the date of the agreement to the date of his arrival in Tasmania. The agreement further provided

that the officer should receive quarters and allowances for fuel and light, and declared if he should at any time neglect or refuse or from any cause become or be unable to perform his duties under the agreement, his removal or suspension should be conducted under and be subject to the regulations in force at the time in Tasmania under *The Defence Act 1885*, or any other regulations applicable to the case of the officer under the agreement.

Shortly before the expiration of the agreement, it was extended for a further period of five years; but before the expiration of the second period of five years the Government dismissed the officer without notice or compensation, and refused to make any charge against him before a court martial or a court of inquiry held under the provisions of *The Defence Act 1885*. The officer filed a supplication in the Supreme Court under *The Crown Redress Act* to recover damages for an alleged wrongful dismissal, and to that supplication the Attorney-General pleaded by way of demurrer that the supplication was bad in substance, and the points of law submitted on behalf of the Crown for determination by the Court were:—(1) That inasmuch as the agreement set out in the supplication shows that the suppliant was in the public service of the Government of Tasmania, the said Government might lawfully dismiss the suppliant from the said service at its pleasure, and without payment of any compensation or damages, and notwithstanding the existence of the special agreement set out in the supplication; (2) That the said Government might lawfully dismiss the suppliant at pleasure under the provisions of *The Defence Act 1885*; (3) That no engagement made by the Crown in the absence of some statutory authority with any of its military officers in respect of services, either past, present or future can be enforced against the Crown in any court of law; (4) That the suppliant as a military officer was liable to dismissal at will, notwithstanding the agreement stated in the supplication. The points submitted on behalf of the suppliant were:—(1) That the Crown had not the power to dismiss the suppliant peremptorily, (a) because *The Defence Acts* and the Regulations made under them have made provisions inconsistent with the prerogative of peremptory dismissal; (b) because the express provision for conditional dismissal in the contract of 1890 necessarily contradicts the implication in that contract of a term for peremptory dismissal, and the express contract, therefore, governs the terms of dismissal, and is not illegal because it follows and is authorised by the statutes and by regulations which are equal to statutes; (c) because the express contract can be enforced under *The Crown Redress Act*, which makes contracts between the Crown and a subject actionable like contracts between subject and subject; (2) That even if the Crown had power to peremptorily dismiss the suppliant from his employment the provision for payment of passage money to England stands upon a different footing, and is good even if

the claim for salary and allowances is bad; (3) That the claim for salary and allowances from 1st to 7th July is good even if the remainder of the claim is bad, as it is a claim for work already performed.

When the demurrer came on for argument the Supreme Court was constituted by two judges and they differed in opinion. The opinion of the junior judge was afterwards withdrawn and judgment was entered for the Crown in accordance with the opinion delivered by the senior judge. The junior judge was of opinion that the Act made special provision for the appointment of staff officers and that Regulation 108 referred exclusively to them and protected them from peremptory dismissal. In the opinion of the senior judge, which stood as the judgment of the court, reference was made to regulation 108 in the following words: —“This Regulation provides that ‘if the Commandant or any officer under his command from any cause become or be unable to perform his duties under his engagement, the Minister may, if he think fit, recommend to the Governor-in-Council that the said Commandant, or such officer (as the case may be) be suspended or removed, and he may thereupon be removed by the Governor.’ The position of this Regulation under the heading ‘Permanent Force’ and subheading ‘General Staff’ indicates that the words ‘any officer under his command’ must not be taken to mean any officer of the Defence Force, but are intended to refer to staff officers only. This being understood, it is said that Regulation 108, providing for the suspension or removal of the Commandant and staff officers under certain specified circumstances, (namely inability to perform duties), precludes the possibility of such officer's removal under any other circumstances by the application of the maxim *expressio unius exclusio alterius*, in other words, that this regulation places the Commandant and staff officers in a separate category, exempting them from the general provisions of the Act, that all officers hold their rank during pleasure (section 31), and that officers of the Permanent Force hold their appointments during pleasure (section 28). But if the wording of the Regulation be looked at more carefully, it will be seen that this view cannot be maintained. It may be true that it places the Commandant and staff officers in a separate category, but the point in respect of which they are distinguished is that, in certain circumstances the Minister can recommend their suspension or removal to the Governor-in-Council. The power of the Governor to deprive an officer of his rank is expressly given by the Act, and Regulation 108 cannot be construed to mean that before he can exercise that power, the Minister must make a recommendation for suspension or removal to quite another authority, viz., the Governor-in-Council. Such an interpretation would make the regulation antagonistic to the Act, and therefore *ultra vires*. As I read the Regulation it appears to be merely an addition to the provisions of the Act in the matter of dismissal.

There is nothing in the Act itself providing for the temporary suspension of an officer, and the Regulation supplies the omission, also mentioning the right to remove which would naturally be exercised in cases of permanent incapacity. The provisions of Regulation 108 cannot, therefore, be held to affect in any way the general power of the Governor; they merely provide that for a particular class of officers in particular circumstances, the *minister* may take steps to obtain their removal, temporary or permanent.”

The construction placed here upon the provisions of *The Defence Act* of Tasmania which refer to the appointment of officers and upon Regulation 108 seems to recognise a power of dismissal vested in the Governor in person as Commander-in-Chief and exercisable independently of the Governor in Council. But if the Governor as Commander-in-Chief has the power to dismiss an officer without the recommendation of the Minister for Defence or the concurrence of any members of the Executive Council, he must also have the power to suspend him without any such recommendation or concurrence, and therefore Regulation 108 is not required to enable him to suspend or dismiss an officer. Nor can the Regulation have the effect of limiting or reducing the Governor's power of dismissal if that power is expressly given to him as Commander-in-Chief by the Act, in which case the Regulation is nugatory, except as a declaration of procedure which would not be binding if not in accordance with the Act. But if the word “Governor” whenever used in *The Defence Act* in reference to the administration of the Act means the Governor in Council, then Regulation 108 is perfectly consistent with the Act and is supplementary to it. Undoubtedly the power of appointing and dismissing all the officers of *The Defence Forces of the State* is vested by *The Defence Act* in the Governor in the same manner as the power of appointing and dismissing all the officers in the civil service of the State is vested in him by common or statute law. But wherever parliamentary and responsible government exists in a dependency of the British Empire, all officers in the public service, whether civil or military, are appointed and dismissed by the Governor upon the advice of his Ministers who are responsible for the conduct of the various departments of the public service. This fundamental rule extends to the appointment and dismissal of officers who share with the Governor the honour and privilege of directly representing the Crown and exercising prerogative powers, such as the Lieutenant-Governors of the Provinces in the Dominion of Canada. The fifty-ninth section of the *British North America Act* 1867 declares that “A Lieutenant-Governor shall hold office during the pleasure of the Governor-General.” In the year 1879 the Lieutenant-Governor of the Province of Quebec was removed by the Governor-General upon the advice of his responsible Ministers, and a long controversy ensued in the course of which the

Premier of Quebec contended that the power of dismissing the Lieutenant-Governors of the Provinces was vested in the Governor-General in person and not in the Governor-General in Council as was contended by the Premier of the Dominion. But Sir John Macdonald successfully refuted the contention of the Premier of Quebec, and made it clear that “all acts of government must be equally performed under the advice of responsible Ministers wherever the British Constitution prevails, whether the chief executive officer is individually charged with the same, or whether his council are formally associated with him in the transaction”; and the Secretary of State for the colonies ratified the application of this rule by the Premier of the Dominion to the case then under discussion (*a*). Therefore, unless *The Defence Act* of the State of Tasmania creates an exception to this fundamental rule, all the powers conferred by it upon the Governor are powers which cannot be exercised by him without the advice and concurrence of some members of his Executive Council, excepting such powers as may be expressly conferred upon him as the holder of a specific office distinct from his office of Governor, such as that of Commander-in-Chief of the military and naval forces of the State. As Commander-in-Chief he may undoubtedly exercise any of the powers and functions which are legally inherent in that office or are expressly conferred by any law upon the person holding it. But the power of appointing and dismissing officers of the Defence Force at his personal discretion is not legally inherent in the office of Commander-in-Chief, and it is not conferred upon the holder of that office by *The Defence Act*. On the contrary that power is expressly conferred by the Act upon “the Governor” as such, and it must be exercised by him in accordance with the same rule that applies to his exercise of every other power conferred by the Act upon “the Governor” as such.

Regulations which have been laid before Parliament as directed by law.

The case which has been mentioned in connection with *The Defence Act* of the State of Tasmania suggests a very important question of constitutional law which was not argued or mentioned in it, but which may be very fitly considered in this chapter. It was contended on behalf of the Crown in that case that Regulation 108 was *ultra vires* of the Act and invalid. Section 95 of *The Defence Act* of the State of Tasmania is as follows:—

“95.

(1) All Regulations made under the authority of this Act shall be published in the Gazette; and when so published they shall have the force of law as fully as if they were contained in this Act, of which they shall be deemed to form a part.

“(2). All Regulations made under this Act, and an annual report of the state of the Defence

Forces, shall be laid before Parliament by the Minister.”

The question suggested by this section is, whether the validity of any Regulation made under the authority of the Act, and published in the Gazette and laid before Parliament as directed, can be reviewed in a court of law? The provision that all Regulations made under the Act shall be laid before Parliament appears *primâ facie* to have been inserted for the purpose of inviting the attention of the two Houses of Parliament to them, so that either House might take such action as it might deem proper to secure the amendment or abrogation of any Regulation of which it disapproved. But the attention of Parliament is invited to something which presumably has the force of law by virtue of its publication in the Gazette; and if no disapproval of it is expressed by Parliament, the inference is that Parliament desires that the Regulation shall continue to have the same effect which publication in the Gazette has presumably given to it. *The Municipalities Act* 1867 of the State of New South Wales authorised the Municipal Councils elected under its provisions to make by-laws on a variety of subjects, and section 158 enacted that “All or any such by-law being consistent with the provisions of this Act and not repugnant to any other Act or law in force within the Colony of New South Wales shall have the force of law when confirmed by the Governor and published in the Government Gazette, but not sooner or otherwise; and copies thereof shall be laid before both Houses of Parliament forthwith, if Parliament be sitting, and if not, then within fourteen days after the opening of next session.” The effect of this section was considered by the Judicial Committee of the Privy Council in the case of *Slattery v. Naylor* ^(a), and a very strong doubt was expressed in the judgment of the Judicial Committee whether any by-law made under the alleged authority of the Act and confirmed by the Governor and published as required by section 158 could be impugned in a court of law upon the ground that it was unreasonable. The judgment in that case dealt separately with the two objections that the by-law in question was *ultra vires* and that it was unreasonable. But, in dealing with the objection that it was unreasonable, Lord Hobhouse observed that the argument of Sir Horace Davey on that point made the question of reasonableness only a branch of the question whether the by-law was *ultra vires*; and the concluding reason given for supporting the validity of the by-law was that it did not appear that the two Houses of Parliament on whose tables the by-law had been laid had thought it necessary to modify the powers conferred by the Act or to interfere with the exercise of them. In that case the Act of the Parliament of New South Wales provided that confirmation by the Governor and subsequent publication in the Gazette should endow with force of law such by-laws only as were consistent with the provisions of the Act and not repugnant to any

other law in force in the colony. But no such qualification or limitation is expressed in the section of *The Defence Act* of the State of Tasmania, which authorises the Governor to make Regulations, or in the section which directs the publication of them in the Gazette. The language of the section (94) which confers upon the Governor the power to make regulations is as follows:—

“94. The Governor may make such Regulations as he thinks fit relating to any matters or things which may be necessary to be prescribed or done for carrying this Act into effect, and for prescribing and defining the duties of members of the Defence Force, and may by any such Regulations impose a penalty not exceeding Twenty pounds for a breach thereof.”

The only semblance of a restriction upon the Governor's unlimited discretion is contained in the description of the matters and things in relation to which he is empowered to make regulations, viz., “matters or things which may be necessary to be prescribed or done for carrying this Act into effect.” But the Governor in Council, subject to the supreme control of Parliament, is the sole judge of what is necessary to be prescribed to carry the Act into effect; and if the Governor in Council decided that the proper instruction and efficiency of the local Defence Force could not be secured without the engagement of officers of the Imperial Army, and that in order to induce such officers to leave England it was necessary to offer them security of tenure for a fixed period of service, and a Regulation was made for that purpose and published as prescribed by the Act and submitted to both Houses of Parliament without any exception being taken to it in either House, can the validity of the Regulation be challenged in a court of law? If the regulation prescribes anything that is contrary to the will of Parliament as expressed in the Act, either of the Houses of Parliament may intervene when the Regulation is submitted to it. If neither of the Houses of Parliament intervenes, does not the legal presumption follow that Parliament approves of the Regulation? And seeing that Parliament has already declared that, upon being published in the Gazette, the Regulation “shall be deemed to be a part” of the Act, can it be challenged as *ultra vires* of a law of which it is a portion?

Legal meaning of the phrases “Governor in Council” and “Governor with the advice of the Executive Council.”

The legal meanings of the phrases “the Governor in Council” and “the Governor with the advice of the Executive Council” when they are used in colonial legislation were considered by the Attorney-General and the Solicitor-General of England (*a*) in the year 1857 in a case submitted to them by the Secretary of State for the Colonies, and they gave the following joint opinion upon the matter.

“LINCOLN'S INN,
17th December, 1857.

“In obedience to the request contained in Mr. Merivale's letter, we have the honor to report:—

“That we have considered the despatch from the Governor of the Bahamas. The Royal instructions treat the presence of the Governor as necessary at every meeting of the Executive Council. They dispense with his presence in cases only of some insuperable impediment.

“Whenever the Governor is physically able to attend, he is bound to be present. Of the three forms of expression cited in the despatch as contained in Colonial Acts confirmed by the Crown, we are of opinion that where a colonial enactment enjoins certain things to be done ‘by the Governor in Council,’ the Governor must be present, and the Royal instructions do not control the act so as to admit of the things being done in the absence of the Governor, even though such absence be caused by some insuperable impediment.

“Secondly and Thirdly.—Where the Colonial Acts enjoin certain things to be done ‘by the Governor, with the advice of the Executive Council,’ or simply to be done ‘with the advice and consent of the Executive Council,’ the forms of expression do not require the actual presence of the Governor in Council as a necessary condition, but the enactments, of course, do not control or dispense with the necessity of obeying the instructions; and in these two latter cases, therefore, whenever the attendance of the Governor is prevented by an insuperable impediment, the Act may be done by the Council, with the subsequent concurrence of the Governor (*a*).

THE RIGHT HON. H. LABOUCHERE, M.P., &c. &c.

RICHARD BETHELL.

HENRY. S. KEATING.”

Governor-General and Governor-General in Council.

In the Constitution of the Commonwealth the expression “Governor-General in Council” is used in nine places, viz., sections 32, 33, 63, 64, 67, 70, 72, 83 and 85. In all other sections in which the Governor-General is mentioned the phrase “Governor-General” is employed without any addition to it; and in view of the foregoing observations upon the corresponding variations of phraseology in the legislation of the several States of the Commonwealth, it is doubtful whether the variations which occur in the phraseology of the Constitution of the Commonwealth were necessary. The use of both phrases in section 70 of the Constitution is clearly correct because the section refers directly to legislation of the States in which both phrases are found. But there does not seem to be any necessity for the use of the phrase “Governor in Council” in any other section of the Constitution in face of the explicit declaration contained in section 62 that “There shall be a Federal Executive Council to advise the Governor 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 pleasure.” Both phrases are used in section 64, which declares that “The Governor-General may appoint officers to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish.” The use of both phrases in this section may be defended on the ground that the appointment of a Minister of State for the Commonwealth is necessarily a personal act of the Governor-General, and that the establishment of a Department of State of the Commonwealth is a matter which comes within the rule of English constitutional law, that the acts of the Monarch which are not to be personally performed by him must be done in accordance with the advice of one or more of his Ministers who must accept the responsibility of it. But section 65 declares that “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.” This section clearly contemplates that the Parliament shall from time to time prescribe the number of Ministers of State for the Commonwealth and the offices which they shall hold, and that the Governor-General shall prescribe the offices to be held by them only so long as provision is not made by Parliament in regard to the matter. But as soon as the Governor-General had an Executive Council to advise him, the establishment of the several Departments of State of the Commonwealth was a matter which in accordance with the explicit declaration of section 64 was to be within the purview and control of the Governor-General in Council. The establishment of the several Departments of State of the Commonwealth necessarily includes the assignment of distinguishing names to them and the assignment of distinguishing titles to the Ministers who are to preside over the Departments; and it is therefore evident that when section 65 mentions the Governor-General it means the Governor-General in Council. These examples of the use of the two phrases “Governor-General” and “Governor-General in Council” in the Constitution of the Commonwealth show that it is open to some extent to the same criticism as that which has been made of the use of the two phrases “Governor” and “Governor in Council” in much of the legislation of the several States.

(a) See Anson's *Law of the Constitution*, Part II., p. 41, and Hearn's *Government of England*, 2nd ed., p. 97.

(b) The local Parliament may be opened by Commissioners directly appointed by the Governor for that purpose, as the Imperial Parliament may also be opened by Commissioners appointed by the Crown for that purpose. In such cases the Commissioners represent the person of the

Governor in the same manner as the Governor himself represents the person of the Monarch.

(a) 2nd ed., pp. 18-19.

(a) Part II., "The Crown," p. 371 (1st ed.).

(a) See Todd's *Parliamentary Government in the British Colonies*, 2nd ed., pp. 608-610.

(a) L.R. Appl. Cases, vol. 13, p. 446.

(a) Sir R. Bethell and Sir H. S. Keating.

(a) Forsyth's Cases and Opinions on Constitutional Law, pp. 78-9.

14. The Paramount Legislative Power of the Imperial Parliament.

The legislative power of the Imperial Parliament is paramount throughout the Empire and may be exercised in reference to the whole Empire or to any portion of it.

As the depositary and organ of the sovereign power of the whole British Empire, the Imperial Parliament possesses and frequently exercises with respect to the whole Empire, or specified portions of it, a legislative power which is paramount to the local legislation of any other parliament in the Empire; and it is expressly declared by the Act of the Imperial Parliament intituled “An Act to remove doubts as to the validity of colonial laws” (*a*), that—

“Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament” (*i.e.* the Imperial Parliament) “extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under authority 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.”

The Merchant Shipping Act.

This paramount legislative power of the Imperial Parliament has been exercised from time to time for many different purposes. When it is exercised in such legislation as *The Merchant Shipping Act 1894* (*a*) and the previous Acts of the same kind, the object is to establish a uniform law throughout the whole Empire in regard to particular matters.

The British Law Ascertainment Act. Sometimes it is exercised to aid the administration of the local laws of different portions of the Empire in which separate legislatures exercise plenary legislative powers, as in the case of *The British Law Ascertainment Act* (*b*), under which any superior court in any part of the Empire may direct a case to be prepared and submitted to any superior court in any other part of the Empire for the purpose of ascertaining the local law of the territory within which the court to which the case is submitted has jurisdiction, in order to enable the court transmitting the case to apply such law in any action or proceeding pending in such last mentioned court and in which such law has been pleaded. Legislation of this description does not raise any question as to the validity or repugnancy of any colonial law so long as an attempt is not made by any colonial parliament to restrict the operation of the Imperial law. But Imperial legislation which establishes a uniform law relating to any matter throughout the Empire sometimes invalidates previous or subsequent legislation of a colonial parliament in particular cases.

23 & 24 Vict. cap. 122.

In other instances the paramount legislative power of the Imperial Parliament has been exercised to confer a particular legislative power upon the local legislatures of separate portions of the Empire, as in the case of the Act 23 & 24 Vict. cap. 122, which enables the legislature of any portion of the Empire outside of the United Kingdom to enact laws similar to the Imperial Act 9 Geo. IV. cap. 31, sec. 8, under which any person may be tried and convicted and punished for murder or manslaughter in respect of any injury inflicted within the jurisdiction of the court before which the accused person is arraigned, although the death caused by the injury may have occurred beyond the territorial limits of the general jurisdiction of the court.

12 & 13 Vict. cap. 96.

In several instances the paramount legislative power of the Imperial Parliament has been exercised to confer what may be described as an Imperial jurisdiction upon colonial courts, as in the case of the Imperial Act 12 & 13 Vict. cap. 96, which provides for the prosecution and trial in the colonies of offences committed within the jurisdiction of the Admiralty. The fourth section of that Act expressly provides that nothing contained in the Act shall affect or abridge the jurisdiction of the Supreme Courts of New South Wales and Van Diemen's Land as established under the Imperial Act 9 Geo. IV. cap. 83, by which jurisdiction had been previously conferred upon them in respect of offences committed within the jurisdiction of the Admiral.

The Courts (Colonial) Jurisdiction Act 1874.

The exercise of an Imperial jurisdiction by colonial courts under the authority of Imperial legislation frequently raised a question as to the punishments which such courts were authorised to inflict for offences committed out of the limits of their local jurisdiction, and in order to determine the question the Imperial Parliament enacted *The Courts (Colonial) Jurisdiction Act 1874*, which provides in the third section of it that—

“When, by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a court of any colony for any crime or offence committed upon the high seas or elsewhere out of the territorial limits of such colony and of the local jurisdiction of such court, or if committed within such local jurisdiction made punishable by that Act, such person shall, upon conviction, be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony and of the local jurisdiction of the court, and to no other, anything in any Act to the contrary notwithstanding: Provided always, that if the crime or offence is a crime or offence not punishable by the law of the colony in which the trial takes place, the person shall, on conviction, be liable to such punishment (other than capital punishment) as shall seem to the court most nearly to correspond to the

punishment to which such person would have been liable in case such crime or offence had been tried in England.”

The Merchant Shipping Act 1894.

Some of the provisions of *The Merchant Shipping Act 1894* delegate a limited and prescribed legislative power to the legislatures of British possessions outside of the United Kingdom in respect of particular matters mentioned therein. For example, section 264 provides that:—

“If the legislature of a British possession, by any law, apply or adapt to any British ships registered at, trading with, or being at any port in that possession, and to the owners and crews of those ships, any provisions of this part (II.) of this Act which do not otherwise apply, such law shall have effect throughout Her Majesty's dominions, and in all places where Her Majesty has jurisdiction in the same manner as if it were enacted in this Act.”

The effect of this section is to confer upon all the legislatures in the Empire outside of the United Kingdom a defined and prescribed legislative jurisdiction in relation to particular matters co-extensive with the territorial limits of the Empire, and with the extra-territorial jurisdiction of the Crown. Section 735 of the same Imperial Act provides that—

“(1) The legislature of any British possession may by any Act or ordinance, confirmed by Her Majesty in Council, repeal, wholly or in part, any provisions of this Act (other than those of the third part thereof which relate to emigrant ships), relating to ships registered in that possession; but any such Act or ordinance shall not take effect until the approval of Her Majesty has been proclaimed in the possession, or until such time thereafter as may be fixed by the Act or ordinance for the purpose.

“(2) Where any Act or ordinance of the legislature of a British possession has repealed in whole or in part as respects that possession any provision of the Acts repealed by this Act, that Act or ordinance shall have the same effect in relation to the corresponding provisions of this Act as it had in relation to the provision repealed by this Act.”

And section 736 provides that:—

“The legislature of a British possession, may, by any act or ordinance, regulate the coasting trade of that British possession, subject in every case to the following conditions:—

(a) The act or ordinance shall contain a suspending clause providing that the act or ordinance shall not come into operation until Her Majesty's pleasure thereon has been publicly signified in the British possession in which it has been passed.

(b) The act or ordinance shall treat all British ships (including the ships of any other British possession) in exactly the same manner as ships of the British possession in which it is made.

(c) Where by treaty made before the passing of *The Merchant Shipping (Colonial) Act 1869* (that is to say, before the 13th day of May 1869), Her Majesty has agreed to grant to any ships of any foreign state any rights or privileges in respect of the coasting trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the act or ordinance to the contrary notwithstanding.”

In the case of the Commonwealth of Australia, all the powers conferred by the British *Merchant Shipping Act 1894* upon the legislatures of British possessions will accrue exclusively to the Parliament of the Commonwealth so far as those powers refer to matters which are within the exclusive legislative power of that Parliament in respect of trade and commerce with other countries and among the States and in respect of navigation and shipping under sections 51 and 98 of the Constitution of the Commonwealth. The restrictions imposed upon the previous plenary legislative power of the Parliaments of the States by the Constitution of the Commonwealth are imposed by the Imperial Parliament, and they must be held to extend to powers conferred by special legislation of that Parliament as well as to the legislative powers conferred in general terms by the several constitutions of the States.

The Bankruptcy Act 1883.

A very striking and peculiar exercise of the paramount legislative power of the Imperial Parliament is found in section 118 of *The Bankruptcy Act 1883(a)* which provides that:—

“The High Court, the County Courts, the courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the court seeking aid, with a request to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court which made the request, or the court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions.”

The provisions of this section are sufficiently extraordinary to raise a doubt whether the draftsman contemplated the full effect of them. If the operation of the section had been confined to making all the courts in the Empire which have jurisdiction in bankruptcy auxiliary to any court in the United Kingdom in the administration of the Act, it would have simply conferred upon them an uniform jurisdiction for the more effectual administration of the same law. But the section

goes far beyond that, and empowers and requires every court having jurisdiction in bankruptcy under the local law of any part of the Empire to administer, in regard to particular persons and in prescribed cases, specific portions of the local laws of other parts of the Empire; and it imparts to a specific portion of the local legislation upon bankruptcy in every part of the Empire an extra-territorial efficacy in regard to all persons who are domiciled or ordinarily resident within the territorial limits of the jurisdiction of the legislature from which in each case such local legislation has proceeded. Imperial legislation of this description exhibits in a strong light the exclusive sovereignty of the Imperial Parliament within the territorial limits of the Empire and the absence of that attribute from all the other parliaments in the Empire.

All the Acts of the Imperial Parliament which extend to the Commonwealth of Australia in common with other portions of the Empire proceed from the same legislative source as that from which the Constitution of the Commonwealth derives its authority, and they are equally binding with the Constitution of the Commonwealth upon the Parliament of the Commonwealth and upon the Parliaments of the States, in the restrictions they impose upon the legislative powers of those Parliaments, or upon any other governmental authority in the Commonwealth. It has been already observed that some of the Acts of the Imperial Parliament which extend to the Commonwealth of Australia confer special legislative powers either upon the Parliament of the Commonwealth or upon the Parliaments of the States; but the majority of such Imperial Acts impose restrictions upon the legislative powers of the Commonwealth and the States, not expressly, but by making, in reference to particular matters, legislative provisions which are paramount to any law which the Parliament of the Commonwealth or the Parliaments of the States can enact with respect to the same matters. All these Acts of the Imperial Parliament, whether they confer special powers or impose restrictions upon the Parliament of the Commonwealth or upon the Parliaments of the States, are a part of the constitutional law of the Commonwealth. But they cannot be amended by the same authority as that by which the Constitution of the Commonwealth can be amended in accordance with the procedure prescribed by section 128 of the Constitution. The only authority by which they can be amended or repealed is the Imperial Parliament which enacted them except such of them as expressly empower colonial legislatures to alter them. But some of the Imperial legislation which applies to the States of the Australian Commonwealth may be superseded and displaced by legislation proceeding from the Parliaments of the States, under the authority expressly conferred upon the local legislatures to make other provisions with respect to the matters in respect of which such Imperial

legislation has made primary provisions.

9 Geo. IV. cap. 83. Such is the power conferred by the Imperial Act 9 Geo. IV. cap. 83, now known as *The Australian Courts Act 1828*, by which it was declared that all laws and statutes in force in England at the time of the passing of the Act which were not inconsistent with the Act, or with any charter or letters patent or order in council issued under its authority, and which were applicable to the colonies mentioned in the Act, should be applied by the courts of those colonies, but that the local legislatures of those colonies could from time to time declare whether or not any such laws or statutes were in force in those colonies, and could modify or alter any of them. This Imperial Act is still in force in the several States of the Commonwealth to which it applied when they were colonies; and, in addition to the particular power conferred by it upon the local legislatures of the colonies to modify and alter the laws which it declared to be in force in those colonies, subsequent Imperial legislation has conferred in general terms upon the same legislatures plenary legislative powers under which any portion of the common law or any Imperial legislation in force in any State of the Commonwealth by virtue of 9 Geo. IV., cap. 83, may be altered or repealed by the Parliament of the State. But any Imperial legislation which applies to the States of the Commonwealth by explicit declaration of the Imperial Parliament cannot be amended by the Parliament of the Commonwealth or by the Parliaments of the States if the power to amend such legislation is not expressly conferred upon it or them by the Imperial Parliament either at the time of its enactment or by subsequent legislation. It is also to be noted that the amendment or repeal by the Imperial Parliament of any portion of the law of England which was extended to the Australian colonies by 9 Geo. IV. cap. 83, does not have any force within any State of the Commonwealth, if the Commonwealth or the State is not expressly included in the territory within which the amendment or repeal is to apply; and all such laws remain in force in each State of the Commonwealth until altered or repealed by the Parliament of the State (a).

The paramount character of the legislative power of the Imperial Parliament prohibits any claim on the part of a local legislature to exercise its power as a delegate of any portion of the legislative power of the Imperial Parliament.

The paramount character of the legislative power of the Imperial Parliament is the root of the doctrine enunciated by the Judicial Committee of the Privy Council in the cases of *The Queen v. Burah* (b), *Hodge v. The Queen* (c), and *Powell v. The Apollo Candle Co.* (d), which were cited in the chapter on the subject of the distribution of governmental powers under the Constitution of the Commonwealth. In those cases it was explicitly declared that when the Imperial Parliament establishes a local parliament or legislature in any part of the Empire it does not delegate any portion of its legislative power to the local parliament or legislature,

and the local parliament or legislature is therefore not subject to any of the restrictions or limitations that apply to the exercise of delegated powers. The Constitution of the Commonwealth of Australia is an enactment of the Imperial Parliament, and if the powers conferred by it upon the Parliament of the Commonwealth to make laws for the peace, order and good government of the Commonwealth in respect of trade and commerce with other countries (section 51), and with respect to navigation and shipping (section 98), were delegations of the legislative power of the Imperial Parliament with respect to those matters within the territory of the Commonwealth, then any legislation of the Parliament of the Commonwealth with respect to any one of those matters which was in conflict with any previous legislation of the Imperial Parliament upon the same matter, such as *The Merchant Shipping Act* 1894, would prevail over the Imperial enactment in accordance with the rule that when two enactments of the same legislative power are in conflict the last in date prevails. But if this rule could be applied to abrogate the local authority of any enactment of the Imperial Parliament which was in conflict with the later legislation of any local parliament or legislature in any part of the Empire, the paramount character of the Imperial legislation would be destroyed. Hence it follows that the paramount character of the legislative power of the Imperial Parliament prohibits any claim on the part of any local parliament or legislature to exercise as a delegate of the Imperial Parliament any of the legislative powers which the Imperial Parliament has conferred upon it.

(a) 28 & 29 Vict. cap. 63, sec. 2.

(a) 57 & 58 Vict. cap. 60.

(b) 22 & 23 Vict. cap. 63.

(a) 46 & 47 Vict. cap. 52.

(a) *See Reg. v. Mount*, 4 A.J.R., 38-42.

(b) L.R. Appeal Cases, vol. 3, p. 889.

(c) L.R. Appeal Cases, vol. 9, p. 117.

(d) L.R. Appeal Cases, vol. 10, p. 282.

Appendices.

1. The Inclusion of the Crown as a Constituent Part of a Subordinate Parliament.

The first section of the Constitution of the Commonwealth of Australia declares that “The legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate, and a House of Representatives,” &c.; and the second introductory section to the Constitution declares that the provisions of the Constitution referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom. In like manner *The British North America Act* 1867 declares in section 17 that “There shall be one Parliament for Canada, consisting of the Queen and an Upper House styled the Senate, and a House of Commons.” In section 91, it declares that “It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada in relation to all matters,” &c.; and in accordance with this section all the Acts of the Parliament of the Dominion of Canada declare that “Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows.”

The *Constitution Acts* of the States of New South Wales, Victoria, Queensland, and Western Australia also vest the power of making laws for those States in the Queen, “by and with the advice and consent of the Legislative Council and House of Assembly”; and the enacting words of the Acts of the Parliaments of those States run as follows:— “Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly,” &c.

But the enacting words of the Acts of the Parliament of New South Wales prior to the year 1855 declared that they were enacted “by the Governor, with the advice and consent of the Legislative Council,” &c.; and *The Constitution Act* of the State of Tasmania provides, in section 3, that “The Governor and Legislative Council and House of Assembly together shall be called the Parliament of Van Diemen's Land,” and the enacting words to the Acts of the Parliament of Tasmania run, “Be it enacted by his Excellency the Governor of Tasmania, by and with the advice of the Legislative Council and House of Assembly, in Parliament assembled,” &c.

The Act of the Imperial Parliament which grants a representative Constitution to the Colony of New Zealand provides, in section 37, that “There shall be within the Colony of New Zealand a General Assembly consisting of the Governor, Legislative Council, and House of Representatives,” and the enacting words of the

Acts of the Parliament of the Colony of New Zealand run, "Be it enacted by the General Assembly of New Zealand, in Parliament assembled, and by the authority of the same," &c.

The Act which establishes the Constitution of the State of South Australia provides that in place of the Legislative Council then subsisting there should be "a Legislative Council and a House of Assembly, which shall be called 'The Parliament of South Australia,'" and the enacting words of the Acts of the Parliament of South Australia are, "Be it enacted by the Governor of the Province of South Australia, by and with the advice and consent of the Legislative Council and House of Assembly, in this present Parliament assembled," &c.

The Act of the Imperial Parliament (9 Geo. IV. cap. 83) intituled "*An Act to provide for the administration of Justice in New South Wales and Van Diemen's Land, and for the more effective Government thereof, &c.*," and now known as *The Australian Courts Act 1828*, provides, in the 21st section, that "The Governors for the time being of the said Colonies respectively, with the advice of the Legislative Councils to be appointed as aforesaid, shall have power and authority to make laws and ordinances for the good government and peace of the said Colonies respectively," and the subsequent Act of the Imperial Parliament, intituled "*An Act for the Government of New South Wales and Van Diemen's Land*," (5 & 6 Victoria, Chapter 76), provides that "It shall be lawful for Her Majesty, by any such Letters Patent, to authorise any number of persons, not less than seven, including the Governor or Lieutenant-Governor of any such new Colony or Colonies, to constitute a Legislative Council or Legislative Councils for the same, &c., and that it shall be lawful for such Legislative Councils to frame and ordain all such ordinances as may be required for the peace, order, and good government of any such Colony as aforesaid," &c.

The later Act of the Imperial Parliament, 13 & 14 Victoria, Chapter 59, intituled "*An Act for the better government of Her Majesty's Australian Colonies*," enacts "That it shall be lawful for the Governors and Councils of the said Colonies of New South Wales and Van Diemen's Land and Victoria respectively from time to time by any Act or Acts to make such provision as to them may seem meet for the better administration of justice," &c.; and in Section 32 it provides that "it shall be lawful for the Governor and Legislative Council of the Colony of New South Wales after separation from the sister Colony of Victoria, and for the Governors of the said Colonies of Victoria, Van Diemen's Land, South Australia, and Western Australia after the establishment of Legislative Councils therein, by any Act from time to time to alter any provisions in force by this Act," &c.

It will be seen from these references that the first section of the Constitution of the

Commonwealth of Australia which makes the Queen a constituent part of the Parliament of the Commonwealth, and the section of *The British North America Act* 1867 which makes the Queen a constituent part of the Parliament of Canada, and the provisions of the *Constitution Acts* of the States of New South Wales, Victoria, Queensland, and Western Australia, which make the Queen a constituent part of the Parliaments of those States also, are, together with the enacting words of the Acts of those Parliaments, departures from the form of the legislation of the Imperial Parliament in the Acts originally establishing local Legislatures in the Australasian Colonies, and from the language subsequently used by the Legislature of New South Wales previous to the year 1855, and from the word always used by the Parliaments of Tasmania, New Zealand, and the Province of South Australia in the enacting words prefixed to the laws made by them; and there are not wanting grounds for suggesting that these innovations are improper, and have been made under a misapprehension of the constitutional relations of the Australasian Parliaments to the Crown and the Parliament of Great Britain and Ireland, and that the Acts of the Imperial Parliament and of the Australasian Parliaments which declare the Governor to be part of the local Parliament, and declare that the laws of such Parliaments are made by him with the advice and consent of the local Houses of Legislature, are correct in form and in accordance with the true relations of the Colonial Parliaments to the Imperial Parliament and to the Crown.

The questions raised by these differences in the language of the legislation of the Imperial Parliament and in language of the legislation of the Parliaments of some of the States of the Commonwealth of Australia were raised and exhaustively discussed in America previous to the revolt of the thirteen united colonies and their final declaration of their independence of the British Crown. The first Continental Congress that assembled to speak and act on behalf of the thirteen colonies at the commencement of their quarrel with the mother country, passed a series of resolutions, the last of which declared it to be the indispensable duty of the colonies to endeavour by a dutiful address to His Majesty, and humble applications to both Houses of Parliament, to procure a repeal of the Act for granting and applying certain Stamp Duties, &c., and, in accordance with this resolution, petitions were forwarded to the King, to the House of Lords, and to the House of Commons, asking for a repeal of the obnoxious Act. But the colonists soon discovered that to recognise the legislative power of the British Parliament to make laws for the colonies, and to petition that Parliament on those grounds for a repeal of the Stamp Act, was totally inconsistent with their famous doctrine of “no taxation without representation,” and they accordingly soon advanced to the position that the British Parliament had no right to legislate for the colonies in any manner, and that the

connection of the colonies with the mother country was maintained through the medium of the Crown alone, and that in regard to all purely colonial matters the Crown occupied the same position in relation to the Colonial Legislatures as it occupied in relation to the Imperial Parliament in regard to all matters within the limits of the United Kingdom of Great Britain and Ireland. The second Continental Congress accordingly ignored the two Houses of the Imperial Parliament, and adopted an address to the King only, and when the colonies ultimately declared their independence they expressly renounced allegiance to the King alone, and described as “pretended acts of legislation” the obnoxious laws of the British Parliament, for the repeal of which they had originally petitioned that Parliament as well as the King.

The doctrine enunciated by the American colonies is perfectly consistent with the introduction of the Queen into the enacting words of the Acts of the Colonial Parliaments; and, in the event of any dispute upon the question, would derive strong support from such use of the name of the Queen. But against such a theory of the connection of the colonies with the mother country Lord Mansfield vigorously protested in the House of Lords, and asserted “a complete, entire, and unconditional supremacy” of the British Parliament over the people of the American colonies, and declared that the claim of “no taxation without representation” was a renunciation of that supremacy. The Stamp Act was ultimately repealed, but the repealing Act was accompanied by a “Declaratory Act” affirming the power of the King in Parliament to bind the colonies and the people of America “in all cases whatsoever.” This is the position maintained by the British Parliament with regard to all the dependencies of the Empire at the present day; and although no attempt has been made by the mother country since the revolt of the American colonies to impose taxation on the dependencies of the Empire possessing Legislatures of their own, the supremacy of the Imperial Parliament is occasionally exercised by legislating for the colonies in common with the United Kingdom upon such subjects as the maritime laws, &c. This supremacy has been authoritatively confirmed in an Act of the Imperial Parliament of so late a date as the year 1865, intituled “*An Act to remove Doubts as to the Validity of Colonial Laws*,” which provides that “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 the authority of such Act of Parliament, or having in the Colony the force or 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.” The Colonial Legislatures are therefore subordinate to the British Parliament, and it cannot but be derogatory, in some

measure, to the dignity of the Crown, which is a part of the Imperial Parliament, to make it also a constituent part of any Parliament subordinate to the Imperial Parliament. We know that if any portion of an Act of a Colonial Parliament should be contrary to the provisions of any Act of the Imperial Parliament on any subject upon which the latter had legislated for the whole Empire, the Colonial Act would be held to be void in the courts of the Colony in which it had been passed, as well as in the Courts in England. This was done in Canada in the year 1881, in the case of the ship *Farewell*, under the authority of the “*Act to remove Doubts, &c.*,” which has been already quoted (*a*). Another decision of a like character, and under the authority of the same Act, had previously been given by Mr. Justice Gray against the legality of the Chinese Tax Bill of British Columbia, in the year 1878. And if in such cases both Acts are declared to be made by the Queen, but in one case “by and with the advice and consent of the Lords Spiritual and Temporal and Commons,” &c., and in the other case “by and with the advice and consent of the Legislative Council and Legislative Assembly” of the colony, the Crown is placed in the undesirable and undignified position of being made a direct party to an invalid, and, in one sense an illegal and unconstitutional act, as well as being made to appear guilty of stultifying itself by declaring two contradictory laws to be in force at the same time in reference to the same subject-matter and in the same locality.

These difficulties and inconsistencies are avoided when the Governor is made part of the Colonial Parliament, and the laws of that Parliament are declared to be enacted by him “with the consent and advice of the Legislative Council and Legislative Assembly” of the Colony, and the Crown is named only in connection with the exercise of executive power in the colony. As agent of the Crown for the exercise of executive functions, the Governor of the colony is subject to the instructions he receives from the Crown as well as to the provisions of any law of the Imperial or Colonial Parliament regulating the manner in which those functions shall be exercised. As a constituent part of a subordinate Colonial Parliament in respect of the legislation whereof the Crown has, by the express provision of the Imperial Parliament, the power of disallowance he may also be subject to instructions from the Crown as to the exercise of his legislative functions, and his assent to any Bill is always given subject to the power of disallowance vested in the Crown. There is, therefore, nothing inconsistent in the Governor being made to occupy the duplex position of direct representative of the Crown for the purpose of executive acts, and a constituent part of a subordinate Parliament, all Acts of which are subject to disallowance by the Crown. The inclusion of the Queen in the Constitution Acts of the States of New South Wales, Victoria, Queensland and Western Australia as a constituent part of the Parliaments of those States, and the

introduction of the Crown into the enacting words of the Acts of those Parliaments, seem to have been made in forgetfulness of the duplex position occupied by the Crown itself as the depositary of the supreme executive power of the Empire, and at the same time a constituent part of the Imperial Parliament, or from a confused apprehension of the capacity in which the Crown exercises its veto on Colonial legislation. It cannot be denied that some authority for this inclusion of the Crown as a constituent part of the Parliaments of the States lastly above-mentioned, and for the introduction of the Queen instead of the Governor in the enacting words of the Acts of those Parliaments, is to be found in the language of the 31st and 32nd sections of Act of the Imperial Parliament, 5 & 6 Victoria, chapter 6, which speaks of Bills being presented “for Her Majesty's assent to the Governor of the said Colony;” but the language of those sections is in some measure inconsistent with the language of the sections which have been previously quoted from the same Act, in which the Governor is mentioned as a constituent part of the Colonial Legislature thereby established, and is inconsistent with the true character of the power of disallowance conferred on the Crown with regard to the Acts of the Colonial Parliaments by section 32 of the same Act. The power of veto possessed by the Crown in respect of Bills passed by the two Houses of the Imperial Parliament is inherent in the Crown as a constituent part of that Parliament, and may therefore be regarded as legislative in its character; but the power of disallowance possessed by the Crown with respect to the Acts of Colonial Parliaments is a statutory power expressly conferred upon it by the Imperial Parliament, and it may therefore be properly regarded as an executive power which is vested in the Crown as the supreme depositary of executive power in the Empire.

We know that the Crown originally exercised its legislative power in the English Parliament by initiating the laws enacted there (*a*), and this is the origin of the enacting words of the Acts of the Imperial Parliament. But the Crown's active intervention in the legislation of the English Parliament gradually shrunk to the exercise of the power of veto and the recommendation of Bills to appropriate a portion of the public revenue. The last mentioned part of the Crown's interposition in the legislation of the Imperial Parliament was at one time shared by the House of Commons, but a Standing Order of that House dating from the year 1713, and amended in the year 1852, has restricted it, since the first-mentioned date, to the Crown alone.

The right of the Crown to veto Bills passed by both Houses of the Imperial Parliament has not been directly exercised for nearly two centuries. Nevertheless the right remains, and if it should be exercised at any time in the future, as it has been used in the past, it would be exercised upon the personal determination and

responsibility of the occupant of the Throne, and not be upon the advice of the responsible Ministers of the Crown. But the power of disallowing Acts passed by Colonial Legislatures is always exercised by the Crown upon the advice of its responsible Ministers in England; and all acts of the Crown performed upon such advice must, in accordance with the latest developments of parliamentary government in England, be regarded as executive acts. To regard or describe them as legislative would be contrary to all the well settled and unreservedly-accepted doctrines of the constitutional functions and privileges of responsible Ministers in England at the present day. If the right to veto a Bill passed by the Lords and the Commons should at any future time be exercised by the Crown it seems impossible to suppose that it would be exercised upon the advice of the Ministers who would occupy the position of responsible advisers to the Crown at the time. The only circumstance in which it has been suggested that the Crown's right to veto a Bill passed by the two Houses of the Imperial Parliament might be used again, would be at a time when the Crown found itself at variance with its responsible advisers. The suggestion of the use by the Crown of its power of veto in such circumstances is made by Mr. Disraeli in his *Life of Lord George Bentinck* in a passage quoted in Todd's *Parliamentary Government in England* (a). It is as follows:—"As a branch of the legislature, whose decision is final, therefore last solicited, the opinion of the Sovereign remains unshackled and uncompromised until the assent of both Houses has been received. Nor is this veto of the English Monarch an empty form. It is not difficult to conceive an occasion when supported by the sympathies of a loyal people, its exercise might defeat an unconstitutional Ministry and a corrupt Parliament." Whether such a contingency as that contemplated by Mr. Disraeli could possibly occur under the present system of Cabinet Government which exists in the United Kingdom or not, it is very clear that the power of the Crown to veto Bills assented to by both Houses of the Imperial Parliament would never, while the present system of Cabinet Government remains, be exercised in its fullest measure upon the advice of the Cabinet of the day, because any Bill which would be absolutely vetoed by the Crown must either have been supported by the members of the Cabinet in Parliament, or it must have been carried through Parliament in opposition to their wishes and against their votes, in which case they would resign before attempting to advise the Crown to override the decision of a Parliament which had been adverse to them.

It has been already stated that the power to disallow Bills passed by Colonial Legislatures is a statutory power conferred by Acts of the Imperial Parliament, and is always exercised by the Crown upon the advice of its responsible Ministers in England. This at once distinguishes the veto in such cases from the veto which the

Crown has a prerogative right to exercise in respect of Bills passed by both Houses of the Imperial Parliament; and the respective position and functions of the Crown and the Governor in relation to Colonial Parliaments are more intelligible, and will appear more consistent with the language of the Acts of the Imperial Parliament establishing Colonial Legislatures, and with the subordinate positions which those Legislatures occupy, if the power expressly conferred by the Imperial Parliament on the Crown to disallow their Acts is regarded as an executive and not as a legislative power.

There is one pertinent objection that can always be urged against regarding the Crown's power to disallow Acts of Colonial Legislatures as an executive act, viz., that there can be a negative as well as positive exercise of legislative power, as when one House of Parliament disagrees to a Bill passed by the other House, and that the veto of the Crown is a similar exercise of its legislative functions. But it must be also always remembered that the power conferred on the Crown by the Imperial Parliament to disallow Acts of the Colonial legislatures can be exercised any time within a period of two years after the Act has been passed and has been in actual operation. This peculiarity of the power in question distinguishes it very much from the power of disagreement inherently possessed by the different branches of a Legislature in regard to Bills which remain only proposals for new legislation until all the constituent branches of the Legislature have concurred in them, and transforms it into something very nearly approaching the power to repeal within a limited time an existing law without the concurrence of all the constituent branches of the Legislature which shared in the making of it. It is also to be noted that the *British North America Act 1867* confers on the Governor-General of Canada the power to disallow any Act of a Provincial Legislature at any time within one year after it has received the assent of the Lieutenant-Governor of the Province. It will not be argued from this fact that the Governor-General of Canada is a constituent part of those Provincial Legislatures of which, as in the cases of the Provinces of Ontario and Quebec, the Lieutenant-Governor is expressly declared by the *British North America Act 1867* (sections 69 and 71), to be a part. But if the Governor-General of Canada is not a part of each Provincial Legislature, then the exercise of his power to disallow any Act of a Provincial Legislature must be an executive function. On the other hand, if it should be contended that he is a part of each Provincial Legislature, such a contention would involve the assertion that a Colonial Legislature might consist of four branches, and by parity of reasoning it might be equally well contended that the Crown, by virtue of its power to disallow any local legislation within two years after its enactment, is a fourth branch of each Australasian Parliament of which the Governor is made by statute of the Imperial

Parliament a constituent part. Whether such a power of disallowance, or whether the power of veto in general, can be more properly described as legislative or executive, depends very much on the nature and extent of the powers and authority definitely allotted to the executive branch of the particular Government under consideration, and how far such a power may be regarded as necessary for the due preservation of other powers and functions belonging to the executive branch of that Government. Blackstone and Chitty, while describing the Crown's power to veto Bills agreed to by the Lords and Commons as a legislative power, regard it as being necessarily attached to the executive branch of the Government of England for the due protection and preservation of the strictly executive powers and privileges of that branch of the Government (*a*). Upon this view of the purpose and use of the veto power, it might with equal propriety be regarded and described as a part of the executive power itself; for whatever powers are conferred on any department of a Government for the due protection and preservation of the functions for the performance of which that department exists, or has been created, may surely be properly included among the distinctive and peculiar powers of that department. Many of the American commentators on the Constitution of the United States discuss the power of veto possessed by the President under that Constitution as an attribute of the executive department of the American Government. In this matter they are followed by Mr. Bryce, who regards the President as totally destitute of any legislative power, and as exercising the power of veto solely as an executive function. And in distinguishing the position of the King of England from that of the American President in regard to the veto power, he says, in his *American Commonwealth* (*a*), that "The King of England is a member of the English Legislature, because Parliament is in theory his Great Council which he summons and in which he presides, hearing the complaints of the people, and devising legislative remedies," and that "the term 'veto power' does not happily describe his right of dealing with a measure which has been passed by the Council in which he is deemed to sit, though in point of fact he no longer does sit except at the beginning and ending of a Session."

It is however, evident that a similar historical reason for regarding the right of the Crown to veto the Acts of a Colonial Parliament as a legislative power does not exist, because the Monarch never sat in person in any Colonial Legislature, and it would be scarcely consistent with a proper view of the dignity and exalted position, of the Monarch to make use of a fiction which would exhibit him as being a party to the Acts of a subordinate legislature any one of which might afterwards be disallowed by him in his executive capacity. Agreeably to Mr. Bryce's view of the position of the English Crown in relation to Parliament, everything done by or in the

name of the Crown in initiating legislation would be an exercise of the Crown's legislative power. But Mr. Disraeli, in his *Life of Lord George Bentinck*, makes a statement, quoted with approval by Todd in his *Parliamentary Government of England* (a), that “no Minister of the Crown can introduce a measure into either House without the consent of the Crown,” and “such consent is only given in the first instance *in the executive capacity of the Sovereign*.” This statement extends the executive functions of the Crown much more across the boundary line dividing them from its legislative powers, than the foregoing contention regarding the power of disallowance vested in the Crown in regard to the Acts of Colonial Legislatures may be supposed to do. Probably, whichever of the two theories of the character of the Crown's power of initiating legislation and of its power of veto is advocated will be found to involve some inconsistencies and illogical results, but the balance of argument appears to be in favour of making the Governor or Governor-General, instead of the Crown, a constituent part of a subordinate Parliament.

(a) See 7 Quebec Law Reports, page 380.

(a) See Hearn's *Government of England*, chapter 2.

(a) 2nd edition, page 392.

(a) “It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole of the legislative. The total union of them we have seen would be productive of tyranny; the total disjunction of them for the present would in the end produce the same effects by causing that union against which it seems to provide. The Legislative would soon become tyrannical by making continual encroachments and gradually assuming to itself the rights of the executive power. To hinder, therefore, any such encroachments, the Sovereign is a necessary part of the Parliament: and, as this is the reason of his being so, very properly, therefore, the share of the legislation which the constitution has placed in the Crown consists in the power of *rejecting* rather than *resolving*; this being sufficient to answer the end proposed.” —*Blackstone's Commentaries*, by Kerr, Vol. I., p. 139. “The executive power could not exist if the King had no share in the legislative authority; which would in such case make rapid encroachments on, and gradually assume, the reigns of government. The King is, therefore, very properly, a constituent part of Parliament; in which capacity he possesses the means of preserving inviolate his rights and prerogatives, as supreme executive magistrate, by withholding his assent at pleasure, and without stating any reason, to the enactment of provisions tending to their prejudice. It is, however, only for the purpose of protecting the regal executive authority that the constitution has assigned to the King a share in legislation; this purpose is sufficiently ensured by placing in the Crown the negative power of rejecting suggested laws.” —*Chitty on Prerogatives of the Crown*, p. 2.

(a) Volume 1, pages 71 and 72.

(a) Second edition, volume 2, page 391.

2. The Power of the Crown to Disallow Australian Legislation.

By the several Acts of the Imperial Parliament which have provided from time to time for the erection of local legislatures in the several Australian Colonies, power is reserved to the Crown to disallow at any time within two years thereafter any Bill which has been passed by the local legislature and has received the Governor's assent (*a*). The same Imperial Acts also provide that when any Bill is presented to the Governor for his assent he shall declare according to his discretion, but subject to the statutory provisions referring thereto, and to such instructions as may from time to time be given to him in that behalf by the Crown, that he assents to such Bill on behalf of the Crown, or withholds the Crown's assent to it, or that he reserves the Bill for the signification of the Crown's pleasure in regard to it. The Instructions which are issued to each of the Governors of the several States of the Commonwealth include specific directions as to the course to be followed by him in reference to several kinds of Bills which may be presented to him for the Crown's assent. But the instructions which have been issued to the Governor-General of the Commonwealth of Australia do not include any directions in reference to the granting or the withholding of the assent of the Crown to any Bill, and the matter is left entirely as it stands under section 58 of the Constitution, which provides that:—

“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.

“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.”

Section 59 provides that:—

“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.”

And section 60 provides 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-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.”

The reservation of a Bill by the Governor-General of the Commonwealth, or by the Governor of a State, for the signification of the Crown's pleasure in reference to it, is a matter which is entirely in his own discretion, and it is seldom that the circumstances in which that discretion is exercised permit any comment or criticism upon it. But the action of the Secretary of State for the Colonies in regard to a Bill which has been reserved by the Governor has frequently been the subject of correspondence and discussion between the Colonial Office and the Ministers in the colony in which the Bill originated, and in the following correspondence, which took place in reference to a Bill reserved by the Governor of Tasmania, the question of the extent to which the local legislation of an Australian colony ought to be subject to disallowance by the Crown in view of the plenary legislative powers conferred by the Imperial Parliament upon the Parliaments of the several States of the Commonwealth is directly considered.

FOREIGN COMPANIES BILL, 1895.

Tasmania.

No. 3.

Downing-street, 31st January, 1896.

My Lord,

I have the honour to acknowledge the receipt of your Despatch No. 44 of the 28th of September, last, enclosing a Bill intituled "An Act to enable certain Foreign Companies to carry on Business and to sue and to be sued in Tasmania," which you had reserved for the signification of Her Majesty's pleasure on account of objections to Clauses 19, 20, and 21.

I caused your Despatch to be referred to the Board of Trade, which, as you are doubtless aware, is the Department concerned with Joint Stock Companies, and I now enclose for communication to your Ministers a copy of a letter from that Department pointing out some weighty objections against the new principle of allowing payment in full to local creditors, to the injury of creditors outside the Colony, which is embodied in Clause 21.

I concur in their view, and have decided to defer tendering any advise to Her Majesty with regard to the Bill until your Ministers have had an opportunity of considering this letter from the Board of Trade.

With regard to Clauses 19 and 20, to which the Board of Trade also refer, there are no doubt special reasons for making Trustees and Executors' Companies deposit caution-money, as is proposed in these clauses; but, if the deposit is to be applied solely to the benefit of the local creditors, who might thus gain payment in full or a larger dividend on winding up than creditors elsewhere, Clause 20 becomes open to the same objections of principle as Clause 21, and appears equally to require

reconsideration.

I have the honour to be,
My Lord,
Your Lordship's most obedient, humble Servant,
J. Chamberlain.

*Governor the Right Honourable Viscount Gormanston,
K.C.M.G., &c.*

Copy.

R 22769.

*Board of Trade (Railway Department), 7 Whitehall Gardens, London, S.W.,
10th January, 1896.*

Sir,

With reference to your letter of the 4th December last (No. 19368/95), forwarding copy of an Act passed by the Legislature of Tasmania, intituled "The Foreign Companies Act," together with copy of a despatch by His Excellency the Governor of Tasmania relating thereto, I am directed by the Board of Trade to inform you that they have carefully considered Clauses 19, 20, and 21 of the Act, and I am to submit the following observations thereon for the information of the Secretary of State.

1. Dealing, in the first place, with Clause 21, the Board of Trade concur in the opinion expressed by Lord Gormanston to the effect that this clause would prejudicially affect the rights of Her Majesty's subjects residing out of the Colony. Under the laws at present in force throughout the Empire, so far as the Board of Trade are aware, the right of all persons to associate together for trading purposes without distinction as to residence, and the right of the various classes of creditors to rank on equal footing without such distinction in the distribution of the assets of a bankrupt company, partnership, or individual, are clearly recognised. But, if the clause in question became law, a serious disability would be imposed upon the exercise of such rights by all persons residing outside Tasmania, which would probably result in a practical monopoly as regards the formation of companies, and in an undue preference in the distribution of assets in case of insolvency being established in favour of residents in the Colony. The interests of the trading community in the United Kingdom, and in all other British Colonies and Dependencies, might thus be prejudiced.

2. The Board of Trade are further of opinion that such legislation would also prejudice the interests of the majority of the residents in Tasmania, by preventing the free flow of capital into the Colony, thereby retarding the development of its resources; and that any benefit which might accrue from the creation of a local monopoly would be confined to those engaged in conducting joint stock enterprise,

and would be obtained at the expense of the general inhabitants of the Colony.

3. Further, if the principle contended for were admitted in the case of Tasmania, it would probably be difficult to resist similar legislation in the case of other Colonies, should they desire it; while such enactments would not improbably lead to a demand for legislation in the United Kingdom to guard against the practice of Colonial Companies which were thus founded upon a monopoly coming to this country for the purpose of obtaining capital to be employed in the Colonies. It is hardly necessary to point out that such a result would not only be injurious to Colonial interests, but would tend to the erection of a barrier against free commercial intercourse between the various branches of the British Empire.

4. The Board of Trade also concur in the view expressed by the Governor of Tasmania, that there is no real analogy between restrictions imposed by the Legislature on the conduct of the business of life assurance and similar restrictions upon ordinary trading and banking business. Apart from the fact that Governments have found it necessary to enact special legislation with regard to the former, having regard to the special character of the business of life assurance, and to the need for protecting the interests of large masses of the population who, without such legislation, have no adequate means for judging of the trustworthiness of such institutions, and who, owing to the long periods over which the risks extend, are practically powerless to protect themselves against reckless and imprudent management, it should be pointed out that a Foreign Company engaging in the business of life assurance in Tasmania is not likely to have any large amount of its funds invested in the Colony, and that the giving of a preference to the local creditors in the distribution of local assets is not therefore likely to confer any material advantage upon them: whereas, in the case of English trading, and more especially of English banking companies establishing themselves in Tasmania, the very nature of the business carried on by such companies implies that they would employ capital raised elsewhere for local purposes, and would thus, under the proposed legislation, afford to local creditors an altogether disproportionate share in the distribution of the company's assets in the event of liquidation.

It is unnecessary for the Board of Trade to offer any opinion upon the policy of Section 11 of the Tasmanian "Life Assurance Companies Act, 1874," which confers a preference on local creditors in the distribution of the assets of a liquidating Assurance Company, beyond pointing out that it differs from English legislation, which in no case permits of a preference to English creditors, and that any justification for such a provision must be sought for in the special circumstances affecting life assurance already referred to, and could not therefore, on grounds of analogy, be extended to similar provisions affecting ordinary trading and banking

companies.

5. The considerations affecting Clauses 19 and 20 of “The Foreign Companies Act” are of a somewhat different character. Clause 19 applies exclusively to a foreign company carrying on business in Tasmania as a Trustee and Executors' Company, and requires a local deposit of £5000, which is apparently to be appropriated as a security for the payment of local liabilities, but which may be replaced at the option of the company by the acquisition and registration of “secured assets” within the colony of £15,000; and Clause 20 provides that such secured assets shall continue to be invested in Tasmania, and shall, in the event of the company being wound up, be available for the payment in priority of local claims.

6. No doubt the Secretary of State will decide how far the business of a “Trustee and Executors' Company” brings it within the category of companies carrying on a special business which justifies the application of special legislation in the interests of the public, and how far it is desirable in that case to distinguish betwixt companies having their head office and business in Tasmania, where they are subject to local supervision and control, and companies having their head office and the chief portion of their business elsewhere, and not therefore subject to such supervision and control. In the event of his coming to the conclusion that such companies fall within the special class referred to, then, on the analogy of the Tasmanian Life Assurance Act, there would appear to be no objection to the principle involved in these clauses, although it would be more in accordance with the general principles of legislation adopted throughout the British Empire to apply the provisions in question to all companies carrying on business in Tasmania without reference to the question whether their head offices were situated in Tasmania or elsewhere.

7. As further bearing upon this question, I am to enclose copy of an extract from the official report of a Judgment delivered in the Supreme Court of Adelaide by the Chief Justice of South Australia upon a claim, by local creditors of the Federal Bank of Australia, Limited, to a preferential treatment over creditors outside the Colony; and in which the law of that Colony is not only stated to be opposed to such claims, but some of the arguments against the desirability of amending the law in the direction indicated are also pointed out.

I have, &c.,

Courtenay Boyle.

The Under Secretary of State, Colonial Office.

(Extract) R. 22,769.

In the matter of the Federal Bank of Australia, Limited.

Extract from a Transcript of the Official Report of the Judgment delivered in the

Supreme Court at Adelaide, by His Honor the Chief Justice (Hon. S. J. Way, D.C.L.), on the hearing of an Application to determine the right of Foreign Creditors to an equal participation in the assets collected in the South Australian Colony.

“It is the example of Brazil. The adjacent Republic of Paraguay has been thought a suitable field for carrying out certain social experiments, but I think that in South Australia we should require something more definite on the subject before we come to the conclusion that the law in Brazil with respect to the rights of foreign creditors is desirable to be followed here. For example, as Mr. Symon has pointed out, the Federal Bank has about a million of Scotch money to carry on business in Australasia. It is exceedingly unlikely that a single sixpence of that money would have found its way to these southern countries if our northern friends had thought it possible that the local creditors would receive a preferential claim upon the assets for payment of their debts in the event of a compulsory winding up of the institution to which their money was advanced. Further, it does not require a very powerful imagination to see that, quite apart from stopping the flow of capital into these Colonies, a provision of that kind might be locally disastrous, because, if it is the law of South Australia that the assets of a company are to be divided among South Australians, a law of that kind would probably be imitated in other Colonies, and it would not be to the interest of South Australian creditors, in the absence of local assets, to be shut out from participating in Victorian assets sufficient, it might be, to pay 20s. in the £.”

Transmitted to the Honourable the Attorney-General.

Wm. Moore, *for Premier, absent.*

9th March, 1896.

Perused and returned. See Memorandum forwarded herewith.

A. Inglis Clark.

7th May, 1896.

Attorney-General's Office, Hobart, 7th May, 1896.

Memorandum for The Honourable the Premier.

I have perused the Despatch of the Right Honourable the Secretary of State for the Colonies to His Excellency the Governor in reference to the Bill, intituled “An Act to enable certain Foreign Companies to carry on Business and to sue and be sued in Tasmania,” which was passed by both Houses of the Tasmanian Parliament last year, and which was reserved by His Excellency for the signification of Her Majesty's pleasure thereon; also the communication from the Board of Trade to the Secretary of State for the Colonies upon the same Bill; and I deem it to be my duty to make the following observations upon the objections urged by the Governor and the Secretary to the Board of Trade to Clauses 19, 20, and 21 of the Bill.

1. I adhere to the opinion which I expressed in the Memorandum I addressed to His Excellency in reference to the Bill when I transmitted it to him for his assent thereto on behalf of Her Majesty, which opinion was, that none of the provisions of the Bill could be properly regarded as coming within the purview of that portion of the Governor's Instructions which require him to reserve for the signification of Her Majesty's pleasure any Bill by which the property or rights of Her Majesty's subjects residing out of the Colony could be prejudicially affected, because the Bill expressly continued the existing law with regard to all British Companies now carrying on business in the Colony, and, the operation of the Bill being necessarily confined to Tasmania, it is impossible that any of its provisions could prejudicially affect rights which have never been acquired by companies that have no existence of any kind in the Colony. The argument that the Bill would place non-resident creditors of any British Company which might hereafter establish a business in Tasmania in a different position from that which they would occupy under the existing law in relation to the distribution of the local assets of such a company in the event of it being wound up in consequence of its inability to pay its debts, and would therefore prejudicially affect the rights of such creditors, could be urged with more or less relevancy and force against every Act of the Parliament of Tasmania which has made the laws regulating the enforcement of claims against debtors and the acquisition and devolution and enjoyment of property within Tasmania different from the law of England and other portions of the Empire in regard to the same subjects. But the power to make such laws is clearly conferred upon the local legislature by the Act of the Imperial Parliament for the better government of Her Majesty's Australasian Colonies (13^oree; & 14^oree; Vict. cap. 59), and has been exercised by numerous Acts of the Tasmanian Parliament which have received Her Majesty's assent without question; and any attempt to restrict that power in any particular by means of Her Majesty's veto cannot fail to be regarded with serious apprehension, not only by the people of Tasmania, but also by the people of all the other Australasian Colonies; and I therefore deem it desirable that the Honorable the Premier should forward copies of the Bill in question and of the Despatch of the Secretary of State for the Colonies thereon, and of this Memorandum, to the Governments of all the other Australasian Colonies for their consideration.

2. The Secretary to the Board of Trade seems to regard the existing rights of non-resident creditors in relation to the distribution of the assets of a foreign country in this Colony as if they constituted or were included in a special class of rights created or confirmed and guaranteed by a law operating throughout the Empire with a continuity and entirety of territorial authority similar to that possessed by laws expressly made by the Imperial Parliament for the whole of Her Majesty's

Dominions; but no such law exists regulating the formation and dissolution of joint stock companies and the distribution of their assets among their creditors throughout the Empire; and any attempt to assert the existence of such a law, and to enforce its observance in the Australasian Colonies by an exercise of the Royal prerogative of veto upon the acts of their Legislatures, would be clearly an attempt to curtail the jurisdiction now possessed and exercised by all the Australasian Parliaments upon that subject, and, therefore, a supersession *pro tanto* of the legislative authority solemnly conferred upon them by the Imperial Parliament, and which has always been regarded by the people of the Australasian Colonies as granted without any intention of abridgment in any future contingency.

3. The opinion of the Board of Trade, that such legislation as that proposed by the Bill in question would prejudice the interests of the majority of the residents in Tasmania by preventing the full flow of capital into the Colony, and thereby retarding the development of its resources, may be well founded; but the Parliament of Tasmania, elected by the people of the Colony, ought to be the best judge of what is beneficial and what is detrimental to the interests of the people it represents, and I am not aware that the Board of Trade is in any better position than the local Legislature to arrive at a safe conclusion upon the matter.

4. The assertion of the Secretary of the Board of Trade, that English banking companies establishing themselves in Tasmania would employ capital raised elsewhere for local purposes, is directly contrary to fact in regard to the English banking companies hitherto established in Tasmania, and now carrying on business here. All such banks have made a constant practice of receiving at fixed deposits very large sums of money from persons resident in Tasmania and sending it outside the Colony for investment and their indebtedness to residents of the Colony has always been largely in excess of their assets in the Colony.

5. The extract from the Judgment of Chief Justice Way in the Supreme Court of South Australia, on the hearing of an application to determine the rights of foreign creditors to an equal participation in the assets of the Federal Bank collected in that Colony, clearly states the existing law upon the subject, and contains his own opinion as to the benefit of it in view of the commercial and financial interests that have taken root and grown up under it there. But I have already pointed out that the chief reason he gives for the beneficial operation of the existing law in South Australia, viz., the influx of foreign capital into that Colony through the medium of banking companies incorporated outside the Colony, does not apply to Tasmania, where the English banks have been the channels of a constant outflow of capital from the Colony.

I may also observe, that the convenience or benefit of a law in regard to interests

and conditions that have arisen under it is not a valid argument against an alteration of it, to which future commercial and financial transactions may be reasonably expected to adapt themselves in the future, as they have adapted themselves to the existing law in the past, so long as the existing law is preserved in regard to rights and interests that have arisen under it, as the Bill in question expressly provides shall be done.

6. The insular position of Tasmania, and the smallness of its population in comparison with the larger colonies on the Australian Continent, together with its proximity to them, and the very heavy customs duties which all of them, with the exception of New South Wales, have from time to time levied upon Tasmanian products, have created in this colony commercial and industrial conditions peculiar to itself; and the present law regulating the distribution of the local assets of a joint stock company incorporated in the other colonies and carrying on business in Tasmania has been found from past experience to enable such a company to remove out of the jurisdiction of our Courts, to the detriment of local creditors, assets in which those creditors believed that they had security for their claims against the company, and in view of which they gave credit to the company and afterwards refrained from taking proceedings to enforce payment of those claims prior to the commencement of proceedings for the winding up of the company in the colony in which it was incorporated. The necessity of an alteration of the law for the protection of local creditors in such circumstances is a matter upon which the Tasmanian Parliament may legitimately claim to be the proper judge and the safest guardian of the interests of the people who elect it.

I subjoin a copy of the Memorandum which I addressed to the Governor upon the Bill when I transmitted it to him for his assent last year.

A. Inglis Clark,
Attorney-General.
[COPY].

A Bill to enable certain Foreign Companies to carry on Business, and to sue and be sued, in Tasmania.

When this Bill was presented to the Governor in the first instance for the Royal Assent, a question was raised in regard to the operation of the provisions of section 21 upon the local assets of certain Banking Companies which had been incorporated in the United Kingdom under Royal Charter or Act of the Imperial Parliament for the express purpose of carrying on business in Australasia, and His Excellency was of opinion that in regard to those and other similar Companies the provisions of section 21 might be held to come within the purview of that portion of his Instructions which refers to Bills by which the rights or property of British subjects

not residing in the colony may be prejudiced, and the Governor was advised to send a message to the Houses of Parliament recommending the insertion of a proviso which exempts all Companies incorporated in Great Britain or Ireland, and now carrying on business in Tasmania, from the operation of section 21. That proviso having been inserted, I am of opinion that the Bill in its amended form does not contain anything which prevents the Governor giving his assent to it consistently with his Instructions.

Any British Company that may hereafter establish a business in this Colony will place itself voluntarily under the provision of the new law, and therefore cannot be said in the language of the Instructions, to be "*Prejudiced*" by it.

It is also to be observed that the Instructions refer in this connection to "*any Bill of an extraordinary nature and importance,*" by which is evidently meant any Bill making a new departure from the ordinary and usual course of legislation; but this Bill only extends to other Foreign Companies the same law which has been in force for many years in Tasmania and in the other Australasian Colonies in regard to Foreign Life Assurance Companies, and the same reasons which make it desirable to protect the local creditors of the last-mentioned companies to the full extent of the local assets of those companies make it equally desirable to protect the local creditors of other Foreign Companies to the same extent.

For these reasons, I am of opinion that there is no objection to the Royal Assent being given to this Bill.

(Sd.) A. Inglis Clark.

Attorney-General's Chambers, Hobart.

30th September, 1895.

His Excellency the Governor of Tasmania.

Attorney-General's Office, Hobart, 6th June, 1896.

Memorandum for the Honourable the Premier.

In re the Foreign Companies Bill.

Since I transmitted to the Honourable the Premier my previous Memorandum upon the correspondence which has taken place between his Excellency the Governor and the Secretary of State for the Colonies in reference to the Foreign Companies Bill, I have ascertained that *The British Companies Act of 1886* of the Colony of Queensland contains a provision that all land held by any British Company in that Colony in the event of the Company being wound up or made bankrupt shall be primarily liable for the payment of debts incurred by the Company within the Colony.

The principle of this provision is exactly the same as that of the provisions in our Bill to which the Governor and the Secretary to the Board of Trade have been

pleased to take exception.

I also find that the assets of British Banking Companies in the Colonies of Victoria and South Australia have been made primarily liable by the legislation of those Colonies for the satisfaction of the claims of a particular class of local creditors in the event of the Company being wound up or made bankrupt. (See *Banks and Currency Statute* 1890, of the Colony of Victoria, and the previous *Banks and Currency Amendment Statute* 1887 of the same Colony, and the *Bank Notes Security Act* 1890 of the Colony of South Australia).

These additional examples of similar legislation in other Australasian Colonies confirm the statement I have already made in regard to the bill now under consideration when I directed the Governor's attention to the legislation of all the Australasian Colonies in regard to Foreign Life Assurance Companies,—viz., that the Bill in question does not come within the purview of that portion of the Governor's Instructions which refers to "*any Bill of an extraordinary nature,*" and they can only increase our surprise at the unusual action that has been taken in regard to it.

A copy of the Governor's despatch which accompanied the Bill when he transmitted it to the Secretary of State for the Colonies for the signification of Her Majesty's pleasure thereon has not been forwarded to me with the other correspondence upon it. I am of opinion that the Premier is entitled to be supplied with a copy of the Despatch.

A. Inglis Clark,
Attorney-General.
(No. 24.)

(*In continuation of Paper No. 24.*)

Tasmania.

No. 22.

Downing-street, 7th October, 1896.

My Lord,

I have the honour to acknowledge the receipt of your Despatch No. 24 of the 27th of June, with its enclosures, on the subject of "The Foreign Companies Act," which you reserved for the signification of Her Majesty's pleasure.

The Bill will be submitted for the Queen's assent at the next meeting of the Privy Council.

I retain my opinion as to the unsoundness of the principle involved in the clauses which have formed the subject of the recent correspondence; but having explained to your Ministers the objections which are entertained to the clauses in question, and having learnt that these objections do not alter the views of your Ministers, I shall

advise Her Majesty to give her assent to the Bill.

I have the honour to be,

My Lord,

Your Lordship's most obedient, humble Servant,

Selborne,

for the Secretary of State.

Governor The Right Honourable Viscount Gormanston,

K.C.M.G., &c.

(a) See 5 & 6 Vic. chap. 76, 7 & 8 Vic. chap. 74 and 13 & 14 Vic. chap. 59.

3. The Commonwealth and the Judicial Committee of the Privy Council.

After the Bill to establish the Commonwealth of Australia had received the approval of a majority of electors in each of the colonies in which the Bill had been previously submitted to the popular vote and had been transmitted to England for enactment by the Imperial Parliament, the only portion of it that elicited discussion either in England or in Australia was the provision that prohibited any appeal to the Crown in Council from any judgment of the High Court “in any matter involving the interpretation of this 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.” The advocates and supporters of this restriction of the right of appeal to the Crown in Council were in perfect accord with the opponents of it in regard to the benefit of securing uniformity of judicial declaration and interpretation of law throughout the Commonwealth in respect of all laws that were common to all the States. But when the advocates of an unrestricted right of appeal to the Crown in Council from all judgments of the High Court asserted that not only ought provision to be made in the Constitution for uniformity of declaration and interpretation of law throughout the Commonwealth, but that the Constitution should provide as far as possible for the continuance of “unity of law over the whole Empire,” they argued for the maintenance of something that never had existed, and for something which the establishment of the Commonwealth of Australia could not produce. Unity of law cannot exist without unity of legislation; and within the British Empire there are upwards of a score of separate legislatures competent, and frequently compelled by local circumstances, to make divergent and contrary laws upon many of the subjects that supply questions for judicial determination. Within the United Kingdom itself two distinct bodies of law are in force on the opposite sides of the river Tweed; and if a separate court of final appeal existed in Scotland for the determination of all questions of purely Scotch law, neither the unity of the Empire nor imperial interests could be detrimentally affected by its decisions.

A very practical and substantial objection to any right of appeal to the Crown in Council from appellate judgments of the Court of final resort in Australia is the increase in the delay and cost of litigation that would be involved in the addition of another tribunal to the several courts before which a litigant may have been previously compelled to appear; and the Bill prepared by the Convention of 1891, in accordance with the concurrence of the majority of the Convention upon the validity

of this objection, prohibited all appeals to the Crown in Council from appellate judgments of the Supreme Court of the Commonwealth except in cases in which the public interests of the commonwealth or of any State or other part of the Crown's Dominions might be concerned, in which cases the Bill provided that the Crown could grant special leave to appeal to the Privy Council. But until the Parliament of the Commonwealth should have abolished the existing right of appeal to the Crown in Council from judgments of the Supreme Courts of the several colonies, the Bill of 1891 allowed a litigant in the Supreme Court of any State to appeal immediately to the Crown in Council if he chose to do so; but it precluded any intermediate appeal to the Supreme Court of the Commonwealth with an ultimate appeal to the Privy Council. The assertion which was frequently made in the course of the discussion upon the question of the right of appeal from judgments of the High Court, that to refuse to litigants in the Supreme Court of any State the right of such a double appeal would be to dispossess them of a right enjoyed by all the other subjects of the Queen in all parts of the Empire outside of the Commonwealth, is as incorrect as the assertion made by the late Mr. Justice Richmond of New Zealand, that the establishment of a court of final resort in Australia whose decisions would not be subject to review by the Judicial Committee of the Privy Council would degrade the Australian courts by causing them to "sink from the position of Imperial to merely local tribunals." So long as Australia continues to be a portion of the British Empire, and subject to the paramount authority of the British Parliament, every court in Australia will derive its authority from that Parliament, either directly, as in the case of the High Court of the Commonwealth, or indirectly through local legislatures which exercise such legislative powers as that Parliament has conferred upon them. If the right of litigants to appeal from the judgments of a colonial court to the Judicial Committee of the Privy Council is necessary to make the colonial court an Imperial tribunal, then in every case in which such right of appeal does not exist, in consequence of the smallness of the value of the subject matter of the litigation, the court ceases for a time to be an Imperial tribunal and becomes purely local in its character. The prerogative right of the Crown to grant special leave of appeal in such cases does not preserve the imperial character of the court in any greater degree than it is preserved by the power of the British Parliament to intervene with some other mode of redress. To seek redress from either source is to invoke the intervention of an authority which is an immediate organ of the sovereign power of the Empire. In the one case redress would be administered by legislation and in the other it is granted in accordance with existing law; but in neither case is the authority which is invoked under any legal obligation to act; and when the Crown grants special leave to appeal, it exercises the residue

which it retains of the original and inherent judicial authority which it possessed before courts were erected and judges were appointed to act in its name. The fact that this residue of the original and inherent judicial authority of the Crown is now exercised by a Committee of the Privy Council does not remove the Crown in such a case from the position of an immediate organ of sovereign power, any more than the exercise of the prerogative power of mercy and pardon by a responsible Minister removes the Crown from that position. In the last-mentioned case the sovereign power through its immediate legislative organ has prescribed the punishment and only the same power can release a convicted culprit from it; and therefore the authority which at its own discretion, and without the co-operation of any other organ of the sovereign power, releases the culprit from the penalty of his crime, cannot be anything less than an immediate organ of that power. It is to the same immediate organ of the sovereign power of the Empire that application is made for special leave to appeal from the judgment of a colonial court, and so long as the courts of the Commonwealth of Australia shall continue to be subject to the control of the sovereign power of the Empire, as exercised through the immediate legislative organ of its will, their judgments must be declarations of its will, whether it makes them subject to review by the Crown as the immediate judicial organ of its will or not.

The further assertion of the late Mr. Justice Richmond that a colonial court whose decisions would not be subject to appeal to the Crown in Council could not exercise jurisdiction over the Governor of the colony in which the court was established, in order to determine whether any official act done by him was within the limits of his authority, implies that the powers and jurisdiction of any colonial court established under the authority of any Act of the British Parliament, or of any Charter or Royal Letters Patent, are extended beyond the definition and description of them expressly inserted in such instrument, by force of the provision which confers upon litigants a right of appeal from the judgments of the court to the Crown in Council; and that the excision or abrogation of the right of appeal would reduce the powers and jurisdiction of the court below the express definition and description of them contained in the instrument. Surely such an assertion must have been made in a moment of forgetfulness and under a temporary misapprehension of the status of colonial courts deriving their existence directly from Imperial authority.

If an universal right of appeal to the Crown in Council was possessed by every litigant in every court of the Empire, irrespective of the nature of the litigation or the value of the subject matter, there would be some force in the argument that to remove that right from the litigants in some of the courts of the Empire would be to derive these courts of a feature which marked their Imperial origin and character;

but the alleged universal right of appeal to the Crown in Council possessed by all its subjects in all parts of its dominions is as mythical as the alleged unity of law over the whole British Empire. The inhabitants of England, Scotland, and Ireland do not possess it. Their final court of appeal is the House of Lords, whose appellate jurisdiction is not exercised as a part of the Royal Prerogative, as is the appellate jurisdiction of the Privy Council.

In the course of the discussion which took place in Australia upon the proposed restriction of the right of appeal to the Crown in Council the Chief Justice of South Australia (Sir Samuel Way) referred to what he described as “the familiar arguments as to the necessity of maintaining uniformity of judicial decisions throughout the Empire.” The practical necessity of maintaining uniformity in the decisions of all the courts which administer in the same territory the law of a single legislative authority is too obvious to require any argument to support it. But the necessity for uniformity in the decisions of courts which administer divergent as well as similar laws in separate territories within which distinct legislative authorities enact the laws, is not an equally obvious and incontestable proposition. Nor is uniformity in judicial decisions an obvious and indisputable desirability in the case of two communities which may have to-day only one legislative authority to make laws for them, but in which two distinct bodies of law of different historical origins are in force. If in such a case there has been long acquiescence in divergent applications of substantially similar legal doctrines in the two communities, the subsequent enforcement of uniformity in the application of them might be very disturbing in its effects upon one or both of the communities and very detrimental to the sentiment of respect for the administration of the law. Every successful attempt by a supreme appellate tribunal in such a case to enforce uniformity of judicial decisions upon the two communities will necessarily diminish in one or both of them that confidence in the certainty of its law which is of infinitely more value to any community than the uniformity of its jurisprudence with that of another community. We have testimony of one of the most eminent of living jurists in England that on one occasion, at least, the House of Lords, in order to make the jurisprudence of the two countries uniform, forced upon the reluctant courts of Scotland a doctrine which was not supported by any judicial decisions in that country and which had only a short line of judicial authority to sustain it in England (*a*). Within twelve years afterwards, the rule which, as Lord Chelmsford admitted (*b*), eminent Scotch Judges had declared to be the law of Scotland, but which the House of Lords had declared not to be the law of that country, was made the law of the whole United Kingdom of Great Britain and Ireland by legislation (*c*).

In cases which involve the interpretation of an Act of the Imperial Parliament

which is in force over the whole of the Empire, such as *The Merchant Shipping Act*, the argument for uniformity of judicial decisions in all the courts of the Empire is very strong. But it is highly improbable that in any such case there would be a divergence in the decision of the High Court of Australia from the decisions of the courts in England, and the simple possibility of such a contingency is not sufficient to decide the whole question of the desirability of investing the High Court of Australia with finality of jurisdiction.

In the United States of America the Supreme Courts of the different States have given divergent interpretations of similar laws and have made divergent declarations of the common law in relation to similar facts; but the Federal Supreme Court has never attempted to enforce uniformity of decision in the courts of the several States when it has been required to review divergent judgments from different States, and the divergence in the judgments has not involved the interpretation of the Constitution or of an Act of Congress. There may be some inconveniences attending this practice in the United States, but a compulsory uniformity of judicial decisions in all the States would have retarded that expansion of legal doctrines to meet the exigencies of social and industrial development which has marked the decisions of the American courts and which, as a result of the existence of separate courts of final resort administering the English common law, has aided the elucidation and application of its principles in its original home in the mother country and in the colonies to a much greater extent than American decisions subject to review by an appellate tribunal in England would have contributed to the same process.

For a long time after the establishment of the independence of the United States the bench and bar in England seemed to deliberately ignore the study and application of the principles of the English common law that were being daily made in the American courts, and to prefer to seek assistance in the solution of new problems in jurisprudence from the law and practice of any European nation rather than among their kin across the sea. But the erudition and intellectual power of Story and Kent at last compelled recognition from the courts and lawyers in England, and the reports of the cases heard and decided by the English courts during the last fifty years abound in citations of American authorities. In the case of *Steel v. Dixon* (a) Fry, L.J., said that in coming to the conclusion at which he had arrived in that case he was much strengthened by the American cases which had been cited at the bar. As early as the year 1837 we find the court of Queen's Bench following the lead of American decisions on a question that had not been previously decided in England (b). A few years earlier the same court had decided a question in the law of marine insurance upon which there was not any previous reported authority (a), and a short time afterwards Mr. Justice Story sitting in an American court decided the

same question in a contrary direction. When Lord Denman, C. J., who had delivered the judgment in the English case, read Story's judgment he said that it would "at least neutralize the effect" of the English decision and induce the English courts "to consider the question as an open one" (*b*). If the decision of the American court had been subject to review by an appellate court in England, the previous decision of the court of Queen's Bench would have been an authority from which the American court would have found it as difficult to dissent as an Australian court would find it to be in like circumstances, and the strong probability is that Story's powerful argument in support of the opposite view would never have been delivered.

In delivering judgment of the court in the case of *Beverley v. The Lincoln Gas Light and Coke Co.*, Mr. Justice Patteson said that there were "obvious circumstances" which justified the American courts in advancing with a somewhat freer step to the discussion of ancient rules of the common law than would be proper for the courts in England; and the same statement can be made with equal truth and force in regard to a modification of the ancient rules of the common law by the courts in Australia. But there is not any guarantee that those "obvious circumstances" will always be visible to a tribunal at the other side of the world, or that it will always properly appreciate the consequences of a rigid application to them of an ancient rule of law. On the contrary, if the members of that tribunal attach the same urgent importance to a compulsory unity of law for the whole Empire as the Australian advocates of it have attached to it, they will deliberately disregard any local circumstances that may suggest the utility of a divergence in the application of the rules and doctrines of the common law in Australia from the uniform course of judicial decisions in England. Only absolutely beneficial results could demonstrate the wisdom and justice of following such a course. But unity of law, like all other human institutions, is subject to limitations in its capabilities of beneficial service, and if these are ignored and it is regarded as a fetich which has a mysterious efficacy to prevent the evolution of such distinctive conditions in different portions of the Empire as would otherwise arise and justify variations in the application of ancient rules and doctrines of social conduct and legal liability, the result will be more injurious than beneficial to the community in which it will become visible.

The illustrations afforded by American decisions of the contributions which may be made to the more perfect elucidation and application of legal rules and principles by the existence of different courts administering homogeneous bodies of law in different territories, and not under the control of any appellate tribunal having authority to make their judgments uniform, are not confined to cases where divergent decisions have been given. The most competent court may fail in an

attempt to extract the true rule or doctrine from a number of previous decisions scattered over a long period of time, or may fail to give the best and truest reasons for its own decision in a case of first impression; but when the judgment of a court of final resort has been delivered, with reasons for it, those reasons will be repeated for a long period of time in reference to every new set of facts to which the rule of law expressed in the judgment is applied, although in many cases they may be manifestly inadequate to support the rule. But another independent court of final resort may subsequently give the best and truest reasons for adopting the rule, and thereby secure a more discriminating and satisfactory application of it in future cases. An illustration of a contribution of this character made by an American court to the elucidation and application of a doctrine of the English common law is furnished by the history of judicial decisions in England upon the question of the liability of a master for injuries received by one of his servants through the negligence of another servant employed by the same master. The first reported decision of an English court upon this question is the judgment in the case of *Priestley v. Fowler*(a), and the reasoning upon which it was based was subsequently regarded as not entirely satisfactory. But a few years later a similar decision was given by the Supreme Court of Massachusetts, in a judgment which Sir Frederick Pollock characterises as “the fountain head of all later decisions” upon the question, and which the President of the Probate and Admiralty Division of the High Court of Justice in England has described as “the great judgment of Shaw, C.J., of Massachusetts, which no doubt materially influenced the House of Lords in reversing the decision of the Court of Session” in the case of *Bartonshill Coal Co. v. Reid*(b). The importance attached to the judgment of the American court by the House of Lords in the case above mentioned is proved by the fact that the judgment is inserted in full in the volume of the official reports which contains the judgment of the House of Lords in which the judgment of the American court is mentioned(c).

One of the observations made by Sir Samuel Way was that “it is not easy to understand what constitutional questions arising in Australia will not be as intelligible to judges experienced in the varied laws of all parts of the Empire as to judges with an exclusively Australian training.” It is not to be supposed that he is prepared to say that if the Judicial Committee of the Privy Council could have been made the final court of appeal for the United States after they became an independent nation it would have proved so good a tribunal for the interpretation of the American Constitution as the American Supreme Court under the lead of Chief Justice Marshall proved itself to be. But under the Constitution of the Commonwealth of Australia questions will arise for judicial determination which will be as foreign to the experience of judges with an exclusively English training as

any of the questions that have arisen under the Constitution of the United States for decision by the Supreme Court of that country have been. It cannot be disputed that in all the departments of English law which are represented in the large majority of the cases which are decided in the English courts the active members of the English bar obtain much more experience than the lawyers of Australia, and that such wider experience produces more perfect masters in each of those departments. But in the interpretation of the Constitution of the Commonwealth of Australia the members of the bar in England would have only the small amount of practice which would arise out of appeals from the judgments of Australian courts. The larger experience in the constitutional law of the Australian Commonwealth will be obtained by Australian lawyers, and the experts and masters in it will be found among them.

An example of the manner in which lawyers in England, whose training and experience in the consideration and application of questions of constitutional law have been acquired exclusively in the United Kingdom, may be expected to treat questions involving an interpretation of the Constitution of the Commonwealth of Australia, is exhibited in the Letters Patent which purport to create the office of Governor-General of the Commonwealth, and in the Commission which purported to empower the Duke of Cornwall to open the first Parliament of the Commonwealth. The question of the legality of the Letters Patent has been discussed in the chapter on the Governor-General(*a*). In the Commission under which the Duke of Cornwall purported to open the first Parliament of the Commonwealth, His Majesty the King declares that “We . . . by the advice of our Council, do give and grant, by the tenor of these presents, unto the said George Frederick Ernest Albert, Duke of Cornwall and York, full power in our name to begin and hold the first Parliament of our said Commonwealth of Australia, and to open and declare and cause to be opened and declared the causes for holding the same, and to do everything which for Us and by Us shall be therein done.” Section 61 of the Constitution of the Commonwealth declares that “The executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen's representative,” and section 5 provides that “The Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit.” If the opening of the Parliament of the Commonwealth is an exercise of the executive power of the Commonwealth, then it is exercisable by the Governor-General only under section 61. If it is a part of the power specially conferred upon the Governor-General by section 5, then it is equally exercisable by the Governor-General only. In either aspect of the matter, and in any other possible aspect of it, the Duke of Cornwall purported to open the Parliament as the representative of the Crown. But section 2 of the Constitution of the Commonwealth declares that “A

Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth," and the Constitution does not provide for the presence of two representatives of the Crown in the Commonwealth at the same time, each of whom shall perform executive or administrative functions, or exercise any portion of the royal prerogative in the Commonwealth, under a separate Commission granted directly by the Crown. When the Duke of Cornwall purported to open the first Parliament of the Commonwealth, the Governor-General was present, and his Commission was in full force, and therefore he alone could legally act as the primary representative of the Crown in the Commonwealth in the exercise of any power vested in the Crown's representative in the Commonwealth. The Crown is under the law and is, therefore, bound by the provisions of the Constitution of the Commonwealth. But the law officers of the Crown in England who advised the King to sign the Commission granted to the Duke of Cornwall seem to have advised His Majesty that he had some indefinable prerogative right to sign it, and to disregard the express provisions of the Constitution of the Commonwealth in the matter. Such advice is not a hopeful augury of the manner in which the provisions of the Constitution of the Commonwealth will be interpreted by the majority of the members of the Judicial Committee of the Privy Council(a).

In the course of his criticisms of the proposal to establish a court of final appeal in Australia under the Bill adopted by the Convention of 1891, the late Mr. Justice Richmond made the following valuable observations. "The public is more interested than it knows," said he, "in maintaining the highest scientific standard in the administration of the law. The intellectual interest thus created in the profession is one of the best guarantees for purity of administration. Thoroughbred lawyers are supremely anxious to be right in their law. They may not always succeed in freeing themselves from class prejudices and party ties, but their interest in abstract law makes them generally incapable of showing favour to individuals." To these pregnant words I think that I may safely add the statement that a most effective stimulus to the production of the best and highest work a man can do is a knowledge that for good or ill it will take its place among the permanent facts of the world's history and reflect upon him perennial honour or discredit. No reason has ever been suggested why this stimulus should not operate upon men when they are engaged in the performance of such momentous work as the ultimate declaration and interpretation of the laws by which a community is held together in peace and order. All the arguments that have been used to extol the merits of the judges who constitute the courts of final appeal in England imply that this stimulus is not inoperative upon them; and no reason can be given why it should not operate and produce like results upon judges laden with work of equal magnitude in Australia.

The exercise of a final jurisdiction by a competent court whether in England or Australia will at all times be a constant provocative to the members of it to make a close investigation of all alleged and apparent authority and a careful application of fundamental principles; and if the existence of an independent court of final resort in Australia were to produce divergences from the decisions of the courts in England, it may be confidently expected that such divergences would be capable of justification and not without benefit to the Australian people.

Instead of producing uniformity of law throughout the Empire, the appellate jurisdiction of the Judicial Committee of the Privy Council in respect of the judgments of colonial courts has repeatedly produced divergences in the declaration of the common law and in the interpretation of statute law in different parts of the Empire. In February, 1869, an appeal from a judgment of the Supreme Court of Hong Kong in the case of *Rodger v. The Comptoir d'Escompté de Paris* was heard by the Judicial Committee of the Privy Council and the judgment of the colonial court was reversed^(a). The question involved in the case was the right of a transferee of bills of lading for valuable consideration to defeat an unpaid vendor's right of stoppage *in transitu*. The appeal was heard by a bare quorum of three members of the Committee, and their decision was that a pre-existing debt was not a valuable consideration for a transfer of bills of lading and an assignment of the goods to which they referred. In May, 1877, the same question was raised before the Court of Appeal in the Queen's Bench Division of the High Court of Justice in the case of *Leask v. Scott Brothers*^(b), and that Court decided that the transfer of a bill of lading for valuable consideration to a *bonâ fide* transferee defeats the unpaid vendor's right of stoppage *in transitu* although the consideration was past and not given at the time the bill of lading was handed to the transferee. The contrary decision of the Judicial Committee of the Privy Council in the appeal case from Hong Kong was strongly pressed upon the Court, but the Court refused to follow it; and the judgment of Lord Bramwell contains a trenchant criticism of the rejected decision, which he describes as "a novelty opposed to what may be called the silent authority of all previous judges who have dealt with the subject."

Another illustration of the divergences in judicial declarations of the common law in different parts of the Empire which have been produced by the appellate jurisdiction of the Privy Council is afforded by the case of *The Victorian Railway Commissioners v. Coultas and Wife*,^(c) which was an appeal from a judgment of the Supreme Court of the Colony of Victoria. The respondents had obtained a verdict for substantial damages in the colonial court for injuries sustained by them through the negligence of a servant of the Victorian Railway Department in opening a gate upon a railway crossing when a train was approaching and thereby inviting the

plaintiffs to pass over it in their buggy. There was not any actual impact of the train with the buggy, but the danger to the plaintiffs was so imminent, and their escape so narrow, that the wife received such a severe nervous shock as to induce a severe illness of a very critical character. The Full Court in Victoria decided that actual impact of the train was not necessary to enable the plaintiffs to recover compensation for the injuries they had received. The Judicial Committee of the Privy Council reversed the judgment of the Supreme Court of Victoria and thereby deprived the plaintiffs of the benefit of their verdict and made them pay the costs of the appeal. The judgment of the Judicial Committee of the Privy Council in this case was brought under the notice of the Court of Appeal of the Queen's Bench Division of the High Court of Justice in England in the case of *Pugh v. The London, Brighton and South Coast Railway Co.(a)*, in which Lord Esher, M. R., said that the case then before the Court of Appeal was distinguishable from the case from the Colony of Victoria which had been decided by the Judicial Committee of the Privy Council and that he would not like to express an opinion upon the last mentioned case until he was forced to do so. What his opinion would have been, if he had been forced to give it, may be fairly inferred from the reception which the same decision met when it was cited before Mr. Justice Wright in the Queen's Bench Division in the case of *Wilkinson v. Downton(b)*. In that case the court decided that the plaintiff was entitled to recover damages for an illness produced by a violent nervous shock induced by a false statement maliciously made to her by the defendant that her husband was dead, and Mr. Justice Wright definitely refused to follow the judgment of the Privy Council in the Victorian case, and said it was inconsistent with the decision of the Court of Appeal in Ireland. The judgment of the Supreme Court of the Colony of Victoria which was reversed by the Privy Council was therefore in accordance with the rule of law subsequently declared by the Court of Appeal in Ireland and by the Queen's Bench Division of the High Court of Justice in England, and the result of the reversal of the judgment of the Supreme Court of Victoria by the Judicial Committee of the Privy Council is that although the same rules of the common law were alleged to be applied in each of the several cases, two of the Crown's subjects in the colony of Victoria were denied redress for injuries received under circumstances in which subjects of the Crown in the United Kingdom are allowed to obtain redress.

The following illustration of divergence produced in judicial interpretation of statute law in different parts of the Empire by the appellate jurisdiction of the Privy Council is one which demonstrates that, so long as the existing appellate control of the judgments of Australian courts continues, the suitors in those courts will not have any guarantee that the language of the Acts of an Australian legislature will

receive the same construction which the English courts will place upon similar language in an Act of the Imperial Parliament. In November, 1877, an appeal was heard by the Judicial Committee of the Privy Council from an order of the Supreme Court of Queensland and the judgment of that court was reversed (*a*). The question to be decided was whether a lease of land granted by the Crown under the provisions of an Act of the Parliament of Queensland became immediately void or only voidable at the option of the Crown, upon failure of the lessee to occupy and improve the land in accordance with the statutory requirement to that effect. The statutory provision in reference to the subject was as follows:—

“If any person selecting lands in an agricultural reserve shall fail to occupy and improve the same, as required by section 7 of this Act, then the right and interest of such selector to the land selected shall cease and determine &c.” The lessee had not cultivated and improved the land as required by the Act, but he had been allowed to continue in possession of it, and to pay the reserved rent for it for several years, in accordance with a notice published in the *Gazette* that rents received in respect of any selections that might have been “forfeited by operation of law” would be “deemed to have been received conditionally and without prejudice to the right of the Government to deal with the same according to the provisions contained in the Act in that behalf.” The Supreme Court of Queensland decide that the lease in question had been “forfeited by operation of law,” but the Judicial Committee of the Privy Council decided that the language of the Act of the Parliament of Queensland which said that “the right and interest of such selector to the land selected shall cease and determine” was subject to the same restrictive rule of interpretation which is applied to provisions for forfeiture upon breach of covenant or condition which are inserted in leases made between private individuals, and that the acceptance of rent by the Crown, notwithstanding the notification in the *Gazette*, had operated as a waiver by the Crown of its right to forfeit the lease. Two years afterwards a provision in the Imperial statute 13 Eliz. chap. 10 which declared that certain leases granted for a longer period than the term of twenty one years or three lives “shall be utterly void and of none effect to all intents constructions and purposes” was submitted for construction to the House of Lords in the case of *The President and Governors of the Magdalen Hospital v. Knotts and Others* (*a*), and that tribunal decided that the words of the imperial statute were not subject to the same restrictive rule of interpretation which is applied to provisions for forfeiture in a lease made by a private person. The particular significance of the judgment of the House of Lords in this case in relation to the judgment of the Judicial Committee of the Privy Council in the case of *Davenport v. The Queen* lies in the fact that the last mentioned case, together with the case of *Pennington v. Cardale* (*b*), was

prominently cited before the House of Lords by the counsel for the appellants as an authority in support of a restricted interpretation of the language of 13 Eliz., chap. 10, and although the Lord Chancellor commented at length upon *Pennington v. Cardale*, neither he nor any of the other members of the House who took part in the judgment made any reference to *Davenport v. The Queen*. It was simply disregarded.

Another illustration of a declaration of law by the Judicial Committee of the Privy Council which is divergent from that of the other Courts of Appeal in England on the same question is found in the case of *Waring v. Waring (c)*, in which a rule determining the relation of mental disease to testamentary capacity is expounded which is contrary to the opinions given by the judges to the House of Lords in McNaghten's case, and contrary to the rule subsequently declared by the Court of Queen's Bench in the case of *Banks v. Goodfellow (d)*. In the judgment delivered in the last mentioned case by Chief Justice Cockburn he refers to *Waring v. Waring*, simply to discredit it by remarking that the court does not think necessary to consider the psychological doctrine propounded in it.

No reference has been made in these observations to the constitution and procedure of the Judicial Committee of the Privy Council because they can be altered so as to remove the objections that have been repeatedly made to them. But whatever changes may be made in the constitution and procedure of the Judicial Committee of the Privy Council, uniformity of judicial decisions will not be secured for all parts of the Empire so long as there is one court of final resort for the United Kingdom and another for the colonies and dependencies of the Empire. We know that the House of Lords has been frequently divided in opinion, and that the judgments which in such cases have declared and fixed the law have been the judgments of only a majority of the judges who have constituted the Court. The practice of the Judicial Committee of the Privy Council is to appoint one of its members to deliver judgment in each case, and no record is made of any dissentient opinions; but we cannot suppose that there have never been any differences of opinion among its members, and if internal unanimity cannot be constantly obtained in either of two such tribunals as the House of Lords and the Judicial Committee of the Privy Council, it is practically certain that uniformity will not be constantly maintained in the respective decisions of each of them.

But if there are to be divergences in the separate judicial decisions which declare the law for different parts of the Empire, it is much more desirable that the divergences affecting such a large and distant portion of the Empire as Australia should find their origin in an Australian court of final jurisdiction cognisant of the local circumstances and conditions in the midst of which its judgments will take

effect, than in the existence of a distant tribunal whose members are entirely ignorant of those circumstances and conditions.

Some of the opponents of a restricted right of appeal to the Crown in Council from judgments of the High Court, in matters involving an interpretation of the Constitution of the Commonwealth, appear to have argued as if they imagined that the body of law administered by the courts in England and in Australia is a compact system of knowledge and doctrines in which a man can become an expert in the same manner as he may become a master of mathematics or of a particular system of dogmatic theology, and that the declaration and application of it can be made with the greatest possible degree of accuracy by a trained exponent of it, without any personal experiential knowledge on his part of the multiform structure and internal relations of the community in the midst of which his judgments are to be enforced. It is probable that there are a considerable number of persons otherwise well informed whose ideas of the nature of all the law administered by courts and judges throughout the civilised world are more or less of this description. But the true character of the great body of the law administered in the courts in England, in Australia and in America is very different from any such conception of it. Its real nature, and the varied character of the forces which control the development and administration of it, have been faithfully described by the present Chief Justice of Massachusetts in the following words:— “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, even the prejudices which judges share with their fellow men, have a good deal more to do than the syllogism in determining the rules by which men shall be governed. The law embodies the story of a nation's development through many centuries and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics” (*a*). It is in the facts expressed in these pregnant words that the justification of the claim that has been made for the judicial independence of the Commonwealth of Australia is to be found. A nation's judiciary is, next to its legislature, the most potent and influential organ of its national life in the formative period of its national consciousness; and if all the assertions that have been made of the growth of a sentiment of Australian nationality and of the advent of an Australian Nation under the Constitution of the Commonwealth are not hollow and untrue, then those who have resisted the claim which has been made for the judicial independence of the Commonwealth have been endeavouring to impose upon the coming nation a restriction upon the growth and expansion of its national consciousness and upon the growth and development of its capacity to make a distinctive contribution to the jurisprudence and civilization of the world.

(a) See *Pollock on Torts*, 5th ed., p. 93; also *Essays in Jurisprudence and Ethics*, p. 115.

(b) *Wilson v. Merry*, L.R. 1 Sc. Appl. Cases, p. 326.

(c) 43 & 44 Vic. chap. 42.

(a) L. R. 17 Ch. Div. 825.

(b) See *Beverley v. The Lincoln Gas Light and Coke Co.*, 6 A. & E., p. 829.

(a) *De Vaux v. Salvador*, 4 A. & E., p. 420.

(b) See *Life of Story*, vol. 2, p. 379.

(a) 3. M. & W., p. 1.

(b) See *The Petrel*, L.R.P.D., 1893, p. 323.

(c) See *Macqueen's Scotch Appeals*, vol. 3. p. 266.

(a) Pages 52-56.

(a) The first Parliament of the Commonwealth was legally and properly opened by the Governor-General on the day immediately following the day on which the Duke of Cornwall performed the ceremony by which he purported to open the Parliament under the authority of his Commission.

(a) L.R. 2 P.C., 393.

(b) L.R. 2 Q.B.D., 376.

(c) L.R. Appl. Cases, Vol. 13, p. 222.

(a) L.R. 1896 Q.B.D. Vol. 2, p. 284.

(b) L.R. 1897 Q.B.D. Vol. 2, p. 57.

(a) *Davenport v. The Queen*, L.R., 3 Appl. Cases, p. 115.

(a) L. R. 4 Appl. Cases, p. 324.

(b) 3 H. & N., 656.

(c) 6 Moore's P.C., 341.

(d) L.R. 1 Q.B., p. 549.

(a) *The Common Law*, by O. W. Holmes, p. 1.

4. Origin and Fundamental Features of the Constitution of the United States of America.

The Constitution of the Commonwealth of Australia so closely resembles the Constitution of the United States of America that it may be not improperly described as an adaptation of that Constitution to the political circumstances of a number of contiguous communities which are dependencies of an Empire in which a hereditary monarch is the primal and supreme depositary of the executive powers of government; and the authors of its American prototype may be fitly regarded as being also the primary authors of the Constitution of the Commonwealth of Australia. Hence a study of the fundamental features of the Constitution of the Anglo-American Republic and of the circumstances surrounding its formation must always possess an attraction for the student of the constitutional law of the Australian Commonwealth, and cannot fail to assist him to more fully appreciate its contents.

The essential character of a federal government necessitates a written or pre-appointed form of political organisation. But all federal constitutions that have endured and proved capable of performing the functions for which they were established have been evolved from existing institutions, and have not been manufactured in accordance with abstract political theories. The Constitution of the United States is contained in a document that is less than 120 years old; but its fundamental provisions are adaptations and combinations of institutions, principles, and usages with which the English colonists on the American continent had been familiar for more than 200 years before the document was drafted. Its fundamental purpose was to make all the members of thirteen separate and self-governing societies occupying contiguous territories into one people in all their commercial intercourse with each other, and in all their commercial and political intercourse with other nations of the world, and at the same time to preserve and continue the separate political existence of each of the united societies as fully as would be compatible with their unity in commerce and in international transactions. The political machinery established by the Constitution, whether for the performance of legislative or executive or judicial functions, was erected solely for accomplishing that dual purpose in as complete and effectual a manner as the existing conditions permitted it to be done; and the particular feature of the form of the government created by it which invites special attention is the duplex citizenship which it produced in the members of the several communities which it erected into one nation, but which it at the same time preserved and continued as so many distinct

and separately organised societies.

The Primary Causes of the Union.

At the close of the war which secured the independence of the original thirteen colonies of Great Britain which had given to themselves the title of “The United States of America,” each of them was perfectly independent of all the others in all its internal affairs, and there was not any central power in existence which had, in the full and proper meaning of the words, legislative authority over any two or more of them. They had formed themselves into what they described as a perpetual union, under Articles of Confederation which provided for the election of delegates from each State to a central Congress, upon which was conferred the sole power of levying and carrying on war and of establishing postal communication between the States and of settling disputes between the States; and the Articles of Confederation declared that the free citizens of each State were to be entitled to all the privileges and immunities of free citizens in all the other States. But the central Congress had not power to levy any tax upon the residents of each State, and was totally dependent for its revenue upon the contributions provided by the separate legislatures of the thirteen States, and was equally dependent upon the executive and judicial authorities of the separate States to enforce any of its resolutions or ordinances, and its authority might be defied by any State without any coercive consequences. The central Congress had contracted a debt for the purpose of carrying on the war of independence; and the several States which had laid claim to the possession of territory beyond their western boundaries had ceded it to the Confederation. These two facts—a common territorial possession and a common debt—constituted the only apparently permanent bonds of political association which united the original thirteen colonies during the period that elapsed between the acknowledgment of their independence by Great Britain and the subsequent adoption by them of the Federal Constitution which transformed them into a nation. In that intervening period many of the States imposed duties on the goods imported from the other States, and frequent quarrels arose between them in reference to their respective boundary lines and their respective rights of navigation of the rivers that flowed through or alongside the territory of any two or more of them. It is manifest that such a condition of things was highly detrimental to the development of profitable commercial intercourse between them, and to the growth and prosperity of the separate industrial interests of each of them; and in the absence of any restraining power or common tribunal for the determination of their grievances against one another, several of them were repeatedly on the verge of actual war with

their neighbours. In this position of affairs Washington became president of a company which had been established for the purpose of extending the navigation of the Potomac and James rivers; and in order to effect that object it was necessary to secure joint action on the part of the States of Virginia, Maryland, and Pennsylvania. For this purpose a meeting of a number of the principal men in Virginia was held at Washington's house at Mount Vernon, and shortly afterwards the legislatures of Maryland and Virginia agreed to the proposals suggested at that meeting. But the report of the legislature of Maryland upon the subject went on to recommend that all the States should be invited to consider proposals for the better regulation of commercial intercourse among them, and the result of that suggestion was the election of the Convention that framed the Federal Constitution.

We have, therefore, this interesting and important fact presented to us for consideration and instruction, viz., that it was not primarily for what are usually called political reasons that the United States of America were led to unite themselves into a nation under one central government, but for the purpose of obtaining and securing more favorable conditions for the development of their material resources and the increase of their industrial and commercial prosperity. This fact was clearly recognised and emphatically asserted by the great American statesman and jurist, Daniel Webster, in several of his most important public speeches in the Supreme Court and in Congress, among which particular reference may be very properly made to his famous argument in the case of *Gibbons v. Ogden*, in which the question involved was the constitutional validity of an Act of the Legislature of the State of New York, which purported to grant to certain persons the exclusive right to navigate the rivers of that State with vessels propelled by steam. "Few things," said he, "are better known than the immediate causes which led to the adoption of the present Constitution, and there is nothing, I think, clearer than that the prevailing motive was to regulate commerce, to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different States, and to place it under the protection of uniform law." Again, in his great speech in the Senate, on the institution of the Sub-treasury, he said, "Sir, whatever we may think of it now, the Constitution had its immediate origin in the conviction of the necessity for uniformity or identity in commercial regulations. The whole history of the country, of every year and every month, from the close of the war of the revolution to the inauguration of the Constitution in 1789, proves this. Over whatever other interests it was made to extend, and whatever other blessings it now confers, or hereafter may confer, on the millions of free citizens who do, or shall, live under its protection, even though in time to come it should raise a pyramid of power and grandeur, whose apex should look down on the loftiest

political structures of other nations and other ages, it will yet be true that it was itself the child of commercial necessity. Unity and identity of commerce among all the States was its seminal principle. It had been found absolutely impossible to excite or foster enterprise in trade under the influence of discordant and jarring State regulations.”

Functions of the Federal Government.

This important fact in connection with the origin of the Constitution of the United States provides an explanation of the peculiar and distinguishing characteristics of the Government which it established as compared with the governments established by the constitutions of unitary States, and also as compared with other federal constitutions that were framed amid other conditions and for other purposes. The governments of all unitary States are necessarily the depositaries of all the political authority that can be exercised within the territorial limits of their jurisdiction. But the Government established by the Constitution of the United States is a government of strictly limited powers, or, in other words, a Government which is confined in the exercise of its legislative, executive, and judicial functions to a limited and specifically mentioned number of subjects. These are all set out in the eighth section of the second article of the Constitution, and the remainder of the document is limited to the purposes of providing the necessary legislative, executive, and judicial machinery to enable the Federal Government to exercise the powers conferred upon it by the second article, and of prohibiting the separate States from exercising functions which would interfere with the free and full exercise of the powers of the Federal Government. The first section of the first article of the Constitution declares that all legislative powers granted by the Constitution shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives; and the subjects enumerated in the eighth section of the second article are those over which Congress is declared to have full and exclusive legislative power. Among them are found many matters in regard to which every Government that regulates the conduct and mutual relations of the members of an organised community must necessarily have legislative authority, such as the power to raise a revenue and provide an army and a navy for the defence of the nation against the attacks of an enemy. But the central and most important subject placed under the full and exclusive jurisdiction of Congress is the regulation of commerce with foreign nations and among the several States; and all the other matters placed by the Constitution under the jurisdiction of Congress will be found, upon investigation, to have a more or less intimate connection with that central

subject. If Congress is to have the exclusive power of regulating commerce with foreign nations it is necessary that it should have power to make laws for the control of vessels engaged in that commerce. Hence it must have jurisdiction over all maritime questions. It must also have power to raise a navy for the protection of that commerce, and the power of establishing courts for the settlement of disputes arising out of maritime trade, and the punishment of maritime offences. And if Congress is to effectually regulate all commercial intercourse among the States, as well as their commerce with foreign nations, and to have exclusive jurisdiction over those subjects, it must have power to coin money and regulate the currency. For the same reasons it must have the power of establishing and regulating postal communication among the States and with other nations. For the same reasons also the separate States must be deprived of the power to coin money, or to lay any imposts or duties on imports or exports without the authority of Congress. Accordingly we find all these powers expressly granted to Congress by the Constitution, and either expressly or implicitly denied to the separate States; and it may be broadly stated that all the powers granted to Congress and denied to the separate States are those powers which are necessary for the full and exclusive regulation of external and inter-state commerce, and the regulation of all other matters affecting either of those kinds of commerce or ancillary to them.

But in the primitive condition of society in which civil government has its origin, trade and commerce, as we understand the words at the present time, can hardly be said to exist, and the fundamental purposes for which governments are established in primitive societies, and the fundamental purposes also for which all unitary governments have been established and continue to exist, are the protection of the life and property and freedom of action of all the separate members of the community. We know that the American Declaration of Independence asserts that all men are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness, and that to secure these rights governments are instituted amongst men; and all the modern writers on the origin and functions of government, whether they accept or reject the doctrine of the natural rights of man, are agreed that the primary purpose of government is to secure for each individual member of society protection for his life, his person, and his property. But, excepting the power to define and punish felonies committed on the high seas, and the power to secure to authors and inventors a right of property in their writings and inventions, together with the power to enforce, by appropriate legislation, the restrictions placed by some of the provisions of the Constitution upon the power of the separate States to infringe the personal rights guaranteed by those provisions, there is not any power conferred by the Constitution upon

Congress to pass any law which has for its immediate object the protection of the lives, or property, or the personal freedom of the citizens of any State of the American nation. There is power given to Congress to make laws for this purpose in regard to the inhabitants of the District of Columbia, but that District is not one of the States of the Union, and it has not any separate local legislature. The sole object of the creation of that District was to provide a piece of territory outside of the jurisdiction of any State for the purpose of erecting a city for the seat of the Federal Government, and it was necessary to provide a complete system of government for the persons who would reside there. This was done by giving Congress the power to make laws upon all subjects for that District. Congress is also invested with power to make laws for the government of all territories belonging to the United States and not within the boundary or the jurisdiction of any one of the States. With these exceptions, the Constitution does not confer upon Congress the power to make any law primarily designed for the protection of the lives, or personal liberty, or property, of any person under its jurisdiction, or to legislate in reference to any of the questions which arise out of the personal and contractual relations of individuals. This fact demonstrates, beyond all question, that the Federal Government established by the Constitution of the United States was not created for the fulfilment of those primary functions for which governments are admitted to be originally instituted amongst men, but for certain supplementary purposes which required a special form of political organisation for their accomplishment.

The Federal Government and the States.

But at this point the question naturally suggests itself as to what power exists, and what provision is made in the Constitution of the United States for the performance of the fundamental functions of government for the inhabitants of the several States; or in other words, to what power or authority can the citizens of each separate State appeal for the protection of their persons and property and liberty in the course of their daily transactions? The answer is that the inhabitants of each State, while they reside there, are under the jurisdiction and protection of a Government which is distinctly separate from the Government established by the Federal Constitution, and which in regard to all matters not placed by the Constitution under the jurisdiction of Congress or the Federal Judiciary is perfectly independent of the control or interference of either of them. The separate and independent jurisdiction of the local government of each State is secured to it by the tenth amendment of the Constitution, which declares that— “The powers not granted to the United States by the Constitution nor prohibited by it to the States, are reserved to the States

respectively or to the people.” It is this Government which makes provision for the protection of the life, liberty, and property of every person resident within its jurisdiction, and which makes laws and establishes courts of its own for the accomplishment of that object. Each State has such a local Government, and the laws which enable the residents of any State to enforce the fulfilment of the contracts which they make with other residents of the same State, as well as all laws which regulate the domestic relations of the residents of each State, and the laws which provide for the punishment of crimes against their persons or properties, are all made by the separate Legislatures of the several States, and are enforced by courts established by those Legislatures for that purpose; and it has been well said that a citizen of any one of the States may go through a long life and never come into contact with the Federal Government, or be in any way reminded of its existence, except when he exercises his right to vote for a member of Congress, or as a presidential elector, or puts a letter into the post office, or sees a building which has been erected by the Federal Government, and which has the national flag flying over it. But immediately a citizen of New York enters into a commercial contract with a citizen of Massachusetts or Virginia, and a dispute arises between them in regard to its terms or their respective rights and obligations under it, both parties then find themselves in a position in which they may be reminded that while they are severally citizens of their respective States, they are also both citizens of the common country of the United States, and that a federal court exists for the determination of the controversy between them.

So also, if a citizen of Virginia or New York travels to Europe or Asia, and is in any manner molested by the Government or people of the foreign country in which he is travelling, his appeal for protection and redress is not made to the Government of his own State which protects him when he is at home in the exercise of his ordinary legal rights, but is made to the Federal Government at Washington, and that Government, if it shall be necessary to do so, will display and use all its naval and military forces for his safety. This protection of the citizens against the aggression of a foreign State is not extended to him by virtue of any special power expressly conferred upon the Federal Government by the Constitution, but in virtue of the fact that he is a citizen of the United States, and as such he is entitled to their care and protection whenever an injury is inflicted on him in violation of the principle of international comity.

Bill of Rights.

But although the Constitution does not empower Congress to make any law for

the prevention or redress of any offence committed by a private individual against the person or property of another private individual within the jurisdiction of a State, it contains several explicit provisions against any arbitrary and tyrannical interference on the part of the legislative or the executive branch of the Government of any State with the life, or liberty, or property, of any person within its jurisdiction. It also contains similar provisions for the protection of the life, liberty and property of the individual against any arbitrary and oppressive interference on the part of the Federal Government or Congress. The majority of these provisions have been added as amendments to the original Constitution, and they have been frequently described as the American Bill of Rights. Some of them are very similar to several of the provisions of the Great Charter of England and others are identical in purport and language with some of the provisions of the Bill of Rights which followed the English Revolution of 1688. The insertion of these provisions in the Constitution was due to a very large extent to the prevalence among the American people of the doctrine of the natural rights of man which dominated the political thought of the eighteenth century, and which finds explicit expression in the Declaration of Independence.

At a subsequent stage of our inquiry we shall see that these amendments have become very important portions of the Constitution.

Adaptation of the Principles of Representative Government.

The most difficult question that confronted the framers of the Constitution of the United States, and the one which provoked the most prolonged and acrimonious debates in the Convention in which they were assembled, was the proper application of the principles of representative government to a federation of States of unequal territories and populations, but claiming equality of rank and political power in the Union. The satisfactory solution of this problem required the erection of a legislature which would secure in its composition a representation of the several States upon the basis of equality in rank and equal participation in legislative power as States and a representation of the people of all the States in their collective character as citizens of the same nation. This was accomplished by the division of Congress into two branches, the smaller of which is called the Senate, and is composed of two representatives elected by the Legislature of each State for a term of six years, and the larger branch of which is called the House of Representatives, and is composed of members chosen by the people of the several States for a term of two years and proportioned in number to the population of the State. It was also provided that the Senate should be a perpetual body, whereof one third of the

members should be renewed every second year, while the House of Representatives should be totally renewed at the end of every two years. In this manner the Constitution secures a separate and equal representation of each State in Congress, and a collective representation of all the people in every State as the constituents of one nation.

It was also provided that the consent of the Senate should be required to all treaties made with other nations, and to the appointment of all ambassadors, consuls, judges of the Supreme Court, and other officers and agents of the Federal Government whose appointment was not otherwise provided for. By virtue of this provision each State secures a direct and equal participation in executive as well as legislative power; and to secure perpetually the equal representation of each State in the Senate, the Constitution contains a special provision that no amendment of it shall be made by which any State shall be deprived of its equal representation in the Senate without its own consent. The consent of a majority of three-fourths of all the States is also required to any amendment whatever of the Constitution.

Distribution of Powers.

At the time that the Constitution of the United States was devised, the generally received opinion among students and expounders of political science in Europe and America was that the full protection of the political and personal rights of the citizen was dependent upon the proper distribution of the legislative, executive, and judicial functions among separate and distinct branches of the government of a country. This doctrine had been first distinctly formulated by the great French jurist Montesquieu, and had been repeated by Blackstone, and other writers upon English law and political science. In accordance with this theory, the framers of the American Constitution provided that the executive functions of the Federal Government should be vested in a President, who should be independent of Congress for the tenure of his office, and who should be chosen by electors specially elected by the people for that purpose, but that he should be removable from office, on impeachment and conviction of treason, or other high crimes or misdemeanours. The President was also made commander-in-chief of the army and navy, and was empowered to appoint all the officers of the Federal Government, but subject in specified cases, as above mentioned, to the approval of the Senate. He was also endowed with the power of granting reprieves and pardons for offences against the laws of the United States, and was invested with a power to veto all Acts of Congress until they were passed by a majority of two-thirds in both branches. The whole of the legislative power created by the Constitution is granted to Congress,

subject to the suspensive veto of the President, and the Constitution provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time establish; and the judges of both the Supreme and inferior courts are invested with their offices during good behaviour, which means during life, unless they are removed on impeachment and conviction of any offence. The jurisdiction of the Supreme Court and of all other federal courts is strictly limited, like the jurisdiction of Congress, to the subjects enumerated in the Constitution, and a subsequent amendment of the Constitution provided that the judicial power of the United States should not be construed to extend to any suit in law or in equity commenced and prosecuted against one of the United States by a citizen of another State or by citizens or subjects of any foreign State. The object of this amendment is to prevent the Federal Government from assuming jurisdiction in any dispute between a State and a private person. In all such cases the private person must be content with the remedy provided by the State itself, and if the State does not provide a remedy the private person is without redress, which is the position always occupied by every private individual in relation to all sovereign and independent States.

The subjects over which the Supreme Court has jurisdiction are all federal in their character and connection, and there is no appeal from the decision of the Supreme Court of any separate State to the Supreme Court of the United States on any case arising under the local law of that State, except in those cases in which the local law is alleged to be contrary to the Constitution or to an Act of Congress made under the authority of the Constitution. In all other cases the decision of the Supreme Court of the State upon a case arising under the local law is final. But if a dispute cognizable by a court of law arises between two citizens of different States, either of them may have the case tried in a federal court, and from all federal courts there is an appeal to the Supreme Court.

The Unwritten Constitution.

It has been already observed that the essential character and requisite conditions of a Federal Government necessitate a written or pre-appointed political organisation or Constitution, and it is evident that this fact is inseparable from the existence of every Government which has only limited and specifically defined powers, whether it be a national government like that of the United States or a local and subordinate one such as that of a county council, or a municipal council of a city or a town. But we should be led into making a serious mistake if we concluded that all the powers possessed by the Federal Government of the United States, and the manner in which

they can be exercised, could be found explicitly stated in the words of the written instrument from which that Government has derived its existence. There is an unwritten as well as a written Constitution of the United States, and a knowledge of the existence and of the working of that unwritten Constitution can only be derived from an acquaintance with the history of the people living under it, in the same manner as we derive a knowledge of the actual Constitution of England, and know its workings from a study of the history of the English nation. But when we speak of an unwritten Constitution, whether in reference to that of the United States or of England, we do not use the words in their primary and literal meaning. An unwritten Constitution in the strict and precise interpretation of the words would be a Constitution of which there is not any permanent and accessible record; and it is hardly possible for us to imagine the existence of such a thing in the form of a persistent and practical reality. But when we speak of an unwritten Constitution we mean a Constitution not written in a single instrument bearing that name, or in any number of separate and correlative documents collectively designated by that title. Every political and every personal right and privilege which is possessed or can be claimed and exercised by each member of the British Empire as a right or privilege conferred upon him by the Constitution of his country, and every political and personal obligation which can be imposed upon him, or enforced against him, on the ground that he is a member of the British Empire, is recognised and affirmed, and defined, in an authoritative record of one kind or another. A large number of these rights and privileges and obligations are specified and recorded in the long series of documents which contain the laws made and promulgated by the Imperial Parliament, commencing with Magna Charta and extending down to the latest statute which touches the organisation of the empire or the political status and the personal rights of the citizens. The remainder of these rights, privileges, and obligations are affirmed and defined in the recorded judgments and decisions of the superior courts of the Empire throughout a period of four or five centuries. In the same manner the citizens of the United States are dependent on the judgments and decisions of the federal courts for the practical possession and exercise of many of the political and personal rights and privileges conferred upon them in general terms by the Federal Constitution.

For example the second section of the fourth article of the Constitution declares that “the citizens of each State shall be entitled to all the privileges and immunities of all the citizens of all the States.” But the right of a citizen of New York or Virginia to claim a particular right or privilege under the law of the State of Maryland or Louisiana is dependent upon the question whether the particular benefit or privilege which he claims under that law is a privilege or immunity attaching to

the position of citizenship in the particular State in which the claim is made; and if that question is a disputed one, it cannot be determined without the decision of a federal court. A large number of decisions have been given by the federal courts upon this provision of the Constitution, and among them was one which decided that the right of suffrage was not necessarily one of the privileges or immunities of the citizenship in any State, because the word "citizen," as used in the Federal Constitution, included women and other persons not entitled to the suffrage. In another case it was decided that each State commands the tide-waters, and the beds of the tide-waters, within its jurisdiction, and the right of fishing is a property right, and not a privilege of citizenship, and further that a State may grant to its own citizens the exclusive privilege of using the land covered by tide-waters on its borders containing oyster beds, and may, with penalties, prohibit the use of such lands by citizens of other States (*a*).

Citizenship of the United States.

The original Constitution of the United States, as adopted 112 years ago, did not contain any definition of a citizen of the United States, and a long series of judicial decisions and opinions of eminent jurists supported the contention that citizenship of the United States was dependent upon citizenship of one of the separate States; and that it was only in virtue of being a citizen of one of the separate States that any person could claim the political rights and privileges conferred by the Constitution upon citizens of the United States. This decision placed the inhabitants of the district of Columbia and of the territories belonging to the United States in a very peculiar and anomalous position. They were not citizens of any State, and they did not take any part in the election of the President or Vice-President, or of any member of the Senate or House of Representatives. The residents of the district of Columbia send a delegate to Congress who can speak but not vote, and they are governed, as I have already explained, directly by Congress. It was never denied, or doubted, that they, as well as the residents of the territories, were entitled to all the personal rights and privileges conferred by the Constitution upon citizens, and that they could claim the protection of the Federal Government against the interference of any foreign power when they were travelling outside the United States; but these personal rights and privileges were secured by various interpretations placed by the federal courts upon the word citizen, in accordance with the exigencies of the cases that brought the rights and status of the citizens under review. In the same manner the federal courts, before the civil war, frequently denied to persons of African blood, who were citizens of a State in which slavery did not exist, the status of

citizenship of the United States. This anomalous and very unsatisfactory position of so many of the residents of the several States and territories was brought to an end by the 14th amendment of the Constitution, which was adopted after the abolition of slavery throughout the Union, and which provided that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside;" and it went on to declare that "no State shall make, or enforce, any law which shall abridge the privileges or immunities of citizens of the United States, nor shall 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." The portion of this amendment which refers to the protection of life, liberty and property is identical in language with a portion of one of the previous amendments which were adopted to secure the recognition and preservation of what were regarded by the American people as the personal and natural rights of the individual. But the previous amendments were directed to the protection of those rights against any attempted infringement of them by Congress or the Federal Executive, and did not place any restriction upon the violation of them by the several Governments of the separate States; and the purpose of the 14th amendment was to extend to every State Government a similar restriction to that which had previously been placed upon the Federal Government in reference to any encroachment upon the rights in question. It is very evident that a literal interpretation of this amendment would place the life, property, and personal freedom of every person in the United States directly under the protection of the Federal Government, and would therefore give to the Federal Legislature and to the Federal Judiciary the power to control and to restrict and annul all the local legislation of the several States upon these subjects; and to do this would be to change the whole character of the Federal Government and to place every citizen in every separate State in a totally new relation to that Government and to the Government of his own State to which he had always previously looked for the protection of his person and property. In short a literal interpretation of the 14th amendment would reduce the several States to the position of provinces in a unitary nation, and destroy the fundamental character of the federal union of the States in all but name. It cannot for a moment be supposed that the authors and advocates of that amendment intended to produce any such revolutionary result, but they had determined to consummate the abolition of slavery by depriving the separate States of all local power of keeping the negro in a position of political and social subjection; and to attain this object they used language which if applied literally and without reference to the whole purport and essential characteristics of the document of which it was made a part would alter the fundamental principles of

the federal union of the States. As was to be expected, the time soon arrived when the local legislation of one of the States was challenged as being in conflict with the 14th amendment, and the case was carried to the Supreme Court at Washington for a decision. The case was not one in which the status and rights of the colored population in any State were involved. The local legislation which was assailed was an act of the Legislature of the State of Louisiana entitled "An Act to protect the health of the city of New Orleans, and locate the stock landings and slaughter houses, and to incorporate the present City Live Stock Landing Company." This Act declared that the company established under it should have the sole and exclusive right of conducting and carrying on the live stock landing and slaughter house business, within the limits prescribed in the Act; and that all animals brought into the city for slaughter should be landed at the slaughter house of the company, and nowhere else. The butchers of the city of New Orleans resisted the Act, as contrary to the 14th amendment of the Constitution, and appealed to the Supreme Court of the United States against the decision of the Supreme Court of the State of Louisiana, which had upheld the validity of the Act. The grounds of the butchers' appeal were that the Act abridged the privileges and immunities of the citizens of the United States, that it deprived the plaintiffs of the equal protection of the laws, and that it deprived them of their property without due process of law, contrary to the provisions of the first section of the 14th amendment of the Constitution. The Supreme Court consisted of nine judges, and the validity of the Act was denied by four of them, and upheld by the five other judges. The judgment of the majority was delivered by Mr. Justice Miller, in one of the ablest arguments that had been delivered from that historic bench on which Marshall and Story sat side by side for more than a quarter of a century, and enriched the jurisprudence of America and England with their stores of learning and power of logical statement and deduction. Mr. Justice Miller clearly and conclusively established the proposition that the Constitution, as amended by the 14th amendment, recognised two distinct citizenships, namely, the citizenship of the separate States, and the citizenship of the United States, and that each of them had different and corresponding privileges and immunities, and he defined the privileges and immunities attaching to the citizenship of a State as "those privileges and immunities which are fundamental, and which belong to the citizens of all free Governments, and which have at all times been enjoyed by the citizens of the several States which constitute the Union." Among them he specified the right to enjoy life and liberty under the protection of the Government of the State, the right to bring and maintain actions in the courts of the State, the right to acquire and possess property of every kind; and the right to pursue and obtain happiness and safety, subject to such restraints as the Government

may prescribe for the general good of the whole community. He then asks: "Was it the purpose of the 14th amendment by this simple declaration that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire dominion of civil rights heretofore belonging exclusively to the States? All this and more must follow, if the proposition of the plaintiffs in error be sound, for not only are those rights subject to the control of Congress, whenever, in its discretion, any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper in all subjects; and still further, such a construction, followed by a reversal of the judgment of the Supreme Court of Louisiana in this case, would constitute this court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption or particular construction of an instrument, but when, as in the case before us, these consequences are so serious, so far reaching, and pervade so great a part of the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments, to subject them to the control of Congress in the exercise of powers, heretofore universally conceded to them, of the most ordinary fundamental character; when, in fact, it radically changes the whole theory of the relations of the States and Federal Government to each other, and of both these Governments to the people, the argument has a force that is irresistible, in the absence of language, to express such a purpose too clearly to admit of doubt."

He then proceeds to enumerate the privileges and immunities attaching to the citizenship of the United States, and which the separate States cannot abridge, and which he declares were placed by the fourteenth amendment under the protection of the Constitution. These privileges and immunities include the protection of life, liberty, and property by the Federal Government only when the citizen is on the high seas, or within the jurisdiction of a foreign Country; but they include the right to the writ of *habeas corpus*, and the right to become a citizen of any State by a *bonâ fide* residence within its jurisdiction; and in rejecting the more literal interpretation of the words of the fourteenth amendment, which was supported by the four dissentient judges, the majority of the court preserved the dual citizenship

which is the basis and essence of American federation and provided for the separate States a citadel of defence in any future struggle to preserve their autonomy against the centralising tendency of any legislation of Congress that may be enacted under the alleged authority of the amendments of the Constitution which were adopted in the heat and stress of the controversy and passions involved by civil war (*a*).

The Federal Supreme Court.

The position occupied by the Supreme Court of the United States in the Federal Government, of which it forms a part, is one that claims the special attention of every student of the American Constitution, and of the federal form of Government. Under the provisions of the Constitution which define the extent of the judicial power of the Federal Government, all the federal courts have authority to declare void any Act of Congress or of the Legislature of any State which is contrary to any provision of the Constitution; and the courts of every State have also a similar authority by virtue of the provision of the Constitution, which declares it to be the supreme law of the land. But from the decisions of all other courts upon questions of constitutional law, there is an appeal to the Supreme Court. The illustration which I have given of the power it possesses to preserve or obliterate at critical periods of the nation's history the boundary lines which mark the jurisdictions of the National and the State Governments indicate the nature and the immense extent of the influence which it exercises on the political history of the American people.

In the year 1896 the Court declared an Act of Congress, which purported to levy an income tax to be void under the Constitution, and thereby exempted the people of every State of the Union from all obligation to pay it. In other cases it has repeatedly declared Acts of the Legislature of a State to be contrary to the Constitution, and therefore inoperative and void. It has also the power to declare invalid anything done by the President or any officer of the Federal Government which is not permitted by the Constitution. But the Supreme Court is not directed, or authorised, by the Constitution to act spontaneously, and declare any Act of Congress or of the Legislature of any State void before a case arises under it, and comes before the Court, for its decision. It must wait until it is moved at the suit of a citizen who declares that his personal or political rights or privileges have been infringed by the legislation which is challenged, and after it has given its decision its function is exhausted, and it depends upon the executive branch of the Government to execute its decrees. If the President refuses to enforce such decisions, the Court is powerless to compel him to do it, and it is then a question for Congress to decide whether the President shall be impeached for disobedience to the Constitution, or be upheld in

his refusal. President Jefferson on one occasion refused to obey *a mandamus* granted by the Court to compel the admission of an applicant for a judicial office to which he had been appointed by the President's predecessor, and President Lincoln ignored an order made by Chief Justice Taney for the issue of a writ of *habeas corpus*. In both cases the President relied on his own interpretation of his powers under the Constitution, and his responsibility to Congress for his conduct. These instances of conflict between the different branches of the Federal Government illustrate the fundamental principle of the complete separation of the legislative, the judicial, and the executive branches of the Federal Government, under the Constitution, and their perfect independence of each other in their respective spheres. This feature of American federalism is frequently criticised by English and French critics as a serious defect; but it may be that, upon close investigation, it will be found that the alleged defect is a necessary condition of many of the advantages which the federal form of government, as it exists in the United States, secures as its ultimate results, and which are not secured by the English or French systems of Constitutional Government.

The Constitution and the Popular Will.

One eminent French writer upon Constitutional Law, who has studied exhaustively the written instrument of the American Constitution, and who has also watched its workings and compared it with those of England and France, has declared that in the position which it places the Executive in its relation to the Legislature “never was more art brought to bear in keeping up and prolonging the existence of a Government which, weak, and divided against itself, without policy, and without credit, will not, or cannot, carry out the will of the nation”(a). But it may be that a wider and deeper knowledge of the political and social forces which determine and direct the course of American legislation and American history would have prevented the writer of that statement putting it forward as a correct picture of the actual working of the American Constitution in relation to the settled and determined will of the American people. There have undoubtedly been periods of American history in which the position of affairs appeared, on the surface, and to foreign observers, to be very much like that which the French critic has described; but in both England and America there have been crises in the history of the country in which the Legislature failed to give expression to the contemporaneous wishes of the nation, and it may be that in some such cases the advantage may rest with that form of Constitution which has placed the most obstacles in the way of the immediate realisation of the popular will. In both countries the two opposing

political parties set themselves to manufacture subject for legislation, upon which they can appeal to the electors to give them a majority in Parliament, or in Congress; but in many instances it is doubtful whether the result of the elections expressed the mature and deliberate wishes of the majority of the people upon the particular question which has been most prominently discussed during this electoral campaign. In England a Ministerial or Opposition majority is frequently obtained by the inclusion of a number of secondary questions in the electoral programme which secure the adherence of various sections of the community who are perfectly indifferent or very lukewarm in regard to the principal plank in the party platform. But if the majority obtained by that process is sufficiently large, it is taken to be an acceptance by the people of the entire platform, and legislation immediately follows to give effect to it. In America party questions are manufactured at the time of the election of a President, but the result of that election does not entail any immediate action. The opposing party may have a majority in one or both branches of Congress during the whole of the President's term of office, and every two years the whole of one branch and one-third of the other branch are renewed by fresh elections. By means of these periodical changes in the composition of the Senate and the House of Representatives, the actual wishes and opinions of the people in regard to the party questions that were the subject of debate during the presidential election have additional means and opportunities of expression before legislative action is finally taken upon them. As Mr. Bryce in his great work on the American Commonwealth has truly said, "If the people desire perfect stability, it must put up with a certain slowness and cumbersomeness. It must face the possibility of a want of action when action is called for. If, on the other hand, it seeks to obtain executive speed and vigor by a complete concentration of power, it must run the risk that the power will be abused, and irrevocable steps be too hastily taken." If a test of the excellence of a political Constitution is the rapidity with which it allows laws to be made and executed in accordance with the wishes of the majority of the day, the English system of Cabinet Government, with its dependence of Ministers upon the Legislature for their tenure of office, must certainly be admitted to be superior to that of the Presidential and Congressional Government of the United States. But there are a number of keen and careful observers who share the judgment of the late Sir Henry Maine, whose wide and profound knowledge of political and social institutions in many ages eminently fitted him to form a reliable opinion on the subject, and who asserted that the English people "are drifting towards a type of Government associated with terrible events, a single assembly armed with full power over the Constitution which it may exercise at pleasure. . . . A theoretically all-powerful convention, governed by a practically all-powerful secret committee of

public safety.” Such a type of Government can never arise under the Constitution of the United States, so long as it retains the fundamental features which its authors impressed upon it.

Power and Influence of the Senate.

The composition and continuity of the Senate effectually protect it against any attempted coercion by the House of Representatives or by a temporary majority of the people, while its power of veto in the matter of appointments to the Federal Judiciary, and in regard to the appointment of all the superior officers of the Federal Government who are under the direction and control of the President, together with its participation in the making of all treaties with other nations, secure for it a prestige and an independent and prominent activity in the political life of the nation which enable it to exercise an influence on all federal legislation which the House of Representatives is unable to resist or diminish. As a necessary consequence of its predominant influence and prestige, the Senate has always attracted a very large proportion of the ablest and most prominent politicians in the country, with the result of strengthening and extending its influence on the public opinion of the nation, and actual deadlocks in legislation in consequence of differences of opinion between it and the House of Representatives have been very rare.

The Presidential Veto.

In the veto power of the President the Constitution has also provided another bulwark against the coercive attempts of temporary majorities, whether in the electorate or the Legislature, and the emphatic testimony of American history on this point is that a President does not suffer any loss of public favour or confidence by the exercise of this power. On the contrary, the usual result of the exercise of it is to elevate him in public esteem. The same statement may be made in regard to the exercise of the veto powers which the Constitutions of the separate States confer upon their Governors; and, in the case of President Cleveland, we find that it was his free and courageous exercise of his veto power in the successive positions of Mayor of Buffalo and Governor of the State of New York which drew the attention of the country to him and led to his nomination and election to the presidency.

The Supreme Court and the Rights of the American Citizen Under the Constitution.

In the last place the Constitution has provided in the Federal Supreme Court a

final and permanent restraint upon any violation of the personal rights which the Constitution has assured to the individual citizen for the protection of his life, his liberty, and his property. Entrenched in the Constitution, beyond the reach of President or Congress, the Federal Supreme Court, in response to the appeal of the humblest citizen, will restrain and annul whatever the folly, or the ignorance, or the anger of a majority of Congress or of the people may at any time attempt to do in contravention of any personal or political right or privilege the Constitution has guaranteed to him. So great and momentous a power has probably never been vested in any other judicial tribunal in the world, and the protective functions and the impregnable position assigned to the Supreme Court of the United States may always with pardonable pride be claimed by the advocates of a republican form of Government as having been first exhibited to the world in association with republican institutions. Many of its most important and beneficent decisions have been founded upon those amendments of the Constitution which, as has been previously stated, are frequently described as the American Bill of Rights, and those decisions may be cited as examples of a successful application to practical politics of the essentially republican doctrine of the natural, or, as they have been more correctly designated by Reneuvier, the rational rights of man. Discredited as that doctrine may be in many quarters to-day in consequence of the distortions it has suffered at the hands of some of its expounders in the past, it has the support and endorsement of some of the greatest of English, French, and American publicists and jurists; and it may be that it will ultimately be found to be the true and final justification of all resistance to the tyranny of the majority, whose unrestricted rule is so often and so erroneously regarded as the essence and distinctive principle of democracy. The unrestricted rule of the majority of the hour is at all times a contradiction of the rational rights of the individual; and to every man who, in the midst of the political and social turmoil that surrounds us to-day, speculates on the future of human society, it may well be a substantial satisfaction to know that, during a period of more than a century, a political Constitution which guarantees to every man living under it the protection of the rights asserted by the Declaration of Independence to be inalienable, has proved capable of providing the necessary machinery to govern a people which, during that period, has increased from four millions to seventy millions; and that while it places the ultimate source of all political authority in the whole body of the citizens, yet erects effectual barriers against all attempts to establish a democratic despotism.

(a) *McCready v. Virginia*, 94 U.S., 391.

(a) *Slaughter House Cases*, 16 Wall., 36.

(a) *Boutmy: Studies in Constitutional Law.*

Documents

An Act to Constitute the Commonwealth of Australia.

A.D. 1900.

[*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 Australian 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:

I. This Act may be cited as the Commonwealth of Australia Constitution Act.

Short title.

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.

Act to extend to the Queen's Successors.

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.

Proclamation of Commonwealth.

IV. The Commonwealth shall be established, 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.

Commencement of Act.

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; 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.

Operation of the Constitution and laws.

VI. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

Definitions.

"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 Commonwealth 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 Australia Act, 1885, is hereby repealed; but so as not to affect any laws passed by the Federal Council of Australia 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, 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.

Application of Colonial Boundaries Act, 58 & 59 Vict., c. 34.

IX. The Constitution of the Commonwealth shall be as follows :

A.D. 1900. Constitution.

The Constitution.

This Constitution is divided as follows:—

| | Secs. |
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| Chapter I.—THE PARLIAMENT. | |
| Part I.—General, | 1–6 |
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| Chapter VIII.—Alteration of the Constitution, . . | 128 |
| The Schedule. | |

CHAPTER 1. THE PARLIAMENT.

PART I - GENERAL.

Legislative Power.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, 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.

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.

Provisions relating to the 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.

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.

Summoning Parliament.

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.

First session.

The Parliament shall be summoned to meet not later than six months after the

establishment of the Commonwealth.

Yearly session of Parliament.

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.

Part II.—The Senate.

PART II. THE SENATE.

7. The Senate shall be composed of senators for each State, directly chosen by the people 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.

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.

Qualification of electors.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform 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.

A.D. 1900. Method of election of senators.

The Parliament of a State may make laws for determining the times and places of

elections of senators for the State.

Times and places.

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.

Application of State laws.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Failure to choose senators.

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.

Issue of writs.

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 class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration 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.

Rotation of senators.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January 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 preceding the day of his election.

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.

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.

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.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Qualifications of senator.

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.

Election of 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.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Absence of President.

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.

Resignation of senator.

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 by absence.

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.

Vacancy to be notified.

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.

Quorum.

23. Questions arising in the Senate shall be determined by a majority of votes,; 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.

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, 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.

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.

Provision as to races disqualified from voting.

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:

Representatives in first Parliament.

| | | |
|--------------------------|---------------|---------------------------|
| 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. |

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Alteration of number of members.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Duration of House of Representatives.

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.

Electoral divisions.

In the absence of other provision, each State shall be one electorate.

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.

Qualification of electors.

31. Until the Parliament otherwise provides, but subject to this Constitution, the law 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.

Application of State laws.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

Writs for general election.

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.

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.

Writs for vacancies.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

Qualifications of members.

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.

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.

Election of 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.

36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.

Absence of Speaker.

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.

Resignation of member.

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.

Vacancy by absence.

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.

Quorum.

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.

Voting in House of Representatives.

Part IV.—Both Houses of the Parliament.

A.D. 1900. PART IV. BOTH HOUSES OF THE PARLIAMENT.

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.

Right of electors of States.

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.

Oath or affirmation of allegiance.

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.

Member of one House ineligible for other.

44. Any person who—

Disqualification.

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 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.

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.

45. If a senator or member of the House of Representatives—
A.D. 1900. Vacancy on happening of disqualification.

- 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.

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.

Penalty for sitting when disqualified.

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.

Disputed elections.

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.

Allowance to members.

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.

Privileges, etc., of Houses.

50. Each House of the Parliament may make rules and orders with respect to:

Rules and orders.

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.

Part V.—Powers of the Parliament.

A.D. 1900. PART V. 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:

Legislative powers of the Parliament.

I. Trade and commerce with other countries, and among the States:

II. Taxation; but so as not to discriminate between States or parts of States:

III. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:

IV. Borrowing money on the public credit of the Commonwealth:

V. Postal, telegraphic, telephonic, and other like services:

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:

VII. Light-houses, light-ships, beacons and buoys:

VIII. Astronomical and meteorological observations:

IX. Quarantine:

X. Fisheries in Australian waters beyond territorial limits:

XI. Census and statistics:

XII. Currency, coinage, and legal tender:

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:

XIV. Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:

XV. Weights and measures:

XVI. Bills of exchange and promissory notes:

XVII. Bankruptcy and insolvency:

XVIII. Copyrights, patents of inventions and designs, and trade marks:

XIX. Naturalization and aliens:

XX. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

XXI. Marriage:

XXII. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

XXIII. Invalid and old-age pensions:

XXIV. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

XXV. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States:

XXVI. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:

XXVII. Immigration and emigration:

XXVIII. The influx of criminals:

XXIX. External affairs:

XXX. The relations of the Commonwealth with the islands of the Pacific:

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:

XXXII. The control of railways with respect to transport for the naval and military purposes of the Commonwealth:

XXXIII. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:

XXXIV. Railway construction and extension in any State with the consent of that State:

XXXV. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:

XXXVI. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:

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:

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:

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:

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to:

Exclusive powers of the Parliament.

I. The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:

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:

III. Other matters declared by this Constitution to be within the exclusive power of the Parliament:

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 licenses, or fees for services under the proposed law.

Powers of the Houses in respect of legislation.

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.

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

Appropriation 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.

Tax Bill.

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.

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.

Recommendation of money votes.

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.

Disagreement between the Houses.

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.

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.

Royal assent to Bills.

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.

Recommendations by Governor-General.

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.

Disallowance by the Queen.

60. 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-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.

Signification of Queen's pleasure on Bills reserved.

Chapter II. The Executive Government.

A.D. 1900. CHAPTER II. THE GOVERNMENT.

61. 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.

Executive power.

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.

Federal Executive Council.

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.

Provisions referring to Governor-General.

64. The Governor-General may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish.

Ministers of State.

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.

Ministers to sit in Parliament.

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.

Number 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.

Salaries of Ministers.

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.

Appointment of civil servants.

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.

Command of naval and military forces.

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:—

Transfer of certain departments.

Posts, telegraphs, and telephones;

Naval and military defence;

Light-houses, light-ships, beacons, and buoys;

Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

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.

Certain powers of Governors to vest in Governor-General.

Chapter III. The Judicature.

A.D. 1900. CHAPTER III. THE JUDICATURE.

71. 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. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judicial power and Courts.

72. The Justices of the High Court and of the other courts created by the Parliament—

Judges appointment, tenure, and remuneration.

I. Shall be appointed by the Governor-General in Council:

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:

III. Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

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—

Appellate jurisdiction of High Court.

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.

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.

Appeal to Queen 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.

75. In all matters—

Original jurisdiction of High Court.

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 the High Court shall have original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

Additional original jurisdiction.

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.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

Power to define jurisdiction.

I. Defining the jurisdiction of any federal court other than the High Court:

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:

III. Investing any court of a State with federal jurisdiction.

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.

Proceedings against Commonwealth or State.

79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Number of judges.

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.

Trial by jury.

Chapter IV. Finance and Trade.

A.D. 1900. CHAPTER IV. FINANCE AND TRADE.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund), to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Consolidated Revenue Fund.

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.

Expenditure charged thereon.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Money to be appropriated by law.

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.

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.

Transfer of officers.

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.

85. When any department of the public service of a State is transferred to the Commonwealth—

Transfer of property of State.

I. 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.

IV. The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

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.

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.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

Uniform duties of customs.

89. Until the imposition of uniform duties of customs:

Payment to States before uniform duties.

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.

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.

Exclusive power over customs, excise, and bounties.

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.

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.

Exceptions as to bounties.

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.

Trade within the Commonwealth to be free.

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.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides:

Payment to States for five years after uniform Tariffs.

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.

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.

Distribution of surplus.

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.

Customs duties of Western Australia.

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.

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.

Financial assistance to States.

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.

Audit.

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.

Trade and commerce includes navigation and State railways.

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.

Commonwealth not to give preference.

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.

Nor abridge right to use water.

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.

Inter-State Commission.

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.

Parliament may forbid preferences by State.

103. The members of the Inter-State Commission:

Commissioners' appointment, tenure, and remuneration.

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.

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

Saving of certain rates.

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.

Taking over public debts of States.

Chapter V. The States.

CHAPTER V. THE STATES.

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.

Saving of Constitutions.

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.

Saving of power of State Parliaments.

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.

Saving of State 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.

Inconsistency of laws

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.

Provisions referring to Governor.

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.

States may surrender territory.

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.

States may levy charges for inspection laws.

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.

Intoxicating liquids.

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.

States may not raise forces. Taxation of property of Commonwealth or State.

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.

States not to coin money.

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.

Commonwealth not to legislate in respect of religion.

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.

Rights of residents in 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.

Recognition of laws, etc., of States.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

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.

Custody of offenders against laws of the Commonwealth.

Chapter VI. New States.

A.D. 1900. 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.

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 fit.

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.

Alteration of limits of 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.

Formation of new States.

Chapter VII. Miscellaneous.

A.D. 1900. CHAPTER VII. MISCELLANEOUS.

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.

Seat of Government.

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.

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.

Power to Her Majesty to authorize Governor-General to appoint deputies

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.

Aborigines not to be counted in reckoning population.

Chapter VIII. Alteration of the Constitution.

A.D. 1900. CHAPTER VIII. ALTERATION OF CONSTITUTION.

128. This Constitution shall not be altered except in the following manner:

Mode of altering the Constitution

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.

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 Britain and Ireland for the time being is to be substituted from time to time.*)
