

# The Constitution of the Commonwealth of Australia

Moore, W Harrison, Sir (1867-1935)

A digital text sponsored by  
New South Wales Centenary of Federation Committee

University of Sydney Library  
Sydney

2000



<http://setis.library.usyd.edu.au/fed/>

© University of Sydney Library.

The texts and Images are not to be used for commercial purposes without permission

**Source Text:**

Prepared from the print edition published by John Murray, Albemarle St.  
London 1902

---

First Published: 1902  
Languages: French

*Australian Etexts 1890-1909 prose nonfiction federation*

**2001**  
Creagh Cole Coordinator  
Final Checking and Parsing

**The Constitution of the Commonwealth of Australia**  
**London**  
**John Murray, Albemarle St.**  
**1902**

## Preface

THE writer of a book on the Commonwealth of Australia has no need to arouse interest in his subject; but his anxiety must be the greater, lest his exposition should be unworthy of the matter dealt with, and should fail to satisfy the expectations of those who, from many very different points of view, desire to study the new Constitution.

I have departed somewhat from the arrangement adopted in the Constitution itself, for reasons which I think will be apparent to those who may use the book. I hope, however, that the index to the Constitution will enable readers to use the book as an annotated text.

I append a list of principal works referred to. I have not in every case made use of the latest editions, partly because in Australia it is not always easy to obtain them or even to ascertain what is the latest edition of a work, partly because the greater number are works of which libraries and students are as likely to have earlier as later editions.

I desire to express my thanks to the editors and publishers of the **Quarterly Review**, the **Law Quarterly Review**, and the **Journal of the Society of Comparative Legislation** for permission to make use of articles which I have contributed to those magazines; in the case of the last-named journal, I have also to acknowledge the assistance I have received from the articles which have appeared from time to time on Modes of Legislation in the British Colonies, and from Mr. Wood Renton's article on Indian and Colonial Appeals to the Privy Council.

To Mr. Justice Inglis Clark, of the Supreme Court of Tasmania, and to the Hon. W. H. Irvine, late Attorney General for Victoria, I am indebted for advice and criticism on particular matters. My thanks are also due to Professor Jethro Brown, of the University College of Wales, for reading the proofs and seeing the book through the press; and to Mr. Alban C. Morley, of the Victorian Bar, for assistance in making the indexes and in preparing the book for the press.

W.H.M.

MELBOURNE, 1901.

## **Note.**

The Publisher thinks it right, on behalf of the Author who is in Australia, to acknowledge the trouble and care taken by Mr. C. Eastlake Smith in the final adaptation of the Index and the reading of the proofs of this book.

# Contents

	PAGE
TABLE OF CASES, . . . . .	xi
TABLE OF STATUTES, . . . . .	xvi
PRINCIPAL WORKS REFERRED TO, . . . . .	xx
CHAPTER I.	
THE SOURCES OF THE LAWS AND INSTITUTIONS OF THE COLONIES, . . . . .	1
CHAPTER II.	
THE HISTORY OF AUSTRALIAN FEDERATION, . . . . .	19
CHAPTER III.	
THE NATURE AND AUTHORITY OF THE FEDERAL COMMONWEALTH, . . . . .	62
CHAPTER IV.	
“THE CONSTITUTION” OF THE COMMONWEALTH, . . . . .	75
CHAPTER V.	
DISTRIBUTION OF POWERS IN THE COMMONWEALTH, . . . . .	82
CHAPTER VI.	
THE PARLIAMENT, . . . . .	92
CHAPTER VII.	
THE RELATIONS OF THE SENATE AND THE HOUSE OF REPRESENTATIVES, . . . . .	117
CHAPTER VIII.	
THE LEGISLATIVE POWER OF THE PARLIAMENT, . . . . .	128
CHAPTER IX.	
THE SUBJECTS OF THE LEGISLATIVE POWER OF THE PARLIAMENT, . . . . .	141
CHAPTER X.	
THE RELATION OF THE LEGISLATIVE AUTHORITIES: THE IMPERIAL PARLIAMENT, THE COMMONWEALTH PARLIAMENT, THE STATE PARLIAMENT: THE VALIDITY OF LAWS, . . . . .	165
CHAPTER XI.	
FINANCE AND TRADE, . . . . .	180
CHAPTER XII.	
THE EXECUTIVE POWER: ORGANIZATION OF THE EXECUTIVE, . . . . .	210
CHAPTER XIII.	
THE FEDERAL EXECUTIVE COUNCIL AND THE QUEEN'S MINISTERS OF STATE: THE CABINET SYSTEM, . . . . .	224
CHAPTER XIV.	
THE JUDICATURE, . . . . .	232
CHAPTER XV.	
THE APPELLATE JURISDICTION: THE QUEEN IN COUNCIL AND THE HIGH COURT OF AUSTRALIA, . . . . .	245
CHAPTER XVI.	
THE FEDERAL JURISDICTION, . . . . .	258
CHAPTER XVII.	
ORGANIZATION OF COURTS: JUDICIAL TENURE: THE CONSTITUTION OF THE FEDERAL COURTS, . . . . .	276
CHAPTER XVIII.	

THE STATES, . . . . .	282
CHAPTER XIX.	
NEW STATES AND TERRITORIES, . . . . .	310
CHAPTER XX.	
THE ALTERATION OF THE CONSTITUTION, . . . . .	316
CHAPTER XXI.	
CONCLUSION,	324
THE COMMONWEALTH OF AUSTRALIA ACT, 1900 ( <i>annotated</i> ),	333
APPENDIX.	
A. THE CHARACTER OF POLITICAL UNIONS, . . . .	362
B. CONSTITUTIONAL DOCUMENTS RELATING TO COMMONWEALTH:	
1. Proclamation of Commonwealth of Australia, . .	367
2. Letters Patent creating office of Governor-General, .	368
3. Instructions to Governor-General, . . . .	371
4. Commission appointing Lord Hopetoun Governor-General,	374
CONSTITUTIONAL DOCUMENTS RELATING TO STATE:	
1. Letters Patent creating office of Governor of State of Victoria, . . . . .	375
2. Instructions to Governor of Victoria, . . .	379
3. Commission appointing Sir John Madden Lieutenant-Governor of Victoria, . . . . .	382
INDEX, . . . . .	383

## List of Cases Referred to.

- Abbot *v.* Bayley, 297.  
Alcock *v.* Fergie, 277.  
Alger, Commonwealth of Massachusetts *v.*, 302.  
Alliance Contracting Company *v.* Russell, 257.  
Alling *v.* Sherlock, 304.  
American Bridge Co., Cardwell *v.*, 205.  
American Insurance Company *v.* Canter, 313.  
American Publishing Company *v.* Fisher, 313.  
Apollo Candle Company, Powell *v.*, 77, 130, 177, 179.  
Ashbury *v.* Ellis, 8.  
Attorney-General for Canada *v.* Attorney-General for Ontario (The Pardoning Power Case), 219.  
Attorney-General for the Dominion of Canada *v.* Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia, 72, 242, 295.  
Attorney-General for Hong-Kong *v.* Kwok-a-Sing, 86.  
Attorney-General of Manitoba, Brophy *v.*, 193.  
Attorney-General for New South Wales, M'Leod *v.*, 8, 166.  
Attorney-General of Ontario *v.* Attorney-General for the Dominion, 138, 146.  
Attorney-General for Ontario *v.* Attorney-General for the Dominion and the Distillers' and Brewers' Association of Ontario (The Liquor Prohibition Case), 133, 139, 174, 306.  
Attorney-General for Ontario *v.* Mercer, 74, 239, 269.  
Attrill, Huntington *v.*, 153.  
Baird, Walker *v.*, 261.  
Baltimore, Penn *v.*, 263.  
Baltimore and New York Railroad Company, Stockton *v.*, 157.  
Baltimore and Ohio Railway Company, Inter-State Commerce Commission *v.*, 185.  
Baltimore, Mayor of, Barron *v.*, 202.  
Bank of Toronto *v.* Lambe, 70, 183, 186.  
Barbier *v.* Connolly, 301, 303.  
Barron *v.* Mayor of Baltimore, 202.  
Barton *v.* Taylor, 114, 161, 254.  
Bateman's Trusts, *in re*, 74, 262.  
Bayley, Abbot *v.*, 297.  
Bélisle, L'Union St. Jacques de Montreal *v.*, 132, 147.  
Beresford-Hope *v.* Sandhurst, 110.  
Bickford, Smith and Company *v.* Musgrove, 176.  
Bigge, Hill *v.*, 94.  
Black, Dow *v.*, 189.  
Blackwood *v.* Reg., 299.

Blake, Loughborough v., 313.  
Blake v. McClung, 295, 296, 297.  
Board of Wardens of the Port of Philadelphia, Cooley v., 199.  
Boothby, Justice, case of, 278.  
Bowman v. Chicago Railway Company, 203, 305.  
Bowman, Farnell v., 265, 266.  
Bradfield v. Roberts, 308.  
Brophy v. Attorney-General of Manitoba, 193.  
Buckwalter v. United States, 272.  
Bull, Calder v., 85.  
Burah, Reg. v., 9, 77, 86, 129, 130.  
Butler v. Goreley, 174.  
Calder v. Bull, 85.  
Cameron v. Kyte, 94.  
Campbell v. Hall, 261.  
Canter, American Insurance Company v., 313.  
Cardwell v. American Bridge Co., 205.  
Carson, Kielley v., 114.  
Chemung Canal Bank v. Lowrey, 296.  
Cherokee Nation v. State of Georgia, 260, 269.  
Chicago, Escanaba Co. v., 205.  
Chicago and U.W. Railway Company, Bowman v., 203, 305.  
Chicago and Alton Railroad v. Wiggins Ferry Company, 152.  
Chicago and Grand Trunk Railway Company v. Wellman, 238.  
Chisholm v. State of Georgia, 258, 266, 276.  
Chorlton v. Lings, 110, 111.  
Citizens' Insurance Company of Canada v. Parsons, 137.  
Civil Rights Cases, The, 303.  
Claflin v. Houseman, 69, 274.  
Clary, Commonwealth of Massachusetts v., 71.  
Cohens v. Virginia, 69, 163, 271, 274.  
Commercial Bank v. McCaskill, 257.  
Commissioners of Stamps v. Harding, 6.  
Commonwealth of Massachusetts v. Clary, 71.  
Commonwealth of Massachusetts v. Alger, 300.  
Commonwealth of Pennsylvania v. Standard Oil Company, 299.  
Commonwealth of Pennsylvania, Gloucester Ferry Coy. v., 299.  
Commonwealth of Pennsylvania, Pullman's Car Company v., 299.  
Connolly, Barbier v., 301, 303.  
Connor v. Elliot, 296.  
Cook v. Sprigg, 261.  
Cooley v. Board of Wardens of the Port of Philadelphia, 199.  
Cooper v. Stewart, 2.  
Cooper v. Telfair, 85.  
Corfield v. Coryell, 72, 295.

Cornell, United States *v.*, 71.  
Coryell, Corfield *v.*, 72, 295.  
Council of Dover, *ex p.* County Council of Kent *v.*, 242.  
Country Council of Kent *ex p.* *v.* Council of Dover, 242.  
Country of Mobile *v.* Kimball, 204.  
Crease, Robertson *v.*, 258.  
Cumings *v.* Wingo, 296.  
Cushing *v.* Dupuy, 147, 248, 249, 255.  
Davis, Tennessee *v.*, 271.  
Debs, *in re*, 306.  
Dennison, Kentucky *v.*, 264.  
Devine *v.* Holloway, 104.  
Dill *v.* Murphy, 114.  
Dodge *v.* Woolsey, 83.  
Donohue, Hanley *v.*, 152, 153.  
Dover, Council of, *ex p.* County Council of Kent *v.*, 242.  
Dow *v.* Black, 189.  
Doyle *v.* Falconer, 114.  
Dunning, State of Indiana *v.*, 219.  
Dupuy, Cushing *v.*, 147, 248, 249, 255.  
E. C. Knight Coy. United States *v.* (The Case of the Sugar Trust), 198.  
Elliot, Connor *v.*, 296.  
Ellis *v.* McHenry, 4.  
Ellis, Ashbury *v.*, 8.  
Escanaba Co. *v.* Chicago, 205.  
Evershead, L. and N.W.R. *v.*, 185.  
Extended Hustlers' Freehold Company *v.* Moore, &c., 257.  
Eyre, Phillips *v.*, 77, 86.  
Falconer, Doyle *v.*, 114.  
Farmers' Trust, The, Pollock *v.* (The Income Tax Case), 184.  
Farnell *v.* Bowman, 265, 266.  
Fergie, Alcock *v.*, 277.  
Fielding *v.* Thomas, 87, 132.  
Fisher, American Publishing Company *v.*, 313.  
Fort Leavenworth *v.* Lowe, 72.  
Freeman, Chy Lung *v.*, 302, 306.  
Frith *v.* Reg., 262.  
Gagnon, Prince *v.*, 249.  
Georgia, State of, *v.* Stanton, 260, 269.  
Georgia, State of, Cherokee Nation *v.*, 260, 269.  
Georgia, State of, Chisholm *v.*, 258, 266, 267.  
Georgia, State of, South Carolina *v.*, 264.  
Gibbons *v.* Ogden, 197, 198, 302, 303.  
Glass, Speaker of Legislative Assembly of Victoria *v.*, 114.  
Gloucester Ferry Company *v.* Pennsylvania, 299.

Glover, Huse *v.*, 205.  
Godfrey, *v.* Terry, 258.  
Goreley, Butler *v.*, 174.  
Governor and Government of New Zealand, Sloman *v.*, 73, 262.  
G.W.R. *v.* Sutton, 185.  
G.W.R., Parker *v.*, 185.  
Hall, Campbell *v.*, 261.  
Hamilton *v.* Vicksburg Ry. Co., 205.  
Hanley *v.* Donohue, 152, 153.  
Hans *v.* Louisiana, 264, 267.  
Happersett, Minor *v.*, 297.  
Hardin, Leisy *v.*, 203, 290, 305.  
Harding, Commissioners of Stamps *v.*, 6.  
Henderson *v.* New York, 306.  
Hill *v.* Bigge, 94.  
Hodge *v.* Reg., 77, 86, 130.  
Holloway, Devine *v.*, 104.  
Holmes *v.* Reg., 262.  
Homeward Bound G.M. Company *v.* Macpherson, 152.  
Houseman, Claflin *v.*, 69, 274.  
Houston *v.* Moore, 173, 272.  
Huntington *v.* Attrill, 153.  
Huse *v.* Glover, 205.  
Husen, Railroad Company *v.*, 302, 305.  
Hutchinson, Palmer *v.*, 262.  
Income Tax Case, The (Pollock *v.* The Farmers' Trust), 184.  
Indiana, State of, *v.* Dunning, 219.  
Inter-State Commerce Commission, The, *v.* Baltimore and Ohio Railway Company, 185.  
Johnston *v.* St. Andrew's Church, 248.  
Jones, United States *v.*, 285.  
Judges of the Court of Registration (Massachusetts), Tyler *v.*, 237.  
Kempton Park Racecourse Company, Powell *v.*, 238.  
Kendall *v.* United States, 215.  
Kent, *ex p.* County Council of, *v.* Council of Dover, 242.  
Kentucky *v.* Dennison, 264.  
Kentucky, Patterson *v.*, 302.  
Kielley *v.* Carson, 114.  
Kimball, County of Mobile *v.*, 204.  
Kwok-a-Sing, Attorney-General for Hong Kong *v.*, 86.  
Kyte, Cameron *v.*, 94.  
Lambe, Bank of Toronto *v.*, 70, 183, 186.  
Lathrop, United States *v.*, 272.  
Legal Tender Cases, The, 149.  
Leisy *v.* Hardin, 203, 290, 305.

Lemmon *v.* The People, 296.  
Licence Cases, The, 301, 302.  
Lings, Chorlton *v.*, 110, 111.  
Liquor Prohibition Case, The (A.-G. for Ontario *v.* A.-G. for the Dominion and the Distillers' and Brewers' Association of Ontario), 133, 139, 174, 306.  
L. and N.W.R. *v.* Evershead, 185.  
Loughborough *v.* Blake, 313.  
Louisiana, Hans *v.*, 264, 267.  
Louisiana *v.* Texas, 264.  
Low *v.* Routledge, 8.  
Lowe, Fort Leavenworth *v.*, 72.  
Lowrey, Chemung Canal Bank *v.*, 296.  
L'Union St. Jacques de Montreal *v.* Bélisle, 132, 147.  
Luxton *v.* North River Bridge Company, 157.  
Macleod *v.* Attorney-General for New South Wales, 8, 166.  
Macpherson, Homeward Bound G.M. Company *v.*, 152.  
McCaskill, Commercial Bank *v.*, 257.  
McClung, Blake *v.*, 295, 296, 297.  
McCluny *v.* Silliman, 269, 274.  
McCready *v.* Virginia, 295.  
M'Culloch *v.* State of Maryland, 135, 137, 183, 186, 298, 332.  
McHenry, Ellis *v.*, 4.  
Madison, Marbury *v.*, 270, 274.  
Manistee Improvement Co., Sands *v.*, 205.  
Marbury *v.* Madison, 270, 274.  
Maritime Bank *v.* Reg., 168.  
Maritime Bank of Canada *v.* New Brunswick Receiver General, 74, 287.  
Maryland, Ward *v.*, 297.  
Maryland, State of, M'Culloch *v.*, 135, 137, 183, 186, 298, 332.  
Massachusetts, Commonwealth of, *v.* Alger, 302.  
Massachusetts, Commonwealth of, *v.* Clary, 7.  
Mayor of Baltimore, Barron *v.*, 202.  
Mayor of New York *v.* Miln, 301.  
Mercer, Attorney-General for Ontario *v.*, 74, 239, 269.  
Miln, Mayor of New York *v.*, 301.  
Minor *v.* Happersett, 297.  
Mobile, County of, *v.* Kimball, 204.  
Monk *v.* Ouimet, 74.  
Moore, etc., Extended Hustlers' Freehold Company *v.*, 257.  
Moore, Houston *v.*, 173, 272.  
Mormon Church *v.* United States, 313.  
Morrison, New Zealand Loan and M.A. Company, Ltd. *v.*, 4.  
Murphy, Dill *v.*, 114.  
Musgrove, Bickford, Smith and Company *v.*, 176.  
Musgrove, Toy *v.*, 216, 229.

Neagle, *in re*, 161, 213, 306.  
New Brunswick Receiver General, Maritime Bank of Canada *v.*, 74, 287.  
New York, Mayor of, *v.* Miln, 301.  
New York, Henderson *v.*, 306.  
New Zealand, Governor and Government of, Sloman *v.*, 73, 262.  
New Zealand Loan and Mercantile Agency Company, Ltd. *v.* Morrison, 4.  
North River Bridge Company, Luxton *v.*, 157.  
Ogden, Gibbons *v.*, 197, 198, 302, 303.  
Oriental Bank Corporation, *in re, ex p.* The Crown, 74, 262.  
Ouimet, Monk *v.*, 74.  
Palmer *v.* Hutchinson, 262.  
Pardoning Power Case, The (Attorney-General for Canada *v.* Attorney-General for Ontario), 219.  
Parker *v.* G.W.R., 185.  
Parlement Belge, The, 261.  
Parsons, Citizens' Insurance Company of Canada *v.*, 137.  
Passenger Cases, The, 199, 306.  
Patterson *v.* Kentucky, 302.  
Pearson *v.* Russell, 257.  
Pelican Insurance Company, Wisconsin *v.*, 152, 153, 264, 273.  
Penn *v.* Baltimore, 263.  
Pennsylvania, Commonwealth of, *v.* Standard Oil Company, 299.  
Pennsylvania, Commonwealth of, Gloucester Ferry Company *v.*, 299.  
Pennsylvania, Commonwealth of, Pullman's Car Company *v.*, 299.  
People, The, Lemmon *v.*, 296.  
Phillips *v.* Eyre, 77, 86.  
Pollock *v.* The Farmers' Trust (The Income Tax Case), 184.  
Port of Philadelphia, Board of Wardens of, Cooley *v.*, 199.  
Powell *v.* Apollo Candle Company, 77, 130, 177, 179.  
Powell *v.* Kempton Park Racecourse Company, 238.  
Prince *v.* Gagnon, 249.  
Pullman's Car Company *v.* Pennsylvania, 299.  
Rahrer, *in re*, 137, 174, 203.  
Railroad Company *v.* Husen, 302, 305.  
Railway Company (Chicago), Bowman *v.*, 203, 305.  
Receiver General of New Brunswick, Maritime Bank of Canada *v.*, 74, 287.  
Reese, United States *v.*, 167.  
Reg. *v.* Burah, 9, 77, 86, 129, 130.  
Reg. *v.* Riel, 129.  
Reg. *v.* Wilson, 261.  
Reg., Blackwood *v.*, 299.  
Reg., Frith *v.*, 262.  
Reg., Hodge *v.*, 77, 86, 130.  
Reg., Holmes *v.*, 262.  
Reg., Maritime Bank *v.*, 168.

Reg., Russell v., 138.  
Reg., St. Catherine's Milling and Lumber Company v., 72, 74, 240, 269.  
Reg., Stevenson v., 277.  
Reg., Tobin v., 265.  
Reynolds, United States v., 308.  
Riel, Reg. v., 129.  
Robbins v. Shelby County Taxing District, 200, 203.  
Roberts, Bradfield v., 308.  
Robertson v. Crease, 258.  
Rolfe, *ex p.*, 257.  
Routledge, Low v., 8.  
Russell v. Reg., 138.  
Russell, Alliance Contracting Company v., 257.  
Russell, Pearson v., 277.  
Rutland, etc., Railway Company, Thorpe v. 302.  
St. Andrew's Church, Johnston v., 248.  
St. Catherine's Milling and Lumber Company v. Reg., 72, 74, 240, 269.  
Sandhurst, Beresford-Hope v., 110.  
Sands v. Manistee Improvement Co., 205.  
Shelby County Taxing District, Robbins v., 200, 203.  
Sherlock, Alling v., 304.  
Silliman, McCluny v., 269, 274.  
Slaughter House Cases, The, 182, 294, 303, 325.  
Sloman v. Governor and Government of New Zealand, 173, 262.  
South Carolina v. Georgia, 264.  
Speaker of Legislative Assembly of Victoria v. Glass, 114.  
Spickler, *in re*, 137.  
Spiller v. Turner, 300.  
Sprigg, Cook v., 261.  
Stamps, Commissioners of, v. Harding, 6.  
Standard Oil Company, Commonwealth of Pennsylvania v., 299.  
Stanton, State of Georgia v., 260, 269.  
State Tax on Foreign Held Bonds, Case of the, 299.  
State of Georgia v. Stanton, 260, 269.  
State of Indiana v. Dunning, 219.  
State of Kentucky v. Dennison, 264.  
State of South Carolina v. Georgia, 264.  
State of Tennessee v. Davis, 271.  
State of Texas v. White, 283.  
State of Wisconsin v. Pelican Insurance Company, 152, 153, 264, 273.  
State of Georgia, Cherokee Nation v., 260, 269.  
State of Georgia, Chisholm v., 258, 266, 267.  
State of Georgia, State of South Carolina v., 264.  
State of Kentucky, Patterson v., 302.  
State of Louisiana, Hans v., 264, 267.

State of Maryland, M'Culloch v., 135, 137, 183, 186, 298, 332.  
State of Maryland, Ward v., 297.  
State of Virginia, Cohens v., 69, 163, 271, 274.  
State of Virginia, McCready v., 295.  
Stevenson v. Reg., 277.  
Stewart, Cooper v., 2.  
Stockton v. Baltimore and New York Railroad Company, 157.  
Sugar Trust, The Case of the (United States v. E. C. Knight Company), 198.  
Sutton, G.W.R. v., 185.  
Tarble's Case, 272.  
Taylor, Barton v., 114, 161, 254.  
Telfair, Cooper v., 85.  
Tennant v. Union Bank of Canada, 145.  
Tennessee v. Davis, 271.  
Terry, Godfrey v., 258.  
Texas, State of, Louisiana v., 264.  
Texas, State of, v. White, 283.  
Thomas, Fielding v., 87, 132.  
Thompson v. Whitman, 153.  
Thorpe v. Rutland, etc., Railway Company, 302.  
Tobin v. Reg., 265.  
Toy v. Musgrove, 216, 229.  
Trade Mark Cases, The, 167.  
Turner, Spiller v., 300.  
Tyler v. of the Court of Registration (Massachusetts), 237.  
Union Bank of Canada, Tennant v., 145.  
United States v. Cornell, 71.  
United States v. E. C. Knight Company (Case of the Sugar Trust), 198.  
United States v. Jones, 285.  
United States v. Lathrop, 272.  
United States v. Reese, 167.  
United States v. Reynolds, 308.  
United States, Buckwalter v., 272.  
United States, Kendall v., 215.  
United States, Mormon Church v., 313.  
Vicksburg Ry. Co., Hamilton v., 205.  
Virginia, Cohens v., 69, 163, 271, 274.  
Virginia, McCready v., 295.  
Walker v. Baird, 261.  
Ward v. Maryland, 297.  
Wellman, Chicago and Grand Trunk Railway Company v., 238.  
White, State of Texas v., 283.  
Whitman, Thompson v., 153.  
Wiggins Ferry Company, Chicago and Alton Railroad v., 152.  
Wilson, Reg. v., 261.

Wingo, Cumings *v.*, 296.

Wisconsin *v.* Pelican Insurance Company, 152, 153, 264, 273.

Woolsey, Dodge *v.*, 83.

## List of Statutes Cited.

- 5 Geo. iii. c. 12. (The Stamp Act, 1765), 3.  
12 Geo. iii. c. 7. (Tea Duty, 1770), 3.  
22 Geo. iii. c. 75. (The Colonial Leave of Absence Act, 1782), 278.  
27 Geo. iii. c. 2. (The N.S.W. Criminal Courts Act, 1787), 12.  
4 Geo. iv. c. 96. (The Charter of Justice, N.S.W., 1823), 4, 12, 13, 251.  
— sec. 29. 235.  
— sec. 44. 14.  
9 Geo. iv. c. 83. (The Australian Courts Act, 1828), 12, 13, 129, 256, 257.  
— sec. 22. 235.  
— sec. 24. 12.  
10 Geo. iv. c. 22. (The Government of W.A. Act, 1829), 17.  
3 and 4 Will. iv. c. 41, sec. 4. (The Judicial Committee Act, 1833), 241, 260.  
4 and 5 Will. c. 95. (The Government of South Australia Act, 1834), 16.  
1 and 2 Vict. c. 60. (The Government of South Australia Act, 1838), 16.  
5 and 6 Vict. c. 61. (The South Australia Act, 1842), 16. (The N.S. Wales Act, 1842), 19.  
— c. 76. (The Australian Constitutions Act, 1842), 13, 129.  
— sec. 51. 15, 315.  
— sec. 52. 15.  
— sec. 53. 14.  
6 and 7 Vict. c. 22. (The [Colonies] Evidence Act, 1843), 7.  
— c. 34. (The Fugitive Offenders Act, 1843), 144, 150.  
7 and 8 Vict. c. 69. (The Judicial Committee Act, 1844), 256, 257.  
8 Vict. c. 20. (The Railways Clauses Act, 1845), 184.  
10 and 11 Vict. c. 83. (The Aliens Act, 1847), 10.  
10 and 11 Vict. c. 95. (The Colonial Copyright Act, 1847), 4.  
13 and 14 Vict. c. 59. (The Australian Constitutions Act, 1850), 10, 13, 14, 17, 129.  
— sec. 1. 15.  
— sec. 9. 17.  
— sec. 12. 96.  
— sec. 30. 315.  
— sec. 34. 15, 315.  
— sec. 35. 15.  
15 and 16 Vict. c. 72. (The New Zealand Constitution Act, 1852), 279.  
16 and 17 Vict. c. 48. (The Coinage Act [Colonial Offences], 1853), 4.  
— c. 118. (The Apprehension of Offenders Act, 1853), 150.  
17 and 18 Vict. c. 31. (The Railway and Canal Traffic Act, 1854), 184.  
18 and 19 Vict. c. 54. (The New South Wales Constitution Act, 1855), 15, 114, 315.  
— secs. 5, 6, and 7. 315.

— sec. 35. 114.  
— c. 55. (The Victoria Constitution Act, 1855), 15, 114.  
— 40. 309.  
20 and 21 Vict. c. 39. (The Colonial Attorneys Relief Act, 1857), 3.  
22 Vict. c. 20. (The Evidence by Commission Act, 1859), 151.  
22 and 23 Vict. c. 63. (The British Law Ascertainment Act, 1859), 151.  
23 and 24 Vict. c. 122. (The Admiralty Offences [Colonial] Act, 1860), 8.  
24 and 25 Vict. c. 44. (The Australia Colonies Act, 1861), 16, 256.  
— secs. 2, 5, and 6. 315.  
— c. 114. (The Wills Act, 1861 secs. 1 and 2. 3.  
25 and 26 Vict. c. 11. (The Australia Constitutions Act, 1862), 14.  
26 Vict. c. 24. (The Vice-Admiralty Courts Act, 1863), 289.  
28 and 29 Vict. c. 63. (The Colonial Naval Defence Act, 1865), 8, 10, 142  
— c. 14. (The Colonial Laws Validity Act, 1865), 6, 11, 167, 168, 170, 171,  
175, 178.  
— sec. 2. 6, 173, 175.  
— sec. 3. 10.  
— sec. 5. 9, 96, 130.  
— sec. 6. 176.  
— c. 64. (The Colonial Marriages Act, 1865), 8.  
29 and 30 Vict. c. 109. (The Naval Discipline Act, 1866), 142.  
30 and 31 Vict. c. 3. (The British North America Act, 1867), 74, 86, 131, 137,  
139, 167, 169, 170, 174, 181, 188, 197, 286, 316.  
— sec. 9. 219.  
— sec. 17. 92.  
— sec. 18. 114.  
— sec. 55. 95, 96.  
— sec. 91. 132, 145, 146.  
— sec. 101. 233.  
— sec. 125. 186.  
30 and 31 Vict. c. 45. (The Vice-Admiralty Courts Act Amendment Act, 1867),  
289.  
— c. 102. (The Representation of the People Act, 1867), 110.  
32 Vict. c. 10. (The Colonial Prisoners Removal Act, 1869), sec. 4. 5, 8.  
33 Vict. c. 14. (The Naturalization Act, 1870), sec. 16. 10.  
33 and 34 Vict. c. 52. (The Extradition Act, 1870).  
— sec. 18. 4, 5.  
36 Vict. c. 22. (The Australasian Colonies Duties Act, 1873), 10, 26.  
36 and 37 Vict. c. 60. (The Extradition Act, 1873), 261.  
— c. 66. (The Judicature Act, 1873), sec. 100. 260.  
38 and 39 Vict. c. 38. (The Parliament of Canada Act, 1875), 114.  
40 and 41 Vict. c. 23. (The Colonial Fortifications Act, 1877), 142.  
44 and 45 Vict. c. 58. (The Army Act, 1881), secs. 175-7, 10, 142.  
— c. 69. (The Fugitive Offenders Act, 1881), 150.  
— sec. 32. 5.

45 and 46 Vict. c. 76. (The Merchant Shipping [Colonial Inquiries] Act, 1882), sec. 6. 252.

— c. 50. (The Municipal Corporations Act, 1882), sec. 16. 110.

— sec. 63. 110.

40 and 47 Vict. c. 52. (The Bankruptcy Act, 1883), sec. 118. 151.

46 and 47 Vict. c. 57. (The Patents Designs and Trade Marks Act, 1883), sec. 104. 4.

47 and 48 Vict. c. 24. (The Colonial Attorneys Relief Act Amendment Act, 1884), 3.

47 and 48 Vict. c. 31. (The Colonial Prisoners Removal Act, 1884), sec. 12. 5.

47 and 48 Vict. c. 39. (The Naval Discipline Act, 1884), 142.

48 and 49 Vict. c. 60. (The Federal Council of Australasia Act, 1885), 14, 33, 63, 144, 150, 159.

— sec. 15. 158.

— sec. 20. 134.

— sec. 24. 37.

49 and 50 Vict. c. 33. (The International Copyright Act, 1886), 147, 261.

— sec. 8 (s. sec. 3). 4, 5, 147.

51 and 52 Vict. c. 25. (The Railway and Canal Traffic Act, 1888), 206.

— c. 32. The Imperial Defence Act, 1888), 39, 142.

— c. 41. (The Local Government Act, 1888), 110.

— sec. 39. 242.

52 and 53 Vict. c. 63. (The Interpretation Act, 1889), 110.

— sec. 18 (3). 292.

— sec. 18 (7). 292.

— sec. 38. 175.

53 and 54 Vict. c. 27. (The Colonial Courts of Admiralty Act, 1890), 4, 10, 251, 273, 289.

— sec. 2. 273.

— sec. 3. 11, 273.

— c. 26. (The West Australian Constitution Act, 1890), 18.

— sec. 6. 315.

55 and 56 Vict. c. 6. (The Colonial Probates Act, 1892), 3.

57 and 58 Vict. c. 30. (The Finance Act, 1894), 3.

57 and 58 Vict. c. 60. (The Merchant Shipping Act, 1894), sec. 264. 5.

— secs. 366 and 367. 11.

— sec. 478. 8, 252.

— secs. 670-5. 5.

— sec. 735. 4.

— sec. 736. 8.

58 Vict. c. 3. (The Australian Colonies Duties Act, 1895), 10.

58 and 59 Vict. c. 34. (The Colonial Boundaries Act, 1895), 9, 63, 292, 315.

— c. 44. (The Judicial Committee Amendment Act, 1895), 245.

#### **New South Wales.**

51 Vict. No. 11. (The Constitution Act), 13, 114.

57 Vict. No. 5. (The Criminal Law and Evidence Amendment Act, 1891), sec. 11. 151.

56 Vict. No. 38. (The Parliamentary Electorates and Elections Act, 1893), 107.

59 Vict. No. 15. (The Land and Income Tax Assessment Act, 1895), 300.

Vict. Act No. 30. (The Claims against the Government and Crown Suits Act, 1897), 265.

#### **New Zealand.**

21 and 22 Vict. No. 22. (The Supreme Court Judges Act, 1858), 280.

#### **Queensland.**

29 Vict. No. 23. (The Claims against the Government Act, 1866), 265.

31 Vict. No. 38. (The Constitution Act, 1867), sec. 24. 256.

— (The Elections Acts, 1885–1897), 107.

54 Vict. No. 10. (The Dividend Duty Act, 1890), 300.

57 Vict. No. 4. (The Railway Border Tax Act, 1893), 58.

62 Vict. No. 15. (The Evidence Act, 1898), 151.

#### **South Australia.**

7 Will. iv. No. 5. (The Supreme Court Act), 251.

1853 No. 6. (The Claims against the Government Act, 1853), 265.

1855–6 No. 2. (The Constitution Act, 1855–6), 16, 120.

— sec. 35. 114.

24 and 25 Vict. No. 5. (The Court of Appeals Acts Amendment Act), 251.

(44 and 45 Vict.) No. 236. (The Constitution Act Further Amendment Act, 1881), 126.

(59 and 60 Vict.) No. 667. (The Electoral Code, 1896), 107.

#### **Tasmania.**

18 Vict. No. 17. (The Constitutional Act), 14.

55 Vict. No. 24. (The Crown Redress Act, 1891), 265.

60 Vict. No. 49. (The Electoral Act, 1896), 107.

60 Vict. No. 54. (The Constitution Amendment Act, 1896, No. 2), 107.

63 Vict. No. 7. (The Electoral Continuation and Amendment Act, 1899), 107.

#### **Victoria.**

54 Vict. No. 1075. (The Constitution Act Amendment Act, 1890), 107.

54 Vict. No. 1080. (The Crown Remedies and Liability Act, 1890), 265.

54 Vict. No. 1142. (The Supreme Court Act, 1890), sec. 231. 257.

58 Vict. No. 1374. (The Income Tax Act, 1895), 297.

— sec. 8 (s. sec. 2). 298.

60 Vict. No. 1467. (The Income Tax Act, 1896), sec. 19 (s. sec. 1). 300.

62 Vict. No. 1554. (The Evidence Act, 1898), 151.

63 Vict. No. 1606. (The Constitution Act Amendment Act, 1899), 107.

#### **Western Australia.**

33 Vict. No. 13. (Ordinance establishing Legislative Council, 1870), 17.

24 Vict. No. 15. (Privy Council Appeals), sec. 29. 251.

62 Vict. No. 9. (The Crown Suits Act, 1898), 265.

63 Vict. No. 19. (The Constitution Acts Amendment Act, 1899), 107.

— (The Constitution Act Amendment Act, 1900), 107.

FEDERAL COUNCIL.

49 Vict. No. 2. (The Federal Council Evidence Act, 1886), 151.

49 Vict. No. 3. (The Australasian Civil Process Act, 1886), 151.

49 Vict. No. 4. (The Australasian Judgments Act, 1886), 151.

51 Vict. No. 1. (The Queensland Pearl Shell and Beche-de-mer Fisheries [Extra-Territorial] Act of 1888), 143.

52 Vict. No. 1. (The Western Australian Pearl Shell and Beche-de-mer Fisheries [Extra-Territorial] Act of 1889), 143.

60 Vict. No. 2. (The Australasian Testamentary Process Act, 1897), 151.

**Canada.**

38 Vict. c. 11. (The Supreme and Exchequer Court Act, 1875), 241.

49 Vict. c. 106. (The Dominion Temperance Act, 1886), 174.

53 Vict. c. 56. (Ontario), (The Liquor Licence Act, 1890), 174.

54 and 55 Vict. c. 25. (The Supreme and Exchequer Courts Act, 1891), 241.

**United States of America.**

The Inter-State Commerce Act, 1887, 184, 206.

## Principal Works Referred to.

- ANSON—"Law and Custom of the Constitution" (1892).  
BAKER—"Annotated Constitution of the United States" (1891).  
BLACKMORE—"The Law of the Constitution of South Australia" (1894).  
BRYCE—"The American Commonwealth" (1888).  
BURGESS—"Political Science and Constitutional Law" (1891).  
COOLEY—"Constitutional Limitations" (fifth edition, except where sixth is mentioned).  
COOLEY—"Principles of Constitutional Law" (1898).  
DICEY—"Law of the Constitution" (1897).  
HARE—"American Constitutional Law" (1889).  
HEARN—"Government of England" (second edition, 1886).  
JENKS—"Government of Victoria" (1891).  
JENKS—"History of the Australasian Colonies" (1896).  
LEFROY—"Legislative Power in Canada."  
LEWIS—"Government of Dependencies" (Clarendon Press edition, 1891).  
LOWELL—"Government and Parties in Continental Europe" (1896).  
MORRIS—"Memoir of George Higinbotham" (1895).  
MUNROE—"Constitution of Canada" (1889).  
QUICK and GARRAN—"Annotated Constitution of the Australian Commonwealth" (1900)  
STORY—"Commentaries on the Constitution of the United States" (second edition, 1851).  
THAYER—"Cases on Constitutional Law" (1895).  
TODD—"Parliamentary Government in the British Colonies" (second edition, 1894).  
OFFICIAL REPORTS of the Debates in the Australasian National Convention (Sydney, 1891), the Australasian Federal Convention (Adelaide and Sydney, 1897, Melbourne, 1898).

# **The Commonwealth of Australia**

## **Chapter I. The Sources of the Laws and Institutions of the Colonies.**

1

MULTIPLICITY OF SOURCES.—One of the many useful services already performed by the Society of Comparative Legislation has been the collection and publication in their Journal of “Modes of Legislation in the British Empire.” The returns which have been made to the circular of the Society exhibit one feature which is bound to strike an English lawyer as remarkable. Accustomed to a legal system whose feature is its unity, he is struck by the multiplicity of the sources of laws and institutions in the Colonial system; and in place of singleness of authority he finds not a little doubt and conflict. The Common Law, the Prerogative, Acts of Parliament and Orders thereunder, play their part as in England. But the Prerogative looms larger in Colonial than in Home institutions; Acts of Parliament have varying force and authority according to their date and their nature; Orders in Council are less frequently acts of supplementary legislation than the exercise of a statutory suspending power or power to put into operation. In addition to these are the Acts and Ordinances of Colonial Legislatures, sometimes of Legislatures between which the power of legislation is divided, sometimes of Legislatures which have been superseded by others.

### **The Australian Colonies: Common Sources of the Law.**

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

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

The “Laws of England” include the Statute Law as well as the Common

Law; the law so imported is what is sometimes called the Common Law of the colony. The applicability of any law according to the principle laid down is mainly a question for judicial determination, but this class of laws falls completely within the power of the Colonial Legislature, which may declare what laws are in force and may repeal any of them.

2. ACTS OF PARLIAMENT MADE APPLICABLE.—Acts of Parliament *made applicable* to the colony either in common with other dominions of the Crown or specially, whether by express words or necessary intendment—these Acts are of paramount obligation. The expression *made applicable to the colony* requires some explanation. In the first place it excludes those Acts of Parliament which, being part of the general law of England applicable to the circumstances of the colony, are received at its settlement as part of its common law; and it includes all Acts by which Parliament intends to bind the colonies, whether these Acts were passed before or after the settlement of the colony.<sup>1</sup> In the second place, an Act of the Imperial Parliament may relate to a colony without being in force there, just as it may relate to a foreign country. An Imperial Act may relate or refer to persons, to things situated, to acts done, or to events happening in a colony or foreign country; but the enforcement of the regulation established by the Act may belong to the English Courts alone, and be limited by the powers of those Courts to make their orders effective. The colonies, through their inhabitants and in other ways, receive by many statutes certain favourable treatment in England and in English Courts, either absolutely or upon terms of reciprocity, *e.g.* by the Colonial Attorneys Relief Act, 1857, and the Amendment Act, 1884, the Colonial Probates Act, 1892, and the Finance Act, 1894. These and the like Acts are very commonly regarded as “in operation in the colony”; they are in fact “in operation in England in respect to the colony.” The importance of this distinction is obvious, but it was ignored by those who compared the financial proposals of the Chancellor of the Exchequer in 1894 with the Stamp Act of 1765 and the Tea Duty of 1770. Again, the Wills Act, 1861, §§ 1 and 2, affects wills made in the colonies and wills of persons domiciled in the colonies, but only for the purpose of admitting them to probate in England or Ireland, and in Scotland to confirmation. The Bankruptcy Acts and the Companies Acts illustrate the two different kinds of operation. The Bankruptcy Acts vest in the trustee the debtor's property everywhere in such a way that the trustee's title is enforceable in all parts of the British Dominions, and a discharge in bankruptcy in England is a discharge in a paramount jurisdiction, recognized and enjoyed in all parts of the British Dominions.<sup>1</sup> On the other hand, in the winding up of a company in England, while the English Court will treat its orders as

affecting all colonial property of the debtor, and as binding all his colonial creditors, the operation of these orders is limited by the power of the English Court to give effect to them, and any recognition they may obtain in the colonies is due, not to any paramount jurisdiction, but to the “comity of nations.”<sup>2</sup>

The general rule that Acts made applicable to a colony cannot be repealed or varied save by the Imperial Parliament is occasionally excluded by a provision giving special power to the Colonial Legislature to enact as if the Act had not been passed and to alter or vary it, *e.g.* Coinage Act, 1853, or to repeal the Act or some part of it as the provisions of the Merchant Shipping Act, 1894, relating to ships registered in the possession (¶ 735).

3. STATUTORY ORDERS AND REGULATIONS.—Orders or Regulations made by the Crown in pursuance of Acts of the Imperial Parliament to which they are equal in authority. These Orders

(*a*) Put an Act into operation in a colony, the Act being in terms postponed in the case of such colony until an Order is made. This is the commonest case, and many illustrations might be given, *e.g.* Colonial Courts of Admiralty Act, 1890, in the case of four colonies scheduled.

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

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

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

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

The Orders in Council under the Colonial Prisoners Removal Act, 1869, ¶ 4, and the Merchant Shipping Act, 1894, ¶¶ 670–675 (Colonial Lighthouses, etc.) are made upon an address of the Colonial Legislature.

4. PREROGATIVE ORDERS, CHARTERS, LETTERS PATENT.—Prerogative Orders, including Charters and Letters Patent, are not of the same importance in a settled as in a conquered colony, for as constitutions come to rest more and more on statute, the Prerogative recedes. Its most

important exercise is in the grant of constitutions, the establishment of executive authority, the appointment of governors and the definition of their powers, and the setting up of courts of justice. Most of these things in Australia, however, are done by the Crown under statutory authority, and so fall into the last class. The Orders in Council relating to Colonial Currency are a conspicuous case of Prerogative Orders in operation in the colonies.

The Orders in force in 1890 are contained in the collection published “by authority” under the title “Statutory Rules and Orders Revised.” The Prerogative Orders are contained in an appendix in volume viii. Later Orders are in subsequent volumes published annually.

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

Amongst “Laws and Ordinances made by the Legislature of the Colony” are included many Acts of the Imperial Parliament which have been adopted for the colony by the local legislature. They form part of the ordinary legislation of the colony, and are to be distinguished from other local laws merely by a rule that where a statute has before its adoption by the colony received an authoritative judicial construction in England, that construction is deemed binding in the colonies.<sup>1</sup>

The powers of Colonial Legislatures are defined by the Colonial Laws Validity Act, 1865 (28 and 29 Vict., c. 63). They have power generally to make laws for the peace, welfare, and good government of the colony. Special powers of legislation have been conferred by the Imperial Parliament by many Acts on various grounds, of which the following may serve as examples:

(a) The general power to make laws has always been limited by a condition that such laws should not be “repugnant to the laws of England.” This condition has received widely different interpretations, and the views which has ultimately prevailed has been embodied in the Colonial Laws Validity Act, providing that:

¶ 2. Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

¶ 3. No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such Act, order, or regulation, as aforesaid.

But under the influence of narrower interpretations, Acts of Parliament had been from time to time passed to enable the Colonial Legislatures to make laws on specific subjects, *e.g.* 6 and 7 Vict., c. 22, empowering Colonial Legislatures to make laws for receiving the evidence of barbarous and uncivilized persons. These Acts, although the occasion for them has gone, are generally still in force.

(b) Colonial Legislatures are “local and territorial legislatures,” an expression used to denote that their power is different in kind from that of the Imperial Parliament. For while the Imperial Parliament, like the organs of every Sovereign State, is limited territorially by its power through the executive and the courts to give effect to laws, it can constrain every person and every authority within its borders to treat its enactments as valid; and the rule against the extra-territorial operation of statutes is a rule of interpretation merely, over-ruled by any clear indication of the intention of Parliament to apply an Act to persons or things outside of the British Dominions. The territorial limitation on a Colonial Legislature, however, is more than a rule of interpretation; it is a rule in restraint of power, sanctioned not merely by the refusal of foreign courts to recognize rights acquired or acts done under it, but by the refusal of the courts of the colony itself to treat the enactment as valid. This is the general but not the universal opinion as to the nature of the powers of a Colonial Legislature.<sup>1</sup> Many of the cases relied on for the opinion in question are unsatisfactory in that they are decisions, not of courts of the colony whose power is in question, but of an English court or the court of another colony asked to recognize and give effect to the law on grounds of comity. And adopting

the opinion in question, we find no certain test of what is “legislation for the colony.”<sup>2</sup> The narrow view by which Parliament has sometimes been moved as to the powers of Colonial Legislatures is manifested by the Acts passed from time to time to enlarge their powers in special cases, *e.g.* 23 and 24 Vict., c. 122, enables Colonial Legislatures to enact that where any person feloniously injured within the colony shall die beyond the limits of the colony, the offence may be dealt with in the colony where the injury was inflicted. Other Acts enable Colonial Legislatures to make laws having a true operation outside their limits (*a*) as enabling acts of authority to be done, or jurisdiction to be exercised in respect of acts done or things happening, out of the colony, *e.g.* the Colonial Prisoners Removal Act, 1869, the Colonial Naval Defence Act, 1865, the Merchant Shipping Act, 1894, ¶¶ 478 (Colonial Inquiries), 736 (Coastal Trade); or (*b*) as giving to Acts of the Colonial Legislature the force of law throughout the British Dominions, *e.g.* 28 and 29 Vict., c. 64, an Act to remove doubts respecting the validity of certain marriages contracted in Her Majesty's Possessions abroad. This is generally effected by an Order in Council made in pursuance of the enacting Imperial Act.

(*c*) The territorial boundaries set to a colony, whether by the Crown or by an Act of Parliament, and the constitution of a colony bind the legislature of the colony.<sup>1</sup> As far as the constitution is concerned, special power has been given in the Constitution Acts of the Australian Colonies to alter the constitution subject to the observance of certain forms, and by the Colonial Laws Validity Act, 1865, ¶ 5 every representative legislature has full power, and is deemed at all times to have had full power to make laws respecting the constitution, powers, and procedure of such legislature, to establish and reconstitute courts and to make provision for the administration of justice therein. As to the territory of the colonies, this also is the subject of special provision in the Constitution Acts, having in view the great extent of New South Wales, South Australia, and Western Australia; and very naturally the power of subdivision was, subject to limitations, left in the hands of the Crown. In 1895 the Imperial Parliament passed the Colonial Boundaries Act, which, while conferring general powers of severance and delimitation on the Crown, provides that in the colonies with responsible government—which are set out in a schedule and include all the Australian Colonies—the power shall not be exercised except with the consent of the colony.

(*d*) The “local and territorial” nature of colonial legislatures has been regarded as implying the reservation of certain matters in which there must be one law for the Empire, or which fall within an Imperial rather than a local policy. Such matters are of course generally the subject of Imperial

legislation, so that any Colonial Act thereon would be over-ridden by the Act of the paramount authority; but the opinion in question is that the matters referred to are excluded from the area of Colonial power, and that an Act of the Legislature under the general power to make laws for the possession would be *ultra vires*.

Colonial Acts conferring upon aliens the privileges of British subjects within the possession are the most common illustration of matters of this class, as is seen from Chalmers' *Opinions*. Sometimes the law officers allowed them to pass, more often they were disallowed, as beyond the province of a colony. At last 10 and 11 Vict., c. 83, was passed to quieten doubts; and besides confirming Colonial Acts of Naturalization, it conferred the power of local naturalization upon all Colonial Legislatures, a power confirmed by the Naturalization Act, 1870, ¶ 16. In their fiscal and commercial policy, in the regulation of shipping and the jurisdiction of Admiralty, the colonies came at the outset under a political system which treated these matters as Imperial. As the older policy has been abandoned, it has generally not been deemed sufficient to repeal the paramount Imperial Acts; power of legislation has been specially conferred. In regard to duties of customs, the restrictions which accompanied the grant of representative institutions to the Australian Colonies by 13 and 14 Vict., c. 59, have been removed by 36 and 37 Vict., c. 22, and 58 Vict., c. 3. The special powers to make laws with respect to the coasting trade and certain other matters of shipping are due partly no doubt to the "territorial" limitations on the legislature, but partly also to the opinion that the regulation of trade was essentially Imperial. The same may be said of defence. The Colonial Naval Defence Act, 1865, though in supplement of the territorial powers of the Colonial Legislatures, also authorizes the proper legislative authority to make proper provision for maintaining discipline among the officers and men while ashore or afloat within the limits of the colony (¶ 3). The Army Act 1881, ¶ 177, provides that where a force is raised in a colony, any law of the colony may extend to such force, whether within or without the limits of the colony; and that when such force is serving with Her Majesty's regular forces, the Act shall be in supplement of the law of the colony. The Court of the Vice-Admiral in a colony has always been a branch of the Admiralty and outside the Colonial system of courts and jurisdiction. The Court, its judge, and jurisdiction alike have been regulated by Imperial and not by Colonial Statutes and Orders. In 1890, however, by the Colonial Courts of Admiralty Act, it was provided that every court of law in any colony declared in pursuance of the Act to be a Court of admiralty, and in the absence of such declaration, every court with unlimited civil jurisdiction should have the same

admiralty jurisdiction as the High Court in England; and (¶ 3) the legislature of any British possession may declare any of its courts of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and may limit territorially or otherwise its admiralty jurisdiction, and may vest partial or limited jurisdiction in any inferior or subordinate court. The Legislature may not, however, confer any jurisdiction not by the Act conferred upon a Colonial Court of Admiralty.

The opinion that for some matters the Colonial Legislature does not possess the power even of internal legislation has thus been a reason for conferring special powers. Whether it is well founded has never been authoritatively decided. But if it was a correct opinion, its effect does not appear to be altered by the Colonial Laws Validity Act, 1865, for that Act merely deals with the ground of repugnancy to the laws of England, and, as was pointed out<sup>1</sup> many years ago, the objection of “repugnancy” is one thing, the objection of “want of power” is another.

6. ORDERS UNDER ACTS OF COLONIAL LEGISLATURES.— Rules, Orders, and Regulations issued by some authority within the colony under powers conferred by the Colonial Legislature, *e.g.* the Governor-in-Council, are hardly to be regarded as an independent source of law. But the Governor has power under some Imperial Acts to issue proclamations making regulations upon certain matters, *e.g.* the Merchant Shipping Act, 1894, ¶¶ 366 and 367, and “every such proclamation shall have effect without as well as within such possession, as if enacted in this part of this Act.”

## **The Australian Colonies.**

### **New South Wales.**

Captain Phillip's expedition arrived at Botany Bay on the 18th January, 1788, and formal possession of Sydney Cove was taken on the 26th January, which is observed in Australia as “Foundation Day,” though the proclamation of the colony did not take place until the 7th February. The Governor's commission and proclamation embraced the present colony of New South Wales, Tasmania, Victoria, and Queensland, as well as part of New Zealand and of the Western Pacific. The early government was little in accord with the principles applicable to free settlements, and much that was done in the name of authority had a very slender basis of law to support it. The uncertainty as to the legality of the government was met by the Statutes of 4 Geo. IV., c. 96, with the Charter of Justice of the 13th of October, 1823, and 9 Geo. IV., c. 83. Although the Act under which the

colony was founded (27 Geo. III., c. 2) contemplated the establishment of “a colony and civil government,” the true foundation of civil as distinguished from military government dates from 1823. A Supreme Court with the ordinary adjuncts of a common law court as contrasted with those of a court martial was established, and the Ordinances of a Council, equipped by Statute with legislative power, took the place of the doubtful regulations of the Governor. In 1829 the Australian Courts Act, 1828 (9 Geo. IV., c. 83), superseded the temporary provisions of the Act of 1823; and while confirming the Supreme Court and the Legislative Council, the Act also set at rest doubts concerning the law in force in the colony. Section 24 of the Act provided “that all Laws and Statutes in force within the Realm of England at the time of the passing of this Act (not being inconsistent herewith, or with any Charter, or Letters Patent, or Order in Council which may be issued in pursuance hereof) shall be applied in the Administration of Justice in the Courts of New South Wales and Van Diemen's Land respectively so far as the same can be applied within the said colonies.” This has been construed as not applying merely to procedure on the one hand nor introducing the whole law of England on the other, but putting the colony in the same position as if it had been founded on the 25th July, 1828. The law enacted in the colony includes:

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

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

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

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

New South Wales has never been a member of the Federal Council of Australasia.

### **Tasmania.**

Although the commission of Governor Phillip included the territory of Van Diemen's Land, there was no settlement there until the arrival of an expedition under Lieutenant Bowen, on September 12th, 1803. Bowen was

commissioned “Commandant of the Island of Van Dieman” by Governor King of New South Wales; and in February, 1804, the island was made a Lieutenant-Governorship under New South Wales. For some years it was treated less as an integral part of New South Wales than as a dependency of that colony. The Act of 1823, which established a Council in New South Wales to make laws for that “colony and its dependencies,” authorized the establishment of a Supreme Court of Judicature for Tasmania, with an appeal to the Governor of New South Wales. This power was exercised on October 13th of the same year. Section 44 of the Act empowered the Crown to erect Van Diemen's Land into a separate colony independent of the Government of New South Wales, and to commit to any person or persons within the island of Van Diemen's Land such and the like powers, authorities, and jurisdictions as might be committed to any person or persons in New South Wales. On December 3rd, 1825, the island was proclaimed a separate colony, and the appropriate legislative and executive authority established. By the Australian Courts Act, 1828, provision was made for the government of Van Diemen's Land identical with that made for New South Wales (*q.v.*), including the provision for the introduction of the Laws of England in the administration of justice. A Charter of Justice, dated March 4th, 1831, was granted under the powers of the Acts of 1823 and 1828. When the representative principle was introduced into New South Wales in 1842, all that was done for Van Diemen's Land was to make permanent the arrangements of the Act of 1828 and to enlarge the number of members of Council (see 5 and 6 Vict., c. 76, ¶ 53). The island was, however, embraced in the constitutional arrangements of the Act of 1850 (13 and 14 Vict., c. 59), and that under that Act acquired a Legislative Council, one third nominated and two thirds elected, with the power to alter its own Constitution. This power was exercised by 17 and 18 Vict., No. 17, passed on October 31st, 1854 (confirmed by 25 and 26 Vict., c. 11), and a Legislative Council and Legislative Assembly, both elected, were substituted for the old Legislative Council. The new Legislature began its first session in December 2nd, 1856.

The colony was an original member of the Federal Council of Australasia (constituted by 48 and 49 Vict., c. 60), and has remained a member ever since.

### **Victoria.**

The Colony of Victoria was established by separation from New South Wales on July 1st, 1851, under the provisions of 13 and 14 Vict., c. 59, ¶ 1, and was upon that day duly proclaimed by the Governor-General.

Thereupon the authority of the Legislative Council of New South Wales over the colony ceased and determined. The law of the colony includes:

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

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

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

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

5. Statutes of the Federal Council of Australasia since 1886.

#### **Queensland.**

The Moreton Bay District of New South Wales was by letters patent proclaimed a separate colony under the name of Queensland on the 6th of June, 1859, in pursuance of a power contained in 5 and 6 Vict., c. 76, §§ 51 and 52; 13 and 14 Vict., c. 59, §§ 34 and 35; and 18 and 19 Vict., c. 54, schedule 1, § 46. The law of the colony therefore includes:

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

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

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

4. Statutes of the Federal Council of Australasia since 1886.

#### **South Australia.**

In 1834 Parliament was persuaded to sanction an experiment in free colonization, and on the 28th of December, 1836, under the powers

contained in the 4 and 5 Will. IV., c. 95, His Majesty proclaimed "The Province of South Australia." The Act specially exempted the province from the laws and jurisdiction of any other part of Australia. The law enacted in the colony consists of:

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

2. Ordinances or Acts of Council passed from the year 1844 to the 21st of February, 1851, both inclusive, by a Legislative Council consisting of the Governor, three official and four non-official members, constituted under the authority of 5 and 6 Vict., c. 61.

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

4. Acts passed from 1857 inclusive down to the present day by the Parliament of South Australia constituted under the Constitution Act No. 2 of 1855-6, which Act itself was authorized by 13 and 14 Vict., c. 59, the "Act for the better government of Her Majesty's Australian Colonies."

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

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

### **Western Australia.**

The Colony of Western Australia was declared a British Colony by settlement on May 2nd, 1829, and the first governor entered upon his government on June 1st, which is said<sup>1</sup> to be the date of the introduction of English law. The law enacted in the colony consists of:

1. Laws, Institutions, and Ordinances made by persons appointed first by Order in Council of December 29th, 1831, under 9 and 10 Geo. IV., c. 22. The power of appointment was continued from time to time by other Acts, and the "Persons" were increased in number and became a "Legislative Council." A non-official element was introduced in 1839, and in 1868 a representative element. This Legislature began to exercise its powers at the commencement of 1832 and continued until the end of 1870.

2. Laws made by the Governor and a Legislative Council (one-third

nominated and two-thirds elected) established in 1870 by Ordinance of the Council last mentioned (Act No. 13, June 1st, 1870) under the authority of 13 and 14 Vict., c. 59, ¶ 9.

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

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

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

1 Reprinted from the *Journal of Comparative Legislation*, New Series, No. V., August 1900.

1 (1889) 14 App. Cas. 286.

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

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

1 *Ellis v. M'Henry*, L. R. 6, C.P. 228.

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

1 See *Harding v. Commissioner of Stamps for Queensland*, L.R. [1898] A.C. 769.

1 See *Low v. Routledge* (1865), L.R. 1, Ch. 42; 4 E. and I. App. 100; *M'Leod v. Att.-Gen. for New South Wales* L.R. [1891], A.C. 455; and see the colonial cases collected and discussed by Mr. Lefroy in his *Legislative Power in Canada*.

2 Cf. *M'Leod v. A.G. for New South Wales* and *Ashbury v. Ellis*, L.R. [1893], A.C. 339.

1 Cf. *Reg. v. Burah* (1878), L.R. 3, A.C. 889, per Lord Selborne at p. 5.

1 See Papers of the Juridical Society, vol. iii., "Competence of Colonial Legislatures to enact Laws in Derogation of Common Right," by T. C. Anstey.

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

## **Chapter II. The History of Australian Federation.**

THE dangers which attended the existence in a remote part of the world of a group of separate colonies became apparent as soon as the first of those colonies obtained the most rudimentary form of self-government. An Imperial Act of 1842 provided for the establishment of a Legislature in New South Wales, of whose members two-thirds were to be elected by the inhabitants of the colony. In a few years the Legislatures of New South Wales and Van Diemen's Land were in conflict on the tariff, and Sir Charles Fitzroy, the Governor of New South Wales, in recommending the disallowance of an Act of the Council of Van Diemen's Land, indicated at once the danger and the remedy. He considered it "extremely desirable that the colonies in this part of Her Majesty's dominions should not be permitted to pass hostile or retaliatory measures calculated not only to interrupt their commercial intercourse with each other, but to create feelings of jealousy and ill-will which, if not checked, may lead to mischievous results." It appeared to him that, "considering its distance from home and the length of time that must elapse before the decision of Her Majesty's Government upon measures passed by the Legislatures of these colonies can be obtained, it would be very advantageous to their interests if some superior functionary were to be appointed to whom all measures adopted by the local legislatures affecting the general interests of the mother-country, the Australian Colonies, or their inter-colonial trade should be submitted by the officers administering the several governments before their own assent is given." The necessities of trade which called forth this, the first suggestion of a single control, have been to the last the central fact upon which the federal movement has depended, at once the most formidable obstacle—"the lion in the path"—and the great impelling force.

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

time by a Governor-General. The mode of constituting the General Assembly was indicated, and to it were to be committed, besides the tariff, postal communications, inter-colonial transit, the erection and maintenance of beacons and lighthouses, port and harbour dues on shipping, and the regulation of weights and measures. The General Assembly was to have power to establish a General Supreme Court with original and appellate jurisdiction, and generally to enact laws upon subjects referred to it by the Legislatures of the colonies. Finally, there was to be allowed to the General Assembly a power of appropriating funds for the purposes committed to it.<sup>1</sup>

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

That part of the scheme which concerned a General Executive, however, did not require legislative sanction; and Earl Grey had not abandoned his scheme. Accordingly, in 1851 Sir Charles Fitzroy was appointed “Governor-General of all Her Majesty's Australian possessions, including the Colony of Western Australia,” and the Lieutenant-Governors were instructed to communicate with the Governor-General in matters of common interest. Not less important were the Commissions appointing the Governor-General Governor of each of the colonies, for they enabled him by a visit to any colony at once to assume the administration of government there.<sup>1</sup> But Earl Grey left the Colonial Office in 1852, and the nursing policy was abandoned. In the future, suggestions for the government of Australia must come from the colonies themselves, and on

matters of common concern the Home Government must be well assured that the colonies were thoroughly agreed before any action could be taken. In 1855 the Lieutenant-Governors became Governors, and in 1861 the Duke of Newcastle determined not to renew the commission of Governor-General in the Governor of New South Wales, on the ground that such a title indicated "a species of authority and pre-eminence over the Governors of other colonies which. . . . could not with justice be continued, and if continued could not fail to excite dissatisfaction very prejudicial to their common interests."

In Australia the expediency of a general, or as it soon came to be called a federal, government for Australia demanded too much political foresight to capture the popular imagination. Earl Grey's hopes were, however, shared by Wentworth and Deas-Thomson in New South Wales, and by Mr. Charles Gavan Duffy in Victoria. In 1853 Committees of the Legislative Council in New South Wales and Victoria were preparing Constitutions embodying responsible government in those colonies. Wentworth succeeded in inducing the Legislative Council of New South Wales to declare in very emphatic terms for a scheme substantially the same as Earl Grey's, and Victoria more guardedly recorded an opinion in favour of occasionally convoking a general assembly for legislating upon subjects submitted to it by any legislature of the colonies. The Constitution Bills forwarded to England, however, dealt purely with the affairs of the two colonies respectively, and a Government whose hands were very full in 1855 did not see its way on the thorny path of constitution making for the colonies.

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

growing inconvenience of separation. The reply to the Memorial was written by Mr. Herman Merivale, and was a *non possumus*. The Secretary of State was sensible of the difficulties which had been experienced, and was aware that they were likely to increase. He did not think, however, that the colonies were prepared to give such large powers to the Assembly in respect to taxation and appropriation as were involved in the tariff and many other matters to be submitted; and even if they were to assent in the first instance to the establishment of such a scheme, the further result, in his opinion, would probably be dissension and discontent. He would readily give attention to any suggestion from the colonies for providing a remedy for defects which experience might have shown to exist in their institutions and which the aid of Parliament was required to remove. If the establishment of some general controlling authority should be impracticable, he trusted that much might be done by “negotiations between the accredited Agents of the several Local Governments, the results agreed upon between such Agents being embodied in Legislative measures passed uniformly and in concert by the several Legislatures.” More important were the steps taken in the colonies. Independent action was taken in New South Wales and Victoria by the appointment of committees of the Legislature to consider the subject of federation. Mr. Charles Gavan Duffy's Committee was the first to conclude its labours, and its report is a striking statement of the case for federation. After affirming that there is unanimity of opinion as to the ultimate necessity for federal union, the report proceeds:—“We believe that the interest and the honour of these growing states would be promoted by establishing a system of mutual action and co-operation amongst them. Their interest suffers and must continue to suffer while competing tariffs, naturalization laws, and land systems, rival schemes of immigration and of ocean postage, a clumsy and inefficient method of communication with each other and with the Home Government on public business, and a distant and expensive system of judicial appeal exist. The honour and importance which constitute so essential an element of national prosperity, and the absence of which invites aggression from foreign enemies, cannot perhaps in this generation belong to any single colony in this southern group, but may, and we are persuaded would, be speedily attained by an Australian Federation representing the entire. Neighbouring states of the second order inevitably become confederates or enemies. By becoming confederates so early in their career, the Australian Colonies would, we believe, immensely economize their strength and their resources. They would substitute a common national interest for local and conflicting interests and waste no more time in barren rivalry. They would enhance the national credit, and

attain much earlier the power of undertaking works of serious cost and importance.” Finally the Committee recommended a conference of New South Wales, Tasmania, Victoria, and South Australia, and laid down with minuteness the questions which such a conference would have to consider. The New South Wales Committee recognized the difficulties that attended an attempt to deal with the subject, but shrewdly observed that those difficulties were likely to increase rather than diminish. In 1858 the four colonies had agreed to a conference, and in 1860 the new colony of Queensland gave in her adhesion. All this, however, was not without reservation. South Australia was of opinion that the project of a Federal Legislature was premature, but believed that there were many topics on which uniform legislation would be desirable. Queensland, as was to be expected from her newly won independence, foresaw obstacles to the creation of a “central authority tending to limit the complete independence of the scattered communities peopling this continent.” A change of Ministry in New South Wales led to a change of policy there, and despite urgent representations from Victoria and Tasmania, the proposed conference never took place. The fiscal conference held in 1863 for the purpose of attempting an agreement on the tariff declined without instructions to consider federation.

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

arrangement subsisted until 1864, when negotiations for a revision of the system of distribution broke down. The agreement with some modifications was renewed, and was finally terminated in 1873. A modified system of intercolonial free trade, by which each colony admitted free goods *bona fide* the produce of any other colony, was suggested by South Australia in 1862, but received little encouragement. There was in fact another obstacle than the inability to agree. All the colonies were restrained by Imperial Acts from establishing preferential or differential duties; and this applied equally to their relations with each other as with the outside world. The colonies set themselves therefore in the first instance to secure the removal of these obstacles, and intercolonial conferences asked the Home Government to permit reciprocal arrangements among the colonies. At first these proposals met with little encouragement. Successive Secretaries of State—the Duke of Buckingham in 1868, Earl Granville in 1869, and Lord Kimberley in 1870—felt that they could not with propriety ask Parliament to assent to a measure whereby one part of the British Dominions might differentiate against another; and the Home Government was affected by the fear of complicating foreign relations. The Colonial Office, however, pointed out that the objections and the difficulties of the Home Government would be removed by a “complete customs union,” or by any arrangement which made the Australian Colonies one country instead of several countries. In 1873 the resistance of the Imperial Government gave way before the insistence of the colonies; and the Australian Colonies Duties Act, 1873, removed all obstacles to tariff arrangements amongst the members of the Australian group. The removal of legal restraints had, however, no other result than to mark the width of the gap between the colonies. The question between them was no longer the mere adjustment of tariff regulations so as to meet the financial necessities of all and to secure to each its fair share of revenue collected. Protection had taken firm root in Victoria; and it was not long before that colony was as much concerned to protect her agricultural products and her pastoral industry against her neighbours as to protect her manufactures against the “pauper” labour of Europe. The way was thus barred to the free exchange even of Australian products, for Victoria would hear of it on no other terms than that her manufactures should find a free market in the other colonies. Protection begot retaliation; and after an unsuccessful attempt to effect a fiscal union in 1881, it became evident that in the interests of peace the tariff must be laid aside for a time.

The impossibility of establishing a customs union, and the bitterness of feeling which attended the tariff differences, gave little hope for the cause of federation. Still there were other matters in which disunion meant

inconvenience and even danger; and in 1870 Mr. Charles Gavan Duffy obtained a Royal Commission in Victoria on the best means of accomplishing a federal union of the Australian Colonies. The time was one in which the foreign relations of the Empire, both with Europe and America, wore an unusually threatening aspect; and there were not wanting responsible statesmen both in England and the colonies who believed on the one hand that the colonies were a source of entanglement and weakness to England, and on the other that the connection with England was the one thing which threatened the peace of the colonies. There were also plentiful elements of discord within the Empire, and the recent confederation of the Canadian Provinces was generally regarded as a step towards independence. In the not unlikely event of war, the colonies were in a peculiarly exposed condition, for the Home Government had just carried through the withdrawal of Imperial troops from the colonies in pursuance of the policy approved by the House of Commons. The report of Mr. Charles Gavan Duffy's Commission bears the impress of the times. Urging as before the importance on sentimental grounds of creating a united nation, the report declared that the colonies presented the unprecedented phenomenon of responsibility without either corresponding authority or adequate protection. They were as liable to all the hazards of war as the United Kingdom, but they were as powerless to influence the commencement of war as to control the solar system; and they had no certain assurance of that aid against an enemy upon which the integral portions of the United Kingdom could reckon. This was a relation so wanting in mutuality that it could not be safely regarded as a lasting one, and it became necessary to consider how far it might be so modified as to afford greater security for permanence. Reference was made to the former relation between England and Hanover, and between England and the Ionian Isles, which showed that two sovereign states might be subject to the same Prince without any dependence on each other, and that each might retain its own rights as a free and sovereign state. The only function which the Australian Colonies required to entitle them to this recognition was the power of contracting obligations with foreign states; "the want of this power alone distinguishes their position from that of states undoubtedly sovereign." "If the Queen were authorized by the Imperial Parliament to concede to the greater colonies the right to make treaties, it is contended that they would fulfil the conditions constituting a sovereign state in as full and perfect a manner as any of the smaller state cited by jurists to illustrate this rule of limited responsibility; and the notable concession to the interests and duties of humanity made in our own day by the great powers with respect to privateers and to merchant shipping,

renders it probable that they would not on any adequate grounds refuse to recognize such states as falling under the rule.” “It must not be forgotten that this is a subject in which the interests of the mother-country and the colonies are identical. British statesmen have long aimed not only to limit more and more the expenditure incurred for the defence of distant colonies, but to withdraw more and more from all ostensible responsibility for their defence, and they would probably see any honourable mode of adjusting the present anomalous relations with no less satisfaction than we should.” The Imperial Government might ascertain the views of the African and American colonies and take the necessary steps to obtain its recognition as part of the public law of the civilized world.<sup>1</sup> The circulation of the report elicited expressions of opinion from a number of public men in the colonies (amongst them Mr., afterwards Sir Henry Parkes) as to which Sir C. G. Duffy has since remarked that “a dozen years had not apparently ripened the question for action, but apparently had raised a plentiful crop of new objections.” The truth was, however, that to men unaccustomed to the refinements of public law, Sir Charles Duffy's neutrality scheme suggested separation. There was small faith in the sanctity of neutrality, and the general opinion was probably expressed by the gentleman who observed that “no enemy who had the means or power to attack us would respect our neutrality.”

Australia was in fact beginning to have foreign affairs very near her door, and the policy of more than one great Power began to develop in the Pacific in a manner which would compel Australia to adopt a counter policy, to maintain which she would require at her back the whole strength of the Empire. It was in 1870 that an intercolonial conference first discussed the subject of defence and the Pacific question. Present interest centred upon Fiji, where the lawlessness of the relations between natives and European traders had long been a grave scandal; and after many negotiations and inquiries, the islands were ceded to Great Britain in 1874. In 1864 France sent her first consignment of criminals to New Caledonia; and Australia, which in the eastern colonies had long got rid of transportation, saw the last arrival of convicts in the west in 1867. The colonies were not disposed to view with equanimity the establishment of the hated thing so near their shores; and their sentiments no doubt magnified the dangers of escaped convicts finding a city of refuge on Australian shores. There was reason to believe that France, anxious to increase her possessions and extend her system, intended to annex New Hebrides and to use them for the wholesale transportation of her most hopeless criminals. An agreement in 1878 between England and France that neither should annex the islands did not altogether allay

apprehensions, and the designs of France have always been and are now regarded with suspicion in Australia. In the Samoan group, important German and American interests were established, and wound themselves about the complicated internal politics of the islands, so that action by the Governments became necessary, and the intervention of the United States in 1875 was soon followed by that of Germany.

In 1883 federation was “in the air.” The junction of the New South Wales and Victorian railways at Albury led to an exchange of courtesies—then not too common—between the politicians of the colonies, and many pious wishes were expressed for federation. There the matter might have ended, but that events outside Australia suddenly gave a stimulus to action. The suspected designs of Germany upon New Guinea had for some time aroused anxiety in Australia. At last, the Government of Queensland sent a commissioner to take possession of New Guinea, and, aware that the Home Government was likely to disapprove of the step, at once took action to secure the support of the other colonies, in which she had some success, notably with the colony of Victoria. The Secretary of State (Lord Derby), while repudiating the act of Queensland, took the opportunity of pointing out that:

“If the Australian people desire an extension beyond their present limits, the most practical step that they can take, and one that would most facilitate any operation of the kind and diminish in the greatest degree the responsibility of the mother-country, would be the federation of the colonies into one united whole which would be powerful enough to undertake and carry through tasks for which no one colony is at present sufficient.” In November and December, 1883, owing principally to the exertions of Mr. Service, the Premier of Victoria, the first Australasian Convention met at Sydney to consider the subjects of “The Annexation of Neighbouring Islands, and the Federation of Australasia.” The Convention consisted of Ministers from the Australian colonies and New Zealand, and in the later stages of the proceedings, Fiji was represented. The Convention promulgated what has been called the Monroe Doctrine of Australia. It resolved that “the further acquisition of dominion in the Pacific south of the equator by any foreign power would be highly detrimental to the safety and well being of the British possessions in Australasia and injurious to the interests of the Empire.” Other resolutions of the Convention urged the annexation of New Guinea, protested against the transportation of French criminals to the Pacific, and demanded that the understanding of 1878 in regard to the New Hebrides with France should be observed by that Power, or, if it were possible, that the New Hebrides should be acquired by Great Britain. Of these measures, the Convention declared that the colonies were

prepared to bear the cost, thus removing what had hitherto been a great obstacle to the Home Government meeting the wishes of the colonies in the extension of responsibilities. But it was not the mere acceptance of a policy with which Mr. Service would be content. In the course of the correspondence which followed the action of Queensland, Mr. Service, following up his emphatic declaration at Albury, said: "That Confederation can now be effected in all its fulness I do not hope, but that some basis can be agreed upon for a federal union of both a legislative and executive character capable of dealing with those important questions which are immediately pressing, and which will gradually develop into a complete Australian Dominion, I have the greatest hopes. Conferences hitherto have produced a minimum of result. Resolutions have been passed over and over again, but as there existed no common legislative body to give them force the greatest part of them remained a dead letter. A limited federation now would give practical effect to the wishes of the colonies on those points on which they are agreed. A common danger—the outpouring of the moral filth of Europe into these seas—a common desire—to save the islands of Australasia from the grasp of strangers—render federal action a necessity, and federal action is only possible by means of a federal union of some sort." The result fell short of his aims; but it marked a great step forward, for the Convention of 1883 gave birth to the Federal Council of Australasia. At an Intercolonial Conference in the summer of 1880–81, the usual variety of matters had been discussed, and it was clear that the colonies were completely at issue upon the tariff. Sir Henry Parkes, however, chose the occasion for submitting a series of resolutions on the subject of federation, and laid before the Conference a Draft Bill which he proposed should be introduced in the several colonial legislatures. The resolutions affirmed that the time was not come for the construction of a federal constitution with an Australian Federal Parliament; that the time was come when a number of matters of much concern to all the colonies might be dealt with more effectually by some federal authority than by the colonies separately; that an organization which would lead men to think in the direction of federation and accustom the public mind to federal ideas would be the best preparation for the foundation of federal government; and that the Bill framed should be the forerunner of a more mature system. The resolutions were discussed and the Bill considered, but nothing came of it. A proposal of Sir Graham Berry (Victoria), that the Federal Council should be endowed from the sale and occupation of the public lands of the colonies did not tend to encourage confidence in the disinterestedness of Victoria's zeal in the federal cause. The scheme which had fallen flat in 1881 was revived in the Convention of 1883. On the motion of Sir Samuel

Griffith (Queens land), it was resolved:

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

1. The marine defences of Australasia beyond territorial limits.
2. Matters affecting the relations of Australasia with the islands of the Pacific.
3. The prevention of the influx of criminals.
4. The regulation of quarantine.
5. Such other matters of general Australasian interest as may be referred to it by Her Majesty or by any of the Australasian legislatures.”

A committee was appointed to draft the necessary Bill; and on the report a Bill was approved on the motion of Sir Samuel Griffith:

“That this Convention, recognizing that the time has not yet arrived when a complete federal union of the Australasian colonies can be attained, but considering that there are many matters of general interest with respect to which united action would be advantageous, adopts the accompanying Draft Bill for the constitution of a Federal Council as defining the matters upon which in its opinion such united action is both desirable and practicable at the present time, and as embodying the provisions best adapted to secure that object so far as it is now capable of attainment.” In 1884 all the colonies of the Australasian group (including Fiji) except New South Wales and New Zealand adopted addresses praying for legislation on the lines of the Bill, and in August, 1885, the “Federal Council of Australasia Act” received the Royal assent.

The time from 1863 to 1883 is the time of Intercolonial Conferences; and not fewer than ten such conferences had been held with a view to uniform action in various matters of common concern. Postal and telegraphic communication and the navigation of the Australian coasts urgently called for agreement. As a result of a conference in 1867 New South Wales passed an Act proposing to create a Federal Council to carry into effect resolutions as to ocean mail service. At one time the colonies were supporting in rivalry three lines of steamers, and instead of the public getting the advantage of competition, letters were detained in the several colonies for the proper line. As we have seen, the withdrawal of the Imperial forces brought defence into the programme in 1870, and in the same year the Pacific question was first discussed. In the early years the land system, the goldfield regulations, and the transportation of convicts to Western Australia are discussed. The early importance of uniform land laws has been referred to; and in later times there has been some disposition to regard the vast area of unappropriated lands in several of the colonies as an Australian asset.<sup>1</sup> The anomalies and scandals of the

defective administration of the law through inability to co-operate in the service of legal process and the enforcement of judgments were ventilated from time to time. The inconvenience of carrying appeals to England was from early times the ground of a demand for a General Court of Appeal for Australia. South Australia and Victoria were for some years active in promoting the establishment of such a Court, and in 1861 South Australia found a sympathetic Secretary of State in the Duke of Newcastle. It was not until the conference of 1881 that the matter passed beyond the stage of a discussion and a Bill was agreed to, which, saving the Prerogative, provided for an Australian Court of Appeal. But it was entirely in accordance with custom that the matter should end there. The tariff as a subject of conference has been already considered; and the other principal matters suggested for joint action were the regulation of Chinese immigration, and the suppression of another “undesirable immigrant,” the rabbit.

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

Australia from speaking with one voice to the Home Government, and was often fatal to effective action in matters within the powers of the colonies themselves. Nor did unanimity in Council, even when it was obtained, by any means, ensure unanimity in action. The delegates were not plenipotentiaries; they had in most matters no power to bind; they could only bear a report and offer advice to their principals. The neglect of a colony to carry out the measures agreed upon was itself calculated to promote ill-will and to give rise to accusations of bad faith, which would have been more serious had not failure been so much the rule as to count amongst the things expected. It was said by Mr. Service in 1883 that of twenty-three subjects discussed in the conferences not more than three had been dealt with effectively, and of those agreements which required uniform legislation not one had been carried out. When the matter involved communication with the Home Government, the presentation of a resolution to the Secretary of State was but the beginning of negotiations which had to be carried on with every member of the group, and which rarely failed to disclose differences of opinion amongst the colonies. The proposed amendment of the law concerning fugitive offenders may serve as an example. In 1867 the conference had passed a resolution calling upon the Home Government to enlarge their jurisdiction in criminal matters. The Secretary of State pointed out that the differences in the criminal law of the various colonies presented certain difficulties, and invited suggestions, and particularly a draft Bill, for the best mode of giving the powers required. Some colonies were in favour of one course, others proposed another; some did not take the trouble to answer the letters of the Colonial Office. Three years' delay would have taxed the patience of a more sympathetic Secretary than Earl Granville; and in 1870 the Minister announced the decision of Her Majesty's Government not to proceed further in the matter, on the ground of "the want of unanimity of opinion both as to the proper mode of proceeding and as to the scope of the proposed legislation."

Called into existence by the pressure of external conditions at a time when the commercial policies of the colonies were unfavourable to complete union, the Federal Council was no more than an attempt to provide a remedy for the most obvious of the defects of the intercolonial conferences. A constitutional body could be summoned, a conference was merely invited. The conferences met at irregular intervals; the Council was to meet at least once in every two years. A conference could only recommend legislation; the Council could make laws. A conference had no corporate existence; the Council was a permanent body, and under the powers conferred by the Act (§ 24) it proceeded at its first meeting in 1886 to appoint a Standing Committee to act out of session, which should,

through its chairman, communicate with the Secretary of State. Thus the Council lightened the burden of negotiation with the Imperial Government. The functions of the Council were mainly deliberative and advisory; above all things it was to have been the articulate vote of Australia. The legislative function was subordinate; federal judiciary or executive there was none. Altogether the Federal Council of 1885 fully merited the description applied by Sir Henry Parkes to his scheme in 1881—"an unique body" "formed upon no historical model."

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

The representatives of the colonies in the Council were delegates nominated and not elected; until 1895, when the representation of each colony was increased, they were always Ministers or ministerial supporters. Save in a few matters, the Legislative powers could be exercised only on the initiative of the legislatures of the colonies. Every power of the Council was restrained by the fact that it could neither raise nor appropriate revenue; even its own expenses had to be provided for in the budgets of the colonies. Lord Derby, well aware of the difficulty of settling colonial contributions, even when the colonies were ready to provide money, had urged that the Council should have powers of expenditure; but the colonies would not hear of it. The power of the purse must lie in a body chosen by popular election, and in such a body the equal representation of communities of very unequal powers of contribution would be impossible. Financial powers would have involved the creation of an assembly in which the colonies would have been represented according to their population; and the claims of equality of states would

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

The next step in the federal movement is connected with the subject of defence. At the Colonial Conference held in London in 1887, important conclusions were arrived at both as to naval and military defence. In regard to the former, an agreement was come to between the Imperial Government and the Australasian Colonies whereby the latter were to contribute the sum of £126,000 per annum for the provision of the Australian Squadron. The agreement was ratified by Acts of the Legislatures of each of the colonies and by the Imperial Parliament in the Imperial Defence Act, 1888. As to military defence, it was agreed that there should be a periodical inspection of the Australasian forces by a General Officer of the Imperial Army. The further proceedings concerning this inspection themselves offer an interesting illustration of the futility of all attempts at concerted action by the divided colonies. Immediately after the conference, a correspondence began<sup>1</sup> which soon developed the usual differences of opinion, and Sir Henry Parkes on behalf of New South Wales withdrew from the arrangement altogether. At last, the Imperial Government undertook to bear the cost of sending Major-General Edwards, the officer commanding the forces in China, to report on the defences, and in May 1889 the offer was accepted. The report was presented in October 1889, and was virtually a recommendation of the federation of the colonies for purposes of defence, and as one incident of defence, of the establishment of a common gauge for the railway system of Australia in place of the existing three gauges by which communication was impeded.

Sir Henry Parkes at once made the report the basis of a propaganda, and

while there is room for difference of opinion as to where the balance would lie in taking account of Sir Henry Parkes's activity in the matter of federation, his efforts at this time to arouse public interest must be accounted a great national service. He had difficulties to encounter both in his own and in other colonies. Victoria was anxious that New South Wales should make trial of the Federal Council; but Sir Henry Parkes would have none of it. Believing that the time was ripe for consolidating the Australias into one, he invited each of the other colonies to appoint through their Legislatures six representatives, who he suggested should be chosen equally from both sides in political life. In the end he consented to a conference, which should meet for purposes of preliminary consultation merely; and on February 6th, 1890 a conference of the seven colonies met at Melbourne. The true purpose of the conference was, in the words of a delegate to "decide whether there is such a wave of public opinion through these colonies that it has removed the question from the mere sentimental airiness in which it has existed for some years past, and has brought it into the region of practical politics." It was moved by Sir Henry Parkes, seconded by Mr. Alfred Deakin (Victoria), and unanimously resolved that "the best interests and future prosperity of the Australasian Colonies would be promoted by an early union under the Crown, and that the time was come for the union of these colonies under one Legislative and Executive Government on principles just to the several colonies." The members of the conference pledged themselves to endeavour to induce their Legislatures to appoint delegates to a National Australasian Convention, empowered to consider and report upon an adequate scheme for a Federal Constitution; and the conference resolved that such a Convention should consist of not more than seven members from each of the self-governing colonies and four from each of the Crown Colonies. The Parliaments of the colonies appointed their delegates, though the discussion in New Zealand made it clear that that colony withdrew from more than a friendly interest in the scheme. The National Australasian Convention met at Sydney on March 2nd, 1891, and sat until April 9th. On March 18th the following resolutions were, after exhaustive debate, agreed to:

"That in order to establish and secure an enduring foundation for the structure of a federal government, the principles embodied in the resolutions following be agreed to:

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

2. No new State shall be formed by separation from another State, nor

shall any State be formed by the junction of two or more States or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Federal Parliament.

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

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

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

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

Subject to these and other necessary conditions, this Convention approves of the framing of a federal constitution, which shall establish:

1. A parliament which shall consist of a senate, and a house of representatives, the former consisting of an equal number of members from each colony, to be elected by a system which shall provide for the periodical retirement of one third of the members, so securing to the body itself a perpetual existence, combined with definite responsibility to the electors, the latter to be elected by districts formed on a population basis, and to possess the sole power of originating all bills appropriating revenue, or imposing taxation.

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

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

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

The preliminary discussions in 1890 had made it clear that Sir Henry Parkes's plan of a Dominion of Australasia on the model of the Dominion of Canada was impracticable; and the scheme adopted followed in its main outlines the Constitution of the United States. Important amendments in detail have been made in the scheme, principally in the direction of democratizing the Constitution; but the Draft Bill of 1891 contains in

substance the Constitution which received the Royal Assent in 1900 and came into operation on January 1st, 1901.<sup>1</sup> On the motion of Sir Samuel Griffith the Convention recommended that provision should be made by the Parliaments of the several colonies for submitting for the approval of the colonies respectively the Constitution adopted by the Convention; and it was further recommended that as soon as the Constitution was accepted by three colonies the Home Government should be requested to take the necessary steps to put it into operation.

With so great an advance and with such fair prospects, federation seemed now to be within reach. Sir Henry Parkes took steps to carry out his part of the bargain in New South Wales. But his Government was soon in difficulties, and in order to placate the different sections of its supporters was compelled to give federation a subsidiary place in its programme. In October, 1891, the Parkes Ministry went out of office, and though the new Ministry included Mr. Edmund Barton, a prominent federalist, the Prime Minister, Mr. Dibbs, if he were in favour of union at all, desired unification rather than federation. Victoria, South Australia, and Tasmania dealt with the Bill in a tentative fashion; the other colonies did nothing. All were in fact waiting for the signal from New South Wales, and the signal did not come. Sir Henry Parkes in despair urged that if the question were too big for the Parliaments, "the Australian people should take the matter into their own hands, and elect a Federal Congress representing all the colonies and the whole people." The next few years were years of financial crisis, in which Governments had more than sufficient to do, first in staving off disaster, and next in "balancing the ledger"; and though the crisis itself had illustrated the dangers of division, Sir George Dibbs's proposal in 1894 for the unification of New South Wales and Victoria received scant attention. The country, however, was beginning to take Sir Henry Parkes's advice, and a popular movement was organized which, if it did not take federation out of the hands of Parliament, at least supplied a force with which Parliament must reckon. The Australian Natives' Association interested itself in the cause from its first demonstration in 1884, and from 1893 federation leagues were formed in various parts of Australia. At the end of 1893 a conference of delegates from the various organizations met at Corowa, and on the motion of Dr. (now Sir John) Quick (Victoria) adopted a scheme for the popular election of a Federal Convention which should frame a Federal Constitution to be submitted to the electors, and, if approved by two or more colonies, to be forwarded to the Imperial Government. The next step was taken at the Conference of Premiers held at Hobart in January, 1895. The Premier of New South Wales (Mr. Reid) submitted, and the Conference adopted, the following series of resolutions:

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

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

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

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

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

Mr. (now Sir George) Turner (Victoria) and Mr. Kingston drafted a Federal Enabling Bill, which was in its main features passed by New South Wales, Victoria, South Australia, and Tasmania, and with an important difference by Western Australia. In four of the colonies a minimum vote for the Constitution was required—50,000 (afterwards raised to 80,000) in New South Wales, 50,000 in Victoria, and 6000 in Tasmania and Western Australia; subject to this, a bare majority of votes cast was sufficient to declare the consent of the colony. In Western Australia the ten members of the Convention were to be elected not by direct popular vote, but by the members of both Houses of Parliament sitting together and voting by ballot. In Queensland the Bill was lost in the first instance through the disagreement of the Houses as to the mode of election. The divergent interests and aims of the northern, central, and southern parts of the colony (for the reconciliation of which a sectional federation of the Colony of Queensland has more than once been proposed), and a general lack of knowledge on, or interest in, federation, both among the politicians and the scattered population of her vast territory, were the main causes that nothing was done, and the Convention met and finished its labours without the assistance of the northern colony.

In March, 1897<sup>1</sup> the Convention elections took place. There was everywhere a large field of candidates, and the contests in the four colonies where the election was by popular vote did a good deal to stimulate interest and to dispel the illusions which abounded on the subject. In every colony the delegation was fairly representative in the sense that the candidates elected were well known in the Parliamentary life of the colonies.<sup>2</sup>

The number and percentage of the electors voting in the several colonies were:<sup>1</sup>

New South Wales, . 142,667 or 51.25 ”.

South Australia, . . 42,738 or 30.9 ”.

Tasmania, . . . 7,582 or 25.0 ”.

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

Three Committees were appointed as before, and their work was submitted to a Drafting Committee consisting of Mr. Barton, Mr. R. E. O'Connor (N.S.W.), and Sir John Downer (South Australia). The character of the debates was significant that the Convention “meant business.” There was the sharp clash of interests; and the struggle between large and small States over the financial powers of the Senate, the contest over the rights in the rivers, railway rates, and the adjustment of financial relations indicated that there were great material interests at stake. On April 23rd the first consideration of the Bill was concluded, not without clear indications that there were some matters which must be revised. The Convention then adjourned; and in accordance with arrangement, the Bill was remitted to the various Parliaments for consideration and for the suggestion of amendments. The second session of the Convention began at Sydney on September 2nd and ended on September 24th. The financial questions were sent to a committee. A large number of amendments were considered, for the proceedings in the Legislatures of New South Wales and Victoria had indicated that the larger colonies were in favour of some concessions to the claims of population. There were keen debates on the Constitution and powers of the Senate, and various ingenious expedients were suggested for the prevention of “dead-locks.” The third and final session of the

Convention began at Melbourne on January 20th, 1898. There the Financial Committee brought up its report, and salvation was found in the “Braddon Clause.” The duels between New South Wales and South Australia on the claims of irrigation and navigation in respect of the rivers, and between New South Wales and Victoria as to railway rates, were fought out at length and with great determination. A solution for deadlocks was found at last, and a jaded Convention gave its assent to clauses affecting the appeal to the Queen in Council, which were then and later the subject of much misunderstanding. The Bill was then finally revised by the Drafting Committee, which had remained in existence throughout and exercised the most scrupulous care over the formal expression of the Constitution. On March 16th the Bill was adopted by the Convention; on March 17th, after calling for cheers for the Queen and for Australia, the President declared the proceedings of the Convention closed.

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

	For.	Against.	Majority.	Percentage of Voters to Electors on the Roll.
New South Wales,	71,595	66,228	5,367	49·88
Victoria,	100,520	22,099	78,421	48·94
Tasmania,	11,797	2,716	9,081	46·5
South Australia,	35,800	17,320	18,480	39·44

The number of electors voting shows some improvement on the election

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

As three colonies had accepted the Bill, it was within the terms of the Premiers' agreement that they should address the Crown to have the Bill enacted. But federation without New South Wales was not a matter of practical politics, and it was everywhere recognized that no effort should be spared to include all the colonies of Australia. After a general election in New South Wales, the Premier (Mr. Reid), who had been the principal critic of the Draft Bill of 1891 and the Bill of 1897-98, presented, and the Legislative Assembly adopted with some amendments, the modifications in the Constitution required by New South Wales. A conference of Premiers was held in Melbourne on 29th January, 1899, and the six colonies were represented, the re-appearance of Queensland being hailed as a pledge of adhesion to the federal cause. The conference agreed to the following amendments: (1) The substitution of an absolute majority of members for a three-fifths majority at the joint sitting of the Houses on the occasion of "dead-locks"; (2) the "Braddon Clause" (sec. 87) to be limited to ten years and "until the Parliament otherwise provides"; (3) the insertion of a clause enabling the Parliament to grant financial assistance to necessitous States; (4) a further guarantee of territorial rights and a special provision relating to Queensland; (5) the application of the "dead-lock" provisions to the amendment of the Constitution. The vexed question of the capital was settled by compromise—it was to be in New South Wales, but not within 100 miles of Sydney, and until the seat of Government should be ready the Parliament was to meet at Melbourne.

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

	For.	Against.
Victoria, . . .	152,653	9,805

In September a vote was taken in Queensland, and there was a majority of 7492 in favour of the Bill—For, 38,488; against, 30,996.

Western Australia still stood aloof, in the hope of further concessions in the matter of customs duties and the transcontinental railway, and it was not until after the Bill had received the Royal Assent that a poll was taken in that colony. The voting was—For, 44,800; against, 19,691; majority, 25,109.

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

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

Western Australia and New Zealand lodged memoranda containing their cases; and the observations of the Law Officers on the Bill were laid before the Delegates.<sup>1</sup> The Delegates presented a counter memorandum dated March 23rd, 1900, and thereafter conferences and negotiations followed lasting until after the introduction of the Bill to Parliament. Some minor amendments in the covering clauses of the Bill were agreed to; and the question of the appeal to the Queen in Council became substantially the single matter in dispute. The Constitution (section 74) provided that “no appeal should be permitted to the Queen in Council in any matter involving the interpretation of the Constitution or of the Constitution of a State unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State are involved.” It was also provided that, save as thus provided, the prerogative to hear appeals as of grace should be unimpaired, but that the Parliament of the Commonwealth might make

laws limiting the matters in which leave might be asked. The objections to these provisions were obvious. The questions withdrawn from the Queen in Council were precisely those on which, in the words of the Law Officers, “the Queen in Council has been able to render most valuable service to the administration of law in the colonies, and questions of this kind, which may sometimes involve a good deal of local feeling, are the last that should be withdrawn from a Tribunal of appeal, with regard to which there could not be even a suspicion of pre-possession.” The provisions of the section safeguarding the appeal where the “public interests” of other parts of Her Majesty's Dominions were concerned, were vague and uncertain; and the Commonwealth was receiving extended powers of legislation which might well affect places and interests outside Australia. Finally, the Law Officers urged that “the retention of the prerogative to allow an appeal to Her Majesty in Council would accomplish the great desire of Her Majesty's subjects both in England and Australia, that the bonds which now unite them may be strengthened rather than severed, and by ensuring uniform interpretation of the law throughout the Empire, facilitate that unity of action for the common interests which will lead to a real federation of the Empire.”

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

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

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

Rarely has any group of States been so signally marked out by nature for political union as are the six colonies of Australia. Though new countries, whose whole life lies within a period characterized by great movements of the population of the old world, there is less diversity of nationality amongst them than is to be found in most European countries. Religious differences there are in plenty, but sectarian strife, though bitter enough, affects or interests but few. The State has been strictly unsectarian, and there has been no party of irreconcilables. The population has long been sufficient to enable a united Australia to stand with the nations of the old world; it is at present almost the same as the population of the United States and the British North American Provinces at the time of their respective unions. In distribution of population, the colonies satisfy the condition of union laid down by Mill, "that there should not be any one State so much more powerful than the rest as to be capable of vying in strength with many of them combined," and again we may glance at the successful union of the Canadian Provinces, where the numbers of Upper and Lower Canada bore much the same relation to each other and the other provinces as do the numbers of New South Wales and Victoria to each other and the other Australian Colonies. The six colonies are the sole occupants of a continent and its adjacent islands with an extent of territory little less than that of Europe. The fears of foreign occupation, once common, have now been dispelled. There is no "No Man's Land"; the territories of the colonies are co-terminous; every colony on the mainland except Western Australia touches the borders of two of her sisters; South Australia touches four. The colonial boundaries are generally no more than conventional lines; and at the present day the judge who goes on circuit from Sydney to Broken Hill travels *via* Melbourne and Adelaide, while a large part of New South Wales, the rich "Riverina," has its natural port at Melbourne. Every colony has an extensive coast line well furnished with harbours unaffected by the seasons. The coast districts are the places of closest settlement; and from the first the sea has been the great highway of colonial traffic, so that the difficulties of internal communication, and notably the absence of great navigable rivers, have not prevented intercourse between the centres of population. In all these respects the Australian Colonies greatly differed from the British Provinces of North America, which fell into four distinct groups, sharply severed from each other by natural obstacles, and finding their access to the world by foreign

outlets.<sup>1</sup> The distances in Australia, it is true, are great—from Brisbane to King George's Sound is 2500 miles. But distance is a relative thing; to men who have made a journey of 12,000 miles and perhaps spent four months in the passage, 2000 miles traversable in little over a week is no more than neighbourhood. That Australians regard distance on the grand scale has been more than once proved to British statesmen. There is nothing in the life or occupations of the people to cause deep divergence among the colonies. The familiar separation is between town and country, not between colony and colony, and while the fact that a great part of Australia is within the tropics would naturally tend to conditions of life there different from those in the temperate parts, there is no policy to which the colonies are more devoted than “a white Australia,” with all that that implies. To the solution of the same problems of government—the holding of the public lands, the regulation of mining, fiscal policy, the relations of the state to religion, national education, and a host of others—the colonies have brought the same stock of political ideas. They brought with them the same common law; they have received and developed similar institutions.

In these favourable conditions it may be wondered why union has been so long delayed. The wonder should rather be that it has now been accomplished. Writing after the Convention of 1891, Professor Jenks said:<sup>1</sup> “If the Australian Colonies accomplish federation under existing circumstances, they will succeed in a political experiment for which there is practically no precedent in modern times. All through modern history there has been but one determining cause of political union between communities—physical force or the fear of physical force. In Switzerland, Germany, Austro-Hungary, Sweden and Norway, the United States of America, Canada, Mexico, Central America, the tale has been always the same. No community has consented to link its fortunes with the fortunes of another, save when instigated by fear of violence from that other or a third power. Many attempts have been made on other grounds, many other excellent motives have suggested themselves to thinking men. But the determining cause, the dead-lift over the hill, has always been force or the fear of it.” Common subjection to the Crown went far to satisfy such desire for political union as there was. The Provinces of Canada, separated and remote from each other, had a powerful neighbour from whose territory had proceeded more than one act of hostility, who made no secret of her resentment at the existence of their “political system” on the American Continent, and who in 1865 was flushed with military triumphs achieved for the cause of American unity in the teeth of what she regarded as the active hostility of England. Australia has had no such dangerous neighbour. Partnership in the British Empire, which was in Canada a cause

of offence, has been the security of Australia. Since the development of anything like a national life in Australia, the British Empire has been at peace, so far at any rate as world politics are concerned. Protected by the shield of Empire from external dangers, the colonies have rarely been reminded that they were dependencies, and in general, if they have had ground to complain of the mother country, it has been on the score of indifference to the claims of Empire rather than any pressure of lordship. Within their own territories the work of pioneers has been carried on without fear of a hostile aboriginal population. The absence of national and religious feuds, such as divided Upper and Lower Canada, has been already referred to. If the sea has given every colony means of communication with her neighbours, it has also opened to her the trade of the world. Unlike the River Provinces of Canada, dependent for half the year on the licence of a foreign and often unfriendly Power for their external trade, the development of internal communications has not been matter of life or death to any Australian Colony, though in the latter stages of federal movement the attitude of Western Australia in regard to the projected Transcontinental Railway has recalled, as it has perhaps been suggested by, the story of Canadian Confederation.

Australia has been without all but one of the great causes which were instrumental in bringing about the Confederation of 1867. Just as the North American Provinces complained that the Foreign Office was disposed to sacrifice Canadian interests, partly from ignorance of local conditions, and partly for the sake of a good understanding with the United States, so the Australian Colonies complain that Australian interests in the Pacific are too lightly regarded, and, if not given away, are bargained away for a compensation which may have some value for other parts of the Empire, but is no direct advantage to Australia.

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

New colonies, whatever the conditions of their foundation or their form of government, are less states in the Old World sense than trading and industrial communities; their citizenship recalls membership of the "regulated companies" or even the stockholding in the joint-stock

companies which have played so great a part in our colonial history. With rare exceptions “politics” means public works, the tariff, or the conditions of holding and working the lands and minerals of the state. The development of the resources of the country is the chief concern of the Government, and the task is one in which the Australian Colonies have been no laggards. These very material interests develop a special kind of patriotism. Every inhabitant of a thinly populated country feels that its territory is an asset in which he has an appreciable share; and the once common distinction in older lands between the man with a stake in the country and the man who has not is meaningless in colonial politics. Every neighbouring colony is a rival concern, or whose doings the shrewd man of business must keep a sharp look out. If there is to be a partnership, each must make the best bargain he can. If your neighbour has a small territory and you have a large one, if his estate wants water and you control the supply, if your railways pay and his don't, you must protect your interests and must be well assured of advantages to yourself before you agree to join him.

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

In New South Wales and Victoria the guiding principle of railway policy has been to secure its “legitimate traffic” for Sydney and Melbourne respectively. The claim of each of the two great cities to be the seat of government in any federation has been an obstacle to union since Melbourne put forward its claim in 1852 and added insult to injury by urging the special advantage of “a safe and capacious harbour.”<sup>2</sup> But it may be doubted whether the competition for the capital has been the most serious incident in the jealousy of the two cities. Speaking of the city states of the Middle Ages, Freeman says: “The highest point which human hatred can reach has commonly been found in the local antipathy between neighbouring cities.” In more than one sense the colonies have been city states.

A great obstacle to federal union has been the fact that with the exception of the tariff, the subjects calling for federal action have been those which in Australia attract little popular attention. The need for union has been apparent mainly to those who have been responsible for the administration of affairs, and it has been some compensation for the inconveniences which have attended the rapid succession of colonial ministries that this class has been large. The legislatures have been apathetic; even when matters had advanced so far that the Federal Council Bill was under discussion, thin attendances in the House bore witness to the lack of interest in New South Wales, Victoria, and South Australia. A cynical public readily referred the zeal of a “professional politician” to the billet-hunting nature of his class. For the rest, the description of public opinion in New South Wales in 1884 by W. B. Dalley—himself no enthusiast for federation—though intended by way of contrast to Victoria, where “for some time there had been a strong public opinion in its favour which her statesmen merely expressed,” may serve as a description of the public attitude throughout Australia—some thought it of doubtful ultimate advantage, and an immediate attempt to accomplish it dangerously premature; those who were in favour of it differed as to ways and means; and, finally, there was “a large party, as in all national questions, who give the matter little or no consideration at all, is influenced more easily by a cry than by an argument, and which is consequently disposed to regard the eagerness and activity of other colonies as signs of peril to the interests of their own.” There were those who feared that Australian federation meant separation; there were others who saw in the anxiety of the Home Government for federation, a design to prepare the way for an Imperial Federation, which to them meant the sacrifice of self-government. Finally, the advent of the Labour Party since 1890 provided an organized body of opinion pledged to resist all schemes which “did nothing for the people”; and the members of this party, with some exceptions who with great courage and at some sacrifice separated themselves from their fellows, were opposed to every practicable federal scheme.

Amid these difficulties—the greatest of them all was indifference—and the great cleavage in fiscal policy, the federal movement had to make its way. The financial disasters awakened a sense of sympathy, and the burden of the common trouble was necessarily shared. In regard to the tariff a *modus vivendi* became possible, through the acknowledged necessity for developing the intercolonial trade. The growth in the proportion of “native born” to the whole population, the existence of Australian questions and the untiring zeal of a band of enthusiasts in each colony have created a sentiment sufficiently strong to serve as an impulse to action. The votes

cast at the first Referendum were an improvement on those cast at the election of the federal convention, and the second Referendum marks an advance in popular interest upon the first. It is easy to point to the fact, that at the convention election only from 25 to 51 per cent of the electors took the trouble to vote, at the first Referendum only from 40 to 50 per cent., and at the second Referendum only 36 to 67 per cent., as compared with from 50 to 70 per cent. at general elections presenting no burning national question. But it is hard indeed for any single public question to compete with the varied attractions of a general election. Local wants are the matters of first consideration, and the member, no matter how distinguished his past services or present position, must never cease to be the parliamentary agent of his constituency or he will soon cease to be a member. That this is so is due not to the baseness of members or constituency. In a country like Australia, where the central government has functions which elsewhere are carried out by local agencies or by private enterprise, there must be someone to do the business of the constituency with the central government; and the satisfaction of local wants may well mean the difference between prosperity and adversity. After these, there is in a general election, the personal element—the contest in the constituency between two or more known men—and the stimulus of the personal canvass, which counts for so much; more remotely, there is the knowledge that on the result of the election depends the fate of the Ministers. It is “men not measures” that in ordinary times give to politics their interest for the mass of mankind. With the local and the personal element eliminated, it is a tribute to the efforts of the workers on both sides that at the second Referendum 583,865 of the 983,486 electors recorded their votes, and when we observe that 422,788 votes were cast for the Bill and only 161,077 against, we see that it was no mere form which declared that the people of the colonies had agreed to unite. The federation of Australia was a popular act, an expression of the free will of the people of every part of it, and therein, as in some other respects, it differs in a striking manner from the federation of the United States, of Canada, and of Germany.

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

1 See Jenks, *Government of Victoria*, 155–6.

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

1 As witness Sir Graham Berry's proposal in the conference of 1881. At the first meeting of the Federal Council a proposal was made that 50,000,000 acres of the waste lands of Western Australia should be appropriated to form a fund for defence purposes; and Western Australia—which had not then received responsible

government—was not unfavourable to the plan if she could secure a federal guarantee for the £5,000,000 required for the construction of a transcontinental railway. At the Federation Conference of 1890, it was suggested that the unsettled territories of Queensland, South Australia, and Western Australia should be made federal; and Sir Henry Parkes spoke of “the immense advantage to these colonies themselves if four or five new colonies were cut out of their vast and unmanageable territories.”

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

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

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

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

1 *Victorian Year Book*, 1895–8, section 1.

1 *Victorian Year Book*, 1895–98, p. 39.

1 For the proceedings of the London Conference, see Papers relating to the Federation of the Australian Colonies, published in the Parliamentary Papers in England and in the several colonies.

1 See chapter xv.

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

1 *Government of Victoria*, p. 373.

1 Cf. The Queensland Railway Border Tax Act, 1893, which contains an interesting recital of typical wrongs: “Whereas large sums of money have been expended by the Government in extending railway communication with the southern and western districts of the colony for the purpose of promoting agricultural and pastoral settlement in those districts; and whereas large sums of money have at various times been expended by the Government in harbour and river improvements for the purpose of increasing the shipping facilities of the colony; and whereas a large sum of money has been and is being annually paid by the Government in subsidizing direct steam communication with Europe, primarily with the object of facilitating the

speedy and direct shipment of goods and produce therefrom and thereto; and whereas it has been ascertained that differential rates on the railway lines of the neighbouring colonies have been promulgated and otherwise arranged for, which have had and are continuing to have the effect of diverting the traffic which ought legitimately to be conveyed over the railway lines of this colony, thereby entailing a considerable loss of railway revenue; and whereas it is considered desirable to prevent as far as practicable this diversion of traffic”—because these things were so, every ton of station produce crossing the border was to pay a railway tax of £2 10s.; every person who attempted to evade the tax was liable to a penalty of £100, and everything animate or inanimate concerned in the adventure, teams, drays, and produce was declared forfeit. In such circumstances, one does not wonder that the construction of a railway by one colony to the borders of her neighbour's territory often provoked feelings similar to those called forth in some quarters by the project of the Channel Tunnel.

*2 Votes and Proceedings, Legislative Council, 1852, p. 197.*

### **Chapter III. The Nature and Authority of the Federal Commonwealth.**

ON September 17th, 1900, the Queen by Proclamation declared that the people of the colonies of New South Wales, Tasmania, Victoria, Queensland and Western Australia, and the Province of South Australia should be united in a Federal Commonwealth under the name of "The Commonwealth of Australia"; and on January 1st, 1901, the day appointed by the Proclamation, the Commonwealth became established and the Constitution of the Commonwealth took effect, in accordance with sections iii. and iv. of an Act of the Imperial Parliament known as the Commonwealth of Australia Constitution Act, 1900 (63 and 64 Vict., c. 12). The preamble of the Act recites the agreement of the people of the colonies "to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland and under the Constitution hereby established." The enacting part of the Act consists of nine sections, known as the "covering clauses," and of these section ix. contains the Constitution. Substantially the Act falls into two parts, of which the first eight sections and the introductory words of section ix. have the ordinary character of an Imperial Act and are unalterable save by the Imperial Parliament; while the second part consists of "The Constitution" in 128 clauses, and is made alterable by the Commonwealth. (Constitution, section 128.)

In addition to conferring the power to establish the Commonwealth, the covering clauses prepare the ground by (section vii.) repealing the Federal Council of Australasia Act, 1885, and (section viii.) providing that the Colonial Boundaries Act, 1895, shall no longer apply to any colony which has become a State of the Commonwealth, but that for the purposes of the Act the Commonwealth shall be taken to be a self-governing colony. Section ii. enacts that provisions in the Act referring to the Queen shall extend to her successors in the sovereignty of the United Kingdom; and section v. deals with the operation and binding force of the Act and defines the operation of laws made by the Parliament of the Commonwealth under the Constitution. Section vi. defines the leading terms of the Act.

It is one of the hindrances of political study that more than in most branches of knowledge we have to work with terms which, forming part of the popular language, are full of the vagueness of popular notions; they are employed with no single meaning, and are not susceptible of exact definition. The terms which describe the various unions of States share to the full this disadvantage, and though their ambiguity may be in some

cases no more than an inconvenience, in others they are an impediment to clear thinking, and constitute a real and substantial evil.

COMMONWEALTH AND STATE.—As to “Commonwealth,” the Act does no more than explain that “the Commonwealth shall mean the Commonwealth of Australia as established under this Act.” But it introduces the term “State” as the designation of “such of the colonies (which includes ‘province’) of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States”; “and each of such parts of the Commonwealth shall be called a ‘State.’ ” The enumeration of the colonies eligible in the first instance to become members of the Commonwealth is a matter of political significance. It includes none but “settlement” colonies, which have a common civilization, and which have all had a sufficient training in self-government. Fiji is a member of the “Australasian group” of colonies, as defined by more than one Act of Parliament, and she was a member of the Federal Council of Australasia. But the islands of the Pacific, whatever their importance, could hardly be associated as parts of a democratic government; and their organic relation with the Commonwealth, if it be established, will be that of dependents rather than members.

The term “Commonwealth” and the term “State” are both ambiguous in themselves, and are frequently used with implications and inferences that create further confusion. In the Australian Constitution the term “Commonwealth” describes the whole political organism, the term “State” the part; but in Mr. Burgess's *Political Science and Constitutional Law*—a work that was frequently referred to in the debates on the Constitution, and will be an important aid to its elucidation—the terms are reversed in the case of the United States, as the author found himself bound in defiance of the Constitution to assign the term “state” to its ordinary use amongst publicists, to describe the sovereign organism, and therefore had to find some other term to designate the part. I shall endeavour to mark the distinct uses of this term by writing “state” in the juristic sense with a small s, and “State” as used in the American Constitution and in this Constitution with a capital S.

The name “Commonwealth of Australia” has been vigorously attacked upon several grounds. In the first place, it has been contended that it is a break in uniformity; that Australia should have followed Canada, and become a “Dominion,” if it did not assume the title proposed for Canada but rejected in deference to the susceptibilities of the United States—

“Kingdom.” It is enough perhaps to say here that the union of the Australian Colonies differs fundamentally from the union of the Provinces of Canada, and that the name Dominion has been associated for too long with features which Australia did not desire to copy. As to the term Kingdom, it must be remembered that the present union took shape in 1891 when patriotism had hardly begun to express itself in the passionate loyalty of to-day. The “Kingdom of Australia” would indeed be acceptable to none; one class would see in it a menace to democratic institutions, another would find in the creation of a “distinct dominion” a suggestion of dismemberment of the Empire. The name “Commonwealth of Australia” does not and did not in 1891 indicate a leaning to separation or republicanism. It was adopted by the Constitutional Committee in 1891 on the suggestion of Sir Henry Parkes, whose fancy led him to pay his tribute of admiration to the statesmen of the “Commonwealth Period.” Perhaps if this origin had been better known, the name would have met with more opposition. Commonly the title was associated with Mr. Bryce's *American Commonwealth*, first published in 1888, the great source of knowledge as to the working of federal government amongst English speaking people. The term passed without much notice into the popular discussion of federation, and having thus taken root was adopted almost as of course.

The name “Commonwealth” is not without ambiguity in the Act itself. The habit of identifying a colony with its government has not unnaturally led to the use of the term “Commonwealth,” where the constitution evidently means the central government or some particular organ of the central government. In fact, in the Act and Constitution it has at least three distinct though connected meanings:—First, the political organism established under the Act; secondly, the territorial limits of that political society; and thirdly, the central government or some appropriate organ thereof. Where the constitution prohibits “the Commonwealth” from making laws of certain kinds (as in sections 99, 100, 114, 116) the prohibition of course is addressed to the Parliament as the legislative organ of government; but such prohibition does not bind the Commonwealth as a political organism, for the constitution may be amended by the Commonwealth.

The Commonwealth is not an organization consisting merely of a Parliament exercising limited powers with an executive of judiciary to support it, though that is the implication of the common and convenient expression “Commonwealth Powers.” There is an organization behind the Parliament which, save for the supremacy of the Imperial Parliament, is the political superior over all its parts, and over all persons and things therein. The Commonwealth, in its ultimate organization, short of dissolving itself

or otherwise infringing an Imperial Act, may exercise every power of government within its territory, and strip the States—which exist as governmental agencies only, by the sufferance of the Commonwealth—of every power. This is no more than follows from the analogy of the Commonwealth to a “state” in the juristic sense. It threatens nothing to the security of the States in the Commonwealth; for the acknowledgment of the organic nature of the Commonwealth does not imply anything as to the form of the organization, and certainly does not imply unitary action by bare majority.<sup>1</sup>

### **The Origin of the Commonwealth.**

The Commonwealth, with its constitution, is a legal institution, since it was established under the authority of the acknowledged political superior. The Constitution is first and foremost a *law* which is declared (section v.) to “be binding on the courts, judges, and people of every State and of every part of the Commonwealth.” The agreement of the colonies, which was the occasion for the law, is no more than one of the circumstances to which resort may be had in interpreting the law. The form of the establishment of the Commonwealth may be compared with the preamble of the Constitution of the United States. The famous “We, the people of the United States, do ordain and establish” has a threefold significance. First, it points to the national or unilateral as distinguished from the conventional nature of the Union; secondly, as the act of the people and not of their governments, it negatives the old confederate union; and thirdly, it indicates the democratic basis of the state. In the formation of the Commonwealth, the free acknowledgment of the contract behind the Constitution may be made without impairing the stability of the Union, because the Constitution is the act of an undoubted sovereign authority. The people do not affect to ordain and establish; they have agreed to unite; and in the making of that agreement the most scrupulous care was taken to make the popular participation a reality and not a fiction; secondly, as in the United States, the Commonwealth of Australia, being a union of the people of the several colonies and not of their governments, is no mere confederacy; and thirdly, the insistence of “the people” indicates the democratic origin and nature of the union, and foreshadows the character of the institutions of the Commonwealth, that it is to be a state in which Lincoln's doctrine is to hold, where there is to be government of the people by the people for the people.

### **The Nature of the Commonwealth.**

We have seen that the Commonwealth forms a single political community, though a dependent community; and we have now to consider what is meant by the description “federal.” In the first place, the term “federal,” which is generally used in conjunction with “state,” is more appropriately used to describe a form of government in the state. A federal government exists where a state distributes the powers of government between two classes of organization—a central government affecting the whole territory and population of the state, and a number of local governments affecting particular areas and the persons and things therein—which are so far independent of each other that the one cannot destroy the other or limit the powers of the other, or encroach upon the sphere of the other as determined by the state in the Constitution. Both are completely subject to the state. Either may be changed or abolished at will by the state.<sup>1</sup> This, while it imperfectly describes any existing Federation, is all that can be said of every Federation,<sup>2</sup> and would indeed require modification and explanation to fit the Dominion of Canada. But the observation of Federal Governments leads us in the case of any particular federation to consider what is its organization in various other particulars. The following are from this point of view, the leading features in the Federal Commonwealth of Australia:

1. The Commonwealth is formed of communities which, whatever their earlier condition, were at the time immediately preceding the Union separate and independent in their relation to each other. In the formation of the Commonwealth there is no severance of existing communities, as in Canada, where the legislative union of Upper and Lower Canada was dissolved by confederation. But the question of disintegration was raised in relation to Western Australia and Queensland; and there is full power to form new States within the Commonwealth, either by the division or the union of States' territory. (Constitution, section 124.)

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

3. The Commonwealth Government and the State are each organized separately and independently for the performance of their functions, whether legislative, executive, or judicial. The powers of the States come from the organization and powers which were their prior to the establishment of the Commonwealth. Though they owe their existence as “States” to the Act, there is no break in the continuity of the political existence which began as “Colony” or “Province.” But though the Commonwealth and State Governments are separately organized, the Commonwealth and the State system must be regarded as one whole; and

in the United States the disposition to treat the federal and State authorities as foreign to each other has been condemned as founded on erroneous views of the nature and relations of the State and Federal Governments. “The United States is not a foreign sovereignty as regards the several States, but is a concurrent and within its jurisdiction a paramount sovereignty”; their respective laws “together form one system of jurisprudence which constitutes the law of the land for the State, and the Courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as Courts of the same country having jurisdiction partly different and partly concurrent.”<sup>1</sup>

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

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

5. Subject to what has been said in (4), the Commonwealth Government and the States Governments are in their relations independent and not hierarchical. There is no such general supervision of the State in the exercise of the powers belonging to it as is enjoyed by the Dominion Government over the provinces of Canada. This is not to say that the respective Governments do not owe certain duties to each other, or that the State or some of its organs may not be in some cases the instrument of the Commonwealth Government. The exception to this independence is in the department of judicature, for the High Court of the Commonwealth is the head of the judicial system both of the Commonwealth and of the States, and the States as corporate communities are in some cases now amenable and in others can be made amenable to the jurisdiction of the Commonwealth Courts (Constitution, chapter iii., “The Judicature”). The

existence of a sphere of State activity which is subject to no sort of control by the legislative or executive organs of the Commonwealth Government, and the absence of any veto by the Commonwealth Executive upon State legislation, are facts of great importance in determining the limits of State powers. In Canada the existence of the controlling power of the Dominion Government has been referred to<sup>1</sup> as a reason for taking a more liberal view of the powers of the Provinces than is taken of the powers of the States in the United States where the relations are similar to those set up in Australia.

6. The observance by the Commonwealth Government and the States of the limits set to their powers is secured generally, but not universally, by the action of the Courts whose judicial duties may involve the determination of the validity of the authority under which acts are done, whether that authority is the Crown, a subordinate legislature, or any whatsoever save the Imperial Parliament.

### **The Territory of the Commonwealth.**

This expression may be used with different meanings. First, we have seen that the Commonwealth is a territorial community; and its territory is the sum of the territories of its parts. The territory of every State therefore is territory of the Commonwealth. But there are parts of the Commonwealth which, not forming part of any State (Act, sections v. and vi.; Constitution, section 127), stand outside the main principle of federal government, and these are distinguished by the expression “territory of the Commonwealth” from the “territory of the States.” Such parts of the Commonwealth outside the State organization include:

1. Territory of a State surrendered by the State Parliament, thereby becoming subject to the exclusive jurisdiction of the Commonwealth (sections 111 and 122).

2. Territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth (section 122).

3. By section 52 (1), the seat of government and all places acquired by the Commonwealth for public purposes are subject to the legislative power of the Commonwealth exclusively; and in the view taken in the United States, the exclusive power of legislation in the Federal Government, where it exists over any territory, carries with it exclusive jurisdiction in all respects, so that the territory in question ceases wholly to be in the power of a State.<sup>1</sup>

By section 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. 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.

A third meaning with which the expression “territory of the Commonwealth” may be used, is in relation to property in the land and not governmental power. Nowhere is it more necessary than in communities in the economic condition of the United States, Canada, and Australia to appreciate the distinction between government and property. The vast areas of public and unappropriated lands form one of the most constant subjects of legislation and absorb the attention of one of the largest departments of administration. In the United States and in Canada the Courts have been called on again and again, in dealings between the central and the local power, to determine whether the transaction was one of cession or grant, of public power or private right.<sup>1</sup>

Section 125 is a typical case of difficulty. The terms employed—“granted to or acquired by,” “vested in and belong to”—are words of property rather than of jurisdiction; and it is open to question whether the section deals with government and jurisdiction at all, whether the exclusive power of the Commonwealth over the territory in question does not come from ¶ 52 (1) alone. The last clause in ¶ 125, which declares that such portion of the territory as consists of Crown lands shall be granted without any payment therefor, clearly designates a right of property. It seems reasonable to conclude that the first clause in the section at any rate embraces property, and that the words “or acquired by” point to acquisition by purchase of lands other than Crown lands either by voluntary dealing or by the exercise of compulsory powers under ¶ 51 (xxxi.).

### **Union under the Crown.**

The recital in the preamble is no mere expression of loyalty, but is a statement of fact to which the most important legal incidents attach. The Crown establishes the Commonwealth, is a part of the Federal Parliament, is the depositary of the executive power of the Commonwealth, and retains the power (subject to limitations to be considered) of entertaining appeals in Council. So much is provided in the Act itself; but the Act does not exhaust the relations of the Crown to the Commonwealth. The prerogative runs there as in other dominions of the Crown; and in analogy to the

practice whereby in the United Kingdom the prerogative secures the people against an abuse of power by the instruments of government, so in the colonies the prerogative is no reservation of personal enjoyment or profit to the Crown, nor even to any great extent of power to the Imperial Government, but is an instrument for increasing and effectuating the powers of self-government. While the paramount power of the Imperial Parliament emphasizes the dependent condition of the colonies, the unity of the Empire is manifested in the omnipresence and indivisibility of the Crown. Save in the rare cases in which, for the purpose of suit in their own Courts, colonies have made an exception by statute, the Colonial Governments, like the Government of the United Kingdom, have no corporate existence save in the Crown.<sup>1</sup> For this reason, the governments of the colonies, though not sovereign, have in all parts of the Empire that immunity from suit which belongs to the Crown. A claim by the Crown in right of any part of its Dominions can be prosecuted, not merely in that part of the Empire which is immediately concerned, but in any Court which, according to ordinary principles, has jurisdiction of the cause; and the adjustment of interests as between the different parts of the Empire is in general not a matter for the consideration of the Court.<sup>1</sup> The indivisibility of the Crown is peculiarly manifested by the position of the Attorney General. The Crown appears in Court in any part of the British Dominions by the law officer for that part; and it is immaterial that the particular interest involved is imperial, local, or touches some other part of the dominions of the Crown. The Attorney General for a colony, like the Attorney General for England, represents the Crown and holds office under the Crown. In 1879 the House of Commons adopted the report of a Select Committee, supported by past and present Law Officers of the Crown, to the effect that by acceptance of the office of Attorney General for Victoria, Sir Bryan O'Loghlen, member for County Clare, had vacated his seat in the House.<sup>2</sup>

The establishment of the Commonwealth in no way affects the participation of the Crown in the government of the States; the principles which governed the relations of the colonies to the Crown will govern them as States. Notwithstanding the emphatic declaration of the Constitution (section 2), that the "Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth," the Crown is represented in the States Governments by the State Governor, or other administrator of the Government. Even in Canada the existence of the Dominion Government does not sever the connexion between the Crown and the provinces so as to make the government of the Dominion the only government of the Queen in North America, and reduce the

provincial governments to the rank of municipal institutions; the several provincial governments remain as Governments of the Queen within the limits prescribed by the British North America Act, 1867.<sup>3</sup>

1 See Appendix A—“The Nature of Federal Union.”

1 Burgess, *Political Science and Constitutional Law*, vol. ii., pp. 5, 6.

2 See Appendix A.

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

1 E.g. *Bank of Toronto v. Lambe*, 12 App. Cas. 575.

1 *Commonwealth v. Clary*, 8 Mass. 72; *United States v. Cornell*, 2 Mason, 60.

1 Canada, cf. *St. Catharine's Milling and Lumber Coy. v. Reg.* (1888), L.R. 14, A.C. 46; *Att. Gen. of Ontario v. Att. Gen. of Dominion* (1898), A.C. 700; etc. United States, *Corfield v. Coryell* (1825), 4 Wash., C.C. 371; *Fort Leavenworth v. Lowe*, 114 U.S. 525.

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

1 See in *re Bateman's Trusts*, L.R. 15, Eq. 355; in *re Oriental Bank Corporation, ex parte The Crown* (1884), 28 Ch. Div. 643; *Monk v. Ouimet* (Canada), 1874, 19 L.C.J. 71. But see also *A.G. for Ontario v. Mercer*, L.R. 8, A.C. 767; and *St. Catharine's Milling and Lumber Coy. v. Reg.* (1888), 14 A.C. 46.

2 *Hansard's Debates*, 1879, vol. 245, p. 1104.

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

## **Chapter IV. “The Constitution” of the Commonwealth.**

### **Contents of the Constitution.**

A Constitution<sup>1</sup> in the modern sense is a fundamental law or instrument of government. It consists mainly of:

1. The frame of government, which creates and provides for the continuance of the legislative, executive and judicial organs, and defines their powers and relations to each other;
2. An enumeration of rights of the citizens or classes of citizens against the government which may vary from the enunciation of a few general principles which are rather counsels of perfection than practical restraints, to the most minute provisions on all sorts of matters rigorously binding the organs of government; and
3. Provisions for amendment.

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

The constitution of a state formed by the union of states is a more complicated matter. We do some violence to the idea of contract when we regard an ordinary constitution either as a compact of the citizens or a compact between the citizens and their government; but we need neither analogy nor metaphor to speak of the agreement of the parties in a union of states. As Professor Dicey remarks, “the foundations of a federal state are a complicated contract,” and this bargain may include many matters. The States are jealous not merely of possible encroachments of the central government on their sphere, but of the possibility of a rival State securing any advantage over them in matters within the power of the central government. This jealousy is not less apparent in the Australian Constitution than in others of the same kind; and it has some very important consequences. The principle of State equality and State right, pressing upon and conflicting with the democratic principle, modifies the democratic character of the Constitution which, where there is not room for that conflict, is the dominant note of the instrument. Fervid declarations of individual right, and the protection of liberty and property against the government, are conspicuously absent from the Constitution; the individual is deemed sufficiently protected by that share in the government which the Constitution ensures him. Another feature which belongs to the federal character of this instrument is that the Constitution in many cases does not confine itself to conferring powers on the central government, but prescribes how those powers are to be used. This, in the opinion of an

eminent and friendly critic (Sir Samuel Griffith), goes beyond the proper functions of a Constitution. Others see in these provisions indications of a general distrust of parliamentary institutions.<sup>1</sup> The contractual basis of the Constitution seems a sufficient answer to both objections.

If the Constitution makes fundamental some things that might be in the control of the governmental organs, it also contains much that is not fundamental. There are many provisional arrangements which are completely under the control of Parliament, but which had to be established before the government could get under weigh. Whether these arrangements might not more conveniently have been contained in a separate instrument, or put in a schedule of the Act, it is useless now to consider. It is sufficient to note that “Until the Parliament otherwise provides,” is a phrase which meets us in all parts of the Constitution.

### **Supremacy of the Constitution.**

The preamble of the Act recites the agreement to unite “under the Constitution hereby established”; and the Act demonstrates the supremacy of the Constitution over all the organs of government within the Commonwealth.

*Colonial Constitutions.*—The Legislatures of British Colonies have necessarily existed under some higher law, and have from the nature of the case recognized some limits to their power other than their own will. These limits, however, have been so vaguely conceived, that in practice the restraint has hardly been felt. The paramount nature of Imperial legislation has of course been evident; but the sphere of local and Imperial laws has been different, and there has been little conflict. On the few occasions when colonial laws have been challenged as *ultra vires*, the English Courts, and especially the Privy Council, have been emphatic in their assertion of the plenitude of the powers of the colonial legislatures, and have laid it down that “an act of the local legislature, lawfully constituted, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the Imperial Parliament.”<sup>1</sup> Thus colonial legislatures have been formed on the model of the Imperial Parliament; and the Acts giving a Constitution to a colony have done little more than establish a Legislature, and have left the further organization of government within the colony if not to the establishment, at any rate to the control of the Legislature. The source of executive power, and the origin of courts of justice, may have been in the Crown, but that in no wise withdrew these matters from the control of the Legislature. The Crown is commonly an

immediate party to a colonial as to an Imperial Act; most colonial laws are enacted by the Queen's Most Excellent Majesty, and not by any less authority; and in all cases the express or implied assent of the Crown itself is given by actual confirmation or by "leaving the Act to its operation."

The legislative power is all-embracing, and within the colony all other powers of government follow it.

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

*Meaning of "The Constitution."*—"The Constitution," therefore, in the Commonwealth is an exact term. In the first place, it gives the title to the Act of Parliament under which the Commonwealth is established. This Act may be cited as "The Commonwealth of Australia Constitution Act" (section i.). That does not mean that everything in the Act is technically part of the Constitution; it merely follows the common plan of taking the title from the most conspicuous feature in the Act. The covering clauses (sections i.-viii., and the introductory words of sect. ix.) are no part of the Constitution; from their nature, providing for the establishment of the Constitution, and dealing with its authority, they fitly stand outside and above the instrument they govern, and rest upon the supremacy of the Imperial Parliament.

Section ix. provides: "The Constitution of the Commonwealth shall be as follows"; and then under the title "The Constitution," we find set out the organization of the government of the Commonwealth, the duties, powers, and limitations of the organs of government, and the organization of the Commonwealth behind its government. "The Constitution," then, is a

definite instrument, having the Imperial Parliament for its source, binding the organs of government which it establishes, and therefore superior in authority to the enactments of the legislature which it creates; but it may be freely altered or added to by the Commonwealth as is provided by the instrument itself.

*The Constitution and Constitutional Law.*—In the British Constitution, we are familiar with the fact that the “Law of the Constitution” does not exhaust the rules under which our system of government is carried on; there is the custom as well as the law of the constitution, to complicate the terms “constitutional” and “unconstitutional.” In the Commonwealth, there is a further complication; for “The Constitution” does not exhaust even the Constitutional law in force there. An exhaustive constitutional code could hardly be compiled for any part of the British Dominion without codifying the whole or a great part of the common law. The Parliament has power over several subjects, the laws on which are ordinarily regarded as part of constitutional law—*e.g.* the qualification of candidates and electors for the Parliament, disputed elections, privilege of the Houses and the members thereof, naval and military defence, the organization of the Civil Service, the establishment of courts of justice, etc. Then there is the constitutional law affecting the Commonwealth as a part of the Empire, or as a dependency. There is the constitutional law of each of the States. There are rules affecting the relation of the Government to the subject and the subject to the Government. Of all of these account must be taken by one who would understand the system under which the political life of Australia is lived; and they all form part of constitutional law as generally conceived by Englishmen.

*The Authority of the Constitution in the State.*—The emphatic declaration of Art. vi. in the Constitution of the United States, that the Constitution and the laws made in pursuance thereof shall be “the supreme law of the land,” is not to be found in the Commonwealth Constitution. The Constitution Act can claim no higher force than belongs to an Act of the Imperial Parliament, and it is not the only Act in operation in the Commonwealth. The duty of the Commonwealth Executive to maintain the Constitution and execute the laws of the Commonwealth Parliament is expressed in its very establishment (section 61); the duty of the judiciary to recognize and enforce the “Constitution” and the laws made in pursuance of it, is manifest. But the position of the States Governments is different. They are not created and established by the Constitution; their executive and judiciary are not co-ordinate with, but subordinate to the State Parliament. The State Parliaments are bodies with “plenary powers,” a phrase which would cover many extravagant claims. It might be plausibly contended that

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

As a measure of caution, then, the Act provides:— “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.”<sup>1</sup>

Thus in the causes within their jurisdiction, the Courts of the States are bound to uphold the Constitution and maintain the Commonwealth laws. As this is their duty, they have to determine for themselves whether an Act of the Parliament is in truth a law, whether it is within the powers committed by the Constitution to the Parliament. The interpretation of the Constitution, therefore, is not for the Judiciary of the Commonwealth alone; it falls upon every court throughout the Commonwealth, whatever the authority under which it sits.

<sup>1</sup> For the history of the term “Constitution,” see *The English Constitution*, by Jesse Macy, cap. xlvii.

<sup>1</sup> See two articles by Mr. A. H. F. Lefroy in the *Law Quarterly Review*, April and July, 1899.

<sup>1</sup> *Phillips v. Eyre*, L.R. 6, Q.B. 1; see also *R. v. Burah*, 3 A.C. 889; *Hodge v. Reg.*, 9 A.C. 117; *Powell v. Apollo Candle Coy.*, 10 A.C. 282.

<sup>1</sup> Section V. of the Commonwealth Act strikingly resembles the original form of Article VI. in the Constitution of the United States. The draft provided that

“legislative Acts of the United States and treaties are the supreme law of the respective States, and bind the judges there as against their own laws.”

## **Chapter V. Distribution of Powers in the Commonwealth Government.**

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

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

“The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to” the matters enumerated (sections 51 and 52).

“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” (section 61).

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

*The Co-ordination of Powers.*—As in the Federal Government of the United States, the departments of the Commonwealth Government are “co-ordinate in degree to the extent of the powers delegated to each of them. Each in the exercise of its powers is independent of the other; but all rightfully done by either is binding on the others. And the Constitution is supreme over all.”<sup>1</sup> The three departments of government equally owing their origin to the Constitution and deriving their functions from it, there is no ground for any claim by the Legislature to treat the Executive and the Judiciary as mere auxiliary organs whose sole duty lies in obedience to the mandates of the Legislature. Each of the departments has to interpret the Constitution for itself so far, and so far only, as is necessary for the discharge of its own functions. The Parliament which legislates, the Executive which carries out, and the Court which judges, may each in succession have to interpret the same power. But it may happen that the validity of a particular exercise of power never reaches the Courts for adjudication at all. In the ordinary affairs of life, it is notorious that many things are done without right, that many transactions are carried through which no Court would support, that many wrongs go unremedied and crimes go unpunished. So, in the Commonwealth, many an unconstitutional Act may be passed, and produce all the social and economic effects which would belong to it if it were lawful. The

interpretation of the Courts is strictly a judicial act; the Courts act neither as advising the Legislature nor as allowing or disallowing its enactments. In order that the Courts may pass upon an Act of the Legislature, or a matter of executive action, there must be some litigation before them raising the question, and there may never be such litigation. The range of inquiry into the lawfulness of alleged authority which an English Court of Law will undertake is very wide; but it has its limits. It by no means follows that all who suffer *damnum* by an act in excess of authority can also show *injuria*; legislative and executive acts alike may be fruitful of consequences which extend beyond the known causes of action, and for which the Courts can offer no remedy. Judge Cooley has said: "The common impression undoubtedly is, that in the case of any legislation where the bounds of constitutional authority are disregarded . . . the judiciary is perfectly competent to afford the adequate remedy; that the Act, indeed, must be void, and that any citizen, as well as the judiciary itself, may treat it as void, and refuse obedience. This, however, is far from being the fact."<sup>1</sup> We shall find many provisions in the Constitution which have none but "political" sanctions.

If the matter does become the subject of judicial investigation, the judicial interpretation binds the Legislature only in indirect fashion. The decision becomes an *authority*, raising a probability ranging, according to many circumstances forming part of the practice of our Courts, from practical certainty on one side to the gravest uncertainty on another, that that Court and other Courts will decide the same question in the same way. The Legislature will be aware of this probability, and will generally refrain from passing Acts which are likely to be ineffective by reason of the refusal of the Courts to enforce them.

The distribution of power between the Commonwealth and State Governments is sanctioned by the power and the duty of the Courts of Commonwealth and State alike to interpret the Constitution, and to refuse recognition to Acts of the Legislature of either encroaching on the sphere of the other.

The question remains whether this duty of interpretation extends to the definition of "legislative power." May the Courts consider whether an Act of the Commonwealth Parliament—we shall see that the question can hardly arise as to an Act of the State Parliament—upon a matter committed to it is an exercise of legislative power in relation to that subject, or is a usurpation of executive or judicial power?

The Constitution, we have seen, follows the plan of the Constitution of the United States, a plan which has been adopted also in the Constitution of every one of the American States. In America the separation of powers of

the organs of government is uniformly sanctioned by the action of the Courts. The creation of separate departments is treated as an implied prohibition of each from exercising any of the powers that belong to another; and the Courts have constantly to consider not merely whether an Act of the Legislature which is in question deals with a subject committed to the Legislature, but whether the Act is a true exercise of legislative power or an assumption of judicial power. This view did not prevail without some question. In 1798 the Supreme Court of the United States laid it down that “if a government of legislative, executive, and judicial departments were established by a Constitution which imposed no limits on the legislative power, the consequence would invariably be, that whatever the Legislature chose to enact would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”<sup>1</sup> And though the doctrine of the separation of powers is now thoroughly established in the American Courts, as an independent principle, the more important cases in which the Courts have called attention to the separation of powers have been decided, not on the implied prohibition arising from the separation, but upon express restraints imposed on the Legislature by the Constitution, as the prohibition of bills of attainder, and the making of *ex post facto* laws, and—in the case of States Legislatures—laws impairing the obligation of contracts, and laws infringing the Fourteenth Amendment. Had not the separation of powers been made, the disposal of executive and judicial duties must have devolved upon the department vested with the general power to make laws.<sup>2</sup> This is in accordance with the opinion expressed in *Calder v. Bull*, already cited, and *Cooper v. Telfair*,<sup>3</sup> where Patterson, J., said: “I consider it a sound political proposition, that wherever the legislative power is undefined, it includes the judicial and executive attributes.”

In the British Colonies there has not been a separation of powers; the executive and the judiciary have been organized under the legislature. An attempted exercise of power by the legislature contrary to that expediency which leaves the executive and the judicial functions to other departments, is checked by the power of the Crown to disallow Acts; and in the case of the American Colonies, Acts were frequently disallowed on this ground.<sup>1</sup> The Privy Council has emphasized the plenitude of the powers of the Legislature, and likened them to the powers of Parliament itself, even in those cases where, as in the Provincial Legislatures of Canada, the subjects of legislation are limited by enumeration.<sup>2</sup> In the Dominion Government of Canada, where the British North America Act, 1867, vests the executive power in an authority not the Legislature, the general grant does not prevent the Dominion Parliament from making full provision for carrying

out its laws, and constituting appropriate authorities for that purpose. On the other hand, it is true that in several instances Canadian Courts have dwelt upon the purely legislative powers of the Provincial Legislatures, and have considered that the executive and judicial powers, not being expressly given, are impliedly withheld.<sup>3</sup> In the Privy Council itself, there have been observations indicating that the question, What is legislation? is one for judicial consideration. Thus, during the argument in *Att. Gen. for Hong Kong v. Kwok-a-Sing*,<sup>4</sup> Mellish, L.J., said that "It was assumed in *Phillips v. Eyre* that an Act of Attainder would be void." In the leading case of *R. v. Burah*,<sup>5</sup> where one of the questions was as to the power of the Governor-General in Council in India to remove a certain area from the jurisdiction of the High Court, Lord Selborne, in delivering the opinion of the Board, uses language which, while not unambiguous, suggests that the question whether what has been done is legislation is a matter for the consideration of the Court. In the case of *Fielding v. Thomas*,<sup>1</sup> a Statute of Nova Scotia had conferred upon the House of Assembly the character of a Court of Record, with inherent power to punish for insults or libels on members during session, and had provided that members who were present and voted on the question of the arrest of an offender, should enjoy the immunities of a Court of Record. In considering the validity of the Act, the Judicial Committee said: "It may be that the words, if construed literally, and apart from their context, would be *ultra vires*. Their Lordships are disposed to think that the Legislature could not constitute itself a Court of Record for the trial of criminal offences.<sup>2</sup> But read in the light of other sections of the Act, and having regard to the subject-matter with which the Legislature was dealing, their Lordships think that these sections were merely intended to give to the House the powers of a Court of Record for the purpose of dealing with breaches of privilege and contempt by way of committal. If they mean more than this, or if it be taken as a power to try or punish criminal offences otherwise than as incident to the protection of members in their proceedings, section 30 cannot be supported."

In determining the powers which may be exercised by each of the organs, regard must be had to history and common practice as well as to the nature of the power itself. Thus, the Courts exercise a power of making rules for the conduct of judicial business; each branch of the Legislature, without invading the "judicial power," exercises functions which are judicial in their nature in regard to its own privileges, and in respect to its constitution. Nor can it be doubted that the Parliament may, without abdicating its legislative power, delegate to the Governor-General in Council powers of subordinate legislation. The complex conditions of modern life make such powers increasingly necessary. The same necessity

leads to a further delegation of legislative power to the judges in regard to the administration of justice. As to the Executive, it is common experience that there are many offices which combine executive and judicial functions. The discipline of the services of the Commonwealth, both civil and military, involves the exercise of punitive powers by the Executive; these powers the Legislature can restrain by requiring that they shall be exercised only for specific causes, and after inquiry by tribunals acting upon judicial lines, and can extend (as it does in the case of the military forces) by adding to the ordinary official sanctions of degradation, suspension, or dismissal, the ultimate sanctions of the criminal law. Yet even in the United States it is conceded that the powers of a Court-martial are not within the judicial branch of the Government, and that Courts-martial belong to the Executive.<sup>1</sup>

Opinion seems agreed that all the powers of a government which do not belong to the executive or the judiciary belong to the legislature.<sup>2</sup> Thus the taxing power, though in itself hardly a “legislative power,” is always deemed to belong to the legislature. It follows that the plenary power possessed by the Commonwealth over the subjects committed to it is exerciseable by the Parliament whenever it is not exerciseable by some other power. Both executive and judicial power (the former so far as it is productive of any juristic consequences) involve the application of existing law. Such a power is very rarely usurped by a legislature; the temptation to which legislatures are liable, to which American Legislatures have succumbed, and which American Courts have sought to defeat by alleging an invasion of the judicial power, is to apply a new rule to past acts or events, or to deal with a matter independently of all rule. However mischievous and dangerous may be *ex post facto* laws and *privilegia*, their very mischief lies in the fact that they are something other than judicial acts; and the propriety, the justice, or the expediency of an Act of Parliament is a question which lies outside the jurisdiction of any Court. It may be conjectured that in this matter of the distribution of powers, our Courts will not closely follow the American precedents,<sup>1</sup> which would assign to the Commonwealth Parliament in its sphere a position quite different from the States Parliaments in their sphere. In America, as has been already pointed out, the practical restraints upon the legislature came rather from express prohibitions than from the implications of the separation of powers. The political ideas under the influence of which the United States Constitution was established, ideas which have been developed in the States Constitutions, are very different from those prevailing in Australia: the distrust of legislatures is not the first article of political faith in the new Commonwealth. It is suggested, therefore, that

those questions of *generality* as to persons or circumstances, and of prospective or retrospective operation which are discussed in America on the distribution of powers among legislative, executive, and judicial organs, have not the same importance in the Commonwealth Government. The question of generality, it is true, may be important, but as an incident of the distribution of power between Commonwealth and State<sup>1</sup> rather than of the distribution of powers among the organs of the Commonwealth Government.

*The Preponderance of the Parliament.*—The distribution of powers by the Constitution is not inconsistent with the preponderance of the Parliament in the Government; the tradition of the identity of self-government with Parliamentary Government remains, and the Constitution is in the main regarded as a transfer of powers now exercised in the several colonies by the respective Parliaments to a Parliament which represents the whole. In addition to that kind of control over other functions which the power of making laws necessarily carries, the Parliament is expressly given considerable powers of control over the executive and judiciary. Parliament may make laws on any matter incidental to the execution of powers vested by the Constitution in any of the organs or officers of the Commonwealth (section 51, art. xxxix.). The organization and regulation of the executive is almost exclusively in the hands of Parliament, which fixes the number of Ministers (section 65), and controls the appointment and removal of all officers in the public service (section 67). Cabinet Government is everywhere a matter of convention rather than of law, but it is more clearly adverted to in the Commonwealth Constitution than in the Constitution Act of any of the colonies (section 64). The financial necessities which secure Parliamentary control over the working of the public departments will of course exist in the Commonwealth as elsewhere; and the Constitution does not leave the assembly of Parliament to those necessities, but requires that it shall meet every year and at such times that twelve months shall not intervene between sessions (section 6). Even in the judicial department the establishment and jurisdiction of Courts other than the High Court of Australia are completely controlled by Parliament. The provision as to the tenure of judges (section 72) intended to secure them against arbitrary interference by either the executive or the legislature, rather indicate the course to be followed by the two Houses of Parliament in the exercise of the power of removal than impose any legal limits on their power to remove at will. In the important matter of the amendment of the Constitution, the power of initiation lies in the Parliament alone, and is not, as in the United States, shared with the States Governments, or, as in Switzerland, with the people.

1 *Dodge v. Woolsey*, 18 How. 381.

1 *Journal of the Michigan Political Science Association*, vol. i., p. 47; cited by Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, p. 9.

1 Per Iredell, J., *Calder v. Bull*, 3 Dallas, 386.

2 Cooley, *Constitutional Limitations*, section 90.

3 4 Dallas, 19.

1 Chalmers, *Opinions of Eminent Lawyers*, vol. ii.

2 E.g. *Hodge v. Reg.*, 9 A.C. 117.

3 See Lefroy's *Legislative Power in Canada*, p. 125.

4 L.R., 5 P.C. 179.

5 L.R., 3 A.C. 889, 904. "If what has been done is legislation within the general scope of the affirmative words which gave the power, and if it violates no express condition or restriction by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

1 [1896] A.C. 600.

2 Though "Criminal Law" is a Dominion matter, the "Constitution of Courts of Criminal Jurisdiction" is excepted; and the Provincial Power includes the "Constitution, maintenance, and organization of Provincial Courts, both of Civil and Criminal Jurisdiction."

1 See Chapter xvi.

2 "When a power is not distinctly either legislative or executive or judicial, and is not by the Constitution distinctly confided to a department of the government designated, the mode of its exercise and the agency must necessarily be determined by law; in other words, must necessarily be under the control of the legislature."—Cooley, *Constitutional Law*, pp. 45–6.

1 The American cases are very fully considered in Cooley, *Constitutional Limitations*.

1 See *The Legislative Power of the Parliament*.

## Chapter VI.

## **The Parliament.**

BY section 1 of the Constitution, "The Parliament of the Commonwealth" consists of "The Queen, a Senate, and a House of Representatives."

### **A. The Crown and the Governor-General.**

One of the few legal characteristics of self-governing colonies is that the legislation generally proceeds in the name of the Crown, while in colonies in a less advanced state enactments are in the name of the Governor. The inclusion of the Crown in "The Parliament" follows the British North America Act, 1867, sec. 17, and follows the legal theory as to the composition of the Imperial Parliament.<sup>1</sup> In the Commonwealth it is specifically provided by section 2 of the Constitution that a Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, who has, 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." The office of Governor-General has been created by Letters Patent, and the Governor-General has been appointed by Commission under the Royal Sign Manual and Signet.<sup>2</sup>

Sections 3 and 4 of the Constitution relate generally to the office of Governor-General, and have no special reference to the Parliament or to legislative power. Section 3 provides for a salary of £10,000 per annum, which may be altered by the Parliament, but so that the salary of the Governor-General then in office is not affected. Section 4 deals with the construction of powers in the Constitution conferred upon the Governor-General, and provides that they may be exercised by the Governor-General for the time being or by the administrator of the Government. Section vii. of the Letters Patent follows upon this. Another general provision affecting the office—the power of the Crown to authorize the Governor-General to appoint a deputy or deputies to act in any part of the Commonwealth—is contained in section 126; the power is exercised in the Letters Patent, section vi., which repeat the proviso that the appointment of such a deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

As sections 3 and 4 relate generally to the office of Governor-General, it has been inferred that section 2 is equally general; and that the provision that the Governor-General "shall have and may exercise" "such powers and

functions of the Queen as Her Majesty may be pleased to assign to him,” shuts out the contention of which something has been heard in Australia and in Canada, that the Governor of a self-governing colony has *virtute officii*, and without special grant, all the executive powers of the Crown exerciseable in relation to the internal government of the colony. The matter is referred to under the head of “Executive Power.” It may be noticed that the Constitution takes a new departure in speaking of the Governor-General “as Her Majesty's representative” (sections 2, 61, 68). It is true that this term is used colloquially to describe a Governor, and has been occasionally used in judgments. It is believed that it has never before been used in any Statute, Letters Patent, or Commission of a Colonial Governor; and, on the other hand, the expression “the representative of the Queen in the government of the colony” has more than once been used by the Judicial Committee to describe a Viceroy, and to distinguish him from a Governor, who is an officer merely with a limited authority from the Crown.<sup>1</sup>

The powers and duties of the Governor-General in relation to the Parliament and to legislation spring partly from the Royal grant, and partly from the provisions of the Constitution. Some of them, though of statutory origin, correspond with actual prerogatives of the Crown, or are in close analogy thereto; others are rather in the nature of ministerial Acts, lodged in the Governor-General as the only permanent officer of the Commonwealth. The following are the principal powers and duties related to the prerogative:

1. He summons, prorogues, and dissolves the Parliament.

These are prerogative powers, and in accordance with constitutional custom they are conferred upon the Governor-General by the Letter Patent (section v.). They are also, however, expressly granted by the Constitution itself (section 5), and the powers of dissolving and summoning the Parliament are the subject of important provisions. 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 (section 5), and there is to be a session of the Parliament once at least in every year, “so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session” (section 6). The first Parliament of the Commonwealth was to be summoned to meet not later than six months after the establishment of the Commonwealth.<sup>2</sup> As to the dissolution of the Parliament, that extends in the ordinary case only to the House of Representatives (section 5); but in the special case of a “deadlock,” both Houses may be dissolved (section 57).

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

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

In the exercise of these powers the Governor-General will generally, but not necessarily nor always, act on the advice of his Ministers. As to the summoning of the Parliament, he is in this as in other matters the guardian of the law, and should see that it meets at the proper times. As to the power of dissolution, that has always been the most difficult and delicate of a Governor's powers in a self-governing colony; and is the one matter in which governors always exercise a personal discretion which not infrequently leads them to refuse a dissolution. The principle which has been acted upon is that with the short Parliaments in the colonies, a dissolution should, save in special circumstances, be resorted to only when it is clear that in no other way can government be carried on.<sup>1</sup>

The provisions of section 58 relating to the Royal Assent to Bills are taken from the British North America Act, 1867, section 55, with an important difference. The Governor-General is to exercise his powers of assenting, withholding the Royal Assent, or reserving "according to his discretion, but subject to this Constitution." "According to his discretion" raises the consideration of two matters by which the discretion of the Governor-General may be guided—the Royal Instructions and the advice of his Ministers. As to the Royal Instructions, it has been doubted whether a law assented to by a Governor would not in all cases be valid, notwithstanding that such assent was given contrary to the terms of the Instructions. The Constitution Acts of the Australian Colonies, however, made the observance of the Instructions a condition of validity,<sup>2</sup> though as the Instructions themselves gave the Governor a discretionary power to assent to any Bill in case he should be of opinion that an urgent necessity existed for bringing it into operation, the result was that the non-reservation of a Bill prescribed for reservation by the Royal Instructions only, would not impair its validity. The British North America Act, section 55, provides that when a Bill is presented to the Governor-General for the Royal Assent, he shall declare "according to his discretion, but subject to the provisions of this Act, and to Her Majesty's Instructions, either that he assents," etc. The words "and to Her Majesty's Instructions" are omitted in the Commonwealth Constitution, and there is no provision on the subject similar to that in the Constitution Acts of the Australian Colonies.<sup>1</sup> Section 58, however, provides that the Governor-General shall declare his assent, etc., according to his discretion, "but subject to this Constitution"; section 2, as has been seen, limits the powers of the Governor-General to such

“powers and functions of the Queen as Her Majesty may be pleased to assign to him”; and it would seem to follow that if the Crown forbids the Governor-General to assent to a particular measure, his assent will be invalid. A difficulty arises from the fact that the limitation of power in section 2, like the grant of power in section 58, is expressed to be “subject to this Constitution.” Another question arises as to the application of the Colonial Laws Validity Act, 1865, section 5:—“No colonial law, passed with the concurrence of or assented to by the Governor of any Colony, or to be hereafter passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof by any instrument other than the Letters Patent, or instrument authorizing such Governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last mentioned instrument.” The question is, for the present, without practical importance, for the Governor-General's instructions contain no restrictions on the subject.

In assenting to or withholding assent from Bills, the Governor-General must first regard his duty as an Imperial Officer. He must consult his instructions, and see whether the measure is one which he ought to reserve. He must then satisfy himself that the subject is one over which the Commonwealth Parliament has power, and that the proposed law does not conflict with any Imperial law in operation in the Commonwealth. For this purpose, he will probably receive a report from his Law Officers; and if the matter is of more than local importance, he may seek the advice of the Imperial Law Officers. With these limitations, it would seem that he ought to act upon the advice of his Ministers.<sup>1</sup> In any case where the Governor-General assents to a Bill, the Crown may disallow the Act within one year, and the law will then be annulled from the day when the disallowance is made known (sec. 59).

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

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

## **B. The Senate.**

The principal character of the Senate may be gathered from the

alternative names which were suggested for it— the House of the States, the States Assembly. Though it differs in many important respects from the Senate in the United States and in the Dominion of Canada, it stands like them for the federal principle in the Constitution. Every Original State has equal representation in the Senate (sec. 7), a condition which was vigorously assailed in the larger States. This equality can be varied only by an amendment of the Constitution, and then only with the consent of the electors of the State or States whose “proportionate representation” it is proposed to diminish (Section 128). In the first instance, each State has six members; but the Parliament may increase the number. There is no power to diminish the number, because it is part of the plan of the Constitution to set up a numerical proportion between the Houses, and an alteration of numbers might affect the balance of power.

As the Senate is to represent the States, it is fitly provided that each State shall constitute one electorate; though this is a provision which the Parliament may alter, and the Constitution itself makes special provision for Queensland (sec. 7). These provisions may also be regarded as a check upon localism in Commonwealth politics; it is a common complaint of popular assemblies that “they represent the nation too little and particular districts too much.” Large constituencies are in the colonies a feature of the Second Chamber, where that Chamber is elective. It is not impossible that, from the mode of its constitution, the Senate may be more “national” than the national Chamber itself.

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

A condition which the Senate shares with Second Chambers and Upper Houses in general is “perpetual existence.” Except in the event of deadlocks (sec. 57), it is not liable to dissolution. Its members retire by rotation after six years' service (sec. 7), the length of service of a Senator being double the term of the House of Representatives. The rotation of Senators is to be determined by the body itself as soon as practicable after its first meeting, and after every dissolution (sec. 13), so that half the Senators of each State in the first Senate and every new Senate will retire at the end of three years' service (sec. 13). Whenever the number of Senators for a State is increased or diminished, the Parliament may make

such provision for the vacating of the places of Senators for the State as it deems necessary to maintain regularity in rotation (sec. 14).

The Senate is popular in the mode of its Constitution. The Bill of 1891 followed the United States Constitution in providing that Senators should be directly chosen by the Houses of the Parliament of the several States. There was nothing as to which there was more agreement than that this system should give way to one which secured immediate responsibility to the people. Senators are to be directly chosen by the people of the States (sec. 7), and the qualification of Senators and electors is not left to the States to determine, but is uniform with that of members and electors for the House of Representatives, “but in the choosing of Senators each elector shall vote only once” (sections 16, 8). Only in the case of casual vacancies is the scheme of 1891 resorted to (sec. 15). The provision for filling casual vacancies is curiously complex and minute. The person chosen holds the seat until the expiration of the term of the person whose seat he fills, or until the election of a successor, whichever first happens. If the State Parliament is not in session when the vacancy is notified (by the President, or, if there is no President, by the Governor-General, to the Governor of the State— sec. 21), the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until 14 days after the beginning of the next session of the State Parliament, or “until the election of a successor, whichever first happens.” The last-mentioned condition of tenure is explained by a provision that “at the next general election of members of the House of Representatives, or at the next election of Senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place until the expiration of the term” (sec. 15).

The Parliament may provide a uniform method of electing Senators throughout the Commonwealth. Subject to any such law, the State Parliaments may make laws prescribing the method of choosing Senators (sec. 9).

The State Parliaments may make laws for determining the times and places of elections of State Senators (sec. 9). The Commonwealth Parliament may make laws regulating the conduct of the Senate elections, but in default of such provisions the State laws, for the “more numerous House of the Parliament of the State,” shall, subject to the Constitution, apply to Senate elections as nearly as practicable (sec. 10).

The Governor of a State may cause writs to be issued for the election of the State Senators; in case of the dissolution of the Senate, the writs shall be issued within ten days of the proclamation of the dissolution (sec. 12).

The Senate, before proceeding to the despatch of business, and thereafter

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

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

### **C. The House of Representatives.**

The Constitution contains throughout elements which suggest unity, and elements which suggest union merely. Writers on the Constitution of the United States, which presents the same phenomena, speak of these respectively as the national and federal elements in the Constitution. Using the terms in this sense, we have seen that the Senate is the Federal Chamber; and we now come to the House of Representatives, which is regarded as the National Chamber. As the name "Commonwealth" has been objected to on account of its Republican associations, so the title "House of Representatives" has been criticised as too American. It is not, however, altogether new in Australian Constitutions. Earl Grey's Act of 1850, giving Constitutions to all the Australian Colonies, empowered them to substitute for their single-chambered legislature "a Council and House of Representatives." None of them adopted the name House of Representatives; but in New Zealand the General Assembly does consist of a Council and House of Representatives. There were sufficiently good reasons for not following the Dominion of Canada in establishing a "House of Commons"; you cannot translate the thing or its traditions, and without these the name in Canada or Australia is meaningless or misleading. If we look to history, we see that it is the Senate rather than the House of Representatives which recalls the *communitas communitatum*—the assembly of the organized political communities. It is indeed a signal merit that in the Senate the constituency is such an organized body, and not a mere electoral district formed *ad hoc*. If we look to practical politics we shall hardly find that the Lower House can successfully maintain the same supremacy which the House of Commons claims in England and Canada.

The national character of the House, the federal character of the Senate, are intended to be emphasized by the different terms used in respect to

their constitution. The Senators are directly chosen by the people of the States (sec. 7); the House is composed of members “directly chosen by the people of the Commonwealth” (sec. 24). But even in the case of the House the State is for many incidental purposes an electoral unit.

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

By Section 24 the number of members chosen in the several States is in proportion to the respective numbers of their people; and until the Parliament otherwise provides, is determined whenever necessary as follows:

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

2. The number of members to be chosen is determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one half of the quota, one more member shall be chosen in the State. But five members at least shall be chosen from each Original State. By a provision suggested by the Fourteenth Amendment (sec. 2) to the United States Constitution, if the law of a State excludes the people of any race from the franchise, such race is not to be reckoned in computing the population of the State (sec. 25).

The distribution of seats among the States is thus subject to change. The total number of seats in the House, however, bears a fixed relation to the number in the Senate—the number of members is as nearly as practicable twice the number of the Senators (sec. 24). This provision has more than one reason. In the first place it was inserted with a view to measuring the strength of the House on a joint sitting should that ever be necessary; and in the end the scheme for avoiding deadlocks does involve such a joint sitting. In the second place it serves to maintain the tradition of the Lower House as “the more numerous House,” and at the same time it maintains the relative proportions of the Houses which without it might be upset by the increase of members of the House of Representatives which may become advisable by the increase of population. It will be remembered that the Parliament may increase or diminish the number of senators, but cannot diminish the representation of Original States below the present number—six (sec. 7).

The representation to which each State was entitled in 1900 was ascertained during the passage of the Bill through the Imperial Parliament, and section 26 provides for the number of members to be returned from

each State at the first election as follows:

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

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

In respect to the constitution of electoral divisions there are three possibilities. The Commonwealth Parliament may provide; in default of any provision, the State Parliament “may make laws for determining the divisions in each State for which members may be chosen, and the number of members to be chosen for each division,” but a division is not to be formed<sup>1</sup> out of parts of different states. In the absence of provision by Commonwealth or State each state is to be one electorate (sec. 29). Under the powers of this section and sec. iv. of the Act, four of the States passed laws dealing with this subject; but at the first general election South Australia and Tasmania voted as single electorates.<sup>2</sup>

Any provision corresponding with that referring to the Senate under which the House may proceed to business, notwithstanding the failure of a State to provide for its representation, is of course unnecessary in relation to a national chamber; and it has been thought unnecessary to provide directly for the failure of electoral divisions to return members. By sec. 39, until the Parliament otherwise provides, the presence of one-third of the whole number of the members of the House is necessary to constitute a meeting of the House for the exercise of its powers. In respect to its duration, the House is assimilated to the popular House in all British colonies. It is liable to dissolution by the head of the Government—the Governor-General—and if not dissolved it expires three years after its first meeting<sup>3</sup> (sec. 28). (Three years is the term assigned to the Lower House in all the Australian Colonies, except Western Australia, where it is four years.) The House has thus no permanent existence, and it is made of course more sensitive to public opinion than the Senate by the fact that a

general election sends all the members to their constituents at the same time.

The Governor-General may cause writs to be issued for general elections, and after the first general election writs shall be issued within ten days from the expiry of the House, or the proclamation of a dissolution (sec. 32). Casual vacancies are filled by election on the writ of the Speaker, or, in his absence, of the Governor-General (sec. 33). Until the Parliament otherwise provides, but subject to the Constitution, the laws in force in the States respectively regulating the conduct of State elections for the “more numerous House” are to govern the conduct of elections for the House of Representatives (sec. 31). A member may resign his seat (sec. 37); and his seat becomes vacant if for two consecutive months of any session, without leave, he fails to attend the House (sec. 38).

The House, before proceeding to the despatch of business and as often as occasion arises, must choose a member to be Speaker. The Speaker ceases to hold his office (*a*) if he ceases to be a member, or (*b*) if he be removed by a vote of the House, or (*c*) if he resign his office or his seat (sec. 35).

Questions arising in the House of Representatives are determined by a majority of votes, and the Speaker has no ordinary vote, but has a casting vote where the numbers are equal (sec. 40).

## **Qualifications of Electors and Members of the Senate and House of Representatives**

The Constitution assimilates these qualifications (sections 8, 16). Some of the qualifications are dealt with in the Constitution under the head of “the House of Representatives,” others under “Both Houses of the Parliament.”

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

## **Electors.**

Section 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.

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

On these sections the following observations may be made:

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

2. The reference to the more numerous House of Parliament of the State is taken from the United States Constitution, where the federal franchise is regulated by the provision that “the electors in each State shall have the qualification requisite for electors of the most numerous branch of the State Legislature.” In those States of the Commonwealth in which both Houses are elective, the law of the State has fixed the number of representatives in each House, and has always provided that the Lower House shall contain a number of members which is substantially larger than that in the Upper House. In New South Wales and Queensland the Upper House is nominated, not elected, and the number of members is by law unlimited. The present electoral qualifications in the States vary considerably. In all the States electors must be British subjects, 21 years of age or over, and there are certain conditions of residence.

*New South Wales* (Parliamentary Electorates and Elections Act, 1893).—Manhood suffrage, the elector voting in the division of the electoral district in which he resides.

*Victoria* (Constitution Act Amendment Act, 1890 and 1899).—Manhood suffrage, the elector voting in the district in which he resides; all persons on the ratepayers' roll; freehold property of the value of £50 or of the annual value of £5. Since 1899, though a person may be on the roll in various electoral districts, in virtue of his various qualifications, and entitled, therefore, to vote in any one of them, he may not vote more than once.

*Queensland* (The Elections Acts, 1885 to 1897—a consolidation).—Manhood suffrage, the elector voting where he resides. Leasehold occupation, or freehold or leasehold estate, or pastoral licence of specified value. An elector may vote in any number of electoral districts in which he

may have a qualification, but not more than once in any particular district.

*South Australia* (Electoral Code, 1896).—Adult suffrage, the elector voting where he resides.

*Western Australia* (Constitution Acts Amendment Acts, 1899 and 1900).—Adult suffrage; freehold, leasehold, household, or Crown lease or licence of certain value, exerciseable as in Queensland.

*Tasmania* (Constitution Amendment Act, 1896, No. 2; Electoral Act, 1896, and Electoral Continuation and Amendment Act, 1899).—Men in receipt of income of £40 a-year have a vote in the district in which they reside; ratepaying qualifications exerciseable wherever the qualification exists.

3. The provision that in the choosing of members each elector shall vote only once, seems clearly to run throughout the Commonwealth and to prohibit an elector from voting more than once, whether in the same State or in different State.

4. There is room for some doubt whether the provisions of sec. 30 against plural voting applies to the suffrage under a law of the Commonwealth Parliament as well as to a State law. It is not clear whether the controlling words are “Until the Parliament otherwise provides” or “but in the choosing of members each elector shall vote only once.” It is submitted that the latter words govern the power of the Parliament. The similar prohibition in sec. 8 regarding the Senate clearly binds the Parliament, and by the section the Constitution has prescribed uniformity in the qualifications of electors for the two Houses.

5. In speaking of the qualification “which is prescribed by the law of the State,” does the Constitution mean the qualification as prescribed from time to time? The provision of the United States Constitution certainly does mean that; but in the United States the federal suffrage is treated as a matter for State regulation, and Congress has no power over it, save under the Amendments, to prevent abuses by the State. In the Commonwealth the suffrage is treated as a national matter, and in the absence of any words of futurity (such, for instance, as are contained in section 31, the “laws in force in each State for the time being”), it is reasonable to suppose that the qualification referred to is that existing at the establishment of the Commonwealth.

If this view be correct, section 41, which imposes an important limitation upon the power of the Parliament, is shorn of some of its difficulties. Section 41 provides that “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.” As has been seen, two of the States— South Australia and Western Australia—have adopted adult suffrage, in which they followed the lead of New Zealand, also a possible State. “Women's suffrage,” too, was being strongly pressed upon the Legislatures of New South Wales and Victoria. Accordingly, a concession was made to the States, which should, in its political operation, facilitate the adoption in regard to each State of its own policy. For it is clear that the preservation of rights in States where they have been acquired will more readily reconcile those States to a Commonwealth law which accords with the policy of those States which have not adopted women's suffrage.

If the true construction of section 30 be the “law in force in each State at the establishment of the Commonwealth,” then under section 41 any person who at that time has, or who at any time afterwards acquires a right under that law to vote for the more numerous House of the State Parliament, may vote in federal elections, whatever law be established by the Commonwealth Parliament. If, on the other hand, section 30 means laws enacted by the State Parliament at any time before the establishment of a federal franchise by the Commonwealth Parliament, section 41 presents some difficulties of construction.<sup>1</sup> It would probably mean *has* at the establishment of the federal franchise or *acquires* at any time afterwards under a State law in force at the establishment of the federal franchise.

### **Qualifications of Members.**

By section 16, the qualifications for a Senator are the same as those of a member of the House, and by section 34 it is enacted that the Parliament may deal with the qualifications of a member of the House, but until the Parliament has provided otherwise:

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

ii. He must be a subject of the Queen, either natural born or for at least five years naturalized under a law of the United Kingdom or of a colony which has become, or becomes, a State, or of the Commonwealth or a State.<sup>1</sup>

### **Disqualifications for Membership.**

Section 43. A member of either House of the Parliament is incapable of being chosen or of sitting as a member of the other House.

Section 44. Any person who

i. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen, or is entitled to the rights or privileges of a subject or a citizen of a foreign Power;<sup>1</sup> 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 Member of the House of Representatives.

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

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

Until the Parliament otherwise provides, any person declared by the Constitution to be incapable of sitting as a member of either House is liable, for every day on which he so sits, to pay £100 to any person who sues for it in a court of competent jurisdiction. It is noteworthy that the Constitution does not disqualify members of the State Parliaments from

being members of the Commonwealth Parliament. The State Parliaments, however, have already passed Acts which disqualify members of the Commonwealth Parliament from sitting in the State Parliament. In so doing they have followed the examples of the States in America, and have acted on the principle that a seat in Parliament is a seat to which the familiar doctrine “one man, one billet” applies.

### **Both Houses of the Parliament.**

Several of the provisions under this head have been already considered.

By section 42 every member must complete his title by making and subscribing an oath or affirmation of allegiance in the form set out in the schedule to the Constitution.

By section 47 any question respecting the qualifications of members, or respecting a vacancy in either House, and any question of a disputed election, is determined by the House in which the question arises. The Parliament may, however, provide otherwise. By section 48 the members of each House receive an allowance of £400 a year, to be reckoned from the day on which they take their seats. In all the States members of the Lower House are paid a salary,<sup>1</sup> “allowances,” or “re-imbusement of expenses” varying from £100 to £300 per annum with railway passes and other privileges. Only in South Australia, Tasmania, and Western Australia are members of the Legislative Council paid a salary, but they have in all the States the same privileges of travelling as members of the Lower House. The payment of members of the Commonwealth Parliament is under no constitutional guarantee: the Parliament may abolish it or alter the amount.

### **Privilege of the Parliament.**

It has long been settled that the *lex et consuetudo Parliamenti* does not apply to Colonial Legislatures.<sup>1</sup> While the Chambers of such a Legislature have “every power reasonably necessary for the proper exercise of their functions and duties, powers such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute,” this does not extend to nor justify punitive action. Accordingly, the Constitution Acts of most of the colonies have authorised the Legislature or the Houses respectively to supply this defect in their power.<sup>2</sup> The Legislature of Victoria having adopted for each House and for the Committees and members thereof the powers, privileges, and immunities of the House of Commons, it was held by the Privy Council that the

doctrine of the English privilege cases applied, and that where a person was committed by order of the Legislative Assembly for contempt, there was no power in the Courts to examine the cause of contempt.<sup>3</sup>

The Constitution proceeds at once to oust the common law doctrine from application to the Parliament. “The powers, privileges, and immunities of the Senate and the House of Representatives and of the members and 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” (sec. 49).<sup>4</sup> The Parliament has thus plenary power over the subject, untrammelled by the condition that privileges shall not exceed those of the House of Commons at the date of the Constitution Acts respectively, as in the case of the other Australian Acts, or at the date of the Act conferring the privileges, as in Canada.

## **Procedure.**

Under section 50, each House separately, or the two Houses in conjunction, may make rules and orders for the conduct of its or their business and proceedings. The same section contains a provision that each House may make rules and orders with respect to “the mode in which its powers, privileges, and immunities may be exercised and upheld.” These are somewhat startling terms, and on the face of them would justify the House in establishing appropriate penalties for breach of privilege. The term “powers, privileges, and immunities,” however, includes the sanctions which are available to each House, and therefore it is conjectured that “mode” relates exclusively to what may be called procedure—the “machinery as distinguished from the product.”

The procedure in legislation is to some extent regulated by the Constitution itself. The provisions affecting the Royal Assent (sections 58–60) have been already referred to. The proceedings in regard to Money Bills, so far as they concern the relations of the Senate and the House, are considered in the next chapter. The provision requiring the recommendation of money votes by the Governor-General may be here referred to. It is an essential part of our Parliamentary system that every grant of money for the public service shall be based upon the request or recommendation of the Crown. “The foundation for all Parliamentary taxation is its necessity for the public service as declared by the Crown through its Constitutional advisers.”<sup>1</sup> This principle fixes upon the Ministry a definite responsibility for the national finance, which acts as a safeguard against Parliamentary recklessness. The absence of such a rule in the

colonies was regarded by Lord Durham as one of the principal factors in the ill-government of Canada; competent observers to-day notice the financial chaos in France and Italy as a consequence of the neglect of this rule. Ever since the introduction of responsible government into the colonies, the rule has in one form or other found a place in colonial constitutions. Consistently, therefore, it is provided in the Constitution that “a vote, resolution, or proposed law for the appropriation of revenues or monies 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” (section 56). This provision must, like so much else that belongs to our system of Parliamentary government, be supplemented by conventional rules such as exist in the House of Commons as to the origination of laws imposing taxation, and the prohibition of the increase of the amount asked for by the Crown.

1 Blackstone, *Com.*, i., p. 153.

2 See Appendix.

1 *Cameron v. Kyte*, 3 Knapp, 332; *Hill v. Bigge*, 3 Moore, P.C. 476. For the legal liability of a Colonial Governor, see *Anson*, vol. ii., pp. 262–3, and cases there referred to.

2 The first Parliament of the Commonwealth was opened by H.R.H. the Duke of Cornwall and York, on Thursday, May 9th, 1901, as Commissioner appointed by the King under Letters Patent of February 23rd, 1901.

1 See the whole subject discussed in Todd's *Parliamentary Government in the Colonies*, cap. xvii., part iii., and especially the summary at pp. 800–803.

2 13 and 14 Vict., cap. 59.

1 13 and 14 Vict., cap. 59.

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

1 *Quaere*, by the State only?

2 In Tasmania a modified form of the Hare system of proportional representation was used. For an account of it see *The New Democracy* (Chapter iii.), by Professor Jethro Brown.

3 A Colonial Legislature is not dissolved by a demise of the Crown— *Devine v. Holloway*, 14 Moo. P.C. 290.

1 Section 41 is fully discussed by Messrs. Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, pp. 483–7. The learned authors are of opinion that “has or acquires” means has at the establishment of the Commonwealth or acquires before the framing of the federal franchise by the Commonwealth Parliament; and are further of opinion that “a right to vote” means a right completely acquired by the individual. Accordingly, persons who become entitled to vote in State elections after the passing of the Commonwealth law, are not within the saving of the section, though the State law itself was passed before the Commonwealth law. But such an operation of the law would be so partial and anomalous as to constitute a strong reason for rejecting altogether the limitation of time. The protection of the section only operates “while the right continues,” and it is not the case under the law of any one of the States that a right to vote once acquired by an individual is perpetual: its continuance depends upon many circumstances, some of which are bound to change, so that the right to vote lapses and is renewed. For instance, the “elector's right,” which plays so large a part in the constitutional law of the colonies, is good for a limited time only, and then expires. There would be a constant process of extinction of right under the State law.

1 A question which may become of practical importance arises as to the eligibility of women electors for membership. The words of the section are words of the masculine gender, but under the Interpretation Act of 1889, sec. 1, in every Act passed after 1850 (the date of Lord Brougham's Act, containing similar provisions), unless the contrary intention appears, words importing the masculine gender include females. The application of that doctrine to public functions has been considered in England in two cases—*Chorlton v. Lings*, L.R., 4 C.P. 374, which dealt with the claim of women to vote at Parliamentary elections under the Representation of the People Act, 1867; and *Beresford-Hope v. Sandhurst*, 23 Q.B.D. 79, which related to the eligibility of women for membership of the County Council under the Local Government Act of 1888. In the latter case it was admitted that, as the result of various enactments, women might be on the burgess roll and might vote at municipal elections. The Municipal Corporations Act, which was made applicable to the London County Council, provided, by section 11, sub-sec. 2, that “a person shall not be qualified to be elected or to be a councillor unless he is enrolled, and entitled to be enrolled, as a burgess.” It was contended that as a woman might be a burgess, and as words of the masculine gender included females, Lady Sandhurst was eligible as a councillor. The Court of Appeal decided against the claim, but (in the cases of Coleridge, L.C.J., and Cotton, Lindley, Fry, and Lopes, L.JJ.) on the ground that the application of Brougham's Act was excluded by section 63 of the Municipal Corporations Act, whereby: “For all purposes connected with, and having reference to, the right to vote at municipal elections, words in this Act importing the masculine gender include women,” a provision which must be confined in its operation to the matter dealt with—the right to vote. Lord Esher, however (and the Divisional Court, from which the appeal was taken), decided the case on the broader ground, supported by the dicta in *Chorlton v. Lings*, that “neither by the common law nor the constitution of this country, from the beginning of the common law until now, can a woman be entitled to exercise any public function” (p. 96), and “when you have a statute which deals with the exercise of public functions, unless that statute

expressly gives power to women to exercise them, it is to be taken that the true construction is that the powers given are confined to men, and that Lord Brougham's Act does not apply" (p. 96). There is no provision in the Constitution such as that on which the majority of the Court of Appeal relied for taking the case out of Lord Brougham's Act, and Lord Esher stood alone in the Court in taking the broader view of exclusion. The conclusion appears to be that women electors are qualified to be members of either House. If women are eligible by reason of a State law making them electors, it seems clear that those women electors are eligible for election in any part of the Commonwealth, and are not confined to the State in which they are electors. In the second place, it seems equally clear that they may be disqualified by an Act of the Commonwealth Parliament, since sec. 34 does not declare that all electors may be members, but merely enacts that, "until the Parliament otherwise provides," amongst other conditions, all members shall be electors or persons qualified to become electors.

1 This seems unnecessarily stringent, and may produce unexpected disqualifications. There are many states in which the right to trade or to hold land is a right or privilege of the subject in the sense that the foreigner is excluded from it. Is a British subject, who obtains from a foreign Power a license to trade or to hold land, within the disqualification?

1 Payment of members was introduced into Western Australia only in 1900.

1 See *Kielley v. Carson*, 4 Moo. P.C. 63; *Doyle v. Falconer*, L.R., 1 P.C. 328; *Barton v. Taylor*, 11 A.C. 197. See Forsyth's *Cases and Opinions on Constitutional Law*, p. 25.

2 Victoria, Constitution Act, 1855, sec. 35; South Australia, Constitution Act, 1855–6, No. 2, sec. 35; British North America Act, 1867, sec. 18, and the Parliament of Canada Act, 1875; New South Wales Constitution Act, 1855, sec. 35.

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

4 For Privileges of the House of Commons, see Anson, vol. i., and May's *Parliamentary Practice*.

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

## **Chapter VII. The Relations of the Senate and the House of Representatives.**

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

These conditions are not fully reproduced in the Commonwealth Government. The Constitution described in the last chapter shows us two Chambers, each elected upon a popular basis, uniform alike in the qualification for members and for electors; and the provision for payment of salaries equal in amount to Senators and Members of the House leaves no room for the suggestion of social exclusiveness as a mark of distinction between them.

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

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

The circumstance which most closely touches the relation of the two Houses of the Parliament is the introduction of Cabinet Government, with

its tradition of the supremacy of one House through the control of finance. The constitution seeks to reproduce the main features of this familiar relation in two ways: (1) by provisions as to Money Bills; (2) by a novel provision for deadlocks.

### **Revenue and Appropriation Laws.**

This matter is dealt with by sections 53 to 56. Sections 53 to 55 seek to define with more detail and precision than is customary in constitutions the powers of the two Chambers of the Legislature respectively, a matter which has in all the colonies been one of controversy, and in some has produced conflicts of so much heat as to involve Governor, Ministry, and both Houses of the Legislature in discredit. The attempt to translate to the colonies the traditions of the Lords and Commons has hardly succeeded even where the Legislative Council has been a nominee body; where the Legislative Council has been elective, there has been more than a plausible ground for standing purely upon the law of the Constitution, a law which, reproducing often clumsily and in ill-chosen words some of the conventional rules which are observed by the Lords and Commons, has been silent as to others. In the Commonwealth the Senate is more than the Legislative Council of a colony; not merely elected, it rests upon the same popular basis as the House of Representatives, and its constitution charges it with the protection of interests which might not be those represented by the majority of the House. On the other hand, the States contribute to and receive from the Commonwealth upon a population basis, and the House of Representatives is broadly speaking the representative of population. While the House of Representatives cannot claim that Parliamentary supplies are made good by their sole constituents, they can evidently claim a larger power than can the Senate. These are the conditions which underlie sections 53 to 55.

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

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

The Senate may not amend any proposed law so as to increase any

proposed charge or burden on the people.

The Senate may at any stage return to the House of 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.

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

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

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

The succeeding paragraphs of the section are suggested by certain resolutions adopted by the Council and Assembly in South Australia, and known as “The Compact of 1857.” Unlike the Constitution Acts of some of the colonies, the Constitution Act of South Australia (No. 2 of 1855-6) made no special provision as to Money Bills save as to their recommendation to the Assembly by the Governor. Conflicts between the Council and Assembly as to their respective powers, in other colonies postponed for a time, began in South Australia at once. In the result, the Council waived its claim to deal with the details of the ordinary annual expenses of the Government submitted in an Appropriation Bill in the usual form, but reserved the right to demand a conference thereon, to state objections and to hear explanations. As to other Bills, the object of which was to raise money or to authorize the expenditure of money, the Council asserted its competence to suggest alterations to the Assembly, and to assent to or reject such measures. These resolutions were agreed to by the

Assembly.

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

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

Sections 54 and 55 are auxiliary sections designed to secure the arrangements of section 53. They prevent “tacking” in its most objectionable forms; they also deprive the House of the power of effectuating its control over finance by including the whole of the financial measures for the year in one bill—the course hinted at by the Commons resolutions of 1860, and often adopted in the colonies for the purpose of compelling the Upper House to accept an unwelcome measure. The great resource of the Commons, however, depends for its efficacy upon a tradition which has not equal force in the colonies—that the Upper House will not embarrass the Crown by refusing to pass an Appropriation Act. In Australia, a Legislative Council, by rejecting an Appropriation Bill, merely embarrasses its political opponents, and has not hesitated thus to deal with attempts to deprive it of power over such matters as the tariff or payment of members. In fact, the old constitutional weapon—the refusal of supplies—is in new hands, and may be made to serve a new purpose. The control of the Lower House over the policy of the Crown and its Ministers is now so complete that the problem of modern governments is rather now to protect the Government from the caprice of the House than to secure further control; it is never necessary for the House to fall back upon the source of its power. But the responsibility of the Ministry to the Upper

House, if it exists, is of a very indirect kind, and one of the checks upon the Ministry and the Lower House lies in the fact that the Upper House might in an extreme case refuse to pass the Appropriation Bill, and thereby force a dissolution or a change of Ministry. These are the conditions recognized by the Constitution. It marks the province of the Senate in financial matters, and prevents the House of Representatives from taking a course which might justify or excuse the Senate in rejecting an Appropriation Bill. In the balance of power in the Commonwealth, it is a factor not to be neglected that, while the Senate has a recognized power over Money Bills beyond that of any other Second Chamber in the British Dominions, it can hardly exercise the extreme power of rejecting the Bill for the “ordinary annual services of the Government” upon any other ground than that the Ministry owes responsibility to the Upper not less than to the Lower House. That is a position which in the future the Senate, as the House of the States as well as the Second Chamber, may take up; but it is a position from which, even in the history of Parliamentary Government in the colonies, the strongest supporters of the Upper House have generally shrunk.

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

Of course it is obvious that with two irreconcilable Chambers of the Legislature with co-ordinate power, the Cabinet system would break down, and so also would any other system that could be devised. But in the Commonwealth, at anyrate, the Constitution of the two Houses is a

sufficient guarantee that they will not be in perpetual conflict. It may even be that the Senate, which as a Second Chamber is designed to contribute to the stability of Government, will perform that office in an unexpected way by protecting the Ministry from the caprice of the House; and it will be no small service to the Commonwealth if Ministers, owing a certain responsibility to both Houses, learn that it is their duty not less than that of the Crown, to preserve a good correspondence between the two branches of the Legislature. The Cabinet system depends so much upon understandings and conventions that it would be rash to declare any development impossible.

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

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

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

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

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

The solution is curious and unique. In the first place it will be noticed that the scheme applies only to measures initiated in the House of Representatives, a fact significant of the parts which the two Houses are expected to play in government. Secondly, there is ample provision made for delay and for reconsideration by the House,<sup>1</sup> and there is no obstacle to a resort to the familiar means of conference. The application of the principle of dissolution to the Second Chamber is not wholly a novelty, and was inspired in a measure by the constitution of South Australia.<sup>2</sup> But in South Australia a dissolution of the Legislative Assembly must precede the dissolution of both Houses; and the Constitution of the Commonwealth avoids the appearance of punishing or putting pressure upon one House rather than the other. The mere double dissolution of the South Australian system may of course result in each House receiving a mandate from its constituents "to stick to its guns." For such a contingency the Commonwealth Constitution provides by establishing a joint sitting of the Senate and House, in which the Bill is disposed of by the vote of an absolute majority of the total number of members of both Houses. The requirement of an absolute majority of each House, in its separate sitting is to be found in most of the Constitutions of the colonies as the condition of

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

The real origin of the joint sitting provided for in section 57, however, is none of these; but rather the Norwegian system according to which the two Chambers (or rather the two parts into which the House is divided) meet as one for the purpose of composing their differences.

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

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

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

2 Constitutional Act Further Amendment Act, 1881, section 16.

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

## Chapter VIII. The Legislative Power of the Parliament.

THE definite and limited character of the Commonwealth Government is indicated in the enumeration of the powers of its principal organ—the Parliament. The legislative power is not contained in any one or two sections; it is found in all parts of the Act, for, as has been observed, the power of Parliament pervades the whole instrument. But as the main object of federation was to put under a central legislature matters which could not be dealt with effectively, or at all, by the colonial legislatures, the statement of those matters in sections 51 and 52 is the very kernel of the measure. The other powers of Parliament, dispersed through the Constitution, are in general adjective rather than substantive; they relate not to independent matters, but to the regulation, explanation, or restriction of the powers contained in sections 51 and 52, or to the regulation of the departments of government, including, in some matters, the constituent elements of Parliament itself.

The terms of grant are as follows:

Section 51. The Parliament shall, subject to this Constitution, have (section 52 exclusive) power to make laws for the peace, order, and good government of the Commonwealth with respect to: (*matters enumerated*).

The terms used correspond with the grant of power to the Dominion Parliament to make laws for the “peace, order, and good government of Canada.” In Australia the grant of legislative power to the colonies has been made in the same or similar terms. In the Australian Courts Act, 1828, and the Australian Constitutions Act, 1850, the word “welfare” is found in the place of the word “order,” which is in the Act of 1842; the use of the one word or the other seems to be a matter of indifference; either appears to deserve the description by the Privy Council of the Canadian form: “apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.”<sup>1</sup> The plenitude of the powers of a colonial legislature has been already referred to<sup>2</sup>; and the words used in the grant indicate the intention of the Act to confer powers, which, though limited as to subject-matter, are, as to the subject-matters, of the same nature and extent as those which have received the most authentic judicial construction. In *R. v. Burah*,<sup>3</sup> Lord Selborne described the powers of an Indian Legislature in terms which are applicable to colonial legislatures generally. He said: “The Indian Legislature has powers expressly limited by the Act of Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe those powers. But when acting within those limits it is not in any sense an agent or delegate of the

Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself. The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so is by looking to the terms of the instrument by which affirmatively the legislative powers were created, and by which negatively they are restricted. If what was done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to inquire further, or to enlarge constructively those conditions and restrictions.” That legislative powers are of the same nature where the subjects are limited by enumeration, appears from the judgment of the Privy Council in *Hodge v. The Queen*<sup>1</sup> in relation to the powers of the Provincial Legislatures in Canada.

In America, the delegate character has been imputed not merely to the Congress, but also to the States' Legislatures, and the doctrine *delegatus non potest delegare* has greatly hampered their action. In the dependencies of Great Britain this doctrine has not been applied; and the Privy Council has recognized the validity of important delegations in the case of Indian, Canadian, and Australian Legislatures.<sup>2</sup> But as a mere incident of legislative power, these legislatures could not create and arm with general legislative authority a new legislative power not created or authorized by their Act of Constitution (*R. v. Burah*), certainly not if it were in substitution for the legislature and probably not if it were to exercise by way of delegation the whole legislative power. Even this restriction does not apply to legislatures which, either by special grant or as representative legislatures under the Colonial Laws Validity Act, 1865, section v., have the constituent power. The Commonwealth Parliament has not the full constituent power, and therefore comes under the restriction indicated. But, in accordance with the decision of the Privy Council in *Hodge v. The Queen*, the delegation of power over particular subjects will be a proper exercise of legislative discretion. It has been held in the United States that Congress cannot transfer its legislative powers to a State; but, as we have seen, the American doctrine is against delegation generally. In Canada, it has been said that “in any case where, in the distribution of powers by the B.N.A. Act, certain matters are assigned to the legislative authority of the Dominion Parliament, it is not competent for that body to delegate its functions to the local legislature, so as by an absolute grant of discretionary power to enable the local authority to deal with the matter itself.”<sup>1</sup> It may

be inferred that the Commonwealth Parliament cannot make the State its delegate in regard to matters expressly withdrawn from or forbidden to the States, and the same rule may apply to matters which are declared to be in the exclusive power of the Commonwealth Parliament. But, apart from these cases, there seems no reason why the Commonwealth Parliament should not make the State its instrument of legislation whenever it may think fit to do so, as it may undoubtedly use the agency of the State to execute its laws.

It must not be supposed, because the Commonwealth Parliament is a general legislature and the State Parliaments are local legislatures, that the legislation of the Commonwealth Parliament must necessarily be of general application and relate equally to all parts of the Commonwealth. Uniformity of bounties (§ 51), absence of discrimination in taxation (§ 51), and of preference in trade, commerce, and revenue (§ 99), are expressly provided for. But, otherwise, it would seem to be a matter of legislative discretion to determine whether the interests of the Commonwealth require uniform or diverse, general or local laws. So far as concerns those matters which are put under the exclusive power of the Parliament, and those new subjects over which the State Parliaments have had no power, the principle may be accepted without any qualification, since the Parliament possesses the sole legislative power exerciseable within the Commonwealth, and the State Parliament is unable to cover the local ground. In respect to other subjects over which the State has power within its own area, it is obvious that the interests of the whole may require special regulation in a single State or locality; and such regulation would be a law for the peace, order, and good government of the Commonwealth in respect to that subject, though it required something to be done or forborne only in the State or locality in question. But the position is more difficult where the law is clearly not part of a general system of regulation, but is local or special. For instance, could the Commonwealth Parliament pass an Insolvency Act for the State of Victoria or a Divorce Act for New South Wales, or an Act establishing old-age pensions in South Australia and not elsewhere? It has probably been settled for Canada that so far as the enumerated powers of the Dominion are concerned, the Parliament of Canada may pass a law affecting one part of the Dominion and not another, if in its wisdom it thinks the legislation applicable to or desirable in one and not in the other.<sup>1</sup> But this conclusion has been reached mainly because the Dominion powers over these subjects are exclusive powers; and, as it is not clear that the Provincial Legislatures may, under their power to make laws on “matters of a merely local or private nature in the Province,” deal substantively with Dominion subjects at all, there would be a defect of legislative power if the

Parliament of Canada could not deal with them irrespective of area. This defect of power could not arise in Australia. Even in these cases there have not been wanting in the Judicial Committee indications of an opinion restricting the Parliament of Canada to "general legislation." Thus in the *L'Union St. Jacques de Montreal v. Belisle*,<sup>2</sup> the Board say: "Their Lordships observe that the scheme of distribution in that section (¶ 91 B.N.A. Act, 1867) is to mention various categories of general subjects which may be dealt with by legislation. There is no indication in any instance of anything being contemplated except what may properly be described as general legislation." In *Fielding v. Thomas*,<sup>3</sup> Lord Herschell said: "There can be no doubt, speaking generally, that the object and scheme of the Act is in ¶ 91 to give the Dominion Parliament those things which were to be dealt with as a whole for the whole Dominion." The decision of the Judicial Committee in the Liquor Prohibition Appeal,<sup>1</sup> as well as the observations of members of the Board during the argument, affirms the doctrine that, so far as Dominion legislation proceeds not from the enumerated powers, but from the general power to make laws for the peace, order, and good government of Canada in relation to all matters not exclusively assigned to the legislature of the Provinces, it may not deal with "any matter which is in substance local or provincial and does not truly affect the interests of the Dominion as a whole." It may be expected that in the Commonwealth the Courts will be guided by the considerations which belong to the meeting of the general residuary power of the Parliament of Canada, and the power over matters of "a local or private nature" in the Legislatures of the Provinces; that legislation by the Commonwealth Parliament for purely local or State purposes will not be *intra vires* except in the case of the exclusive powers and in some of the new powers, but that Commonwealth legislation may be directed to a particular State or particular States for the purpose of effecting any object of common interest. This is one of the matters in which legal and political issues mingle, and accordingly it is safe to affirm that the presumption in favour of the validity of an Act of Parliament, which is a leading rule of interpretation, will have even more than its usual force, and the Courts will be slow to say that the Parliament, assuming to act for the interest of the whole community, has dealt with a matter of no more than local concern.

*Classification of Subjects of Legislative Power.*—It has been said of the Canadian Constitution, to which in regard to the subjects of legislative power the Commonwealth Constitution presents a close resemblance, that it is difficult to refer the distribution of legislative power to any one principle.<sup>1</sup> Generally, the matters enumerated are those over which the legislatures of the colonies had power within their territories, so that there

is apparently merely the transfer of power from a local to a central government. But there are also several matters which lay outside the powers of a mere "local and territorial legislature," matters of an extra-territorial character, e.g. "the relations of the Commonwealth with the islands of the Pacific," "external affairs." Further, all laws of the Commonwealth, on whatever matter, have a limited extra-territorial operation, for by section v. of the Act it is provided that "all 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," an adaptation and restriction of section 20 of the Federal Council of Australasia Act, 1885, by which Acts of the Council had the force of law "on board all British ships, other than Her Majesty's ships of war, whose last port of clearance or port of destination" was in any colony which had become a member of the Council.

In the second place, the powers of the Parliament may be classified as *direct* or *indirect*. The greater number may be exercised by Parliament on its own motion; a few, however, can be exercised only (a) with the *consent* of the State concerned—cf. section 51, articles xxxiii. and xxxiv., acquisition of State railways, railway construction and extension in any State; section 124, separation of territory from a State; or (b) at the *request* or with the *concurrence* of the State or States directly concerned (the Parliament may exercise any power which can at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia—section 51, art. xxxviii.); or (c) on *reference* by a State or States (any matter, but so that the law shall extend only to States by whose Parliament the matter is referred, or by which the law is afterwards adopted—section 51, art. xxxvii). In the Federal Council of Australasia, *indirect* power was the rule, *direct* power the exception.

In the third place, the legislative powers of Parliament may be grouped under certain heads of subjects. An enumeration of subjects of legislative power necessarily uses general terms,<sup>1</sup> but some of the subjects set out are related to each other, and lend themselves to grouping according to this relation.

Extra-territorial matters, defence, trade and commerce, communications, account for a large number of the articles of legislation. For the rest—the subjects enumerated are generally matters of private law falling within the departments of commercial or family law, wherein the conflict of laws and jurisdiction is especially likely to occur, and is always inconvenient and sometimes scandalous—it is in the recognition of the value of uniformity of the law in these departments that the Constitution makes its most notable departure from the Constitution of the United States.

Fourthly, the powers of Parliament may be classified according to the plan recognized by the Constitution itself, under which some of the powers are expressed to be exclusive (section 52).

In the United States, the Courts are constantly engaged in determining the spheres of the Congress and the State Legislatures, and ascertaining whether there is any inconsistency in their laws. In the Confederation of Canada, it was believed that the uncertainty introduced by the American system would be avoided by assigning to the Dominion and the Province respectively exclusive powers over the subjects committed to them. The plan, however, has not fulfilled its purpose. The necessary generality of the terms used in the distribution of powers, and the fact that the terms themselves were not terms of legal art, have added to rather than lessened uncertainty. On the whole, it appears that the difficulties which attend a distribution of powers increase where the powers of both authorities are enumerated, and become more serious where the powers of each are expressed to be exclusive. The Australian Constitution, therefore, falls back on the United States plan. In general, State Parliament and Commonwealth Parliament have concurrent powers of legislation over the subjects committed to the latter, and in case of inconsistency the Act of the Commonwealth Parliament prevails. In both the United States Constitution and the Australian Constitution, exclusive power on a few subjects is committed to the Federal Legislature, and in such matters of course State legislation is not merely controlled by the paramount power of the Commonwealth Parliament, but is *ultra vires*.

The designation by section 52 of certain powers as exclusive does not, however, necessarily imply that all the enumerated powers of section 51 are concurrent; the term "concurrent power" is nowhere used in the Act in regard to legislative power. Section 51 confers power on the Commonwealth Parliament, not on the States; and so far as the subjects therein enumerated are beyond the power of the Colonial Legislatures, they will be beyond the power of the States Parliaments; there was no need to prohibit the States from dealing with them.

The question whether an Act of the Commonwealth Parliament is valid depends upon whether it is an exercise of any of the enumerated powers; and this, of course, must be shown to the satisfaction of any Court in which the enactment is brought in question. This requires, in the first instance, the construction of the terms in which the power is conveyed; and makes it necessary to set legal bounds to descriptions which are necessarily general rather than precise. This is not due solely to the infirmities of the technical language of English law. The occasion was not one for the use of rigid and inelastic terms; and even where the terms used are technical it must be

remembered that the legal definition of a subject is part of the law thereon, and, therefore, to some extent, from the nature of the case, within the legislative power.<sup>1</sup> The nature of a Constitution “requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”<sup>2</sup> It is, no doubt, as Sir Montague Smith pointed out, a misfortune that the British North America Act, 1867, uses such general terms; and the Australian Constitution avoids the most troublesome of the difficulties by omitting the widest subjects—“criminal law,” “property and civil rights,” and “all matters of a merely local and private nature.” But even with the Australian Constitution there is wisdom in the advice of a Privy Council to those who have to undertake the difficult task of interpretation, “to decide each case which arises as best they can, without entering more largely upon an interpretation of the Statute than is necessary for the decision of the particular question in hand.”<sup>3</sup>

The second question which arises on an enactment is as to its true nature and character. An Act of the Parliament may have more than one aspect; in one view, a provision may be an exercise of power over one of the enumerated matters; in another it may be an exercise of power over some matter remaining in the exclusive power of the States Parliaments. Or again, an Act of a State Parliament may in one view be an exercise of authority upon some matter within the residuary power of the State Parliament; in another, it may be an enactment upon one of the subjects of the exclusive power of the Commonwealth Parliament. These questions have been of great importance in Canada, where the powers of Dominion and Province are generally exclusive, and in the United States have given rise to a large number of cases in which the Courts have had to determine whether Acts of the States Legislatures affecting trade and commerce are in substance enactments of commercial regulation, in which case they would be invalid as infringing federal powers which the Courts have held to be exclusive, or are within what is called the “police power” of the States—*i.e.* their general power of providing for the peace and welfare of the State. On the one hand, it is certain that a legislature cannot, by passing an Act which incidentally affects some matter within its power, in substance legislate upon some matter outside its control. On the other hand, the grant of exclusive power over a subject does not withdraw from the other legislature all power of affecting that subject as an incident to the provision which it makes for subjects left within its control.<sup>1</sup> In all cases of enactments of this kind, “the true nature and character of the legislation in the particular instance under discussion must always be determined to ascertain the class of subject to which it really belongs.”<sup>2</sup> The difficult task

of determining the true nature and character of Acts which have different aspects, may involve the exceedingly delicate inquiry whether the Act is a *bona-fide* exercise of power over a subject committed or left to the Legislature, or is a pretence, under cover of which an attempt is made to invade the province of the other Legislature. In discharging these duties, the Court must keep separate the subject and scope of the enactment, which are material, and the motive of the legislator, which is immaterial and irrelevant.<sup>3</sup> We can understand that some of John Marshall's fame as an expounder of the Constitution is due to the fact that he came to the Bench after a distinguished career as statesman man and diplomatist. In the Liquor Prohibition Case,<sup>1</sup> on appeal from Canada, Lord Watson said: "We are always inclined to stand on the main substance of the Act in determining under which of these provisions (of the British North America Act, 1867) it really falls. That must be determined *secundum subjectam materiam*, according to the purpose of the Statute, as that can be collected from its leading enactments. . . . There may be a great many objects, one behind the other. The first object may be to prohibit the sale of liquor, and prohibition the only object accomplished by the Act. The second object probably is to diminish drunkenness; the third object to improve morality and good behaviour of the citizens; the fourth object to diminish crime, and so on. These are all objects. What is the object of the Act? I should be inclined to take the view that that which is accomplished, and that which it is its main object to accomplish, is the object of the Statute; the others are mere motives to induce the legislature to take means for the attainment of it."

*Note.*—The completeness of the legislative powers of the Australian Parliaments, and the absence of a competing power, has prevented the raising of such questions as are here discussed upon Acts of Parliament. But a similar question has arisen between the two Houses of Parliament as to their respective powers over finance. The Constitution Acts provide that Bills "for appropriating" revenue, and "for imposing" taxation must originate in the Legislative Assembly, and though they may be rejected they may not be altered in the Council. The question has been whether this limitation applies only to Bills having appropriation or taxation for their principal object, or extends to Bills which appropriate revenue or impose some charge as an incident in the accomplishment of some substantive purpose. Briefly, is a "Bill for appropriating" equivalent to "a Bill which appropriates"? The question has, of course, never presented itself for judicial decision; and the adjustment of powers between the Houses is necessarily affected by political more than purely legal considerations. The matter is ably discussed in Hearn's *Government of England*, second edition,

## Appendix.

1 *R. v. Riel*, L.R., 10 A.C. 675. Mr. Lefroy, in *Legislative Power in Canada*, p. 214 note, regards the substitution of “order” for “welfare” in the powers of the Dominion Parliament as “advised” and significant.

2 See Chapter IV.

3 L.R., 3 A.C. 889, 904.

1 L.R., 9 A.C. 117.

2 India: *R. v. Burah*, L.R., 3 A.C. 889; Canada: *The Queen v. Hodge*, 9 A.C. 117; Australia (New South Wales): *Powell v. Apollo Candle Company*, 10 A.C. 282.

1 Todd, *Parliamentary Government in the British Colonies*, 2nd ed., p. 570.

1 See Lefroy, *Legislative Power in Canada*, p. 567, etc.

2 L.R., 6 P.C., at p. 36.

3 [1896] A.C. 600. The citation is from Mr. Lefroy's book at pages 575 and 580 respectively, referring to the shorthand writers' report of the proceedings.

1 *A.G. of Ontario v. A.G. of Canada*, 1896, A.C. 348.

1 Munroe, *Constitution of Canada*, p. 223.

1 Cf. Marshall, C.J., in *M'Culloch v. State of Maryland*, 4 Wheaton, 316: “A Constitution . . . requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.”

1 This principle appears to underlie the decisions in America upholding the validity of the “Wilson Bill”—see in *re Spickler*, 43 Fed. Rep. 653, 657; in *re Rahrer*, 140 U.S. 545.

2 Per Marshall, C.J., *M'Culloch v. Maryland*, 4 Wheaton, 316, at p. 407.

3 *Citizens' Insurance Company of Canada v. Parsons* (1881), 7 A.C. 96, at p. 109.

1 *Att.-Gen. for Ontario v. A.G. for Dominion of Canada*, L.R. [1894], A.C. 189.

2 *Russell v. The Queen*, L.R., 7 A.C. 829, at p. 840.

3 See Cooley's *Constitutional Limitations*, 222; Lefroy's *Legislative Power in Canada*, 273.

1 [1896] A.C. 348.

## **Chapter IX. The Subjects of the Legislative Power of the Parliament.**

A DIVISION of the powers of the Parliament into direct and indirect affords a convenient basis of classification.

### **Direct Powers.**

#### **A. Administrative Services Transferred to the Commonwealth (Sec. 69).**

Five of the subjects of legislative power enumerated in sec. 51 are identical with the subjects of administrative departments of the States transferred to the Commonwealth (sec. 69). Over “matters relating to these departments” the power of the Parliament is, by sec. 52, exclusive.

##### 1. Defence.

Sec. 51 contains two articles dealing immediately with this matter, viz.:

vi. The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.

xxxii. The control of the railways with respect to transport for the naval and military purposes of the Commonwealth.

By sec. 114 a State may not, without the consent of the Commonwealth, raise or maintain any naval or military force; and by sec. 119 the Commonwealth shall protect every State against invasion, and, on the application of the Executive Government of the State, against domestic violence.

There are several Imperial Statutes affecting colonial defences and colonial forces, viz., the Army Act, 1881 (secs. 175–177); Colonial Fortifications Act, 1877; Colonial Defences Act, 1865; Naval Discipline Acts, 1866 and 1884; Imperial Defence Act, 1888.

##### 2. Posts, Telegraphs, and Telephones. Sec. 51 (v.).

These services are subject to the control of the Commonwealth, not merely for foreign and intercolonial, but also for internal purposes. In all the colonies, postal, telegraphic, and telephonic communication has been a Government monopoly.

##### 3. Lighthouses, Lightships, Beacons, and Buoys. Sec. 51 (vii.).

##### 4. Quarantine. Sec. 51 (ix.).

5. “Customs and Excise” are dealt with under the general head of Finance and Trade.

#### **B. Administrative Services not Transferred to the Commonwealth.**

These are all matters in which a uniform system is essential to the full utility of the services. The Commonwealth is given power to provide for them; but any provision which may be made does not legally supersede, and may exist concurrently with, the provision made by the States.

1. Astronomical and Meteorological Observations. Sec. 51 (viii.).
2. Census and Statistics. Sec. 51 (xi.).

### **C. External Matters.**

1. External Affairs. Sec. 51 (xxix.).

This is a power the extent of which it is difficult to measure. The most important external matters which have engaged Australian attention are, with a few exceptions, the subjects of special articles; and the “external affairs” of the Commonwealth, like the “foreign affairs” of the Empire, are primarily matters of administration rather than legislation. So far, however, as the conduct of external affairs may require the co-operation of the legislative power, the Parliament has authority to make provision. The enactment of laws for the execution of treaties made by the Imperial Government affecting the Commonwealth, or made by the Commonwealth itself under such powers as the Crown may confer upon it; of laws on extradition or neutrality, and the like; of laws giving effect to arrangements between the Commonwealth and other parts of the Empire—all these would clearly fall within article xxix. The question arises, how far a legislature which has power over “external affairs” may be described as “local and territorial,” a description which, as has been seen, indicates a great restraint of power in the case of Colonial Legislatures. It may be suggested that, in virtue of this power, Acts of the Commonwealth Parliament will, like the Acts of the Imperial Government, and unlike the Acts of the Colonial Legislatures generally, be free of the restraint which prohibits laws intended to operate extr territorially. Such an effect would in no way contradict the grant of power to make laws *for* the Commonwealth, for there would be no claim to enforce the Acts in Courts outside the Commonwealth, and their recognition abroad would depend upon their accordance with the principles of Private International Law. And it would not affect the rule of construction under which Statutes are presumed not to operate extr territorially. But that rule would be, as in the case of the Imperial Parliament, a rule of construction merely, and not a rule in restraint of power.

2. Trade and Commerce with other countries and among the States. Sec. 51 (i.). (See “Finance and Trade.”)
3. Fisheries in Australian waters beyond territorial limits. Sec. 51 (x.).

This is one of the powers which was possessed by the Federal Council of Australasia; and it was exercised to regulate the pearl, shell, and bêche-de-mer fisheries in Australian waters adjacent to Queensland (51 Vic., No. 1) and Western Australia (52 Vic., No. 1). In each of the Acts a schedule declared what were to be deemed Australian waters under the Act. It is not without interest to note that the United States invoked these Acts in support of their claim to regulate the seal fisheries in the Behring Sea, but overlooked the limitation that the Act applied only to British ships and boats attached to British ships.

4. Naturalization and Aliens. Sec. 51 (xix.).

5. The people of any race other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. Sec. 51 (xxvi.).

This refers to the various race problems which arise in different parts of Australia, and enables the Parliament not merely to regulate the admission of alien races, but to establish laws concerning the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, and market gardeners; the Japanese settlers and Kanaka plantation labourers of Queensland.

6. Immigration and Emigration. Sec. 51 (xxvii.).

“Undesirable immigrants” has been a subject fruitful of discussion and legislation in the colonies at Intercolonial Conferences, and more than one attempt has been made to secure uniformity of legislation upon the subject.

7. The influx of criminals. Sec. 51 (xxviii.).

This was one of the heads of legislative authority under the Federal Council Act of 1885; and although it would no doubt be included under “external affairs” or “immigration,” it was retained in the Constitution as calling attention to a particular evil of which the colonies have long complained—the escape of criminals from the penal settlements of foreign Powers in the Pacific.

8. The relations of the Commonwealth with the islands of the Pacific. Sec. 51 (xxx.).

This also was a head of legislative authority in the Federal Council Act, which was the outcome of the “Australasian Convention” of 1883, called to consider the “Annexation of neighbouring islands and the Federation of Australasia.” The position of the Pacific Islands has been the most important matter of foreign or external policy with which Australasia has concerned herself; and like “external affairs” in general the matter has been one to be dealt with rather by diplomacy than legislation. At the Convention of 1883, Australian Ministers promulgated her “Monroe Doctrine” by declaring that “The further acquisition of Dominion in the Pacific south of the equator, by any foreign power, would be highly detrimental to the safety and well-being of the British possessions in

Australasia and injurious to the interests of the Empire.” Australian statesmen have often, and very recently, expressed the opinion that Australasian interests in the Pacific are over readily sacrificed by Imperial Ministers, and their hope no doubt is that the Governor-General may receive the powers of a High Commissioner in the Pacific, and may be instructed to exercise those powers on the advice of his Australian Ministry. How far this may be practicable will depend largely upon the attitude of New Zealand, whose recent action has gone some way to forestall the Commonwealth. Article xxx., therefore, stands for a policy which is certainly ambitious and may be aggressive. Even under present arrangements there is scope for the exercise of legislative authority, *e.g.* in the regulation of the trade with the islands, particularly the prohibition or regulation of the labour traffic and the punishment of offenders against the natives.

#### **D. Mercantile Law.**

1. Banking, other than State banking, also State banking extending beyond the limits of the State concerned, the incorporation of banks and the issue of paper money. Sec. 51 (xiii.).

Compare British North America Act, 1867, sec. 91 (15), and the interpretation by the Judicial Committee in *Tennant v. Union Bank of Canada*.<sup>1</sup> “The legislative authority conferred by these words is not confined to the mere constitution of corporate bodies with the privilege of carrying on the business of bankers. It extends to the issue of paper currency, which necessarily means the creation of a species of personal property carrying with it rights and privileges which the law of the province does not and can not attach to it. It also comprehends “banking,” an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.”

2. Insurance, other than State insurance, and also State insurance extending beyond the limits of the State concerned. Sec. 51 (xiv.).

3. Weights and Measures. Sec. 51 (xv.).

4. Bills of Exchange and Promissory Notes. Sec. 51 (xvi.).

5. Bankruptcy and Insolvency. Sec. 51 (xvii.).

Commenting upon a similar power of the Dominion of Canada, the Judicial Committee, in *the Att. Gen. for Ontario v. the Att. Gen. for Canada*,<sup>1</sup> say: “It is not necessary in their Lordships' opinion, nor would it be expedient to attempt to define what is covered by the words, ‘bankruptcy’ and ‘insolvency’ in sec. 91 of the British North America Act. But it will be seen that it is a feature common to all the systems of

bankruptcy and insolvency to which reference has been made, that the enactments are designed to secure that in the case of an insolvent person his assets shall be rateably distributed amongst his creditors whether he is willing that they should be so distributed or not. Although provision may be made for a voluntary assignment as an alternative, it is only as an alternative. In reply to a question put by their Lordships, the learned counsel for the respondent were unable to point to any scheme of bankruptcy or insolvency legislation which did not involve some power of compulsion by process of law to secure to the creditors the distribution amongst them of the insolvent debtor's estate. In their Lordships' opinion these considerations must be borne in mind when interpreting the words 'bankruptcy' and 'insolvency' in the British North America Act." See also *Cushing v. Dupuy*,<sup>1</sup> and *L'Union St. Jacques de Montreal v. Belisle*.<sup>2</sup>

6. Copyrights, patents of inventions and designs, and trade marks. Sec. 51 (xviii.).

*Copyrights.*—This is the subject on which has arisen the important legal and political controversy, hereafter referred to, as to the nature and exercise of the respective powers of the Imperial Parliament and the Parliament of Canada. It is impossible here to enter into the intricate history of Colonial copyright, or to consider the very difficult questions which remain unsettled.<sup>3</sup> The most important provisions of the Imperial law of copyright are those contained in the International Copyright Act, 1886, and the Order in Council of 1887, whereby (*a*) the author of a book first published in any part of the Queen's dominions has copyright in the book throughout the Queen's dominions for 42 years from first publication, or for the lifetime of the author and seven years afterwards, whichever time is the longer; and

(*b*) The author of a book first published in any foreign country belonging to the Copyright Union has copyright throughout the Queen's dominions for the same term, or any less term allowed by the law of the foreign country.

Her Majesty may, however, denounce the Berne Convention in the case of any British Colony, and thereafter the provisions as to international copyright shall cease to apply. The power of Colonial Legislatures over Imperial copyright is apparently limited to supplementing the Imperial law—to "Enactments for registration and for the imposition of penalties for the more effectual prevention of piracy."<sup>4</sup> But by sec. 8 of the Act "Nothing in the Copyright Acts or this Act shall prevent the passing in a British possession of any Act or Ordinance respecting the copyright within the limits of such possession of works first produced in that possession."

Inasmuch as none of the powers in article xviii. are exclusive powers in the Commonwealth, there is *prima facie* nothing to prevent the State

Parliament from making laws as to the grant of patents, and the protection of copyrights and trade marks. It may be assumed that when the Commonwealth Parliament does legislate upon these topics, it will be by a uniform law applying equally throughout the Commonwealth; and the question may be raised whether after such law it will be competent for the State, in virtue of its own laws, to grant patents or to protect copyrights and trade marks as it has done in the past—*i.e.* to protect within its own territory alone. It would probably be held in such a case that the Commonwealth law was a law not only for the whole Commonwealth, but for each and every part of the Commonwealth, and therefore superseded the State laws.

It may also be pointed out that a question may arise as to the operation of State laws on these subjects after the imposition of uniform duties of customs. Such laws, to be effective, must prohibit the introduction of articles manufactured or works produced elsewhere, otherwise the protection would be illusory. But would not such laws impair the freedom of trade, commerce, and intercourse among the States, in contravention of sec. 92?

7. Foreign Corporations, and trading or financial corporations formed within the limits of the Commonwealth. Sec. 51 (xx.).

This subject of foreign corporations is of especial importance in Australia, because many of the most important trading and financial companies and some mining companies are companies formed in England, while of the companies formed in the colonies large numbers carry on operations in several colonies.

The result is that there is much legislation in the various colonies as to “foreign corporations.” Article xx., of course, authorizes the Parliament to make a Companies Law for the whole of the Commonwealth; and there is no branch of the law in which a uniform law is more desirable.

8. Currency, Coinage, and Legal Tender. Sec. 51 (xii.). This must be read in connection with Sec. 115: “A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.”

The words “and legal tender” are inserted in order to avoid the doubt raised in the United States as to whether Congress could, under a power to “coin money,” make paper legal tender.<sup>1</sup>

## **E. Family Law.**

1. Marriage. Sec 51 (xxi.).

2. Divorce and Matrimonial causes; and in relation thereto, parental rights and the custody and guardianship of infants. Sec. 51 (xxii.).

It is presumed that these powers include a power to regulate the property rights of husband and wife, upon marriage, during marriage, and on the dissolution of marriage. There is a good deal of diversity in the divorce laws of the colonies; and it is quite possible, so long as the colonies remain separate law districts, that parties may be married persons in the view of one colony and single persons according to the law of another. The matter is complicated by the fact that the relation is principally governed by domicil, and in countries like Australia the conditions of life make it peculiarly difficult to ascertain the domicil. It is to be observed that “parental rights and the custody and guardianship of infants” is not a substantive power, but is only “in relation” or incident to “divorce and matrimonial causes.”

*F. Administration of Justice.*

The intimate social and economic relations of the Australian Colonies have intensified the inconvenience which belongs to their separate existence as foreign countries for purposes connected with the administration of the law. Though all had the common law of England, the law of one had to be proved in another as foreign law. No process of one colony would run in another; and the arrangements which independent states may make to supplement the limitations of territorial power were deemed to be beyond the power of mere “local and territorial legislatures.” The Imperial Acts dealing with the matters—6 and 7 Vict., c. 34, and 16 and 17 Vict., c. 118—were modelled upon extradition, and were confined to treason and felony. The mischief and scandal of criminals finding a refuge by crossing an imaginary line, early engaged the attention of Australians, and abortive attempts in intercolonial councils, and elsewhere, were made to deal with the matter. The Imperial Government was urged in 1867 to extend the Acts to misdemeanours, but protracted negotiations only ended in 1870 in a refusal by the Colonial Secretary (Earl Granville) to propose legislation until the colonies should have come to a common understanding, and in a suggestion that a solution of the problems “would be facilitated if it were possible for the Australian Colonies to enact in concert a common criminal code, based on the Imperial law, a measure which Her Majesty's Government would see with much pleasure both from its intrinsic convenience and its tendency to consolidate the great Australian group.” It was not until the Fugitive Offenders Act of 1881 that the special conditions of groups of colonies were recognized and provision made for meeting the want that had so long been urgent in Australia.

The laws of the colonies themselves did something, though not by uniform or concerted action, to recognize the judgments, the probates, the inquisitions in lunacy, and some other proceedings in other colonies of

Australia, while it was very general to provide for an extension of jurisdiction by permitting service out of the jurisdiction. The Federal Council of Australasia Act, 1885, included among the few subjects on which direct power was given to the Council: (d) “The service of civil process of the courts of any colony within Her Majesty's possessions in Australasia out of the jurisdiction of the colony in which it is issued”; (e) “The enforcement of judgments of courts of law of any colony beyond the limits of the colony”; (f) “The enforcement of criminal process beyond the limits of the colony in which it is issued, and the extradition of offenders (including deserters of wives and children, and deserters from the Imperial or Colonial naval or military forces)”; (g) “The custody of offenders on board ships belonging to Her Majesty's Colonial Governments beyond territorial limits.” In its first session the Federal Council passed three Acts, which were in pursuance of these powers: No. 2, an Act to facilitate the proof throughout the Federation of Acts of the Federal Council, and of Acts of the Parliaments of the Australasian Colonies, and of Judicial and Official Documents, and of the Signatures of certain Public Officers; No. 3, an Act to authorize the service of civil process out of the jurisdiction of the colony in which it is issued; No. 4, an Act to make provision for the enforcement within the Federation of Judgments of the Supreme Courts of the Colonies of the Federation. These Acts, it must be remembered, apply only to those colonies which became members of the Federal Council. There is also a Federal Act—the Australasian Testamentary Process Act, 1897—applying to four of the colonies, which, in a very limited way, makes them auxiliary to each other. A few Imperial Acts do something to bring the courts of the Australian Colonies into touch with each other, as well as with other parts of the British Dominions, *e.g.* the Evidence by Commission Act, 1859; the British Law Ascertainment Act, 1859; and section 118 of the Bankruptcy Act of 1883. Finally, some of the colonies have gone far on the road to require their courts to take judicial notice of the laws and public acts of other Australasian Colonies. In 1898 Victoria (Act No. 1554), Queensland (62 Vict., No. 15), and Western Australia passed practically identical Acts for this purpose; while, by 55 Vict., No. 5, sec. 11, New South Wales requires its courts to take notice of the Statute law and the unwritten law of other countries, authenticated in the manner prescribed by the laws of such countries respectively.<sup>1</sup>

Turning now to the Constitution, we find that the legislative power extends over:

1. The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the Courts of the States. Sec. 51 (xxiv.).

2. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States. Sec. 51 (xxv.).

These provisions must be read with sec. 118, whereby

“Full faith and credit shall be given throughout the Commonwealth to the laws, the public acts and records, and the judicial proceedings of every State.”

Compare the United States Constitution, art. iv., sec. 1: “Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” This clause in the Constitution of the United States has often received judicial construction. While it “implies that the public acts of every State shall be given the same effect by the Courts of another State that they have by law or usage at home” (*Chicago and Alton Railroad v. Wiggins Ferry Coy.*),<sup>2</sup> the provision and the Act of Congress upon it “establish a rule of evidence rather than of jurisdiction” (*Wisconsin v. Pelican Insurance Coy.*),<sup>3</sup> The laws of a State have not under it any extraterritorial operation; they must be proved in other States as matters of fact; the Courts there will not take judicial notice of them.<sup>4</sup> Judge Cooley says:<sup>5</sup> “By this provision a rule of comity becomes a rule of constitutional obligation. It also becomes a uniform rule, and the common authority is empowered to pass laws whereby the courts may govern their action in receiving or rejecting the evidence presented to them of the public acts, records, and judicial proceedings of other States.” The provision has operated, and its limitations have been defined, principally in relation to the judgments of other States.<sup>1</sup> It is held that judgments recovered in a State of the Union “differ from judgments recovered in a foreign country in no other respect than in not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a Court having jurisdiction of the cause and of the parties.<sup>2</sup> In the words of Story (*Conflict of Laws*, sec. 609), cited and approved by the Supreme Court in *Thompson v. Whitman*<sup>3</sup> : “The Constitution did not mean to confer any new powers upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.” And it has been held that the rule that one

country will not enforce the penal laws of another holds as between States of the Union, and extends to judgments recovered under such penal laws.<sup>4</sup>

The most general conclusion to which the cases point is that the provision does not carry us much further than the doctrines of the common law now well established but in their infancy in 1789, embodied in what is called Private International Law. In a sovereign State, however, these doctrines may be varied or excluded by the action of the Legislature; the provision in the U.S. Constitution prevents such action, and therein lies the aptness of Judge Cooley's observation, cited above, that by the provision, "a rule of comity becomes a rule of constitutional obligation." A further consequence of inserting this provision in the Constitution is that the observance is brought under the protection of the federal judicial power.

These observations will apply to the Commonwealth. It should be noticed, however, that in the Commonwealth full faith and credit is to be given to the "laws" of a State as well as to its "public acts," and, conformably with the American doctrine which treats the clause as evidentiary, it may be suggested that this enables the States Courts to take judicial notice of the laws of other States. English and Colonial Courts have properly enough treated the ascertainment of foreign law as a matter of fact, wherein in truth it does not differ from domestic law.<sup>1</sup> Less appropriately it has been treated as a question for the jury, and has to be proved by evidence in accordance with well settled rules. If the State Courts are required to take judicial notice of the laws of other States, such proof will no longer be required. "The true conception of what is judicially known is that of something which is not or rather need not be unless the tribunal wishes it, the subject of either evidence or argument—something which is already in the Court's possession, or, at any rate, is so accessible that there is no occasion unless the Court asks for it to use 'any means to make the Court aware' of it; something it may deal with quite unhampered by any rules of law. In making this investigation, the judge is emancipated from all the rules of evidence laid down for the investigation of facts in general."<sup>2</sup> It has been pointed out that the State laws have already made considerable provision for the authentication of the laws of other States; and these will no doubt guide the discretion of the judges. Section 51 (xxv.) enables the Parliament to provide for the authentication of the laws, public acts, etc., following the terms of section 118.

There is some doubt whether article xxv. goes beyond this proof. Can the Parliament provide, *e.g.*, that probate taken out in Victoria shall give to the executor the powers of an executor throughout the Commonwealth? Or that the committee of a lunatic or the guardian of an infant appointed in one State shall have the powers of a committee or a guardian throughout

the Commonwealth, exercising in each State the powers which he would have had under an appointment there? This would undoubtedly be “recognition” of the public acts and judicial proceedings in question, and the provision would cause no difficulty in law and would be very convenient in practice.<sup>1</sup> It is submitted that the collocation of “laws” creates no difficulty, and that it would be satisfied by a construction which enables the Commonwealth Parliament to determine as amongst the States the difficult questions of jurisdiction and choice of law, which belong to the “Conflict of Laws” or the “Extra-Territorial Recognition of Rights.” Many indeed of the subjects which cause the greatest difficulty in this the most modern chapter of the law are already provided for as substantive heads of legislative power—bankruptcy, bills of exchange, corporations, marriage, and divorce. The inconveniences which attend the existence of separate law districts among a people whose relations must be intimate may be met in different ways. On the one hand, separation may be made to give way to unity, and this is no doubt contemplated in the subjects referred to. This may be easily and painlessly effected, because the colonies have already substantially the same law. On the other hand, the separate law districts may be maintained, but a uniform system of inter-state relation of law may be established. In general, the doctrines of Private International Law permit the forum to claim more than it is prepared to concede to other countries, and in such a case the fact that all the members of a group of countries apply the same doctrines does not facilitate a reconciliation of their claims. In this department, the Commonwealth Parliament may be able under articles xxiv. and xxv. to apply itself with advantage.

In regard to article xxiv., “civil and criminal” must probably be taken to embrace the whole range of judicial proceedings; and “judgments” will certainly include “decrees” and “sentences,” and probably also “orders.” There is no reason to suppose that the power is confined to final judgments, and does not extend to interlocutory proceedings.

#### **G. Miscellaneous.**

There are two heads of power which may be described as afterthoughts, and are to some extent to be accounted for by a desire to disarm the opposition of those who contended that federation “would do nothing for the people.” They reflect the popular political interests of the time, quite apart from the project of federal union. “Invalid and old-age pensions,” sec. 51 (xxiii.), and “conciliation and arbitration for the prevention and settlement of industrial disputes,” sec. 51 (xxxv.), were part of the political

programme of some party, if not of all parties, in each of the States; and all were regarding with interest the experiments already made in New Zealand. The latter subject was made one of federal legislative power when such industrial disputes “extend beyond the limits of any one State.” “Invalid and old-age pensions” can no doubt be dealt with more effectively by the Commonwealth than by the State Parliaments. If a State is not to be burdened with pensioners who have resorted to it merely for the pension, it must require a considerable period of residence within its limits as one of the qualifying conditions. But with the nomadic population of the Australian Colonies such a requirement necessarily excludes from the benefit of the pension large numbers of persons who have “tried their luck” in various parts of the Continent. The Commonwealth Parliament may be satisfied with residence for a specified period in the Commonwealth.

### **Indirect Powers.**

1. The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State. Sec. 51 (xxxiii.).

The opinion was strongly held that the railways, which had been so fruitful a source of intercolonial bitterness, should, for political and commercial reasons alike, be vested in the Commonwealth, and subject to federal control. This policy was not adopted, and the provisions in the chapter on Finance and Trade and articles xxxiii. and xxxiv. take the place of such an arrangement. As the article stands, there is no power in the Commonwealth to acquire State railways save by agreement with a State.

By virtue of sec. 98, the power of the Parliament to make laws with respect to trade and commerce extends to railways the property of any State; and it may be inferred that they will not have less power over the railways which they acquire from a State.

2. Railway construction and extension in any State with the consent of that State. Sec. 51 (xxxiv.).

In the United States it has been contended, and is apparently now established, that the commerce power of Congress includes as an incident the authorization and execution of all manner of works for facilitating inter-State and foreign commerce, including the construction of roads, railroads, bridges, and canals.<sup>1</sup> This is very much more than the general power of appropriating money for the general welfare where the objects of expenditure remain under State laws; it is a federal power in which the federal law prevails notwithstanding the obstacles of State law. The express power contained in art. xxxiv. may perhaps be taken as indicating

that the commerce power in the Commonwealth Parliament does not extend to the construction of railways in a State without the consent of that State. But this is not the only view that may be taken of it. Article xxxiv. is clearly not limited to railways which are incidental to inter-State commerce. It might be held that the Parliament has as a matter of commerce (sec. 51 (1) and sec. 98) among the States power to make railways which are obviously in furtherance of that commerce; and that art. xxxiv. merely authorizes the exercise of legislative power with the consent of the State in regard to the construction of railways which have no direct relation to inter-State commerce.

3. Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliament the matter is referred, or which afterwards adopt the law. Sec. 51 (xxxvii.).

This section may be compared with the provision in sec. 15 of the Federal Council Act, 1885, under which legislative power was given to the Federal Council over a number of enumerated matters whenever the legislatures of two or more colonies should refer such matters. It differs from that provision in that reference may be made by a single legislature so that the Parliament may legislate for that colony. It offers a convenient method of extending the range of legislative subjects without resorting to an amendment of the Constitution. Any enactment by the Commonwealth in pursuance of such a reference will be a federal law in the sense that it cannot be altered by the State Parliament, and that State laws inconsistent therewith will be invalid.

4. 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. Sec. 51 (xxxviii.).

This is a very remarkable and far-reaching power. It appears to enable the Commonwealth Parliament, with the co-operation of the States, to assume the full measure of Imperial power within the Commonwealth; and to repeal without limitation of any kind Imperial Acts of Parliament in operation there. Of course, there is always the power in the Crown to disallow such Acts, and in the Imperial Parliament to withdraw the power. But as the Imperial Parliament is in the highest degree unlikely to recall a constitutional power, the latter safeguard has no great practical value. The fact remains that there is now within the Empire a "subordinate legislature" with a very extensive power of repealing Imperial legislation. It can hardly be suggested that the article is confined to the cases in which both the

Federal Council and the Imperial Parliament could have acted. The expression “at the establishment of the Constitution” in this connection is rather curious. The Federal Council Act was repealed, and the Council itself ceased to exist when the Commonwealth Act received the Royal Assent on July 9th, 1900 (sec. vii. of the Act). The Commonwealth was not established, nor did the Constitution take effect until January 1st, 1901. What is the date of the “establishment of the Constitution”?

It is to be noted that art. xxxviii. stands outside the distribution of Commonwealth powers into legislative, executive, and judicial, for the supremacy of the Imperial Parliament, which is the measure of powers to be referred, does not admit of such a separation.

### **Auxiliary and Incidental Powers.**

1. The acquisition of property on just terms from any State or person for any purpose in respect to which the Parliament has power to make laws. Section 51 (xxxii.).

This is a recognition of the power of “eminent domain”; it means that the Parliament may, by act of legislation, provide for the acquisition of property against the will of the owner, whether a State or a private person. The conditions are : (1) that the Commonwealth must acquire “on just terms,” *i.e.* not at a price arbitrarily determined by itself; and (2) that the purpose of acquisition must be some purpose in respect to which the Parliament has power to make laws. This does not, of course, set any limit to the power to acquire property; it applies only to compulsory acquisition. The provision may be compared with that in the Fifth Amendment to the United States Constitution—“nor shall private property be taken for public use without just compensation,” a prohibition reproduced in many of the States Constitutions.

2. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides. Sec. 51 (xxxvi.).

The Constitution establishes many things “Until the Parliament otherwise provides.” This article is equivalent to a declaration that in such a case the Parliament shall have power to provide from time to time for the matters in question—that its power over the matter is not exhausted by a single provision.

3. Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. Sec. 51 (xxxix.).

Of the corresponding provision in the Constitution of the United States,

Judge Cooley says: “The import of the clause is that Congress shall have all the incidental and instrumental powers . . . to carry into execution all the express powers. It neither enlarges any power specifically given, nor is it a grant of any new power to Congress, but it is merely a declaration, for the removal of all uncertainty that the means for carrying into execution those otherwise granted are included in the grant.”<sup>1</sup>

And it must not be inferred from this power to legislate that in the absence of legislation the various organs of government are without the instrumental and protective power which belongs by the common law to their like. Thus, though the *lex et consuetudo Parliamenti* does not apply to a colonial legislature so as to enable its constituent parts to exercise punitive powers, the chambers of such a legislature have all the powers necessary for their own protection, and for securing their proceedings against interruption or disturbance.<sup>1</sup> Again, the Courts of the Commonwealth may regulate the admission of persons to practise before them, and may exercise according to their degree the power of punishing for contempt. The Executive Government may take the measures allowed to the Executive authorities at common law to protect every branch of the federal authority in the performance of its duties, and by the Constitution itself, the executive power of the Commonwealth extends to the execution and maintenance of the Constitution. The nature of this power was illustrated in the United States in the case *In re Neagle*.<sup>2</sup> In anticipation of an attack being made by one Terry upon Judge Field, United States Circuit Judge in California, Neagle was ordered to attend him as deputy marshal for his protection; and when the anticipated attack was made, Neagle, in defence of the judge, killed Terry. For this an information was sworn in the State Court and a warrant issued against the judge and the deputy marshal. The latter was arrested, and sued out his writ of *habeas corpus*. The Circuit Court held that the prisoner was in custody for “an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States,” and accordingly ordered his discharge. It was objected in the Supreme Court that there was no Statute authorizing such protection as that which Neagle was instructed to give Judge Field, but it was held, nevertheless, that it was within the power and duty of the executive to protect a judge of any of the Courts of the United States when there was just reason to believe that he would be in personal danger while executing the duties of his office. Answering the argument that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States, Mr. Justice Miller said: “We hold it to be an incontrovertible principle that the Government of the United States may by

physical force exercised through its official agents execute on every foot of American soil the powers and functions that belong to it. That necessarily involves the power to command obedience to its laws, and hence the power to keep order to that extent.”<sup>1</sup> *A fortiori* is there such a power in the Commonwealth, where the principal organ—the legislature—is expressly empowered to make laws “for the peace, order, and good government of the Commonwealth,” in respect to the matters committed to it.

It is to be noted that powers over many of the subjects committed to the Parliament of the Commonwealth are exercised by Congress in the United States as “implied powers,” *e.g.* lighthouses and quarantine under the commerce power.

### **The Exclusive Power of the Parliament.**

Section 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:

i. “The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes.”

This has been already referred to in chapter iii. on “The Nature and Authority of the Federal Commonwealth,” under the head of “The territory of the Commonwealth”; and it has been pointed out that according to the American decisions the exclusive power of legislation over a place carries with it exclusive jurisdiction. Persons residing within it are not residents in any State; and are not entitled to vote as citizens of a State at any election.<sup>1</sup> Such territory and its government are without the most characteristic feature of a federation—the division of power between central and local governments; and the territory stands outside the “federal” arrangements of the Constitution, which adjusts the relations of the States. “Territory so placed becomes as extraneous to the State as if it were held by a foreign government.” This is true in the sense that the territory in question ceases to be part of its State. But in any other sense, such territory is not to be regarded as foreign even in the limited way in which that term can be applied to the relation of the States to each other. The Commonwealth Government exercises in regard to it the full powers of a national government throughout the Commonwealth; the government of the territory is not a distinct political entity, a separate *persona*, it is nothing else than the Commonwealth Government discharging its national duties.<sup>2</sup> It is obvious that the omnipotence of the Parliament in relation to Commonwealth territory, and especially the seat of government, may be made the basis of an exercise of power which may be of national

importance.

In the United States the residents in the Federal District of Columbia and the territories are not electors for the Presidency, the Senate, or the House of Representatives. And in like manner the arrangements of the Constitution provide, in the first instance only, for the exercise of political power by electors of the States. Section 122, however, provides that the Parliament may allow the representation of territory surrendered by any State and accepted by the Commonwealth, in either House of the Parliament, to the extent and on the terms which it thinks fit.

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."

"By this Constitution" must be taken to include "under the powers of this Constitution." Strictly speaking, the departments of customs and excise alone are transferred by the Constitution; the others become transferred on the proclamation of the Governor-General.

iii. "Other matters declared by this Constitution to be within the exclusive power of the Parliament."

The question whether the power over commerce among the States is an exclusive power is discussed elsewhere.

1 [1894] A.C. 31, 46.

1 [1894] A.C. 189.

1 (1880) 5 A.C. 409, 415.

2 (1874) L.R., 6 P.C. 31.

3 See *Scrutton on Copyright*, cap. viii., and the *Bluebook* (1895, C. 7783).

4 *Opinion of Law Officers*, 1889 (1895, C. 7783, p 49).

1 See Cooley, *Constitutional Law*. p. 91; and the *Legal Tender Cases*, 12 Wall, 457.

1 See thereon *Homeward Bound G.M. Coy. v. Macpherson* (1896), 17 N.S.W. Rep. 281.

2 (1896) 119 U.S. 615.

3 (1887) 127 U.S. 265.

4 *Chicago, etc., v. Wiggins, sup.*; *Hanley v. Donohue* (1885), 116 U.S. 1, 4.

5 *Principles of Constitutional Law*, p. 203.

1 See Dicey, *Conflict of Laws*, cap. xvi. (*American Notes*), p. 434.

2 *Hanley v. Donohue*, 116 U.S. 1, 4.

3 18 Wallace, 457, 462, 463.

4 (1887) *Wisconsin v. Pelican Insurance Coy.*, 127 U.S. 265; (1892) *Huntington v. Attrill*, 146 U.S. 657.

1 See Thayer, *Evidence at the Common Law*, p. 258; Salmond, *Law Quarterly Review*, 1900, p. 386.

2 Thayer, p. 280.

1 Cf. Dicey, *Conflict of Laws*, pp. 10, 20, and 30, on “Recognition” and “Enforcement” in relation to foreign laws and rights.

1 See *Story on the Constitution*, c. 26; *Stockton v. Baltimore & N.Y.R.R. Coy.* (1887), 32 Fed. Reports 9; *Luxton v. North River Bridge Coy.* (1894), 153 U.S. 525.

1 *Principles of Constitutional Law*, p. 105.

1 See *Barton v. Taylor*, L.R., 11 A.C. 197.

2 (1889) 135 U.S. 1.

1 135 U.S. 60.

1 Hare, *American Constitutional Law*, p. 1142.

2 Cf. Hare, *American Constitutional Law*, 1143, and passage there cited from the judgment of Marshall, C.J., in *Cohens v. Virginia*, 6 Wheaton 428.

## **Chapter X. The Relation of the Legislative Authorities (The Imperial Parliament, the Commonwealth Parliament, the State Parliament) and the Validity of Laws.**

ACTS of non-sovereign legislatures may be unconstitutional on several grounds. If the Legislature is one of special powers, its Act may have dealt with a matter not granted. If the Legislature is one of general powers, its Act may relate to a matter expressly or impliedly excepted from the grant. In either case, the grant of power may, in respect to any matter, be subject to restrictions upon its exercise—the power is not to be exercised in certain directions, or certain modes or forms are prescribed. And the supreme Legislature may from time to time invade the sphere of the subordinate and exert its paramount authority, in which case it overrides existing laws of the subordinate and offers an obstacle to the making of new laws by the subordinate, which are inconsistent with it.

1. So far as any Act deals with matters not granted to the Legislature, or with matters withheld from it, or exercises power in a forbidden way, it is *ultra vires*. But the taint does not go beyond the restriction; an Act may perfectly well be *ultra vires* as to part only. The test adopted both in the United States and Canada is the separate nature of the enactments or their application. “Whether the other parts of the Statute must also be adjudged void because of the association, must depend upon the consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the remainder. . . . Where a part of the Statute is unconstitutional, that fact does not authorize the Courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other. . . . The point is . . . whether they are essentially and inseparably connected in substance.”<sup>1</sup> The separation is not necessarily affected by enactment in different sections or in different parts of the Act. On the other hand, connection is not conclusively established by inclusion in the same words; the words of the Act may apply and be unmistakably intended to apply equally to cases within and without the power of the legislature. “A legislative act may be clearly valid as to some classes of cases, and clearly void as to others.”<sup>2</sup> A State law, purporting to affect all commerce, might be *ultra vires* so far as it impaired the freedom of trade, commerce, and intercourse among the States, yet valid so far as its operation upon the

internal commerce of the State was concerned. In *Macleod v. A.G. for New South Wales*,<sup>3</sup> the Privy Council decided that a colonial legislature has no power over crimes committed beyond its territory; accordingly, an Act purporting to deal with offences wheresoever committed, and plainly intended to include crimes committed abroad, would be *ultra vires* so far as those crimes are concerned. But a person indicted under the Statute for an offence committed in New South Wales would not be entitled to an acquittal on the ground that the Act extended to cases beyond the power of the legislature.<sup>4</sup>

“The unconstitutional law must operate as far as it can, and it will not be held invalid on the objection of a party whose interests are not affected by it in a manner which the Constitution forbids.”<sup>1</sup>

2. *Legislation by Paramount Authority.*—The three legislatures—the State Parliament, the Commonwealth Parliament, and the Imperial Parliament—in matters which are within the power of all form a hierarchy.

(1) Control by Imperial Legislation—The Colonial Laws Validity Act, 1865.

The Imperial Parliament remains paramount, and is capable now, as at all times previously, of legislating for this as for all other parts of the dominions of the Crown. Whether an Imperial Act extends to the Commonwealth is a matter of interpretation, upon the principles of which there can hardly be any difference of opinion. The view that obtained some currency in Canada, that the “exclusive” powers of legislation conferred by the British North America Act, 1867, meant exclusive of the Imperial Parliament, is now so far discredited that it is unnecessary to discuss the grounds upon which it is based, especially as “exclusive” powers form so small a part in the Commonwealth Parliament. The subjects upon which there will be some difference of opinion are whether the circumstances which determine the application of an Imperial Act as a matter of “necessary intendment” are the same in the Commonwealth as in the colonies; and, further, whether there is any power in the Parliament of the Commonwealth to repeal or alter laws of the Imperial Parliament applying in the Commonwealth at the date of the establishment of the Commonwealth. The first of these questions relates to future legislation of the Imperial Parliament, the second to past legislation. Though the questions are distinct, it is obvious that they are governed by considerations which are in general the same or similar.

It is most important in this connection to observe that many of the matters within the power of the Parliament are exactly those matters in which, as being deemed of Imperial or international concern, the legislative power of the Imperial Parliament has been freely exercised, and (it may be

presumed) will be exercised in the future. Thus the question of the relation of Commonwealth Acts to Acts of the Imperial Parliament is one of practical importance.

Whether or not the Commonwealth is a “Colony,” and the Commonwealth Parliament a “Colonial Legislature,” within the terms of the Colonial Laws Validity Act, 1865, future Acts of the Imperial Parliament will of course extend to the Commonwealth whenever they are made applicable by express words or necessary intendment. But what is necessary intendment? The test is a vague one, to be applied in the light of many circumstances, one of which is the status of the place, and the measure of self-government which it enjoys. It may be urged that an exercise of legislative power by the Imperial Parliament in these matters is less lightly to be presumed in the case of the Commonwealth than in the case of the colonies in their separate state;<sup>1</sup> that the express grant of power over them indicates a general intention that these matters henceforth are to be deemed primarily within the scope of self-government, and therefore ordinarily outside the exercise of Imperial power. In this, of course, there is no suggestion of any abandonment of legal power. On the other hand, it may be argued that the matters in question are in several cases matters in which the separate colonies had power by virtue of express grant; and that the general nature of the Constitution is to set up new relations within Australia, and not to create new relations between Australia and the Imperial Parliament. The subject is one upon which it is hardly possible to give a decided answer. The weight which a Court is disposed to give to the fact that a power of legislation has been conferred on the Commonwealth Parliament may well differ in the case of particular matters, but it would seem to be of some relevance in all. More than this the vagueness of the subject makes it impossible to say.

The second question is, How far does the express grant of power by the Constitution to the Commonwealth Parliament over the various specified subjects affect the past legislation of the Imperial Parliament thereon? Merchant Shipping Acts, Copyright Acts, Bankruptcy Acts—is the power to repeal or alter these Acts extending to the Commonwealth included in the power to make laws for the peace, order, and good government of the Commonwealth in respect to “navigation and shipping,” “copyrights,” “bankruptcy and insolvency.” A similar question has been raised in Canada, and Sir John Thompson has strenuously contended that in respect to all the subjects committed to the Parliament of Canada that Parliament must be considered to have the plenary power of the Imperial Parliament, including the power to repeal Imperial laws thereon operating in Canada at the establishment of the Dominion.<sup>1</sup> The Provincial Courts of Canada,

which have considered the question in relation to the specific powers conferred on the Provincial Legislatures by the British North America Act, 1867, have taken divergent views of it. The Canadian Government has pressed the view of “plenary power.” The Colonial Office, on the advice of successive law officers of the Crown, has uniformly determined against the view of Sir John Thompson, and has on that ground disallowed Canadian Acts inconsistent with Imperial Acts passed prior to the Act of 1867. In support of this action, it is urged that the Colonial Laws Validity Act, 1865, is a general law dealing with the enactments of all subordinate legislatures throughout the British Dominions, except in the Channel Islands, the Isle of Man, and British India; that it is intended to apply to new political communities equally with those existing at the time of the Act, and that grants of constitutions are subject to the provisions of the Act. Therefore, the Dominion Parliament and the Provincial Legislatures are “Colonial Legislatures,” and their enactments “colonial laws” within the Act; and by section 2 “any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any Order or Regulation made under authority of such Act of Parliament, or having in the colony the force 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.”

On the other hand, it may be urged that the specific grant of powers to legislate upon a given subject is a power to make laws upon that subject in the legal condition in which it is at the time of the grant. Power is given over the subject in the colony, and that includes the power to deal with existing laws thereon, whatever their origin. This view is probably strengthened by the fact that so many of the subjects of the specific grant are subjects on which there is existing Imperial legislation; and that the new Constitution of the British North America Act, 1867 (as of the Commonwealth Act, 1900), is devised as a liberal extension of the power of self-government.

It is argued with less force that in the case of any colony the repugnancy which avoids an Act is repugnancy to some Act passed after the creation of the Legislature of the colony; this would imply that every colonial legislature was empowered to repeal or vary all Imperial laws in operation in the colony at the time of the grant of a constitution. The suggestion has been made that the establishment of a new political community within the Empire is analogous to the acquisition of a colony by settlement or occupation; and that just as the legislature of such a colony has power over Imperial Acts in operation in that colony at the time of the settlement, so

the Dominion Parliament or the Commonwealth Parliament has power over the Imperial laws in the Dominion or the Commonwealth at the time of its establishment. But the analogy fails for more than one reason. In the first place, it is at best a case of analogy and not of identical instances. The political re-organization of a portion of the dominions of the Crown, which has existing laws and institutions, is something widely different from the acquisition of new territories in which *ex hypothesi* there is neither law nor government. In the second place, such legislatures have not power over all Imperial Acts in the colony in virtue of the doctrine of the common law that a new settlement colony takes so much of English law as is suitable to its condition. Acts which are not merely part of English law, but are at the time of their enactment made applicable throughout the British Dominions cannot be repealed by a colonial legislature. And it is to this class that the legislation now in question belongs.

There are no circumstances to distinguish the Commonwealth of Australia from the Dominion of Canada in this respect; and the arguments which have been advanced in one case may be adduced in the other.

*Note.*—A phrase in sec. vi. of the Draft Bill suggested to the Law Officers of the Crown the advisability of inserting in sec. v. an express provision that “the laws of the Commonwealth shall be Colonial Laws within the meaning of the Colonial Laws Validity Act, 1865.” Section vi. having defined “the Commonwealth,” proceeded: “ ‘Colony’ shall mean any Colony or Province.” This, it was surmised, implied that the Commonwealth was not a “colony”; that consequently “the Parliament” was not a “colonial legislature,” and its Acts not “colonial laws.” It is obvious that such an effect might cut in either of two ways. If the Colonial Laws Validity Act really extend, the powers of dependent legislatures, a legislature which is without its scope is deprived of its benefits. But the exception of the Commonwealth Parliament from the scope of the Act would also except it from the restrictions imposed by the Act, and would strengthen in the case of the Commonwealth the arguments which have been held in Canada as to the power over existing Imperial legislation. Ultimately, the objections of the Law Officers were met by the omission of the definition of “Colony” in section vi. It is submitted that the objection was not sound. The purpose of the definition was clear—South Australia is designated a “Province” and not a “Colony,” and it was advisable to extend to her the term which described the other colonies. The definition, in common with other definitions in an Act of Parliament other than an Interpretation Act, applies only to the term as used in the Act itself. In the Act, “colony” (save as provided by section viii.) excludes “Commonwealth”; but for other purposes, including the application of

other Imperial Statutes, the definition of section vi. would have been inoperative.

(2) State and Commonwealth Laws.

The relation between State legislation and Commonwealth legislation is laid down in sec. 109, whereby “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”

This provision operates where the State law conflicts with some exercise of power by the Commonwealth Parliament, not where it is inconsistent with the power itself. It assumes that each legislature is acting within its proper range of power, where the State law would be good and operative but for the exercise of paramount power by the Commonwealth Parliament, the case which has been described in America as that in which the State law fails, “not because it is unconstitutional, but because it is superseded by the paramount authority of the national legislature.”<sup>1</sup> It applies whether the State law has been passed after the Commonwealth law or the Commonwealth law has been passed after the State law.

The application of the provision raises two difficulties. The first is to determine when inconsistency arises; the second is as to the nature and extent of invalidity.

First, inconsistency may arise otherwise than from the conflict of the very terms of the Acts. “The two laws may not be in such absolute opposition to each other as to render the one incapable of execution without violating the injunctions of the other; and yet the will of the one legislature may be in direct collision with that of the other.”<sup>1</sup> When the Commonwealth Parliament has made a law on some matter committed to it, it may well be intended that the law should be exhaustive of regulation upon that matter. In a case where the whole field of legislation is thus covered State laws making further regulations upon the subject will be inconsistent with the exclusive purpose of the Commonwealth Parliament, and invalid, though there be no inherent contradiction in the expressed terms of the laws. Indeed, it is clear that not a few of the subjects over which the Parliament has power, though they are not exclusive in the strict sense, are such that the legislation of the Parliament, to use the language of Story, “suspends the legislative power of the States over the subject matter.”<sup>2</sup> No universal rule as to “inconsistency” of this kind can be laid down; we must look in each case to “the nature of the power, the effect of the actual exercise, and the extent of the subject matter.”<sup>3</sup>

*Inconsistency with Paramount Laws.*—The provision of section 109 that a State law inconsistent with a law of the Commonwealth shall, to the extent of the inconsistency, be invalid, may be compared with the language

of the Colonial Laws Validity Act, 1865, sec. 2, whereby a colonial law repugnant to an Imperial Act shall, to the extent of the repugnancy, but not otherwise, be and remain absolutely void and inoperative. An analogous doctrine is contained in the provision of the United States Constitution that the Constitution and the laws of the United States made in pursuance thereof shall be the supreme law of the land (article vi.); and, though there is no provision in the British North America Act upon the subject, it is now settled that, in case of conflict between Dominion and Provincial laws in matters within the competence of both, the Dominion law prevails.

The express provisions that the State law, to the extent of the inconsistency, shall be invalid, suggests on the face of it that it will be wholly null and void, so that it will not become operative on the repeal of the Commonwealth Act. And in the United States there are many decisions that “an unconstitutional Act is not a law; it is, in legal contemplation, as though it had never been passed.” But, as has been already pointed out, the distinction has been taken between unconstitutional Acts, which are void, and Acts conflicting merely with an exercise of paramount power. Both in the case of the United States and of Canada it has been held that a State or Provincial Act is only barred of its operation by the Act of Congress or the Dominion, and on the repeal of the latter it becomes operative. Thus in *Butler v. Goreley*<sup>1</sup> an Insolvency Act of the State of Massachusetts inconsistent with Acts of Congress of 1853 and 1867 repealed by Congress in 1878, need not be re-enacted, for “the repeal of the Bankruptcy Act of the United States removed an obstacle to the operation of the Insolvent Laws of the State.” In *Att. Gen. for Ontario v. Att. Gen. for the Dominion of Canada and the Distillers' and Brewers' Association of Ontario*,<sup>2</sup> the Judicial Committee of the Privy Council, having to consider a conflict between the Ontario Liquor License Law of 1890 and the Dominion Temperance Act of 1886, said: “In so far as they do (conflict), provincial must yield to Dominion legislation, and must remain in abeyance, unless and until the Act of 1886 is repealed by the Parliament which passed it.” By section 109 it is provided not merely that the Commonwealth law shall prevail, but that the State Law shall, to the extent of the inconsistency, be invalid. This seems to indicate more than temporary abeyance or failure of operation; and it is conceived that the State law will be, or become, according to the circumstances, a nullity, and will not be operative, except by re-enactment when the bar is removed.

The result appears to be the same where a Colonial Act is inconsistent with an Imperial Act. The Colonial Laws Validity Act, section 2, provides that a repugnant colonial law shall be, *and remain*, absolutely void and inoperative. And the matter is strengthened by the Interpretation Act, 1889,

sec. 38 (ii.), whereby

“When this Act, or any Act passed after the commencement of this Act, repeals any other enactment, then, unless the contrary intention shall appear, the repeal shall not

“(a) Revive anything not in force or existing at the time at which the repeal takes effect.”

*Formal Validity of Laws.*—The Constitution in sections 53 and 60 has prescribed the modes of legislation or the forms of the law in certain classes of case. We have to consider how far any departure from the mode, or any defect in the form prescribed, affects the validity of enactments.

The case may well be different from that of the Imperial Parliament, where rules of procedure, whatever their importance as conventions of the Constitution, are secured by Parliamentary sanctions merely; a measure purporting to be an Act of the Imperial Parliament, if authenticated in the usual and proper way, could hardly be impugned by any external evidence.<sup>1</sup> The Colonial Constitution Acts have commonly dealt with the procedure to be observed in the case of Money Bills and Bills for the amendment of the Constitution; and doubts have been entertained as to the validity of Acts amending the Constitution which are not shown to have been passed by the statutory majorities or to have been reserved for the Royal Assent. In 1864 the Law Officers of the Crown (Sir Roundell Palmer and Sir Robert Collier) expressed the opinion that “when the power of legislation is given, not to a simple majority, but to certain specified majorities in one or both branches of the Legislature, it is evident that such majorities are a *sine qua non* to its exercise, and consequently that the judges are not at liberty to treat any law on that subject as valid if it appears either on the face of the law itself, or by other proper evidence that it was not, in fact, passed by the required majorities.” The customary forms of legislation, however, afford no indication of the use of any special procedure; and, in the opinion referred to, the Law Officers did not think it absolutely necessary “that it should appear on the face of the law itself that it was passed by the requisite majorities (if the fact can be otherwise proved) in order to authorize the judges to act upon such legislation as valid and effectual”; and they inclined to think, though they treated the point as admitting of some doubt, that “the judges ought to presume, until the contrary is proved, that every Act which has passed the Legislature, and which is authenticated as an Act of the Legislature, was passed by such a majority as would be necessary according to law to give it effect.” Accordingly the Colonial Laws Validity Act, 1865, section 6, provides that “the certificate of the clerk, or other proper officer of a legislative body in any colony, to the effect that the document to which it is attached is a true

copy of any colonial law assented to by the Governor of such colony . . . . shall be *prima facie* evidence that . . . . such law has been duly and properly passed and assented to.” The question remains whether in all cases this presumption can be rebutted, and how in any case it may be rebutted. The proper evidence for rebutting the presumption would, of course, be the Journals of the Legislature; but as each House controls its own records, it seems to be within the power of the Legislature to refuse to make that evidence available. In *Bickford, Smith and Coy. v. Musgrove*<sup>1</sup> the question was raised as to the observance of the proper forms in the case of a Money Bill, and the issue fell because the Speaker of the Legislative Assembly of Victoria refused to allow the production of the Journals, and the Act was treated as valid. But, apart from the question of evidence, can the presumption of validity be rebutted? So far as the common provisions concerning Money Bills are concerned, the Judicial Committee of the Privy Council in *Powell v. Apollo Candle Coy.*<sup>1</sup> said: “It has been argued that the proviso that all Bills for appropriating any part of the public revenue, or for imposing any new rate, tax, or impost, shall originate in the Legislative Assembly in the colony is at least a direction on the part of the Imperial Parliament that all levying of taxes in the colony shall be by Bill, as in this country in the Lower House. It may be that the Legislature assumed that, with respect to customs duties, such a course would undoubtedly be pursued, as is in accordance with the usages and traditions of this country; but it appears to their Lordships impossible to hold that the words of an Act which do no more than prescribe a mode of procedure with respect to certain Bills shall have the effect of limiting the operation of those Bills.”<sup>2</sup>

“*Laws*” and “*Proposed Laws.*”—This is the assumption which underlies the use of the terms “law” and “proposed law” in the Commonwealth Constitution, sects. 53–59. They indicate the difference between the product and the machinery; “law” is sanctioned by ill usage as an equivalent for “act” or “statute,” “proposed law” is an innovation, and a somewhat clumsy one, indicating “bill.” Where the Constitution prescribes the procedure upon “proposed laws,” the provisions are generally directory merely; they are matters of Parliamentary practice attended with Parliamentary and political sanctions, and may be waived by the concurrence of the enacting authorities. Where on the other hand the Constitution speaks of “laws,” it makes the observance or non-observance of the provisions a legal and not simply a political question.<sup>1</sup> What is the legal sanction? In the absence of express direction, nullity. By section 55 laws imposing taxation, except laws imposing duties of customs or excise, shall deal with one subject of taxation only; if they deal with more than “one subject of taxation,” the whole will be void. “Laws imposing duties of

customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only”; if an Act transgress either rule, it is invalid. But in providing that “laws imposing taxation shall deal only with the imposition of taxation,” section 55 expressly provides that “any provision therein dealing with any other matter shall be of no effect.”

There are two cases, however, in which the term “proposed law” introduces provisions which go to the validity of the enactments to which they relate—in section 60 and section 128. Section 128 deals with the alteration of the Constitution, and will be referred to under that head. By section 60 it is provided that “a proposed law reserved for the Queen's pleasure *shall not have any force unless* and until, within two years from the day on which it was presented to the Governor-General for the Queen's Assent, the Governor-General makes known by speech or message to each of the Houses of Parliament or by Proclamation that it has received the Queen's Assent.”

*Note.*—In the United States the Courts have gone very far towards holding that the ordinary distinction between mandatory and directory provisions does not apply to Constitutions, and that as these high and solemn instruments do not condescend to procedure, all their enactments must be treated as mandatory. (See Cooley's *Constitutional Limitations*, p. 93.) I think, however, that the decision of the Judicial Committee in *Powell v. the Apollo Candle Coy.*<sup>1</sup> sufficiently indicates that in this, as in other matters touching the exercise of legislative power, the English and American Courts are travelling on different roads.

1 Cooley, *Constitutional Limitations*, 5th ed., pp. 211, 212. For Canadian cases, see Lefroy, pp. 289–299.

2 Cooley, p. 215.

3 [1891] A.C. 455.

4 In *Macleod v. A.G. for N.S.W.*, the Privy Council held as a matter of construction that the expression, “wheresoever committed,” must mean “wheresoever in N.S.W.,” as from the more extended meaning “it would follow as a necessary result that the Statute was *ultra vires*.” *Semble*, this must be qualified, and can mean no more than that the Statute would, so far as the more extended operation was concerned, be *ultra vires*. But see *U.S. v. Reese*, 92 U.S. 214, and the *Trade Mark Cases*, 100 U.S. 82.

1 Cooley, p. 215.

1 Cf. Lefroy, *Legislative Power in Canada*, p. 82 n., citing *Gwynne, J., in Maritime Bank, v. The Queen*, 17 S.C.R., at pp. 681–2: “I must say that, in my opinion, we make a very great mistake if we treat the Dominion of Canada constituted as it is as a mere colony. The aspirations of the founders of the scheme of confederation will, I fear, prove to be a mere delusion if the Constitution given to the Dominion has not

elevated it to a condition much more exalted than and different from the condition of a colony which is a term that, in my opinion, never should be used as designative of the Dominion of Canada.”

1 See Lefroy, *Legislative Power in Canada*, pp. 208–231.

1 Hare, *American Constitutional Law*, p. 98.

1 Per Washington, J., *Houston v. Moore*, 5 Wheaton, 1, 21, 22.

2 Story, *Constitution of the United States*, sec. 441.

3 *Ib.*

1 (1892) 146 U.S. 303. See also *In re Rahrer* (1890), 140 U.S. 345.

2 [1896] A.C. 348.

1 See May, *Parliamentary Practice*, 10th ed., pp. 488, etc.

1 17 V.L.R. 296.

1 10 A.C., pp. 282, 290.

2 Mr. Burgess, speaking of the United States Constitution, art. i., sec. 7, whereby “Bills for raising revenue shall originate in the House of Representatives,” regards the matter as a legal question determinable by the Courts, and not a political question determinable by the Legislature alone (*Political Science and Constitutional Law*, vol. i., p. 196).

1 The ambiguity of “law” in the English language has often been commented upon. The inconvenience of using the same term for *jus* and *lex* is to some extent mitigated by the pre-eminence of the Imperial Parliament, and the fact that Statute is our type of law. But the use of “a law” to describe an enactment of a subordinate legislature leads us at once to confusion and paradox. For a “law” made by the Parliament of the Commonwealth or a State may be invalid, may not be “law” in the abstract. The authors of the Commonwealth Constitution are not the originators of the anachronism, a void or invalid “law.” The same thing may be found in the Colonial Laws Validity Act, 1865, which declares that “Colonial laws” shall, in certain cases, “be and remain absolutely void and inoperative.”

1 10 A.C., p. 282.

## Chapter XI. Finance and Trade.

ALTHOUGH this is the title of chapter iv. of the Constitution, important provisions on the subject are to be found in several other parts of the instrument. In chapter i., part v., sec. 51, under "Powers of the Parliament," the first matters mentioned in respect to which the Parliament has power to make laws are:

"1. Trade and commerce with other countries and among the States": a power which by section 98 is declared to extend to making laws with respect to "navigation and shipping, and to railways the property of any State."

"2. Taxation, but so as not to discriminate between States or parts of States."

"3. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth."

"4. Borrowing money on the public credit of the Commonwealth."

The departments of customs and excise are among the State departments of public service transferred to the Executive Government of the Commonwealth, and are therefore dealt with in chapter ii.—"The Executive Government." They are also brought within the exclusive power of the Parliament, which, by section 52, covers "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."

Finally, certain sections of chapter v.—the States—also relate to finance and trade, viz., sections 112 and 113.

### A. Finance.

*Taxation.*—Sec. 51. "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to

"ii. Taxation, but so as not to discriminate between States or parts of States."

The power which lies at the root of all government is thus conferred in the most unqualified terms. It is a substantive power, and not a mere incident to the accomplishment of the other purposes of the Commonwealth Government. In the second place, the terms employed extend far beyond those used in the Constitution of the United States, where Congress has power merely "to lay taxes, duties, imposts, and

excises to pay the debts and provide for the common defence and general welfare of the United States”; or in the British North America Act, 1867, where the government of particular powers—the Provincial Legislature—has power to make laws with respect to “Direct Taxation within the Province in order to the raising of a revenue for Provincial purposes.” A power to make laws for the peace, order, and good government of the Commonwealth with respect to “Taxation” is *prima facie* more than a power to raise money by taxation, and to prescribe the matter, manner, measure, and time thereof; it is capable of embracing the whole subject of taxation, by whatever authority, throughout the Commonwealth. While the States would retain the power of regulating and imposing taxation as heretofore, their laws thereon would be subject to the paramount laws of the Commonwealth Parliament. To such an extensive construction of the power over taxation, it may, no doubt, be objected that it is a Federal Commonwealth which has been established; that “the power to tax is a power to destroy”; that under it the Commonwealth Parliament would have power to deprive the States of the means of carrying on their government by forbidding every conceivable mode of taxation; and that it is a cardinal doctrine of construction applied both to the Constitution of the United States and the Constitution of Canada that the extent of particular powers conveyed must be measured by the nature of the union. A notable instance of restricted construction put upon extensive words is to be found in the Slaughter-House Cases,<sup>1</sup> interpreting the Fourteenth Amendment of the Constitution of the United States, whereby no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. The Supreme Court treated as irresistible the argument that a construction must be false which would involve so great a departure from the structure and spirit of American institutions as to fetter and control the States Governments by subjecting them to the control of Congress in the exercise of powers of the most ordinary and fundamental character, radically changing, in fact, the whole theory of the relation of State and Federal Governments to each other, and of both those Governments to the people. In the Slaughter-House Cases, however, the question was as to the effect of an Amendment which, had the extended meaning contended for been given to it, would have changed the relations of nearly a century by introducing Congressional and judicial control over functions which the States Legislatures had exercised independently; and the arguments of the Court would have had little or no application if the provision had been an original provision in the Constitution, so that the question would have been—What was the nature of the federal union established? The organization of the Dominion of Canada shows that the

control of the federal executive over all legislative acts of the province is not inconsistent with a federal union. Some controlling power over taxation would be entirely within the scope and spirit of the Union. At present the State laws of taxation may be and in some cases are based upon different principles, so that property may be liable to a double taxation which is generally recognized as inequitable. Income tax and death duties may be collected upon a different basis—one State may levy the tax upon a basis of domicile, another upon the situation of property. It would be well within the spirit of federalism that such a clash of principles should be prevented by a central authority. Further, the decision of the Privy Council in *Bank of Toronto v. Lambe*<sup>1</sup> shows that the existence of a controlling power in the central authority leaves a larger sphere of action to the local authority than could in the absence of that control be safely allowed.

The argument of Marshall, C.J., in *M'Culloch v. Maryland*,<sup>2</sup> that the “power to tax is a power to destroy,” is to some extent met by the observation of the Privy Council in the *Bank of Toronto v. Lambe*,<sup>3</sup> that the liability to abuse is not a sufficient reason for deciding that a power does not exist. The argument from inconvenience is one which, in any case, must be cautiously applied, and in this case it tells both ways, for in the absence of control the State can, by imposing taxation on objects taxed by the Commonwealth, embarrass the calculations of a Commonwealth Treasurer and impede the collection of federal revenue.

“Taxation” is adopted as being the most comprehensive word for describing all the various means of raising a revenue. “In the broadest sense an exercise of the taxing power occurs whenever a compulsory contribution of wealth is taken from a person, private or corporate, under the authority of the public powers” (*Public Finance*, by Carl Plehn, p. 77). The practice of enumerating more particularly the modes of revenue (as in the United States Constitution—“taxes, duties, imposts, and excises”) is one which a very slight acquaintance with English history condemns.

The substantive power of taxation thus conferred is, like every other power of sovereignty, liable to abuse; but the power is legally quite independent of the conditions which attach under the Constitution to the appropriation and expenditure of the proceeds of the tax.

The power is subject to the following conditions:

1. “Taxation; but so as not to discriminate between States or parts of States.”

This is a “federal” condition for the protection of the States against the Parliament. As originally drawn, it followed the terms of the Constitution of the United States as to duties, imposts, and excises, and provided that taxation should be “uniform throughout the Commonwealth.” But this was

more than the federal spirit required; it prevented not merely discrimination among the States, but discrimination in the case of individuals; and the Convention, warned by the observations of the Supreme Court of the United States in *Pollock v. The Farmers' Trust* (the Income Tax Case),<sup>1</sup> adopted terms of geographical limitation.

“Discriminate” is ordinarily used in two senses—“to distinguish” merely, and to “distinguish adversely.” It would be reasonable to suppose that the latter meaning attached here, as it undoubtedly does in sec. 117, both as restricting in a less degree the power which has been conferred on Parliament, and as satisfying the federal purpose of the provision. But against this view there are some forcible reasons. In the first place, “discriminate,” in its dyslogistic sense, is followed by “against” and not by “between.” In the second place, where discrimination in favour of or against a person or interest has been forbidden, the legislature has used some qualifying term to indicate the character of the prohibition; and the Courts have been careful to point out that not all discrimination, but only discrimination of a particular kind was prohibited, *e.g.* the “unjust discrimination” by the Inter-State Commerce Act (United States). In applying the analogous provisions of the Railways Clause Consolidation Act and the Railway and Canal Traffic Act, the English Courts have distinguished between the prohibition of “undue preference” and “undue prejudice” on the one hand, which casts upon them the duty of ascertaining whether the preference or prejudice is “undue,” and the obligation to impose equal rates, on the other hand, which is an “absolute statutable obligation,” and when it applies requires the Company to charge a rate “equal to all persons without reference to the particular advantage to be derived by any individuals or class of individuals.”<sup>1</sup> Similarly, in sec. 102, the Constitution itself, dealing with railways, recognizes the distinction between “preference” or “discrimination,” and “preference or discrimination which is undue or unreasonable, or unjust to any State,” by conferring power on Parliament to forbid undue or unreasonable discriminations only. Finally, the disposition of the Courts to adopt a construction favouring the more extensive power of Parliament as against one which would fetter its discretion (as by preventing it from distributing taxation according to the principle of special benefit accruing to particular areas<sup>2</sup> ) would be checked by the consideration that such a construction would cast upon the Courts the invidious duty of pronouncing upon the justice of the action of Parliament in that matter which has always been pre-eminently a matter of Parliamentary concern, and would require them to undertake the solution of difficult economic problems.

2. The Commonwealth (*i.e.* the Parliament) may not impose any tax on

property of any kind belonging to a State (sec. 114).

This prohibition is accompanied by a provision that the State shall not impose any tax on property of any kind belonging to the Commonwealth; and section 114 may be compared generally with sec. 125 of the British North America Act, 1867, under which no lands or property belonging to Canada, or any province, shall be liable to taxation. In the United States it has been established by judicial decision that neither Congress nor a State Legislature may tax the “Governmental agencies” of the other. “That the power to tax involves the power to destroy; that the power may defeat and render useless the power to create; that there is a plain repugnance in conferring upon one Government a power to control the constitutional measures of another, which other, in respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.”<sup>1</sup> In the *Bank of Toronto v. Lambe*,<sup>2</sup> the Privy Council expressly refused to apply this doctrine to provincial taxation of corporations constituted under Dominion laws, on the ground that though the doctrine of Marshall, C.J., was applicable where “each State may make laws virtually uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction,” it was inapplicable where the controlling power possessed by the Dominion Government over provincial legislation effectually protected Dominion interests from destruction by the Provinces. Obviously that case decides nothing as to the taxation of Provincial instrumentalities by the Dominion.

In the Commonwealth the power of the State may depend upon the view taken of the Commonwealth power to make laws with respect to “taxation.” If the true meaning of that power is that the Commonwealth Parliament may control the taxation of the States, there is in the Commonwealth as in Canada a power which may intervene more effectually than the Dominion Executive to prevent an abuse of power by the States. If, as is probable, the power over “taxation” is limited to taxation imposed by the Commonwealth Parliament itself, the doctrine of Marshall, C.J., is applicable to both State and Commonwealth. But in such a case it might be held, though not necessarily, that both State and Commonwealth are subject to no other restriction than that specially provided in sec. 114—that neither may tax the *property* of the other. It may be argued that sec. 114 is exclusive of other exemptions, since “property” would be exempt as an “agency or instrumentality,” and if agencies generally are to be exempt, section 114 is superfluous. But there may be property which is not a “governmental agency,” e.g. land of the Commonwealth for a National University, or a Library or Museum, or property of a State situated in another State; and upon these, section 114

would operate. Adopting the view that the governmental agencies of the State are exempt from Commonwealth taxation, it remains to see what they are. "Governmental agencies" have been described as "the means or agencies through or by the employment of which the States perform their essential functions, since if these were not within their reach they might be embarrassed and perhaps wholly destroyed by the burdens it (*i.e.* the Federal Government) should impose."<sup>1</sup> Among these agencies are municipal corporations or other governing bodies, the courts or the process of the courts, the salaries of judges or officers of a State; and, generally, every instrument employed by the government to carry its powers into execution.

Section 81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund.

*Appropriation and Expenditure; Issue and Audit.*—By section 83, "No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law."

This emphasizes the constitutional rule of the control of Parliament over expenditure, as to which there was at one time much misconception in Australia. "Appropriation by law" excludes the once popular doctrine that money might become legally available for the use of the government service upon the votes of supply of the Lower House. As will be seen, some appropriations of public money are made by the Constitution itself; for the rest, it will be for the Parliament to determine what matters are to be provided for by permanent and what by annual acts. The Parliament will also have to determine how public money appropriated shall be issued from the Treasury, and to make provision for ensuring that money drawn for any purpose has been expended upon that purpose. The Constitution properly leaves the details of "issue and audit" to be settled by the Parliament. Until provision is made, the existing laws of the States are to apply (sec. 97). Provision for the immediate needs of the Commonwealth is made by a clause in sec. 83, under which the Governor-General in Council may, until a month after the meeting of Parliament, draw moneys necessary for the maintenance of the transferred departments, and for holding the first elections.

The Consolidated Revenue Fund "shall be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution" (sec. 81). This provision is similar to that contained in the Constitutions of the Australian Colonies and the British North America Act, 1867.

A Consolidated Fund has long commended itself to British statesmen in

preference to the assignment of specific taxes to specific charges. The earmarking of the revenue from customs and excise by the Constitution is, however, an exception to the principle.

“Shall be appropriated” means, of course, by “the Parliament.”

What are “the purposes of the Commonwealth”? Are they limited to carrying into effect the matters committed by the Constitution to the Commonwealth Government, or has the Parliament, with its unlimited power to raise money, an unlimited power to determine what are the purposes of the Commonwealth? In the United States, after keen controversy, it is now agreed that “the power of Congress over the Treasury is in effect absolute, and extends to the appropriation of money for any object which in their judgment will conduce to the defence of the country or promote its welfare.”<sup>1</sup> This, however, is under an express power to “provide for the general welfare.” In Canada, the government whose powers are limited by enumeration—the provincial government—has power to raise a revenue by direct taxation “for provincial purposes”; and the Judicial Committee has held that this includes direct taxation “for a local purpose upon a particular locality,” and is not confined to general provincial purposes, and this notwithstanding that there is another article under which the Provincial Legislature may impose licenses “in order to the raising of a revenue for provincial, local, or municipal purposes.”<sup>2</sup> It must be remembered, however, that amongst the matters of provincial power are “all matters of a merely local or private nature in the Province.” The Commonwealth Government is without either of the attributes which seem material to the conclusion arrived at in the United States and in Canada. There is also some indication of a restricted power of expenditure. By section 96, the power to grant financial assistance to a State is the subject of a special grant, which, of course, suggests that such assistance could not be given under the general power to appropriate moneys for the purposes of the Commonwealth. On the other hand, the Government of the Commonwealth is a national government, and for some portions of its dominions the sole government, and it might not unreasonably be contended that, as has been said of the Government of the United States, it may play the part of “a public-spirited individual who draws his purse strings for the common good”; that it may go into the market and do whatever can be done by the use of money without the exercise of legislative, executive, or judicial power.<sup>3</sup> This does not necessarily involve any invasion of the powers of the State, for an unlimited power to appropriate does not imply an indefinite extension of legislative power. The Parliament might well be able to provide money for a national university and yet want the power to acquire land compulsorily for

buildings or to exempt it from the operation of the State laws concerning educational institutions. In any case, the restriction on the power of appropriation and expenditure seems to be subject to political sanctions merely.

*Charges and Liabilities.*—“The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon” (section 82).

This is the only matter which is specifically created a charge. The provision is similar to that in existing Constitutions; and, though the practice may be to appropriate money for these charges, there can be no doubt that the opinion of the Imperial Law Officers in 1878 is correct, that the moneys necessary are “legally available for, and applicable to, the purposes mentioned . . . . because they are, in fact, specifically appropriated by the Statute in question.” Other specific appropriations by the Constitution are the salary of the Governor-General, which, until the Parliament otherwise provides, shall be £10,000 (sec. 3), and the salaries of the Ministers of State, which, until the Parliament otherwise provides, shall not exceed £12,000 a year (sec. 66).

The principal “liabilities imposed by this Constitution” are the following:

1. Sec. 89.—Until the imposition of uniform duties of Customs, to pay to each State, month by month, the balance of the revenues collected by the Commonwealth in that State after debiting to it:

- (a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance as at the time of transfer of any department transferred.
- (b) The proportion of the State, according to the number of its people in the other expenditure of the Commonwealth.

2. Sec. 93.—During the first five years after the imposition of uniform duties of Customs, and thereafter until Parliament otherwise provides, to pay balances as provided by sec. 89, but the credit basis of each State is not collection of duties, but consumption of imports or produce in the State.

After five years from the imposition of uniform duties of Customs, 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 (sec. 94). This wide power is subject to the prohibition of preferences by sec. 99, and (temporarily) to the provisions of sec. 87.

3. Sec. 87.—During a period of ten years after the establishment of the Commonwealth, and thereafter until the Parliament of the Commonwealth otherwise provides, of the net revenue of the Commonwealth from duties of customs and excise, not more than one-fourth shall be applied annually

by the Commonwealth towards its expenditure. The balance shall, in accordance with this Constitution (*i.e.* sections 89, 93, and 94), be paid to the several States, or applied to the payment of interest on debts of the several States taken over by the Commonwealth (see sec. 105).

This is a contingent liability, and attaches to the Commonwealth only in respect to one of the possible sources of revenue. It was assumed, however, as a matter of political necessity that the Commonwealth must raise a Customs revenue; and the States which have relied in the past so largely upon the customs were not prepared for a financial revolution such as would be involved in a resort to direct taxation for all State purposes. It was generally accepted, therefore, that they must be assured of some part of their accustomed revenue; and, finally, Sir Edward Braddon's plan, "the Braddon Blot," as it was called for a time, was adopted, as making a rough provision for the maintenance of existing conditions.

Sec. 82. . . . "And the revenue of the Commonwealth shall, in the first instance, be applied to the payment of the expenditure of the Commonwealth."

The expression, "expenditure of the Commonwealth," is an ambiguous one, but it is used in sections 87 and 89 to exclude payment of balances to the States and payment of State debts. The direction as to first application of revenue must be subject to the ear-marking of three fourths of the revenue from customs and excise under section 87. In fact, this provision of section 82 really belongs to the scheme of financial arrangement adopted by the Convention at Adelaide, and subsequently abandoned in favour of section 87. By that scheme the maximum "expenditure of the Commonwealth in the exercise of the original powers given to it by this Constitution" and the "expenditure of the Commonwealth in the performance of the services and the exercise of the powers transferred from the States to the Commonwealth by this Constitution" were fixed for a term of years.

In addition to the specific appropriations already referred to, there are other matters of expenditure which are either fixed by the Constitution or which, when fixed by the Parliament, are not freely alterable by it. By section 48 the salary of a member of either House is fixed at £400 a year, but only until the Parliament otherwise provides. On the other hand, the salary of a justice of the Federal Court is left to the Parliament to determine, but when fixed it shall not be diminished during his continuance in office (sec. 72). As an incident to the transfer of public departments to the Commonwealth, the Commonwealth assumes all the current obligations of the State in respect of such department (section 85, subs. iv.); is bound to compensate the State for any property passing to the

Commonwealth for the purposes of a department (section 85, subs. iii.); and by section 84 the Commonwealth is subject to certain present liabilities of the State to officers of public departments taken over by the Commonwealth.

*Financial Relations of the Commonwealth with the States.*—These are involved in, but not exhausted by, the liabilities imposed upon the Commonwealth. The financial difficulties were not completely provided for by securing to each State the return of its proper proportion of revenue; for, as the colonies relied in unequal degrees upon the tariff, a Commonwealth tariff securing to one colony the return of an amount suited to its needs would embarrass others by a surplus or a deficit. It is accordingly provided (sec. 96), in terms following those adopted in sec. 87, that “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.” The words “and thereafter until the Parliament otherwise provides” are apt enough in sec. 87, but cause some difficulty in sec. 96. Sec. 87 is a section restrictive of the full power over appropriation; the restriction is temporary, and, after the expiration of its term, may be removed by the Parliament. But sec. 96 is enabling, and, according to the ordinary meaning of the terms used in the section, the power to assist the States would come to an end, when, after ten years, the Parliament shall “otherwise” provide, apparently by some Act of prohibition or by the mere repeal of existing Acts providing for financial assistance. It might, indeed, be urged that a legislative body cannot bind itself in the exercise of its legislative power, and that when Parliament has “otherwise provided” it can restore the *status quo*. But this contention has already been urged before the Judicial Committee without success. In *Brophy v. A.G. of Manitoba*<sup>1</sup> the Board said: “The Chief Justice of the Supreme Court (of Canada) was much pressed by the consideration that there was an inherent right in a legislature to repeal its own legislative acts, and that ‘every presumption must be made in favour of the constitutional right of a legislative body to repeal the laws which it has itself enacted.’ . . . Their Lordships are unable to concur in the view that there is any presumption which ought to influence the mind one way or the other.”

It is to be noted, however, that section 51 (xxxvi.) expressly empowers the Parliament to make laws with respect to “any matter in respect of which this Constitution makes provision until the Parliament otherwise provides”; and probably, therefore, the power of the Parliament to grant assistance under sec. 96 is perpetual, and the period specified in sec. 96 is to be regarded as a term in the federal bargain indicating that during this

transition period assistance to a necessitous State will be a proper and probable object of the Commonwealth concern. But the case is hardly *in pari materia* with the other cases for which “this Constitution makes provision until the Parliament otherwise provides.”

The colony whose exceptional position caused the principal difficulty in the financial adjustment was Western Australia. By section 95 Western Australia may, subject to various conditions, continue to impose duties for five years after the imposition of uniform duties of customs. These conditions are (1) that the duties shall not exceed those in force in Western Australia at the time of the imposition of the uniform duties of customs; (2) that they shall diminish by one-fifth annually; and (3) that they shall not be imposed on goods imported from without the Commonwealth except when the Western Australian duty is higher than that imposed by the Commonwealth.

*The Debts of the States.*—Section 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, and if such surplus is insufficient, or if there is no surplus, then the deficiency on the whole amount shall be paid by the several States. See also sec. 87.

*Customs, Excise, and Bounties.*—It is in regard to customs and excise duties—“the tariff”—that there is the most immediate connection between finance and trade, since such duties are imposed as well for the regulation of trade as for the raising of a revenue; and the main purpose of the Commonwealth was to secure uniformity in such duties, and their abolition as regards the intercolonial trade.

i. 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 passed to the Executive Government of the Commonwealth (sec. 86); and the departments of customs and of excise in each State were transferred to the Commonwealth (sec. 69). All property of the State, used exclusively in connection with the departments controlling customs and excise and bounties, vested in the Commonwealth (which is to pay compensation therefor) for such time as the Governor-General in Council may declare to be necessary; and the Commonwealth assumed the current obligations of the State in respect to the transferred departments (section

85). The laws of the State relating to the matters transferred will remain generally in force until the Commonwealth otherwise provides in virtue of section 108; but obviously some provisions are abrogated by the mere fact of transfer from the separate governments to a single government. By section 52 the Parliament of the Commonwealth has exclusive power to make laws with respect to matters relating to the control of the departments transferred.<sup>1</sup>

ii. But notwithstanding these provisions, the States retain the power to impose duties of customs and excise, and to grant bounties until the imposition of uniform duties of customs by the Commonwealth Parliament. Upon such imposition of uniform duties, the power of the Commonwealth Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods becomes exclusive, and the State laws imposing duties of customs or excise or offering bounties cease to have effect. (Section 90.)

iii. The exclusive power of the Commonwealth Parliament and the withdrawal of power from the States are subject to the following provisions:

(a) Under section 88, uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth. This is of course merely a directory enactment, unattended by any sanction.

(b) Any grant of or agreement for any bounty lawfully made by or under authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, 1898, and not otherwise. (Section 90.)

(c) “Nothing in this Constitution prevents 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.” (Section 91.)

(d) “. . . 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.” (Section 112.)

## **B. Trade.**

The power of the Commonwealth and States in matters of trade, commerce, and intercourse is subject to an important restriction in section 92, which must be considered after we have dealt with the nature of the power of the Commonwealth under section 51 (i.) over trade and

commerce with other countries and among the States.

*“Trade” and “Commerce.”*—These terms are used in the British North American Act, 1867, and the necessity of putting some limitation upon words of such wide import has been one of the great difficulties of construing that Act. In the Commonwealth Constitution, however, they are cut down by their accompanying words, “with other countries and among the States.” The power of the Parliament, therefore, is limited to foreign and inter-state trade and commerce. It is impossible to define such a power exactly. While its nature points to fiscal and economic regulations, and particularly to the removal of those barriers to trading intercourse which arise from the existence of separate political communities, it is not limited by those objects. In *Gibbons v. Ogden*,<sup>1</sup> Marshall, C.J., said: “The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.” The Commonwealth Constitution uses the terms “trade and commerce”; but the term “trade,” while it may serve to recall the regulations of trade which belonged to our old mercantile system, does not appear to extend or alter the power of the Parliament.<sup>2</sup>

Some assistance as to the extent of the power may be found in the Constitution itself, which declares that “the power of the Parliament to make laws with reference to trade and commerce extends to navigation and shipping, and railways the property of any State” (section 98); that Parliament “shall not by any law or regulation of trade or commerce abridge the rights of a State or the residents therein to the reasonable use of the waters of rivers for conservation or irrigation” (section 100); that Parliament “may by any law with respect to trade or commerce forbid as to railways any preference by a State or the authority constituted under any State” (section 102). The power therefore includes the regulation and control of transport and communication between the States, and the means thereof, whether they are natural or artificial, whether in public or in private hands. On the other hand, the inclusion in section 51 of “banking,” “bankruptcy and insolvency,” “bills of exchange,” and certain other matters as separate and independent heads of legislation, indicates that

“trade and commerce” does not embrace the whole of what is called “commercial law.”

“Among” is “intermingled with” (per Marshall, C.J., in *Gibbons v. Ogden*). The power of the Parliament does not extend to making a general and uniform law on all matters of trade and commerce, however desirable such a law may appear to be; thus, in the United States, a national combination to control the production of an article, although its effects were experienced throughout the country, was held not to be a matter of inter-state commerce, and therefore could not be regulated or forbidden by Congress.<sup>1</sup>

“The commerce of a State which Congress may control must in some stage of its progress be extra-territorial. It can never include transactions wholly internal, between citizens wholly of the same community, or extend to a polity and laws, whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such a community.”<sup>1</sup>

*Extent and Limitations of the Power.*—Sections 98 and 102 (with section 104) have been already referred to as expressly asserting or extending the power of the Parliament under “trade and commerce”; and on the other hand, sections 99 and 100 define or restrict the power of the Parliament. Section 99 provides that “The Commonwealth (*i.e.* the Parliament) 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.” This is an adaptation from the United States Constitution section ix., clause 6, as judicially construed in the “Passenger Cases.”<sup>2</sup> Preferences by laws of a State are not within the prohibition; they are sufficiently covered by the general power of the Commonwealth over “trade and commerce”; the special power of “The Parliament,” and the powers of the Inter-State Commission.

*The Power of the Parliament—Exclusive or Concurrent.* —After long controversy, the Supreme Court in 1851 decided in the case of *Cooley v. Board of Wardens of the Port of Philadelphia*<sup>3</sup> that the power of Congress to regulate commerce with foreign nations, and among the several States, was necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. Where the power of Congress to regulate is exclusive, the failure to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions, and any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom.

But the power to regulate commerce covers a vast field, containing many and exceedingly various subjects, quite unlike in their nature—some

demanding a single uniform rule, others as imperatively demanding diversity; in the latter case, in the absence of legislation by Congress, the State Legislature may properly make provision, though the matter is one of inter-State commerce. Finally, State legislation for the protection of the life, liberty, safety, health, comfort of its people, and for the protection of their property—the exercise of what is known as the “police power”—is not invalid merely because it incidentally affects inter-State commerce, if it does not extend beyond what is reasonably necessary for its legitimate purpose. But in all cases, of course, the legislation of the State, so far as it affects inter-State commerce, is liable to be over-ridden by an exercise of the paramount power of Congress.<sup>1</sup>

The main difficulty of these principles lies in their application—in determining what matters are of national concern requiring one uniform set of regulations, and what are proper for local regulation. But the statement of the difficulty suggests a question, which in a new Constitution demands consideration. It has been pertinently observed<sup>2</sup> that “the question, whether or not a given subject admits of only one uniform system or plan of regulation, is primarily a legislative question, not a judicial one. For it involves a consideration of what on practical grounds is expedient, possible, or desirable; and whether, being so at one time or place, it is at another. . . . It is not in the language itself of the clause of the Constitution now in question, or in any necessary construction of it, that any requirement of uniformity is found in any case whatever. That can only be declared necessary in any given case as being the determination of some one's practical judgment. The question then appears to be a legislative one; it is for Congress and not for the Courts—except indeed in the sense that the Courts may control a legislative decision so far as to keep it within the bounds of reason, of rational opinion. If this be so, then no judicial determination of the question can stand against a reasonable enactment of Congress to the contrary. . . . It would seem to follow that the Courts should abstain from interference except in cases so clear that the legislature cannot legitimately supersede its determinations; for the fact that the legislature may do this in any given case, shows plainly that the question is legislative and not judicial. . . . If it be thought that Congress will very likely be dilatory or negligent, or that it may even purposely allow and connive at what should be forbidden—that is quite possible. But the objection is a criticism upon the arrangements of the Constitution itself, in giving so much power to the legislature and so little to the Courts. It is to be observed, however, that the great object which the makers of the Constitution had in view as to this subject, was to secure power and control to a single hand, the general government, the common representative of all,

instead of leaving it divided and scattered among the States; and that this object is clearly accomplished” by the control of Congress. These are weighty reasons against the test applied by the American Courts, and may well prevail in a political system where the courts have been long accustomed to the supremacy of the legislature. Our Courts are not likely to declare any power of the Commonwealth Parliament to be an exclusive power, unless they find good warrant for it in the Constitution itself.

*Freedom of Trade and Commerce.*—The section in the Constitution which bears directly on the matter is section 92, whereby

“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.” This section was commended to the Convention as “a bit of layman's language on which no legal technicalities can be built.” The case was an unfortunate one for the exhibition of the layman's art, for of all vague and varying words in the political vocabulary, “free” is probably the worst. Here we can do no more than indicate a few of the difficulties that beset the application of the section.

The most obvious meaning is that which springs from the association of the clause with the imposition of uniform duties, and the declaration that the power of the Parliament over customs, excise, and bounties shall be exclusive. *Noscitur a sociis*. “Absolutely free” would therefore mean that commerce among the States was to be free of all duties of customs and excise; and, as the power of the States to impose such duties has been already taken away by section 90, section 92 would operate as a restriction upon the Commonwealth Parliament alone. For such a limited application, some support might be found in the observations of Marshall, C.J., in *Barron v. Mayor of Baltimore*,<sup>1</sup> “that the limitations on power, if expressed in general terms, are naturally, and we (*i.e.* the Supreme Court of the United States) think necessarily, applicable to the government created by the instrument. They are limitations of power granted by the instrument itself; not of distinct governments framed by different persons and for different purposes.” But the section is associated with others, which, while expressly conferring power on the Commonwealth, are expressly taking away or saving the powers of the States, not in matters incidental or collateral, but in a matter vital to the Commonwealth. In such a case it is reasonable to suppose that the section must have a wider interpretation; that it operates upon the Commonwealth Parliament and the States; and that at the least the absolute freedom of trade, commerce, and intercourse is impaired by any charge (not merely of customs and excise duties), by whatever name it may be called or on whatever pretence it may be levied,

which is in substance a tax (in the broad sense of the word) upon the intercourse of persons, or the commerce in goods among the States. Charges for services rendered are not *ejusdem generis*; they are in promotion, not in hindrance of intercourse. Charges for railway services, reasonable tolls for the advantage of ports and improved waterways, may be imposed. But a charge for services may become a tax if the charge is unreasonable, or if it is used to the prejudice of intercourse among the States. Discriminating and preferential railway charges are dealt with in section 102, and a question may well arise whether they are to be exclusively dealt with under that section, or fall also within the control of the judicial power.

It is not clear that “absolutely free” in section 92 applies to obstructions or restrictions upon commerce which are not in the nature of a tax. It is natural to turn to the American decisions for aid in this matter. There we find that the expression “free from any restrictions or impositions,” and similar phrases, are used by the Courts in describing the total inability of the States to regulate inter-State commerce. Thus, in *Robbins v. Shelby County Taxing District*,<sup>1</sup> the Supreme Court of the United States, stating the doctrine of constitutional law on the subject of the inter-State commerce, says: 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, is repugnant to such freedom.” Again, in *re Rahrer*,<sup>2</sup> the Court says: “The laws of Iowa, under consideration in *Bowman v. Railway Company*, 125 U.S. 465, and *Leisy v. Hardin*, 135 U.S. 100. . . . amounted, in fact, to a regulation of (foreign or inter-State) commerce. Hence. . . . it was held that, so long as Congress did not pass any law to regulate it specifically, or in such a way as to allow the laws of a State to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammelled, and therefore the laws of Iowa referred to were inoperative in so far as they amounted to regulations of foreign or inter-State commerce. It followed as a corollary that when Congress acted at all the results of its action must be to operate as a restraint upon that perfect freedom which its silence ensured.” In other words, “freedom” means absence from all interference. But in the same case the Court is careful to point out that the Constitution does not guarantee the absolute freedom of inter-State commerce, but only protects it from the embarrassment of diverse regulations by the States by confiding the powers of regulation exclusively to Congress. The Commonwealth Constitution does the very thing which the United States Constitution does not do. By a clause which

binds both the Commonwealth Parliament and the States, it provides that trade, commerce, and intercourse shall be “absolutely free.” But if inter-State commerce is to be absolutely free from all interference or regulation, what becomes of the power confided to the Commonwealth Parliament to make laws with respect to trade and commerce among the States?

It may be that section 92 expresses as to the States the doctrine of non-interference with inter-State commerce, which has been declared in the United States to arise by necessary implication as to matters of a national character. If so, it must apply unequally to State and Commonwealth; and the latter, while it may be restrained by it from taxation, prohibition, and perhaps from all regulation, the essential and unequivocal nature of which is to impede commerce, may for the rest operate freely upon the matter. And, of course, it is hardly a correct assumption that every regulation of commerce, even by the State, is an intrusion upon freedom of commerce, a truth which is recognized in the sufferance of the States to deal with those matters of inter-State commerce which admit of local regulation—“aids to commerce,” as they have been called.<sup>1</sup>

The embodiment of the United States doctrine of freedom would still leave it open to the States to make laws under its police power for the life, safety, and health of its citizens, though such laws might incidentally affect foreign or inter-State commerce.<sup>2</sup>

It is to be noticed that section 92 only becomes operative on the imposition of uniform duties of customs; and during the time preceding such imposition the Commonwealth is, like the United States, without express provision on the subject.

It is submitted that in the Commonwealth the mere grant of the commerce power to the Parliament does not make it in any way exclusive, and that the States may, until uniform duties are imposed, freely deal with inter-State commerce, except so far as they are expressly prohibited (as under section 117), or as may be inconsistent with the legislation of the Parliament. After uniform duties are imposed, the further restraint will depend on the exclusive power of the Commonwealth over duties, and on the construction put upon section 92. The Commonwealth Constitution, unlike the Constitution of the United States, makes a particular enumeration of exclusive powers; and it is reasonable to suppose that if the commerce power had been intended to be exclusive, it would have been included in the enumeration.

*The Inter-State Commission.*—Section 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 the laws made thereunder.

The nature of the Commission is indicated in the clause; it is to combine the functions of adjudication and administration. It was suggested by the Inter-State Commerce Commission in the United States and the Railway and Canal Commission in the United Kingdom, and may be expected to exercise powers of each of those bodies. The Inter-State Commerce Act, 1887 (U.S.), provided for the appointment of a Commission to carry out the objects of the law, which were in the main to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preferences to persons, corporations, and localities; to inhibit greater compensation for a shorter than for a longer distance over the same line; and to abolish combinations for the pooling of freights. The Commission is a special tribunal, whose duties, though largely administrative, are sometimes semi-judicial; but it is not a Court empowered to render judgments and enter decrees.<sup>1</sup> It investigates facts; reports and makes orders upon them; but to enforce those orders it must resort to the Courts, and the Courts may investigate the whole merits of the controversy, and form an independent judgment.

The Railway and Canal Commission in England, as constituted by the Act of 1888, is empowered to order the Railway Companies to obey the provisions of numerous Acts of Parliament, under which they are bound, amongst other things, to afford reasonable facilities for traffic; and are forbidden to give undue or unreasonable preference or advantage in favour of any person, company, or description of traffic. Such undue preference may arise from a difference in treatment to any trader or class of traders, or to the traders in any district, in respect of the same or similar merchandise, or of the same or similar services. It may intervene, not merely at the request of an individual alleging the infringement of his right, but also on the complaint of the Attorney General, the Board of Trade, and various local authorities or associations of traders or freighters, without proof that the body is aggrieved by the matter complained of, if the Board of Trade has certified the body to be a proper one. In addition to ordering the Company to redress the wrong for the future, the Commission may award damages to a person aggrieved in full satisfaction of any claim which the party would have had by reason of the matter of complaint. The Commission has now full power to carry out its awards, and is armed with the powers of a court of record.

How far the Inter-State Commission will resemble the one body or the other can be determined only after it is appointed, for while its powers cannot extend beyond the execution and maintenance of the provisions of

this Constitution relating to trade and commerce and of all laws made thereunder, its only powers within those limits are such as the Parliament thinks it necessary to confer upon it. There is of course no means of compelling the Parliament to confer any powers upon the Commission, but it is to be noted that the power of the Parliament to forbid railway preferences as undue or unreasonable, or unjust to any State, is dependent upon a finding to that effect having been made by the Commission (sec. 102). It is well settled in England that what is *undue* or *unreasonable* is a question of fact to be determined in each case, by looking at the matter broadly and applying common sense. The fact that railways in Australia are the property of the State, and that they have been constructed in many cases for quite different reasons than immediate gain or profit from their traffic, leads to the enactment of two provisions in the Constitution:

1. That, in determining whether a preference or discrimination is undue or unreasonable or unjust to any State, regard is to be had to the financial responsibilities incurred by the State in connection with the construction and maintenance of its railways. (Section 102.)

2. 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. (Section 104).

The questions that have arisen in the past as to railways in Australia, and therefore presumably the class of case with which the Commission will be mainly concerned, are singularly different from the typical preference and discrimination cases in England and America. Speaking generally, it may be said that the problem in England and America has been how to protect the trader and the passenger against various kinds of oppression by the Railway Companies, and to discourage combination and to encourage competition. In Australia, the question has been rather how to reconcile the interests of the railway proprietors—the Governments—each of which has deemed itself entitled to a monopoly of certain traffic. It is only fair to add that cases of favour or oppression of individuals, which account for much of English and American legislation, have been conspicuously absent in Australia. Favour of localities, however, is not unknown—the anxiety of New South Wales and Victoria has been to bring the trade to their respective capitals as much as to secure traffic for their railways.

The powers of the Inter-State Commission may extend beyond the railways and transportation. They may for example be called on under section 99 to determine whether the Commonwealth has by any law of

trade or commerce given preference to a State or part thereof over another State or part thereof; or, under section 100, to decide whether the Commonwealth has abridged the right of a State or resident therein to the reasonable use of the waters of rivers for conservation or irrigation. It is submitted, however, that these matters will still be within the cognizance of the Courts so far as the redress of individual grievances is concerned, as by the award of damages in proper cases. Possibly the Parliament may be able to confer upon the Commission the power to award damages to a person aggrieved which the Railway Commission in England now enjoys; but it is conceived that a person aggrieved could not be compelled to resort to the Commission, and it may be doubted whether the recovery of damages in the Inter-State Commission would be a bar to an action in the Courts, though of course it would affect the amount recoverable. The Inter-State Commission seems to be in the position of some other bodies which have been referred to—it has mixed administrative and judicial powers, but it is not a court. It belongs not to the “judicial power,” but to the executive—the very terms which describe its possible functions for “the execution and maintenance . . . of the provisions of this Constitution,” relating to trade and commerce, “and of all laws made thereunder,” recall the terms in section 61 establishing and vesting the executive power.

Section 103. The members of the Inter-State Commission:

- i. Shall be appointed by the Governor-General in Council;
- ii. Shall hold office for seven years, but may be removed within that time by the Governor-General in Council on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity;
- iii. Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

1 (1873) 16 Wallace, 36.

1 12 A.C. 575.

2 4 Wheaton, 316.

3 12 A.C. 575.

1 157 U.S., p. 429. See the Opinion of Field, J.

1 See *Inter-State Commerce Commission v. Baltimore and Ohio Railway Co.*, 145 U.S., at p. 277; *Parker v. G. W. R.* (1844), 7 Man. and G., 253; *G. W. R. v. Sutton* (1869), L.R., 4 H.L. 226; *L. & N. W. R. v. Evershead* (1878), 3 A.C. 1029.

2 But taxation according to benefits received has been held not to conflict with the requirement of uniformity in States Constitutions. See Cooley, *Constitutional*

*Limitations*, 6th ed., p. 613, etc.

1 Per Marshall, C.J., in *M'Culloch v. Maryland*, 4 Wheaton, 316, 431.

2 (1887) 12 A.C. 579.

1 Cooley, *Constitutional Law*, p. 61.

1 Hare, *American Constitutional Law*, vol. i., p. 245.

2 *Dow v. Black*, L.R., 6 P.C. 272.

3 Hare, *American Constitutional Law*, vol. i., pp. 246, 248.

1 [1895] A.C. 202.

1 It should, of course, be understood that nothing more is transferred than what relates to customs, excise, and bounties. The Customs Acts of the Colonies and the Departments of Customs deal with many matters which are quite outside duties of customs; these things, and executive and legislative powers of the States over them, are of course unaffected.

1 (1824) 9 Wheaton, 1.

2 See Lefroy, *Legislative Power in Canada*, p. 551 n., for a view submitted in Canada, but inapplicable in the Commonwealth as to the significance of "trade."

1 *United State v. E. C. Knight Coy.*, 156 U.S. 1. (The case of the Sugar Trust.)

1 Cooley, *Constitutional Law*, p. 68.

2 7 Howard, 283.

3 12 Howard, 299.

1 The principles are stated, and the cases collected in *Robbins v. Shelby County Taxing District* (1887), 120 U.S. 489. See also chapter xviii.—The States.

2 By Professor J. B. Thayer, *Cases on Constitutional Law*, p. 2190.

1 (1833) 7 Peters, 243.

1 (1887) 120 U.S. 489.

2 (1891) 140 U.S., p. 545.

1 *County of Mobile v. Kimball* (1880), 102 U.S. 691.

2 The United States Ordinance of 1787 for the Government of the Northwest Territory provided that all navigable waters should be for ever free; and on the admission of new States an Act of Congress has provided for free navigation. The cases in which the Courts have considered this provision may be referred to in connection with section 92. The most important are: *Escanaba Company v. Chicago*, 107 U.S. 678; *Cardwell v. American Bridge Company*, 113 U.S. 205; *Hamilton v. Vicksburg Railway Company*, 119 U.S. 280; *Huse v. Glover*, 119 U.S. 543; *Sands v.*

*Manistee Improvement Company*, 123 U.S. 288. See Cooley, *Constitutional Law*, pp. 85, 86, and notes.

1 Rorer, *Inter-State Law*, p. 421 n.

## **Chapter XII. The Executive Power: Organization of the Executive.**

SIR WILLIAM ANSON introduces the subject of his second volume on the Law and Custom of the Constitution, by the observation that “In every political society there must be some person or body which acts on behalf of the whole, which represents the state as dealing with other states, which represents its collective force and will in maintaining amongst its own citizens the rules which the society has made or accepted for the preservation of order and the promotion of the public welfare.” In the history of Australia, the want of such an authority to speak and to act for the whole has been as potent a factor in producing union as the absence of a common legislative power. The authority must be continuous, and not occasional; it must be capable of prompt and immediate action; it must possess knowledge and keep its secrets; it must know discipline. In a word, it must have qualities very different from those which belong to the large representative and popular bodies which in modern times exercise legislative power.

It is characteristic of English methods that there has been small attempt to analyze the nature of the threefold division of governmental functions which we recognize. When the distinction was being established, men were content to reason that this particular power belonged to the King in his Council, that to the King in his Courts, and that other to the King in Parliament. It was only after the lines of action were settled in England that men began to analyze for the benefit of others who had their own constitutional arrangements to make. The supremacy of Parliament has generally made it unnecessary for us to consider the distinctions with scrupulous accuracy, and the existence and undoubted validity of a number of anomalies has kept us from over refinement. It is for the King to put the law into operation and to admonish his subjects that they keep it; to execute the law by bringing offenders to justice, by maintaining and supporting courts of justice, and by carrying out the judgments of those courts. On the other hand, the King may not alter the law; may not make an offence where none is; may not establish new penalties or novel tribunals. These matters belong to the Parliament. Such are the lines upon which the distinction between executive and legislative has been founded. The typical executive officers have been the sheriff and the constable.

But there is much more in government than mere execution of the law, whether enacted or unenacted; just as there is more in human conduct than the creation of legal relations. The state is a going concern; it has affairs

which must be managed with prudence and judgment and which are not necessarily related to law in any other sense than that in which all conduct may be bounded by legal restraints. It is perfectly true that a very great part of this business of the state is regulated by law more than is the like business of private individuals; as an owner of property and as an employer of labour, the state sets rules to its agents; and to a very great extent, in Australia at any rate, these rules create rights against the Crown. But were those laws directing and controlling the management of the state affairs repealed, the business would not itself come to an end; it would simply have to be carried on under conditions of greater freedom and more responsibility by the agents of the state. In modern and settled times, it is the conduct of the business of the state which men mean by government; the execution of the law is assumed as a thing of course; and the term “executive” has seemed little apt to describe functions which are so far removed from justice and police. Sir G. C. Lewis suggested that the term “administrative” would serve better to indicate the “stewardship” or “management” of government.

In speaking of the Executive Government, then, the term “Executive” must be understood in a very broad sense; and we are not to expect a complete statement of the functions of the Government in a legal instrument. For more than one reason, Statutes defining the Constitutions of the Colonies have been almost silent on the subject of the powers as of the organization of the Executive. In the first place, the legislative power has included the power of making full provision for the execution of the law. Secondly, a large measure of executive power resides in the prerogative of the Crown, and has been conferred through prerogative acts and not by Statute, lest thereby the prerogative should be prejudiced. Finally, the organization of the Government and the relations of the Ministry and Parliament in our system are a very type of matters which are not under the continual direction of organic laws, but are freely organized as utility has suggested or may suggest within the ultimate bounds of law. The attempts which have from time to time been made to reproduce in terms of law for the colonies some of the conventions of the British Constitution—as in the relations of the two Houses of the Legislature as to Money Bills—have not been very successful. Constitutional Statutes for the colonies, and even the prerogative instruments which accompany them, do no more than hint at the Cabinet System, and the delicate relations of the Crown and Parliament. They differ from the British Constitution on which they are modelled, principally in this—that they do hint at the Cabinet System. They contain some provisions which imply a Parliamentary executive; they speak of “officers liable to retire upon

political grounds,” even of “responsible ministers of the Crown.” It would be impossible to frame a constitution upon the Law of Victoria such as the Convention at Philadelphia in 1787 framed upon the Law of the British Constitution as expounded by Blackstone.

### **Extent of Executive Power.**

The short chapter ii. on the “Executive Government,” then, is necessarily suggestive rather than expressive; it passes in rapid survey a very great extent of ground. By section 61, the executive power of the Commonwealth “extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.” The executive power therefore is not limited to the execution of the enactments of the Commonwealth Parliament; it is to maintain the Constitution, a duty the import of which can of course be gathered only from a consideration of the whole instrument. It has been already pointed out, in considering the incidental powers of the Legislature, that the executive numbers amongst its duties the protection according to the common law, of the organs of the Commonwealth government—that in fact there is a peace of the Commonwealth as well as a peace of the States,<sup>1</sup> and of this peace the Executive is the guardian.

There are of course many powers conferred expressly upon the principal executive officer in the Commonwealth, the Governor-General. This is notably the case in the chapter on the Parliament, where the Governor-General has important powers and duties in relation to constituting, summoning, proroguing, and dissolving the Parliament. But there are other powers and duties which, though not in terms conveyed to any department, primarily at any rate fall to the Executive as the appropriate organ for Commonwealth action, *e.g.* by section 119 “The Commonwealth shall protect every State against invasion, and on the application of the Executive Government of the State against domestic violence.”

Incidentally, the declaration that the executive power extends to the execution and maintenance of this Constitution is a warning against a not unlikely tendency to exaggerate the jurisdiction of the Courts as guardians of the Constitution. There is no provision in the Constitution applicable to the Judiciary which makes it in any special way the guardian of the Constitution; that protection arises, as will be seen, solely as an incident of judicial power. It is not to be assumed that every power and function, because it is provided for in the Constitution, is necessarily cognizable in some way by the Courts. In many matters the legislature, and in many others the executive, will be the final interpreters of their duties. The duty

of the executive government to execute and maintain the Constitution, as every other duty involving the exercise of a discretion, is a duty attended by political sanctions only.

### **Organization of the Executive Government.**

The establishment of a federal executive power of course adds to the complexity of governmental relations. Although in the past complexity and not simplicity in the sources of laws has been characteristic of our colonial institutions, there has been in each of the colonies but a single executive and a single system of courts to enforce those laws. In the Commonwealth duality runs through all the functions of government.<sup>1</sup> It is true that the scheme of the Constitution is to reproduce the Crown in the Commonwealth; and just as the Queen is a constituent part of the Parliament, so the Executive power of the Commonwealth is vested in the Queen (as is the executive government in Canada), though it is exerciseable by the Governor-General as the Queen's representative. It has already<sup>2</sup> been pointed out that, except in a few cases, colonial governments have no corporate existence save in the Crown, and that it has been a question whether colonial ministers hold office under the Crown. The Letters Patent command "Our Ministers and Officers" in the colonies to be obedient, and the Instructions speak of "Our Executive Council"; but despatches from the Colonial Office to the Governor generally speak of "Your Ministers." The ordinary usage of the Colonial Office was perhaps not unconnected with the fact that the "Colonial Ministers of the Crown," "Her Majesty's Ministers for Victoria," were associated with awkward claims. The Commonwealth Constitution brushes aside all doubts on this question by declaring that Commonwealth Ministers are the "Queen's Ministers of State for the Commonwealth" (section 64); and in section 44 it speaks of the "Queen's Ministers for a State."

Notwithstanding the general vesting of executive power by section 61, it is within the discretion of the Parliament to provide the machinery for carrying out its own laws, to establish bodies or offices to which their execution is entrusted, and it would appear even to designate the persons who shall constitute such bodies or fill such offices. It is long since our Legislatures departed from the practice of laying down merely the broad outlines of law; the characteristic of British legislation has been extreme minuteness of enactment, the extent to which it has plunged into the details of administration. It is true that at the present day there is a tendency in the Legislature to permit much to the Crown in Council, or in the colonies to the Governor-in-Council. Even in the United States it is admitted that the

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

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

### **Powers of the Executive Government.**

The exceptional reference to executive power in the Commonwealth Constitution, and the provision that it shall be exercisable by the Governor-General, raise a question of great importance which has been considered more than once even under the colonial constitutions. The opinion was strongly held by the late Chief-Justice Higinbotham (Victoria) that under the Constitution Acts of the Colonies the executive power of self-government was no less complete than the legislative power, that “the executive government of Victoria possesses and exercises necessary functions under and by virtue of ‘the Constitution Act’ similar to and co-extensive, as regards the internal affairs of Victoria, with functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain,” and that “the Executive Government of Victoria in the execution of the statutory powers of the Governor express and implied and in the exercise of its own functions, has a legal right and duty, subject to the approval of Parliament, and so far as may be consistent with the Statute law and the provisions of treaties binding the Crown, the Government, and the Legislature of Victoria, to do all acts and to make all provisions that can be necessary, and that are in its opinion necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria.”<sup>1</sup> The Governor having thus a Statutory authority to exercise within the colony, every power of the Crown belonging to its internal government, such authority could not be enlarged, lessened, or withdrawn by the Crown, and consequently the grant of powers by prerogative instruments was idle, and the attempt to define and limit the

exercise of such powers was illegal.<sup>1</sup> The Chief-Justice held accordingly in the Chinese Immigration case—*Toy v. Musgrove*—that the executive government of Victoria could exercise the power (which was assumed to be part of the prerogative) of excluding aliens, though no such power had been conferred on the Governor by the Letters Patent, Commission, or Instructions. The full Court held by a majority that the Constitution Act had for its primary object the establishment of a bi-cameral legislature with full legislative power, and that though undoubtedly it contained provisions which indicated an intention to introduce a system of responsible government, it was impossible to infer from these isolated expressions a grant to the Executive Government of all the powers over internal affairs exercisable by the Crown in the colony.

The difference between the Constitution Acts of the Colonies and the Commonwealth Constitution lies, as has already been pointed out, in the explicit grant of executive power by the latter, and it must be conceded that the Governor-General has, *virtute officii*, and without special grant from the Crown, the “executive power of the Commonwealth.” But the question remains what that power is, and section 61 itself gives the answer: “It extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth.” It is of course clear that the Executive Government of the Commonwealth cannot claim power within the sphere of action reserved to the States; and it seems not less obvious that the subjects committed to the Commonwealth Parliament—save in the matters expressly committed to the Executive as well as the Legislature (sec. 70) come within the sphere of executive action as distinguished from deliberation and representation to the Imperial Government, only when there has been legislation upon them and only to the extent of carrying out that legislation.<sup>1</sup> Thus, the power of the Parliament to make laws with respect to “external affairs” does not *per se* imply an executive power to make treaties nor “the relations of the Commonwealth with the islands of the Pacific” a power to annex Pacific islands. There are, in fact, many powers which the Commonwealth Government may desire, but which it will enjoy, if at all, not directly under the Constitution, but by grant from the Crown, or by virtue of some Act of the Parliament over which, of course, the Crown has control. This is perhaps recognized by section 2, whereby the Governor-General has, and may exercise in the Commonwealth, subject to this Constitution, “such powers and functions of the Queen as Her Majesty may be pleased to assign to him”; but the application of that section to matters other than those incident to the Parliament and “legislative power” must from its place in the Constitution be doubtful.

There is one power commonly associated with executive power of which, from the important part which it has played in the Constitutional arrangements of the self-governing colonies, a word must be said. The pardoning power—the prerogative of mercy—has, in all the colonies, been delegated to the Governor by the express terms of the Commission or Instructions. The Crown has in practice conferred upon Colonial Governors only a limited power to pardon offenders; and until lately the matter stood, to some extent, outside the scheme of responsible government in Australia, since the Governor, though bound to consult his Executive Council, was specially instructed to decide “either to extend or to withhold a pardon or reprieve, according to your own deliberate judgment, whether the members of our said Executive Council concur therein or otherwise.” It was not until 1892 that the matter was put upon a footing satisfactory to the Australian Colonies by the adoption of the practice obtaining in Canada, whereby the instruction as to personal consideration is confined to cases in which a 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 Colony.” Even now, Colonial Governors are not empowered to exercise the full prerogative of pardon—the delegation applies only to convicted offenders; and it happens from time to time that an Australian Government desiring to pardon an alleged offender, before conviction, has to seek the aid of the Imperial Government, and does not always obtain it.

The question is, whether the Commonwealth Government is in the ordinary or an exceptional position as to this prerogative. It is one which is essentially necessary to the administration of criminal law; but an unbroken constitutional practice is sufficient warrant for the opinion expressed by the Chief Justice of Canada, that “it is not incidental to the office of a Colonial Governor, and can only be exercised by such officer in the absence of legislative authority under powers expressly conferred by the Crown.”<sup>1</sup> Is section 61 a sufficient legislative authority? The matter is not free from doubt; but it is submitted that under section 61 the Governor-General has statutory authority to pardon offenders. The Imperial Government, however, appears to hold a different view, for the power is expressly given, with certain limitations, by section 8 of the Instructions. (See Appendix.)<sup>2</sup>

The executive power in every part of the Queen's dominions is part of the prerogative, and therefore section 61, so far as it vests generally the executive power of the Commonwealth in the Crown, is merely declaratory of the common law. The British North America Act, 1867, section 9, uses more appropriate terms when it says: “The Executive Government, and

authority of and over Canada, is hereby declared to continue and be vested in the Queen.” The statutory authority to the Governor-General to exercise the executive power cannot of course be withheld or withdrawn by the Crown from the office; and, practically, this will suffice to make the Governor-General's power, in many cases, exclusive of all other exercise by the Crown. But in some cases the existence of a power in the Governor-General may still admit of its exercise by the Crown; and in such a case the ordinary presumption in favour of the prerogative would, notwithstanding the pointed designation of the Governor-General as “the Queen's representative,” seem to prevent the Crown from being limited to the exercise of the power through the Governor-General. Thus, though the Governor-General may exercise the pardoning power of the Crown, the Crown may also exercise the power through Imperial Ministers, and that whether the Governor-General has refused to pardon or not. The law on petitions of right affords an interesting illustration of the vitality of prerogative in a matter which is onerous rather than beneficial. Most of the Australian Colonies have passed Statutes establishing a procedure analogous to that upon the Petition of Right; but the Imperial Law Officers have uniformly held that the powers conferred by these Statutes upon the Colonial Executive do not supersede the common law powers of the Crown. Consequently, when the Colonial Executive has refused to cooperate in the submission of claims against the Government to a judicial tribunal, petitioners have carried their claims to the Queen, and the Secretary of State, after consultation with the Imperial Law Officers (as to Western Australia in 1897, South Australia in 1894, and New South Wales in 1863), has, as a matter of ministerial duty, advised her Majesty to grant her *fiat* that right be done in the Court of the colony concerned.

There are many powers in the Constitution which are in terms vested not in the Crown but in the Governor-General, or the Governor-General in Council. Some of these consist of powers which, according to the theory of the British Constitution, belong to the Crown as supreme executive authority, and would, if the Constitution were silent, be exerciseable in the Commonwealth by such authority as the Crown might designate. Others are the mere creation of the Constitution, and belong to the Governor-General as the Ministerial officer, under that instrument appointed. The latter are no doubt exerciseable by the Governor-General alone. As to the others, there is room for some doubt. By section 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.” Here, though the power is a prerogative one, its nature makes it exclusive. And it is probably a safe general conclusion that the object of the express grant of powers to the

Governor-General, or the Governor-General in Council, as distinguished from the general grant to the Queen, was to indicate that the power was exercisable by the authority designated alone.

The position of the Governor of a Colony as Commander-in-Chief of the Forces is one as to which there has been naturally much misconception. In England the king gave up the personal command of the army upon the establishment of the office of General Commanding in Chief in 1793. In the colonies, however, the civil and military government have nominally remained in the hands of one person. For this there are several reasons. In the first place—and this is true of several of the Australian Colonies—the military command has often preceded the civil government, and it was but gradually that the government passed out of the military to the civil state. In the second place, even in colonies which have reached an advanced stage of self-government in civil matters, defence has been regarded as in the main an Imperial affair; and notwithstanding the general withdrawal of the Imperial forces from the self-governing colonies, the local forces which have been raised and maintained by the colonies have generally been under the immediate direction of Imperial officers, who for many causes, social as well as military, were disposed to regard themselves as outside the scope of the local government of the colony. Even Chief-Justice Higinbotham, above all others the champion of independence in local affairs, treated the control of Her Majesty's military and naval forces as a matter in which the Governor was bound to obey instructions given to him by the Crown directly or through the Secretary of State. In all these circumstances it was natural that there should be not a little friction. The Governor's own position is defined by the Colonial Office Regulations.<sup>1</sup> Though bearing the title of Captain-General or Commander-in-Chief, he is not, without special appointment from Her Majesty, invested with the command of Her Majesty's Regular Forces in the Colony, and in the event of the Colony being invaded, the officer in command of Her Majesty's land forces assumes entire military command over the forces. Most of the difficulties that have arisen are described by Mr. Todd in *Parliamentary Government in the Colonies*, chapter xii. "Imperial Dominion exercisable over self-governing colonies: in naval and military matters."<sup>2</sup> The most important of these questions has been as to the right of communication on military affairs between the Governor and the officers commanding the forces without the intervention of the colonial minister of defence. The principle is now generally recognized that the forces locally raised and maintained are, in the words of Sir Henry Parkes, as much subject to the responsible government of the colony as any other branch of the public service. The provision of section 68 of the Commonwealth Constitution vesting the

command in chief of the Naval and Military Forces of the Commonwealth in the Governor-General as the Queen's representative is intended to carry out these principles, and in no way points to the exercise of independent powers.<sup>3</sup> The whole military and naval organization of the Commonwealth is a matter to be undertaken by the Ministry, which is responsible therefor to the Parliament. In this organization there must be some division of functions between military and civil officers; and if a reasonable standard of efficiency is to be maintained, appointments, promotions, dismissals, and discipline must be treated as non-political matters. But this organization is subordinate to the cardinal principle of ministerial responsibility; and the question of the limits within which Parliamentary control is legitimate in matters of administration is not peculiar to the subject of defence, or to the affairs of the colonies.<sup>1</sup>

It should be noted that the Letters Patent and the Commission of the Governor-General go somewhat beyond the Constitution. The latter deals only with the command of the naval and military forces of the Commonwealth; the former contain no such qualification, and in virtue thereof the Governor-General is the Commander-in-Chief of all forces, whether Imperial or Colonial, in the Commonwealth. The relation of Imperial forces to the Colonial Government when on active service is discussed by Mr. Todd in reference to the difference between Sir Bartle Frere and Mr. Molteno in 1877.<sup>2</sup>

1 Cf. United States—*In re Neagle* (1889), 135 U.S. 1.

1 But the State Executive may be used as the instrument of the Commonwealth. This will be further considered under the head of the States.

2 *Ante*, “Nature and Authority of the Federal Commonwealth-Union under the Crown,” chapter iii.

1 Cooley, *Constitutional Limitations*, p. 135-6. And see *Kendall v. U.S.*, 12 Peters, 524.

1 *Toy v. Musgrove* (1888), 14 V.L.R. 349, at p. 397.

1 The opinions of the Chief Justice are also set out in a memorandum addressed by request to the Secretary of State (Lord Knutsford). See *Memoir of George Higinbotham*, by Edward E. Morris, p. 209.

1 A contrary view has been held in Canada with reference to the powers of the Dominion and Provincial Executive. See Lefroy, 111–114.

1 The Pardoning Power Case (*A.G. for Canada v. A.G. for Ontario*), 23 S.C.R. 468-9.

2 In America it has been laid down that though the power to pardon offenders is

vested by several State Constitutions in the Governor, it is not a power which necessarily inheres in the Executive. (*State v. Dunning*, 9 Indiana, 20.)

1 Chapter ii., sec. ii.

2 See also chapter iv., p. 135.

3 The first General Order of the Commander-in-Chief in the Commonwealth was issued in connection with the inauguration of the Commonwealth, and was addressed to the Minister of State for Defence, directing him to inform the Major-General commanding the forces, etc.

1 On the question of the relation of a Minister to Parliament in respect to the army, reference may be made to Anson, *Law and Custom of the Constitution*, vol. ii., p. 369.

2 Todd, pp. 380–388.

## **Chapter XIII. The Federal Executive Council and the Queen's Ministers of State.**

### **The Cabinet System.**

IN the vesting and exercise of powers, the Constitution distinguishes between the "Governor-General" and the "Governor-General in Council." Section 63 declares that "the provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council," whence it might be inferred that all the powers conferred upon the Governor-General were intended to be exercised by him upon his own discretion. But though the terms are not wholly unconnected with the distinction between personal action and action on the advice of Ministers, this is not the main character of the distinction. Statutory powers conferred or duties imposed upon the colonial executive have generally been exerciseable or performable only by the Governor in Council; powers emanating from the Crown have been exerciseable by the Governor in some other form of law than an Act or Order in Council. While in both cases powers have been exerciseable, if not always on the *advice* of Ministers, yet always in accordance with the doctrine of ministerial responsibility, the co-operation of the Executive Council in a colony no more ensures action in conformity with modern constitutional practice than does the co-operation of the Privy Council in acts of the Crown in England, for, as we shall see, the Executive Council is in some cases formally distinct from the Ministry. In one matter, however, the use of the terms "Governor-General" and "Governor-General in Council" adverts, as do the Constitution Acts of the colonies, to the constitutional practice of the cabinet system. The appointment of "officers to administer the Departments of State," is a power conferred upon the Governor-General (sec. 64), while the appointment of civil servants (sec. 67) and of the justices of the Commonwealth Courts (sec. 72) is to be made by the Governor-General in Council. The terms used in this connexion serve to point a contrast between the choice of Ministers, which is an act of personal discretion without the advice of Ministers, and the ordinary patronage of Government which is under ministerial control.

*The Federal Executive Council.*—After the Governor-General, the principal executive organ is the Federal Executive Council. Though it is established "to advise the Governor-General in the government of the Commonwealth" (sec. 62), its characteristic function is action rather than

advice. There are no legal qualifications for membership, but every Minister of State must be a member of the Council (sec. 64). On the other hand, an Executive Councillor is not necessarily a Minister of State. An Executive Councillor is not, as such, the holder of an office of profit, and is therefore not disqualified for a seat in the Parliament. Members of the Council “shall be chosen and summoned by the Governor-General and sworn as Executive Councillors,” and hold office during pleasure (sec. 62). This must be subject to existing constitutional custom; there can be no duty in the Governor-General to summon particular members to the Council. There is great scope for choice in the constitution of the Council. It might become, like the Privy Council, a body composed of present and past Ministers, great officials, and other persons who have attained eminence in any sphere, and upon whom the membership is conferred as an act of honour. Or, like the Executive Council in Victoria, it might consist of present and past Cabinet Ministers. Or, again, like the Executive Council of New South Wales and the Privy Council in Canada, it might be limited to the Ministry of the day, including in that term, of course, the “honorary members” of the Cabinet.<sup>1</sup>

*The Ministers of State.*—After the Federal Executive Council come the Queen's Ministers of State for the Commonwealth, who are appointed by the Governor-General “to administer such Departments of State of the Commonwealth as the Governor-General in Council may establish” (sec. 64). They hold office during the pleasure of the Governor-General; their offices are such as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs (sec. 65). The annual sum of £12,000 per annum is appropriated to the payment of the salaries of the Ministers of State, but Parliament may alter the amount.

It is in the sections relating to the Ministers of State that the Commonwealth Constitution goes further than any existing Colonial Constitution in establishing an organic relation between the Ministers and Parliament. For not merely does the Constitution, following the British and Colonial Constitutions absolve Ministers from the general disqualification of holders of offices of profit for a seat in Parliament (sec. 44), but by sec. 64 it provides that “after the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a Senator or a Member of the House of Representatives.” The other provisions regarding the Ministers of State, though they are made with a view to the Cabinet System, do not preclude very extensive modifications of that System. There is no recognition of the Cabinet, for as pointed out the Federal Executive Council is not necessarily identical in constitution or functions with a Cabinet. There is no recognition of the collective

responsibility of the Ministers of State; section 64 treats them as separate administrative officials and there is no hint of a Prime Minister. There is nothing to prevent the virtual establishment of Ministries elected by Parliament<sup>1</sup> which at one time found some favour in Australia, though they cannot be given the fixity of tenure which the instability of political parties has recommended to many persons. All that has been done is to establish a Parliamentary Executive; the rest is left as in England and the colonies generally to custom and convention.

It has been already stated that the development of the Executive Council is a matter of uncertainty—it may or may not be identical in constitution with the Cabinet. There is another point connected with the Ministry upon which a comparison may be made with English practice. In England, the Cabinet and the Ministry are not identical bodies, the latter includes a large number of officers “liable to retire upon political grounds” (to use an expression common in the colonies) who are able to sit in Parliament. In Australia there are no Ministers outside the Cabinet; and the habitual inclusion of law officers in the Cabinet has had the result of making those appointments dependent much more on political than professional position. The Constitution Acts designate a limited number of offices tenable with a seat in Parliament; and the Commonwealth Constitution by enacting that, until the Parliament otherwise provides the Ministers of State shall not exceed seven in number, practically makes it certain that all the Ministers will be in the Cabinet. The other point of difference between English and Australian practice is the existence of what are sometimes called “honorary Ministers” or “Ministers without a portfolio” in the colonies. No Constitutional rule seems to be more firmly established in England than that which, treating the Ministry as a body of departmental chiefs, confines it, to adopt Addington's description of the Cabinet, to the persons “whose responsible situations in office require their being members of it.” It is true that the rule has been broken; that the Duke of Wellington and Lord John Russell were both members of the Cabinet without holding any office, but in each case strong objections were made to the practice, not by a political opponent, but in the one case by the Prime Minister, Sir Robert Peel, and in the other by the Queen herself. In Australia on the other hand every cabinet includes from one to three members who hold no office and receive no salary. They are not to be compared with the light administrative offices—such as the Privy Seal, the Chancellorship of the Duchy of Lancaster, or the First Lordship of the Treasury, held by important members of the Cabinet with heavy parliamentary or party duties. They are generally held by gentlemen of whom it may be said without intending any disparagement that they are politically deemed of less account for the moment than their

colleagues.<sup>1</sup> The “honorary Ministers” or “Ministers without a portfolio” are generally members of the Upper House, and sometimes the only members of the Government in that House, for it is not unknown that the Prime Minister finds himself compelled to distribute all his salaried offices in the House upon whose support the Ministry mainly depends. The honorary or non-official member of the Cabinet may be expected to form a regular feature in Commonwealth Cabinets.<sup>2</sup>

There are two considerations which may mark off a Federal Cabinet from the Cabinets of the Colonies. The Senate is bound to be stronger than any existing Legislative Council, and the Ministry must accordingly be strongly represented there. In the second place, in the construction of Cabinets some regard must be had to the State principle. In accordance with this necessity, the first Australian Cabinet included representatives of every State,<sup>1</sup> and there was great discontent in Tasmania that no office was given to any one from that State. Doubtless the claim of State representation in the Cabinet will become less powerful, but it must retain some force. These considerations probably tend to produce an increase in the size of Cabinets, since the Prime Minister will be as little able as in an unitary government to afford to leave out men who are individually able or influential.

It was part of the theory of responsible government held by the late Chief Justice of Victoria and enunciated by him in *Toy v. Musgrove*,<sup>2</sup> that not merely had the Governor *virtute officii* all executive power exerciseable in relation to the internal affairs of the Colony, but that as matter of law those powers were exerciseable only on the advice of the colonial ministry, and that any instructions by the Crown through the Imperial Ministry as to the exercise of those powers were void and illegal. On this point as on the other, the majority of the Supreme Court were against the Chief Justice. As to the Commonwealth Constitution there is no hint save in section 63 as to the advice by which the Governor-General shall act. Advice and instructions naturally fall in the main outside effective legal arrangements. The Ministry cannot perform executive acts without the co-operation of the Governor-General, and the Governor-General, as a servant of the Crown, responsible politically not to any authority in the Commonwealth but to the Crown alone, will doubtless be guided by such instructions as he may receive from the Secretary of State, and there would be nothing illegal though there might be something unconstitutional in the popular sense in instructions being given as to any or all of the powers of the Governor-General. But neither the Instructions nor any other prerogative instrument can limit the powers conferred by Statute, and if the Governor-General should in the exercise of powers conferred on him by the Constitution,

designedly or inadvertently act contrary to his Instructions this will not affect the validity of his act; the sole sanction lies in the responsibility of the Governor-General to the Crown.

The successive steps taken upon the inauguration of the Commonwealth are interesting as illustrating the relation of the various authorities. By virtue of the Royal Proclamation of September 17, 1900, the federating colonies were united in a Federal Commonwealth on January 1st, 1901; and under section 3 of the Act of Queen had on October 29, 1900, constituted the office of Governor-General and Commander-in-Chief and had appointed the Earl of Hopetoun thereto. On January 1st, 1901, the Royal Proclamation was read at Sydney, and the Governor-General took the prescribed oaths, and thereupon made proclamation that he had assumed the office. The next step was the constitution of the Federal Executive Council, which consisted of nine gentlemen who were to form the first Cabinet. Then the Governor-General proceeded, "with the advice of the Federal Executive Council," to establish the following departments of State, viz.:

The Department of External Affairs.

The Attorney General's Department.

The Department of Home Affairs.

The Department of the Treasury.

The Department of Trade and Customs.

The Department of Defence.

The Postmaster-General's Department.

Finally the Governor-General appointed seven members of the Federal Executive Council to administer the Departments respectively allotted to them.<sup>1</sup> In accordance with the doctrine of ministerial responsibility, all the notifications of these executive acts were signed by Mr. Edmund Barton, the gentleman who had successfully undertaken the task of forming a Ministry.

On the establishment of the Commonwealth the departments of Customs and Excise in each State became transferred to the Commonwealth Government (sec. 69). Under Proclamations of the Governor-General, of Feb. 14th and Feb. 20th respectively, the departments of each State for "Posts, telegraphs, and telephones," and "Naval and military defence," were transferred on March 1st, 1901. Under sec. 70 the Commonwealth Government became invested in the transfer, with all the powers and functions of the States Governments in respect to the departments in question. The other departments referred to in sec. 69 have not yet (May, 1901) been transferred.

*Note.*—The Departments of State are in general sufficiently explained by

their titles. The Premier has however explained some of the duties which belong to his own department—the Department of External Affairs—and to the Department of Home Affairs. The Minister for External Affairs will have to deal with immigration and emigration, the influx of criminals and the relations with England, communications with the Governor-General and the Home Government, also communications with the various States of the Union, the Executive Council and the officers of the Parliaments; also the railways of the Commonwealth. Some of these duties hardly fit in with the description “External Affairs”; but they mark out the office as one likely to be assumed, as in the first Ministry it has been assumed, by the Premier. The Department for Home Affairs includes public works, the question of the federal capital, the Inter-State Commission, the Federal elections, public service regulation, old-age pensions, and the acquisition and construction of railways where the States concerned have given their consent.<sup>1</sup>

1 For a consideration of the relative merits of the Victorian and New South Wales system, see correspondence between Sir A. Helps and Sir H. Parkes, *Fifty Years in the making of Australian History*, Parkes, vol. i., p. 305.

1 The curiously worded ¶ 65 may be found to have some bearing on this subject.

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

2 The first Commonwealth Cabinet contained two “honorary members.”

1 *New South Wales*: Mr. Barton, Sir William Lyne, and Mr. R. E. O'Connor (Executive Councillor without portfolio); *Victoria*: Sir George Turner and Mr. Alfred Deakin; *South Australia*: Mr. Kingston; *Queensland*: Sir J. Dickson; *Tasmania*: Mr. N. E. Lewis (Executive Councillor without portfolio); *West Australia*: Sir John Forrest.

2 (1888) 14 V. L. R., 349.

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

1 Speech of the Prime Minister at Maitland on January 17th, 1901. See the *Melbourne Age*, January 18th.

## **Chapter XIV. The Judicature.**

THE objects of the national judiciary in the Constitution of the United States—objects of paramount importance and fundamental to free government—are stated by Story to be, first a due execution of the powers of government, and secondly, a uniformity in the interpretation and operation of those powers and of the laws enacted in pursuance of them; and to the attainment of these ends, the national judiciary ought to possess powers co-extensive with those of the legislative department, and must be so organized as to carry into complete effect all the purposes of its establishment.<sup>1</sup>

These objects are effected in the Commonwealth Constitution.

Judicial power is an essential element in government and the administration of law; and in a composite government with its inevitable conflicts, there must be some provision which shall ensure finality both in enforcement and interpretation of the law. This practically implies a central judicature which shall be supreme, for the Courts of the States, whatever their learning, wisdom, and good faith, however free from all imputation of bias, must nevertheless frequently differ so as to make uniformity impossible, while the mere co-ordination of a federal and state judiciary would simply add to the confusion of authority. In Canada, though the Provinces constitute, organize and maintain the Provincial Courts, the Dominion Government appoints, pays and if necessary removes the Judges of the Courts in the Provinces and has established over all a Supreme Court with appellate jurisdiction, and various other Courts for the better administration of the Laws of Canada (British North-America Act, 1867, sec. 101). It must be remembered, too, that the Dominion control over Provincial legislation, and the grant of exclusive powers to each were devised with a view to minimising occasions of conflict. In the Commonwealth, as in the United States, consistently with the principle of State autonomy, the States continue to control their judiciary, and hence it is essential that the Commonwealth powers should be enforced and guarded by an independent judiciary. On the other hand, if the States are to be secure against the intrusion of the Commonwealth organs, it is equally clear that the Commonwealth Judiciary should not be readily subject to the pressure or control of the Commonwealth Legislature or Executive.

The Commonwealth Judiciary is not the mere auxiliary of the Parliament and the Executive Government; it has, like them, an independent duty, but only within its own sphere of judicial power, to uphold and maintain the Constitution against all attack, whether from the Commonwealth Executive

or Legislature or the State Governments. If we ask, whence comes this duty of the Courts to determine whether the Commonwealth or the State Parliament has exceeded its powers, we shall hardly find an answer in the Constitution itself. Nor shall we find the explanation in the essential nature of the federal principle, or of the “written constitution.” In Germany the relation of the Courts to Imperial and State legislation is a matter of dispute; but there is every authority for saying that the Legislature must be the interpreter of its own powers, as it is in France and Belgium where the Constitution affects to bind the Legislature. Conformity to the Constitution in Switzerland is obtained by a method in entire harmony with the political ideas of that country: federal laws are not subject to review in the Courts, but may be challenged by 30,000 citizens or eight Cantons. Cantonal laws, on the other hand, are subject to review in the Federal Courts; but, consistently with the doctrine of the independence of the Legislature in its own sphere, their validity cannot be questioned in the Courts of the Cantons. The system under which the valid exercise of legislative power is treated as a judicial question belongs to the history of the relation of courts of law to public power. In the reign of James the First the Courts succeeded in making good their claim to entertain legal causes, though they involved the prerogatives of the Crown, whether in the nature of property or executive power. Thus they effectually prevented the establishment of any practical distinction in the administration of public and private law; and if, on the one hand, questions of power are treated judicially in suits between individuals, it is not to be forgotten that all justice is with us “public justice,” and that the term “private justice” is not known amongst us. If executive power was thus a subordinate power subject to judicial review, it was by no means clear that legislative power was not subject to the same control, and there were dark hints of Acts of Parliament which had been declared invalid, or at any rate might be so declared. The supremacy of Parliament, however, became unmistakably established. But there were other legislatures as clearly subordinate. The American Colonies held charters of government from the Crown; and were constantly reminded that they must keep within the terms of the grant. Control by forfeiture of charter, by Act of Parliament, by judicial proceedings, and an ultimate appeal to the Privy Council, whose action might be referred now to one, now to another of its high functions—these were the constitutional checks with which the colonies were familiar. A subordinate legislature being within the experience of all, the Revolution, though it removed some of the external checks, established a form of government which emphasized the subordinate character. It was not readily assumed in the Federal Constitution, that the judicial power in the Courts would be all-sufficient to

deal with the possibilities of conflict. In the Philadelphia convention it was successively proposed that the general government should have a negative on all the legislation of the States—the power which eighty years later was given to the general government in Canada; that the Governors of the States should be appointed by the United States, and should have a negative on State legislation—a condition also established in Canada; that a Privy Council to the President should be appointed, composed in part of the judges; and that the President and the two Houses of Congress might obtain opinions from the Supreme Court. But these expedients were discarded; the Constitution and the laws of Congress were declared the supreme law of the land and binding on the judges of the several States. It was not without some hesitation on the part of the Courts, and some resistance on the part of the Legislatures, that the further steps were taken by the Courts of holding, in the case of both the States Constitutions and the Federal Constitution, that the Courts must, as a matter of judicial duty, hold invalid laws which were inconsistent with the distribution of powers within the respective governments.

It is interesting to observe how questions similar to those which agitated the framers of the United States Constitution were dealt with by the Australian Convention. In the early history of the Australian colonies, the Legislature and the Supreme Court were brought into curiously close relation by the part which was assigned to the Chief Justice in the Legislative Council of the Governor of New South Wales by 4 Geo. IV., c. 96, sec. 29; and by the compulsory submission of all Acts of the Legislative Councils to the Supreme Court for the consideration of their validity under 9 Geo. IV., c. 83, sec. 22. But these examples did not influence the deliberations of the Convention. The members of the Convention were, however, thoroughly acquainted with the prevalence and the nature of judicial control as developed in the United States, a control experienced in some small degree by the colonies themselves, notably in the early days of responsible government in South Australia. The tendency was, in fact, rather to exaggerate than to underrate the controlling power of the courts. In general, the power was regarded with singularly little jealousy or suspicion, a phenomenon entirely in accord with the tendency of the day to submit to judicial authority problems which are more economical or political than legal. Two substantive proposals were submitted as to unconstitutional laws. In the first place, it was moved that when any law passed by the Commonwealth Parliament was declared *ultra vires* by any decision of the High Court of Australia, the Executive might, upon the adoption of a resolution by absolute majorities in both Houses, or, as was suggested, in one House alone, refer the law to the electors for their

approval. The other proposal was of a more sweeping kind. It was to the effect that the plea that a law of the Commonwealth or of a State was *ultra vires* should not be raised in any Court, except, in the case of a Commonwealth law, by or on behalf of any State, or, in the case of a State law, by or on behalf of the Commonwealth, but without prejudice to the power of the Courts in any litigation to deal with conflicts of Commonwealth and State law. The proposal received no support, and the maintenance of the individual right to impugn laws is the more significant because in other respects the Constitution differs markedly from the Constitution of the United States in not establishing rights of individuals against governmental interference.

The duty of passing upon the validity of Acts, whether of the Commonwealth or of the State Parliament, exists purely as an incident of judicial power. It belongs not to any one Court, or any system of Courts, but to all Courts within the Commonwealth whatever their degree, whenever in a matter in litigation before them some Act of the one Legislature or of the other is invoked. It is the duty of every Court to administer the law, of which the Constitution is a part, and a superior part. "The judges of the United States control the action of the Constitution, but they perform purely judicial functions, since they never decide anything but the cases before them. It is natural to say that the Supreme Court pronounces Acts of Congress invalid, but in fact this is not so. The Court never directly pronounces any opinion whatever upon an Act of Congress. What the Court does do is simply to determine that in a given case A is or is not entitled to recover judgment against X; but in determining that case the Court may decide that an Act of Congress is not to be taken into account, since it is an act beyond the constitutional powers of Congress."<sup>1</sup> No principle is better established than that the Courts will not consider the validity of a Legislative Act except at the instance of one whose rights are touched by such Act<sup>2</sup> ; and the case must be one in which the Courts can afford relief. Many of the provisions in the Constitution of the Commonwealth, as in the Constitution of the United States, are outside the scope of judicial sanctions. In a dependent community such "political" matters are fewer than in an independent political society; but reference has been made to several examples in the course of this work.

It is possible of course that the principle object of a suit may be to obtain a judgment upon the constitutionality of a Statute. The immediate matter in dispute may be trifling in amount; but the suit is a "test case." That is no ground upon which the Court can refuse jurisdiction. But it must be a real and not a fictitious suit; the Courts will not permit issues on feigned facts. Between these cases lies the "friendly" or "collusive" action, *i.e.* one in

which are present all the facts which ordinarily give jurisdiction to the Courts and raise an issue, but the suit is a “friendly” one, and there is a substantial identity of interest of the parties, or the acts which give rise to the action have been done for the purpose of creating an issue to be tried. Such a course is not uncommon; in England and the colonies some of the most important constitutional questions have been determined in collusive actions. It is obvious that as authorities such cases may rightly be regarded with suspicion, but the Supreme Court of the United States has gone the length of declaring that the Courts will not in such a cause consider the validity of a Statute. In 1891, in the *Chicago and Grand Trunk Railway Company v. Wellman*,<sup>1</sup> the Court said: “The theory upon which apparently this suit is brought is that the parties have an appeal from the legislature to the Courts; and that the latter are given an immediate and general supervision of the constitutionality of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any Act of any legislature, State or Federal, and the decision necessarily rests on the competency of the legislature to so enact, the Court must, in the exercise of its solemn duties, determine whether the Act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort and as a necessity in the determination of real, earnest, and vital controversy between the individuals. It never was thought that by means of a friendly suit a party beaten in the legislature could transfer to the Courts an inquiry as to the constitutionality of the legislative Act.” The English practice seems more favourable to friendly suits, if at any rate they are brought and conducted in good faith. In *Powell v. Kempton Park Racecourse Company*,<sup>2</sup> the suit was avowedly a friendly suit, the purpose of which was to obtain a decision of the highest judicial tribunal as to the construction of an Act of Parliament. It is true that to ask the Court to construe an Act of Parliament is not quite the same thing as to ask the Courts to declare that a State Statute is invalid, but each is the judicial determination of a question of law in a matter where the parties have rights. Lord Halsbury said (p. 157), “I think it is right to say that in my view it is absolutely immaterial what motive has induced the plaintiff to bring this action. Once it is brought, the Court before whom it comes must decide according to law, and the construction of an Act of Parliament is a pure question of law, and must be decided according to its legal construction whatever may be the motives and wishes of the respective litigants.” And Lord James of Hereford said (p. 190), “It seems clear that the action was brought in good faith for the purpose of obtaining an

authoritative and final judgment. Probably the plaintiff will regard with satisfaction his want of success in the action. But the judgment whatever it may be will and must be acted upon. This therefore is not a case where the judgment of a judicial tribunal is sought for the purpose of determining a right for mere abstract purposes.”

The consideration of constitutional questions purely as an incident of judicial power has one great advantage; “The judicial control”—Mr. Bryce objects to the expression altogether—is exerted with the least possible amount of friction. But it has two considerable effects. The practical importance of a decision of the Courts lies in its authority as precedent; and it may well be for the public interest that a cause involving great constitutional questions should not be left wholly in the hands of the parties. The parties may not be able to command the best legal assistance, or they may be content with the decision of a Court which is not the court of ultimate appeal. These inconveniences may of course be mitigated by the public authority concerned taking up and carrying on the case,<sup>1</sup> or by the intervention of such authority as an interested third party where the circumstances admit it. In the case of *St. Catharines Milling and Lumber Company v. Reg*<sup>1</sup> (on the information of the A.G. for Ontario), the claim of Ontario in respect to certain lands was resisted on the ground that they were the property of the Dominion; and in granting leave to appeal, the Judicial Committee provided that, as the case raised large questions of right between the Province and the Dominion, the Dominion should be at liberty to intervene.

The other defect of the system belongs to the accidental character of litigation,<sup>2</sup> an inconvenience which belongs to all judiciary law. In England the authority of Parliament is now available to settle disputed questions of law. But this was not always the case; Parliament was normally divided rather than united, and Parliamentary action requires unity. The great importance of judicial determinations in the seventeenth century lay in the fact that as the disputes concerned the powers of the constituent parts of Parliament, itself, these parts could not co-operate to settle or change the law. The opinion of the judges, whether judicially or extra-judicially expressed, was a powerful weapon, which the king was eager to turn to his own advantage. He was not disposed to wait nor did law or custom then require him to wait, until litigation should arise. In a Federal Constitution, the circumstances are somewhat analogous. The Constitution is in no case readily alterable; it is quite likely that the very nature of the dispute precludes the necessary co-operation of powers. In any case there may be many uncertainties which may embarrass the Government and paralyse its action. The Government desires to know not whether they have done right,

but whether they may do this or that thing. Very early in the history of the United States Constitution, the judges of the Supreme Court had to decide upon their attitude towards questions of law addressed to them by the Executive. In 1793, Washington sought the opinion of the judges of the Supreme Court as to various questions arising under treaties with France, but after some delay the judges, “considering themselves merely as a legal tribunal for the decision of controversies brought before them in a legal form, deemed it improper to enter the field of politics by declaring their opinion on questions not growing out of the case before them.”<sup>1</sup> In several of the States of the Union, the Constitutions have provided that the judges shall give opinions when called on by the Executive or the Legislature. Such opinions are never regarded by the judges themselves as authoritative, and may be departed from by the Courts even when constituted by the judges who have given the opinion; they are given under an obvious disadvantage, since the judges have not the assistance of the arguments of counsel. In Canada, by the Supreme Court Act, 1875 (R.S.C., c. 135), extended by 54 & 55 Vict. c. 25. the Governor-General in Council may refer to the Supreme Court various specified matters including questions touching Provincial legislation and the constitutionality of any legislation of the Parliament of Canada, and generally any other matter with reference to which the Executive sees fit to exercise this power; and in certain limited cases, the Senate or House of Commons may seek the assistance of the Court. These references are modelled closely upon the form of judicial proceedings. It is the duty of the Court to hear and consider the matter referred to it; parties interested, whether Provincial Governments, associations, or individuals, are cited, and are represented by counsel, and the finding of the Court is practically a declaratory judgment, on which an appeal may be taken to the Queen in Council. The power may be compared both with the power of the House of Lords to consult the judges, and the power of the Crown under 3 & 4 Will. iv. c. 41 sec. 4 to refer to the Judicial Committee for hearing or consideration any such matters whatsoever as the Crown shall think fit. The power has been very freely exercised, and most of the important constitutional questions which have come from Canada to the Privy Council during recent years have been submitted under it.

The inconvenience of determining certain matters as abstract questions has been referred to,<sup>1</sup> but the Court is able to guard itself, and the power of reference seems to have been exercised with advantage. It may be noted that the proposal submitted to but rejected by the Australian Convention for prohibiting any challenge of a Statute as *ultra vires* save on behalf of the Commonwealth or a State, assumed that a substantive proceeding

might be taken in the Court by the Attorney General of the one or the other for the determination of the validity of such a Statute. In Canada, as in other Colonies, the Judiciary is organised under the Parliament, which fully determines its functions. In the Commonwealth, as in the United States, it is judicial power which is vested in the Courts, and it is clear that the advisory function is not included in that power, even when the Court may hear evidence and arguments to aid it in giving advice. By the Local Government Act, 1888, sec. 39, any question arising or about to arise as to whether any business, power, duty or liability passes to a County Council under the Act, may, without prejudice to any other mode of trying it, on the application of certain persons be submitted for decision to the High Court of Justice; and the Court after hearing such parties and taking such evidence (if any) as it thinks just, shall decide the question. In *ex parte the County Council of Kent v. Council of Dover*,<sup>2</sup> the Court of Appeal held that such an application was purely consultative and not judicial, that it “could only be decided in the sense of expressing the opinion of the Court how it ought to be decided,” when the question should arise in an actual determination of an existing dispute in which a private right was involved.

It has been pointed out that the organization of the judicial system of the Commonwealth must be such as to enable it to fulfil its functions. It must be able to assume cognizance of causes competently brought before it where the Constitution and the respective powers of the Commonwealth Government and the States are concerned. It must be protected against interference by the other parts of the Commonwealth Government. Before considering the organization of the judicial system, it is necessary to point to two other phases of the judicial power of the Commonwealth. Not merely is it a guardian and interpreter of the Constitution, which if not supreme is at all events superior to the like power in the States; but certain matters, by reason of the cause or the parties being deemed of especial concern to the Commonwealth as a whole, are assigned specifically to it; and finally it embraces, subject to limitations to be considered, the supreme appellate jurisdiction over all Courts within the Commonwealth.

### **The Judicial System.**

Section 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.

Thus the Constitution establishes and provides for the constitution of but one court. This Court cannot be abolished, nor can the jurisdiction, which it will be seen is assigned to it, be taken away except by an amendment of the Constitution. As to other federal courts, their establishment, their continuance, and their share of the judicial power of the Commonwealth are in the power of the Parliament. The power to invest the State Courts with federal jurisdiction is important and convenient; it avoids a multiplicity of tribunals, and the heavy cost of a large judicial establishment; and it is entirely justified by the high reputation for integrity and ability enjoyed by Australian Courts.

The extent of judicial power is nowhere expressly defined as it is in the Constitution of the United States. It consists of a general appellate jurisdiction (sec 73) and a jurisdiction over the matters specified in sections 75 and 76, which is partly vested in the High Court and for the rest to be defined by the Parliament under section 77.

1 Story, *Constitution of the United States*, sections 1576-7.

1 Dicey, *Law of the Constitution*, p. 155. It is perhaps going too far to say that the Court never directly expresses any *opinion* upon an Act of Congress.

2 This is well illustrated by the recent case of *Tyler v. Judges of the Court of Registration* (Mass.), 21 Supreme Court Reports 206, noted in *Harvard Law Review*, vol. 14 (1901), pp. 529, 542.

1 143 U.S. 339.

2 [1899] A.C. 143.

1 As in *A.G. for Ontario v. Mercer* (1883), A.C. 767, where the contest was virtually as to whether certain prerogative rights in land belonged to the Crown in right of Ontario or of the Dominion of Canada. The defendant was content with the judgment of the court of first instance, but the Dominion of Canada appealed in the name of the defendant, and was heard in the Supreme Court and in the Judicial Committee. The latter treated the public character of the case as reason for making no order as to costs. And see Todd, *Parliamentary Government in the Colonies*, p. 541.

1 (1888) 14 A.C. 416.

2 See Bryce, *The American Commonwealth*, Pt. i. cap. xxiv. Every one who wishes to understand the matters here referred to should read Mr. Bryce's account of the Relation of the Courts to the Constitution in the United States.

1 Marshall's *Life of Washington*, vol. v. 441.

1 *A.G. for Dominion v. A.G. for Ontario* [1898], A.C. 700, at p. 713.

2 [1891] 1 Q.B. 725.

## **Chapter XV. The Appellate Jurisdiction: The Crown in Council and the High Court of Australia.**

THE vexation of appeals to the Privy Council is an old colonial grievance, of which traces may be found even in the seventeenth century; and in the early history of the federal movement in Australia there were few matters which were more frequently appealed to as demonstrating the need for union than the hardships and inconvenience of “a distant and expensive system of appeal.” The delay and the cost of a proceeding in the Privy Council, and the occasional weakness of the Judicial Committee, amounted to a real grievance; submission to an external Court was a sentimental grievance which counted for much in countries proud of their new-won powers of self-government. But time has worked changes; and if in the later history of federation the establishment of a general appellate court has been assumed, the desire for such a court has hardly been an effective force. Cable communication and a regular and rapid steam service have diminished delays; from one cause or another the cost of litigation in England is not greater than in Australia; the Judicial Committee has been made a sufficiently strong Court to command the confidence of everyone, and the sentimental grievance has been met, under Lord Rosebery's Act of 1895, by the admission of colonial judges to the Board. Other causes have been at work to modify opinion. The enormous investments of English money in the colonies, and the importance of Australian credit at a time when several of the colonies are suffering a recovery from financial disaster, have made the commercial interests favourable to a tribunal submission to which may be regarded in England as a pledge of good faith. Some importance is attached among the same classes as well as in the legal profession to the maintenance of uniformity of law throughout the Empire. A few years ago the project of a code of commercial law for the Empire was approved by the Congress of Chambers of Commerce for the Empire, and recommended to the consideration of the colonies by the Secretary of State. The scheme may or may not prove to be practicable, but it was evident that the break with English judges would be a step backwards. The public in general has too thoroughly acquired a habit of cynical indifference towards litigation to be greatly interested in the question as one of efficient administration of justice; but the discussion was caught in the tide of loyalty which swept over the country, and a strong public opinion declared against any severance of Imperial ties. The result, therefore, was compromise. The long expected general court of appeal was established; and the appellate jurisdiction of the Privy Council is retained

under conditions which, whatever their demerits, respect local and Imperial sentiment, and in the main preserve the royal prerogative without creating the evil of a multiplicity of appeals. The scheme is contained in section 73 (Appellate Jurisdiction of the High Court) and section 74 (Appeals to the Queen in Council).

Section 73. The High Court shall have jurisdiction with such exceptions and subject to such regulations as the Parliament prescribes to hear and determine appeals from all judgments, decrees, orders, and sentences.

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court.

(ii.) Of any other federal court or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other Court of any State from which at the time of 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.

Section 74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise in virtue of Her Royal prerogative to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such

limitation shall be reserved by the Governor-General for Her Majesty's pleasure. (*vide* section 60.)

On these sections the following observations may be made:

1. Section 73 shows the High Court in its two capacities—first, the Supreme court of federal jurisdiction in the Commonwealth; secondly, the general court of appeal in the Commonwealth. In the first capacity, it may be compared with the Supreme Court of the United States; in the second, with the Supreme Court of Canada.

2. Section 73 not merely confers jurisdiction on the High Court where there is a right of appeal, but grants a right of appeal to the litigant, for the jurisdiction is to hear appeals from *all* judgments, etc. But it is subject to restriction by the Parliament, and in the case of appeals from the State Courts is limited by the section itself.

3. There is no appeal as of right to the Queen in Council from any judgment of the High Court in its appellate jurisdiction. The words used in sec. 73—“final and conclusive” —are the words used of the Canadian Supreme Court, and have been assumed by the Judicial Committee to mean that the right to appeal to the Queen in Council is not continued in cases where an unsuccessful litigant in a provincial court has resorted to the Supreme Court of Canada.<sup>1</sup>

4. The declaration of sec. 73 that the judgment of the High Court shall be final and conclusive, would not impair the prerogative of the Queen to entertain such appeals in Council as a matter of grace, whether there were express words saving the prerogative or not.<sup>2</sup> The last paragraph of section 74 does contain words saving the prerogative to grant special leave of appeal from the High Court to the Queen in Council, but the terms of that section affect the prerogative in two ways: (1.) The words introducing the saving clause—“Except as provided in this Constitution”—make it evident that the first part of section 74 is intended to exclude the prerogative and that no leave to appeal in the class of cases there referred to is to be given except by the High Court. (2.) The Parliament may make laws in effect limiting the prerogative of the Queen to grant special leave to appeal from the High Court to Her Majesty in Council. There has been and is some doubt whether a colonial legislature in the exercise of its general powers, may not merely deprive the litigant of his right to appeal to the Queen in Council (which is admitted to be within its powers), but can also prevent him from asking and the Crown from granting special leave to appeal as a matter of grace.<sup>1</sup> In the Commonwealth, the Parliament receives an express grant of this power in the case of judgments of the High Court.

5. The circumstances in which the Judicial Committee will advise the Crown to grant special leave to appeal are very rare; it is part of the

declared policy of the Board to discourage such applications, and it has been laid down that leave will be refused “save where the case is of gravity, involving matter of public interest, or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.”<sup>2</sup> In the case of appeals from the High Court this is narrowed by the fact that the cases expressly withdrawn by section 74 from the prerogative power are typical cases in which, but for the withdrawal, special leave would be given by the Queen in Council.

6. The power of the High Court to grant a certificate to appeal in the cases withdrawn from the prerogative power, is established by the Constitution, and cannot be taken away or affected by the Parliament. It differs from the “leave of the Supreme Court” which under the Orders in Council is one of the conditions of “the appeal as of right” from colonial courts, since the High Court is to certify only “if satisfied that for any special reason the certificate should be granted.” The “special reasons” which will satisfy the High Court must, of course, to a great extent, be a matter of conjecture. A typical special reason might be found in the case provided for in the Draft Bill—questions which involve the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State. Probably if the matter of litigation itself affected some other part of the Queen's Dominions, the case would not fall within the prohibition—it would not be “as to the limits *inter se*.” But many conceivable cases “as to the limits *inter se*” of the constitutional powers in question might depend upon principles of common application throughout the Empire, and upon which it is eminently desirable that there should be an uniform rule declared by a common authority. Again, a case in which the High Court is divided in opinion, or in which it disagrees with a previous decision of the Court, may furnish a special reason for certifying for an appeal to the Queen in Council.

7. The prohibition of appeals to the Queen in Council, and the attendant power of the High Court to certify for special reasons apply howsoever the questions arise—whether in suits between private parties, or between the Commonwealth and a State or between States; or (if that course be possible) in a case stated for the opinion of the High Court.

8. The prohibition and the power apply only to the determination of the particular question of constitutional law, not to the determination of the whole case. If a case contains several points of law, only one of which falls within the provision, an appeal on all of them could only be had by leave of the High Court on the question of constitutional powers, and of the Queen in Council on the other matters. Further, if the question of

constitutional powers has not been raised and decided in the High Court, it would appear competent to the Privy Council to consider and determine it. Finally, the questions of constitutional powers referred to might reach the Privy Council for consideration and determination otherwise than on appeal from a decision of the High Court, in which case of course the Privy Council would have to decide them.

9. It is perhaps necessary to call attention to the fact that questions “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,” do not exhaust possible constitutional decisions of the High Court even in the narrowest sense of the word “constitutional.” The interpretation of the Commonwealth Constitution on many points will fall without those terms. The distribution of power amongst the organs of the Commonwealth Government; the exercise of power by Commonwealth or State in excess of their respective powers but not in derogation of the powers of the other, are illustrations. Questions of proprietary right such as have arisen between the Dominion and the Provinces in Canada, and are not unlikely to arise in Australia, are hardly questions of “constitutional powers.”

10. The subject of appeals from the State Courts is expressly dealt with only by section 73 (ii). The provision recognises that there may be some State Courts other than the Supreme Court from which an appeal lies to the Queen in Council. Not to speak of the old jurisdiction formerly exercised in some of the colonies by the Governor in Council as a Court of Error and Appeals from the Supreme Court,<sup>1</sup> Colonial Courts of Admiralty under 54 and 54 Vict. c. 27 are not identical with the Supreme Courts of the Colonies where the Act is in force; and it is probable that the Vice-Admiralty Courts in New South Wales and Victoria which have not yet been brought under the Act are not included under “courts of any State.” In Victoria, the Governor-in-Council has a statutory jurisdiction by way of appeal from judgments of courts of marine inquiry. Although the Queen in Council is the ordinary Court of final appeal in colonial cases, so that the terms used in section 73 are those which naturally suggest themselves as embracing the whole range of appellate jurisdiction, there is at any rate one case in which the appeal from a colonial court lies to another English Court—appeals from Colonial Courts of Inquiry under 45 and 46 Vict. c. 76, sec. 6,<sup>1</sup> lie to the Probate Divorce and Admiralty Division of the High Court of Justice.

11. The Commonwealth Parliament may make exceptions and regulations as to the power of appeal from State Courts to the High Court, subject to the limitation that it may not prevent the High Court from

hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council (section 73). The State Parliament has no power directly to define the conditions and restrictions applicable to appeals from its Courts to the High Court.

12. The present jurisdiction of the High Court to entertain appeals from the Supreme Courts of the States is defined by the clause of section 73, under which, “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.”

13. The jurisdiction of the High Court to entertain appeals from the State Courts does not extinguish the right of a litigant to appeal from the highest court of the State to the Queen in Council; the jurisdiction of the High Court is concurrent with, not exclusive of, the jurisdiction of the Queen in Council. The restrictive provisions of section 74 apply only where the High Court is the tribunal resorted to. The practice now well established in regard to judgments of the Supreme Courts of the Provinces in Canada is reproduced in the Commonwealth. In Canada, the party aggrieved by a decision of the Supreme Court of a Province may elect to prosecute his appeal either to the Queen in Council or to the Supreme Court of Canada. If both parties are aggrieved, one may appeal to the Queen in Council, the other to the Supreme Court of Canada, and in one case this course was actually taken.<sup>1</sup> This may be a “solecism in jurisprudence”; it may produce awkward relations in the particular case, and it may produce uncertainty of the law by reason of the conflict of authority. However, we are assured that no difficulty has resulted from the practice.

14. The right of appeal from the States Courts to the Queen in Council is regulated by Charters, Orders in Council under statutory power, and local statutes.<sup>2</sup> Over the rights so arising, the Crown and the State legislatures have full power—they may extinguish such rights, or they may grant rights of appeal in excess of those at present existing.

15. The fact that the right to appeal to the Queen in Council from the State Courts is not merged in the appeal to the High Court, and that the Crown and the States may regulate such appeals, suggests a question as to the meaning of the clause referred to in 12. Are the conditions and restrictions there referred to those existing at the establishment of the Commonwealth, or those which the Crown or the States may from time to time—the Commonwealth Parliament not having otherwise provided—ordain? Good reasons may be found for either opinion, but in a case which presents some analogy, the Judicial Committee pronounced against the

inclusion of prospective changes. The legislature of New South Wales had adopted a standing order, by which, for the regulation of matters of procedure not expressly provided for, resort was to be had to “the rules, forms, and usages of the Imperial Parliament.” The Judicial Committee held that in their application to the Legislative Assembly “the words naturally signify the then existing and known rules, forms, and usages of the House of Commons. In the absence of words of prospect or futurity, and any context indicating an intention so improbable as that of adopting by anticipation all future changes in the procedure or practice of the House of Commons,” their Lordships think it would be unreasonable so to construe the Standing Order” (*i.e.*, as to adopt future changes).<sup>1</sup>

16. The Commonwealth Parliament has no power to interfere with the right of appeal to the Queen in Council from the Courts of any State except where the matter is one falling within the subjects enumerated in sections 75 and 76. Those are matters of federal judicial power, and the Parliament may provide that they shall be brought into federal jurisdiction from the Courts of the State by appeal or otherwise.

17. Where a State Court has been invested with federal jurisdiction and is acting in that jurisdiction, there is of course no right of appeal to the Queen in Council. The appeal is to the High Court alone, and is subject to regulation by the Parliament.

18. If the right to appeal to the Queen in Council from the States Courts is unaffected by the jurisdiction of the High Court under section 73, *a fortiori* the prerogative of the Crown to receive appeals in Council from such Courts as a matter of grace is unimpaired. There is no corresponding power in the High Court, and consequently for the present the considerations which have influenced the Judicial Committee in determining whether special leave ought to be given to appeal from a decision of the Supreme Court of one of the Australian Colonies will apply with equal force to applications for leave to appeal from the Supreme Courts of the States. Thus, the only possible appeal from a State Court in a criminal case will be to the Queen in Council by special leave. But the Parliament may remove restrictions upon appeals to the High Court; and if it should do so, the fact that there is a right of appeal to the High Court will probably be a reason for refusing special leave to appeal to the Queen in Council from a judgment of a State Court. Whether the State Parliaments can by apt and sufficient words deprive the Crown of its prerogative to hear appeals as a matter of grace is one of the unsettled questions of constitutional law. The Crown is a party to colonial legislation, and colonial legislation frequently does impair the royal prerogative, whence it might seem that the State Parliaments could extinguish the prerogative of

grace. On the other hand, there is a distinction between prerogatives exercisable in a colony which may well be affected by the enactments of the colonial legislature, and *majora regalia* which, though belonging to the Crown in respect to the colonies, are not exercised there. These may be regarded as matters of Imperial and not local concern, to be affected only by the legislation of the Imperial Parliament. This is probably the better opinion.<sup>1</sup>

*Note.*—The tables on the following pages are the regulations under which at the present time appeals from the Australian States lie to the Queen in Council. They are in the main extracted from a Table prepared by Mr. Wood Renton, and published in the *Journal of the Society of Comparative Legislation*, December, 1899.

COLONY.	Authority under which Appeals are tendered.	Appealable Amount.	Limit of time within which leave to Appeal must be asked.	of Security Required.
NEW SOUTH WALES.	Order in Council of A November 13, 1850, under 9 Geo. iv. c. 83 (The Australian Courts Act, 1828). See Statutory Rules and Orders Revised, vol. iv., p. 347.	sum Fourteen or a days to the date of judgment appealed against.	Regulated by the Court below, and to be found within three months of the petition for leave to appeal. Execution may be suspended or carried out, respondent giving good and sufficient security. <i>Pro forma</i> judgment sufficient for purpose of appeal when judges equally divided.	
QUEENSLAND.	<i>Remarks</i> —By Order in Council of June 30, 1860, 38, sec. 24), appeal lies as to vacancy in Legislative Council. reciting 7 and 8 Vict., c. 69 (Judicial Committee Amendment Act, 1844.) (See Stat. R. and O. Rev., vol. iv., p. 366.) 24 and 25 Vict., No. 44.	As N.S.W.	As N.S.W. Not exceeding £500; otherwise as N.S.W.	
SOUTH AUSTRALIA.	Order in Council, June 9, 1860, reciting Judicial Committee Act, 1844. (See Stat. R. and O. Rev. vol. iv., p. 379.)	As N.S.W.	As N.S.W. Not exceeding £500; otherwise as N.S.W.	
TASMANIA.	Charter of Justice, March 4, 1831, for	From judgment Fourteen days.	Appellant's security regulated by Court	

reciting Australian or involving  
Courts Act, 1828 directly or  
(Stat. R. and O. indirectly claim  
Rev., vol. iv., p. to property or  
382). civil right of  
value of £1000.

below, within three  
months. Execution may  
be carried out or  
suspended, respondent  
or appellant giving  
security, as case may  
be.

VICTORIA. *Remarks*—As to the Order in Council, A sum Within  
relation between the Orders in Council June 9th, 1860, exceeding, or a fourteen  
and the Supreme Court Act, see *Ex parte* reciting Judicial claim to days.  
Rolfé (1863), 2 W. and W. 51: The Committee Act, property or civil  
Extended Hustlers' Freehold Company 1844 (Stat. R. and right amounting  
*v. Moore, etc.*, 5 A. J. R. 154; *Pearson v. O. Rev.*, vol. iv., p. to, £500. Under  
Russell (1889), 15 V. L. R. 89; 393: Local Act, the Local Act  
Commercial Bank *v. M'Caskill* (1897), Supreme Court Act, the appealable  
23 V. L. R. 343; Alliance Contracting 1890, section 231.) amount is  
*Coy. v. Russell* (1898), 23 V. L. R. 545. £1000.

Not exceeding £500.  
Otherwise as N.S.W.

WESTERN AUSTRALIA.

Order in Council, As N.S.W. As N.S.W. Within twenty-eight  
Oct. 11, 1861:  
Local Act, 24 Vict.,  
No. 15, section 29.

As N.S.W. Within twenty-eight  
days. Execution stayed  
if notice of appeal  
given and security  
perfected.

1 See *Johnston v. St. Andrew's Church*, 3 App. Cas. 159.

2 *Cushing v. Dupuy*, 5 App. Cas. 509.

1 See *Cushing v. Dupuy* (1880), 5 App. Cas. 409, 416.

2 *Prince v. Gagnon* (1883), 8 App. Cas. 102.

1 *E.g.* in New South Wales under the Letters Patent of April 2nd, 1787, 4 Geo. IV. c. 96 and The Charter of Justice, 1823. In South Australia, such a Court of Appeals was established by a local Act, 7 Will. IV. No. 5, and after an acrimonious conflict between the Supreme Court and the Cabinet, was confirmed and strengthened by 24 & 25 Vict. No. 5. The South Australian Court still exists but is rarely resorted to; and under the Order in Council of 1860 an appeal lies directly from the Supreme Court to the Queen in Council.

1 Merchant Shipping Act, 1894, sec. 478.

1 See Todd, *Parliamentary Government in the Colonies*, pp. 309, 310.

2 See Note at end of chapter.

1 *Barton v. Taylor*, 11 App. Cas. at p. 202.

1 *Cushing v. Dupuy* (1880), 5 App. Cas. 409, is sometimes cited as authority for the proposition that a colonial legislature cannot affect the prerogative to hear appeals as a matter of grace. No such proposition was affirmed and no opinion was expressed by the Judicial Committee on the subject; all that was said was "It is in their Lordships' view unnecessary to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative, since the 28th section of the Insolvency Act does not profess to touch it, and they think, upon the general

principle that the rights of the Crown can only be taken away by express words, that the power of the Queen to allow this appeal is not affected by that enactment.”

## Chapter XVI. Federal Jurisdiction.

IN considering the federal jurisdiction of the Commonwealth we return to the normal state of things under the Constitution—the restriction of the powers of the Commonwealth organ to certain enumerated subjects. The Government of the Commonwealth is, in all its departments, primarily a Government of limited and enumerated powers; the general, unenumerated powers belong to the States. Therefore, just as the first thing to be done in interpreting an Act of the Commonwealth Parliament is to ascertain that the subject of the Act is one committed to the Parliament; so, in invoking the jurisdiction of the federal courts, it must be shown that the cause is within the enumerated powers. In the United States it must always appear by the record that a case in the federal court is within its jurisdiction; the presumption is against it until it is shown.<sup>1</sup>

The subjects of federal jurisdiction in the Constitution closely follow the subjects of the judicial power of the United States, though in many respects the political condition of the Australian Colonies and the character of their courts is widely different from the state of things which in America led to the inclusion of certain subjects in the judicial power of the central government. In the great case of *Chisholm v. The State of Georgia*,<sup>2</sup> Mr. Justice Iredell remarked, in terms which have had the approval of Story, that “the judicial power of the United States is of a peculiar kind. It is indeed commensurate with the ordinary legislative and executive powers of the general government (*i.e.* the Federal Government) and the powers which concern treaties. But it also goes further. When certain parties are concerned, although the subject in controversy does not relate to any special objects of authority in the general government wherein the separate sovereignties of the several states are blended in one common mass of supremacy, yet the general government has a judicial authority in regard to such subjects of controversy; and the legislature of the United States may pass all laws necessary to give such judicial authority its proper effect.” The principles underlying these subjects are stated by Kent:<sup>1</sup> “All the enumerated cases of federal cognizance are those which touch the safety, peace, and sovereignty of the nation, or which presume that State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or control the regular administration of justice.”

Section 75. 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 High Court shall have original jurisdiction.

Section 76. 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.

It has been observed that section 73 not merely grants appellate jurisdiction to the High Court, but also confers rights of appeal. In sections 75 and 76, however, the matter of jurisdiction alone is dealt with. The existence of legal rights is assumed, and the sections do no more than indicate that the rights may be enforced in a certain tribunal or class of tribunals. The term “matter,” which governs the enumeration of subjects in sections 75 and 76, is in itself so indefinite that its meaning must be gathered almost wholly from its particular use. In the Constitution it is used in relation to legislative, executive, and judicial power. It is well established by usage as a comprehensive term for describing every kind of proceedings competently brought before and litigated in a Court of law.<sup>1</sup> In relation to judicial power, it excludes political disputes not arising out of legal right; such disputes “do not present a case appropriate for the exercise of judicial power,” and “it is only where the rights of persons or property are involved, and where such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief.”<sup>2</sup> Even the reference to the Judicial Committee of “any such other matters whatsoever as His Majesty shall think fit” (3 and 4 Will. IV., c. 41, sec. 4) is in practice limited to such matters as are fit for judicial determination, and in which the opinion may be followed by effective action by the Crown—a limitation which is the more significant when we remember that the Judicial Committee has many of the marks of the Council rather than the Courts.<sup>3</sup>

The matters of federal jurisdiction enumerated in sections 75 and 76 require particular consideration.

1. *Arising under any treaty.*—This matter, like that which follows it, is taken from the Constitution of the United States, and corresponds with an article of legislative power, “external affairs and treaties.” The reference to

treaties under the head of legislative power was dropped, but was retained under the judicial power. Treaties come very rarely under the consideration of the Courts. In the United States, indeed, treaties are part of the law of the land. This, however, is not the case in the British Constitution, save in special circumstances; even if a treaty expressly deals with matters of private right, the most recent authoritative declaration is that that is “only a bargain which can be enforced by sovereign against sovereign in the ordinary course of diplomatic pressure.”<sup>1</sup>

The operation of many Acts of Parliament is, however, dependent upon the conclusion of conventions between Her Majesty and foreign powers; in such cases, questions as to the operation of the law might fitly be described as arising under the treaty. In some cases the treaty itself becomes incorporated in the law, *e.g.* the International Copyright Convention, 1886, and the Extradition Acts (*R v. Wilson* 1878, 3 Q.B.D. 42).<sup>2</sup>

2. *Affecting consuls or other representatives of other countries.*—This article may be compared with “cases affecting ambassadors, other public ministers and consuls” in the Constitution of the United States. The provision extends to cases affecting such representatives in their private capacity; but whether it extends to others than the representatives in Australia of such other countries, *quaere*.

3. *In which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party.*—It must be repeated that this provision confers no right to sue the Commonwealth. The legal personality of the Commonwealth, as of other parts of the Queen's Dominions is in the Crown,<sup>1</sup> and not the Governor-General, nor the Executive Government; and the Crown cannot be sued, save by its own consent. The provisions made by the Colonies for enabling their Courts to entertain claims against the Crown in right of the colony would not enable their Courts to assume jurisdiction over claims against the Crown in right of the Commonwealth.<sup>2</sup> By sec. 78, the Parliament may confer rights to proceed against the Commonwealth, but the Crown may sue in any right in any of its Courts which has jurisdiction of the parties and the cause.<sup>3</sup> The Commonwealth, therefore, may freely sue in the State Courts, as does the United States in the State Courts in America. “A person suing or being sued on behalf of the Commonwealth” anticipates the common practice of designating some Minister, Department, or officer of Government, as the appropriate person to sue or be sued for the Government.

4. (a) *Between States* or (b) *between residents of different States* or (c) *between a State and a resident of another State.*—All these cases belong to the class described by Kent as presuming that “State attachments, State prejudices, State jealousies, and State interests might sometimes obstruct or

control the regular administration of justice.” Cases between residents of different States are of so common occurrence, and are so much in the ordinary experience of the Courts that there seems no particular reason for giving the High Court original jurisdiction over them, or even for making them matters of federal jurisdiction at all, especially as the appellate jurisdiction of the High Court and the Queen in Council offers a sufficient protection. The Commonwealth jurisdiction is more limited than the United States jurisdiction; it does not extend to suits “between a State or the citizens thereof and foreign states, citizens, or subjects.”

Under the head of controversies “between two or more States” and “between a State and citizens of another State,” frequent attempts have been made to induce the Courts in America to extend the area of judicial cognizance, and to turn matters which in the condition of independent states are moral or political into matters of legal right. The jurisdiction of the federal courts has sometimes been thought to stand for all State disputes as the constitutional substitute for war and diplomacy, and consequently to extend to all disputes which might endanger the peace of the Union or the cordial relations of the States. But the Courts have declined to undertake the discussion of mere political issues, and have in general construed their jurisdiction as limited to cases in which, before the Revolution, jurisdiction was exercised by some Court. “The truth is that the cognizance of suits and actions unknown to the law was not contemplated by the Constitution when establishing the judicial power of the United States. Some things undoubtedly were made justiciable which were not known as such at the common law; such, for example, as controversies between States as to boundary lines. And yet the case of *Penn v. Baltimore*, 1 Ves. Sen., 444, shows that some of these unusual subjects of litigation were not unknown to the Courts even in Colonial times, and several cases of the like character arose under the Articles of Confederation, and were brought before the tribunal provided for that purpose in those Articles. The establishment of this new branch of jurisdiction seems to be necessary from the extinguishment of diplomatic relations between the States. Of other controversies between a State and another State or its citizens, which, on the settled principles of public law, are not subjects of judicial cognizance, this Court has often declined to take jurisdiction.”<sup>1</sup>

Thus the Supreme Court refused to entertain an application by the State of Kentucky for the extradition of a fugitive criminal,<sup>2</sup> and generally “has declined to take jurisdiction of suits between the States to compel the performance of obligations which if the States had been independent nations could not have been enforced judicially but only through the political departments of their governments.” When, in 1876, the State of

South Carolina filed a bill in equity to restrain the State of Georgia and other persons from obstructing the free navigation of the Savannah River, it was left an open question whether a State must not aver and show that it will sustain some special and peculiar injury such as would enable a private person to maintain a similar action in another Court.<sup>3</sup>

In “matters between States” the question has been whether the matter is one of a kind fit for judicial determination at all; and the cases referred to show that generally the cause must be one already cognizable in some court, or at least one which would be cognizable if the defendant were a private person. This it would seem excludes from jurisdiction, not merely pure questions of policy, but those relations of international law which from their nature belong only to political entities, matters of power and government, and not of right and property.

“Matters between a State and a resident of another State” are partly defined by the answer just given, but further questions arise in regard to them. A State is an extensive owner of property, it makes contracts, and the acts of its agents may cause damage. All these are matters which give rise to legal relations between private persons, and those relations are enforced by the courts. But in such matters the State is an abnormal person, and its immunities are commonly expressed in our law by the maxim that “the king can do no wrong.” A common law remedy, the petition of right, enabled the courts to do justice between the king and his subjects, where the former was in possession of land, goods, or money of the latter who sought restitution or damages, and of late this remedy has been held to extend to cases of contract. It is, however, very far from applying to all cases in law or equity which would be justiciable if between subject and subject, nor when the case is justiciable does it follow that the Court in determining the liability of the Crown applies the same principles as in cases between subject and subject. It is well settled that in England the petition of right, whether at common law, or as regulated by statute, does not extend to torts.<sup>1</sup> The Crown has in the colonies the same immunities and is subject to the same procedure as in England. But in addition to the provisions of the common law, most of the colonies have made statutory provision for proceedings against the Crown, or some public officer or department on its behalf.<sup>2</sup> In varying degrees, proceedings for torts of some kinds may be brought against the government in all the colonies; the constant presence of the government in spheres which in England and America are occupied by private enterprise, would make the maintenance of the old doctrine in its integrity intolerable. It has indeed been suggested that the special circumstances of the colonies and the extended activity of the Government there might in itself be a reason for extending the common

law remedy to torts.<sup>1</sup>

Where there is a right to pursue claims against the State under the State law—whether the common law or Statute—such claims will be cognizable by the High Court under sec. 75 whenever they are made by a resident in another State. This will be equally the case whether the proceeding is against the Crown, or against some nominal defendant appointed to represent the Crown or the colonial government. But in this respect, as in others, the jurisdiction given by section 75 is dependent on the existence of a right—it does no more than enable the High Court to adjudicate upon claims which are cognizable in the courts of the colony, or which may be converted into claims of right by some State law. And it must be remembered that it is now well settled that the colonial executive cannot lawfully or effectually bar the submission of claims to the Courts—that the petitioner may go behind the colonial executive and obtain a *fiat* from the Secretary of State.

The question whether the mere grant of jurisdiction in “controversies between a State and citizens of another State” deprived a State of its immunity from suit save with its own consent, was determined by the Supreme Court of the United States in 1793 in *Chisholm v. State of Georgia*.<sup>2</sup> The Court held, contrary to the view that had been urged by Hamilton in the *Federalist* and by John Marshall (afterwards Chief Justice) in the Virginia Convention of 1788, that an action did lie under the Constitution. A strong dissenting judgment was delivered by Iredell J., who held that as no action of the nature of that before the Court could have been sustained against the State before the Constitution was adopted, and as Georgia in common with other States, had not provided by law for any compulsory proceedings against itself, the claim could not be made in the Supreme Court of the United States. The judgment of the Court led immediately to the Eleventh Amendment of the Constitution to the effect that “the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state.” Later judicial expressions have confirmed the views of Iredell J., and the *ratio decidendi* of *Chisholm v. Georgia* was expressly disagreed with by the Supreme Court in 1889.<sup>1</sup>

But unlike the Constitution of the United States, the Commonwealth Constitution confers an important power on the Legislature in respect to proceedings against State or Commonwealth. By section 78, “The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the judicial power.”

This section was the subject of a keen debate in the Convention at

Melbourne;<sup>2</sup> and there was great difference of opinion as to the meaning of a “right to proceed.” It is obvious that the section goes far beyond the regulation of procedure; that it implies the giving of a remedy against the State in certain cases where the State law has provided none. It may be conceded that it enables the Commonwealth Parliament to make laws giving rights against the States under matters within the legislative power. But as has been seen, the judicial power is not merely commensurate with the legislative power; it extends to causes by reason of the parties concerned. “Within the judicial power” are “all matters” in which the Commonwealth is a party, “between States,” and “between a State and a resident in another State”; and in respect of such matters the Parliament may confer “a right to proceed.” The governing word “matters” must receive here the same interpretation as was given to it above; and accordingly it would seem that the Parliament cannot give a right to proceed against a State save in respect of controversies “which on the settled principles of public law are subjects of judicial cognizance.” It may in the cases prescribed deprive a State of the benefit of the doctrine that “the King can do no wrong”; deprive it of its immunity from suit and make it liable for the acts of its servants and agents wherever an individual would be liable, *e.g.* for tort. But the Parliament could hardly create entirely new causes of liability; the words “right to proceed” are not apt to describe substantive rights unconnected with any subsisting liability. Thus, it is conceived that the Parliament could not under this section provide that the State of New South Wales should be answerable in damages to a riparian owner on the Murray or the Darling in South Australia for waters abstracted to his hurt by the Government of New South Wales as a riparian owner on the upper river, and that even though under the law of New South Wales, a riparian owner in New South Wales might have an enforceable claim against the Government for infringing his riparian rights. Still less, it would seem, could the Parliament give a right to proceed for breach of political duties by the State, as for failure by an efficient police to protect non-residents against mob violence.

The same principles will in general govern the right to proceed in matters between State and State. The Parliament may get rid of the obstacle, which arises from the fact that the Crown personifies each; but it could not create new rights of a substantive kind. The Courts may be called on some day to determine whether the powers of the riparian States over the rivers are similar to the rights of individual riparian owners; and it is possible that under section 78 the Parliament might make a law that this question—which obviously might arise in litigation between private persons resident in New South Wales and South Australia—might be directly raised in

proceedings between the States. But the Parliament could not, under section 78, declare what are the respective rights of the States in the rivers, whatever may be its power under other parts of the Constitution.

“Matters in which the Commonwealth is a party” would include proceedings in which the Commonwealth and a State are disputants. The controversies which have arisen in Canada between the Dominion and the Provinces as to proprietary rights in territory are typical of matters between the Governments which are fit for judicial determination, and it is clear that the Parliament may provide that they may be raised directly in a suit between Commonwealth and State, and not merely in actions between their respective grantees, or between one Government and the grantee of the other.<sup>1</sup> Again, the financial relations between Commonwealth and States established by the Constitution are akin to proprietary rights and contractual obligations, and they, too, might be made the subject of judicial determination under a “right to proceed.” It may be that section 78 goes further; and that under it the Parliament may provide for direct litigation between Commonwealth and State of questions as to their respective powers which are in any way capable of judicial determination. It is true that in the United States it is held, as already observed, that the judicial power does not extend to the consideration of such questions, except as incidental to matters of right.<sup>2</sup> But the question of the validity of an Act of Parliament, which may arise any day in the course of litigation, though it may be an abstract question, is, from its nature, not purely a question for the cognizance of the political departments.

5. *In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.* —The power to command or prohibit Federal officers belongs in the United States exclusively to the federal jurisdiction;<sup>3</sup> and the reasons which have denied jurisdiction to State Courts there apply with equal force in the Commonwealth. The United States Constitution does not expressly refer to the matter, leaving it to the Legislature and the Courts to work out appropriate remedies and the incidents of judicial power; and it has not been doubted that Congress, in distributing the judicial power, may constitute Courts with power to issue these writs against executive officers. The cases in which the writs will issue are well defined by rules of common law. They will never issue to direct or control a discretion in the officer; they are reserved for cases in which “a plain official duty requiring no exercise of discretion is to be performed, and performance is refused,” or when “a duty is threatened to be violated by some positive official act.” In either case the person claiming the benefit of the writ must show an injury for which an adequate compensation cannot be had in damages; and he must show not merely that

there is an official duty in the officer, but that the duty correlates a right in the applicant.

The reason for the special inclusion of this provision in the Commonwealth Constitution is the intention that the writs shall be within the original jurisdiction of the High Court. In the United States the Supreme Court decided in the famous case of *Marbury v. Madison* (1 Cranch, 137)—the first which declared an Act of Congress to be unconstitutional—that the original jurisdiction of the Supreme Court was limited by the Constitution to “cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party,” and could not be added to by Congress. It may be added that the provision in the Commonwealth Constitution in no way affects the class of cases in which the writs will issue.

6. *Arising under this Constitution or involving its interpretation.*

7. *Arising under any laws made by the Parliament.*—Cases arising under the Constitution, says Story (sec. 1647), are “such as arise from the powers conferred, or privileges granted, or rights claimed, or protection secured, or prohibition contained in the instrument itself, independent of any particular statute enactment. . . . Cases arising under the laws of the United States are such as grow out of the legislation of Congress, within the scope of their constitutional authority, whether they constitute the right, or privilege, or claim, or protection, or defence of the party in whole or in part by whom they are asserted.” To be within the purview of the clause it is not necessary that the case should be one in which a party comes into Court to demand something conferred upon him by the Constitution or a law made thereunder; it is sufficient that the correct decision of the case depends upon the construction of either.<sup>1</sup>

It has already been pointed out that generally the State Courts have jurisdiction over the class of cases here referred to as an incident of State power, notwithstanding that the matter is one of Commonwealth judicial power; and this State jurisdiction will remain even after the Parliament has granted jurisdiction over the subjects to federal courts, unless it has expressly or impliedly made the federal jurisdiction exclusive. Thus, in the United States, a federal officer who has acted under the alleged authority of the Constitution or an Act of Congress may be prosecuted or sued in a State Court for a crime or tort, and will have to justify his authority there. “Recovery may be had in a State Tribunal wherever the local laws are violated in obedience to an injurious or unconstitutional mandate from the general (*i.e.* federal) Government, and there is no clause in the Constitution or in the Acts of Congress rendering the jurisdiction of the federal courts exclusive.”<sup>2</sup> But this is limited by the necessity of preserving the distinct

and independent character of the Government of the United States. As has been seen, no *mandamus* or prohibition can issue to federal officers from State Courts; and it is now established that “a State Court can not issue any process tending to suspend the execution of an Act of Congress or take goods or persons that have been seized by a federal officer under an authority from the general (*i.e.* the federal) Government.”<sup>1</sup> Wherever it appears that a party is alleged to be illegally confined within the limits of a State, and it appears that he is confined under the authority, or claim, and colour of the authority of the United States, the State Court should refuse a writ of *habeas corpus*;<sup>2</sup> if the detention be illegal a federal court will upon application order a release.<sup>3</sup>

A right arising under federal law may be pursued in a State Court unless the Parliament has indicated that it shall be pursued in the federal court alone; and it seems not less clear that an offence committed by breach of a federal law may be the subject of a prosecution in a State Court. The objection sometimes heard in the United States that “crimes were punishable only by the Government against whom they were committed, and the State Courts could not enforce the penal laws of the United States or any government but their own,”<sup>4</sup> is based upon a false analogy; the federal laws are in the territory of the States not foreign but domestic laws, and State jurisdiction over an offence against the Commonwealth is in no way inconsistent with the doctrine of the territoriality of crime.<sup>5</sup> The provision of section 80<sup>6</sup> does not appear to affect the matter. It is true that the Courts of the Commonwealth will hardly execute the penal laws of the States, but they are courts of limited jurisdiction, and such laws are not among the matters committed to them. The power to entertain “controversies between States and citizens of another State” in the United States Constitution has been held to apply only to such controversies as, before the Union, would have been cognizable in another State, and these did not include prosecutions by or penal actions of a State.<sup>1</sup>

8. *Of admiralty and maritime jurisdiction.*—This again follows the Constitution of the United States, as to which Story observes that “the word ‘maritime’ was doubtless added to guard against any narrow interpretation of the preceding word ‘admiralty.’ ” The power of the Parliament under this provision must, it would seem, be read in connexion with the Colonial Courts of Admiralty Act, 1890, so far as it is not inconsistent therewith. By that Act, the jurisdiction is generally that of the Admiralty Division of the High Court in England, and the Colonial Court shall have the same regard as that Court to “international law and the comity of nations” (section 2): and no colonial law shall confer any jurisdiction which is not conferred by the Act upon a Colonial Court of

Admiralty (section 3).

9. *Relating to the same subject matter claimed under the laws of different States.*—This covers cases in which there are competing claims of the class described as to ownership or possession. It is more extensive than the provision in the United States Constitution as to claims of land under the grant of different States.

## **The Distribution of Federal Jurisdiction.**

By section 77, with respect to any of the matters mentioned in sections 75 and 76, the Parliament may make laws as follows:

i. *“Defining the jurisdiction of any federal court other than the High Court.”*—The assignment of jurisdiction to any but the High Court is left entirely to the Parliament. The original jurisdiction granted to the High Court by section 75, is not necessarily exclusive;<sup>1</sup> whether it is exclusive will depend upon the action of the Parliament under this sub-section and the next. Nor does the power of the Parliament, under section 76, to confer original jurisdiction on the High Court in the matters therein specified, at all limit the power of the Parliament to confer original jurisdiction exclusive or concurrent at its pleasure, upon other federal courts. Section 76 is essentially an enabling section, excluding the implication which might otherwise arise, that the High Court was not to be burdened with original jurisdiction, except in the cases provided by the Constitution itself<sup>2</sup> in section 75.

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.”*—“Any federal court” includes of course the High Court. In most of the matters in section 75 and 76, the State Courts as such have jurisdiction; in such cases they may be deprived of jurisdiction by the Commonwealth Parliament, but until deprived, it “belongs to” them as of course, though not as of federal jurisdiction.<sup>3</sup> But some others—*mandamus* against officers of the Commonwealth,<sup>4</sup> and suits against the Commonwealth or another State—lie outside the ordinary judicature of the State; and accordingly a State Court can act only when jurisdiction is “vested in” it by the Commonwealth Parliament.

iii. *“Investing any Court of a State with federal jurisdiction.”*—This power is co-extensive with the power to establish and define the jurisdiction of federal courts. It may be exercised both by conferring upon the State Court jurisdiction in matters over which it has otherwise no jurisdiction at all, and by committing to it federal jurisdiction in those cases where it had merely State jurisdiction.

1 *Robertson v. Crease*, 97 U.S. 646; *Godfrey v. Terry*, 97 U.S. 171.

2 (1793) 2 Dallas, 419.

1 Kent's *Commentaries* (Holmes' edition, vol. i., p. 320).

1 Cf. "Cause or Matter," Judicature Act, 1873, sec. 100.

2 *Cherokee Nation v. State of Georgia*, 5 Peters 1; *State of Georgia v. Stanton* (1867), 6 Wall. 50.

3 See Todd, 305-6, 843.

1 *Cook v. Sprigg* [1899], A.C. 572, 578. The decision in that case is somewhat at variance with the opinion of Lord Mansfield in *Campbell v. Hall* (1774), Cowp. 204, 20 St. Tr. 239, as to the limitation of the powers of the Crown in a conquered or ceded place by the terms of the capitulations. See as to the prerogative of treaty-making, the *Parlement Belge*, 1877, 4 P.D. 129; 5 P.D. 197; and *Walker v. Baird* [1892], A.C. 491.

2 See generally on Treaties and Acts of Parliament, the judgment of Sir Robert Phillimore in the *Parlement Belge*; and Holland, *Law Quarterly Review*, vol. ix. p. 136, republished in *Studies in International Law*, 1898.

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

2 See *Holmes v. Reg.*, 10 W.R. 39; 31 L.J., Ch. 58; *Frith v. Reg.* L.R., 9 Ex. 365; *Palmer v. Hutchinson*, 1881, 6 App. Cas. 621.

3 *In re Bateman's Trusts*, L.R., 15 Eq. 355; *In re Oriental Bank Corporation, ex parte the Crown* (1884), 28 Ch. Div. 643.

1 *Hans v. Louisiana* (1889), 134 U.S. 1, 15. See also *Wisconsin v. Pelican Insurance Coy.*, 127 U.S. 265. It may be added that the adjustment of boundary disputes was before the Revolution one of the matters undertaken by the King in Council.

2 *Kentucky v. Dennison*, 24 How. 66.

3 *S. Carolina v. Georgia*, 93 U.S. 4; *Wisconsin v. Pelican Insurance Coy.*, *supra*. See also the very recent case of *Louisiana v. Texas* (1899), 176 U.S. 1.

1 *Tobin v. The Queen* (1864), 16 C.B.N.S. 310.

2 New South Wales, "Claims against the Government and Crown Suits Act, 1897" (and see *Farnell v. Bowman*, 12 App. Cas. 649); Victoria, "Crown Remedies and Liability Act, 1890"; Queensland, "Claims against the Government Act, 1866"; South Australia, "Act No. 6, 1853"; Tasmania, "The Crown Redress Act, 1891"; Western Australia, "Crown Suits Act, 1898."

1 *Farnell v. Bowman*, *ubi sup.*

2 2 Dallas 419.

1 *Hans v. Louisiana*, 134 U.S. 1.

2 Official Report of Debates, Melbourne, 1898, pp. 1653–1679.

1 Cf. *St. Catherine's Milling Coy. v. Reg.* (1888), 14 A.C. 416; *A.G. for Ontario v. Mercer* (1883), 8 A.C. 767.

2 *Cherokee Nation v. Georgia*, 5 Peters 1; *Georgia v. Stanton*, 6 Wallace 50.

3 *M'Cluny v. Silliman*, 6 Wheaton 598.

1 *Story on the Constitution*, sec. 1648; *Cohens v. Virginia*, 6 Wheaton 378; *Tennessee v. Davis*, 100 U.S. 257.

2 Hare's *Constitutional Law*, p. 1193.

1 Hare's *Constitutional Law*, p. 1211.

2 *Tarble's Case* (1871), 13 Wallace 397.

3 The power of the federal courts of the United States to issue a writ of *habeas corpus*, arises in the main not out of the Constitution but by statute, and the doctrines set out in the text have been established in the light of the statutory power. The original jurisdiction of the High Court of Australia is much more extensive than that of the Supreme Court of the United States, and therefore its inherent power to issue the writ goes further. But the greater number of cases in which the writ could be sought lie outside the original jurisdiction of the High Court as defined by the Constitution, and can only arise by statute. Until such statutory jurisdiction is given to a federal court, it would appear that the State Courts may issue the writ of *habeas corpus* in the cases referred to; but when jurisdiction is given, it will be exclusive in the federal court.

4 *U.S. v. Lathrop*, 17 Johnson 4.

5 See *Houston v. Moore*, 5 Wheaton 1, 27; *Buckwalter v. U.S.*, 11 Sergeant and Rawle (Pa.) 193.

6 “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.”

1 *Wisconsin v. Pelican Insurance Coy.*, 127 U.S. 265.

1 *Cohens v. Virginia*, 6 Wheaton 274.

2 Cf. *Marbury v. Madison*, 1 Cranch 137, declaring that Congress cannot extend the original jurisdiction of the Supreme Court of the United States.

3 *Clafin v. Houseman*, 93 U.S. 130.

4 *M'Cluny v. Silliman*, 67 Wheaton 598.

## **Chapter XVII. Organization of Courts: Judicial Tenure: the Constitution of the Federal Courts.**

By section 79, the federal jurisdiction of any court may be exercised by such number of judges as The Parliament prescribes.

### **The Judicial Office.**

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

In the Colonies, however, legislatures are not supreme, and “encroachments and oppressions” against the law may not be unknown. In the early days of responsible government in Australia, there were some sharp conflicts between the popular chamber or the Parliamentary Executive and the Courts, and even between Parliament and the Courts, in which, it must be owned, that it was not always the judges who carried away the honours of war. There was a disposition on the part of some judges, as there has been on the part of the military authorities, to regard themselves as standing outside the system of responsible government, and as entitled, in their official relations, to communicate with the Governor without the intervention of a Minister. There was in South Australia, what Sir Roundell Palmer and Sir Robert Collier described as “an unfortunate disposition manifested upon the bench to favour technical objections against the validity of Acts of the Colonial legislature.” And this “unfortunate disposition” was made by the Government and the Legislature the excuse for the perpetuation of a Court of Appeals consisting practically of the Executive Government, a tribunal the unfitness of which called for strong remonstrance from the Secretary of State. In Victoria, during the “deadlocks” of 1865 and 1867, the Courts were called on to adjudicate upon the measures taken by the Government, with the support of the

Legislative Assembly, for carrying on the government of the Colony without an Appropriation Act; and in two cases decided against the validity of the Government Acts.<sup>1</sup>

It is not, therefore, an ideal arrangement, which makes the judges of the Supreme Courts removable on the address of the two Houses of the Legislature. The power of removal upon such address, in some Colonies, belongs to “Her Majesty”; in others, “to the Governor in Council.” Where the power is exercisable by Her Majesty, it is upon the advice of the Secretary of State; and it has been established that “in dismissing a judge in compliance with addresses from a local legislature, and in conformity with that law, the Queen is not performing a mere ministerial act, but adopting a grave responsibility, which Her Majesty cannot be advised to incur without satisfactory evidence that the dismissal is proper.”<sup>1</sup> Where, on the other hand, the power under the local law is in the Governor, he must act as in other matters upon the advice of his Ministry, and there is no legal security that the occasion is a proper one for dismissal. It seems clear, that, in such a case, there is no power to appeal to the Queen in Council.<sup>2</sup>

The appointment, tenure, and emoluments of Justices, not of the High Court alone, but of the other Courts created by The Parliament, are defined by section 72. They

i. Shall be appointed by the Governor General in Council.

(This is in accordance with the practice which now prevails in self-governing Colonies, where the judges are appointed by the Governor by commission. Formerly, the judges received a grant of their office by Letters Patent from the Crown.)

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.

These provisions go beyond those contained in any English or Colonial Act, or in the Constitution of the United States, for protecting the judiciary. As in the United States, the tenure of emoluments of judges of all federal courts are protected by the Constitution; while the Constitution supplies a defect which has been noticed in the American Constitution, it prescribes the minimum number of justices in the High Court. The English and Colonial model gives no protection against Parliament; the power to remove on an address of both Houses is in addition to the power to remove for misbehaviour. In the Commonwealth, these independent powers are interwoven—the Executive may remove only upon an address, which is to

be based on proof of the causes stated.

Nevertheless, it is not less true of the Commonwealth than of the United States, that the judicial department does not really have an independent existence with the legislative and executive departments. That there is no legal process for compelling the Governor-General in Council to proceed to the appointment of judges, is no more than may be said of other powers and duties, notably the summoning of The Parliament. But, while there is the imperative necessity of obtaining money or authority to spend money to secure the latter, there is not the same necessity for appointing judges or preserving the existence of Commonwealth Courts. The Ministry of the day and the two Houses of The Parliament would, it cannot be doubted, be the sole judges of what constituted misbehaviour or incapacity, and when or how such misbehaviour or incapacity was “proved”; their action would not be subject to review in any court of law. Though a judge may not be removed except as provided, the legislature may abolish courts other than the High Court; and there is nothing to protect the judges from loss of office upon such an event, and nothing to secure them compensation. The legal consequences of such an abolition have been discussed in the United States on the action of Jefferson in 1802.<sup>1</sup> The remuneration of judges is not fixed or appropriated by the Constitution, and the provision for salaries is, of course, within the discretion of the Executive and The Parliament. A recent decision<sup>2</sup> of the Judicial Committee, however, throws light upon the constitutional provisions as to the appointment and tenure of judges. An Imperial Act, 15 and 16 Vict., c. 72, appropriated a sum of money for the salary of a Chief Justice and a puisne judge in New Zealand, and gave power to the General Assembly of New Zealand to alter these appropriations by any Act or Acts, provided that the salary of a judge should not be diminished during his continuance in office. An Act of New Zealand—the Supreme Court Judges Act, 1858—enacted that the Supreme Court should consist of “a Chief Justice and such other judges as His Excellency in the name and on behalf of Her Majesty shall from time to time appoint.” Under this power the Government appointed an additional judge, for whom a salary had not been provided by Parliament. Parliament refused to appoint a salary, and proceedings were taken by *quo warranto* against the judge. The Judicial Committee said: “It is manifest that the limitation of the legislative power of the General Assembly was designed to secure the independence of the judges. It was not to be in the power of the Colonial Parliament to affect the salary of any judge to his prejudice during his continuance in office. But if the Executive could appoint a judge without a salary, and he needed to come to Parliament every year for remuneration for his services, the proviso would be rendered

practically ineffectual, and the end sought to be gained would be defeated. It may well be doubted whether this proviso does not by implication declare that no judge shall hereafter be appointed save with a salary provided by law, to which he shall be entitled during his continuance in office, and his right to which could only be affected by that action of the New Zealand legislature, which is excluded by the Imperial Act.” After such an intimation of opinion, the Executive will be practically bound to submit to Parliament a permanent appropriation of salary for a new judgeship before the office is filled, and will act rightly in refusing to make any judicial appointment without such permanent provision.

### **Limitations Upon Constitutional Provisions as to Judicial Power.**

The general vesting of the judicial power of the Commonwealth in Courts, whose justices are protected under section 72, may raise the question whether any judicial power may be exercised, except by courts constituted as required by section 72. In the United States it is accepted, notwithstanding the general terms used, that a certain amount of judicial power has been commonly, and perhaps necessarily, associated with certain offices; and that this power is exerciseable under the United States by the like officers, though they are not protected under the terms of the Constitution. It has been said that the Constitution, in speaking of courts and judges, means “those who exercise all the regular and permanent duties which belong to a court in the ordinary popular signification of the terms.<sup>1</sup> The Justices of the Peace under the authority of the United States, exercising duties partly judicial and partly executive and ministerial, are not regarded as “courts” within the Constitution. There are in fact many officers who are called on, in the ordinary course of their duties, to discharge functions which blend the judicial and administrative, as masters, chief clerks, and some other officers of court. These officers will not be within the Constitutional provision. The same may be said of the Inter-State Commission and of courts martial, administering military law over persons in the defence forces of the Commonwealth. Of courts martial of the United States, Winthrop<sup>2</sup> says, that “although their legal sanction is no less than that of the federal courts, being equally with these authorized by the Constitution, they are, unlike these, not a portion of the judiciary of the United States, and are thus not included among the ‘inferior courts’ which Congress may from time to time establish.” . . . Not belonging to the judicial branch of the Government, it follows that courts martial must appertain to the executive department; and they are in fact simply

instrumentalities of the executive power, provided by Congress for the President as commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives.<sup>3</sup>

1 (1865) *Stevenson v. Reg.*, 2 W.W. & A'B. (L.), 143; (1867) *Alcock v. Fergie*, 4 W.W. & A'B.

1 Case of Mr. Justice Boothby, Todd 848.

2 Otherwise, if the removal is under the powers of 22 Geo. III., c. 75.

1 Story, section 1633.

2 L.R. (1892), A.C. 387.

1 Sergeant on the Constitution, cit. Story, sec. 1634, n.

2 Winthrop's *Military Law*, pp. 52 and 53, cited Thayer's *Constitutional Cases*, p. 2339.

3 See also *ante*, on the Inter-State Commission.

## **Chapter XVIII. The States.**

IN an earlier chapter, it is remarked, that one of the difficulties, which beset political science and constitutional law, is the use of the same term in different senses. The fact of such use must be acknowledged; and Story, in his chapter on the Interpretation of the Constitution of the United States, warns us against men of ingenious and subtle minds “who seek for symmetry and harmony in language.” The term “State” in the Constitution of the United States is used in various senses. It “sometimes means the separate sections of territory occupied by the political society within each; sometimes the particular government established by those societies; sometimes those societies as organized into those particular governments; and, lastly, sometimes the people composing these political societies in their highest sovereign capacity.”<sup>1</sup> In like manner, the Commonwealth Constitution uses the term sometimes of territory (*e.g.* sections 80, 92, 125), sometimes of the political society, sometimes of the government of the political society or some appropriate organ thereof; and if it does not refer to the people of the political society “in their highest sovereign capacity,” it appears in some cases to describe the people of the society as an economic unit (*e.g.* sections 51 (2), 99). It happens more than once, that, in the same section, the term is used in different senses; and there is room for not a little doubt in some cases as to the meaning of the term—*e.g.* in section 99 “preference to any State,” and section 102 “preference or discrimination is undue or unreasonable or unjust to any State.” In general it may be noted, that, when the Constitution saves powers or grants powers or imposes positive duties, it specifically refers to the organ of State Government, which has hitherto exercised, or is intended to exercise, the power or perform the duty in question; and when it withdraws an accustomed power, or imposes a prohibition, it uses the term “State” as comprising all possible sources of action.<sup>1</sup>

As the State Commonwealth is a Federal Commonwealth, it is impossible to advance a step in the consideration of the Constitution without meeting the States. It is true of the Commonwealth as of the United States, that “the Constitution in all its provisions looks to an indestructible Union composed of indestructible States.”<sup>2</sup>

### **New Powers of the States.**

(a) As Instruments of the Constitution.

The States appear in the Commonwealth in more than one capacity. First

and foremost, of course, they are the local parts in the composite government of a federation. They are also the foundation upon which one House, and in a sense both Houses, of The Parliament are built. But they are also, in a special sense, the instruments of the Constitution in the formation of the central government. In the chapter on "The Parliament," various powers and duties incident to constituting that body are imposed upon the Governor and the Legislature of the State; and in all sorts of matters, which must be the subject of some regulation, the laws of the States in their respective territories are applied to the subject matter, or the State Parliament is given power to make laws regarding them, "until The Parliament otherwise provides."<sup>1</sup> In addition to the incidental and auxiliary powers and duties conferred upon the States, or the organs of the State government, by the Constitution, there are some substantive matters in which new powers or duties are conferred upon the States. We have seen under the head of the Legislative power the importance in certain cases of State initiative or concurrence, as a condition of the validity of certain Commonwealth laws. The Constitution also contains important provisions enabling the States to surrender their territory (sections 111, 125), to consent to an alteration of boundaries (section 123), or to the establishment of new States by separation of territory or union of States (124).

One matter affecting The Parliament is regarded as essentially of local concern, and is left to the regulation of the State Parliament altogether (section 9). Without the co-operation of the States Governments at the outset, the central government could not be set to work.

(b) As Delegates of the Commonwealth Government.

The Commonwealth laws bind the State Courts; and we have seen that the Constitution enables The Parliament to constitute the State Courts its instruments for the administration of justice. Whether, and to what extent, the Commonwealth Parliament may delegate legislative power to The Parliament of the States, is a question not free from doubt; it may not be of great practical importance, since comparatively few of the Commonwealth powers of legislation are exclusive. The Commonwealth Government is organized on the executive side, and is not dependent on the States; but the State Executive may, if the State Governments agree, be used as the instrument of the Commonwealth. In the United States, from the establishment of the Constitution, the federal government has been in the habit of using, with the consent of the States, their officers, institutions, and tribunals as its agents. That use has not been deemed a violation of any principle, or as in any manner derogating from the sovereign authority of the federal government, but as a matter of convenience and a great saving of expense.<sup>1</sup> The Constitution of the Commonwealth itself indicates one

matter of executive government, in which the State is to be the auxiliary of the Commonwealth. By section 120 it is enacted, that “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.”

The chapter of the Constitution on Finance and Trade deals with the rights and duties of the States considered as political entities, so far as their economic relation with each other and the Commonwealth are concerned. The chapter on the States deals with their respective relations of political power and governmental duty. In general, the Commonwealth Constitution, like that of the United States, treats the individual rather than the State as the subject upon whom the fundamental law is binding. In these two chapters, however, the “national” element recedes, and the “federal” note predominates.

### **The States Constitutions.**

By section 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.” By section 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.” In speaking of “the Constitution of each State,” the section suggests that there is in each State a law or body of laws, defined and ascertainable, to which the term “Constitution” can be applied. This is, however, no more true of the States than it is of the United Kingdom. As has been seen in chapter i., the constitutional law of the Colonies, taking that term in its narrowest sense, is to be ascertained only by the consideration of a number of statutory provisions and prerogative instruments. In no respect does the Constitution of the Commonwealth differ more markedly from the Constitution of the Dominion of Canada, than in this—that, while in Canada the British North America Act, distributing as it did the powers of government between Dominion and Provinces, had to organize both, the Australian Constitution had not, as any part of its object, the framing of a government for the States. The principle of State autonomy has been carefully observed. In accordance with this

principle, the Constitution omits clauses of the Bill of 1891, which required that there should be a Governor in each State, and proposed that the Parliament of each State might make such provision as it thought fit as to the manner of appointment of the Governor of the State, and for the tenure of his office and for his removal from office. The Constitution no doubt assumes the continuance of the States Governments in their present form, in that it refers to the "Governor," the "Governor with the advice of the Executive Council" (section 15), "the Parliament," the "Houses of the Parliament of the State sitting and voting together," and "the more numerous House of the Parliament of the State." So far as the Governor of a State is concerned, the Constitution provides by section 110, that "the provisions of this Constitution relating to the Governor of a State extend and apply to the chief executive officer or administrator of the government of the State." For the rest, there is room for some doubt as to the consequences of an alteration of the State Constitutions. But whatever may be the inconvenience to the Commonwealth of the abolition of certain State machinery, it cannot affect the power of the State over its own institutions.

### **The State and the Crown.**

The appointment of State Governors will for the present, and until altered by the Crown itself or by Imperial or State Statute, remain with the Crown. It may be determined to revert to the old custom, whereby the Governor-General was also Governor of each of the Colonies; but this is a matter which lies quite outside the Commonwealth Constitution. In the Colonies, the Crown was the supreme executive and legislative head, and, as has been seen, personified the colony. The same is true of the State. Even as to Canada, where there is much greater dependence of the Provinces of the Dominion, and where the Lieutenant-Governors are appointed by the Governor-General as an act of internal administration, it has been held by the Judicial Committee, that "the relation between the Crown and the provinces is the same as that which subsists between the Crown and Dominion in respect of such powers, executive and legislative, as are vested in them respectively."<sup>1</sup> Accordingly, though the Governor-General is by the Constitution declared to be Her Majesty's representative in the Commonwealth, this must in no way be taken to deprive the State of those prerogatives of the Crown applicable to the matters which remain to the State.

Not only does the Crown remain a part of the State Government, but the State Government retains direct relations with the Imperial Government. One of the great objects to be attained by federation was, no doubt, that

Australia should speak to the Home Government with a single voice. In pursuance of this policy, the Bill of 1891 contained a clause, by which all references and communications from a State Governor to the Queen, or from the Queen to a State Governor, were to be through the Governor-General. This clause was not adopted by the Convention of 1897-8. The object of unanimity in representation has been deemed to be sufficiently accomplished by the delegation to the Commonwealth Government of those matters, which appeared to be of common concern. Obviously, there remain many matters which affect directly the Home Government and a State Government, but only remotely or not at all the other States and the Commonwealth. This is notably the case in regard to the legislation of the States, which it must be remembered, in the absence of Commonwealth legislation, covers a field hardly less extensive than before federation. The Home Government therefore, on the establishment of the Commonwealth, repeated the old instructions to Colonial Governors.<sup>1</sup> (See *e.g. Government Gazette* (Victoria), Jan. 2, 1901).

### **The Governor of a State.**

The loss of executive powers by the Governor of a Colony, on its becoming a State, will be sufficiently apparent by a consideration of the executive departments passing to the Commonwealth Government. But the transference of the departments of Naval and Military Defence (section 69), the provision in section 114 that “a State shall not, without the consent of The Parliament of the Commonwealth, raise or maintain any naval or military force,” and the vesting of the command-in-chief of the naval and military forces of the Commonwealth (section 68) and of the Crown in the Governor-General, deprive the Governor of one of his titles. The old Letters Patent and Commissions constituted and appointed respectively a “Governor and Commander-in-Chief in and over the Colony of . . . and its Dependencies.” New Letters Patent and Commissions were issued for the States on the establishment of the Commonwealth, and they constituted and appointed respectively a “Governor of the State of . . . and its Dependencies, in the Commonwealth of Australia.”<sup>1</sup> It is surmised that the Governor of a State is still Vice-Admiral.<sup>2</sup> For the rest, the prerogative instruments, affecting the office of Governor of a State, are substantially the same as those relating to the office of a Colonial Governor. The grant of the pardoning power to the State Governors recognizes the distinction between offences against State laws and offences against Commonwealth laws, and seeks to avoid all danger of conflict. The Letters Patent (clause ix.) provide, that when any crime or offence has been committed within the

State against the laws of the State, or for which the offender may be tried therein, the Governor may pardon an informer who has been an accomplice or one of the offenders, and further may grant to any offender convicted in any Court of the State, or before any Judge or Magistrate of the State, within the State, a pardon, etc. It is clear, therefore, that, as to convicted offenders, the power extends only to convictions in the Courts of the State, and does not apply to convictions in Commonwealth Courts, or (*semble*) an Imperial Court like the Court of Vice-Admiralty. In construing the clause, it would appear that “within the State” governs “against the laws of the State” only, and that the expression “or for which the offender may be tried therein” refers to offences, which are recognizable by the Courts of the State though committed outside the State. If this were not so, and the words “within the State” applied to both classes of offences referred to, the Governor of a State would have power to pardon informers and persons convicted in State Courts for offences against Commonwealth laws; and there would thus be produced the very conflict of authority which ought to be avoided.

### **The Parliaments of the States**

In construing section 107, it must be remembered that, amongst the powers of a State Parliament, is the power of altering its constitution; and it is within the possibilities of political change, that the Parliaments may establish legislatures of limited powers, and may provide for the enactment of laws with the co-operation of the electors. There is some difference of opinion as to the extent of constitutional change, which may be effected by a colonial Parliament without resort to the Imperial Parliament, but it is safe to conclude, that those powers are neither extended nor restricted by section 107.

The section is an express declaration of the principle underlying the federal system of the Commonwealth—that the residuary power of legislation lies in the States, and that power over any matter is not withdrawn from the State Parliament merely because it is vested in the Commonwealth Parliament. The relation of laws, enacted by both in matters within the power of each, is dealt with by section 109, which has been already considered. What powers are withdrawn from the States, and what exclusively vested in the Commonwealth, have also been considered in reference to the powers of the Commonwealth Government, and to finance and trade. In a few cases, the Constitution itself returns a portion of the power which it has withdrawn. Thus, notwithstanding the provisions of sections 51, 90, and 92, a State may levy on goods passing into and out of

the State charges for the execution of its inspection laws (section 112), and, by section 113, intoxicating liquids introduced into any State are, notwithstanding that they are subjects of inter-State commerce, subject to the laws of the States in the same way as liquids produced in the State.<sup>1</sup>

### **Territorial Limitations on State Authority.**

In the United States it is settled that, the legislative authority of every State must spend its force within the territorial limits of the State.<sup>1</sup> This doctrine finds practical application as a matter of constitutional law, in the rule, first, that State laws have no authority on the high seas beyond State lines, because that is the point of contact with other nations, and all international questions belong to the national government; and, secondly, that the State cannot provide for the punishment as crimes of acts committed beyond the State boundary, because such acts, if offences at all, must be offences against the State in whose limits they were committed. On the other hand, persons who have recourse to the tribunals of the State must take the law of the State as they find it; and though the courts of the States generally, in determining the application of law, defer to Private International Law, they do not do so as a matter of Constitutional Law, save in the limited class of cases under Art. iv., sections 1 and 2, and Private International Law is in general part of the laws of the State upon which State legislation may operate.

It has been seen already,<sup>2</sup> that the Parliaments of British Colonies are local and territorial legislatures, and that certain limitations of power are deduced therefrom. The most important of these limitations remain, and are neither greater nor less in the States of the Commonwealth than they were in the Colonies which preceded them.

### **Special Powers Under Imperial Acts.**

Certain of these limitations, however, have been removed by Imperial Acts, and certain powers not incident to a mere local legislature have been conferred upon the Parliaments of the Colonies. Other Imperial Acts have conferred powers to vary the Imperial law, or to supplement it. Section 107 serves to make it clear, that the special powers of legislation in regard to these matters, conferred upon the Colonial Parliaments before the institution of the Commonwealth, remain to the States Parliaments. Some of them, however, fall within the exceptions of section 107—they are by the Constitution withdrawn from the States, or vested exclusively in the Commonwealth Parliament. By section vii. of the Act, the powers

conferred upon the Colonial Parliaments by the Colonial Boundaries Act, 1895, are withdrawn, and the Commonwealth is to be taken to be a self-governing Colony for the purposes of that Act. Another power withdrawn is that over coinage (section 115). The special powers conferred by Imperial Acts in relation to defence, inland posts, customs, and a few other matters, belong solely to the Commonwealth Parliament, because the subjects themselves are declared to be within the exclusive power. With regard to any special powers, which may be conferred by the Imperial Parliament on Colonial legislatures in the future, there is room for some doubt as to the authorities which may exercise them in Australia. The Interpretation Act, 1889, section 18 (3), provides, that in all subsequent Acts, unless the contrary intention appears, “the expression ‘colony’ shall mean any part of Her Majesty's Dominions exclusive of the British Islands and of British India, and when parts of such dominions are under both a central and a local legislature, all parts under the central legislature shall for the purposes of this definition be deemed to be one colony.” By section 18 (7) “the expression ‘colonial legislature,’ and the expression ‘legislature,’ when used with reference to a British possession, shall respectively mean the authority other than the Imperial Parliament or Her Majesty in Council, competent to make laws for a British possession.” If the special power granted relates to a matter within the legislative power of the Commonwealth Parliament—as, for instance, if extended powers were granted to colonial legislatures to vary or suspend the operation of the Imperial Copyright Acts in that possession—it will be exercisable by the Commonwealth Parliament exclusively. But if it relates to a subject not within the power of the Commonwealth Parliament, but in the residuary power of the States—as, for instance, if it gives power to colonial legislatures to make laws punishing crimes committed out of their territory—it is doubtful whether the State Parliament or the Commonwealth Parliament would take the power as the authority competent to make laws for the possession.

The Courts of the States, of course, continue to apply the doctrines of Private International Law in proper cases; but as part of their own law which the State Parliaments may alter. That the “rule of comity,” however, becomes a rule of Constitutional Law in one case, has been seen in dealing with the effect of section 118 under “Judicature.” The power of the State Parliament is also restrained by section 117, whereby

“A subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination, which would not be equally applicable to him if he were a subject of the Queen resident in such other State.”

It is a general characteristic of the Constitution that, as a rule, it does not impose any restraint upon government, except to further some federal purpose. Section 117 aims, not at the protection of individual right against government interference, but at the prevention of discrimination by one State against those who are sometimes referred to as the “subjects” of the other. The section aims at equality, and if the laws of a State refrain from disabling provisions and injurious distinctions affecting the subjects of other States, the section is fulfilled. It is, therefore, very different in character from those provisions of the Constitution of the United States, which forbid the States to pass any Act of Attainder, *ex post facto* law, or law impairing the obligation of contracts, and from the Thirteenth, Fourteenth, and Fifteenth Amendments to that Constitution, which, as protecting the States' own citizens, are essentially *national*, as distinguished from *federal* provisions. It must be compared with Art. iv., sec. 2, of the United States Constitution, whereby “the citizens of each State are entitled to all privileges and immunities of citizens in the several States”; and the sole purpose of that clause, as declared by the Supreme Court, is the sole purpose of section 117—“to declare to the several States that whatever those rights as you grant or establish them to your own citizens, or as you limit or qualify or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.”<sup>1</sup>

There is a difference in form between section 117 and the privileges and immunities clause in the United States Constitution. Section 117 does not purport to grant anything, but merely protects against deprivations and injurious distinctions, while the United States Constitution uses terms of grant, and “privileges and immunities” might certainly include, if they did not suggest, the enjoyment of every kind or advantage open to citizens. The American Courts have, however, put a much narrower construction on the clause, and the terms of section 117 not inaptly express, so far as any general terms can, the nature of the uses to which the American provision has been put. It has been held that the “privileges and immunities” clause only secures those fundamental advantages which belong of right to the citizens of all free governments, and these have been enumerated as implying “protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.” These rights are more particularly instanced by a reference to “the right of a citizen of one State to pass through, or to reside in, any other State for purposes of trade, agriculture, professional pursuits or otherwise; to claim

the benefit of the writ of *habeas corpus*; to institute and maintain actions of any kind in the courts of the States; to take, hold, and dispose of property either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State,” “to which may be added the elective franchise as regulated and established by the laws or Constitution of the State in which it is to be exercised.”<sup>1</sup> An example of an obvious discrimination is to be found in an attempt by a State to give a preference to local creditors over creditors in other States.<sup>2</sup>

Distinctions based on “fundamental rights” are not very helpful in the solution of every-day problems in the application of law; and it is easier to see, that some limit will be put upon section 117, than to lay down any single principle on which it can be established. In the later decisions the United States Courts deprecate the attempt to state formally the limits of Art. iv., sec. 2, and are disposed to treat each case on its merits. In *Corfield v. Coryell* the Supreme Court refused to admit, that “the citizens of the several States are permitted to participate in all the rights, which belong exclusively to the citizens of any other particular State, merely on the ground that they are enjoyed by those citizens, much less that in regulating the use of the common property of the subjects of such State, the legislature is bound to extend to the citizens of all such other States the same advantages as are secured to its own citizens.” Accordingly, in 1876, the Court supported a law of Virginia limiting the enjoyment of the oyster fishery in that State to citizens of Virginia.<sup>3</sup> The same application of the doctrine in the Commonwealth would operate so as to enable a State to refuse a miner's right, or a right to select Crown land, to residents in another State, for in both cases the State is dealing with its property rights. The American doctrine seems to receive support from the decision of the Judicial Committee in *Attorney General for the Dominion of Canada v. Provinces of Ontario, Quebec and Nova Scotia*, a case which goes very far in the protection of the proprietary rights of the Provinces, in the adjustment of governmental powers.<sup>1</sup>

Other cases in the United States support different treatment of residents and non-residents, on the ground that there is some valid reason of justice or convenience for the discrimination, and that the distinction violates no sound principle. Thus the Supreme Court has supported a provision in a State Statute of Limitations, that the absence of the defendant from the State prevents time running against a creditor resident in, but not against a creditor resident out of, the State.<sup>2</sup> It has been held that the common requirement, that a plaintiff resident in another State shall give security for costs, is not *ultra vires*.<sup>3</sup> Again, the section does not annihilate the distinctions of persons known to Private International Law, rules of reason

established by the Courts to do justice between the parties.<sup>4</sup> It does not enlarge the jurisdiction, which is ordinarily assumed on well settled principles; nor does it require the Courts to apply their local law to causes, which are properly governed by the law of some other State. Thus, a State is within its powers in limiting relief in divorce to cases where the parties are domiciled in the jurisdiction. Again, where the law of Louisiana established community of goods between persons married or having their matrimonial home in the State, it was held that the privileges and immunities section did not govern the rights of persons married and living in another State in regard to property in Louisiana.<sup>5</sup> Referring to cases of another class, it has been said that the “privilege of citizens is qualified and not absolute, for they cannot enjoy the right of suffrage or eligibility to office without such term of residence as shall be prescribed by the Constitution and Laws of the State into which they shall remove.”<sup>1</sup>

### **Taxation by the States.**

The most obvious case, to which the section applies, is discrimination in taxation. Of the American provision, Judge Cooley<sup>2</sup> says, it “will preclude any State from imposing on the property which citizens of other States may own, or the business which they may carry on within its limits, any higher burdens by way of taxation than are imposed upon the corresponding property or business of its own citizens.” Accordingly, a special tax on commercial travellers from other countries (such, for instance, as is imposed by New Zealand) would be bad so far as travellers from other States are concerned.<sup>3</sup> An absentee tax, or an increased rate of tax on non-residents, would also be bad; but this does not mean that non-residents are entitled to the most favourable treatment accorded to any class of residents. A “resident in a State” is an ambiguous term; but probably the residence intended is what has been called “habitual physical presence” in the State, neither domicile on the one hand nor mere temporary sojourn on the other.<sup>4</sup> A State may, as a matter of policy, divide its residents into classes, of which one may be treated on more favourable terms than another. Section 117 appears to be satisfied, if residents in other States are not treated more unfavourably than the less favoured class of residents in the State—they are not subject to a discrimination, which would not be equally applicable to them, if they were residents in the State and fell within the class affected.<sup>5</sup>

The benefit of section 117 is secured only to British subjects resident in a State, terms which exclude companies from its scope. It is a personal advantage, and therefore discriminations other than against persons or

classes of persons, if prohibited at all, are prohibited by other provisions of the Constitution.

It has been seen that, on the establishment of the Commonwealth, the States are subject to the restriction, that they may not tax the property of the Commonwealth; that perhaps this extends to the “instrumentalities of the Commonwealth”; and that, on the establishment of uniform duties of customs, they may no longer impose duties of customs or excise, nor put any tax upon inter-State trade, commerce, or intercourse. Further, discriminations, injuriously affecting British subjects resident in other States, are inoperative (section 117). Finally, it has been suggested, that the Commonwealth power to make laws with respect to “Taxation” may give very extensive powers of regulating taxation by the States.

In the United States, the doctrine that the laws of a State can have no extra-territorial operation has been applied to limit strictly, as a matter of constitutional law, the taxing power of the States. Thus, in *M’Culloch v. Maryland*,<sup>1</sup> Marshall, C.J., said, “All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are on the soundest principles exempt from taxation.” “The subjects of taxation,” it is said, “are persons, property, and business, and any one of them may be taxed though the others are beyond the jurisdiction.”<sup>1</sup> Where the person is resident in a State (mere transient presence is not residence), it seems that he may be taxed in proportion to the value of his property, wherever situated; and upon the same principle, a company may not be taxed upon the whole amount of its capital stock, except by the State in which it is domiciled. Where taxation is based merely upon the presence of property, or the carrying on of business in the State, only the property there situated, or the business there done, can be taxed. Intangible property follows the person of the owner. Stock or shares in a company are taxed where the owner of the stock resides. Debts are taxable only in the State of the creditor, where alone they are “property.” Accordingly, bonds of a corporation, held by non-residents in the State, are not taxable, even though the corporation is chartered by or domiciled in the State, and the corporation may successfully resist an attempt to levy a tax in respect to them.<sup>2</sup>

No attempt has been made to limit the taxing power of the Colonial Parliaments upon similar principles. The limits of particular taxes have in many cases been expressly laid down by Parliament, and the only judicial question has been one of interpretation of the particular exercise of legislative discretion.<sup>3</sup> Where the limits have not been defined, the Courts have sought to discover and apply just principles to the incidence of the tax.

Save for the restrictions mentioned as arising out of the Constitution, the powers of taxation belonging to the State Parliaments are the same as those of the Parliaments of the Colonies. It is submitted, that the State Parliaments are not subject to the limitations which the American Courts have inferred from the territorial operation of laws, and that the taxing power is limited territorially only by the ability of the legislature to make its laws effective in its own territory. The question is one of considerable practical importance, especially in relation to companies. Several of the Colonies,<sup>1</sup> for example, have passed laws, similar to those which have been declared unconstitutional in America, requiring companies to pay a tax in respect of their debentures and preference shares held by persons resident out of the several colonies, and to deduct the amount from the interest or dividend of the creditor. If the American doctrine applies, such companies can successfully resist the claim of the Government, and the debenture holder may, in the Courts of the State itself, recover from the Company the full amount of the interest which it has contracted to pay him. If, on the other hand, such provisions are constitutional, the Company may, by proceedings in the Courts of the State, be compelled to comply with the Statute, and the authority of the Statute will be a complete answer to any proceedings in those Courts by the debenture holder against the Government; for there is no provision in the Australian Constitution prohibiting laws which impair the obligation of contracts. But it must be remembered, first, that a State Government is unable to resort to the Courts of any other State to enforce its revenue laws; and, secondly, that, if the contract between the Company and its debenture holder be not governed by the law of the State, the authority of the Statute will not protect the company in any other jurisdiction in which it may be suable by the creditor.<sup>2</sup>

### **The “Police Power” of the States.**

In every work on the Constitution of the United States, we find reference to the “police power” of the States. In the *Mayor of New York v. Miln*<sup>1</sup> the Supreme Court described the powers “which relate to merely municipal legislation, or what may perhaps more properly be called internal police,” in the following terms: “We should say that every law came within this description which concerned the welfare of the whole people of a State or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State or of any individual within it;

and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction.” A later decision, having a closer relation to the modern idea of the functions of government, describes it as the power “to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”<sup>2</sup>

At its broadest, the police power is nothing other than the residuary power of government in the State, and, as such, is hardly capable of exact definition. But it has more restricted uses, as where it is distinguished from the taxing power, or power over commerce; and the many attempts that have been made by the Courts to describe if not define it, vary according to the matter in hand and the practical distinction to be emphasised. It has in fact become the “dark continent” of American jurisprudence.<sup>3</sup> Sometimes it is used in discussions of the limits of the power of the States Legislatures, considered merely in relation to the distribution of power between legislative, executive, and judicial authorities.<sup>4</sup> Sometimes it is used in considering the power of the States Legislatures, as affected by the prohibitions and restrictions, either of the State Constitutions, or the Constitution of the United States.<sup>1</sup> The Constitutions contain certain guarantees against the interference of the States with private rights: it is held, that such restrictions are to be read consistently with the police power, and that the State is not deprived of its discretionary power to regulate good morals, promote health, and preserve order, though in so doing it may incidentally deteriorate property or diminish profits arising out of a contract. So, though Congress has made patent laws, the State may, as a matter of police, prohibit or regulate the sale of the patent article in the State.<sup>2</sup> Again, though the admission of subjects or citizens of other nations to American shores is a matter which can be regulated by Congress alone, it may be that a State can protect itself by appropriate legislation against paupers and convicted criminals from abroad.<sup>3</sup>

So far as concerns the Federal Constitution, the police power has been important mainly in relation to its conflict with the power of Congress over foreign and inter-State commerce. The Courts have declared the commerce power of Congress to be partly exclusive of, partly concurrent with, the power of the States. The exclusive power of Congress over foreign and inter-State commerce is mitigated by the doctrine, that, in the absence of legislation by Congress, the State may affect such commerce by their laws and police. Inspection laws, health laws, quarantine laws, the introduction of impure and adulterated foods or of diseased cattle, are the most conspicuous illustrations of laws of this class.<sup>4</sup>

As has been pointed out in chapter viii., a law may have more than one aspect. "All experience shows that the same measure or measures, scarcely distinguishable from each other, may flow from distinct powers, but that does not show that the powers themselves are identical."<sup>1</sup> Public health is eminently a matter of police and for the States; foreign commerce belongs to Congress; and a quarantine law is a legitimate exercise of either power. If each authority has made a law upon the subject, and there is a collision between them, the law of Congress must prevail.<sup>2</sup> On the other hand, there has been a tendency on the part of Congress to enact laws, purporting to be in pursuance of its commerce power, but affecting matters, which have not become, or which have ceased to be, subjects of foreign or inter-State commerce. Such Acts, whether they affect the internal commerce of a State or deal with matters which are not the subjects of commerce at all, are an invasion of the exclusive powers of the State, and are *ultra vires*. It has been determined by a large number of cases, that the police power is an exclusive power in the States, and that there is no substantive police power in Congress. The powers of Congress are limited by enumeration, and the extent of the enumerated powers themselves must be defined by a regard to the fact, that the Constitution leaves with the States the general power to protect the lives, health, and property of the citizens, to preserve good order and the public morals. This doctrine has received its most striking and practical application in the restrictive interpretation, put by the Courts, on the prohibition imposed upon the States, and the powers conferred upon Congress, by the Fourteenth and Fifteenth Amendments of the Constitution adopted at the close of the Civil War.<sup>3</sup>

The frame of the Commonwealth Constitution is the Constitution of the United States; and it remains to consider how far the American discussions as to the nature and extent of police power affect the States in Australia. The powers of the States Parliaments in Australia are limited at fewer points than those of the States Legislatures in America; the "police power" is subject to fewer limitations. The questions that have arisen in the United States under the State Constitutions cannot at present arise, for the States Parliaments enjoy plenary powers unlimited by a distribution of powers among the legislative, executive, and judicial organs, or by express restriction. The States Parliaments indeed enjoy a position of independence unknown to the States Legislatures in the United States, or to the Provincial Parliaments in Canada. The powers of the former have been controlled by that jealousy and distrust of government, which has been a characteristic of American constitutional history. The power of the Provincial Parliaments in Canada is limited by the fact, that they have enumerated powers merely, and that the Dominion Executive exercises

supervision over them. So far as the Commonwealth Constitution is concerned, the restriction upon State action, imposed by the U.S. Constitution in the interests of individual liberty, are, with one exception (sec. 117), absent. On the other hand, the Commonwealth Constitution leaves room for the conflict of the police power with commerce. The question in the Commonwealth will turn, not upon any “exclusive” power of the Commonwealth Parliament implied by the Courts, but upon the prohibitions of section 92. Some of the ambiguities of that section have been already referred to;<sup>1</sup> but it raises also questions similar to those which have arisen in America out of the exclusive power of Congress. In the United States, it has been held, that “in conferring upon Congress the regulation of commerce, it was never intended to cut off the States from legislating upon all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country,<sup>2</sup> and the strictest interpretation of the police power has conceded, that a State may pass sanitary laws, may prevent persons or animals suffering under contagious or infectious diseases from entering the State, and for the purpose of self-protection may establish quarantine and reasonable inspection laws.<sup>1</sup> Further, “a State may prevent the introduction into the State of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever, or the virus of smallpox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition or quality unfit for human use or consumption.”<sup>2</sup> It can hardly be doubted that the like powers are exerciseable by the States in the Commonwealth, and that a *bonafide* exercise of such powers is not an infringement of the freedom of trade, commerce, and intercourse under ¶ 92. The case becomes more difficult, when we come to measures for the protection of the moral health of the community. The introduction of intoxicating liquids has given rise to constitutional difficulties both in the United States and Canada. In *Leisy v. Hardin* the Supreme Court of the United States held, that a statute of Iowa, prohibiting the transportation by a common carrier of intoxicating liquor from a point within any other State for delivery at a place within Iowa, was a restriction of Inter-State commerce, and therefore *ultra vires*, though in the opinion of the Court, as it might fairly be said that the provision in question had been adopted, “not expressly for the purpose of regulating commerce between its citizens and those of other States, but as subservient to the general design of protecting the morals and health of its people, and the peace and good order of the State, against the physical and moral evils arising from the unrestricted manufacture and sale within the State of

intoxicating liquors.” In the Commonwealth Constitution, this particular matter is provided for favourably to the power of the State, by ¶ 113, whereby “all fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the States as if such liquids had been produced in the State.” That the State may, as a precautionary measure against social evils, exclude convicts, harlots, paupers, idiots, and lunatics, is now generally admitted in the United States. But as the measure is one of self-defence, arising only from vital necessity for its exercise, it must not be carried beyond the scope of that necessity.<sup>1</sup> This necessity can hardly be said to exist in respect to the entrance of Asiatics or to the admission of illiterate persons, the cloak under which laws regulating the admission of aliens are commonly hidden. A Victorian law, prohibiting the admission of Chinese from New South Wales, unquestionably restricts freedom of intercourse among the States, which is *prima facie* contrary to section 92. It would seem that, though such a law is genuinely aimed at preserving the peace and good order and the moral health of the State, in such matters the Court must take “short views” of policy, and must hold it to be void by reason of its immediate purpose.<sup>2</sup>

While the domestic order of the States is a matter for the States themselves, they are, like the States in America, entitled to call on the Federal Government for protection against “domestic violence”; and against “invasion” the Federal Government is bound to protect them without any request (sec. 119). But it is not to be forgotten, that in the United States it has been laid down, that there is a “peace of the United States,”<sup>3</sup> which enables the Federal Government to take all steps which it may think fit, and which its courts may support, to protect the instruments and agencies of the Government, and to secure the due observance of its laws. In the Commonwealth, the terms, which grant its powers to the Parliament, enable it to make laws for the “peace, order, and good government of the Commonwealth” in respect to the matters committed to it, and it is safe to infer that it will have powers at least as extensive as those of the Federal Government in the United States. The functions of the Commonwealth Government are so far-reaching and its agencies and instrumentalities so many, that internal disorders on any large scale could hardly leave the peace, order, and good government of the Commonwealth unaffected in regard to them. In such a case the Commonwealth Government would intervene upon its own initiative.

## **Laws in Respect of Religion.**

Section 116 contains a restriction upon the power of the Commonwealth, which is not very aptly placed in the chapter on "The States." It provides that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

The last provision no doubt imposes a restraint on power, and the prohibition of laws "for establishing any religion" possibly prevents appropriations in aid of religious bodies. In 1899, an attempt was made, under a similar provision in the United States Constitution, to prevent the execution of an agreement with the Providence Hospital at Washington, a body incorporated by Act of Congress, whereby that body was to receive certain sums of money voted by Congress for providing an isolating building. It was contended that, as the institution was governed and maintained by Roman Catholics, this was aid to a sectarian institution and was a law respecting an establishment of religion. There was no suggestion that the benefits of the hospital were confined to any sect, and the Court held, that the fact that the hospital was controlled by a sect was immaterial in the case of a body which had been incorporated, so long as the management was in accordance with the constitution of the body. The grant, therefore, was held to be lawful.<sup>1</sup> In the Mormon case,<sup>2</sup> where the provisions against prohibition of the free exercise of any religion was relied on, the Court held that "a person's religious belief could not be accepted as a justification for his committing an overt act made criminal by the law of the land." The words "or for imposing any religious observance" are new. The Convention was informed that, on the strength of a decision of the Supreme Court that the United States were a Christian people, Congress passed a law closing the Chicago Exhibition on Sunday, "simply on the ground that Sunday was a Christian day." It was represented, that the words in the preamble of the Commonwealth Constitution, "humbly relying on the blessing of Almighty God," might give some support to similar attempts in Australia, and accordingly words were inserted to meet the danger. The words may have unlooked-for effects. If "Sunday closing" is a "religious observance," can the Commonwealth close the Custom House on Sunday, or refuse a clearance to vessels on Sundays, Good Friday, and Christmas Day?

### **Saving of State Laws.**

Sec. 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 power of alteration and repeal in respect of any such law as the Parliament of the colony had until the colony became a State.”

This section may be compared with the common provision in the Constitution Acts of the Colonies, saving existing laws until altered or repealed by the new legislature (*e.g.* Constitution Act of Victoria, 1855, section xl.).

The effect of the Constitution upon certain existing laws of the States has already been referred to in considering the powers of the State Parliament in regard to Taxation, and the provisions of section 117. The important words in section 108 are “subject to this Constitution,” and sections 114, 115, 117, and 118 make, or may make, certain existing laws of the State of no effect.

In general, State laws will remain in force after the establishment of the Commonwealth, even though they relate to matters which are within the exclusive power of the Commonwealth Parliament. The various services which are taken over by the Commonwealth, and which by section 52 are in the exclusive power of the Parliament, are taken over with the State laws thereon: otherwise, there could be no administration or control by the Commonwealth Executive, for some of them must, and all of them may, be transferred before the Commonwealth Parliament has had the opportunity to provide for them. But the power of the State Parliament to repeal or vary the laws saved is, like the saving of these laws, “subject to this Constitution.” It is submitted that, where the Constitution has declared that the Commonwealth Parliament shall have “exclusive power to make laws,” the State Parliament cannot alter or repeal the laws in force, though The Parliament of the Commonwealth has made “no provision in that behalf.” The power of the Parliament of the Colony, before such colony became a State, to alter or repeal such laws included the power to supplement them and to substitute others for them. If that power is preserved, what is the exclusive power of the Commonwealth Parliament?

## **Chapter XIX. New States and Territories.**

THE Commonwealth of Australia starts on its career in circumstances different from those of the United States or of the Dominion of Canada, in that its territory is coterminous with the territory of the States, and that the partition of the Continent amongst the members of the Union leaves no part of it outside the federal system. Some of the colonies, however, are of unwieldy size and possess a vast unsettled territory, and it has been seen, in the History of Federation, that the re-adjustment of territory has been mooted from time to time. Thus, with eyes on Western Australia and South Australia, it has been suggested, that such colonies should consent to a partition, which would place their unsettled and distant territory in the hands of a central government for the benefit of all Australia. Again, in the Colony of Queensland, separate and conflicting interests have been developed, and have produced political conditions, which are believed to require a division of that Colony into two or three Colonies. The re-adjustment of the boundaries of New South Wales and Victoria so as to include the Riverina in the latter colony, the erection of a new Riverina colony, and the claims of aggrieved areas for separation from an unsympathetic capital, are among the political murmurings. In a country as yet so sparsely settled as Australia, it is improbable that the present political divisions are final.

In these circumstances, there must be provision for the surrender of territories to the Commonwealth, the readjustment of existing States, and the erection of new States, either by union or sub-division of existing States, or by establishment out of territories which have been surrendered to the Commonwealth.

But, as it is a fundamental principle of the union that the "territories of the several existing colonies shall remain intact," it is made clear that no State is to be deprived of its territory for any of these purposes without its consent. Two other matters must be remembered. There were two colonies—Queensland and Western Australia—whose present acceptance of federation was uncertain, and one—New Zealand—which had for years dissociated itself from the federal movement. It was considered, that the doubtful colonies would be more likely to come in at the outset, if they ran the risk of getting less favourable terms by delay. Accordingly, the Act, unlike the Constitution of 1891, and despite the protests of New Zealand at the London Conference, distinguishes between Original States and Colonies which may be subsequently admitted (section vi.). Finally, it was recognized that the Commonwealth might, like some of the colonies, have

dependencies, and that it might be entrusted by the Crown with the government of dependent communities not included within the territorial limits of Australia, Tasmania, or New Zealand.

These are the conditions for which provision is made in chapter vi., somewhat misleadingly headed “New States.”

Section 122 deals with what the marginal note calls the “Government of territories,” a term which is used, as in the Constitution of the United States, to describe territory and territorial communities, not forming part of any State, but subject to the general government.

In the United States, the term “Territory” has also connoted that the community in question was in a state of political pupillage, and that in due course it would come to maturity and be received as a State. Accordingly, it has been customary to regard the seat of Government—the District of Columbia—as not included among the “territories,” and some difficulty has been felt as to the status of the islands acquired by the United States from Spain, islands whose condition hardly promises that they will within any reasonable time become States.<sup>1</sup>

The Act by section vi. recognizes the term “Territories” as describing a political status, and the Constitution indicates the manner in which a territory may be constituted. By section 111, the Parliament of a State may surrender any part of the State to the Commonwealth, and, upon acceptance, such part of the State becomes subject to the exclusive jurisdiction of the Commonwealth. The Crown may place under the authority of the Commonwealth any colony or dependency outside the Commonwealth. For the government of these, the Parliament may make provision by section 122. In one important respect these territories differ from the territories of the United States. In America, the territories cannot return members to Congress, though they are suffered to send delegates who may lay their views before the legislature. The Commonwealth Constitution enables the Parliament to allow the representation of such territory in either House of The Parliament, to the extent and on the terms which it thinks fit. There is another class of territory within the terms of section 122—territory “otherwise acquired” by the Commonwealth. It is not improbable that this had some reference to the power over “treaties,” which was in the earlier draft of the Constitution. But, as it stands, it appears to refer to the seat of Government and all places acquired by the Commonwealth for public purposes, which, under section 52, are under the exclusive jurisdiction of the Commonwealth, and therefore probably no longer part of any State, so that their inhabitants enjoy political privileges as citizens thereof.

So far as the government of the territories is concerned, the division of

power between Federal and State government of course does not exist; any institutions, which may be set up there, are the creation of The Parliament, in whom lies the power of regulation and control. To them are inapplicable the rights and duties cast upon States, hence they stand, in the main, outside the provisions of the Constitution—"the Constitution was made for the States, not the territories," is true in the Commonwealth to the same extent as in the United States. Thus, suits between a resident in a State and a resident in a territory are not within federal jurisdiction, and section 117 does not protect residents in a territory against disabilities or discriminations in the States.

Of residents in the territories of the United States it is said, that "the securities for personal liberty which are incorporated in the Constitution were intended as limitations of power over any and all persons within the jurisdiction of the United States." But, as has been mentioned before, such securities are not to be found in the Commonwealth Constitution. Section 116, however, is an exception, and may fetter the power of The Parliament, wherever that power is intended to operate. But the suggested limitation in favour of personal liberty, even in the United States, rests merely upon *dicta*.<sup>1</sup>

### **New States.**

By section 121 the Parliament may admit to the Commonwealth or establish New States. "Admit to the Commonwealth" obviously relates to communities without the Commonwealth, over which the Parliament has no power, viz. Colonies such as New Zealand or Fiji. In this class of case, the power of admission is, of course, subject to the agreement of the community admitted, as signified by the authority competent to act therefor. "To establish New States" relates to communities within the Commonwealth, e.g. the territories, which it may be determined to raise to the dignity of States (section 6 of the Act). It is probable that The Parliament cannot convert the seat of government, or places acquired for public purposes, into a State. The power to convert a Territory into a State, or to establish a State in a Territory, may be exercised by The Parliament without the concurrence of any other authority.

By section 124, The Parliament may form a new State by separation of territory from any State of the Commonwealth, but only with the consent of the Parliament thereof; or may form a new State by the union of two or more States or parts of States, but only with the consent of the Parliaments of the State affected.

In admitting or establishing new States, The Parliament may make and

impose such terms and conditions, including the extent of representation in either House of The Parliament, as it thinks fit (section 121). Except so far as otherwise agreed or determined, upon such admission or establishment, the Constitution will apply to such new State.

### **Alteration of the Limits of States.**

It has been seen, that the preservation of the territory of the federating Colonies was a primary condition of the union, and intercolonial suspicion led to this security being sought in very remarkable terms.

Section 123 confers power upon The Parliament to increase, diminish, or otherwise alter the limits of a State; but requires, that, for such alteration, as well as for the arrangements incident thereto, the consent shall be obtained not merely of the ordinary authority therein—the Parliament of the State—but of the electors of the State. The result is very curious. The State Parliament may, without any consent of Electors, diminish its territory; for it is expressly authorized by section 111 to surrender any part of the State to the Commonwealth. The Commonwealth Parliament may immediately transfer the territory so surrendered to another State; but, in order to make the transfer good, the Electors, as well as the Parliament of the State receiving the accession of territory, must assent to the “increase” of “its limits.” Again, by section 124, a State, without any approval of Electors, may be cut asunder and made into two or more States, or may lose its separate existence altogether by union with another State—in either case, no more than the concurrence of the State Parliament and the Commonwealth Parliament is required.

It may be doubted, whether the powers referred to exclude all other modes of dealing with the boundaries of the States. The Colonial Boundaries Act, 1895, is not applicable to the States (section viii. of the Act). But there are several other statutory provisions affecting the boundaries of the Australian Colonies, and it is by no means clear, that they all merge in, and are extinguished by, the provisions of the Commonwealth Constitution.<sup>1</sup> Thus, it may still be competent for the legislature of New South Wales and Victoria, by laws passed in concurrence with each other, to define in any manner different from that contained in 18 and 19 Victoria, c. 54, the boundary line of the two colonies along the course of the river Murray. Again, by the 24 and 25 Victoria, c. 44 ¶ 5, the Governors of contiguous colonies on the Australian continent may, with the advice of their Executive Councils, determine or alter the common boundaries of such colonies, and, on the proclamation of the Crown, such boundaries as altered shall become the true boundaries of

the colonies; and, by section 6, provision is made for appointing the public debt, and making other necessary arrangements on the rectification. And, while it may be assumed, that the various provisions, enabling the Crown to establish new colonies in Australia by separation from existing colonies, are either spent or repealed by implication, it does not appear certain, that the power of the Crown to annex portions of one colony to another (as under the Western Australian Constitution Act, 1890, section 6) is consumed and extinguished by the Constitution.

1 Madison's *Virginia Report*, 1800, cited by Story on the Constitution, sections 454 and 208, n.

1 Not always, however. For example, sections 112, 118, 120.

2 *State of Texas v. White* (1868), 7 Wallace, 700, 725.

1 The power of the States, and the application of its laws in such cases, seem strictly limited by the words "until The Parliament otherwise provides." If The Parliament provides and then repeals its law without making further provision, it is apprehended that there is no power in the State to supply the defect of authority.

1 *U.S. v. Jones*, 109, U.S., 513, 519.

1 *Maritime Bank of Canada v. Receiver General of New Brunswick*, L.R. 1892, A.C. 437.

1 The States propose to continue the appointment of separate Agents-General in London, but as business rather than diplomatic agents.

1 *Government Gazette* (Victoria), Jan. 2, 1901.

2 See the Vice-Admiralty Courts Acts, 1863 and 1867 ; and the Colonial Courts of Admiralty Act, 1890.

1 Section 113 is suggested by the "Wilson Bill," which was passed by Congress in 1890, as a result of certain decisions of the Supreme Court, notably *Leisy v. Hardin*, 135 U.S. 100.

1 Cooley, *Constitutional Limitations*, 6th ed., 149.

2 See chapter i.

1 Per Miller, J., in the Slaughter House Cases, 16 Wallace 77.

1 *Corfield v. Coryell* (1825), 4 Washington C.C. 380.

2 *Blake v. M'Clung* (1898), 172 U.S. 239.

3 *M'Cready v. Virginia*, 94 U.S. 391.

1 (1898) A.C. 700.

2 *Chemung Canal Bank v. Lowrey* (1876), 93 U.S. 72.

3 *Cummings v. Wingo*, 10 S.E. Rep. 107 (S.C.); *Blake v. M'Clung* (1898), 172 U.S. 239, 256.

4 See *Lemmon v. The People* (1860), 20 N.Y. 562.

5 *Connor v. Elliot* (1855), 18 How. 591.

1 *Abbot v. Bayley* (1827), 6 Pickering 89 (Mass.); and *Minor v. Happersett* (1874), 21 Wallace 162, 174.

2 *Constitutional Limitations*, 6th ed., 597.

3 See *Ward v. Maryland*, 12 Wall. 419, 430.

4 See on "Residence," Dicey, *Conflict of Laws*, pp. 80, 159, and see *Blake v. M'Clung* (1898), 172 U.S. 239.

5 These considerations appear relevant to the provisions of the Income Tax Act of Victoria (Act No. 1374). This Act imposes a tax upon all income from personal exertions within, or property situated in, Victoria. The minimum income taxed is £200, and, in respect to incomes over that amount, a deduction of £200 is allowed. By section 8 (2) it is provided, that "no person who has been out of Victoria for six consecutive months in the year, during which the income was received, shall be entitled to any deduction by way of exemption from income tax." This, it will be observed, applies to all persons, "residents" as well as non-residents; and the proper conclusion seems to be, that non-residents are not entitled to be put on a more favourable footing than that class of residents who have not qualified for the privilege of exemption.

1 (1819) 4 Wheaton 316, 429.

1 Hare, *Constitutional Law*, p. 322, and *Case of the State Tax on Foreign Held Bonds* (1872), 15 Wallace 300.

2 See generally Hare, *Constitutional Law*, pp. 317-330; *Commonwealth of Pennsylvania v. Standard Oil Coy.*, 101 Penn. St. 119; *Case of the State Tax on Foreign Held Bonds* (1872), 15 Wall. 300; *Gloucester Ferry Coy. v. Pennsylvania* (1885), 114 U.S. 196; *Pullman's Car Coy. v. Pennsylvania*, 141 U.S. 18.

3 See *Blackwood v. The Queen* (1882), 8 App. Cas. 82.

1 *Victoria*, Income Tax, 1896, sec. 19 (1); *N.S.W.*, Land and Income Tax Assessment Act, 1895, sec. 22; *Queensland*, Dividend Duty Act, 1890.

2 See *Spiller v. Turner* (1897), 1 Ch. 911.

1 (1837) 11 Peters 102. See also Taney, C.J., in the *License Cases* (1847), 5 Howard 504.

2 *Barbier v. Connolly* (1885), 113 U.S. 27.

3 Burgess, *Political Science and Constitutional Law*, vol. ii., p. 136.

4 See Thayer, *Cases on Constitutional Law*, p. 693

1 See *Commonwealth v. Alger*, 7 Cushing 53 (Mass.), and *Thorpe v. Rutland, etc., Railway Coy.*, 27 Vermont 840.

2 *Patterson v. Kentucky*, 97 U.S. 501.

3 See *Chy Lung v. Freeman*, 92 U.S. 275.

4 See *Gibbons v. Ogden* (1824), 9 Wheaton 1; *Licence Cases* (1847), 5 Howard 504; *Railroad Coy. v. Husen*, 95 U.S. 465.

1 Per Marshall, C.J., in *Gibbons v. Ogden*, 9 Wheaton 1.

2 *Ib.*, p. 209.

3 See the *Slaughter House Cases* (1873), 16 Wallace 36; *Barbier v. Connolly* (1885), 113 U.S. 27; *Civil Rights Cases* (1883), 109 U.S. 3.

1 Chapter xi.—Finance and Trade.

2 *Sherlock v. Alling*, 93 U.S. 99.

1 *Railroad Company v. Husen*, 95 U.S. 465, 472.

2 *Bowman v. Chicago and N. W. Railway Coy.* (1888), 125 U.S. 465, 489. In this case and in *Leisy v. Hardin* (1890), 135 U.S. 100, the American authorities are collected and examined.

1 *The Passenger Cases*, 7 Howard 283, per Grier, J. ; *Henderson v. New York and Chy Lung v. Freeman*, 92 U.S. 275.

2 See the *Liquor Prohibition Case* (1896), A.C. 348.

3 *In re Neagle*, 135 U.S. 1 ; and see *in re Debs.* (1894), 158 U.S. 564.

1 *Bradfield v. Roberts* (1889), 175 U.S. 291.

2 *United States v. Reynolds* (1878), 98 U.S. 145.

1 As to the meaning and status of Territories, see articles in the *Harvard Law Review*, vol. xii., by Professor Langdell, Mr. Randolph, and Professor Baldwin.

1 See Cooley on *Constitutional Law*, p. 37; *American Insurance Coy. v. Canter* (1828), 1 Peters 511; *Loughborough v. Blake* (1820), 5 Wheaton 317; *Mormon Church v. U.S.* (1889), 136 U.S. 1; *American Publishing Coy. v. Fisher*, 166 U.S. 464.

1 See 5 and 6 Vict., c. 76, ¶ 51; 13 and 14 Vict., c. 59, ¶¶ 30 and 34. [These Acts are repeated as to N.S.W., Victoria, and Western Australia by the Constitution Acts of these Colonies “so far as repugnant thereto.”] 18 and 19 Vict., c. 54, ¶¶ 5, 6, and 7; 24 and 25 Vict., c. 44, ¶¶ 2, 5, and 6.

## **Chapter XX. The Alteration of the Constitution.**

THE spirit of federalism requires, that the federal part shall not be at the mercy of the central government. Therefore, in no federal system is the power of constitutional amendment left in the principal organ of that government—the federal legislature—save in the German Empire, where, however, the predominant Chamber—the Bundesrath—both in its constitution and mode of action, is a perpetual memorial of confederatism, and affords ample protection to State rights. There may be, in the constitution itself, an organization of the state behind the government, or “the founders of the polity may have deliberately omitted to provide any means for lawfully changing its bases.” A signal instance of the latter course is to be found in the case of the Dominion of Canada, where the fundamental provisions of the British North America Act, 1867, are alterable only by the Imperial Parliament.

In Australia, it was as necessary, as elsewhere, to establish the federal system upon a basis, which should not be disturbed by the legislature. But it was no less an object of the founders of the Commonwealth to enlarge the power of self-government. The existing colonies had the power of amending their own Constitutions, the Commonwealth must have the power of amending the Commonwealth Constitution. One of the most difficult tasks, which the Convention had to perform, was to devise a mode of amending the Constitution, which should make that instrument sufficiently rigid to protect the rights of the several States, to secure deliberation before action, and to discourage a “habit of mending,” which might become a “habit of tinkering,” but which should at the same time leave it flexible enough to recognize, that development is as much a law of state life as existence, and to harmonize with the spirit of a people, with whom “majority rule” is the first (and sometimes the only) principle of government, and who have grown up under a political system, which knows little more of the distinction between constituent and legislative power than the British Constitution itself.

In no other matter was so much careful attention bestowed upon the methods of other Constitutions, and on the lessons to be gained from the experience of the United States and Switzerland. The compromise ultimately adopted is interesting, both from what it adopts, and from what it rejects, of these models.<sup>1</sup>

The opening words of section 128—“This Constitution shall not be altered except in the following manner”—make it clear, that there is no alternative method of amendment, such as might otherwise perhaps have

been considered to belong to The Parliament under the Colonial Laws Validity Act, 1865, and establish the provisions of the section as mandatory and not merely directory.

The principles of Parliamentary government, of democracy, and of federalism, which run through the Constitution, are all recognized in section 128. The tradition of Parliamentary Government and of Ministerial responsibility leaves the sole initiation of amendments with either House of The Parliament, and neither the States Legislatures, as in the United States, nor the electors, as in Switzerland, have any direct means of setting the machinery to work. The proposed law for the alteration of the Constitution must be passed by an absolute majority of each House of Parliament, a provision common to the Constitution Acts of the several colonies, and distinguishing measures of constitutional amendment in that one respect from ordinary legislation. In providing merely for an absolute majority throughout this clause and in section 57, the Constitution avoids the reproach of the “excessively artificial majorities” required for each stage in the amendment of the Constitution of the United States: experience shows that the two-thirds majority in each House of Congress, and the concurrence of three-fourths of the States Legislatures, can rarely be obtained. But not even the concurrence of the two Houses is essential in the Commonwealth. In Switzerland, where one Chamber of the Federal Assembly demands a revision of the Constitution and the other will not agree thereto, the question of revision or not is submitted to the electors, and if a majority declares for revision, the Chambers of the Legislature have to set themselves to the task. In Australia, if one House rejects a proposed amendment passed twice by the other with an interval of three months in the same or the next session, the Governor-General may submit the amendment to the electors for their approval. The means provided by section 128, for dealing with differences between the Houses on amendments of the Constitution, are much simpler than those, in section 57, relating to ordinary legislation. The reason is that ordinary legislation is essentially a Parliamentary function, and the reference to the people is made, only as a last resort, after the failure of all other means of reconciliation. Constitutional amendment, on the other hand, is a power enjoyed by the people in the ordinary course, and not merely as the arbiter between the Houses. It was the people of the Colonies who adopted the Constitution— it is the people who should amend. If they share the power with The Houses of the Parliament, it is as predominant partners. Another distinction between sections 57 and 128 must be noticed. Section 57 applies only to measures originating in the House and rejected by the Senate, a fact which, it has been observed, is significant of the parts which

they are respectively expected to play in legislation. But the alteration of the federal bargain is a matter in which the House of the States may well move: accordingly, the “deadlock” provision of section 128 applies to proposed laws originating in either House and rejected by the other.

When a proposed law has passed the two Houses, it has to be submitted in each State to the Electors, qualified to vote for the election of Members of the House of Representatives, not less than two nor more than six months after its passage—times fixed to afford sufficient time for the electors to inform themselves of the issue, and to prevent undue delay.

It has been seen, that the Senate, as well as the House, is unitary or national in action, in matters of constitutional amendment, as well as in matters of ordinary legislation. The federal principle received its recognition, as in the Swiss Constitution, in the provisions relating to submission to the electors—“If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.” There is to be a national majority and a federal majority—a majority of the electors of the Commonwealth who have recorded their votes, and a majority of the States acting by their electors.

In determining the national majority, provision is made for the fact that, so long as the electoral qualification is governed by the laws of the States, and even after a federal franchise is established by the Commonwealth Parliament under the saving of section 41, the proportion of electors to population in States, which have adopted Woman's suffrage, will be about double the proportion in other States. Accordingly, it is provided that, “until the qualification of the electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one half the electors voting for and against the proposed law shall be counted in any State, in which adult suffrage prevails.”

Section 128, so far as we have considered it, provides facilities for amendment not to be found in any other federal constitution. But this facility has to be paid for by the reservation of certain matters, for which an additional consent is required. By Article V. of the Constitution of the United States, “no State, without its consent, shall be deprived of its equal suffrage in the Senate.” As in the amendment of the Commonwealth Constitution, the States have conceded more to the national principle than have the States in America, the Constitution reserves more matters for the special approval of the electors of the State concerned. It provides, that “no alteration diminishing the proportionate representation of any State in either House of The Parliament, or the minimum number of representatives

of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law, unless the majority of the electors voting in that State approve the proposed law.”

There is no definition of an “alteration of the Constitution,” but it is reasonable to conclude, that the term “alteration” was used in preference to the more familiar “amendment,” in order to denote the widest power of change, including the unlimited power of addition to the instrument. Broadly, the powers of the Commonwealth, as organized behind the Parliament, may be compared with the powers of constitutional amendment possessed by the representative legislatures of the colonies. All constitutional alteration, like all ordinary legislation, must be for the Commonwealth,” and no alteration of the Constitution may be repugnant to any Imperial Act in operation in the Commonwealth, unless, expressly, or by implication, power over such Act has been given by the Imperial Parliament.

One Imperial Act, operating in the Commonwealth, over which the Commonwealth has no power, is the Commonwealth of Australia Constitution Act itself, from the beginning to the introductory words of section ix.: “The Constitution of the Commonwealth shall be as follows.” Some of these sections are spent, but others remain in force. The Commonwealth is established in virtue of this part of the Act, and it would appear to be dissoluble only by Imperial Act—so far as the preamble may throw light on the Act, it supports this view. The name of the Commonwealth, and the operation of the Constitution, and the laws of the Commonwealth throughout the Commonwealth, are also fixed. “States” and “Original States” are defined, and in as much as the Act speaks of union in a “Federal Commonwealth,” some doubt may be entertained, whether anything may be done which destroys the federal character. But the descriptive “Federal Commonwealth” is too vague, it is submitted, to be available as a limitation of power; and, indeed, the Constitution itself, by section 111 and chapter vi., provides means whereby the dual system may be virtually extinguished, by dealings between the Parliament and all the States, without any resort to the provisions of section 128.

No part of “The Constitution” is withdrawn from the power of the Commonwealth. Indeed, there is no doubt, that the whole Constitution could be repealed under section 128, and that without any provision being made to substitute anything for it. A few years ago, the Home Rule proposals of Mr. Gladstone gave great interest to the effect of surrenders of power by a sovereign body.<sup>1</sup> It seems an irresistible conclusion, that, as Professor Dicey (*Law of the Constitution*, 5th edition, p. 65) says, “The

impossibility of placing a limit on the exercise of sovereignty does not in any way prohibit, either logically, or in matter of fact, the abdication of sovereignty.”

The special provision, protecting the representation and the territory of the States, presents some difficulties. Might not the clause itself be repealed by the ordinary process of constitutional alteration, thus leaving the road open for a further alteration, diminishing the representation or the territory? To prevent such a course, from which—if we might adopt the principles applicable to the Articles of Companies and other Associations—the character of the Constitution, as a compact, would not protect it, are added the words, “or in any other manner affecting the provisions of the Constitution relating thereto,” the effect of which appears to be to put the clause itself under the protection, which is afforded by requiring the assent of the electors of all the States affected.

It is to be observed, that the last clause of section 128 relates only to alterations of the Constitution. It is obvious, that the “proportionate representation” of States, in one sense of the term, will be affected by the operation of the Constitution itself. Thus, every admission of a new State with representatives in the Parliament diminishes the proportion of the whole numbers of members returned by any particular State to Senate and House. Again, the natural increase of population will serve to increase the representation of some States in the House, and diminish that of others; so that the “proportionate representation” of a State, whether we regard that term as describing a relation to the whole number, or a relation to the other States, will be affected. But such a result is in accordance with the Constitution, and it is only the mode by which this adjustment is effected (section 24), which is protected by the last clause of section 128.

Similar observations apply to the provisions concerning the limits of States. We have seen, that the Constitution confers several powers of affecting the States' limits. These require the assent, or the action, of the State Parliament, and, in one case, the Electors of the State (section 123); and there was some apprehension, that the integrity of States territory might be invaded by an alteration of the Constitution repealing the requirement of the consent of the State. Accordingly, it is provided, that any such alteration of the Constitution is valid, only with the consent of the State to be affected.

<sup>1</sup> The American system of amendment is eulogized by Story (*Commentaries on the Constitution*, ¶¶ 1826–1831), and Judge Cooley (*Constitutional Law*, p. 218) speaks of the “simple, easy, and peaceful method” of modifying the provisions of the Constitution. On the other hand, Professor Burgess (*Political Science and Constitutional Law*, vol. i., pp. 150–154) criticizes the Constitution for its overgreat

rigidity. Mr. Bryce discusses the Amending Power in *The American Commonwealth*, vol. 1. cap. xxxii. For the Swiss system and its working, see Lowell's *Governments and Parties in Continental Europe*, vol. 2.

1 See article by Sir William Anson and Professor Dicey in the *Law Quarterly Review*, vol. 2, and the speeches of Sir Henry James and Mr. James Bryce, *Hansard's Debates*, vol. 305.

## Chapter XXI. Conclusion.

THE Constitution of the Commonwealth of Australia contains few evidences of that experimentalism, for which the politics of the Colonies have become famous. Far from disdaining precedent, the founders of the Constitution availed themselves to the full of the opportunities, offered by modern literature, for a comparison of existing Constitutions; and the Constitutions throughout bear the impress of this study. The absence of any obvious cause imperatively calling for immediate union, such as has in every other instance of federal union determined action, allowed her a singular freedom of choice in working from her models.

The natural model for the union of a group of British Colonies would have been the Dominion of Canada, which, in its preamble, recites the desire of the Provinces to be united into one Dominion “with a Constitution similar in principle to that of the United Kingdom.” But the form of Canadian union was determined by special circumstances, both internal and external, very different from any which exist in regard to Australia. In the first place the fundamental character of the Dominion—the possession of the residuary power by the Dominion Legislature, and the subordination of the Provinces to the Dominion Government—was the natural outcome of the existing consolidation of the Provinces of Upper and Lower Canada. Just in the same way, if the policy of “Home Rule” all round were applied in the United Kingdom, we should expect to find residuary power and some controlling power in the Imperial Parliament and the Imperial Government. In the second place, it must be remembered that the years 1864–1867, during which the Canadian Constitution was taking shape, were years full of lessons from the neighbouring union. The War of Secession had discredited the principles of disintegration, upon which the Constitution of the United States was based; and the victorious States of the North were engaged in re-establishing their Constitution upon a basis, which greatly increased the central power, and might, indeed, but for the restrictive interpretation of the Supreme Court, have given to Congress a general controlling power over the State.<sup>1</sup>

If the federalism of Australia is the federalism of the United States and not that of Canada, the Parliamentary Government, which England has given to her Colonies and to Europe, is firmly rooted in the Constitution. That Cabinet Government presents singular difficulties, as applied to the federal system, is obvious, and, in 1891, there were grave doubts whether it could be a durable institution even in the single colonies. The great importance of administrative capacity and experience, in such communities

as Australia, make it intolerable that affairs should be carried on with the ever-shifting personnel supplied by Parliamentary exigencies. But, since 1891, a great change has come over the politics of Australia and New Zealand; in every colony, long tenure of office and stability of government have superseded the kaleidoscopic movements of a few years ago, and in Australia not less than in England, men ask—Where and what is the Opposition? There was no more notable feature, in which the Convention of 1897–8 differed from the Convention of 1891, than in its unquestioning acceptance of the Cabinet system.

The accomplishment of Australian Federation is not to be regarded as an acceptance of any of the schemes of Imperial Federation, which have been or are in the air—the Australian Commonwealth is a measure “for enlarging the power of self-government.” But neither separation nor republicanism is to be inferred from the fact, that the federalism of Australia is that of the United States and not that of Canada. To answer such a suggestion, it is not necessary to do more than to point to the spirit of 1867-70, both in England and the Colonies, and compare it with the spirit of 1897-1900. In the earlier time, Sir John Macdonald and Mr. W. E. Forster stood almost alone, amongst the statesmen of the Dominions of the Crown, in a belief in, or even a hope for, the establishment of an enduring Empire under the Crown, upon a basis of self-governing communities. Now, every man, who wishes to vilipend another, calls him a “Little Englander.” When the Draft Bill of 1891 was under discussion, objection was often taken to its Imperializing tendency. But little was made of such objections in 1898-1899, though the vesting of power in the Crown or the Governor-General excited sometimes apprehension of autocratic power amongst people, who were unacquainted with constitutional forms.

In the number and character of the matters assigned to the Federal Parliament, the Australian Constitution follows the Dominion of Canada rather than the United States. The Fathers of the American Constitution, Mr. Bryce says, “had no wish to produce uniformity amongst the States in government or institutions, and little care to protect the citizens against abuses of State power. Their chief aim was to secure the National Government against encroachments on the part of the States, and to prevent causes of quarrel, both between the central and State authorities, and between the several States.”<sup>1</sup> But, in the 19th century, distance has been constantly shrinking, and divergence of laws and institutions, in two great countries whose inhabitants have perpetual intercourse, is to-day infinitely more inconvenient than the divergences of custom in neighbouring localities a few centuries ago. The century has seen the growth of a whole body of law for the settlement of the conflict of laws

and jurisdictions, but it is obviously simpler, and more convenient, to go to the root of the matter, and establish a uniform law under a central government. Hence the great national states, which the political movements of the century have called into existence, have made "the law," to a great extent, a national law. In Germany, there is a high degree of legal centralization; the legislative power of the Empire extends over the whole domain of ordinary civil and criminal law, and this power has recently given a uniform code of laws for the Empire. Canada was quite alive to the defects of the United States system in respect to the criminal and private law, and, accordingly, vested in the Dominion Parliament power over criminal law and procedure, over the laws of marriage and divorce, and over a large part of commercial law. Australia has shown even greater anxiety than Canada for uniformity of law; for, though criminal law is not made a Commonwealth matter, the Commonwealth Parliament has wider powers over family and commercial law than has the Dominion Parliament. But neither in Canada nor in Australia do we find the legal centralization of Germany.

The predominant feature of the Australian Constitution is the prevalence of the democratic principle, in its most modern guise.

It is true, that, in a federal government, the simple democratic plan of pure majority rule must make compromises with the principle of State right. But that is the only compromise which it makes in Australia. The federalism of Australia is the federalism of the United States; her democracy is her own. The American Constitution was born in distrust. To possess power, was to abuse it; therefore, in devising the organs of Government, the first object was, less to secure their co-operation, than to ensure that each might be a check upon the natural tendencies of the other. Large states, where the central power is far off, were more dangerous to liberty than small states, where popular control was more readily exerted; therefore, central power was to be no greater than was absolutely necessary for security against external attack and internal dissension. And the maxim, "Trust in the People," carried the Fathers of the Constitution but a little way on the democratic road. Direct participation by the people in the ordinary functions of central government seemed equally impracticable and mischievous. The people could, at most, be choosers, and, even here, they were to act at second-hand; there was to be a College of Electors, who should exercise a free judgment in the choice of a President; the Senators were to be chosen by the Legislatures of the States. Thus, the most important offices in the Union were to be filled without the pressure of popular clamour. The Constitution was accepted not by direct vote, but by State Conventions, and amendments were to be approved either by the

States Legislatures or by States Conventions. The Constitution of the Commonwealth of Australia bears every mark of confidence in the capacity of the people to undertake every function of government. In the Constitution of the Parliament, in the relations of the Houses, and in the amendment of the Constitution, the people play a direct part. There are no intermediaries in the formation of the Senate; the electors are the arbiters between the Houses; there are no conventions of select men to approve alterations of the Constitution. The artificial majorities of the American Constitution are not required. The system, governing the qualifications of members and electors, is dictated by a desire to rest those qualifications upon the widest possible basis.

In one notable matter, the Australian Constitution differs markedly from that of the United States. In America, the checks and balances devised by the Fathers of the Constitution were deemed an insufficient restraint of power, and were immediately supplemented by a comprehensive Bill of Rights, which placed the liberties of the citizen under the protection of the Constitution, and secured them against any attack by the Federal Government. More remarkable still in a federal constitution, there were a few provisions protecting the rights of the citizens of the States against their own States Government. It need hardly be said, that this spirit of distrust has so grown that the States Constitutions put many and varied rights of the citizen beyond the reach of the legislature, and that the amendments of the Federal Constitution which followed the War of Secession afford further security to individual right. From the Australian Constitution such guarantees of individual right are conspicuously absent. When the Constitution left the Adelaide Convention, it provided, that no State should make any law prohibiting the free exercise of any religion (section 109, Adelaide draft), and that a State should not deny to any person within its jurisdiction the equal protection of its laws (section 40). These provisions, however, disappeared, and every restraint imposed by the Constitution upon Commonwealth Parliament or State (except the provisions of section 116), may be referred to federal needs. When it was found, that the section, prescribing uniformity of Commonwealth taxation, might be read to protect individuals or classes against discrimination, care was taken to substitute words of geographical description. The great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power.

As a federal system is deemed to be favourable to political experiments, there is no reason to suppose that the States in Australia will be less daring than the Colonies have been, in the adoption of "progressive measures." It

has been noticed, that the apathy of a class, which ordinarily gives a more continuous attention to politics than any other in Australia, was due to the fact, that the earlier programme of federation did not deal directly with any matter of "social and industrial reform." It follows, that the matters, on which modern legislation experiments, remain almost without exception in the exclusive power of the States. The exceptions have been referred to—invalid and old-age pensions, and conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.

Mr. Bryce has pointed out, that local self-government and federalism are distinct, and that it is perfectly possible to have a very high degree of centralization in a federal community.<sup>1</sup> Australia is a signal illustration of this truth. Notwithstanding the extensive powers of the Commonwealth Government, the States are capable of exercising most of the powers of sovereignty, and these extensive powers are exerciseable over vast areas, inhabited in some cases by a million of people, and capable in some cases of sustaining a population infinitely greater. As Mr. Bryce observes, the sort of local interest which local self-government evokes, and the sort of control which a township can exercise, is quite a different thing from the interest men feel in the affairs of a large body like a State, and the control exerciseable over the affairs of a community with a million of people. In the Colonies of Australia, such local government as there was, was established by the central authority, and existed as a highly artificial, and not very robust, product. In addition to undertaking many of the functions, which elsewhere belong to local governments, the central government also concerned itself with works, which, in other lands, fell to private hands. Thus, there existed all the conditions of a highly centralized government, and the mere transfer of some of the functions of the several States to a single authority is, of course, not a step towards decentralization. For some time, the States of Australia must be classed with the States characterized by the centralization of powers.

As to the future of the Federal Constitution, it has been seen that, by the adoption of so flexible a system as that of Cabinet Government, and by the provision of an exceedingly facile mode of amendment, the founders of the Constitution have left ample scope for development. Doubtless, the Cabinet system, as applied to Federal Government, will develop new conventions and understandings, affecting both the constitution of Ministries and the relations of the Houses of the Parliament. It has been remarked, that, in America, federalism acts injuriously upon the filling of public offices, since, in addition to considering the claims of individuals, it is necessary to placate the States by making some attempt at a fair

distribution of offices amongst them. Already there are indications, that, in Australia, the same tendency will be at work to restrict choice.

It is the experience of Federal Government in the United States, in Germany, and in Switzerland, that, with or without any amendment of the constitutional law, the national government grows in power. If, in Canada, the provincial power has been found to be greater than was contemplated by the founders of the Constitution, it must be remembered, that this has been the outcome of interpretation by an external tribunal—the Privy Council—rather than the course of natural development in Canada, and that the liberal view, which has been taken of the power of the Province, has been greatly aided by the fact, that the Dominion Executive has a controlling power enabling it to check the abuse of provincial power. In Australia the great and numerous powers conferred upon the Commonwealth Government may for a considerable time be deemed sufficient, yet the very extent of power is one great fact which makes for increase.

In the United States, and in Canada, the development of the Constitution has been, less by formal amendment, than in the way of judicial decision. It has been abundantly shown in the United States, that the Constitution is a thing of life, with a marvellous capacity for adaptation to the ever-changing needs of the most progressive people of a progressive age, and the process of adaptation has almost uniformly resulted in the increase of the powers of the central government. Had there not been this power of adaptation, the Constitution would have been a serious obstacle to the work of nation-building; for the power of formal amendment is far too cumbrous a machine for every-day needs.

The great facility, with which the Australian Constitution may be altered, makes it probable, that its development will be guided, less by judicial interpretation, and more by formal amendment, than the development of the Constitution of the United States. It may be expected, too, that the Courts will construe the Constitution in a stricter spirit than has been common in America. They are not likely to lose sight of Marshall's warning:<sup>1</sup> "We must not forget that it is a Constitution we are expounding"; nor will they forget, that, in the interpretation of an instrument of government, there must be "the combination of a lawyer's rigour with a statesman's breadth of views." But the most important judgments of the Supreme Court of the United States have been given under a deep sense that their construction was for all practical purposes final, and that the amending power was not available to mitigate the effects of their decision. The Australian Constitution is born in an age of legislation, and Courts will be more free to say, as to the Constitution, what they frequently say as to

ordinary statutes—“It is our duty merely to declare what seems to us to be the law. If we are wrong, or if the consequences of the law as so declared are mischievous, the law can be altered.” So great indeed are the facilities offered by section 128 for altering the Constitution, that very competent expositors<sup>2</sup> have suggested, that, in the event of a difference between the Houses, it may be more convenient to pass ordinary legislation as an alteration of the Constitution under section 128, than to resort to the more elaborate “deadlock” machinery of section 57. Such a course may be possible, but, if it is adopted, it will lead to a “habit of tinkering” with the Constitution, which will give that instrument a portion in the national polity, very different from that, which has been won by its great prototype, the Constitution of the United States.

# **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:

*Short title.*

I. This Act may be cited as the Commonwealth of Australia Constitution Act. (78.)

*Act to extend to the Queen's Successors.*

II. The provisions of this Act referring to the Queen shall extend to Her Majesty's Heirs and Successors in the Sovereignty of the United Kingdom. (63.)

*Proclamation of Commonwealth.*

III. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia, But the Queen may, at any time after the Proclamation, appoint a Governor-General (230) for the Commonwealth.

*Commencement of Act.*

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.

*Operation of the Constitution and laws.*

V. This Act, and all laws made by the Parliament of the Commonwealth

under the Constitution, shall be binding on the Courts, Judges, and people of every State, and of every part of the Commonwealth, notwithstanding anything in the laws of any State (81); 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. (63, 65, 134, 170.)

**Definitions.**

VI. "The Commonwealth" shall mean the Commonwealth of Australia as established under this Act.

"The States" shall mean such of the Colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the Northern Territory of South Australia, as for the time being are parts of the Commonwealth, and such Colonies or Territories (63, 311) as may be admitted into or established by the Commonwealth as States (314); and each of such parts of the Commonwealth shall be called a "State."

"Original States" (311) shall mean such States as are parts of the Commonwealth at its establishment. (63, 68, 170.)

**Repeal of Federal Council Act, 48 & 49 Vict., c. 60.**

VII. The Federal Council of Australia Act, 1885, is hereby repealed (159); but so as not to affect any laws passed by the Federal Council of Australia and in force at the establishment of the Commonwealth.

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. (63.)

**Application of Colonial Boundaries Act, 58 & 59 Vict., c. 34.**

VIII. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony (315) 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. (63, 168.)

IX. The Constitution of the Commonwealth shall be as follows (79):

**A.D. 1900. Constitution.**

**The Constitution.**

This Constitution is divided as follows:—

	Secs.
Chapter I.—THE PARLIAMENT.	
Part I.—General, . . . . .	1–6
Part II.—The Senate, . . . . .	7–23
Part III.—The House of Representatives, . .	24–40
Part IV.—Both Houses of the Parliament, . .	41–50
Part V.—Powers of the Parliament, . . .	51–60

Chapter II.—The Executive Government, . . .	61–70
Chapter III.—The Judicature, . . . . .	71–80
Chapter IV.—Finance and Trade, . . . .	81–105
Chapter V.—The States, . . . . .	106–120
Chapter VI.—New States, . . . . .	121–124
Chapter VII.—Miscellaneous, . . . . .	125–127
Chapter VIII.—Alteration of the Constitution, . .	128
The Schedule.	

# AN ACT TO CONSTITUTE THE COMMONWEALTH OF AUSTRALIA, A.D. 1900.

## CHAPTER 1. THE PARLIAMENT. Part I - GENERAL.

### Legislative Power

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament (82), which shall consist of the Queen, a Senate, and a House of Representatives (92), 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 (74, 93) 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. (92, 96, 218)

### 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. (190)

The salary of a Governor-General shall not be altered during his continuance in office. (93)

### A.D. 1900. Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth. (93)

### 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.(94)

**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. (94)

**First session**

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth. (94)

**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. (90, 94)

**Part II.—The Senate.**

PART II. THE SENATE.

**The Senate.**

7. The Senate shall be composed of senators for each State, directly chosen by the people of the state (99, 102), voting, until the Parliament otherwise provides, as one electorate. (98.)

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. (98.)

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. (98, 103.)

The senators shall be chosen for a term of six years, (99) and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

**Qualification of electors.**

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 (106); but in the choosing of senators each elector shall vote only once. (99, 106, 108.)

**A.D. 1900. Method of election of senators.**

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States (100). Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State. (100.)

*Times and places.*

The Parliament of a State may make laws for determining the times and places of elections (284) of senators for the State. (100.)

*Application of State laws.*

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State. (100.)

*Failure to choose senators.*

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate. (98.)

*Issue of writs.*

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution. (100.)

*Rotation of senators.*

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof (99), 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 (99), 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.

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.

*Further provision for rotation.*

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. (99.)

**Casual vacancies**

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 (125) 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 (99). 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 (286) 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. (100.)

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. (100.)

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General. (99.)

**Qualifications of senator.**

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives. (99, 105, 110.)

**Election of President.**

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the Office of President becomes vacant the Senate shall again choose a senator to be the President. (100.)

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. (100.)

**Absence of President.**

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

**Resignation of senator.**

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place (100), which thereupon shall become vacant.

**Vacancy by absence.**

20. The place of a senator shall become vacant if for two consecutive

months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate. (100.)

*Vacancy to be notified.*

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth, the Governor-General shall notify the same to the Governor of the State in the representation of which the vacancy has happened. (99.)

*Quorum.*

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers. (98.)

*Voting in Senate.*

23. Questions arising in the Senate shall be determined by a majority of votes, (98); and each senator shall have one vote (98). The President shall in all cases be entitled to a vote (100); and when the votes are equal the question shall pass in the negative. (100.)

### **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 (102), and the number of such members shall be, as nearly as practicable, twice the number of the senators. (102.)

*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 (102), 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. (102.)

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. (102.)

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

*Provision as to races disqualified from voting.*

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. (102.)

**Representatives in first Parliament.**

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:

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.	(103.)

**Alteration of number of members.**

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives. (103.)

**Duration of House of Representatives.**

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. (104.)

**Electoral divisions.**

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division (103). A division shall not be formed out of parts of different States. (104.)

In the absence of other provision, each State shall be one electorate. (104.)

**Qualification of electors.**

30. Until the Parliament otherwise provides (106, 108), 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 (106); but

in the choosing of members each elector shall vote only once. (106, 108, 109.)

*Application of State laws.*

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. (105.)

*Writs for general election.*

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives. (104.)

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. (104.)

*Writs for vacancies.*

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker, or if he is absent from the Commonwealth, the Governor-General in Council may issue the writ. (105.)

*Qualifications of members.*

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

I. He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the House of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen. (110.)

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. (109, 110.)

*Election of Speaker.*

35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker. (105.)

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. (105.)

*Absence of Speaker.*

36. Before or during any absence of the Speaker, the House of

Representatives may choose a member to perform his duties in his absence.

*Resignation of member.*

37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker, or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant. (105.)

*Vacancy by absence.*

38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House. (105.)

*Quorum.*

39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers. (104.)

*Voting in House of Representatives.*

40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote. (105.)

**Part IV.—Both Houses of the Parliament.**

A.D. 1900. PART IV. BOTH HOUSES OF THE PARLIAMENT.

*Right of electors of States.*

41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State, shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth. (108, 109, 110, 319.)

*Oath or affirmation of allegiance.*

42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorized by him, an oath or affirmation of allegiance in the form set forth in the Schedule to this Constitution. (113.)

*Member of one House ineligible for other.*

43. A member of either House of the Parliament shall be incapable of being chosen or of sitting as a member of the other House. (111.)

*Disqualification.*

44. Any person who—

- I. Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power (111): 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 (111): or
- III. Is an undischarged bankrupt or insolvent (112): 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 (112): 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 (112):

shall be incapable of being chosen or of sitting as a senator (112) or a member of the House of Representatives. (112.)

But sub-section IV. does not apply to the office of any of the Queen's Ministers of State for the Commonwealth (215, 226), or of any of the Queen's Ministers for a State (215), 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. (112.)

*A.D. 1900. Vacancy on happening of disqualification.*

45. If a senator or member of the House of Representatives—

- I. Becomes subject to any of the disabilities mentioned in the last preceding section: or
- II. Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or
- III. Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant. (101, 112.)

*Penalty for sitting when disqualified.*

46. Until the Parliament otherwise provides, any person declared by this Constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction. (112.)

*Disputed elections.*

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives,

or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises. (113.)

*Allowance to members.*

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of Four hundred pounds a year (192), to be reckoned from the day on which he takes his seat. (113.)

*Privileges, etc., of Houses.*

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth. (114.)

*Rules and orders.*

50. Each House of the Parliament may make rules and orders with respect to:

- I. The mode in which its powers, privileges, and immunities may be exercised and upheld:
- II. The order and conduct of its business and proceedings either separately or jointly with the other House. (115.)

**Part V.—Powers of the Parliament.**

A.D. 1900. PART V. POWERS OF THE PARLIAMENT.

*Legislative powers of the Parliament.*

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to (82, 128, 131, 136):

- I. Trade and commerce with other countries, and among (198) the States (143, 180, 197, 290):
- II. Taxation (297); but so as not to discriminate (184) between States (282) or parts of States (131, 180, 181):
- III. Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth (131, 180):
- IV. Borrowing money on the public credit of the Commonwealth (180):
- V. Postal, telegraphic, telephonic, and other like services (142):
- 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

(141):

VII. Light-houses, light-ships, beacons and buoys (142):

VIII. Astronomical and meteorological observations (142):

IX. Quarantine (142):

X. Fisheries in Australian waters beyond territorial limits (143):

XI. Census and statistics (142):

XII. Currency, coinage, and legal tender (149):

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 (145, 198):

XIV. Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned (146):

XV. Weights and measures (146):

XVI. Bills of exchange and promissory notes (146, 198):

XVII. Bankruptcy and insolvency (146, 198):

XVIII. Copyrights (147, 148), patents of inventions and designs, and trade marks (147, 148):

XIX. Naturalization and aliens (144):

XX. Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (148):

XXI. Marriage (149):

XXII. Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants (149):

XXIII. Invalid and old-age pensions (156):

XXIV. The service and execution throughout the Commonwealth of the civil and criminal (156) process and the judgments of the courts of the States (152, 156, 157):

XXV. The recognition throughout the Commonwealth of the laws, the public acts and records, and the judicial proceedings of the States (152, 155-157):

XXVI. The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (144):

XXVII. Immigration and emigration (144):

XXVIII. The influx of criminals (144):

XXIX. External affairs (142):

XXX. The relations of the Commonwealth with the islands of the Pacific (144, 145):

XXXI. The acquisition of property on just terms (159) from any State or person for any purpose (159) in respect of which the Parliament has power to make laws (159):

XXXII. The control of railways with respect to transport for the naval and military purposes of the Commonwealth (141):

XXXIII. The acquisition, with the consent of a State (134), of any railways of the State on terms arranged between the Commonwealth and the State (157):

XXXIV. Railway construction and extension in any State with the consent (134) of that State (157, 158):

XXXV. Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State (156):

XXXVI. Matters in respect of which this Constitution makes provision until the Parliament otherwise provides (106, 160, 194):

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 (134, 158):

XXXVIII. The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned (134), of any power which can at the establishment of this Constitution (158) be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia (158, 159):

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 (90, 160):

**Exclusive powers of the Parliament.**

52. The Parliament shall, subject to this Constitution, have exclusive power (135, 136, 309) to make laws for the peace, order, and good government of the Commonwealth with respect to (162):

I. The seat of Government of the Commonwealth, and all places acquired by the Commonwealth for public purposes (71, 162, 312):

II. Matters relating to any department of the public service the control of which is by this Constitution (163) transferred to the Executive Government of the Commonwealth (141, 163, 180, 195):

III. Other matters declared by this Constitution to be within the exclusive power of the Parliament (69, 128, 164):

**Powers of the Houses in respect of legislation.**

53. Proposed laws (177) appropriating (120) 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.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government. (119.)

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people. (119.)

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. (119.)

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws. (120.)

54. The proposed law (177) which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation. (120, 121.)

*Appropriation Bills.*

55. Laws (177) imposing taxation shall deal only with the imposition of taxation (178), 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 (178), but laws imposing duties of customs (178) shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only. (120, 121.)

56. A vote, resolution, or proposed law (177) 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. (95, 116, 118.)

*Recommendation of money votes.*

57. If the House of Representatives passes any proposed law (125, 177), and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree (318), and if after an interval of three months (125) 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 (98, 125) and the House of Representatives simultaneously (99). 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. (125.)

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 (318) 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. (126, 319.)

58. When a proposed law (177), 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 (95), but subject to this Constitution (95, 96), that he assents in the Queen's name (95), 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 (178) 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. (97.)

**Disallowance by the Queen.**

60. A proposed law reserved for the Queen's pleasure shall not have any force unless (178) 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. (247.)

**Signification of Queen's pleasure on Bills reserved.**

## **Chapter II. The Executive Government. (213.)**

A.D. 1900.CHAPTER II. THE GOVERNMENT.

**Executive power.**

61. The executive power of the Commonwealth is vested in the Queen

(215) and is exercisable by the Governor-General as the Queen's representative (93), and extends to the execution and maintenance of this Constitution (80), and of the laws of the Commonwealth. (82, 213, 217, 219.)

**Federal Executive Council.**

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth (225), and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors (225), and shall hold office during his pleasure.

**Provisions referring to Governor-General.**

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council. (224, 229.)

**Ministers of State.**

64. The Governor-General (225) may appoint officers to administer such departments of State of the Commonwealth as the Governor-General in Council may establish. (226.)

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council (225), and shall be the Queen's Ministers of State for the Commonwealth. (215.)

**Ministers to sit in Parliament.**

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. (90, 225.)

**Number of Ministers.**

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs. (90, 226.)

**Salaries of Ministers.**

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year. (190, 226.)

**Appointment of civil servants.**

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council (225), unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority. (90.)

*Command of naval and military forces.*

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General (288) as the Queen's representative. (93, 222.)

*Transfer of certain departments.*

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth (141):—

Posts, telegraphs, and telephones (142);

Naval and military defence (141, 288);

Light-houses, light-ships, beacons, and buoys (142);

Quarantine. (142.)

But the departments of customs and of excise (142) in each State shall become transferred to the Commonwealth on its establishment. (180, 195, 231.)

*Certain powers of Governors to vest in Governor-General.*

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires. (217, 231.)

### **Chapter III. The Judicature.**

A.D. 1900. CHAPTER III. THE JUDICATURE.

*Judicial power and Courts.*

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 (82). The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes. (243.)

*Judges appointment, tenure, and remuneration.*

72. The Justices of the High Court and of the other courts created by the Parliament—

- I. Shall be appointed by the Governor-General in Council (225, 278):
- 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 (90, 278):
- III. Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office. (90, 192, 278, 280.)

**Appellate jurisdiction of High Court.**

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations (252, 254) as the Parliament prescribes (248), to hear and determine appeals from all (246) 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 (254); or of the Supreme Court of any State (251), or of any other court (251) 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. (248.)

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. (246, 252.)

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. (246, 248, 252, 254, 260.)

**Appeal to Queen in Council.**

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court (252) upon any question, howsoever arising, as to the limits *inter se* (248) of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* (248) 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. (247.)

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. (247.)

Except as provided in this section (248), 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 (247) 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. (97, 246, 247, 249.)

*Original jurisdiction of High Court.*

75. In all matters (259)—

- I. Arising under any treaty (259, 261):
- II. Affecting consuls or other representatives of other countries (261):
- III. In which the Commonwealth (269), or a person suing or being sued on behalf of the Commonwealth is a party (262):
- IV. Between States (263), or between residents of different States, or between a State and a resident of another (264) State (262, 266):
- V. In which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (269) the High Court shall have original (244, 274) jurisdiction. (254, 259.)

76. The Parliament may make laws conferring original jurisdiction on the High Court (244) in any matter (259):

*Additional original jurisdiction.*

- I. Arising under this Constitution, or involving its interpretation (270):
- II. Arising under any laws made by the Parliament (270):
- III. Of admiralty and maritime jurisdiction (273):
- IV. Relating to the same subject-matter claimed under the laws of different States. (254, 260, 273.)

*Power to define jurisdiction.*

77. 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 (274):
- II. Defining the extent to which the jurisdiction of any federal court (274) shall be exclusive of that which belongs to or is invested in the courts of the States (274):
- III. Investing any court of a State with federal jurisdiction. (244, 274.)

*Proceedings against Commonwealth or State.*

78. The Parliament may make laws conferring rights to proceed (267, 268) against the Commonwealth or a State (269) in respect of matters (267) within (267) the limits of the judicial power. (262, 267.)

*Number of judges.*

79. The federal jurisdiction of any court may be exercised by such

number of judges as the Parliament prescribes. (276.)

*Trial by jury.*

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the state (282) where the offence was committed, and if the offence was not committed within any State (282) the trial shall be held at such place or places as the Parliament prescribes. (272.)

## **Chapter IV. Finance and Trade.**

180 (see Chapter XI.).

A.D. 1900. CHAPTER IV. FINANCE AND TRADE.

*Consolidated Revenue Fund.*

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund (187), to be appropriated (188) for the purposes of the Commonwealth (188) in the manner and subject to the charges and liabilities imposed by this Constitution. (188.)

*Expenditure charged thereon.*

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon (190); and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth. (192.)

*Money to be appropriated by law.*

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. (187.)

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. (187.)

*Transfer of officers.*

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any

pension, gratuity, or other compensation payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth (192); 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.

**Transfer of property of State.**

85. When any department of the public service of a State is transferred to the Commonwealth—

I. All property of the State, of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth (195); 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. (195.)

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 (192, 194): 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. (192, 194.)

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. (195.)

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides (193, 195), 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. (192.)

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts (195) of the several States taken over by the Commonwealth. (191.)

*Uniform duties of customs.*

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth. (196.)

*Payment to States before uniform duties.*

89. Until the imposition of uniform duties of customs:

I. The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

II. The Commonwealth shall debit to each State:

(a) the expenditure therein of the Commonwealth (190) incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth; (190.)

(b) the proportion of the State, according to the number of its people, in the other expenditure of the Commonwealth. (191, 192.)

III. The Commonwealth shall pay to each State month by month the balance (if any) in favour of the State. (190 191.)

*Exclusive power over customs, excise, and bounties.*

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive. (196, 202, 290.)

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 (196); 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. (196.)

*Exceptions as to bounties.*

91. Nothing in this Constitution prohibits a State from granting any aid to

or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods. (196.)

*Trade within the Commonwealth to be free.*

92. On the imposition of uniform duties of customs (205), trade, commerce, and intercourse among the States (282), whether by means of internal carriage or ocean navigation, shall be absolutely free. (148, 201-204, 290, 304-306.)

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. (196.)

*Payment to States for five years after uniform Tariffs.*

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides:

I. The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State (191.)

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. (191.)

*Distribution of surplus.*

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on such basis as it deems fair for the monthly payment to the several States of all surplus revenue of the Commonwealth. (191.)

*Customs duties of Western Australia.*

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State, and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

But any duty so imposed on any goods shall not exceed during the first of

such years the duty chargeable on the goods under the law of Western Australia in force at the imposition of uniform duties (194), 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 (194), 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. (194.)

**Financial assistance to States.**

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides (193, 194), the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. (189, 193, 194.)

**Audit.**

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth (188) 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.

**Trade and commerce includes navigation and State railways.**

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways (157, 158, 180, 198, 199) the property of any State.

**Commonwealth not to give preference.**

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State (282) or any part thereof over another State or any part thereof. (66, 131, 191, 199, 207.)

**Nor abridge right to use water.**

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation. (66, 198, 199.)

**Inter-State Commission.**

101. There shall be an Inter-State Commission, with such powers of

adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder. (205.)

*Parliament may forbid preferences by State.*

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination (185) by any State, or by any authority constituted under a State (198), if such preference or discrimination is undue and unreasonable (185), or unjust to any State (283); due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways (208). 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. (199, 207.)

*Commissioners' appointment, tenure, and remuneration.*

103. The members of the Inter-State Commission:

I. Shall be appointed by the Governor-General in Council:

II. Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

III. Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office. (209.)

*Saving of certain rates.*

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States (199, 207.)

*Taking over public debts of States.*

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 (191) 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. (194.)

## **Chapter V. The States (xviii.).**

### CHAPTER V. THE STATES.

#### *Saving of Constitutions.*

106. The Constitution of each State (285) 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. (69, 285.)

#### *Saving of power of State Parliaments.*

107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue (290, 292) as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be. (69, 285.)

#### *Saving of State laws.*

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution (308), continue in force in the State (195); 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. (69, 308.)

#### *Inconsistency of laws*

109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency, be invalid. (69, 172-174, 290.)

#### *Provisions referring to Governor.*

110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State. (286.)

#### *States may surrender territory.*

111. The Parliament of a State may surrender any part of the State (284) to the Commonwealth (312, 314); 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. (71,

321.)

*States may levy charges for inspection laws.*

112. After uniform duties of customs have been imposed, a State (290) 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 (290) 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. (181, 196.)

*Intoxicating liquids.*

113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State. (181, 290, 306.)

*States may not raise forces. Taxation of property of Commonwealth or State.*

114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force (141, 288), or impose any tax on property of any kind belonging to the Commonwealth (185, 298), nor shall the Commonwealth impose any tax (185) on property (187) of any kind belonging to a State. (185, 187, 309.)

*States not to coin money.*

115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts. (149, 292, 309.)

*Commonwealth not to legislate in respect of religion.*

116. The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion (307), and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. (307, 313, 329.)

*Rights of residents in States.*

117. A subject of the Queen (298), resident in any State (313), shall not be subject in any other State to any disability or discrimination (184) which would not be equally applicable to him if he were a subject of the Queen resident in (293-298) such other State. (205, 304, 309.)

*Recognition of laws, etc., of States.*

118. Full faith and credit shall be given, throughout the Commonwealth, to the laws, the public acts and records, and the judicial proceedings of every State. (152, 155, 293, 309.)

*Protection of States from invasion and violence.*

119. The Commonwealth shall protect every State against invasion (306) and, on the application of the Executive Government of the State, against domestic violence. (141, 213.)

*Custody of offenders against laws of the Commonwealth.*

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. (285.)

## **Chapter VI. New States.**

A.D. 1900. CHAPTER VI. NEW STATES.

*New States may be admitted or established.*

121. The Parliament may admit to the Commonwealth (313) or establish new States (314), and may upon such admission or establishment make or impose such terms and conditions (314), including the extent of representation in either House of the Parliament, as it thinks fit.

*Government of territories.*

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 (311), or otherwise acquired (312) by the Commonwealth, and may allow the representation (163) of such territory in either House of the Parliament to the extent and on the terms which it thinks fit. (71.)

*Alteration of limits of States.*

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 (314, 323) voting upon the question, increase, diminish, or otherwise alter the limits (284, 314) 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.

*Formation of new States.*

124. A new State may be formed by separation of territory from a State (284, 314), but only with the consent of the Parliament thereof (314), and a new State may be formed by the union of two or more States (314) or parts of States, but only with the consent (134, 314) of the Parliaments of the States affected. (68.)

## **Chapter VII. Miscellaneous.**

A.D. 1900. CHAPTER VII. MISCELLANEOUS.

**Seat of Government.**

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to (284) or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State (282) of New South Wales, and be distant not less than one hundred miles from Sydney.

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. (71.)

**Power to Her Majesty to authorize Governor-General to appoint deputies**

126. The Queen may authorize the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function. (93.)

**Aborigines not to be counted in reckoning population.**

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

## **Chapter VIII. Alteration (318-321) of the Constitution.**

(62, 178.)

A.D. 1900. CHAPTER VIII. ALTERATION OF CONSTITUTION.

**Mode of altering the Constitution**

128. This Constitution shall not be altered except in the following manner (317):

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. (125.)

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. (95.)

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 (103), 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. (103, 317-322, 332.)

## **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.)*

1 See the *Slaughter House Cases* (1873), 16 Wallace 36.

1 Bryce, *American Commonwealth*, vol. i., p. 423.

1 Bryce, *American Commonwealth*, vol. i., p. 466.

1 *M'Culloch v. Maryland* (1819), 4 Wheaton 316.

2 Mr. J. A. Isaacs (Attorney-General for Victoria) and Mr. J. E. Mackey, *Melbourne Age*, Monday, July 10th, 1899.

---

## **Appendix.**

### **A. The Character of Political Unions.**

PERMANENT political unions are commonly classified as *Confederation*, *Incorporation* (or *Consolidation*), and *Federation*. The nature of Confederation as a type of political union is simple, though the name is not unfrequently applied to organizations, which, in fact, belong to one of the other classes, as when we speak of the Confederation of Canada or the Confederacy of the Swiss Republic. It is an alliance of States, in which the central power “represents only the governments of the several members of the union; its powers consist simply in issuing requisitions to the state governments, which, when within the limits of the federal authority, it is the duty of those governments to carry out.” The purposes for which requisitions may be made are those, which the parties have submitted to the “federal power”; they may be few or many, and might conceivably extend to everything upon which sovereign power can operate. But so slight a tie will not bear the pressure of many or indefinite requisitions. Defence against external aggression, probably the conduct of foreign affairs, and the determination of disputes between the States, which, by disturbing internal tranquillity, expose the Confederacy to the danger of attack from without—these are the objects to which a system of Confederate States is likely to be confined. But “confederate” elements may be found in the closer unions. In the Empire of Germany, which, perhaps, from its monarchic government and the mode of its establishment, as much as from the scope of the central authority, is often regarded as a consolidation rather than a federation, the Bundesrath—an upper chamber which overshadows the lower—is distinctly confederate. Its constitution might easily mislead us as to its character. The States are unequally represented; their membership roughly corresponds with their population and importance; it therefore suggests a national democratic organization. But its true nature is thus accurately described by Mr. Laurence Lowell: “It is not an international conference, because it is part of a constitutional system and has power to enact laws. On the other hand, it is not a deliberative assembly, because the delegates vote according to instructions from home. It is unlike any other legislative chamber, inasmuch as the members do not enjoy a fixed tenure of office, and are not

free to vote according to their personal convictions. Its essential characteristics are, that it represents the governments of the States and not their people, and that each State is entitled to a certain number of votes, which it may authorize one or more persons to cast in its name, those persons being its agents, whom it may appoint, recall, or instruct at any time. The true conception of the Bundesrath, therefore, is that of an assembly of the sovereigns of the States, who are not indeed actually present, but appear in the persons of their representatives.”<sup>1</sup>

Incorporation differs from Confederation in that it substitutes a new state for several states, in every case at any rate where the incorporation does not consist merely in the absorption by one state of part of another state. The state possesses a government, which may or may not be sovereign, but which, in one form or another, pervades the whole territory of the state, and is capable of affecting all its subjects. If there be governments of parts of the state—what are called local governments—they will commonly derive their existence and authority from the central government, and, in any case, they will be subject to its regulation, and will rely upon its organs for their support. Complete unification would seem to imply such a homogeneity of the institutions of the state, as would remove all the marks of the former separateness of the component parts, which would become mere geographical areas. But such an unification would hardly contribute to the stability and durability of the state, and the new state will act wisely to seek and retain the ancient landmarks. In practice, consolidation does not in fact obliterate the original lines of division; and the retention of these lines furnishes what are called the federal elements of an incorporated union. From one point of view, the United Kingdom of Great Britain and Ireland is a perfect incorporation or consolidation; it is one state whose government—the Imperial Parliament—unlimited in scope, supreme in authority, and unitary in action, is rightly regarded as a type of sovereignty in its simplest and most direct form. But the constitution of both Houses of Parliament, and the separate administrative and jural systems, are the legal recognition of the three kingdoms as separate units, and are the federal elements in the union. To say that these “federal elements” exist by virtue of the law, and therefore by the sufferance of the state, is to say no more than may be said of every part of every federation. The popular description “legislative union” expresses the condition of the United Kingdom better than any other term which can be applied to it.

Federal union differs from Confederation in this, that it creates a new political organism, a state possessing all the attributes of sovereignty. It is universal in scope, exclusive of every other power, and of necessity supreme over, and acting upon, all persons and things within its territory. To

distinguish the “federal state” from the “unitary state” is a much more difficult task. The distinction lies, not in the nature of the state itself, but in the organization of government. In every “federal state” the government consists of central and local parts, neither owing its existence to the other, nor capable of destruction by the other. The central government in matters within its sphere extends over the whole territory and population of the state; the local government is restricted in area. But, while this may be said of every state called federal, the same may be said of states regarded as unitary, where local institutions are directly established by the constitution. Seeley<sup>1</sup> denies altogether that there is any fundamental difference between the unitary and the federal state, and adopts these terms merely as “marking conveniently the great difference which may exist between states in respect of the importance of local government.” Even the preponderance of the local government, which Seeley regards as the mark of the federal state, can hardly be regarded as essential. In Canada, the residuary power of government lies in the central and not in the provincial power, and the control which the Dominion Government may exercise over the provincial in every department warns us, that the doctrine of the independence of the governments in their respective spheres must not be pushed too far. Neither in the United States nor in Germany can we truly speak of the preponderance of local government. On the whole, we must be content with some vague description as that the independence of the local government surpasses anything which can fairly come under the head of municipal freedom,<sup>2</sup> or we may adopt Lewis's<sup>3</sup> description of a subordinate government as one which possesses powers and institutions applicable to every purpose of government, and which would thus be capable of governing the district subject to it, if the supreme government were altogether withdrawn.

To say no more than this, is to describe very imperfectly any federal union that now exists or has ever existed. But the organisms, which go by the name of Federations, present so great a diversity that, beyond the characteristics named, there is hardly anything that may be deemed essential save agreement. In general, the new state has been formed by the coalescence of several states, which preserve their existence as units, and maintain a large part of their previous organization and functions as the “local part” of the government of the new state, and, as units, are the basis of the organization of the central government. This, with the fact that the functions that they discharge are not enumerated, while those of the central government are, gives them the appearance of an independent existence, which leads to such statements as, that there is a “residuary sovereignty in the state” (meaning the component state), that a federation is a “union of sovereign states,” and that a federal state differs from other states by the fact

that it is one state and several states.

In a complex political organism, where law and politics are necessarily entwined, the importance of a clear appreciation of these matters cannot be over-rated. “It requires patient and successful discrimination to attain a point of view from which it is clearly seen that there can be no such thing as residuary sovereignty; that sovereignty is entire or not at all; and that what is left by the state to the local organizations, in this manner of distribution, is only the residuary power of government.”<sup>1</sup>

But the coalition of separate states is not the only way in which a federal state may be established. The experience of the Dominion of Canada has disproved the doctrine of Freeman, that “a federal union, to be of any value, must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united.”<sup>2</sup> Without going so far as Mr. Goldwin Smith, who speaks of that union as the creature of deadlock,<sup>3</sup> we must recognize that the immediate occasion of the accession of Upper and Lower Canada to the Confederation, proposed by the Maritime Provinces, was the perception of the leading men of both parties, that Confederation offered an escape from the embarrassment of a legislative union, which had proved too close a tie. The very general interest in federation at the present day is due to the belief, that it offers an escape from the dangers of over-centralization in large states.

The complete and separate equipment of the central and local governments for the discharge of the three governmental functions— legislative, executive, and judicial—might well be considered essential to the federal form. But a rigid adherence to this test would raise the question of the federal character of the German Empire, where executive power practically rests on the arm of Prussia, and where, as to judicial power, the organization of the Courts of the States is controlled by Imperial legislation. In Canada, the judges of the provincial courts are appointed, paid, and, should the occasion arise, removed, by the Dominion Government.

The division of powers in a Federal State between central and local organs, implies some machinery for confining each to its sphere. But no one method for enforcing those limitations can be deemed essential. The power of the Courts, as an incident of ordinary judicial duties, to interpret the Constitution and prevent the other organs from exceeding their powers, belongs fundamentally neither to a written constitution nor to federalism, for both may and do exist without it. It is in some respects, even, the contradictory of federalism and its separation of powers. Its origin is in the unity and universality of the English Common Law and the jealousy of the Common-Law Courts. For the source of what has been to so many

Englishmen the mythical power of the Supreme Court of the United States, we must look rather to the conflicts of Coke and Bacon than to the letter of the constitution of the United States.

If there be no essential difference in the scope even of a Confederation and an Incorporation, if the former may embrace every subject over which governmental power can be exercised, we are not likely to find the true test of federalism in the purposes of union. So great an authority as Freeman, however, has said, "The true and perfect Federal Commonwealth is any collection of States in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relation with other powers."<sup>1</sup> This may describe, with some approach to accuracy, the principle of the United States Constitution; but, in neither of these elements, does it truly describe the Constitution of the German Empire, and it is wholly inapplicable to such unions of dependent communities as constitute the Dominion of Canada and the Commonwealth of Australia. "All must be subject to a common power in matters which concern the whole body of members collectively,"<sup>2</sup> still leaves one question: What are such common matters? The answer can only be, those which the parties have declared to be common.

Comparing the existing political unions with the three types, we find that no actual union does more than approximate to a type, and that it must be placed in one class or another, according to the preponderance of one or the other elements in it. The Confederacy of the United States did not operate wholly upon governments; the government of the present union contains elements national, federal, and confederate. As has been pointed out, the German Empire is sometimes regarded as a unitary State, sometimes as federal, but it contains at anyrate one mark of confederation. The incorporate union of Great Britain and Ireland has federal features in its government, and the "confederation" of Canada produced an organism without confederacy, and, with a government, which, in many of the matters commonly associated with the federal form, exhibits the marks of unitary rather than of federal government. In the formation of every political organism the only rule can be political expediency.

1 Lowell, *Governments and Parties in Continental Europe*, vol. i., pp. 264-5.

1 Seeley, *Political Science*, pp. 95 and 100.

2 Freeman, *History of Federal Government* (second edition), p. 2.

3 Lewis, *Government of Dependencies* (Ed. Lucas), pp. 72 and 73.

1 Burgess, *Political Science and Constitutional Law*, vol. ii., p. 7.

2 Freeman, *History of Federal Government* (second edition), p. 70.

3 *Canada and the Canadian Question*, p. 143.

1 Freeman, *History of Federal Government*, p. 8.

2 *Ib.*, p. 2.

## **B. Constitutional Documents.**

### **(A.) Commonwealth of Australia.**

#### 1. *Proclamation of the Commonwealth of Australia.*

BY THE QUEEN.

*A PROCLAMATION.*

VICTORIA R.,

WHEREAS by an Act of Parliament passed in the sixty-third and sixty-fourth years of Our reign, intituled “An Act to constitute the Commonwealth of Australia,” it is enacted that it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that on and after a day therein appointed, not being later than one year after the passing of this Act, the people of *New South Wales, Victoria, South Australia, Queensland, Tasmania*, and also, if Her Majesty is satisfied that the people of *Western Australia* have agreed thereto, of *Western Australia*, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.

And whereas We are satisfied that the people of *Western Australia* have agreed thereto accordingly.

We, therefore, by and with the advice of Our Privy Council, have thought fit to issue this Our Royal Proclamation, and We do hereby declare that on and after the first day of January One thousand nine hundred and one the people of *New South Wales, Victoria, South Australia, Queensland, Tasmania*, and *Western Australia* shall be united in a Federal Commonwealth under the name of The Commonwealth of Australia.

Given at Our Court at Balmoral this seventeenth day of September in the year of Our Lord One thousand nine hundred and in the sixty-fourth year of Our Reign.

GOD SAVE THE QUEEN!

2. *LETTERS PATENT passed under the Great Seal of the United Kingdom, constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these Presents shall come, Greeting:

Letters Patent. Dated 29th October, 1900. Preamble. Recites Imperial Act, 63 & 64 Vict., c. 12, and Proclamation of 17th September, 1900.

WHEREAS, by an Act of Parliament passed on the Ninth day of July, 1900, in the Sixty-fourth year of Our Reign, intituled “An Act to constitute the Commonwealth of Australia,” it is enacted that “it shall be lawful for the Queen, with the advice of the Privy Council, to declare by Proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia. But the Queen may, at any time after proclamation, appoint a Governor-General for the Commonwealth”:

Office of Governor-General and Commander-in-Chief constituted.

Governor-General's powers and authorities.

And whereas We did on the Seventeenth day of September One thousand nine hundred, by and with the advice of Our Privy Council, declare by Proclamation that, on and after the First day of January One thousand nine hundred and one, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also Western Australia, should be united in a Federal Commonwealth under the name of the Commonwealth of Australia: And whereas by the said recited Act certain powers, functions, and authorities were declared to be vested in the Governor-General: And whereas We are desirous of making effectual and permanent provision for the Office of Governor-General and Commander-in-Chief in and over Our said Commonwealth of Australia, without making new Letters Patent on each demise of the said Office: Now know ye that We have thought fit to constitute, order, and declare, and do by these presents constitute, order, and declare, that there shall be a Governor-General and Commander-in-Chief (herein-after called the Governor-General) in and over Our Commonwealth of Australia (herein-after called Our said Commonwealth), and that the person who shall fill the said Office of Governor-General shall be from time to time appointed by Commission under Our Sign Manual and Signet. And We do hereby authorize and command Our said Governor-General to do and execute, in due manner, all things that shall belong to his said command, and to the trust We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of “The Commonwealth of Australia Constitution Act, 1900,” and of these present Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him, under Our Sign Manual and Signet, or by Our Order in Our Privy

Council, or by Us through one of our Principal Secretaries of State, and to such laws as shall hereafter be in force in Our said Commonwealth.

*Great Seal.*

II. There shall be a Great Seal of and for Our said Commonwealth which our said Governor-General shall keep and use for sealing all things whatsoever that shall pass the said Great Seal. Provided that until a Great Seal shall be provided, the Private Seal of our said Governor-General may be used as the Great Seal of the Commonwealth of Australia.

*Appointment of Judges, Justices, etc.*

III. The Governor-General may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of Our said Commonwealth, as may be lawfully constituted or appointed by Us.

*Suspension or removal from office.*

IV. The Governor-General, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, may remove from his office, or suspend from the exercise of the same, any person exercising any Office of Our said Commonwealth, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us in our name or under Our authority.

*Summoning, proroguing, or dissolving the Commonwealth Parliament.*

V. The Governor-General may on Our behalf exercise all powers under the Commonwealth of Australia Constitution Act, 1900, or otherwise in respect of the summoning, proroguing, or dissolving the Parliament of Our said Commonwealth.

*Power to appoint Deputies.*

VI. And whereas by “The Commonwealth of Australia Constitution Act, 1900,” it is amongst other things enacted, that We may authorise the Governor-General to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our Commonwealth, and in that capacity to exercise, during the pleasure of the Governor-General, such powers and functions of the said Governor-General as he thinks fit to assign to such Deputy or Deputies, subject to any limitations expressed or directions given by Us: Now We do hereby authorise and empower Our said Governor-General, subject to such limitations and directions as aforesaid, to appoint any person or persons, jointly or severally, to be his Deputy or Deputies within any part of Our said Commonwealth of Australia, and in that capacity to exercise, during his pleasure, such of his powers and functions as he may deem it necessary or expedient to assign to him or them: Provided always, that the appointment of such a Deputy or Deputies shall not affect the exercise by the Governor-General himself of any power or function.

Succession to the Government

Proviso. Oaths of office to be taken.

VII. And we do hereby declare Our pleasure to be that, in the event of the death, incapacity, removal, or absence of Our said Governor-General out of our said Commonwealth, all and every the powers and authorities herein granted to him shall, until Our further pleasure is signified therein, be vested in such person as may be appointed by Us under Our Sign Manual and Signet to be Our Lieutenant-Governor of Our said Commonwealth; or if there shall be no such Lieutenant-Governor in Our said Commonwealth, then in such person or persons as may be appointed by Us under Our Sign Manual and Signet to administer the Government of the same. No such powers or authorities shall vest in such Lieutenant-Governor, or such other person or persons, until he or they shall have taken the oaths appointed to be taken by the Governor-General of Our said Commonwealth, and in the manner provided by the Instructions accompanying these Our Letters Patent.

Officers and others to obey and assist the Governor-General.

VIII. And We do hereby require and command all Our Officers and Ministers, Civil and Military, and all other the inhabitants of Our said Commonwealth, to be obedient, aiding, and assisting unto Our said Governor-General, or, in the event of his death, incapacity, or absence, to such person or persons as may, from time to time, under the provisions of these Our Letters Patent, administer the Government of Our said Commonwealth.

Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.

IX. And We do hereby reserve to Ourselves, Our heirs and successors, full power and authority from time to time to revoke, alter, or amend these Our Letters Patent as to us or them shall seem meet.

Publication of Letters Patent.

X. And We do further direct and enjoin that these Our Letters Patent shall be read and proclaimed at such place or places as Our said Governor-General shall think fit within Our said Commonwealth of Australia.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, the twenty-ninth day of October, in the Sixty-fourth Year of Our Reign.

By Warrant under the Queen's Sign Manual.

MUIR MACKENZIE.

Letters Patent constituting the Office of  
Governor-General and Commander-in-Chief of the  
Commonwealth of Australia.

*3. INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor-General and Commander-in-Chief of the Commonwealth of*

*Australia.*

VICTORIA R.I.

*Dated 29th October, 1900.*

Instructions to our Governor-General and Commander-in-Chief in and over our Commonwealth of Australia, or, in his absence, to our Lieutenant-Governor, or the Officer for the time being administering the Government of our said Commonwealth.

Given at our Court at Saint James's, this Twenty-ninth day of October, 1900, in the Sixty-fourth year of our reign.

*Preamble.*

*Recites Letters Patent constituting the office of Governor-General.*

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 herein-after 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:

*Publication of first Governor-General's Commission.*

I. Our first appointed Governor-General shall, with all due solemnity, cause Our Commission, under Our Sign Manual and Signet, appointing Our said Governor-General, to be read and published in the presence of Our Governors, or in their absence of Our Lieutenant-Governors of Our Colonies of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia, and such of the members of the Executive Council, Judges, and members of the Legislatures of Our said Colonies as are able to attend.

*Oaths to be taken by first Governor-General, etc.*

*Imperial Act, 31 & 32 Vict. c. 72.*

II. Our said Governor-General of Our said Commonwealth shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled "An

Act to amend the law relating to Promissory Oaths,” and likewise the usual Oath for the due execution of the office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of justice, which Oaths Our said Governor and Commander-in-Chief of Our Colony of New South Wales, or, in his absence, our Lieutenant-Governor or other officer administering the Government of Our said Colony, shall and he is hereby required to tender and administer unto him.

*Publication of Governor-General's Commission after the first appointment.*

III. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall, with all due solemnity, cause Our Commission, under our Sign Manual and Signet, appointing our said Governor-General, to be read and published in the presence of the Chief Justice of the High Court of Australia, or some other Judge of the said Court.

*Oaths to be taken by Governor-General, etc. after the first appointment.*

*Imperial Act, 31 & 32 Vict. c. 72.*

IV. Every Governor-General, and every other officer appointed to administer the Government of Our said Commonwealth after Our said first appointed Governor-General, shall take the Oath of Allegiance in the form provided by an Act passed in the Session holden in the thirty-first and thirty-second years of Our Reign, intituled “An Act to amend the law relating to Promissory Oaths,” and likewise the usual Oath for the due execution of the office of Our Governor-General in and over Our said Commonwealth, and for the due and impartial administration of Justice, which Oaths the Chief Justice of the High Court of Australia, or some other Judge of the said Court, shall and he is hereby required to tender and administer unto him or them.

*Oaths to be administered by the Governor-General.*

V. And We do authorise and require Our said Governor-General from time to time, by himself or by any other person to be authorized by him in that behalf, to administer to all and to every person or persons, as he shall think fit, who shall hold any office or place of trust or profit in our said Commonwealth, the said Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any laws or statutes in that behalf made and provided.

*Governor-General to communicate Instructions to the Executive Council.*

VI. And We do require Our said Governor-General to communicate forthwith to the Members of the Executive Council for Our said Commonwealth these Our Instructions, and likewise all such others, from time to time, as he shall find convenient for Our service, to be imparted to

them.

Laws sent home to have marginal abstracts.

Journals and Minutes.

VII. Our said Governor-General is to take care that all laws assented to by him in Our name, or reserved for the signification of Our pleasure thereon, shall, when transmitted by him, be fairly abstracted in the margins, and be accompanied, in such cases as may seem to him necessary, with such explanatory observations as may be required to exhibit the reasons and occasions for proposing such laws, and he shall also transmit fair copies of the Journals and Minutes of the proceedings of the Parliament of our said Commonwealth, which he is to require from the clerks or other proper officers in that behalf, of the said Parliament.

Grant of Pardons.

Remission of fines.

Proviso— Banishment from the Commonwealth prohibited.

Exception— Political offences.

VIII. And We do further authorize and empower Our said Governor-General, as he shall see occasion, in Our name and on Our behalf, when any crime or offence against the laws of Our Commonwealth has been committed, for which the offender may be tried within Our said Commonwealth, to grant a pardon to any accomplice in such crime or offence, who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders, if more than one; and further, to grant to any offender convicted of any such crime or offence in any Court, or before any Judge, Justice, or Magistrate, within Our said Commonwealth, a pardon, either free or subject to lawful conditions, or any respite of the execution of the sentence of any such offender, for such period as to Our said Governor-General may seem fit, and to remit any fines, penalties, or forfeitures which may become due and payable to Us. Provided always, that Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from or shall absent himself from Our said Commonwealth. And We do hereby direct and enjoin that Our said Governor-General shall not pardon or relieve 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 relieve 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 relieve, take those interests specially into his own personal consideration, in

conjunction with such advice as aforesaid.

*Governor-General's absence.*

IX. And whereas great prejudice may happen to Our service and to the security of Our said Commonwealth by the absence of Our said Governor-General, he shall not, upon any pretence whatever, quit Our said Commonwealth without having first obtained leave from us for so doing, under Our Sign Manual and Signet, or through one of our principal Secretaries of State. V. R. I.

4. *COMMISSION passed under the Royal Sign Manual and Signet, appointing the Right Honourable The Earl of Hopetoun, P.C., K.T., G.C.M.G., G.C.V.O., to be Governor-General and Commander-in-Chief of the Commonwealth of Australia.*

VICTORIA R.

*Dated 29th October, 1900.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India; To Our Right Trusty and Right Well-beloved Cousin and Councillor, John Adrian Louis, Earl of Hopetoun, Knight of Our Most Ancient and Most Noble Order of the Thistle, Knight Grand Cross of Our Most Distinguished Order of Saint Michael and Saint George, Knight Grand Cross of the Royal Victorian Order, Greeting.

*Appointment of the Right Hon. the Earl of Hopetoun, P.C., K.T., G.C.M.G., G.C.V.O., as Governor-General.*

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said John Adrian Louis, Earl of Hopetoun, to be, during Our pleasure, Our Governor-General and Commander-in-Chief in and over our Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

*Recites Letters Patent constituting the Office of Governor-General.*

II. And we do hereby authorize, empower, and command you to exercise and perform all and singular the powers and directions contained in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October, 1900, constituting the said Office of Governor-General and Commander-in-Chief, or in any other Our Letters Patent adding to, amending, or substituted for the same and according to such Orders and Instructions as you may receive from Us.

*Officers, etc., to obey the Governor-General.*

III. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said Commonwealth, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at our Court of Saint James's this Twenty-ninth day of  
October, 1900, in the Sixty-fourth year of Our Reign.

By Her Majesty's Command,  
J. CHAMBERLAIN.

COMMISSION appointing

The Right Honourable the Earl of Hopetoun, P.C., K.T.,  
G.C.M.G., G.C.V.O., to be Governor-General and Commander-in-  
Chief of the Commonwealth of Australia.

**(B.) The States.**

[The following instruments were issued in relation to the State of Victoria.  
Similar instruments were issued in relation to each of the other States.]

**Victoria.**

*Letters Patent, dated 29th October, 1900.*

1. *LETTERS PATENT passed under the Great Seal of the United Kingdom constituting the Office of Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To all to whom these presents shall come, Greeting.

*Preamble.*

*Recites Letters Patent of 21st February, 1879.*

*Recites Imperial Act, 63 & 64 Vict., c. 12, Proclamation of 17th September, 1900, and Letters Patent of 29th October, 1900.*

*Revocation of Letters Patent of 21st February, 1879.*

*Office of Governor constituted.*

*Boundaries.*

WHEREAS, by certain Letters Patent, under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-first day of February, 1879, We did constitute the Office of Governor and Commander-in-Chief in and over Our Colony of Victoria as therein described, and its Dependencies: And whereas, in virtue of the provisions of the Commonwealth of Australia Constitution Act, 1900, and of Our Proclamation issued thereunder, by and with the advice of Our Privy Council on the Seventeenth day of September, 1900, We have by certain Letters Patent under the said Great Seal of Our United Kingdom of Great Britain and Ireland, bearing even date herewith, made provision for the Office of Governor-General and Commander-in-Chief in and over our Commonwealth of Australia: And whereas it has become necessary to make

permanent provision for the Office of Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia, without making new Letters Patent on each demise of the said Office. Now know ye that We do by these presents revoke and determine the said first-recited Letters Patent of the Twenty-first day of February, 1879, and everything therein contained, from and after the proclamation of these our Letters Patent as hereinafter provided: And further know ye that We do by these presents constitute, order, and declare that there shall be a Governor in and over Our State of Victoria (comprising the territories bounded on the west by Our State of South Australia, on the south by the sea, and on the east and north by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the Eastern Boundary of Our State of South Australia) and its Dependencies, in the Commonwealth of Australia (which said State of Victoria and its Dependencies are hereinafter called the State), and that appointments to the said Office shall be made by Commission under Our Sign Manual and Signet.

*Governor's powers and authorities.*

II. We do hereby authorize, empower, and command Our said Governor to do and execute all things that belong to his said Office, according to the tenor of these Our Letters Patent and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet, or by Our Order in Our Privy Council, or by Us, through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the State.

III. We do also by these Our Letters Patent declare Our will and pleasure as follows:—

*Publication of Governor's Commission.*

*Oath to be taken by Governor.*

*Imperial Act, 31 & 32 Vict., c. 72.*

IV. Every person appointed to fill the Office of Governor shall with all due solemnity, before entering on any of the duties of his Office, cause the Commission appointing him to be Governor to be read and published at the seat of Government, in the presence of the Chief Justice, or some other Judge of the Supreme Court of the State, and of the Members of the Executive Council thereof, which being done, he shall then and there take before them the Oath of Allegiance, in the form provided by an Act passed in the Session holden in the Thirty-first and Thirty-second years of Our Reign, intituled an Act to amend the Law relating to Promissory Oaths; and likewise the usual Oath for the due execution of the Office of Governor, and

for the due and impartial administration of justice: which Oaths the said Chief Justice or Judge is hereby required to administer.

**Public Seal.**

V. The Governor shall keep and use the Public Seal of the State for sealing all things whatsoever that shall pass the said Public Seal: and until a Public Seal shall be provided for the State the Public Seal formerly used in Our Colony of Victoria shall be used as the Public Seal of the State.

**Executive Council: constitution of.**

VI. There shall be an Executive Council for the State, and the said Council shall consist of such persons as were, immediately before the coming into force of these Our Letters Patent, Members of the Executive Council of Victoria, or as may at any time be Members of the Executive Council for Our said State in accordance with any Law enacted by the Legislature of the State, and of such other persons as the Governor shall, from time to time, in Our name and on Our behalf, but subject to any Law as aforesaid, appoint under the Public Seal of the State to be Members of Our said Executive Council for the State.

**Grant of lands.**

VII. The Governor, in Our name and on Our behalf, may make and execute, under the said Public Seal, grants and dispositions of any land which may be lawfully granted and disposed of by Us, within the State.

**Appointment of Judges, Justices, etc.**

VIII. The Governor may constitute and appoint, in Our name and on Our behalf, all such Judges, Commissioners, Justices of the Peace, and other necessary Officers and Ministers of the State as may be lawfully constituted or appointed by Us.

**Grant of pardons.**

**Remission of fines.**

**Political offenders.**

**Proviso. Banishment from State prohibited.**

IX. When any crime or offence has been committed within the State against the laws of the State, or for which the offender may be tried therein, the Governor may as he shall see occasion, in Our name and on Our behalf, grant a pardon to any accomplice in such crime or offence who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders if more than one; and further, may grant to any offender convicted in any Court of the State, or before any Judge or other Magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such period as the Governor thinks fit; and further may remit any fines, penalties, or forfeitures

due or accrued to Us: Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the State.

*Suspension or removal from office.*

X. The Governor may, so far as We Ourselves lawfully may, upon sufficient cause to him appearing, remove from his office, or suspend from the exercise of the same, any person exercising any office or place under the State, under or by virtue of any Commission or Warrant granted, or which may be granted, by Us, in Our name, or under Our authority.

*Summoning, proroguing, or dissolving any Legislative Body.*

XI. The Governor may exercise all powers lawfully belonging to Us in respect of the summoning, proroguing, or dissolving any Legislative Body, which now is or hereafter may be established within Our said State.

*Succession to the Government.*

*Lieutenant-Governor.*

*Administrator.*

*Proviso. Lieutenant-Governor, etc., to take Oaths of office before administering the Government.*

*Duties and authorities under Letters Patent.*

XII. In the event of the death, incapacity, or removal of the Governor, or of his departure from the State, Our Lieutenant-Governor, or, if there be no such Officer in the State, then such person or persons as We may appoint, under Our Sign Manual and Signet, shall during Our pleasure, administer the Government of the State, first taking the Oaths hereinbefore directed to be taken by the Governor, and in the manner herein prescribed; which being done, We do hereby authorize, empower, and command Our Lieutenant-Governor, and every other such Administrator as aforesaid, to do and execute during Our pleasure all things that belong to the Office of Governor according to the tenor of these Our Letters Patent, and according to Our Instructions as aforesaid, and the Laws of the State.

*Governor may appoint a Deputy during his temporary absence from seat of Government or from the State.*

XIII. In the event of the Governor having occasion to be temporarily absent for a short period from the Seat of Government or from the State, he may in every such case, by an Instrument under the Public Seal of the State, constitute and appoint Our Lieutenant-Governor, or, if there be no such Officer, or if such Officer be absent or unable to act, then any other person to be his Deputy during such temporary absence, and in that capacity to exercise, perform, and execute for and on behalf of the Governor during such absence, but no longer, all such powers and authorities vested in the Governor, by these Our Letters Patent, as shall in and by such Instrument be specified and limited, but no others. Provided, nevertheless, that by the

appointment of a Deputy as aforesaid, the power and authority of the Governor shall not be abridged, altered, or in any way affected, otherwise than We may at any time hereafter think proper to direct.

*Officers and others to obey and assist the Governor.*

XIV. And We do hereby require and command all our Officers and Ministers, and all other the inhabitants of the State, to be obedient, aiding, and assisting unto the Governor, or to such person or persons as may from time to time, under the provision of these our Letters Patent, administer the Government of the State.

*Power reserved to Her Majesty to revoke, alter, or amend the present Letters Patent.*

XV. And We do hereby reserve to Ourselves, our heirs and Successors, full power and authority from time to time to revoke, alter, or amend these our Letters Patent as to Us or Them shall seem meet.

*Publication of Letters Patent.*

XVI. And We do direct and enjoin that these Our Letters. Patent shall be read and proclaimed at such place or places within Our said State as the Governor shall think fit.

In Witness whereof We have caused these Our Letters to be made Patent. Witness Ourselves at Westminster, this Twenty-ninth day of October, in the Sixty-fourth year of Our Reign.

By Warrant under the Queen's Sign Manual.

MUIR MACKENZIE.

*2. INSTRUCTIONS passed under the Royal Sign Manual and Signet to the Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.*

VICTORIA R.I.

*Dated 29th October, 1900.*

INSTRUCTIONS to Our Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia, or to Our Lieutenant-Governor, or other Officer for the time being administering the Government of Our said State and its Dependencies.

Given at Our Court at St. James's, this Twenty-ninth day of October, 1900, in the Sixty-fourth year of Our Reign.

*Preamble.*

*Recites Letters Patent constituting the Office of Governor.*

WHEREAS by certain Letters Patent bearing even date herewith, We have constituted, ordered, and declared that there shall be a Governor in and over Our State of Victoria and its Dependencies, in the Commonwealth of Australia (which said State of Victoria and its Dependencies are therein and hereinafter called the State):

And whereas we have therein authorized and commanded the Governor to

do and execute all things that belong to his said Office, according to the tenor of Our said Letters Patent, and of such Commission as may be issued to him under Our Sign Manual and Signet, and according to such Instructions as may from time to time be given to him under Our Sign Manual and Signet or by Our Order in Our Privy Council, or by Us through one of Our Principal Secretaries of State, and to such Laws as are now or shall hereafter be in force in the State:

*Recites instructions of 9th July, 1892.*

And whereas We did issue certain Instructions under Our Sign Manual and Signet to Our Governor and Commander-in-Chief in and over Our Colony of Victoria and its Dependencies bearing date the Ninth day of July, 1892:

*Revokes aforesaid instructions.*

Now know you that We do hereby revoke the aforesaid Instructions, and We do by these Our Instructions under Our Sign Manual and Signet direct and enjoin and declare Our will and pleasure as follows:—

*Interpretation.*

I. In these Our Instructions, unless inconsistent with the context, the term “the Governor” shall include every person for the time being administering the Government of the State, and the term “the Executive Council” shall mean the members of Our Executive Council for the State who are for the time being responsible advisers of the Governor.

*Oaths to be administered.*

II. The Governor may, whenever he thinks fit, require any person in the public service to take the Oath of Allegiance, together with such other Oath or Oaths as may from time to time be prescribed by any Law in force in the State. The Governor is to administer such Oaths or cause them to be administered by some Public Officer of the State.

*Governor to communicate Instructions to Executive Council.*

III. The Governor shall forthwith communicate these Our Instructions to the Executive Council, and likewise all such others, from time to time, as he shall find convenient for Our service to impart to them.

*Governor to preside.*

*Governor to appoint a President.*

*Senior Member to preside in the absence of the Governor and President.*

*Seniority of Members.*

IV. The Governor shall attend and preside at the meetings of the Executive Council, unless prevented by some necessary or reasonable cause, and in his absence such member as may be appointed by him in that behalf, or in the absence of such member the senior member of the Executive Council actually present, shall preside; the seniority of the members of the said Council being regulated according to the order of their respective

appointments as members thereof.

**Quorum.**

V. The Executive Council shall not proceed to the despatch of business unless duly summoned by authority of the Governor nor unless two members at the least (exclusive of the Governor or of the member presiding) be present and assisting throughout the whole of the meetings at which any such business shall be despatched.

**Governor to take advice of Executive Council.**

VI. In the execution of the powers and authorities vested in him, the Governor shall be guided by the advice of the Executive Council, but if in any case he shall see sufficient cause to dissent from the opinion of the said Council, he may act in the exercise of his said powers and authorities in opposition to the opinion of the Council, reporting the matter to Us without delay, with the reasons for his so acting.

In any such case it shall be competent to any Member of the said Council to require that there be recorded upon the Minutes of the Council the grounds of any advice or opinion that he may give upon the question.

**Description of Bills not to be assented to.**

VII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes:

1. Any Bill for the divorce of persons joined together in holy matrimony.
2. Any Bill whereby any grant of land or money or other donation or gratuity may be made to himself.
3. Any Bill affecting the currency of the State.
4. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
5. Any Bill of an extraordinary nature and importance, whereby Our prerogative or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced.
6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us;

**Powers in urgent cases.**

Unless he shall have previously obtained Our Instructions upon such Bill through one of Our Principal Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorized to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty.

But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto.

*Regulation of power of pardon.*

VIII. The Governor shall not pardon or reprieve any offender without first receiving in capital cases the advice of the Executive Council, and in other cases the advice of one, at least, of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of Our Empire, or of any country or place beyond the jurisdiction of the Government of the State, the Governor shall, before deciding as to either pardon or reprieve, take those interests specially into his own personal consideration in conjunction with such advice as aforesaid.

*Judges, etc., to be appointed during pleasure.*

IX. All Commissions granted by the Governor to any persons to be Judges, Justices of the Peace, or other officers shall, unless otherwise provided by law, be granted during pleasure only.

*Governor's absence.*

*Temporary leave of absence.*

X. The Governor shall not quit the State without having first obtained leave from Us for so doing under Our Sign Manual and Signet, or through one of our Principal Secretaries of State, except for the purpose of visiting the Governor of any neighbouring State or the Governor-General, for periods not exceeding one month at any one time, nor exceeding in the aggregate one month for every year's service in the State.

*Governor's absence and departure from the State. Interpretation clause.*

XI. The temporary absence of the Governor for any period not exceeding one month shall not, if he have previously informed the Executive Council, in writing, of his intended absence, and if he have duly appointed a Deputy in accordance with Our said Letters Patent, be deemed a departure from the State within the meaning of the said Letters Patent. V.R.I.

*3. COMMISSION passed under the Royal Sign Manual and Signet, appointing Sir John Madden, K.C.M.G., Chief Justice of Victoria, to be Lieutenant-Governor of the State of Victoria and its Dependencies, in the Commonwealth of Australia.*

VICTORIA R.

*Dated 29th October, 1900.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, Empress of India: To Our Trusty and Well-beloved Sir John Madden, Knight Commander of Our Most Distinguished Order of Saint Michael and Saint George, Chief Justice of the Supreme Court of Victoria, Greeting.

*Appointment of Sir J. Madden, K.C.M.G., to be Lieutenant-Governor.*

WE do, by this Our Commission under Our Sign Manual and Signet, appoint you, the said Sir John Madden, to be during Our pleasure Our Lieutenant-Governor of Our State of Victoria and its Dependencies, in the Commonwealth of Australia, with all the powers, rights, privileges, and advantages to the said Office belonging or appertaining.

To administer Government during Governor's absence.

Recites Letters Patent constituting Office of Governor.

Powers and authorities.

II. And further, in case of the death, incapacity, or removal of Our Governor of Our said State, or of his departure from Our said State, We do hereby authorize and require you to administer the Government thereof, with all and singular the powers and authorities contained in Our Letters Patent under the Great Seal of Our United Kingdom of Great Britain and Ireland, bearing date at Westminster the Twenty-ninth day of October, 1900, constituting the Office of Governor in and over Our said State of Victoria and its Dependencies, in Our Commonwealth of Australia, or in any other Our Letters Patent adding to, amending, or substituted for the same, and according to such Instructions as Our said Governor for the time being may receive from Us, or through one of Our Principal Secretaries of State, and according to such Laws as are now or shall hereafter be in force in Our said State.

Commission of 29th April, 1899, superseded.

III. And We do hereby appoint that this Our present Commission shall supersede Our Commission under Our Sign Manual and Signet bearing date the Twenty-ninth day of April, 1899, appointing you the said Sir John Madden to be Lieutenant-Governor of Our Colony of Victoria and its Dependencies.

Officers, etc., to take notice.

IV. And We do hereby command all and singular Our Officers, Ministers, and loving subjects in Our said State and its Dependencies, and all others whom it may concern, to take due notice hereof, and to give their ready obedience accordingly.

Given at Our Court at Saint James's, this Twenty-ninth day of October, 1900, in the Sixty-fourth year of Our Reign.

By Her Majesty's Command,  
J. CHAMBERLAIN.