administration, or execution of the trust fund, can, as has been rightly said, be brought for the administration of any trust fund. But the question here is, is there any trust fund. Moreover, if this action is, as contended, to be treated as an action on implied covenant, brought by the defendants (some of the covenantees) against the plaintiff (executrix of the covenantor as well as one of the covenantees), it cannot at the same time be treated as an action for administration. Under these circumstances, I am of opinion that there is no power to award costs out of the estate.

*Order varied. Costs of both parties out of estate.*

Solicitors, for appellant, *Feez & Baynes.*

Solicitors, for respondents, *Ruthning & Jensen.*



[HIGH COURT OF AUSTRALIA.]

BAXTER . . . . . APPELLANT;
DEFENDANT,

AND

THE COMMISSIONERS OF TAXATION, NEW SOUTH WALES . . . } RESPONDENTS.
PLAINTIFFS,

THE COMMONWEALTH OF AUSTRALIA INTERVENING.



ON APPEAL FROM A DISTRICT COURT OF NEW SOUTH WALES.

SYDNEY, *May* 8, 9, 10, 13, 14, 15; MELBOURNE, *June* 7.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

*Legislative powers of States—Taxation of income of Commonwealth officer—Interference with free exercise of Commonwealth power—Implied prohibition in Constitution—Weight to be attached to American decisions—Question as to limits inter se of constitutional powers of Commonwealth and State—Conflicting decisions of Privy Council and High Court—Duty of High Court—Appeal from State Court exercising federal jurisdiction to High Court—Powers of Commonwealth Parliament—Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 39—

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*Ultra vires—Appeal to Privy Council — Application for certificate — The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51, *sub-sec.* (xxxix.), *secs.* 73-77.

In an action in a New South Wales District Court to recover income tax under the *Land and Income Tax Act* of that State from a federal officer in respect of his salary as such officer, the defendant claimed to be exempt from liability on the ground that the taxation of his income was an interference with the free exercise of the powers of the Commonwealth within the meaning of the rule laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91, and therefore impliedly prohibited by the Constitution. The Judge, following the decision of the Privy Council in *Webb* v. *Outtrim*, (1907) A.C., 81, gave judgment for the plaintiffs. The defendant appealed direct to the High Court, adopting the procedure prescribed by the State law for appeals to the Supreme Court.

*Held*, that the question raised by the defence was a question as to the limits *inter se* of the constitutional powers of the Commonwealth and a State within the meaning of sec. 74 of the Constitution, that the District Court was therefore exercising federal jurisdiction under sec. 39 of the *Judiciary Act* 1903, and the appeal was competent by virtue of sub-sec. (2) (*a*) of that section, as well as by sec. 73 of the Constitution.

*Held*, further (*per Griffith* C.J., *Barton* and *O'Connor* JJ.), that the High Court was, by the Constitution, the ultimate arbiter upon all such questions, unless it was of opinion that the question at issue in any particular case was one upon which it should submit itself to the guidance of the Privy Council, and was therefore not bound to follow the decision in *Webb* v. *Outtrim*, (1907) A.C., 81, but should follow its own considered decision in *Deakin* v. *Webb*, 1 C.L.R., 585, in which it had refused to grant a certificate under sec. 74, unless upon a reconsideration of the question for whatever reason it should come to a different conclusion; and that, assuming the fact that the Privy Council had given a decision in direct conflict with the High Court on the same point to be a sufficient reason for a reconsideration of the whole matter by the High Court, there was nothing in the reasons of the Judicial Committee to throw any new light on the question involved, either with regard to the necessity for the implication of the rule of implied prohibition laid down in *M'Culloch* v. *Maryland*, 4 Wheat., 316, and adopted in *D'Emden* v. *Pedder*, 1 C.L.R., 91, or as to the applicability of the rule to the particular question.

The rule in *D'Emden* v. *Pedder*, 1 C.L.R., 91, reaffirmed.

In construing the Constitution regard must be had to the fact that it is an instrument of government calling into existence a new State with sovereign powers, subject only to the British Crown.

The duty of the High Court in regard to questions under sec. 74 is to be determined upon consideration of the whole purview and history of the Constitution.

*Per Isaacs* J. Apart from any consideration of its history, the words of sec. 74 are clear and strong enough to lead to the conclusion that on questions coming within the section the decision of the High Court was final, and, therefore, the Court had a right to decline to follow the decision of the Privy

Council upon any such question, but the respect and weight due to the judgment of the Privy Council made it the duty of the High Court under the circumstances to reconsider the question decided in *Deakin* v. *Webb*, 1 C.L.R., 585. Further consideration, in the light of the decision in *Webb* v. *Outtrim*, (1907) A.C., 81, leaves the authority of *D'Emden* v. *Pedder*, 1 C.L.R., 585, unimpaired, but the *Land and Income Tax Act* of New South Wales, considered apart from authority, cannot be regarded as an infringement of the rule of non-interference laid down in the latter case.

*Per Higgins* J. The only diminution of the prerogative right of the King in Council to entertain appeals from all Courts in the colonies and dependencies is that in cases involving such questions as are referred to in sec. 74, when the High Court has given a decision, there is to be no appeal from the High Court except by leave of the High Court; and there is nothing in the Constitution to make the High Court the final authority on any kind of law. The Act should not be extended by implication in the direction of infringing the prerogative rights of the Crown. The King in Council being therefore still the appellate Court from the High Court, and the High Court a Court from which appeal can be brought to the King in Council, it is the duty of the High Court to accept the decision of the King in Council as the final statement of the law. The *Land and Income Tax Act* of New South Wales is not an interference with federal instrumentalities.

*Per totam curiam.*—Even if sec. 39, sub-sec. (2) (*a*) of the *Judiciary Act* 1903 purports to take away the prerogative right of appeal to the Privy Council, and the section is to that extent *ultra vires* and inoperative, its failure in that respect does not affect the validity of the grant of federal jurisdiction to State Courts contained in the rest of the section and the consequent right of appeal to the High Court.

*Sed Quære*, whether sub-sec. (2) (*a*) should be construed as affecting the prerogative.

Decision of *Murray* D.C.J. reversed by a majority, (*Isaacs* J. and *Higgins* J. dissenting).

*Webb* v. *Outtrim*, (1907) A.C., 81, not followed.

Certificate for leave to appeal to the Privy Council refused.

The fact that there are conflicting judgments of the High Court and the Privy Council on the same question is not a sufficient reason for granting a certificate.

APPEAL from a decision of a Judge of a District Court of New South Wales.

The appellant was an officer in the service of the Commonwealth, residing in New South Wales. He was assessed for the purposes of the *Land and Income Tax Act* 1895 by the Commissioners of Taxation of that State, and, having refused to pay, was

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sued in the District Court for the amount of the tax as assessed. At the hearing before *Murray* D.C.J., the appellant contended that, on the authority of the High Court's decision in *Deakin* v. *Webb* (1), he was not liable. The learned Judge, however, following the decision of the Privy Council in *Webb* v. *Outtrim* (2), decided against the appellant's contention, and found a verdict for the Commissioners for the amount claimed.

From that decision the appellant now appealed to the High Court, adopting the procedure prescribed in the *District Court Amendment Act* 1905 for appeals to the Supreme Court.

The Attorney-General for the Commonwealth was allowed to intervene.

*Sir Julian Salomons* K.C. (*C. B. Stephen* K.C., and *J. L. Campbell* with him), for the respondents on a preliminary objection to the hearing of the appeal by the Court as constituted. Three of the Justices now sitting are pecuniarily interested in the question in dispute, inasmuch as they are residents of New South Wales, and are therefore liable to pay the tax if the appellant is liable. In the absence of express provision, as in the *Land and Income Tax Act* 1895 with regard to the State Judges, a Court so constituted should not sit on the appeal.

[GRIFFITH C.J.—Except where it is a case of necessity.]

There is no necessity here, because by the *Judiciary Act* 1903, sec. 14, the Full Court may consist of two Justices only, and there are two available now who are not pecuniarily interested.

[GRIFFITH C.J.—The question involved is as to the respective powers of the Commonwealth and State Parliaments. No question of that kind can arise in which the Justices are not interested.]

The appellant need not have come here, he might have gone to the Supreme Court.

[GRIFFITH C.J.—By sec. 73 of the Constitution, which is the Statute law of the Empire, the High Court has jurisdiction to entertain appeals from all judgments of Courts exercising federal jurisdiction. We overrule the objection.]

*Flannery* (*J. A. Ferguson* with him), for the appellant. This

(1) 1 C.L.R., 585. (2) (1907) A.C., 81; 4 C.L.R., 356.

is an appeal under sec. 39, sub-sec. (2) (*b*) of the *Judiciary Act* 1903, instituted by notice of motion under sec. 57 of the *District Court Amendment Act* 1905; *High Court Procedure Act* 1903, sec. 37; Appeal Rules, sec. IV., r. 1, as amended August 22nd 1904. The tax is imposed by sec. 15 of the *Land and Income Tax Act* (59 Vict. No. 15), on income derived from a vocation carried on in New South Wales. The appellant as a federal officer is exempt: *Deakin* v. *Webb* (1). *Webb* v. *Outtrim* (2), a decision of the Privy Council to the contrary, on appeal from the Supreme Court of Victoria, was wrongly decided. The Judicial Committee should not have entertained the appeal as of right: *Judiciary Act* 1903, sec. 39 (2) (*a*); the Constitution, sec. 74.

[GRIFFITH C.J.—Suppose they were technically wrong in doing so, can we interfere with their management of their own business? I do not think we should be asked to review the propriety of the act of the Privy Council any more than they should be asked to review the propriety of an act of this Court in a matter of procedure.]

Even if the Privy Council rightly entertained the appeal, their decision is not binding on this Court, and should not, under the circumstances, be followed. The decision of this Court in *Deakin* v. *Webb* (1) is binding on this Court, and should be followed unless it appears that the Court was misled. That is the practice of the House of Lords in such cases. Sec. 74 of the Constitution makes this Court's decision final on all questions as to the limits *inter se* of the constitutional powers of the Commonwealth and a State, unless the Court certifies that the question is one which should go to the Privy Council. The question in this case comes within the section, and upon it this Court has given a decision and refused a certificate. That decision stands as the law until altered by a competent authority, and cannot be reversed or overruled by the Privy Council either on an appeal under State laws or by an exercise of the prerogative. Assuming that there is still an appeal to the Privy Council on such matters by virtue of the prerogative, a decision of the Privy Council on such a question is not that of a superior Court, but of a Court of co-ordinate jurisdiction, and should not be accorded any more weight than it

(1) 1 C.L.R., 585. (2) (1907) A.C., 81; 4 C.L.R., 356.

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would receive from the House of Lords or even the Privy Council itself. The House of Lords does not hesitate to differ from the Privy Council, and the Privy Council itself does not feel itself bound by previous decisions of its own body: *Ridsdale* v. *Clifton* (1). If the reasons of the Privy Council in *Webb* v. *Outtrim* (2) do not commend themselves to this Court the decision should not be followed: *Tooth* v. *Power* (3); *Read* v. *Bishop of Lincoln* (4); "*The City of Chester*" (5); *Mackonochie* v. *Lord Penzance* (6); *Wilkinson* v. *Downton* (7); *Dulieu* v. *White & Sons* (8). On questions coming within sec. 74 the Privy Council has no voice unless it is invoked by the High Court itself. The inference is irresistible that on such questions the High Court is to be the ultimate Court of appeal, and its decision the only binding precedent, except in cases where a certificate is granted. The only alternative is to suppose that the restriction on appeals in sec. 74 was intended to prevent trivial matters from being thrust upon the Privy Council. But the nature of the questions involved renders that an impossible inference. The purpose was rather to give the final voice on those highly important questions to the Court most fitted to deal with them. The High Court is entrusted with the duty of maintaining the balance between the powers of the States and the Commonwealth, in the same way as the Supreme Court of the United States of America, whose Constitution formed the model for that of the Commonwealth. This inference is strengthened by consideration of sec. 76, which gives Parliament power to confer original jurisdiction on the High Court in such matters, and sec. 77, sub-sec. (II.), which enables Parliament to make that jurisdiction exclusive. The Privy Council, if that were done, could never have cognizance of such questions except by permission of the High Court.

*Groom* (A-G. for the Commonwealth), and *Cullen* K.C. (*Bavin* with them), for the Commonwealth, intervening. Even if the words of sec. 74 do not expressly make the High Court's decision binding on all Courts, they do so by implication, when the general

(1) 2 P.D., 276, at p. 306.
(2) (1907) A.C., 81; 4 C.L.R., 356.
(3) (1891) A.C., 284.
(4) (1892) A.C., 644.
(5) 9 P.D., 182, at p. 207.
(6) 6 App. Cas., 424, at p. 447.
(7) (1897) 2 Q.B., 57, at p. 60.
(8) (1901) 2 K.B., 669.

scheme and history of the Constitution are considered. The Constitution should not be construed as a mere Act of Parliament, but as an instrument of government drawn up by the States to form the basis of a permanent union between themselves. The Court should consider what were the evils to be remedied, and the method adopted to remedy them. As in the United States of America, the scheme of government necessitated making the High Court the interpreter and protector of the Constitution: *Dicey, Law of the Constitution*, 6th ed., Append., p. 479. Such an arbiter is necessary where the powers of all are distributed between two quasi-sovereign bodies, State and Commonwealth. The experience of Canada suggested the advisability of having questions as to the limits of the respective powers of the two bodies decided finally in a Court familiar with Australian conditions and aspirations. The provision for appeal to the Privy Council by certificate was intended for questions affecting Imperial interests. The section is not a mere prohibition of appeal in the particular case, it was intended to prevent a question, once decided by the High Court, from being re-opened by the Privy Council. The whole purpose of the section is frustrated if that body may entertain an appeal on the same question coming to them through another channel, and decide it regardless of the High Court's previous decision. The respect due to a decision of the Privy Council does not require this Court to give up its opinion on matters as to which its decision is made final by the Constitution. The Privy Council should follow the High Court. [They referred to *Quick and Groom, Powers of the Commonwealth*, p. 51, and secs. 71-77 of the Constitution.] The question is one arising under the Constitution. It could not be decided without interpreting the Constitution. The question whether a power is implied is really one of construction. [They referred to *Cohens* v. *Virginia* (1); *Starin* v. *New York* (2); *Tennessee* v. *Davis* (3); *Patton* v. *Brady* (4); *Osborn* v. *United States Bank* (5); sec. 76, sub-sec. (I.), and sec. 51, sub-sec. (XXXIX.), of the Constitution.] The argument that to refuse to follow the Privy Council would be equivalent to

(1) 6 Wheat., 264, at p. 379.
(2) 115 U.S., 248, at p. 257.
(3) 100 U.S., 257, at p. 264.
(4) 184 U.S., 608.
(5) 9 Wheat., 738, at p. 823.

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holding that there are in existence two Courts of co-ordinate jurisdiction on these matters giving conflicting decisions, is an argument in favour of legislation, but should not lead this Court to reverse its own decision. The reasoning of the Judicial Committee in *Webb* v. *Outtrim* (1) does not throw any new light on the question, or disclose any valid objection to the application of the principle laid down in *M'Culloch* v. *Maryland* (2) and adopted by this Court in *D'Emden* v. *Pedder* (3), affirmed in *Deakin* v. *Webb* (4); *Municipal Council of Sydney* v. *The Commonwealth* (5); *The Commonwealth* v. *State of New South Wales* (6). It is as necessary to the States as to the Commonwealth, and is an illustration of the maxim *quando lex aliquid alicui concedit, conceditur et id sine quo res ipsa esse non potest.* [They referred to *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (7).] A similar implication of ancillary powers was made by the Privy Council in construing the Canadian Constitution: *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (8); *Citizens Insurance Co. of Canada* v. *Parsons* (9); though they rejected the principle in *Bank of Toronto* v. *Lambe* (10).

[BARTON J. referred to *Attorney-General for Canada* v. *Cain & Gilhula* (11); *Robtelmes* v. *Brenan* (12).]

The principle has been uniformly followed by the Supreme Courts of Canada and the United States with beneficial results. [They referred to *Claflin* v. *Houseman* (13); *Martin* v. *Hunter's Lessee* (14); *The Moses Taylor* (15); *Railway Co.* v. *Whitton* (16).] The framers of the Constitution, having adopted the same or similar language to that of the United States Constitution, must be taken to have adopted it in the sense in which it had been construed by the American Courts.

[ISAACS J. referred to *Trimble* v. *Hill* (17).]

(1) (1907) A.C., 81; 4 C.L.R., 356.
(2) 4 Wheat., 316.
(3) 1 C.L.R., 91.
(4) 1 C.L.R., 585.
(5) 1 C.L.R., 208.
(6) 3 C.L.R., 807.
(7) 4 C.L.R., 488.
(8) (1907) A.C., 65.
(9) 7 App. Cas., 96, at p. 108.
(10) 12 App. Cas., 575, at p. 586.
(11) (1906) A.C., 542.
(12) 4 C.L.R., 395.
(13) 93 U.S., 130.
(14) 1 Wheat., 304.
(15) 4 Wall., 411, at p. 429.
(16) 13 Wall., 270, at p. 288.
(17) 5 App. Cas., 342, at p. 345.

There is no express provision in the Commonwealth Constitution so different from anything in the American Constitution as to exclude the implication. The maxim *expressio unius est exclusio alterius* should be applied with great caution: *State of Tasmania* v. *Commonwealth and State of Victoria* (1); *Broome, Legal Maxims*, 7th ed., p. 493.

*Sir Julian Salomons* K.C. (*C. B. Stephen* K.C. and *J. L. Campbell* with him), for the respondents. This Court, even if it is a Court of co-ordinate jurisdiction with the Privy Council, should not interfere with a decision of a Judge of the State who has followed the decision of the Privy Council. [He referred to *Lavy* v. *London County Council* (2); *Pledge* v. *Carr* (3). Even if the Court is not satisfied by the reasoning of the Privy Council in *Webb* v. *Outtrim* (4), that the decision in *Deakin* v. *Webb* (5) is wrong, it should reconsider that decision. But this Court is not a Court of co-ordinate jurisdiction. It is an inferior Court and is bound by the decision of the Privy Council. That Court is in all other matters a Court of Appeal from this Court, and matters within sec. 74 may come before it on appeal from the Supreme Courts, or on appeal from this Court by certificate of this Court. While it is thus potentially an appellate Court on all matters that can come before the High Court, in no case does an appeal lie from it to the High Court. Apart from sec. 74, there is nothing in the Constitution to affect the position of the Privy Council as a Court of Appeal from the High Court. Sec. 74, though it makes the decision of the High Court final in the case before it unless a certificate is given, does not make that decision binding on all Courts as a precedent. In many Statutes the decisions of an admittedly inferior Court are made final and an appeal is prohibited except by leave of that Court, but the inferior Court is bound to follow a decision of the superior Court on the same point. That being the relation which the High Court bears to the Privy Council, the latter must be regarded as the superior Court, and, according to the constitution of the British judicial system and the whole course of practice and tradition, the decision of the superior

(1) 1 C.L.R., 329, at p. 343.
(2) (1895) 2 Q.B., 577, at p. 581.
(3) (1895) 1 Ch., 51.
(4) (1907) A.C., 81; 4 C.L.R., 356.
(5) 1 C.L.R., 585.

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Court must be followed. Even the Privy Council, for the sake of avoiding diversity of decisions, follows the House of Lords, though not technically bound to do so. For a similiar reason the King's Bench Division follows the Privy Council. It is of the utmost importance to all subjects of the Empire that in all parts of it, where English law prevails, the interpretation of the law should be as nearly as possible uniform: *Trimble* v. *Hill* (1). The duty imposed upon the High Court by sec. 74 is to decide the matter by its own judgment, but only in accordance with the law as laid down by the superior Court. That restriction does not impair its dignity or prestige in any way. [He referred also to *Reprint of Debates on the Commonwealth of Australia Constitution Bill*, pp. 69, 71, 112-116.]

But it is a condition precedent to the jurisdiction defined in sec. 74 that the matter should be one within its meaning. It is not open to the High Court to prevent an appeal from its decision by holding that a matter is within the section, if, as a matter of law, it is not. In this case there is no question as to the limits *inter se* of the constitutional powers of State and Commonwealth. The *Land and Income Tax Act* cannot conflict with any executive or legislative power, nor interfere with any instrumentality of the Commonwealth. The mere question whether the fact of a man being a federal officer renders him exempt from State taxation does not raise any question as to the limits of powers. No relevant power of the Commonwealth has been exercised. The mere raising of the contention that there is such a conflict is not sufficient. The Privy Council were of opinion that no such question was involved.

Even if the principle of *M'Culloch* v. *Maryland* (2) is applied, there was no interference in this case. The liability of federal officers to the ordinary burdens of citizenship without any discrimination against them as compared with others cannot be regarded as impairing the efficiency of a Commonwealth agency. [He referred to *Railroad Co.* v. *Peniston* (3); *Wollaston's Case* (4).] But the principle, however applicable to the United

(1) 5 App. Cas., 342.
(2) 4 Wheat., 316.
(3) 18 Wall., 5, at p. 30.
(4) 28 V.L.R., 357, at p. 378; 24 A.L.T., 63.

States, cannot be applied in construing the Constitution of the Commonwealth. It was adopted by the Supreme Court in America as necessary for the preservation of the Union, not because it was a necessary implication according to the accepted principles of construction in English law. It was a straining of the law that was perhaps justified because there was no other power outside the States to prevent mutual interference. The Privy Council have not held that there is to be no implication in construing the Constitution, but that there is no room for this particular implication. In the United States Constitution the maxim *expressio unius est exclusio alterius* was excluded by Art. IX., as amended, but here the maxim applies, and when secs. 106-109 provide for the preservation of all rights to the States that are not taken away by the Constitution, and sec. 114 expressly prohibits taxation of Commonwealth property, it must be presumed that the States' powers of taxation are otherwise unimpaired, and are not to be cut down by implication. Art. X. of the United States Constitution is not a parallel to these provisions. But even if the Constitution were in identical terms, to read the principle of *M'Culloch* v. *Maryland* (1), into this Constitution would be legislation, not construction, and would be unnecessary. [He referred to *Bank of Toronto* v. *Lambe* (2).] It is not in accordance with English law to hold that a power not expressly taken away should be taken away by implication because if it existed it might be abused, or that the power to tax is the power to destroy. The Royal assent is necessary for all legislation, and is an effective check upon serious encroachments by State or Commonwealth upon one another. Another check is the power of the Imperial Parliament to legislate. The power of veto, though not commonly used, is a real power, and may be exercised at any time to prevent dangerous legislation in the Colonies: *Todd, Parliamentary Government in the British Colonies*, 1st ed., p. 385; *Quick and Garran, Annotated Constitution of the Australian Commonwealth*, pp. 694, 695. Sec. 74 itself recognizes this power as a check upon legislation affecting the prerogative.

An appeal does not lie to this Court from the District Court

(1) 4 Wheat., 316. (2) 12 App. Cas., 575.

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Judge in this case. Before the *Judiciary Act* 1903 the District Court Judge had jurisdiction to entertain this action, and there was an appeal to the Supreme Court. It is not federal jurisdiction, but an ordinary action against a citizen under a State law. Apart from sec. 39 of the *Judiciary Act* 1903, the appeal would lie to the Supreme Court only. But that section is an attempt to take away the appeal from the State Courts to the Supreme Court, and indirectly the appeal to the Privy Council, by the device of taking away their jurisdiction, and giving it back as federal, and then allowing an appeal to the High Court only. The section is therefore *ultra vires*, and the appeal is wrongly brought.

[GRIFFITH C.J.—This Court decided, in *Ah Yick* v. *Lehmert* (1), that the jurisdiction of the Supreme Court to entertain appeals from inferior Courts of the States has not been interfered with by this section.]

*Groom* A.-G. in reply. The conflict of powers indicated in sec. 74 need not be legislative. Here there is a conflict between the legislative powers of a State and the executive power of the Commonwealth. The question has only to be raised to give this Court jurisdiction under sec. 74.

There is no real distinction between the Constitution of the Commonwealth and that of the United States in regard to the division of powers; and the necessity for the rule of non-interference is equally great in the two cases. The power of veto is ineffective as a check. Neither that nor power of the Imperial Parliament to legislate is an efficient substitute for a rule of construction which may be applied as the occasion arises. [He referred to *Garnsey* v. *Flood* (2); *Collector* v. *Day* (3).]

[ISAACS J. referred to *Hebbert* v. *Purchas* (4); *Read* v. *Bishop of Lincoln* (5); *Safford and Wheeler's Privy Council Practice*, p. 548.

HIGGINS J. referred to *Pollock's Jurisprudence*, Bk. I., pp. 322, 324.]

The District Court was exercising federal jurisdiction, as the

(1) 2 C.L.R., 593.
(2) (1898) A.C., 687, at p. 692.
(3) 11 Wall., 113.
(4) L.R. 3 P.C., 605.
(5) (1892) A.C., 644, at p. 654.

interpretation of the Constitution was involved in its decision. Sec. 39, sub-sec. (2) of the *Judiciary Act* 1903 is a valid exercise of the powers conferred by sec 76, sub-sec. (I.) and sec. 77, sub-sec. (II.) of the Constitution. No question arises as to the power of the Parliament to exclude an appeal to the Privy Council.

[GRIFFITH C.J.—This Court has jurisdiction under sec. 73 of the Constitution to entertain the appeal even if it has not under sec. 39 (2) of the *Judiciary Act* 1903.]

*Flannery*, for the appellant, in reply. The Imperial Parliament, having left the Privy Council and the High Court with co-ordinate jurisdiction in certain matters, their relationship in regard to those matters is not analogous to that which exists between Supreme Courts and the Privy Council, or between the High Court and the Privy Council on matters of general law. The High Court is not an inferior Court promoted to a new jurisdiction, but a new Court with new jurisdiction in matters that never could have arisen before, with an authority in those matters at least equal to that of the Privy Council. The proper guidance for the Court is to be found, not in the tradition of the Empire as regards the practice and procedure of the Supreme Courts, but in the Constitution itself, which has no precedent in British legislation, and in the circumstances under which it came into existence.

*Cur. adv. vult.*

June 7.

The judgment of GRIFFITH C.J., BARTON J. and O'CONNOR J., was read by

GRIFFITH C.J. This is an appeal from a judgment of a District Court in New South Wales in an action by the respondents to recover from the appellant a sum of money for income tax claimed in respect of the emoluments received by him for the discharge of his official duty as an officer of Customs in that State. The learned District Court Judge, following the decision of the Judicial Committee in the case of *Webb* v. *Outtrim* (1), in which the decision of this Court in the case of *Deakin* v. *Webb* (2) was disapproved, gave judgment for the plaintiffs. The case was argued at length at the last sittings of the Court in Sydney, but as the

(1) (1907) A.C., 81. (2) 1 C.L.R., 585.

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same questions were said to be raised in the case of *Flint* v. *Webb* which was set down for hearing at the present sittings of the Court in Melbourne, the Court determined to hear the arguments in both cases before delivering judgment. All the points arising for determination are common to both cases, and although the arguments for the respective respondents did not proceed upon quite identical lines we propose to deal with them all in this judgment.

Two questions of supreme importance to the future of the Commonwealth are raised for decision; first, whether the High Court or the Judicial Committee of the Privy Council is under the Constitution the ultimate arbiter upon questions as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States; and, secondly, whether under the Constitution a State can, in the exercise of its legislative or executive authority, interfere with the exercise of the legislative or executive authority of the Commonwealth, and, conversely, whether the Commonwealth can in like manner trammel the exercise of the legislative or executive power of the States.

Other questions of comparatively minor importance are also raised—one as to the competency of this Court to hear the appeal, and another as to the extent, if any, to which a tax imposed by State law upon the official emoluments of a federal officer is a violation of the rule asserted by this Court in the case of *D'Emden* v. *Pedder* (1). In that case this Court, holding that the doctrine laid down in the celebrated case of *M'Culloch* v. *Maryland* (2), was applicable to the Constitution of the Commonwealth of Australia, laid down the rule that "When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."

In the case of *Deakin* v. *Webb* (3) the Court again affirmed that rule, and, adopting the reasoning of the Supreme Court of the United States in the cases of *Dobbins* v. *Commissioners of*

(1) 1 C.L.R., 91.

(2) 4 Wheat., 316.

(3) 1 C.L.R., 585.

*Erie County* (1), and *The Collector* v. *Day* (2), applied it to the case of a State income tax upon the emoluments of Federal Ministers and members of Parliament. In *The Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (3), the Court applied the same principle to an attempted interference by the Commonwealth with the exercise by a State of its sovereign powers.

In *Webb* v. *Outtrim* the Supreme Court had followed the decision of this Court in *Deakin* v. *Webb* (4), but an appeal to the Privy Council was allowed (5).

The respondents contend that this Court is bound by that decision, and that the decisions already mentioned, and others in which the Court applied the same principles, must be taken to be overruled and no longer law—in other words, that, an interpretation of the Constitution on the points in issue having been given by the Privy Council in a case which they had jurisdiction to decide, this Court must defer to their opinion, whether it does or does not agree with it. On the other hand it is contended by the appellant and by the Commonwealth that by the Constitution this Court was created for the express purpose, amongst others, of interpreting the Constitution, and that as to some questions, of which that now in controversy is one, the Judicial Committee has no authority to give a decision binding on this Court unless in the opinion of this Court the question is one which ought to be determined by the Sovereign in Council, although it is conceded that, if they decide such a question incidentally, their decision is binding on the immediate parties.

The answer to the question thus raised must depend upon the terms of the Constitution itself. Sec. 74 is as follows:—"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,

(1) 16 Peters, 435.
(2) 11 Wall., 113.
(3) 4 C.L.R., 488.
(4) 1 C.L.R., 585.
(5) (1907) A.C., 81.

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unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

"The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

"Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal Prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure."

Much argument was addressed to us as to the meaning of this section. It was contended on both sides that the language is plain and unambiguous, though contradictory interpretations were put upon it. There was also a good deal of argument as to the extent to which reference could properly be made to matters of history for the purpose of interpreting the language. In our opinion there is no ambiguity in the language, if it is regarded simply as a prohibition of an appeal to the Sovereign in Council in the prescribed cases. The particular task now imposed upon us is not so much to interpret verbal expressions, as to discover the object of the legislature in making the enactment. No one disputes that in ordinary cases this Court is bound by the decisions of the Privy Council, for the very obvious reason that, if it declined to follow them, the decision of this Court would be reversed on appeal, so that such a refusal would be both futile and mischievous. Apart from this reason, it is a recognized working rule, necessary for establishing consistency and uniformity in the law, that Courts whose decisions are subject to appeal shall follow the decisions of Courts of final appeal. And, if there were no more in the case, the rule might very well be applied to the present controversy. But there is a great deal more. For the first time in the history of the British Empire a Court has been established as to which it has been declared that no appeal shall be permitted from its decisions on certain questions unless the Court itself certifies that the question is one which "ought to be deter-

mined " by the Sovereign in Council. These words cast upon the Court the duty of determining whether the question is such an one or not, and, if it thinks that it is not, it is its solemn duty to say so. If the case falls within sec. 74, the Privy Council has no authority to review its opinion on that point, and the fact that the Privy Council may be called upon to deal with the same question in another case is quite irrelevant to the opinion of this Court as to whether it ought to be determined by that tribunal or not.

The question, then, is not one of construction in the narrow sense, for in that view no difficulty arises. The question is whether the conventional duty of one Court, not in all respects the highest, to follow another Court of higher authority is excluded by the implication arising from the purpose for which this Court was established, and the place which it holds under the Constitution. In this respect the question as to the duty of the Court is very analogous to the question as to the duty of the Governor-General to assent to or reserve a bill duly passed by both Houses of the legislature. There is no doubt as to the meaning of the words used, but the circumstances under which the power was intended to be exercised must be discovered from some other source. That source is to be found in a consideration of the whole purview of the Constitution, and the answer to the question cannot be given without having regard to its history.

Under the Constitution of the United States of America the power of veto possessed by the President and State Governors is absolute and uncontrolled, and was intended to be exercised at their absolute discretion, although its effect may in some cases be overcome in the manner prescribed by the respective Constitutions. In the Canadian Dominion the power of the Governor-General to disallow Provincial Acts is equally absolute, and was intended to be, and has been, used at his absolute discretion, acting of course with the advice of the Dominion Ministers. But no one familiar with the history of the self-governing Colonies of Australia supposes that the power of the Governor-General to reserve a Bill, or of the Sovereign to disallow a Bill, was intended to be exercised on the same principles.

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What then was the purpose for which the Court was established, and what place does it hold in the Constitution?

This is quite a different question from a verbal criticism of the 74th section. The answer to it must be found in a consideration of the whole instrument construed in accordance with recognized rules of construction applicable to written instruments. Those rules are especially applicable when the inquiry is directed to ascertaining the object of the legislature.

In *Heydon's Case* (1), decided in the 29th year of Queen Elizabeth, it was laid down:—"That for the sure and true interpretation of all Statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered. (1). What was the common law before the making of the Act: (2). What was the mischief and defect for which the common law did not provide: (3). What remedy the Parliament hath resolved and appointed to cure the disease of the Commonwealth: (4). The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*." This rule, which is of course not limited to alterations of the common law, nor to mere questions of verbal criticism, has never been departed from. (See of late years the opinions of the Earl of *Halsbury* L.C. in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents, Designs, and Trade Marks* (2), and of Lord *Atkinson* in *Badische Anilin Und Soda Fabrik* v. *Hickson* (3).

How then ought this rule to be applied in construing the Constitution? That instrument partakes both of the character of an Act of Parliament and of an international agreement made between the people of the several self-governing Australian Colonies, and also between the people of those Colonies collectively and the United Kingdom, for the Preamble recites that "The people of New South Wales, Victoria, South Australia, Queensland,

(1) 3 Rep., 7a, at p. 7b.
(2) (1898) A.C., 571, at p. 573.
(3) (1906) A.C., 419, at p. 426.

and Tasmania, humbly relying on the blessing of the 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."

Before referring in detail to the historical facts which supply the answers to the inquiry as to the "mischief and defect for which the law did not provide," we think it right to emphasise what we conceive to be a fundamental principle applicable to the construction of instruments which purport to call into existence a new State with independent powers of legislation and government, and which are important with regard to both the main questions now before us for decision. Such instruments are not, and never have been, drawn on the same lines as, for instance, the Merchant Shipping Acts, which prescribe in every detail the powers and authorities to be exercised by every person dealt with by the Statutes. In this connection I will read a passage from the judgment of *Story* J., delivering the opinion of the Supreme Court of the United States in the case of *Martin* v. *Hunter's Lessee* (1). "The Constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutory, might, in the end, prove the overthrow of the system itself. Hence its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require."

Again, in a Constitution establishing a State, whatever its

(1) 1 Wheat., 304, at p. 326.

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degree of dependence or independence, certain things are taken for granted, just as, to compare small things with great, the mere creation of a corporation implies many incidents which it is not necessary to set forth. The framers of a Constitution at the end of the nineteenth century may be supposed to have known that there have been in this world many forms of Government, that the various incidents and attributes of those several forms had been the subject of intelligent discussion for more than 2,000 years, and that some doctrines were generally accepted as applicable to them respectively. It is true that what has been called an "astral intelligence," unprejudiced by any historical knowledge, and interpreting a Constitution merely by the aid of a dictionary, might arrive at a very different conclusion as to its meaning from that which a person familiar with history would reach. An excellent illustration of this is afforded by the case referred to the Privy Council in 1885 on a joint address of the Legislative Council and Legislative Assembly of the Colony of Queensland. Under the Constitution of that Colony the Legislative Council is nominated by the Crown. So far as regards the express language of the instrument both Houses of the legislature have equal powers of legislation, except that money bills must originate in the Legislative Assembly. The Legislative Council amended an Appropriation Bill by omitting an item which the Legislative Assembly had included. The Legislative Assembly returned the Bill to the Legislative Council with a message dated 12th November disagreeing to the amendment for reasons set forth at length, and asserting their claims as follows:—

"The Legislative Assembly maintain, and have always maintained, that (in the words of the Resolution of the House of Commons of 3rd July 1678), all aids and supplies to Her Majesty in Parliament are the sole gift of this House, and it is their undoubted and sole right to direct, limit and appoint, in Bills of aid and supply, the ends, purposes, considerations, conditions, limitations, and qualifications of such grants, which ought not to be changed or altered by the Legislative Council."

The Legislative Council insisted on their amendment, stating in their message that they neither arrogated to themselves the position of being a reflex of the House of Lords nor recognized

the Legislative Assembly as holding the same relative position as the House of Commons; and further alleging that it did not appear that occasion had arisen to require that the House of Lords should exercise its power of amending Supply Bills, adding that "the right is admitted though it may not have been exercised."

Finally the Legislative Council did not insist on their amendment, but a joint address was presented to Her Majesty embodying a case setting out the facts, and praying that the following questions might be submitted for the opinion of the Privy Council:—

1. Whether the Constitution Act of 1867 confers on the Legislative Council powers co-ordinate with those of the Legislative Assembly in the amendment of all Bills including Money Bills?

2. Whether the claims of the Legislative Assembly, as set forth in their message of 12th November, are well founded?

The case was considered by a Board consisting of the Lord President (Earl Spencer), the Lord Chancellor (Lord Herschell), the Duke of Richmond, Lord Aberdeen, Lord Hobhouse, Lord Blackburn, and Sir Richard Couch, who on 27th March 1886, reported to Her Majesty that the first of the questions should be answered in the negative and the second in the affirmative.

No formal reasons were given for the report, but the ground on which it proceeded is sufficiently apparent. The arguments of the Legislative Assembly were accepted, and it was held that, the legislature of Queensland having been constituted on a basis analogous to that of the United Kingdom, the express limitation of the power to originate supply to the elective House carried with it by implication a limitation of the power of the Legislative Council analogous to that which is recognized as imposed on the House of Lords. If the Queensland Constitution had been technically construed without regard to its subject matter the result must have been different.

What, then, are the relevant historical facts? For many years before 1900 the question of the federation of the Australian Colonies had been the subject of anxious discussion. Under the existing law, *i.e.*, the several Colonial Constitutions by which the

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six several States which now form the Commonwealth had independent powers of legislation in all matters whatsoever subject to the Royal power of disallowance, the six Colonies were isolated units; there were no practicable means by which the united voice of the people of the whole of Australia could be ascertained, or, if ascertained, could be made effective; no efficient measures could be taken for defence; and material inconvenience was caused by the conflict of tariffs, which frustrated the desire for free intercourse among people of one stock, who had come to regard themselves as the inheritors in common of a great continent. There were, no doubt, many persons to whom these matters did not afford evidence of any mischief or defect in the existing law, but the circumstance that a new law does not commend itself to all the persons subject to its operation, or even to its interpreters, does not affect the application of the rule which we have quoted. The existence of this mischief and defect must be taken to have been a fact proved to the satisfaction of the legislature who took such action as they thought best fitted to provide a remedy. The object of the advocates of Australian federation, then, was not the establishment of a sort of municipal union, governed by a joint committee, like the union of parishes for the administration of the Poor Laws, say in the Isle of Wight, but the foundation of an Australian Commonwealth embracing the whole continent with Tasmania, having a national character, and exercising the most ample powers of self-government consistent with allegiance to the British Crown. In 1891 a Convention had been held in Sydney, the members of which had been nominated by the several Colonial Parliaments. The draft Constitution prepared by that Convention had been submitted for the formal consideration of those Parliaments. The principle of national union was generally accepted, although there was much difference of opinion as to details. In 1897 and 1898 another Convention, representing five of the six Colonies, and consisting, in the case of four of the Colonies, of members elected by the people under laws specially passed, and, in the case of the fifth, of members appointed by the Parliament of that Colony, met, and by them a Constitution was framed, which with one alteration is now embodied in the *Constitution Act* passed by the Parliament

of the United Kingdom in 1900, and the construction of which is now in discussion.

So much for local history. But in regarding the birth of a new State we are not obliged to limit our view to the cradle. In fashioning the Constitution of a Federated Commonwealth the framers might assuredly be expected to consider the constitution and history of other federations, old and new. According to the recognized canons of construction they must be taken to have been familiar with them, and the application of this doctrine is not excluded or weakened by its notorious historical truth as to the members of the Convention. Now, at the end of the nineteenth century there were in actual operation three great federal systems of Government—the two great English-speaking federations of the United States of America and Canada, and the Swiss Confederation. We may assume that the relative advantages and disadvantages of these several systems were weighed by the framers of the Constitution. If it is suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if revelant, is negatived by the preamble to the Act itself, which has been already quoted. That is to say, the Imperial legislature expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned, who, as pointed out in the judgment of the Board in *Webb* v. *Outtrim* (1), had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to have been present to the minds of the parties to the agreement be left out of consideration ?

We may take it, then, that, amongst other things, the Canadian Constitution, which had been in operation for some thirty years, was considered. The scheme of that Constitution was to make a complete distribution of the powers of government, so that the Dominion was endowed with all powers which were not expressly conferred upon the Provinces, and so that all powers were assigned to one authority to the exclusion of the other. Under that scheme no question of conflict of powers within the same ambit could arise. But many other questions had arisen under

(1) (1907) A.C., 81.

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that Constitution as to the respective powers of the Dominion and the Provinces—all questions of construction—and had been determined by the Judicial Committee in a series of decisions which had been the subject of much criticism. One eminent English constitutional authority (Bryce) had remarked that if the American Constitution (which is also a written instrument), had been dealt with by the Supreme Court of the United States in the same manner in which the Dominion Constitution was treated by the Judicial Committee the United States would never have grown to their present greatness.

There were, then, two conspicuous points relative to the Dominion Constitution: (1) That it gave the residue of power to the Central Government; and (2) that its interpretation by the Judicial Committee had not given universal satisfaction. As it happens, it is not necessary for present purposes to refer to the Constitution of the Swiss Confederation. We turn to the other great constitutional document, the Constitution of the United States of America. That instrument is based upon a principle fundamentally different from the principle adopted in the case of Canada. Its scheme is to grant or delegate to Congress certain specific powers of government, all other powers being retained by the States, which were sovereign independent States. The authority by which the Constitution was enacted was the people. The 10th amendment of the Constitution, adopted almost immediately after the establishment of the United States, was in these words:—

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Article III. of the Constitution had provided (sec. 1) that the judicial power of the United States should be vested in one Supreme Court and in such inferior Courts as the Congress might from time to time ordain and establish, and (sec. 2) that the judicial power should extend to all cases arising under the Constitution, the laws of the United States, and treaties made under their authority, and to certain other matters.

It had been found by the experience of a century that, under the American scheme, where two distinct Governments exercised

authority over the same locality and the same persons, so that every citizen owed allegiance to, and was bound to obey the laws of, two distinct Governments, conflicts had continually arisen as to what were commonly called the constitutional powers of the General Government and the State Governments. This was a matter of historical fact. It might perhaps have been predicted by anyone with ordinary foresight. But that such conflicts had arisen, and were continually arising, was notorious. The cause of the conflict was, it is quite obvious, the nature of the Constitution. The arising of such conflicts is as much an incident of such a Constitution as the operation of the law of gravitation is an incident of ballooning, or as the possibility of differences arising in the application of a treaty between two States is an incident of the treaty. In the latter case it has not been unusual to make provision for a special tribunal of arbitration to decide such differences. So, in the case of such conflicts between a federal Government and the States some arbiter was necessary. It was well known that in the United States one of the most important functions of the Supreme Court had been to act as such arbiter, and that a large body of law had grown up, founded upon the decisions of most eminent jurists, familiar both with the written Constitution and with its practical operation. It was common knowledge, not only that the decisions of the Judicial Committee in the Canadian cases had not given widespread satisfaction, but also that the Constitution of the United States was a subject entirely unfamiliar to English lawyers, while to Australian publicists it was almost as familiar as the British Constitution. It was known that, even if there should be any members of the Judicial Committee familiar with the subject, it was quite uncertain whether they would form members of a Board that might be called upon to determine a question on appeal from an Australian Court, by which it must necessarily be dealt with in the first instance. It could not be predicted of the Board, which would sit to entertain an appeal, that it would be constituted with any regard to the special familiarity of its members with the subject. And no disrespect is implied in saying that the eminent lawyers who constituted the Judicial Committee were not regarded either as being

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familiar with the history or conditions of the remoter portions of the Empire, or as having any sympathetic understanding of the aspirations of the younger communities which had long enjoyed the privilege of self-government. On the other hand, the founders of the Australian Constitution were familiar with the part which the Supreme Court of the United States, constituted of Judges imbued with the spirit of American nationality, and knowing that the nation must work out its own destiny under the Constitution as framed, or as amended from time to time, had played in the development of the nation, and the harmonious working of its political institutions.

These then being the facts calling for legislation, or, to use the old formula, " the mischiefs and defects " for which the existing law did not provide, all of which were notorious, and these being the known incidents of different forms of government, what did the " people " agree to ?

(1) They rejected the Canadian scheme :

(2) They agreed to adopt, so far as regards the distribution of functions and powers, the scheme of the American Constitution, and in particular :—

(*a*) To confer upon the Commonwealth Parliament plenary power to make laws for the peace, order, and good government of the Commonwealth with respect to the matters enumerated in sec. 51 of the Constitution, thus adopting the analogy of sec. 8 of Article I. of the United States Constitution, which in like manner confers on Congress plenary power as to specified subjects ;

(*b*) To allow the States to retain their original authority except so far as it was taken from them. This was expressed in sec. 107 of the Constitution, which is as follows :

" 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."

For the purposes of comparison we again quote at length the 10th Amendment of the United States Constitution :

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In the case of *D'Emden* v. *Pedder* (1), this Court referred to these respective provisions as "indistinguishable in substance, though varied in form," and in *Deakin* v. *Webb* (2) as "language not verbally identical, but synonymous." To any one familiar with the subject the aptness of both expressions will be apparent.

Finally—

(*c*) The "people" agreed (sec. 71) that the judicial power of the Commonwealth should be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other Federal Courts as the Parliament might create, and in such other Courts as it might invest with federal jurisdiction; following in almost identical terms the language of Article III. of the United States Constitution.

They further agreed (sec. 73) that the High Court should have a general appellate jurisdiction from Federal Courts and Courts exercising federal jurisdiction and also, in this respect going further than the American precedent, from the Supreme Courts of the States, and that (sec. 76) the Parliament might confer on it original jurisdiction in any matter arising under the Constitution or involving its interpretation.

Sec. 75 provided that in five enumerated classes of matters the High Court should have original jurisdiction. Sec. 76 provided that in four other enumerated classes of cases the Parliament might make laws conferring original jurisdiction on the Court. Two of these were "matters arising under the Constitution or involving its interpretation," and "matters arising under any laws made by the Parliament." The nine classes of matters enumerated in these two sections were, therefore, the matters to which the judicial power of the Commonwealth referred to in sec. 77 as "federal jurisdiction," was to extend: *Ah Yick* v. *Lehmert* (3). That section provided that with respect to any of these enumerated classes the Parliament might make laws—

(i.) defining the jurisdiction of any federal court other than the High Court:

(1) 1 C.L.R., 91, at p. 113. (2) 1 C.L.R., 585, at p. 606. (3) 2 C.L.R., 593.

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(II.) defining the extent to which the jurisdiction of any federal court should be exclusive of that which belonged to or was vested in the courts of the States:

(III.) investing any court of a State with federal jurisdiction, that is, with jurisdiction to exercise the judicial power of the Commonwealth.

The 74th section was as follows:—

"74. No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this Constitution or of the Constitution of a State, unless the public interests of some part of Her Majesty's Dominions, other than the Commonwealth or a State, are involved."

It is clear that by exercise of the power conferred by sec. 77 the Parliament of the Commonwealth could have withdrawn the cognizance of matters arising under the Constitution or involving its interpretation altogether from the Courts of the States, and so have drawn them within the sole cognizance of federal courts, with a consequential appeal to the High Court and prohibition of appeal to the Queen in Council except in the specified cases. Or it could first withdraw the power, and afterwards invest the State Courts with federal jurisdiction, in which case an appeal would lie from the State Court to the High Court by virtue of the powers conferred by sec. 73, with like consequences.

What then was the purpose for which the High Court was proposed to be set up as a Court to which an appeal lay from all Courts exercising federal jurisdiction, with power to the Parliament to exclude the State Courts, including the State Supreme Courts, from taking cognizance of such matters altogether, and with a provision that no appeal should lie from the High Court to the Sovereign in Council so long as Australian interests only were involved?

It was open to argument whether the language of sec. 74 would have precluded an appeal from a State Court to the Sovereign in Council in such a matter, but it appears to us quite clear that the purpose apparent on the face of the document was that the Australian people should have their domestic disputes settled finally by a domestic tribunal, and that in this respect a larger measure of independent self-government should be conferred upon them

than had ever been previously conferred in the case of any British Dependency.

Some modifications not material to the present inquiry were afterwards made in the draft Constitution at a conference of Prime Ministers of the Colonies. The changes made as the result of their deliberations are set out, together with the original draft, in the Schedule to the Act No. 1603 of Victoria, passed in 1899, by which it was enacted that the draft as so amended should be submitted to the vote of the electors for the Legislative Assembly, and that if adopted by them it should be submitted to Her Majesty for enactment into law by the Parliament of the United Kingdom, which under the Constitution of the British Empire was probably the only authority formally competent to establish such a law. Similar Acts were passed in the other Colonies except Western Australia, and the draft Constitution, having been adopted in all of them at a poll of the electors, was duly submitted to Her Majesty.

The 74th section was not passed in the form originally proposed, but was altered to read as first quoted. We do not refer, though we are inclined to think that reference might be made, to the intermediate negotiations on the result of which the fate of the Constitution hung in the balance. The section now prohibits any appeal to the Sovereign 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 unless the High Court shall certify that the question is one which ought to be determined by the Sovereign in Council. If such a certificate is granted an appeal lies "on the question" without further leave. The language of this provision is, so far as we know, unique in legislation. A provision that no appeal shall lie from one Court to another without leave is not unusual. Sometimes the leave must be given by the Court sought to be appealed from; sometimes it may be given by that Court or the Appellate Court. But the object of the provision in such cases is to put an end to litigation. And it is properly held that a decision of the Court of Appeal on the same point of law arising in another case is binding upon the inferior Court. But this is an unwritten conventional rule, and

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its application is excluded if it appears that the object of refusing leave was to impose the duty of finally deciding the question as a matter of law upon the Court sought to be appealed from. In all these cases the phrase used is "leave to appeal" or "appeal by leave," and the appeal if allowed is from the judgment. The language of sec. 74 is different. The subject matter of appeal is described as "a decision upon a question, howsoever arising, as to the limits *inter se*," &c., words which aptly describe a decision on a point of law. The word "decision" is not a term of art, and its use in this sense is quite common. See, for instance, *London Street Tramways Co.* v. *London County Council* (1), where The Earl of *Halsbury* L.C. pointed out that "a decision of the House once given upon a point of law is conclusive upon the House afterwards, and it is impossible to raise that question again as if it was *res integra* and could be reargued, and so the House be asked to reverse its own decision." This language was used and reported just two years before sec. 74 was settled in its present form.

Moreover the certificate to be given, if thought fit by this Court, is not that the case is one which ought to be decided by the Privy Council, but that the "question" is one which ought to be determined. It was suggested that the section should be read as if the word "judgment" were substituted for "decision." "Judgment" is an apt word for describing the final determination of a *lis inter partes*, but the phrase "a judgment upon a question as to" &c. would be unintelligible unless it means a decision on a point of law (or possibly of fact) as distinguished from the *lis* itself. It may be that a merely declaratory judgment would be aptly described by the word, but the use of the words "howsoever arising" excludes this limitation of the meaning. Moreover, the section does not prevent an appeal to the Sovereign in Council upon another point even in a *lis* in which such a question arises and has been determined by the High Court and a certificate has been refused. Yet, if any effect is to be given to it, the appeal being prohibited as to that question, the Judicial Committee would be bound in that appeal to accept and follow the decision of the High Court, just as much as if it had been a

(1) (1898) A.C., 375, at p. 379.

decision of a jury on a question of fact upon sufficient evidence. An illustration of such a *lis* that might be appealed from is an action by A. against B. for some wrong, in which the defendant sets up two defences: (1) a denial of the facts alleged, and (2) a State law the validity of which is impeached on the ground that it transgresses the limits of the constitutional powers of the State as between itself and the Commonwealth. Suppose that in such an action this Court gave judgment for the plaintiff on both grounds. The Judicial Committee could grant special leave to appeal against the judgment, but its competency would be limited to dealing with the questions raised by the facts, whatever their opinion might be on the question of law.

It appears to us that these considerations show that the High Court was intended to be set up as an Australian tribunal to decide questions of purely Australian domestic concern without appeal or review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as overruling its own decision on a question which it thinks ought not to be determined by the Privy Council would be to substitute the opinion of that body for its own, which would be an unworthy abandonment of the great trust reposed in it by the Constitution. It is said that such a state of things as would follow from a difference of opinion between the Judicial Committee and the High Court would be intolerable. It would not, perhaps, have been extravagant to expect that the Judicial Committee would recognize the intention of the Imperial legislature to make the opinion of the High Court final in such matters. But that is their concern, not ours. We may point out, however, that the suggested inconvenience of divergence of decisions is always liable to happen if the Judicial Committee do not adopt this view. Suppose that, concurrently with the action which we just now supposed, C. brings an action against D. in the Supreme Court of a State, in which the facts and defences are the same as in the case of *A.* v. *B.*, and that the Supreme Court, following the decision of the High Court, gives judgment for the plaintiff, whereupon the defendant appeals to

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the Privy Council. Upon the view contended for by the respondents, the Judicial Committee, if it disagreed with the High Court, would in one case be bound to give judgment for the plaintiff, and in the other for the defendant, and this might occur in the same week or on the same day. We are disposed to think that a decision of the Privy Council on a question of limits of constitutional powers cannot be put any higher than a decision on foreign law as a question of fact, which is not binding on any other Court.

The questions referred to in sec. 74, while in one sense matters of purely domestic concern, are matters of supreme importance to the working of the Australian Constitution. They are questions likely to arise from day to day, and demanding immediate and authoritative decision. In our opinion, the intention of the British legislature was to substitute for a distant Court, of uncertain composition, imperfectly acquainted with Australian conditions, unlikely to be assisted by counsel familiar with those conditions, and whose decisions would be rendered many months, perhaps years, after its judgment has been invoked, an Australian Court, immediately available, constant in its composition, well versed in Australian history and conditions, Australian in its sympathies, and whose judgments, rendered as the occasion arose, would form a working code for the guidance of the Commonwealth.

For these reasons we are of opinion that this Court is in no way bound by the decision of the Judicial Committee in *Webb* v. *Outtrim* (1), but is bound to determine the present appeal upon its merits according to its own judgment. In other words, we think that this Court is in effect directed by the Constitution to disregard the unwritten conventional rule as to following decisions of the Judicial Committee in cases falling within sec. 74.

But the question must be one within that section. It was boldly contended by Mr. Irvine, who argued for the respondent in *Flint* v. *Webb*, that the question whether a State can in the exercise of its legislative authority interfere with the free exercise of the legislative or executive power of the Commonwealth is not a question of the limits *inter se* of the constitu-

(1) (1907) A.C., 81.

tional powers of the Commonwealth and those of the States. It is clearly a question as to the limits of the constitutional powers of the State with regard to the operations of the Commonwealth. Conversely, the question whether the exercise of the constitutional powers of the Commonwealth is limited to such an extent that the operations of the States may not be so interfered with is a question as to the limits of the powers of the Commonwealth as between itself and the States. The question whether a State law is repugnant to a Commonwealth law dealing with the same subject matter is quite different. That case is expressly dealt with by sec. 109. The cases dealt with by sec. 74 are cases in which the question is whether an attempted exercise of the powers of either a State or the Commonwealth in such a manner as to interfere with the free exercise of the powers of the other of the two authorities is or is not within the limits prescribed by the Constitution. The answer to that question involves in every case the construction of the Constitution. It was said that the imposition by a State of a tax upon the emoluments of a federal officer does not interfere with the rule laid down in *D'Emden* v. *Pedder* (1), and that consequently it is not a question of limits. Of course, if the action impeached does not transgress the limits, there is an end of the matter. But whether it does or not is the very matter in controversy. Such a construction would make the provisions of sec. 74 wholly nugatory. The argument, put in plain English is:—If upon a proper construction of the Constitution the limits of the powers of the State have not been transgressed, the question whether they have been transgressed or not does not arise. Mr. Irvine, of course, repudiated such a statement of his argument, but he failed to convey to our minds any other meaning. He did, indeed, suggest that there cannot be any question as to the limits *inter se* &c. unless there is a conflict of legislative enactments dealing with the same subject matters. Such conflicts, as already shown, are dealt with by sec. 109, while sec. 74 contemplates the existence of another class of questions, such as the experience of the United States of America had shown to be likely to arise in the practical working of the Constitution. The question in the present case is: to what

(1) 1 C.L.R., 91.

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extent, if any, can a State prescribe the conditions of the residence of federal officers within the State territory? Manifestly that question relates to the limits of the powers of the State with regard to the Commonwealth. It is, therefore, a question as to the limits *inter se* &c., within sec. 74. The answer may be that a State has the same powers with respect to federal servants as with respect to other inhabitants of the State, or that it has not. But, as already said, whatever the answer may be, the question exists and must be answered.

We pass to the second of the questions which we have described as of supreme importance, namely, whether the doctrine of *D'Emden* v. *Pedder* (1) is included by necessary implication in the Australian Constitution. *Primâ facie*, this appeal is concluded by the previous decision of this Court in *Deakin* v. *Webb* (2), rendered after full argument and consideration. There must be some finality in the decisions of this Court, especially on constitutional questions, unless the decision in any particular case is to depend upon the accidental constitution of the Bench in that case. There may be cases in which the Court ought to review a previous decision, but a mere change in the constitution of the Bench ought not to be regarded as a sufficient reason for doing so. The danger of such a doctrine has been the subject of much comment in the United States. In the present case the only reason which we can admit for reviewing the previous decision of this Court is the fact that the Judicial Committee in the case of *Webb* v. *Outtrim* (3) disagreed with it. We will assume, but do not admit, that a decision of the Board on a point of law, which is directly in conflict with a decision of this Court on the same point, may be a sufficient reason for inviting this Court to review its decision on that point. Further we cannot go. We proceed to examine the opinion of the Board in *Webb* v. *Outtrim* (3) for the purpose of discovering what new light, if any, it throws upon the questions involved in other decisions of this Court.

In *Deakin* v. *Webb* (2), this Court stated at length the reasons for its conclusion. The judgment was based upon two distinct lines of reasoning; first, that of the judgment of Chief Justice

(1) 1 C.L.R., 91. (2) 1 C.L.R., 585. (3) (1907) A.C., 81.

*Marshall* in *M'Culloch* v. *Maryland* (1), which, as applied to the Australian Constitution, may be shortly summarised as follows: The purpose of the Constitution was the creation of a new State, the Commonwealth, intended to take its place amongst the free nations, with all such attributes of sovereignty as were consistent with its being still "under the Crown." It is essential to the attribute of sovereignty of any Government that it shall not be interfered with by any external power. The only interference, therefore, to be permitted is that prescribed by the Constitution itself. A similar consequence follows with respect to the constituent States. In their case, however, the Commonwealth is empowered to interfere in certain prescribed cases. But under the scheme of the Constitution there is a large number of subjects upon which the legislative powers of both the Commonwealth and the State may be exercised. In such a state of things it is not only probable, but, as shown by the experience of the United States under a similar distribution of powers, certain, that questions will constantly arise as to the operation of laws which, although unobjectionable in form, and *primâ facie* within the competence of the legislature which enacted them, would, if literal effect were given to them, interfere with the exercise of the sovereign powers of the other of the two sovereign authorities concerned. Applying then the doctrine *quando lex aliquid concedit concedere videtur et illud sine quo res ipsa valere non potest*, which is a maxim applied to the construction of all grants of power, from the highest to the lowest, it follows that a grant of sovereign powers includes a grant of a right to disregard and treat as inoperative any attempt by any other authority to control their exercise. A remarkable illustration of the application of this maxim is afforded by the very recent case of *Attorney-General* v. *Cain & Gilhula* (2), where it was held that the doctrine might be applied so as to warrant the exercise of State powers even beyond territorial limits. In *The Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (3), this Court applied the same doctrine to a Commonwealth law, the

(1) 4 Wheat., 316.

(2) (1906) A.C., 542.

(3) 4 C.L.R., 488.

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validity of which was successfully impeached by the very States that are now, in effect, asking us to overrule the decision in that case.

The second line of reasoning in *D'Emden* v. *Pedder* (1) and *Deakin* v. *Webb* (2) was that as the scheme of the Australian Constitution was in this respect practically identical with that of the Constitution of the United States of America, which had been interpreted by the Supreme Court of that Republic in a long series of cases familiar to the Australian publicists by whom the Australian Constitution was framed, it ought to be inferred that the intention of the framers was that like provisions should receive like interpretation. This is a well recognized rule of construction, and its application is not limited to Statutes of the same legislature. On this point I will read a passage from the judgment of the Supreme Court of the United States delivered by *Story* J. in the case of *Pennock* v. *Dialogue* (3):—"It is obvious to the careful inquirer, that many of the provisions of our *Patent Act* are derived from the principles and practice, which have prevailed in the construction of that of England. It is doubtless true, as has been suggesed at the bar, that where English Statutes, such, for instance, as the *Statute of Frauds* and the *Statute of Limitations*, have been adopted into our own legislation, the known and settled construction of those Statutes by Courts of law has been considered as silently incorporated into the Acts, or has been received with all the weight of authority."

We are now asked to review the previous decisions of this Court, and to follow that of the Judicial Committee in *Webb* v. *Outtrim* (4). It was strenuously contended that we are bound to do so. We have already dealt with that point at length. We will, however, assume that the matter may now be regarded as unfettered by the previous decisions of this Court and examined *de novo*, giving to the opinion of the Judicial Committee all the weight which it deserves.

It does not appear from the report that the Board addressed their minds to the first line of reasoning adopted by this Court, although they recognize the great authority of Chief Justice

(1) 1 C.L.R., 91.
(2) 1 C.L.R., 585.
(3) 2 Peters, 1, at p. 18.
(4) (1907) A.C., 81.

*Marshall*, and it may perhaps be inferred that if they had thought that the two Constitutions were substantially identical as to the part of their respective structures now concerned they would have been disposed to give some effect to his opinion. This point, which lies at the root of the whole matter, does not seem to have been argued by counsel for the respondent, although the judgments of this Court were referred to by the appellant's counsel. Nor was any attempt made either in Sydney or Melbourne to dispute the cogency of the argument as applied to the United States Constitution.

So far as we are able to follow the opinion of the Board, they thought that there was no actual analogy between the two Constitutions so far as regards the express provisions relevant to the question, although they confess their lack of familiarity with the subject, and say that it is difficult to understand the application of the principles involved unless the comparison is made clear by the juxtaposition of the provisions. This remark is made between two quotations from the judgments of this Court in *D'Emden* v. *Pedder* (1), and *Deakin* v. *Webb* (2). If the learned Lord who delivered the opinion of the Board had read the whole of the paragraph from the judgment in *Deakin* v. *Webb* of which he quoted a portion, he would have found on the preceding page the relevant provisions set out in full in immediate juxtaposition (3). But, even if they had not been set out, we may be permitted to express regret that in a case of such vast importance to the Commonwealth their Lordships did not seek enlightenment from counsel or from the documents the subject of comparison.

Apparently the main ground for their opinion is expressed in the following passage (4) :—"But here the analogy fails in the very matter which is under debate. No State of the Australian Commonwealth has the power of independent legislation possessed by the States of the American Union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the

(1) 1 C.L.R., 91, at p. 113.
(2) 1 C.L.R., 585, at p. 606.
(3) 1 C.L.R., 585, at p. 605.
(4) (1907) A.C., 81, at p. 88.

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provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see *Colonial Laws Validity Act*, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached. The American Union, on the other hand, has erected a tribunal which possesses jurisdiction to annul a Statute upon the ground that it is unconstitutional. But in the British Constitution, though sometimes the phrase 'unconstitutional' is used to describe a Statute which, though within the legal power of the legislature to enact, is contrary to the tone and spirit of our institutions, and to condemn the statesmanship which has advised the enactment of such a law, still, notwithstanding such condemnation, the Statute in question is the law and must be obeyed. It is obvious that there is no such analogy between the two systems of jurisprudence as the learned Chief Justice suggests. The enactments to which attention has been directed do not seem to leave any room for implied prohibition. *Expressum facit cessare tacitum.*"

No argument was addressed to us either in Sydney or Melbourne founded upon this passage, except so far as it may be taken to refer to the controlling authority involved in the power of the Sovereign to disallow any Act either of the Commonwealth or of any one of the States. It was contended that this fact effectively distinguishes the American from the Australian Constitution, and renders both the reasoning and the decision in *M'Culloch* v. *Maryland* (1) irrelevant. Before dealing with this contention, which was fully considered in the case of *Deakin* v. *Webb* (2), we will, out of respect to the learned Board, make some observations upon the rest of the passage. The statement that no State of the Australian Commonwealth has the same power of independent legislation possessed by the States of the American Union is of course literally correct, but only in the sense that its legislation is subject in some cases to be overridden by Federal legislation, and in all cases is, in the letter, liable to be disallowed by the Sovereign. The rule that, with the exception of the case of repugnancy to the provisions of an Act of Parliament extending to the Colony, no authority exists by which the validity of a State Act can be questioned or impeached was accepted as the basis of

(1) 4 Wheat., 316. (2) 1 C.L.R., 585.

the decision of this Court in the cases already mentioned, in which the sole question to which it addressed itself was whether the State Acts in question were or were not repugnant to the true meaning of the *Constitution Act* which is undoubtedly an Imperial Act of Parliament extending to the States.

The observation that the American Union has erected a tribunal which possesses jurisdiction to annul a Statute on the ground that it is unconstitutional seems to be founded on the supposition that the Supreme Court of the United States was endowed with special powers in this respect different from those possessed by other Courts. We have already pointed out that that tribunal was created by a provision in the American Constitution identical with that by which the High Court is created. The power of the Supreme Court of the United States to decide whether an Act of Congress or of a State is in conformity with the Constitution depends upon and follows from the Constitution itself, which is, by sec. 2 of Article VI., declared to be the supreme law of the land, as the Australian Constitution is declared to be by sec. 5 of the *Constitution Act*. Such questions must certainly arise under a federal Constitution, and must be determined by the Courts before which they are raised. Their Lordships seem to have thought that this Court had asserted a power to declare a law invalid on the ground that it is "unconstitutional," using that word in some vague general sense, but meaning something different from a contravention of the written Constitution. This Court, of course, never asserted any such power, nor did it ever occur to it to treat the word "unconstitutional," as used in the American Courts, as meaning anything more than contrary to and forbidden by the Constitution, nor have those Courts ever claimed to do anything more than construe the written Constitution by the light of recognized canons. English jurisprudence has always recognized that the Acts of a legislature of limited jurisdiction (whether the limits be as to territory or subject matter) may be examined by any tribunal before whom the point is properly raised. The term "unconstitutional," used in this connection, means no more than *ultrâ vires*.

The analogy between the two systems of jurisprudence is therefore perfect. Indeed, it may be said that in this respect

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they are identical, unless, indeed, the attribute of sovereignty, using that term in any relevant sense, is denied to the Commonwealth. The King is the common head of the United Kingdom and of all the self-governing dominions, and the legislature of each of these dominions has, subject to its own Constitution, full autonomy. It seems strange that in this year 1907, when the world is resounding with praises of the system of the British Empire, which allows its different members to enjoy this freedom and independence, we should be asked to decide solemnly that the idea is an entire delusion. It is now, we suppose, well recognized that, except so far as regards relations with foreign powers, which are not now in question, the King as the head of each of these several autonomous States is so far a separate juristic person that differences and conflicts may arise between these States just as between other autonomous States which do not owe allegiance to a common Sovereign. It is too late to set up a contrary theory, unless it is intended to make a revolutionary change in the concept of the Empire.

We turn to other incidental arguments used in the passage just cited. With regard to the application of the maxim *expressum facit cessare tacitum*, we would point out in the first place that all the express prohibitions on which reliance is or can be placed, with one exception, find their counterpart in the Constitution of the United States. We have already referred to the correspondence between the provisions of the Tenth Amendment and sec. 108 of the Australian Constitution, on which the second line of reasoning in *D'Emden* v. *Pedder* (1), and *Deakin* v. *Webb* (2) was founded. The only section to which their Lordships expressly refer, which has any bearing on the application of the maxim *expressum facit*, &c., is sec. 114, which provides that:—

"A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State."

A little consideration will show that this section is not framed for the purpose of exhaustively defining the prohibitions upon

(1) 1 C.L.R., 91. (2) 1 C.L.R., 585.

the exercise of State powers, but altogether *alio intuitu*. Sec. 51 (vi.) empowers the Commonwealth Parliament to make laws respecting the naval and military defences of the Commonwealth and of the several States. This subject is, however, not included in sec. 52 as one within the exclusive power of the Commonwealth Parliament. Without more, therefore, the State Parliaments could have continued to legislate on the matter of defence, subject to the provisions of sec. 109. But this was not intended. It was, therefore, enacted by the first member of sec. 114, which corresponds exactly with sec. 10 of Article I. of the United States Constitution, that this power, although not absolutely withdrawn from the States, should not be exercised without the consent of the Commonwealth Parliament.

The second member of the section deals with another subject. The rule of implied prohibition laid down in *M'Culloch* v. *Maryland* (1), was an accepted part of the constitutional law of the United States, but it was held that it did not extend to prohibit the taxation of federal property or State property in all cases. A distinction had been drawn, and is still accepted in the United States, between property held as an instrumentality of Government and property held by the Commonwealth or a State in the carrying on of an ordinary business or as an investment. See the cases cited in *South Carolina* v. *United States* (2); see also *Fort Leavenworth Railroad Co.* v. *Lowe* (3), from the judgment in which case I will read a passage.

"The consent of the States to the purchase of lands within them for the special purposes is, however, essential, under the Constitution, to the transfer to the general government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals. (Page 531).

(1) 4 Wheat., 316. (2) 199 U.S., 437.
(3) 114 U.S., 525, at pp. 531, 539.

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"Where, therefore, lands are acquired in any other way by the United States within the limits of a State than by purchase with her consent, they will hold the lands subject to this qualification: that if upon them forts, arsenals, or other public buildings are erected for the uses of the general government, such buildings, with their appurtenances, as instrumentalities for the execution of its powers, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed. Such is the law with reference to all instrumentalities created by the general government. Their exemption from State control is essential to the independence and sovereign authority of the United States within the sphere of their delegated powers. But, when not used as such instrumentalities, the legislative power of the State over the places acquired will be as full and complete as over any other place within her limits." (Page 539).

Since, then, it was intended that such a distinction should not be drawn in the case of the Commonwealth it was, if not necessary, at least highly expedient to deal with the matter by express enactment.

Secs. 115, 116 and 117 also contain express limitations upon the legislative powers of the States. Those sections deal, though not in identical manner, with the same matters as those dealt with respectively in Article I., sec. 10, sub-sec. 1; in Article VI., sec. 3 with the first Amendment, and in Article IV., sec. 2, and sec. 1 of the 14th Amendment, of the United States Constitution. That Constitution, therefore, as well as the Australian, contains express prohibitions, but it was never held that they precluded the admission of those necessary implications which are admitted in all other cases.

The framers of the Constitution may be taken to have been aware of this fact, and also of the fact that the doctrine of necessary implication had been applied to the Constitutions of the British Dependencies in the case of Crown Colonies: See *In re Adam* (1), and the Queensland Constitutional Case already cited. (Compare *Attorney-General* v. *Cain and Gilhula* (2) to the same effect.) The maxim *expressum facit* &c. has been often in-

(1) 1 Moo. P.C.C., 460. (2) (1906) A.C., 542.

voked in vain in English Courts. See for instance *Colquhoun* v. *Brooks* (1) where *Lopes* L.J. called it "a valuable servant, but a dangerous master."

The Board did not expressly refer to sec. 109 of the Constitution, which provides that—

"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."

But in our judgment the provisions of that section have no application to the present controversy, but were enacted for a different purpose. They apply to matters which upon the face of them are within the common ambit of power of both legislatures, but do not apply either to State legislation or to Commonwealth legislation, where either would, if valid, be inconsistent with the express or implied provisions of the Constitution itself. In other words sec. 109 only applies in cases of concurrent legislative jurisdiction.

It was, indeed, somewhat faintly suggested that a federal law might be passed annulling a State law which has the effect of interfering with the operations of the Commonwealth. But this argument assumes that the Commonwealth may by its legislation limit the operation of the legislative powers of a State upon a matter within the ambit of those powers. Under the Constitution a State either has, or has not, power to interfere with the free exercise of the powers of the Commonwealth. If it has, the federal legislature can have no authority to say that it shall not exercise such a power. This would not be a case of conflicting laws upon a matter within the concurrent jurisdiction of both powers. Moreover, the idea of the Commonwealth Parliament being engaged in the duty of examining State legislation and passing a series of Acts defining and limiting their operation, is not consistent with any practicable theory of the working of a federal Constitution. If, for instance, a State legislature has authority to call federal servants away from the performance of federal duty, we do not see how the federal Parliament could pass a valid law enacting that it shall not have such authority, or that such authority shall not be exercised. The question is one of

(1) 21 Q.B.D., 52, at p. 65.

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power or no power. A declaratory Act of the federal Parliament in the terms of the rule in *D'Emden* v. *Pedder* (1) would be either idle or invalid.

We pass to the argument founded upon the existence of the power of the Sovereign to disallow Federal or State legislation. It is, correctly, pointed out that the doctrine of *M'Culloch* v. *Maryland* (2) is founded upon the necessity of the implied prohibition, and it is said that the necessity does not exist in the case of the Australian Constitution by reason of the power of disallowance. The necessity was said to rest upon the law of self-preservation. We agree. But what is the meaning of self-preservation? We take it to be the necessity to preserve the Constitution as granted, without the need of recourse to some force which its provisions do not themselves afford. In the case of the United States such force could only be exercised by an act of war. In the case of the Australian Constitution it is said that recourse might be had to the Imperial legislature. This is literally and technically true. But the preamble to the *Constitution Act* already quoted shows how little weight is to be allowed to such an argument. Moreover, the Constitution itself, like that of the United States, makes provision for its alteration by the people of the Commonwealth themselves—thus showing the plain intention that the people of the Commonwealth were to work out their own destiny with all the freedom that is consistent with allegiance to the British Crown.

But it is said that recourse may also be had to the power of reservation or the power of disallowance. The first objection that occurs to this argument is that it is obviously inapplicable to the case of a State law, such as that now in question, passed before the establishment of the Commonwealth, and as to which the question is whether, if literally construed, it interferes with the free exercise of the powers of the Commonwealth. The next answer is that the ambit of a power cannot be controlled by the manner of its execution. A difference in the prescribed mode of execution of two powers expressed in identical terms cannot affect the construction of either power, or the ambit of its operation when duly exercised. The powers conferred upon the

(1) 1 C.L.R., 91.

(2) 4 Wheat., 316.

Commonwealth Parliament and the States are expressed in the same terms, and are to be exercised subject to Royal assent through the Governor-General and Governors respectively, and subject in each case to the power of disallowance. But in either case, the assent once given, and the time for disallowance having expired, the Act, if within the ambit of the power, is binding.

The difficulty does not, then, arise from the mode of the exercise of the power, but from the co-existence of two powers each of which is in its terms absolute. In order that the power of reservation or disallowance may be effectual to avoid the difficulty, it must be capable of operation in such a way as either to prevent conflicts from arising or to compose them when they have arisen. The latter function could not in any view be performed after the prescribed limit of time for the exercise of the power has elapsed, which might easily happen before the ground of objection had been discovered. So far as regards the power of reservation it is clear that, as that power would be exercised *ex parte* upon the advice of the federal or State Ministers, it would be ineffective to prevent any attack upon the rights of the other party to a possible conflict. We will assume that the function of prevention could be performed by the exercise of the power of disallowance. But what does that proposition involve? It would be necessary in the first place for the Commonwealth to institute a bureau charged with the function of examining all State Acts to discover whether they could operate so as to interfere with the free exercise of the sovereign powers of the Commonwealth. It would be necessary for the States to institute a similar bureau or bureaux for the like purpose with regard to Commonwealth Acts. The persons entrusted with this duty would need to possess a faculty of prescience hitherto unknown in human affairs, enabling them to anticipate the future operation of laws apparently designed for a purpose quite other than mutual interference. If, however, one of these bureaux reported that a law, if not disallowed, would in its opinion be likely to give rise to future difficulty, a representation would be made to the Sovereign with a view to the disallowance of the Act in question. In most cases the provisions objected to would be

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a small part of the whole enactment. It would then be necessary for the question of the construction and effect of the Act to be examined with a view to a recommendation from the British Minister to the Sovereign. This would involve the creation of an entirely new department of State, the functions of which would be to supervise and control the legislative operations of the Commonwealth and the States; and the effective legislative powers of the Commonwealth and the States would be dependent upon the view which this new department might take of the expediency of sanctioning proposed legislation. It might, or it might not, recommend the disallowance of an Act because one provision of it, quite separable from the rest of the Statute, would involve an interference with the free exercise of federal or State rights, for there is no power of partial disallowance. It is common knowledge that the power of disallowance has never hitherto been used for any such purpose. It is not necessary to say any more to show to any one acquainted with the history of the self-governing dominions of the Empire that this would involve an entirely new departure, and a restriction of their freedom and independence such as has never before been suggested. If this is what the Australian Colonies gained by Federation, they indeed asked for bread and received a stone. Applying then the law of self-preservation, it is necessary to reject this solution of the difficulty, if the liberties enjoyed by Australians for more than half a century, as well as the enlarged powers conferred by the Constitution, are to be preserved. We have already pointed out that the power of disallowance possessed by the Governor-General of the Canadian Dominion is quite different both in its purpose and in its exercise, but even that power cannot be exercised as to part of an Act.

For these reasons we are of opinion that the implication of a prohibition of mutual interference is as necessary in the case of the Australian Constitution as in that of the United States of America, and that the doctrine laid down in *D'Emden* v. *Pedder* (1), "that when a State attempts to give to its legislative or executive authority an operation which, if valid,

(1) 1 C.L.R., 91, at p. 111.

would fetter, control or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative," should be once more affirmed by this Court notwithstanding the opinion of the Judicial Committee in *Webb* v. *Outtrim* (1). The rule which was then laid down is, in the words of Chief Justice *Marshall*, "safe for the States and safe for the Commonwealth." The contrary rule would be dangerous and ruinous for the States, and dangerous and ruinous for the Commonwealth, and would substitute chaos for order, and set up an official in London subject to political accidents in the place of the High Court as the guardian of the Constitution. Nor is the danger an imaginary one, for history tells us that many attempts have been deliberately made in the United States to hamper the federal Government by State laws which have been afterwards declared invalid by the Supreme Court.

We pass to the minor questions remaining for determination. The question whether a State tax upon the emoluments of federal officers is within the prohibition is a minor question, for the federal Parliament can make its grants subject to such a tax *Quilibet potest renunciare juri pro se introducto.* This branch of the case was fully dealt with by this Court after elaborate argument in *Deakin* v. *Webb* (2). It is not touched by the reasoning in *Webb* v. *Outtrim* (1), and we see no reason to depart from, or even to review, the conclusion there arrived at. We will add only a few words on the subject. It was contended that the decisions in *M'Culloch* v. *Maryland* (3), *Dobbins* v. *Commissioners of Erie County* (4), and *The Collector* v. *Day* (5), had been cut down by later decisions of the Supreme Court of the United States. That argument, which has been often addressed to this Court, is conclusively answered by the judgments, delivered in December 1905, in the case of *South Carolina* v. *United States* (6), from which I will read two passages.

The first is from the majority judgment at pp. 455-6 :—

(1) (1907) A.C., 81.
(2) 1 C.L.R., 585.
(3) 4 Wheat., 316.
(4) 16 Peters, 435.
(5) 11 Wall., 113.
(6) 199 U.S., 437, at pp. 455, 465.

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"Obviously, if the power of the State is carried to the extent suggested, and with it is relief from all federal taxation, the National Government would be largely crippled in its revenues. Indeed, if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government. If it be said that the States can be trusted not to resort to any such extreme measures, because of the resulting interference with the efficiency of the National Government, we may turn to the opinion of Mr. Chief Justice *Marshall* in *M'Culloch* v. *Maryland* (1) for a complete answer.

"'But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with the power to control the operations of a government to which they have confided their most important and most valuable interests? In the legislature of the Union alone, are all represented. The legislature of the Union alone, therefore, can be trusted by the people with a power of controlling measures which concern all, in the confidence that it will not be abused.'

"In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State."

The second is from the minority judgment at pp. 465-6:—

"The Court has constantly held that the absence of authority in the Government of the United States to tax or burden the agencies or instrumentalities of a State government, and the like want of authority on the part of the States to tax the agencies or instrumentalities of the National government, results from the dual system of government which the Constitution created, and that the continuance in force of such a prohibition is absolutely essential to the preservation of both governments.

"It would be superfluous to review in detail the many cases

(1) 4 Wheat., 316, at p. 431.

decided on the subject, but in the endeavor to bring the settled doctrine clearly to the mind, I refer to the most salient of the cases.

"In *M'Culloch* v. *Maryland* (1) and *Osborn* v. *Bank of the United States* (2) it was held that a State could not impose a tax on the operations of the Bank of the United States, or any of its branches. In *Weston* v. *City Council of Charleston* (3); *Bank of Commerce* v. *New York* (4); *Bank Tax Case* (5); and *Banks* v. *Mayor* (6) it was decided that a State was without power to tax stock or bonds issued by the United States for loans made to it, when held by an individual or by a corporation. In *Dobbins* v. *The Commissioners of Erie County* (7) it was decided that a State might not tax the compensation of an officer of the United States. And, in *Van Brooklin* v. *Tennessee* (8) and cases cited on pp. 167 *et seq.*, it was held that a State might not impose a tax on any property of the United States, including real estate of which the United States had become the owner as the result of a sale to enforce the payment of direct taxes previously levied by the United States.

"Conversely, the adjudications concerning the want of power in the United States to tax the States are of a like scope. In *The Collector* v. *Day* (9) it was decided that Congress could not impose a tax on the salary of a judicial officer of a State."

The only other observations that we desire to make on this point are, first, that an income tax as imposed under the Acts of New South Wales and Victoria differs from other taxes on property in being a tax upon its acquisition and not upon its enjoyment; and, secondly, the question is not whether a power has been exercised in such a manner as to interfere in fact to a material extent with a federal instrumentality, but whether the power exists to interfere at all. If it exists, the legislature, and not a Court of law, is the sole judge of the propriety and of the extent of its exercise. If the power to tax federal emoluments exists, it may be exercised to the extent of half of them. A

(1) 4 Wheat., 316.
(2) 9 Wheat., 738.
(3) 2 Peters, 449.
(4) 2 Black, 620.
(5) 2 Wall., 200.
(6) 7 Wall., 16.
(7) 16 Peters, 435.
(8) 117 U.S., 151.
(9) 11 Wall., 113, at p. 127.

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power to tax, as Chief Justice *Marshall* truly said, is a power to destroy, and this is the foundation of the doctrine in *M'Culloch* v. *Maryland* (1). See *Fifield* v. *Close* (2).

The other minor question for determination is whether this appeal is competent or not. It is objected that the District Court was not exercising federal, but State, jurisdiction, and consequently that no appeal lies to this Court from its judgment. *Mr. Irvine* admitted that the question is one of federal jurisdiction, and that, if sec. 39 of the *Judiciary Act* is law so far as it applies to inferior Courts, the appeal is competent. But this concession was not made in Sydney. By sec. 73 of the Constitution an appeal lies to the High Court from all Courts exercising federal jurisdiction. By sec. 77 the Parliament may make laws defining the extent to which the jurisdiction of a federal Court shall be exclusive of that which belongs to or is vested in the Courts of the States, and may invest State Courts with federal jurisdiction. We have already shown that the term "federal jurisdiction" means jurisdiction to deal with matters within the judicial power of the Commonwealth, *i.e.* the matters enumerated in secs. 75 and 76. Until the actual establishment of the federal Courts the determination of such matters was within the jurisdiction of the State Courts, who were bound to administer the laws of the State which include the Constitution and all laws passed by the Federal Parliament (see sec. 5 of the *Constitution Act*). A question of federal jurisdiction may be raised upon the face of a plaintiff's claim, or it may be raised for the first time in the defence, and, if the jurisdiction of a State Court to determine such a question has been taken away by valid legislation, it must stay its hand as soon as the question is raised. The rule is concisely stated in the judgment of *Strong* J. delivering the opinion of the Supreme Court of the United States in the case of *Tennessee* v. *Davis* (3): —"A case arising under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a civil suit. What constitutes a case thus arising was early defined in the case cited from 6 Wheaton:" *Cohens* v. *Virginia* (4). "It is

(1) 4 Wheat., 316.
(2) 15 Mich., 505.
(3) 100 U.S., 257, at p. 264.
(4) 6 Wheat., 264, at p. 379, *per Marshall* C.J.

not merely one where a party comes into Court to demand something conferred upon him by the Constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defence of the party, in whole or in part, by whom they are asserted: "

And again by Chief Justice *Waite*, delivering the opinion of the same Court in the case of *Starin* v. *New York* (1). "The character of a case is determined by the questions involved. *Osborn* v. *The Bank of the United States* (2). If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not."

It is not necessary to decide whether before the establishment of federal Courts the State Courts were, in determining such questions, exercising federal jurisdiction or not, for in the *Judiciary Act* the Parliament undertook to use the powers conferred by sec. 75. This they did by sec. 39 of that Act, which enacts in the first place that the jurisdiction of the High Court, *i.e.*, its power to exercise the judicial power of the Commonwealth, shall be exclusive of the jurisdiction of the several Courts of the States except as provided by that section. Without the proviso the jurisdiction of the State Courts would have been entirely ousted. But the Parliament might on the next day have passed another law investing the State Courts with federal jurisdiction. And the fact that they proceeded to do so by the same Act can make no difference in the result than the fact that a power of revocation and new appointment is exercised by one instrument instead of two. The result is that the jurisdiction of the State Courts is now derived from a new source, with all the inci-

(1) 115 U.S., 248, at p. 257. (2) 9 Wheat., 737, at p. 824.

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dents of jurisdiction derived from that new source, one of which is an appeal in all cases to the High Court. It was contended in Sydney that, as the jurisdiction which the Courts could exercise under the powers conferred by the State laws was co-extensive with that with which they were invested by the federal Parliament, they continued to exercise State jurisdiction and not federal jurisdiction. If the *Judiciary Act* had not first taken away the State jurisdiction as to these matters this consequence might or might not have followed. But, as the enactment stands, the State jurisdiction is effectively taken away if sec. 39 is valid. Its validity is said to be denied by the judgment of the Judicial Committee in *Webb* v. *Outtrim* (1). That decision, so far as regards this point, had reference only to the question whether an appeal lay to the Sovereign in Council from a decision of the Supreme Court in a matter of federal jurisdiction without special leave. It was not contested that an appeal lay by special leave. The provision which gave rise to this controversy is the second paragraph of sec. 39, which is as follows:—

"The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last preceding section, and subject to the following conditions and restrictions:—

"(*a*) Every decision of the Supreme Court of a State, or any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court."

It is said that sub-sec. (*a*) is invalid. It is common knowledge that a right of appeal is the subject of Statute, and that a legislature of plenary power can create a new Court and declare that its decisions shall be final and without appeal, except, of course, so far as the Sovereign may give special leave to appeal from them. The federal legislature appear to have acted on the

(1) (1907) A.C., 81.

assumption that investing an existing Court with federal jurisdiction was substantially the same thing as creating a new Court with like jurisdiction, and that the same incidents followed as to declaring the finality of the judgment of such a Court. The Judicial Committee, on the other hand, appear to have thought that the right to appeal to the Sovereign in Council without special leave in certain cases was a necessary incident of all decisions of the Supreme Court, by whatever authority they exercised their jurisdiction, and that the attempt of the federal Parliament was therefore, so far, ineffectual. No one disputes the power of the Sovereign to give special leave to appeal. The language of sec. 39 is expressly drawn in a form which is understood to recognize that power (compare sec. 73 of the Constitution).

We confess therefore our inability to understand the language of the learned Board with respect to the objection urged to the hearing of the appeal. The objection was twofold—first, that special leave was necessary, and secondly, that, in the exercise of a proper discretion, it should not be given. Their Lordships say that the only basis upon which the objection can be suggested to be founded is the Constitution, and that no direct authority under that Act had been shown, adding that (in the words of *Hodges* J.), it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect or circuitous methods. We suppose the end referred to is the taking away of a right of appeal to the King in Council. As already said, the section as framed does not purport to do so, but only to confer upon the Supreme Court such a jurisdiction that special leave should be necessary. No one, we suppose, would contend that an end not authorized can be attained by indirect or circuitous methods. Another passage quoted by the Board from the opinion of *Hodges* J. appears to be based upon the supposition that sec. 39 was to be construed as applying to matters not within the judicial power of the Commonwealth. We are not sure that this is so, but on any other view we are unable to see the relevancy of the passage, when the fact is borne in mind that the power denied in it to the federal Parliament had not been attempted to be exercised.

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The language of sec. 39 appears to us to be perfectly plain and explicit, and not to raise any of the difficulties which have been suggested.

That section goes on to invest the State Courts with federal jurisdiction. *Mr. Irvine* contended that, having failed in its object in one particular, the section was wholly inoperative. No doubt, if the provisions of the section were so closely bound up together that the failure of any part would affect all the rest this consequence would follow. But, having regard to the express provisions of sec. 2 of the *Colonial Laws Validity Act*, and even without recourse to those provisions, this consequence does not follow when the invalid provision is clearly separable from the rest. What connection is there between the question whether an appeal from a Supreme Court to the King in Council in a matter of federal jurisdiction lies without, or only with, special leave and the question of investing State Courts with federal jurisdiction, and the consequential incident, attached by sec. 73 of the Constitution, of a right of appeal to the High Court? We can see none. This point was fully dealt with by this Court in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1). We are therefore of opinion that the appeal is competent.

Counsel for the respondents in both cases refused to argue the question whether any distinction should be made between the case of a tax upon the emoluments of federal Ministers and members of the federal Parliament, which are secured by the Constitution itself, and the case of a tax upon the salaries of federal officers in general. They were contented to stand or fall by the rule laid down in *Deakin* v. *Webb* (2). We therefore express no opinion upon this point.

For the reasons which we have given we think that the appeal must be allowed.

ISAACS J. read the following judgment. The first question to consider is whether this Court is competent to hear these appeals.

(1) 4 C.L.R., 488, at p. 546.

(2) 1 C.L.R., 585.

That competency has been challenged on the ground that the State Courts whose determinations are under review were exercising State jurisdiction and not federal jurisdiction.

In neither of these cases was it argued that this Court could entertain the appeal if the Court below exercised State jurisdiction only, and therefore, in the view I take, it is unnecessary to say anything with regard to that matter.

In the second case, however, it was contended for the appellant that the State Court possessed and exercised federal jurisdiction, apart from any grant by the Commonwealth Parliament, because the subject matter was a case involving the interpretation of the Constitution. I am unable to accede to that view. Federal jurisdiction cannot exist outside the judicial power of the Commonwealth, and that by sec. 71 of the Constitution is vested in the High Court, in federal Courts created by Parliament and in invested State Courts—but not in any State Court that has not been invested with federal jurisdiction. The Courts of the State are, by the terms of sec. 5 of the *Constitution Act*, bound by, and, in any cause cognizable by them, must enforce, the provisions of the Constitution and of federal laws made under it. But that is by reason of their ordinary State jurisdiction to interpret and decide the law applicable to the case before them. This is clear from the nature of the subject. If a State Court were called upon to interpret and apply an Imperial Statute in the course of a suit, it would not be contended that the tribunal was exercising Imperial jurisdiction. In America this position is well established as in *Claflin* v. *Houseman* (1).

If, therefore, the State Courts in the matters before us were exercising federal jurisdiction, it must be by authority of the grant in sec. 39 of the *Judiciary Act* 1903, for no other enactment purports to confer it.

The validity of that section has been impeached, and must be considered. It has been held by the Privy Council in *Webb* v. *Outtrim* (2), that it is *ultra vires* of the federal Parliament to take away the right of appeal to His Majesty in Council in respect of the jurisdiction conferred by sec. 39 (2). This, it is urged, invalidates the whole section, and, by destroying at once

(1) 93 U.S., 130.

(2) (1907) A.C., 81.

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the exclusion of the State jurisdiction and the grant of federal jurisdiction, leaves the decision of every State Court other than the Supreme Court outside the appellate jurisdiction of this Court. The reasoning by which this argument is supported rests upon the assumption that sec. 39 is indivisible, that its various parts are so interdependent that if one portion is annihilated no other portion can survive.

A fair examination of this section shows that this is a misconception.

Sec. 77 (II.) of the Constitution confers power on the Parliament with respect to matters involving constitutional interpretation to make laws defining the extent to which the jurisdiction of any federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States. Sec. 39 of the *Judiciary Act* begins with the exercise of that power. By the first sub-section the jurisdiction of the High Court is made exclusive of that of the State Courts, except such as is found later on in the section. This it will be observed is not a conditional exercise of power, it is absolute; the exclusion of the jurisdiction of other Courts is complete and unqualified unless a valid exception is to be found later on. The subsequent portion of the section by virtue of sec. 77 (III.) invests the State Courts with "federal jurisdiction."

It appears necessary at this point to guard against an error which may easily arise. "Jurisdiction" is a generic term and signifies in this connection authority to adjudicate. State jurisdiction is the authority which State Courts possess to adjudicate under the State Constitution and laws; federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws.

The first is that which "belongs to" the State Courts within the meaning of sec. 77; the latter must be "vested in" them by Parliament. Now sec. 77 (II.) is a power to exclude jurisdiction, and this power has been exerted in this first sub-section of sec. 39, the result being that, so long as that provision stands unrepealed, no State jurisdiction can exist. Sec. 77 (III.) on the other hand, is a power to invest with federal jurisdiction, not to restore State jurisdiction, and an exercise of that power in sub-

sec. (2) of sec. 39 of the *Judiciary Act* is no contradiction of the deprivation contained in the prior sub-section, and works no restoration of the State jurisdiction. It is, therefore, clearly an error to say that the federal Parliament has in the same section purported to take away and to return the same jurisdiction, with or without the power of appeal to the Privy Council, or that the conjoint effect of sub-secs. (1) and (2) of sec. 39 of the *Judiciary Act* is to leave the jurisdiction of the State Courts as it previously stood. They still have jurisdiction in respect of the same subject matters, but their authority to exercise judicial power with regard to those matters springs from another source quite as much as if an Imperial Act had enacted by one section that their State jurisdiction should cease, and by the next section that henceforth they should have similar jurisdiction but should exercise it under the authority of that Statute. The authority which is given by sec. 39—namely federal jurisdiction—had never been taken away, because it had never "belonged" to a State Court; that which was taken away—namely State jurisdiction—has never even nominally been returned. Sec. 39 2) confers "federal jurisdiction" only; none other is in the power of the Commonwealth Parliament to grant, and in the result either the State Courts possess federal jurisdiction only in these matters or they possess none at all.

Federal jurisdiction to the extent vested in sub-sec. (2) of sec. 39 is the exception referred to in the earlier part. It is conferred upon the various Courts of the State *severally*, that is to say, as if each were named separately and independently of each other, and within the limits of their several jurisdictions. The grant is expressed to be "subject to the following conditions and restrictions."

Then follow four separate and distinct provisions. The first relates to the Supreme Court alone and applies, needless to say, to federal jurisdiction only. The second relates to inferior Courts from which an appeal lies to the Supreme Court; the third to inferior Courts whether an appeal lies to the Supreme Court or not; the last to Courts of summary jurisdiction. Conceding, without deciding, that sub-sec. 2 (*a*) is *ultra vires*, the only necessary effect of that is to leave the appeal from the Supreme

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Court by special grant still available, as in *Prince* v. *Gagnon* (1). If that sub-section be regarded as an inseparable condition of the grant of federal jurisdiction to the Supreme Court, the only further consequence would be to destroy that grant, and leave the tribunal without any jurisdiction at all in the matter specified. But to carry the vitiating effect even so far appears to me entirely without warrant. The *Colonial Laws Validity Act* (28 & 29 Vict. c. 63) restricts the invalidity to the extent of the repugnance to Imperial law, and that is satisfied by regarding sub-paragraph (*a*) as "absolutely void and inoperative." But it is sought, by reason of the phrase "conditions and restrictions," to utilise sub-sec. 2 (*a*) first to invalidate the grant to the Supreme Court, next by this means to infect the investiture of the Inferior Courts, thereby destroying the whole of sub-sec. 2; and ultimately to carry on the destructive process so as to nullify the whole section.

It needs but very slight reflection to be satisfied that this contention is altogether untenable. The underlying presumption is that the legislature would not have made the grant of federal jurisdiction to the Supreme Court, or to any of the inferior Courts, unless all appeals through the Supreme Court to the Privy Council had been cut off, and all appellants from the State tribunals in constitutional matters were compelled to come into the High Court. There are many considerations which at once place that view outside the pale of probability.

Inability to cut off access to the Privy Council from the Supreme Court still leaves open to litigants the option to appeal to the High Court whether the Supreme Court jurisdiction be State or federal. If then, as was plainly the case, the object of the federal Parliament was to ensure, as far as it legally could, that cases of a constitutional nature should find their ultimate solution in the High Court, why should the legislature refrain from pursuing its object in regard to the inferior Courts, from which, without the investing of federal jurisdiction, no appeal at all would lie to the High Court? To attribute an intention to the federal Parliament, at once so senseless and opposed to the admitted purpose of the section, is to furnish an answer to the

(1) 8 App. Cas., 103.

argument itself. A strict examination of the wording of the section is equally fatal to the contention. The expressions "conditions and restrictions" in the connection in which they are found cannot be meant as conditions or restrictions of jurisdiction in the vitally destructive sense attributed to them, any more than so called conditions of sale of land are conditions in the sense that, if any one is broken in any particular, the whole sale is necessarily at an end. There was abundant reason for investing the Supreme Court with federal jurisdiction quite apart from the question of appeal to the Privy Council. Once the jurisdiction became federal the Commonwealth Parliament could at will regulate the procedure and control the method and extent of relief, and, indeed, under sec. 79 of the Constitution could even prescribe the number of Judges by whom the invested jurisdiction should be exercised. So far as sub-sec. 2 (*a*) is concerned it assumes that a decision has been given which, apart from a possible but not inevitable appeal of some kind, would be of full force and effect.

Its provisions, even if valid, are necessarily of later application than the determination of the Court appealed from, and are plainly a mere continuation of the effort to secure complete federal control of the subject matter and not a *sine quâ non* of all federal intervention.

If this portion of the enactment be eliminated, there still remains a consistent perfect working set of provisions, as complete as the federal power can make them, and capable of useful and beneficial operation.

That a Court should annul a clear, purposeful, and workable legislative enactment, which is admittedly within the competency of Parliament, apart from a specific and severable portion negligible under the authority of the *Colonial Laws Validity Act*, is a step not lightly to be undertaken, and, so far as I know, is without British precedent.

I feel no doubt that the State Courts in these cases possessed, and necessarily exercised federal jurisdiction, and that these appeals are competent.

But, though the Court is seized of the appeal, there next arises the question—which I conceive to be by far the most important

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we have to determine—whether, assuming a case is one within the 74th section of the Constitution, this Court should proceed to give judgment upon its own view of the law, or whether, finding the matter already decided by the Privy Council, it should hold itself bound to follow that decision without more. The duty of this Court has been variously presented by the learned counsel for the respondents in the respective cases. *Sir Julian Salomons* rested much of his argument upon the practically coercive pressure of the circumstances, leaving the Court nominally, but not really, a power of determination according to its own opinion, and pressed upon us the view that it would be highly improper—even though technically lawful—for the High Court to depart from any interpretation of the Constitution at which the Privy Council had arrived. He supported his position by reference to two cases. The first was *Lavy* v. *London County Council* (1), where *Lindley* L.J. said the Court of Appeal of three Judges was bound by a previous decision of the Court of Appeal of two Judges, his Lordship being a member of the Court on both occasions. It seems to me, if this passage is an authority for anything, it is an authority for adhering to the previous decision of this Court.

The second case was *Pledge* v. *Carr* (2), in which the Court of Appeal held that it could not overrule a previous decision of a co-ordinate Court. That case, if applicable at all, is applicable only on the assumption that upon this question the Privy Council and this Court are co-ordinate, and that the Privy Council in *Webb* v. *Outtrim* (3) should not have differed from the decision of the High Court in *Deakin* v. *Webb* (4). I think, however, that neither of these cases really affords any assistance in the matter now under consideration.

*Mr. Irvine*, on the other hand, would have nothing to do with any obligation of an intermediate nature incapable of definite and precise legal expression; he stoutly maintained that, as there cannot be two Constitutions for Australia, or differently phrasing it, as there cannot be two differing and yet accurate interpretations of the Constitution, it necessarily follows, in order to avert a chaotic situation, that there must reside in some tribunal the

(1) (1895) 2 Q.B., 577, at p. 581.
(2) (1895) 1 Ch., 51.
(3) (1907) A.C., 81.
(4) 1 C.L.R., 585.

power of ultimately and authoritatively declaring the interpretation so as to bind all other Courts. He urged that, as there cannot under any possible circumstances be an appeal from the Privy Council to this Court, and there may, under circumstances contemplated and defined by Statute, be an appeal from this Court to the Privy Council, the latter tribunal must of necessity be that ultimate and binding authority. He then further contended that, as the Privy Council had now placed its interpretation upon the Constitution, it followed as a logical and legal consequence of the earlier branch of his argument—to depart from which would be an actual breach of law—that this Court, if it entertained the appeal at all, should not any longer stop to consider the matter, but should at once give judgment according to the interpretation found in the decision of the Privy Council.

Respondents in both cases leant for support of their arguments upon the superiority of the status of the Judicial Committee of His Majesty's Privy Council, and upon what they regarded the analogy afforded by English precedents in legislation whereby in varying language appeals to superior tribunals are forbidden except by leave.

What, then, is the duty placed by the Constitution on this Court in all controversies coming before it of the nature marked out in sec. 74 ?

If the present cases are not of that nature then I agree that this Court is bound by the decision of *Webb* v. *Outtrim* (1). Unless there can be found expressly or by necessary implication in a valid enactment an abrogation of the common law or statutory right of the Sovereign to review the judgments of his Courts in His Majesty's oversea Dominions, that right remains. So long as that power subsists, but no longer, and to the extent that it continues, and no further, the Privy Council is the ultimate Court of Appeal, and it is the manifest legal duty of every tribunal subject to its controlling power to acknowledge without question the law as pronounced by its determination.

Every individual subject of the King is bound to respect and obey the law, still more is it incumbent upon every Court to loyally recognize and apply it, whether the law is to be gathered by the

(1) (1907) A.C., 81.

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Court's own unfettered apprehension of its commands, or whether it has been expounded by some other tribunal whose interpretation upon that subject the law itself has invested with compelling authority in relation to the Court.

The position of this Court, with respect to questions comprised within the terms of sec. 74, is unique. Approaching the construction of that section with no other aid than is afforded by the *Constitution Act* itself, always remembering that it is not a casual piece of legislation, but an instrument of government, I hold the opinion that, as a matter of law, this Court has a right to decline to follow the decision of the Privy Council in the class of questions referred to. The words of the section appear to me too plain to admit of any hesitation in this regard, either in point of literal construction, or of the broad intent of the legislature.

If the history of the section were to be called in aid, as was done by the Privy Council itself in *Webb* v. *Outtrim* (1), the conclusion is strengthened. For the present purpose I think the words themselves, by their inherent force, are clear enough and strong enough to satisfy the mind as to the duty of the Court when such a question as the present is submitted to it. Sec. 74 finds no parallel in British legislation. It selects a certain class of controversies and places them apart from all others as proper for separate and unprecedented judicial treatment.

They are selected, not because they are trifling or frivolous, or of a limited effect or passing interest, but by reason of their inherent magnitude, and because they are of the highest concern, on the one side to the development of Australian nationhood, and on the other to the preservation of the States. Their influence is permanent and far reaching, not confined to the immediate litigants nor to a special class in the community, nor even to a State, but extends so far as to affect the political relations of the whole people, when considered in conflicting groups, as citizens of different States, or as citizens of both States and Commonwealth. The determination of these questions touches the very root of the federal principle, namely, the distribution as between State and State, and Commonwealth and State of that total mass of governmental power, which the Imperial Parliament has granted, and

(1) (1907) A.C., 81.

over which, outside the reservations to be found in the Constitution itself, the Imperial authority does not assume or exercise control.

All these questions when pronounced upon by the Supreme federal tribunal constituted and sitting in Australia are declared by sec. 74 to be free from the intervention of even the Royal prerogative. Unless and until the High Court certifies that a question, determined by it and included within the terms of the section, ought to be decided by the Privy Council, which, however eminent, is nevertheless a tribunal constituted and sitting outside Australia, the Constitution insists that it ought not to be and must not be so decided, and until that event occurs—if it ever should occur—the supreme law of the Empire knows no judicial authority in relation to that question superior to this Court.

Provided only that the cause answers the description of a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or of two or more States, it matters not how the question arises, whether as to parties or procedure, whether singly or in conjunction with other questions, whatever the nature of the dispute, whatever the amount involved, whether it concerns the affixing of a penny stamp to a document, or the control and destination of the river waters of the Continent. In all such cases the decision of the High Court, either in the exercise of its original or its appellate jurisdiction, is absolutely final and beyond the power of revision by any tribunal but itself.

The argument that endeavours to place on the same level as these provisions of sec. 74 of the Australian Constitution ordinary legislative restrictions upon appeals such as those from the County and Divisional Courts—legislation interpreted in cases of such high authority as *Lane* v. *Esdaile* (1) and *Ex parte Stevenson* (2) to be a check on unnecessary and frivolous appeals, and in *Ex parte Gilchrist* (3), as meaning that if the decision is one of principle and new, leave should be given—entirely overlooks, not merely the striking difference of language, but still more the vital distinction of aim, purpose and effect.

(1) (1891) A.C., 210. (2) (1892) 1 Q.B., 394. (3) 17 Q.B.D., 521, at p. 528.

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The opening words of sec. 74 are in the negative: "No appeal shall be permitted to the Queen in Council from a decision of the High Court." This makes the Privy Council incompetent to hear such an appeal, just as in the *North British Railway Co.* v. *Wauchope* (1) Lord *Westbury* L.C. said the House of Lords was by very similar words not competent to hear that appeal.

Much of the argument of respondents in both cases rested upon their construction of the word "decision." They contended for the narrow interpretation, that is to say, they regarded it as equivalent to "judgment, decree, order or sentence"—in other words as the formal order whatever name it bears, working out the final details of the cause between the immediate parties, providing for and directing the specific acts or forbearances necessary in the opinion of the Court to do justice as between the particular litigants, and not operating beyond them either in its direct effect or its indirect authority.

They contend, therefore, that it does not mean the declaration of the law as affirmed by the Court.

Having gone so far, counsel necessarily carried his submission to this point, that "decision" meant the final judgment of the Court in any case where the prescribed question was raised between the parties, no matter how it was decided, and no matter whether that was the sole question or one with many others of a totally different character, and counsel maintained that it was quite immaterial upon which of those many questions the judgment ultimately rested.

An unsuccessful party before the High Court could not appeal to the Privy Council even by special leave of their Lordships, it was said, if the constitutional point were raised and determined, even though that point were determined in his favour, and if his only cause of dissatisfaction were some ordinary point of mercantile law, or the construction of a Statute such as the *Income Tax Act* of a State. Before the unsuccessful party could appeal in such a case on the real decision he questioned, he must, it was contended, obtain from the High Court the certificate required by the 74th section, though no one desired or intended to challenge the decision upon the constitutional question.

(1) 4 Macq. H.L. Cas., 352.

Such a construction cannot, in my opinion, be seriously contemplated. It would follow from that as a necessary consequence that, even if the High Court were now to follow in favour of the respondents the Privy Council decision in *Outtrim's Case*, but founded its judgment on other points in favour of the appellants, the case according to respondents' argument would still be unappealable on those other points without a certificate as to the constitutional point, a certificate which, under the circumstances, would be absurd in the extreme.

"Decision of the High Court upon any question," in this section means, in my opinion, what the Court decides to be the law with regard to that question; what it holds to be the proper answer to that particular question. That is the sense in which the word "decision" is frequently used by the House of Lords and the Privy Council; as in *Ridsdale* v. *Clifton* (1); *Read* v. *Bishop of Lincoln* (2), and *London Street Tramways Co.* v. *London County Council* (3). A case before the High Court may present many questions for decision. If it includes one of the nature indicated by sec. 74, the decision upon that question is the only one to which the special provision applies. It may be that it is impossible to appeal from that for the reason that the party, against whom the decision on that question passes, succeeds by reason of some other point—as if the defendants (appellants) here were to succeed only on the construction of the Income Tax Acts, or on a question of fact as to amount of income. But assuming a party is otherwise in a position to appeal from an adverse decision which forms the sole ground, or one of the grounds, for judgment against him, then the special provisions of sec. 74 intervene to deprive him of that right or to except from his general right the decision on the specific point of constitutional conflict, unless he obtains the required certificate.

The argument *ab inconvenienti* founded upon the possibility of two conflicting interpretations of the Constitution was strenuously pressed upon us. It is an argument of great weight if addressed to lawmakers; or even to a Court, if words be of doubtful meaning. But they are not so here: I know of no

(1) 2 P.D., 276.
(2) (1892) A.C., 644, at pp. 654, 655.
(3) (1898) A.C., 375, at p. 379.

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clearer words in the Constitution, or words having a more obvious purpose. Sec. 74 is one of the pillars of the Constitution. Unless it stands firm, much of the true meaning of that document is lost. In the Constitution itself can be discerned as a matter of legal construction the expectation that no conflict of final interpretation would arise, because the State Courts, through whom an alternative channel of construction is possible, were not at once deprived of jurisdiction to interpret the Constitution; still the possibility of conflict was guarded against by empowering the national legislature in case of need to close that channel. While the Constitution lasts in its present form, nothing however can alter the finality of a decision of the High Court upon this class of question. That is a fixed principle, embedded in the Constitution as a fundamental fact, capable of extension in its application but not of restriction, and to my mind should be the governing consideration in such a case as the present.

The Court is not bound to yield to the views of the Judicial Committee on this branch of the Constitution.

But we have been appealed to, in the first case, to accept those views however strongly we disagree with them, because it would tend to consistency of interpretation, and because the Privy Council, being the body to which other questions are appealable, and even these questions if a certificate is given, it would be in some undefined way the desirable course to pursue.

Unity of interpretation, if lawfully obtainable, is, of course, much to be desired. But adherence to that rule is by no means universal. In *Leask* v. *Scott* (1), the English Court of Appeal declined, even on a question of mercantile law, to follow a decision of the Privy Council. And this is surely the right course to pursue by any Court which is not legally subject to authoritative correction by the other tribunal, and which has a distinct opinion contrary to the decision cited.

Every Court within the ambit of its functions is the delegate of the Sovereign and has its own duty to perform. The 74th section has placed a very special duty upon this Court. In framing the Constitution, the creation of the High Court was made an integral part of the federal structure, and while appor-

(1) 2 Q.B.D., 376.

tioning the powers to the several authorities as definitely as circumstances would permit, this Court was made the federal arbiter in all disputes coming before it, regarding the apportionment, unless for special reasons it considered that the Privy Council should be appealed to. To this Court was committed, not only the function of decision in the first instance, but the duty also of looking over and beyond the strife of the parties themselves, and of judging if the public interests would be better served by remitting the controversy to His Majesty in Council for determination, which should for all times bind this Court as the supreme judicial organ of the Commonwealth, and through it the whole Australian people. But we are now asked by the respondents to lay aside all these serious considerations and to regard only the circumstance that by another avenue a decision has in fact been reached which does not accord with a former decision of this Court. We are invited to say because that has happened, although without the opinion of this Court, that the Privy Council ought to decide such a question, and in the face of the express opinion of this Court in *Deakin* v. *Webb* (1), that it ought not, this High Court should now ignore its constitutional duty, virtually for this purpose treat the 74th section as repealed, and accept without question the contrary opinion of the Privy Council.

My answer to that is this. The possibility or existence of a diversity of judicial opinion which can only last during the pleasure of the Commonwealth Parliament as to these questions —and similarly (subject only to the requirement of reservation for the Royal Assent) with regard to all other constitutional questions—cannot justify this Court in abandoning the trust with which, as it appears to me, it has been by law invested. It has no discretion to sacrifice or weaken any part of the Constitution. The 74th section is as much a part of the Constitution as any other, and if its true meaning be, as I hold it is, that unless for some most exceptional reason which does not now present itself, and one to be certified according to law when it does, it is the judgment of this Court alone which, in the matters we are considering, is intended to bind the Commonwealth and States

(1) 1 C.L.R., 585.

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alike, to delimit their powers and restrain any excess of jurisdiction. In the absence of any special reason for certifying under the section, there is no power to substitute the decision of another tribunal, for that of the arbiter appointed by the Constitution. Such a course would amount to a distinct contravention of the command of the Sovereign in his Imperial Parliament.

Counsel for the respondents in both cases, however, contend that in any event the questions arising here did not fall within the class prescribed in sec. 74. Shortly stating their position, they admitted, of course, that the validity of the respective Income Tax Acts as applied to the appellants was in dispute, but they argued that their validity depended, not on any conflict of powers, but on whether there was a repugnancy between those Statutes and the Commonwealth legislation fixing the remuneration of its servants. I agree with them that a question of repugnancy as they aver does arise, because it is contended for the Commonwealth that, for a State to levy an income tax upon federal officers proportioned to their federal salaries, is to clash *pro tanto* with the federal enactment that their remuneration shall be the full sum granted them by the Commonwealth.

But there is involved in the dispute another and a deeper question which is quite independent of all Commonwealth legislation. The repugnancy already alluded to is met by sec. 109 of the Constitution which, recognizing that Commonwealth legislation may encounter State legislation on a concurrent field, gives paramountcy to the former to the extent of conflict. That, however, being on the concurrent field, is not a question simply of competition for or conflict of powers, but of the supremacy of admitted powers when exercised. This views the matter as if it only concerned the relations of the taxpayer to the State.

There is, however, also raised the further question, in which the Commonwealth as a governing authority is interested, and as to which it has intervened, namely, that from its standpoint, the alleged taxpayer is a federal officer, an instrumentality, and a means of government, whose services the Commonwealth is entitled to without impairment, but which are or may be affected by the diminution of his salary. It is urged that the diminution, if not checked at the beginning, may be carried to any distance,

even to absolute deprivation if the State legislature thinks fit. Regarded from this standpoint, we look out, not upon two admitted powers meeting on a concurrent field, but upon State authority encroaching upon a Commonwealth exclusive field, namely, the Federal Executive Government. In *Dobbins* v. *Commissioners of Erie County* (1), the Court recognized the distinction between these several views, and gave them separate treatment.

When an officer's services are lessened the Government, that is the Crown administering the federal government, is obstructed in its operations, and one argument for the appellants and intervenant is that the Income Tax Acts here, if applied to the federal officers' salary, is an illegal entry into the domain of federal administration, and that consequently a question arises as to the limits *inter se* of the constitutional powers of the Commonwealth and the respective States. Whether the Acts do actually amount to such an encroachment or not, whether they do pass the limits permitted by law, and overstep the boundary line of the field of Commonwealth administrative power, is a matter to be decided, but it seems to me indisputable that the question whether or not they are to be considered as trespassing upon the region exclusively assigned to the Commonwealth is distinctly raised. The cases consequently fall within the purview of the 74th section.

Summing up the views I have already expressed, I arrive so far at the following conclusions:—1. This Court is properly possessed of these appeals. 2. Our duty is to determine all causes within sec. 74 according to our own understanding of the Constitution, unless there has been first a certificate under sec. 74, and upon that a decision of the Privy Council. 3. These cases do fall within sec. 74.

I have already pointed out that the Income Tax Acts are impeached upon two grounds—first because, so far as they purport to apply to the appellants, they are *pro tanto* repugnant to Commonwealth Statutes, and are therefore struck at by sec. 109; and secondly, because, independently of any legislative direction by the Commonwealth, they invade the federal field of power, by

(1) 16 Peters., 435.

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requiring a federal officer to surrender a portion of the means provided by the Commonwealth for his support.

The first ground of attack is outside sec. 74, and, if that were the only one, I should, in accordance with what I have already said, feel compelled to follow without discussion the decision in *Webb* v. *Outtrim* (1), by which it has been held that such Acts are not repugnant to the Commonwealth legislation.

But the second ground raising a question within sec. 74, I proceed to consider, free from any coercive authority of *Webb* v. *Outtrim* (1), whether those Acts are invalid as constituting an invasion of Commonwealth exclusive jurisdiction. It is true that the point has already been determined by this Court in *Deakin* v. *Webb* (2), and under ordinary circumstances I should be indisposed to re-open a question previously decided. Still, the rule laid down by the Privy Council in *Ridsdale* v. *Clifton* (3), and *Tooth* v. *Power* (4) is a proper one for this Court to follow. Since *Deakin* v. *Webb* (2) there has been the contrary decision in *Webb* v. *Outtrim* (1), and the respect and weight due to a judgment of the Judicial Committee is a fact which compels reconsideration. I approach the subject therefore with an open and independent mind, but with a desire to profit by the reasons upon which the two opposing decisions are founded.

These Acts imposing taxation on persons resident in the respective States are *primâ facie* valid. If *ultra vires* on the ground of their intrusion into the exclusive field of the federal power, two positions must be sustained by the appellants. The field must be shown to be exclusive, or, in other words, there must exist a prohibition expressed or implied against intrusion by the State upon such a field, and, if that is established, the Acts must then be shown to contravene the prohibition.

If the judgment in *Outtrim's Case* is to be understood as deciding that—because the Constitution does not expressly say so—a State is not prohibited from interfering with the operations of the federal Government, or with the means it employs to effectuate its powers, I most respectfully dissent. If that judgment is to be taken as laying down the rule that, provided a law

(1) (1907) A.C., 81.
(2) 1 C.L.R., 585.
(3) 2 P.D., 276.
(4) (1891) A.C., 284.

would have been within the competency of the State Parliament before Federation, it is still within its competency unless the power to pass it has been expressly withdrawn by the Constitution, I again respectfully differ. The word "expressly" is not found before the word "withdrawn" or elsewhere in sec. 107, and it would of course be a contradiction in terms to imply it. Such a construction in my opinion would certainly tend to destroy the Constitution. I agree with the rule formulated in *D'Emden* v. *Pedder* (1), that "when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."

In *M'Culloch* v. *Maryland* (2), *Marshall* C.J. laid down some principles and arrived at a decision which are not only in consonance with the rule just quoted, but are in strict accord with the most authoritative pronouncements of English law. His doctrines have under the circumstances of the American Constitution received a later application extending the doctrine of necessary implication to cases which the Australian Constitution does not, in my opinion, require or warrant to be brought within it.

But his propositions, first, that the grant of enumerated powers impliedly carries with it the grant of all proper means, not expressly forbidden, to effectuate those powers; and next, that, conversely, as such a grant of these powers and means would be entirely illusory unless their full and free exercise were intended, there arises a necessary implication that no State, even to the least extent, can derogate from the grant by usurping or opposing the powers, or, what is the same thing, by obstructing the means of carrying them into execution, not only commend themselves to the reason, but are supported by the principles enunciated in such cases as *Kielley* v. *Carson* (3); *Doyle* v. *Falconer* (4); *Barton* v. *Taylor* (5); and *Fielding* v. *Thomas* (6). *Kielley* v. *Carson* (3) was heard before a most powerfully constituted Board. The Crown had by its Commission under the Great Seal created a

(1) 1 C.L.R., 91, at p. 111.
(2) 4 Wheat., 316.
(3) 4 Moo. P.C.C., 63.
(4) L.R. 1 P.C., 328.
(5) 11 App. Cas., 197.
(6) (1896) A.C., 600.

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Legislative Assembly for Newfoundland, and the question arose as to what powers were impliedly conferred upon the local legislature. *Parke* B., who delivered the judgment, said (1):—"Their Lordships see no reason to think, that in the principle of the common law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. *Quando lex aliquid concedit, concedere viditur et illud, sine quo res ipsa esse non potest.* In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of legislative functions, they are justified in acting by the principle of the common law." The Board held that the power to punish for contempt was not necessary, and therefore not an incident.

But to interrupt or impede the exercise of its functions was illegal; to obstruct a Court of Record is illegal and the Court has inherent, that is implied, power to prevent it as well as to punish it—even a public meeting, as was pointed out by Lord *Blackburn* in *Barton* v. *Taylor* (2), has implied power to remove obstructions to its proceedings.

How then can it be denied that the Central Government of Australia is by necessary implication to be free from any impediment to the full and perfect performance of the National functions assigned to it?

It would indeed have been an idle task to carve out of the existing State Constitutions the jurisdiction to erect administrative departments for specified services, to vest this in a central authority for the common welfare, and still to leave it within the capacity of each individual State within its own territory, and consequently with varying effect, to harass and impede the functions and operations of the General Government.

No aid to argument leading to so futile a result is lent by the

(1) 4 Moo. P.C.C., 63, at p. 88. (2) 11 App. Cas., 197, at p. 201.

language of the Constitution. By sec. 106 the Constitution of each State is declared to continue but "subject to this Constitution," and by sec. 107 it is expressly recognized that powers exclusively vested in the Parliament of the Commonwealth are no longer within the power of the State Parliament. What power can be more exclusively vested in the Commonwealth Parliament than the regulation and control of Commonwealth administration? And, if this be once conceded, the mere admission that the effect of any specified State Act is to impede or impair the public operations of a federal officer is sufficient to stamp it as unlawful.

Up to this point I am, for the reasons I have given, in entire accord with the majority of the Court.

When, however, I come to apply these principles to the Income Tax Acts I have the misfortune to find myself unable to share their opinion. These Statutes do not appear to me to infringe the doctrine of non-interference. They do not on the face of them, and they do not, I think, in their necessary and reasonable effect transcend the limits of any federal power. The income tax is demanded from all citizens alike; it is obviously not levelled at the federal authority, and I cannot persuade myself that by reason of the impost there is actually, or will probably be, any diminution or impairment of service rendered to the Commonwealth.

The reasoning of the Supreme Court of the United States in the case of *Dobbins* v. *Commissioners of Erie County* (1) as to the effect of the tax undoubtedly supports the appellants' contention that these Acts are invalid. But I am not able to adopt that reasoning.

It has been thought essential under the American Constitution to place such cases within the principle of actual interference as laid down by *Marshall* C.J. In the United States there exists no authority whatever to set aside a valid law but that which enacted it; and this fact has apparently induced the Supreme Court to apply rigidly the standards of interpretation which are found so eloquently and lucidly expounded in *M'Culloch* v. *Maryland* (2). In the various Australian Constitutions, Federal

(1) 16 Peters, 435. (2) 4 Wheat., 316.

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and State, there are found, as part of these Constitutions themselves, provisions enabling, and sometimes requiring, a bill to be reserved for Royal Assent, and enabling the Crown to disallow an Act that was quite within the power granted, and therefore of full validity.

Whether the exercise of these powers be frequent or rare, whether on legal or political grounds, with whatever motive the King may be pleased to put these prerogatives into action, is no concern of a Court of law; but a power which finds its place even in the latest Constitution of all—our own—cannot be disregarded. It must, as it seems to me, be taken into account in interpreting the document of which it forms a part. It is clearly immaterial for the purpose of ascertaining the field of Commonwealth power, or for determining the principles upon which that field is to be maintained supreme and secured from interruption; but it may affect the consideration of whether a given Act of State authority ought to be regarded as an invasion of Commonwealth power.

The additional means of averting peril to Commonwealth and State by conflicting exertions of power, may in Australia modify the necessity which American Courts have experienced, and have acted upon, by striking down at once an enactment which, though harmless enough in itself, might, if held valid, lead the way to actual and dangerous interference with the General Government. As was said by the Earl of *Selborne* in *Barton* v. *Taylor* (1):—"The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity."

If by any fair and reasonable intendment these Statutes could be read as impairing the usefulness or efficiency of the officers concerned to serve the Government, I should be prepared to apply the principle of *D'Emden* v. *Pedder* (2), and hold them so far ineffective. If it were shown that federal servants were singled out from the rest of the community for specially heavy taxation it would not be difficult to detect antagonism to the Commonwealth.

Indications of the attitude which a Court would adopt towards Acts of State legislatures if, in the language of Lord *Coke*, "because they could not do it *de directo* they attempted to do it

(1) 11 App. Cas., 197, at p. 204. (2) 1 C.L.R., 91.

*ex obliquo*," are to be found in the jurisprudence of both England and America: *Brewers and Malsters' Association of Ontario* v. *Attorney-General for Ontario* (1); *Home Insurance Co.* v. *New York* (2).

But the State Act touches no function of the officer, it intrudes its operations into no public act that he performs, it affixes no condition and imposes no qualification upon the discharge of his duties, it makes no demand upon his public time, and seeks no service at his hands; it merely requires of him his just share of the ordinary burden of his fellow citizens in return for the protection and benefits the State affords him.

If this be so, the Statute attacked in each case has not intruded into the exclusive domain of Commonwealth executive action, it has not invaded the powers, interfered with the means, or interrupted the operations of the central Government, and therefore should, in my judgment, be declared to stand as a valid exercise of State legislative authority.

HIGGINS J. I am of opinion that the appeal should be dismissed. The appeal is from an order of a District Court in New South Wales, directing payment of income tax by the appellant. The appellant was admitted to be a resident of New South Wales and an officer in the customs department of the Federal Government in that State. The learned Judge thought that the judgment of the King in Council in *Webb* v. *Outtrim* (3) bound him; and he therefore gave judgment for the plaintiffs, the commissioners of taxation of Sydney. It is desired by the appellant that his appeal shall be confined to this one point—does the fact that he is a federal officer exempt him from income tax in respect of his official salary? The appellant does not wish to raise the objection that the *Land and Income Assessment Act* 1895 (N.S.W.) is not, as a matter of construction, applicable to him; and I shall therefore proceed on the assumption that it is. I shall also assume, in favour of the appellant, that under sec. 39 (2), (*b*) of the *Judicary Act* 1903 this Court is competent to entertain this appeal without special leave, and that the

(1) (1897) A.C., 231.

(2) 134 U.S., 594, at p. 598.

(3) (1907) A.C., 81.

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question involved comes within that very elusive term "federal jurisdiction." In the view that I take of the case I may concede also, for the purposes of argument, that the question is one arising as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State, within the meaning of sec. 74 of the Constitution.

I come at once to what I regard as the main question. What is the duty of this Court when it finds that the King in Council differs from the view which the Court had taken with regard to a question coming within sec. 74? In *Deakin* v. *Webb* (1) this Court held that the salary of a federal officer is not subject to State income tax; and there was no appeal from that decision, for this Court refused to certify, under sec. 74, that the question was one which ought to be determined by the King in Council. Subsequently, the Victorian Commissioner of income tax sued a federal officer, Outtrim, for income tax; the Supreme Court of Victoria followed the ruling of the High Court; and the Commissioner appealed to the King in Council. The Judicial Committee of the Privy Council reported to the King in Council to the effect that Outtrim was liable to the tax; and the King in Council adopted the report of the Committee and gave judgment against Outtrim. In their statement of the reasons for their report (*Webb* v. *Outtrim*) (2) the Judicial Committee has clearly intimated its opinion that *Deakin* v. *Webb* (1) was wrongly decided. This appeal was taken to the King in Council direct from the Supreme Court, by virtue of the Act 7 & 8 Vict. c. 69, and the Order in Council of 9th June 1860 made thereunder. The Commonwealth Government, which was allowed to intervene in the argument before the Judicial Committee, urged strongly that the appeal could not be entertained by the King in Council, because of sec. 39 of the *Judiciary Act* 1903. This section purported to take away jurisdiction in certain matters from the Courts of the States (including the Supreme Court of Victoria), and then to re-invest such Courts with federal jurisdiction, subject to this condition (*inter alia*) that every decision of the Supreme Court "shall be final and conclusive except so far as an appeal may be brought to the High Court." I have never been able to

(1) 1 C.L.R., 585.

(2) (1907) App. Cas., 81.

see how this exclusion of the King in Council from entertaining appeals from the Supreme Court of a State—whether appeals as of right or appeals by special leave—can be treated as within the power of the Commonwealth Parliament as conferred by the Constitution. No power has been conferred on the Commonwealth Parliament by the Constitution to repeal or alter the Acts 9 Geo. IV. c. 83, and 7 & 8 Vict. c. 69, and the Orders in Council made thereunder, allowing appeals as of right. But now the King in Council has expressly held that the provision is beyond the power of federal Parliament, and void; and it has entertained the appeal in *Webb* v. *Outtrim* (1), without even giving special leave to appeal.

Under these circumstances I have now no hesitation in expressing the view that, although by sec. 77 (2) of the Constitution the Commonwealth Parliament can exclude State Courts from federal jurisdiction, it cannot exclude the King in Council from such jurisdiction, or from any jurisdiction which the Supreme Court or other State Court has exercised; and that, if the Supreme Court of a State become seised of a cause, and decide it, the defeated litigant has under the British Acts 9 Geo. IV. c. 83, or 7 & 8 Vict. c. 69, and the Orders in Council made thereunder, a right to appeal to the King in Council, no matter whether the Supreme Court derive its jurisdiction from the State, or from the British Parliament, or from the federal Parliament; and no matter what the federal Parliament may enact to the contrary.

It has not been contended before us that the decision of the King in Council in *Webb* v. *Outtrim* (1), is *ultra vires* and void, although, if sec. 39 of the *Judiciary Act* were valid in so far as it purports to prevent appeals from the Supreme Court to the King in Council, the decision must be void. I understand, however, the theory to be that sec. 39 (2) (*a*) was merely meant to apply to appeals as of right from the Supreme Court; that it was not meant to affect the appeal by special leave; and that if the King in Council entertain the appeal in fact, without formally giving special leave, that is a matter of mere procedure, not affecting the validity of the judgment. The appellant, therefore,

(1) (1907) A.C., 81.

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merely urges that the decision of the King in Council is wrong as to the merits of *Deakin* v. *Webb* (1), and that it should not be followed by the High Court. This latter is the main question to which I address myself.

Now, what is the duty of this Court when it finds that its view of the law as to the liability of State officers to income tax has been condemned by the King in Council? I have already stated that I assume everything else in favour of the appellant. Are we to adhere to the principle of *Deakin* v. *Webb* (1), or are we to submit to the law as laid down in *Webb* v. *Outtrim* (2)? I conceive it to be my duty not to let my personal opinion as to the merits of *Deakin* v. *Webb* (1) weigh with me in the slightest degree in determining the question. I should have gladly and dutifully accepted the well considered judgment of the original Judges of this Court, and treated it as a guide for all Courts within Australia, but for the contrary decision of the King in Council. It is true that I have held, and still hold, a strong opinion with regard to the judgment of *Marshall* C.J. in *M'Culloch* v. *Maryland* (3)—the judgment on which *Deakin* v. *Webb* (1) was based—although I utter the opinion with a feeling that it will be regarded by some as almost blasphemy. I regard it as being the utterance rather of the statesman than of the lawyer. I think that the doctrine of necessary implication was pressed beyond the logical limits recognized by British law. I think that if anything was to be necessarily implied in the United States Constitution, when the State of Maryland was found to be making a deliberate attack on a federal "instrumentality," the United States Bank, the thing to be implied was either (*a*) a power in the Courts to declare a State taxation Act fraudulent and void if and so far as passed for purposes foreign to the State power to tax State citizens: *Duke of Portland* v. *Topham* (4); or else (*b*) a power on the part of the federal Congress to protect the Bank, and any other federal "instrumentality" or federal agent—a power to isolate them, wholly or partially, from State interference, just as Congress could isolate a fort or an arsenal. (See also *Commonwealth Constitution*, sec. 52 (2)). This would not be to "annul"

(1) 1 C.L.R., 585.
(2) (1907) A.C., 81.
(3) 4 Wheat., 316.
(4) 11 H.L.C., 32, at pp. 54, 55.

a State Act. The State Act would remain, but the Court or the federal Congress, as the case may be, would say, in effect:—"Hands off! You must not attack the federal agent under a pretence of taxing the State citizen." I concur with my brother *Isaacs* in the view that it is not an improper interference with a federal agent for a State to collect from him a tax upon his income, on the same scale as from other citizens of the State, even though his salary as a federal agent has to be included in his return. But it is only just to my learned colleagues, the original Justices of this Court, to say that if the reasoning in *M'Culloch* v. *Maryland* (1) is right, and if it ought to be applied to the Australian Constitution, I do not see how they could have given any decision other than that which they gave in *Deakin* v. *Webb* (2). (See in particular the words of *Marshall* C.J. (3)). But I do not wish to base my decision on my personal opinion as to *M'Culloch* v. *Maryland* (1), and I approach the main question in this case with an unprejudiced mind—what is the duty of the Court when the King in Council decides differently? I concur with the Chief Justice in thinking that there is nothing in the reasoning of the Law Lords in *Webb* v. *Outtrim* (4) calculated to satisfy men who are familiar with the long line of decisions in the United States that *Deakin* v. *Webb* (2) was wrong. The Earl of *Halsbury* points to secs. 106 and 107 of our Australian Constitution, and says that these sections leave no room for implied prohibitions, such as a prohibition of State income tax. But in the United States Constitution there was equally strong reason against such implication. Article I., sec. 10, contained the numerous express prohibitions affecting the powers of States to legislate; and Article X. reserved to the States the powers not prohibited to them by the Constitution. This consideration was present to the minds of the members of this Court when they delivered judgment in *Deakin* v. *Webb* (2); but, if I may say so with all respect, it seems not to have been noticed by the Law Lords. This inadequacy of the reasons used by the Judicial Committee adds greatly to our difficulty; but still the question remains, which opinion ought to guide us in our present

(1) 4 Wheat., 316.
(2) 1 C.L.R., 585.
(3) 4 Wheat., 316, at p. 430.
(4) (1907) A.C., 81.

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judgment? I have, of course, no right to allow my mind to be swayed by my view of expediency. I admit that, before taking my seat on this bench, I thought that it would be wiser to leave, as far as possible, the interpretation and the application of Australian laws to Australian Courts, as the making of those laws is left to the Australian Parliament; in effect, to put full responsibility on Australian shoulders. But my duty here is to accept the law as I find it.

Now, I cannot help thinking that much of the difficulty in this case arises from certain preconceived ideas as to federation and as to the function of the chief Court in a federation. The Supreme Court of the United States has been described by its admirers as the guardian of the Constitution, the final interpreter of the Constitution. Whatever may have been the appropriateness of the title in the case of the highest federal Court in States which had severed their allegiance to the British Crown, there is nothing in the Australian Constitution that lends countenance to such a title, unless it be found in sec. 74. What does sec. 74 say? Those who have been accustomed to hear the phrases used as to the High Court—"the guardian of the Constitution"—"the final authority on constitutional points"—"the final arbiter of the Constitution"—will be surprised to find how little there is in the Constitution to justify such language. Sec. 73 enables the High Court to hear appeals from Supreme Courts and other Courts on any subject; and, if the appellant choose to appeal to the High Court instead of appealing to the King in Council, the High Court's decision is to be final. If we are to infer the purpose of this Court from the mere words of the Constitution, it would seem, so far, as if its main purpose were to act as a Court of appeal on ordinary subjects for Australia—not a Court for merely federal and constitutional subjects as in the United States. Then sec. 74 provides:—

"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 section also provides that, except as therein provided, the Royal Prerogative to grant special leave to appeal from the High Court to the Queen in Council shall not be impaired. That is all. When the litigants have had the advantage of a decision of the High Court on a certain limited class of constitutional subjects of a peculiarily Australian character, there is to be no appeal, even by special leave, to the King in Council—the only possible Court of Appeal—unless the High Court see fit to certify that the question is one which ought to be determined by the King in Council. In other words, the only curtailment of the powers of the King in Council, the only diminution of the prerogative right of the King in Council to entertain appeals from all Courts in the Colonies or Dependencies, is this, that when the High Court has made a pronouncement in any case with regard to matters of the character referred to in sec. 74, there is to be no appeal from the High Court in that case except with the High Court's approval. The King in Council still retains his pre-eminence as the final Court of Appeal, and the final exponent of the law, for all his colonial subjects. The King in Council still has, by virtue of his prerogative, power to entertain an appeal from any and every decision of the High Court as well as of any or every colonial Court, and on all kinds of subjects, constitutional or not, within sec. 74 or not; and the only qualification of that power is that in a certain class of cases—the limited class mentioned in sec. 74—the appeal from the High Court must be sanctioned by the High Court. But still, as between the two Courts, the King in Council is the appellate Court, it is competent to hear any and every appeal from the High Court, and the High Court is the Court from which the appeal can be brought. No appeal can ever be brought from the King in Council to the High Court. The King in Council is on a higher platform than the High Court, although the High Court may prevent the litigant from ascending that higher platform. The law which Australians are to obey is one consistent whole. The law, if we can only find the true law, cannot speak finally with two inconsistent voices; and when an appellate Court says one

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thing, and the Court from which an appeal may lie has said another, the latter Court must thereafter accept the view of the appellate Court, and act upon it. This is no new doctrine. A jurist so cautious and so well equipped as *Sir Frederick Pollock* has expressed it thus :—"Decisions of an appellate Court of last resort are binding on all Courts from which an appeal lies to it, and, of course, on all tribunals inferior to them." And again . . . . "A Court of Appeal not only can reverse or vary decisions from which an appeal is brought, but can overrule previous decisions of Courts below which have not been appealed from." (*First Book of Jurisprudence*, pp. 322, 324.) There are analogous cases in British jurisprudence. For instance, in bankruptcy matters there is no appeal from the Court of Appeal to the House of Lords—the King in his High Court of Parliament—except by leave of the Court of Appeal (*Bankruptcy Act* 1883 sec. 104). But if the House of Lords, on an appeal from some other Court, should decide a point of law differently from the Court of Appeal acting in a bankruptcy matter, can anyone doubt that the Court of Appeal would thereafter accept the ruling of the House of Lords? There was no appeal from the Court of Crown Cases Reserved to the House of Lords—even with leave: 11 & 12 Vict. c. 78; *Judicature Act* 1873, sec. 47. But no one can conceive of the Court of Crown Cases Reserved continuing to act on its own opinion, after the House of Lords, in other proceedings, has pronounced against that opinion. In *The City of Chester* (1), *Lindley* L.J., went even further. He was sitting in the Court of Appeal in Admiralty; and the decisions of the Privy Council were not binding on that Court. But he pointed out the inconvenience of any conflict between the decisions of the Judicial Committee and of Courts of Appeal in England, in matters of mercantile and admiralty law, which are professedly the same in England and in the Colonies; and he said that, even if he doubted the correctness of the decision of the Privy Council, he would be disposed to follow it rather than introduce a diversity of practice. No doubt, the King's Bench Division in England does not regard itself as bound by the decision of the King in Council: *Leask* v. *Scott* (2);

(1) 9 P.D., 182, at p. 207.

(2) 2 Q.B.D., 376.

*Dulieu* v. *White & Sons* (1); and the King in Council is not bound by the decision of the King's Bench Division: *Reg.* v. *Bertrand* (2). But there never can, under any circumstances, be an appeal from the King's Bench to the King in Council or *vice versâ*. The two Courts act in parallel lines which never meet. They never stand in the relation of precedence and sequence. They have jurisdiction over different areas, and over different persons; there never can be an appeal from one Court to the other; and even if the Courts do follow conflicting rules, there is no double-headed law as a result. It is true that the old Courts of King's Bench, Common Pleas, and Exchequer operated over the same area, and yet did not consider themselves bound by one another's decisions. But these Courts were not final Courts—a dissatisfied litigant could still appeal to the House of Lords for a final statement of the law. If, however, the High Court is to continue to act on one principle, assuming to be bound by no opinion but its own on subjects within sec. 74, and if the King in Council continue to act on the opposite principle, it is easy to imagine the difficulties which will arise to plain men who want to obey the law. They will be treated as doing right, if their case be taken to one Court, and as doing wrong if it be taken to the other. In my opinion, the *Commonwealth Constitution Act* does not force us to such a result.

I know that it is asked: "What is the use of sec. 74 if it does not mean that the High Court is to be the final arbiter as to these constitutional points?" I can only answer that sec. 74 is clear and specific. It puts a check on a litigant who has had his case discussed before the High Court and has been defeated. He cannot go to the King in Council unless the High Court approve of his doing so. To this extent the section tends to prevent appeals from being carried from the High Court to London. This result the section expressly achieves; this is the object of the section; and I am of opinion that there is nothing else *necessarily* implied. I lay emphasis on the word "necessarily;" for I think I see a tendency to forget its full stringency. We have no right, in interpreting sec. 74, to treat it as containing what we conjecture, or may conjecture, to have been intended, by the Australian

(1) (1901) 2 K.B., 669.

(2) L.R., 1 P.C., 520, at p. 532.

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Convention, by the Australian voters, by the Australian delegates in London, by the British law officers, or by the Houses of the British Parliament. A certain form of words was agreed to after keen discussion: what is their meaning? They give a definite meaning as they stand. There is nothing ambiguous about them. I am told also that it is my duty to look at the intention of the Act, and to see that that intention be not defeated. If the intention alleged be to make the High Court the final arbiter as to constitutional matters (within a certain limit), my answer is that I cannot find that intention. Such reasoning involves a *petitio principii*. As Lord *Watson* said in *Salomon* v. *Salomon & Co.* (1):— "'Intention of the Legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication." Where words are unequivocal as they stand, we have no right to enlarge their meaning, or to treat other words as implied by reference to the object, or supposed object, of the framers, or to expediency, or to the policy, or supposed policy, of the measure. Our function is to construe the Act, not to improve it, or to alter it on the ground of probable intention: *In re Sneezum* (2); *London County Council* v. *Aylesbury Dairy Co.* (3); and, above all, we should avoid extending the Act where the proposed construction would infringe the prerogative rights of the Crown, or fundamental principles. (See *Maxwell's Interpretation of Statutes*, 4th ed., Ch. 3; *United States* v. *Fisher* (4); *Hardcastle, Statute Law*, 3rd ed., pp. 76, 77). The truth is that this limitation in sec. 74, of the appeals from the High Court to the King in Council, would have, in fact, for all practical purposes made the High Court the final arbiter as to the constitutional matters referred to in sec. 74, if at the same time suitors in the Supreme Courts had been com-

(1) (1897) A.C., 22, at p. 38.
(2) 3 Ch. D., 463.
(3) (1898) 1 Q.B., 106.
(4) 2 Cranch, 202.

pelled by the Constitution to bring their appeals to the High Court—if suitors, thinking themselves aggrieved in the Supreme Courts, had been, by the Constitution, deprived of their right to appeal direct to the King in Council. I have no right to refer to what took place in the federal Convention on this subject. It is now admitted as beyond question, unless sec. 39 (2) (*a*) of the *Judiciary Act* 1903 is valid, that a litigant in the Supreme Court retains the right of appeal to the King in Council direct; and, in my opinion, sec. 74 merely restrains litigants who have been heard by the High Court—litigants who have had the benefit of a decision of the High Court on certain constitutional points—from taking the case to the King in Council without the approval of the High Court.

I am aware, of course, of the inference sought to be drawn from the words of sec. 74 when closely scrutinised—that no appeal shall be permitted to the Queen in Council from a *decision* of the High Court upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers, &c. It is urged that the word "decision" does not refer to the judgment or order of the High Court, but to a point of law decided; and that the section prohibits the King in Council from questioning in any proceedings the correctness of a ruling of the High Court in any other proceeding. For instance, the argument is that in *Webb* v. *Outtrim* (1), the King in Council had no power to question, much less to overrule, the doctrines laid down by the High Court in *Deakin* v. *Webb* (2). As I understand the argument in its best form, there is nothing to prevent the King in Council from giving special leave to appeal from the High Court from any judgment so far as it involves questions other than those mentioned in sec. 74; and there is nothing to prevent an appeal direct from the Supreme Court of a State to the King in Council, even when it involves questions of the kind mentioned in sec. 74. In the latter case, the King in Council may even decide questions within the ambit of sec. 74. But in all cases, it is said, as soon as the High Court has pronounced on a question within the ambit of sec. 74, that pronouncement is final, and the King in Council must accept it as law, unless the High Court certify for

(1) (1907) A.C., 81. (2) 1 C.L.R., 585.

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determination by the King in Council. This scheme for subordinating the King in Council to the High Court as regards these questions has the merit of being clear and consistent; but it is not to be found in the Constitution. The natural way of expressing the scheme would be something like this:—"No pronouncement of law made by the High Court shall be subject to be revised or overruled in the same case, or in any other case, by the King in Council, if it be made upon any question arising as to the limits *inter se* of the constitutional powers," &c. But do the words of sec. 74 allow of such a paraphrase? As for the force given by the argument to the words "decision . . . upon any question, howsoever arising, as to the limits," &c., it may be that the argument is right. I should have thought, indeed, that the word "decision" merely sums up, in one word, what had been referred to in the previous section in the cumbrous phraseology of "judgment, decree, order or sentence"; although, perhaps, the word "decision" applies to the judgment in its aspect of expounding the law rather than in its function of directing a litigating party to do or not to do an act. Sec. 74, as it relates to the King in Council, ought to be read with the general Act prescribing the machinery for appeals to the King in Council, &c.—3 & 4 Wm. IV. c. 41: and in this Act the word "decision" is clearly used as an equivalent for "determination, sentence, rule, or order" of the Colonial Court (cf. preamble, and secs. 3, 21, 24). But let the meaning of the word "decision" be conceded to the appellant, how much further does it carry him? He omits to recognize the essential force of the word "appeal." What is forbidden is only an *appeal* from the High Court, and there is no *appeal* except in the identical case which the High Court has decided. If a point of law be decided by the High Court in an action *A.* v. *B.*, and if the same point of law came up for discussion—say on an appeal from a Supreme Court—in *C.* v. *D.*, that is not an appeal from the High Court, or from a decision of the High Court. It is not an appeal from the High Court when a party who is beaten in the Supreme Court appeals from the Supreme Court to the King in Council, even though he question the law as laid down by the High Court in another case. An appeal is defined in Wharton's Law Lexicon as "the *removal of a*

*cause* from an inferior to a superior Court, for the purpose of testing the soundness of the decision of the inferior Court." The old expression was that A. appeals B. (Fr. *appeler*), calls or summons him to the higher Court, with regard to a judgment or order made or refused. The "appeal" must be in a cause between the parties; not in a cause between other parties. This is the natural, obvious, primary and technical meaning of the word; and there is no ground for giving it any other meaning in sec. 74, especially when it is used in that natural, obvious, primary and technical meaning, repeatedly, in the preceding sec. 73. Unless the words of sec. 74 are to be distorted so as to fit some preconceived theory as to the High Court, the construction proposed to be given to the section is, to my mind, absolutely impossible; and if there is any case in which, more than any other, we are not justified in adopting a strained interpretation, it is in a case such as this, in which the strained interpretation would further limit the prerogative of the King, as the fountain of justice, as the final expounder of his laws.

This consideration leads me naturally to a brief review of the historical and constitutional position of the King in Council. According to the theory of British law, the King is the fountain of justice—the supreme magistrate—and the Courts are his delegates. "All jurisdiction exercised in these kingdoms that are in obedience to our King is derived from the Crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence, all Judges must derive their authority from the Crown, by some commission warranted by law." (Bacon's Abridgment, *Prerogative*, *D.* 1). The jurisdiction of the King in Council has its origin in the common law of England. The Great Council of the King gradually branched off into Parliament; and partly by Statute, partly by usage, final appeals of suitors in Great Britain and Ireland are (nearly all) brought to the King in the House of Lords. Even to this day the appellant petitions that the matter of the judgment appealed from may be reviewed before "the King in his Court of Parliament." But the final appeals from the Dominions beyond the seas have always been brought to the King in His Privy Council.

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The King in Council has always had authority to hear appeals from and finally review the decisions of all Colonial Courts whensoever erected, and on any and every subject: *The Queen* v. *Joykissen Mookerjee* (1); *Falkland Islands Co.* v. *The Queen* (2); *In re Lord Bishop of Natal* (3); *Reg.* v. *Bertrand* (4); *In re Dillet* (5); *Anson, Constitution*, 2nd ed., p. 465; *Safford and Wheeler Privy Council Practice*, pp. 699, 720. By the Act 3 & 4 Wm. IV. c. 41, a permanent Judicial Committee was created out of the Privy Council to hear the colonial and other appeals; and in the recitals of the Act appears an authoritative statement of the position:—"And whereas from the *decisions* of various courts of judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council: And whereas matters of appeal or petition to His Majesty in Council have usually been heard before a committee of the whole of His Majesty's Privy Council, who have made a report to His Majesty in Council, whereupon the *final* judgment or determination hath been given by His Majesty." This recital applies unquestionably to decisions of all kinds, given by Courts of all kinds, whensoever created or to be created; and it applies to the High Court, except so far as the prerogative of the King is qualified, expressly or by irresistible inference, by secs. 73 and 74 of our Constitution. Under this Act of Wm. IV. all the appeals are referred to the Judicial Committee, and this Committee makes a report or recommendation to His Majesty in Council "for his decision thereon as heretofore." It will be noticed that, legally, the decision rests with the King in Council. He is not under any compulsion to adopt the report of the Judicial Committee. "The judgment is the King's only; but by way of advice the councillors deliver their opinion, which he increaseth or moderateth at his royal pleasure": *Hudson's Collectanea Juridica, II.*, § iii. The order made is the order of the King in Council, although it recites the report of the Judicial Committee. He still remains "the fountain of justice," the ultimate exponent of the law, the highest and final Court of appeal. It is his duty to exercise an appellate juris-

(1) 1 Moo. P.C.C. (N.S.), 272, at p. 295.
(2) 1 Moo. P.C.C. (N.S.), 299, at p. 313.
(3) 3 Moo. P.C.C. (N.S.), 115.
(4) L.R. 1 P.C., 520.
(5) 12 App. Cas., 459.

diction with a view, not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally: " *Reg.* v. *Bertrand* (1). Are the words of sec. 74 of the Constitution sufficient to deprive the King in Council of this prerogative? Nay, more—are they sufficient to oblige the King in Council to accept as law whatever the High Court may decide as to matters within sec. 74; or do these words merely effect what they expressly say—prevent a suitor, who has had the advantage of the opinion of the High Court, from taking his case further to the King in Council, without the approval of the High Court? It has to be remembered that no prerogative right of the King can be taken away except by precise words; or, as it is sometimes put, an intention to diminish the prerogative cannot be inferred from an Act of the British Parliament, unless the terms are explicit to that effect, or are such as to make the inference irresistible: *Théberge* v. *Laudry* (2); *Cushing* v. *Dupuy* (3).

This is a question as to the operation of a New South Wales *Income Tax Act*. How far do the provisions for the appeal to the King in Council from New South Wales Courts affect the matter? By the Act 9 Geo. IV. c. 83, sec. 15, His Majesty was empowered to make an order in Council, allowing "*any* person or persons feeling aggrieved by *any* judgment, decree, order, or sentence of the Supreme Court (of New South Wales), to appeal therefrom to His Majesty in Council in such manner, within such time, and under and subject to such rules, regulations, and limitations as His Majesty by any such . . . . . orders in Council shall appoint and prescribe." Under this Act, an Order in Council was made November 13th 1850 prescribing that it shall be lawful for "*any* person or persons" to appeal to Her Majesty in Her Privy Council "from *any* final judgment, decree, order, or sentence of any such Court," provided that the matter in dispute is over £500 in value, and provided that security be given for the prosecution of the appeal, and for costs, to the satisfaction of the Supreme Court. It will be observed that the words of this Act, and of the subsequent

(1) L.R. 1 P.C., 520, at p. 530. (2) 2 App. Cas., 102, at pp. 106, 108.
(3) 5 App. Cas., 409, at p. 417.

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Act 7 & 8 Vict. c. 69, and of the Orders in Council thereunder are universal — *any* person aggrieved in the Supreme Court may appeal from *any* judgment. There is no limit as to subject matters, although there is a limit as to amount or value. These Acts are made by the same authority as the *Commonwealth Constitution Act*—the King and Houses of Parliament of Great Britain and Ireland—and these Acts and the *Constitution Act* must be read so as to give full effect to both, so far as the *Constitution Act* does not repeal the prior Acts expressly or by necessary implication. There is certainly no express repeal, no express amendment, of these prior Acts by the *Constitution Act*. There is nothing in the *Constitution Act* to show any intention to limit or qualify the right of appeal from the Supreme Court in respect of any judgment, or any point or matter in that judgment, whether it come under federal jurisdiction, or within the limited class of subjects referred to in sec. 74, or within any class of subjects whatsoever. The King in Council is not shorn of his authority to entertain the appeal of his New South Wales subjects from the Supreme Court, or of his right, on that appeal, to form and express his own conclusions on all relevant issues of law and of fact. He is not bound to accept the view of the High Court as expressed in cases which have gone to the High Court. He still retains his pre-eminence as the final interpreter of the law. He cannot, it is true, *reverse* an actual decision of the High Court unless the cause in which that decision has been given came before him by way of appeal, and it cannot come before him on appeal from the High Court, unless with the High Court's approval. In such a case—as for example in *Deakin* v. *Webb* (1)—the decision of the High Court is final as between the parties to that cause. But though the King in Council cannot *reverse* a decision of the High Court in a case which has not come before him, there is nothing, that I can find, to limit his power to review, and, if need be, to overrule, any pronouncement of law made by the High Court, or by any other Court of his Dominions beyond the seas; and inasmuch as the King in Council has overruled the decision of this Court in *Deakin* v. *Webb* (1), I think it to be the duty of this Court to accept His

(1) 1 C.L.R., 585.

Majesty's official opinion as finally stating the law. I am therefore of opinion that this appeal should be dismissed.

An application was made for a certificate of the High Court under sec. 74 of the Constitution.

*Pigott* for the respondents, in support.

*Ferguson* for the appellant.

*Woinarski* for the Commonwealth.

The application was refused for the reasons given in *Flint* v. *Webb*, *post*, p. 1178.

Solicitor, for appellant, *R. Sullivan*, Sydney.

Solicitor, for respondents, the Crown Solicitor for New South Wales.

Solicitor, for intervener, *Powers*, Commonwealth Crown Solicitor.

*Appeal allowed. Judgment below reversed. Judgment for the defendant with costs. Respondents to pay costs of appeal.*

C. A. W.