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THE KING v. AH LIN.

Appeal allowed. Penalty reduced to one shilling. Appellant to pay costs of appeal.

Solicitor, for appellant, *Crown Solicitor for Queensland.*

Solicitors, for respondent, *Morris & Fletcher.*

[HIGH COURT OF AUSTRALIA.]

HUDDART, PARKER AND CO. PROPRIETARY LIMITED . . . DEFENDANTS, APPELLANTS;

AND

MOOREHEAD . . . . . INFORMANT, RESPONDENT.

APPLETON . . . . . DEFENDANT, APPELLANT;

AND

MOOREHEAD . . . . . INFORMANT, RESPONDENT.

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MELBOURNE, 1908.

October 15, 16, 19, 20.

1909.

March 8, 9, 10, 11, 12, 15, 16; *June* 7.

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

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

Commonwealth legislation, validity of—Interference with internal trade and commerce of States—Power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth"—Limits of power—Creation of corporations—Control of corporations, their status, capacities and contracts—Inquiry by Comptroller-General of Customs—

Compulsory answers—Judicial power of Commonwealth—Trial by jury—Inter-state Commission—Australian Industries Preservation Act 1906 (*No.* 9 *of* 1906) (*amended by Australian Industries Preservation Act* 1907 (*No.* 5 *of* 1908)), *secs.* 4, 5, 7, 8, 15B—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (*i.*), (*xx.*), 71, 80, 101.

By the whole Court. Sec. 15B of the *Australian Industries Preservation Act* 1906 (as amended by the *Australian Industries Preservation Act* 1907) is *intra vires* the Commonwealth Parliament and valid.

The inquiry authorized by that section is not inconsistent with the right to trial by jury conferred by sec. 80 of the Constitution.

Such an inquiry is not an exercise of the judicial power of the Commonwealth.

Such an inquiry is not an incident of the execution and maintenance of the provisions of the Constitution relating to trade and commerce within the meaning of sec. 101 of the Constitution, and need not be entrusted to the Inter-State Commission.

By the whole Court. Sec. 51 (xx.) of the Constitution does not confer on the Commonwealth Parliament power to create corporations, but the power is limited to legislation as to foreign corporations and trading and financial corporations created by State law.

By the Court, *Isaacs* J. dissenting. Secs. 5 and 8 of the *Australian Industries Preservation Act* 1906 are *ultra vires* the Commonwealth Parliament and invalid.

By *Griffith* C.J. and *Barton* J. Sec. 51 (xx.) of the Constitution confers upon the Commonwealth Parliament power to prohibit foreign corporations and trading and financial corporations formed under State laws from engaging in trade and commerce within a State, as distinguished from trade and commerce between States or with foreign countries, or to impose conditions subject to which they may engage in such trade and commerce, but does not confer upon the Commonwealth Parliament power to control the operations of such corporations which lawfully engage in such trade and commerce.

By *O'Connor* J. The power conferred by sec. 51 (xx.) of the Constitution is limited to the making of laws with respect to the recognition of corporations as legal entities within the Commonwealth, and does not include a power to make laws for regulating and controlling the business of corporations when once they have been so recognized and are exercising their corporate functions by carrying on business in the Commonwealth.

By *Isaacs* J. Sec. 51 (xx.) confers on the Commonwealth Parliament power to control the conduct of the specified corporations in relation to outside persons, but not the powers and capacities of corporations, and secs. 5 and 8

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of the *Australian Industries Preservation Act* 1906 are a valid exercise of such power.

By *Higgins* J. The power conferred by sec. 51 (xx.) of the Constitution on the Commonwealth Parliament is a power to legislate with respect to the classes of corporations named, as corporations—that is, to regulate the status and capacity of such corporations and the conditions on which they may be permitted to carry on business; but does not include a power to regulate the contracts into which corporations may enter within the scope of their permitted powers. Secs. 5 and 8 of the *Australian Industries Preservation Act* 1906 are not legislation with respect to such corporations, but legislation with respect to trade and commerce.

APPEALS by way of orders to review.

On 22nd September 1908 the Comptroller-General of Customs, in writing, stated that he believed offences had been committed against secs. 5 (1) (*a*) and 8 (1) of Part II. of the *Australian Industries Preservation Act* 1906 (as amended by the *Australian Industries Preservation Act* 1907) in connection with the trade in coal, and called upon Huddart, Parker & Co. Limited, a company duly formed under the laws of Victoria, to answer in writing several questions, the nature of which is not material to this report. On the same day the Comptroller-General, in writing, required William Thomas Appleton, the manager of the above named company, to answer the same questions, stating in this case that he believed that offences had been committed against secs. 4 (1) (*a*) and 7 (1) of the Act. Both the company and Appleton refused to answer the questions, and they were charged on information by R. W. Moorehead, an officer of Customs, with having refused to answer the questions. The informations were heard at the Court of Petty Sessions at Melbourne on 28th September 1908, and in each case the defendant was fined £5.

An order *nisi* to review the conviction of the company was obtained on the grounds :—

1. That sec. 5 (1) (*a*) and 8 (1) of the *Australian Industries Preservation Act* 1906 are unconstitutional and *ultra vires*, and, therefore, proceedings cannot be lawfully taken under sec. 15B of such Act (as amended), based upon a statement of the belief of the Comptroller-General that an offence has been committed against such sections.

2. That sec. 15B is itself unconstitutional and invalid.

3. That if the arriving at a belief by the Comptroller-General under the provisions of sec. 15B is a judicial proceeding, or *quasi*-judicial proceeding, no opportunity was given to the defendants of being heard by the Comptroller-General before he arrived at such belief.

An order *nisi* was also obtained to review the conviction of Appleton on the 2nd and 3rd grounds above set out.

Mitchell K.C., and *Irvine* K.C. (with them *Harrison Moore*), for the appellants. Secs. 5 and 8 of the *Australian Industries Preservation Act* 1906 are invalid. They are expressly intended to extend to the internal trade and commerce of the States, as will be seen from sec. 10 (1). This legislation purports to be an exercise of the power conferred by sec. 51 (xx.) of the Constitution. Legislation as to the internal trade of the States is under the Constitution within the exclusive domain of the States, and that power of the States must be read together with the power given to the Commonwealth Parliament by sec. 51 (xx.): *Citizens' Insurance Co. of Canada* v. *Parsons* (1). The Commonwealth Parliament can only limit a corporation's enterprises so far as they are within the scope of the Commonwealth power of legislation, otherwise the Commonwealth Parliament could revolutionize the law of contracts and torts so far as regards corporations. The Commonwealth Parliament cannot prescribe conditions as to a corporation's business which interfere with the powers of the State Parliaments to deal with internal trade: *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2): *The King* v. *Barger* (3); *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (4). Parliament might limit the power of a company to make contracts by providing that they should only contract under seal, or in the event of a certain amount of capital being paid up, or Parliament might forbid discrimination in one State against companies formed in another State: See *Crutcher* v. *Kentucky* (5). But Parliament cannot forbid companies from carrying on certain businesses. Under this legislation, if one party to a contract is a

(1) 7 App. Cas., 96.
(2) 6 C.L.R., 469.
(3) 6 C.L.R., 41.
(4) 9 App. Cas., 157, at p. 166.
(5) 141 U.S., 47, at p. 56.

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company and the other an individual, the Act would bind the company but not the individual. The power to legislate as to corporations does not mean a power to make any laws whatever which apply to corporations: *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1). It does not include a power to legislate as to the incorporation of companies.

[O'CONNOR J.—The idea of sec. 51 (xx.) of the Constitution is that what is generally known as the law as to companies should be put on a general footing all over Australia: *Westlake's Private International Law*, 4th ed., p. 358.

ISAACS J.—The whole question depends on what is the scope of the power: *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (2); *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (3); *Toronto Corporation* v. *Canadian Pacific Railway Co.* (4); *United States* v. *43 Gallons of Whiskey* (5).

GRIFFITH C.J.—The question is, is this law truly ancillary to the power to legislate as to corporations?]

Sec. 15B of the *Australian Industries Preservation Act* 1906 is also invalid. By sec. 13 (2) a second offence is made indictable. Then, in sec. 15A, where indictable offences are intended to be excluded, the exclusion is expressly made. The result is that sec. 15B is expressly intended to apply to offences whether they are indictable or not. There is no limitation of the time when this section is to be put into operation, and it might be acted upon as well after as before criminal proceedings have been instituted. It is in effect discovery in aid of criminal proceedings exerciseable before or after proceedings are instituted. If it is, then it is part of the judicial power of the Commonwealth which must be exercised by the High Court or some other federal Court: Sec. 71 of the Constitution. If the section contemplates a written statement of a definite charge, the investigation in relation to which the inquiry is made is judicial in its character, and one that can only be made by a Court of Justice, and it relates to a matter wherein redress can only be had in a judicial proceeding. That brings the case clearly within *Kilbourn* v. *Thompson* (6).

(1) (1896) A.C., 348, at p. 363.
(2) (1899) A.C., 367, at p. 372.
(3) (1907) A.C., 65, at p. 68.
(4) (1908) A.C., 54, at p. 59.
(5) 93 U.S., 188, at p. 197.
(6) 103 U.S., 168, at pp. 182, 192.

[HIGGINS J.—In *In re Chapman* (1) that case is distinguished on the ground that there the subject matter was not within the jurisdiction of the House of Representatives, and it was held that where the subject matter was within the jurisdiction of the Senate the power, although it was judicial in its nature, might be exercised by the Senate.]

That was because the power was given to the Senate by the Constitution. See *Sutherland's Notes on the United States Constitution*, p. 62.

[ISAACS J.—The word "judicial" has two meanings. "It may refer to the discharge of duties exerciseable by a Judge or Justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind": *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (2).]

The term "judicial power" in our Constitution has a wider meaning than in the United States Constitution. In the latter case the term is defined by Art. III., sec. 2, and it has been held to be restricted to the trial and determination of cases in federal Courts: *Robertson* v. *Baldwin* (3). There is no such limitation in our Constitution: See secs. 71, 75. Under our Constitution any act which, at the time of federation, would be an exercise of judicial power, if done by a federal Court or a Court invested with federal jurisdiction in connection with a question of civil rights between individuals or with a criminal charge, is an exercise of judicial power. So an examination under the *Australian Industries Preservation Act* for the purpose of finding out whether a crime has been committed is an exercise of judicial power. The power conferred by sec. 15B cannot be supported by analogy to the power in revenue matters, which is based on the principle that, in the administration of the great Departments of the Commonwealth, Parliament may entrust to the officers of those Departments authority to make inquiries for the purposes of such administration, as in *R.* v. *Arndel* (4); *Murray's Lessee* v. *Hoboken Land and Improvement Co.* (5).

[HIGGINS J.—In *Nishimura Ekiu* v. *United States* (6), a

(1) 166 U.S., 661.
(2) (1892) 1 Q.B., 431, at p. 452.
(3) 165 U.S., 275, at p. 279.
(4) 3 C.L.R., 557.
(5) 18 How., 272.
(6) 142 U.S., 651.

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decision of an immigration officer as to the right of an alien to land was held to be final.]

That case depends on the same principle as is applicable to revenue matters. It may also be supported on the ground that the power of exclusion of aliens may be exercised through administrative officers. He referred to *Wong Wing* v. *United States* (1); *Musgrove* v. *Chung Teeong Toy* (2); *Kelly* v. *Pittsburgh* (3).

[ISAACS J. referred to *Chin Yow* v. *United States* (4).

GRIFFITH C.J.—There is no power in the *Customs Act* 1901 like that in sec. 15B.

Duffy K.C. referred to secs. 64, 234 of the *Customs Act* 1901.

GRIFFITH C.J.—The object of these sections is to enable the Government to do something which it has to do itself.]

The object is to carry out the administration of the Department.

[GRIFFITH C.J.—There are three Departments of Government, executive, administrative and judicial. If an act is for the purpose of carrying out the executive or administrative Departments, it is not part of the judicial power, but, if it is in aid of the judicial power, it may be part of the judicial power.]

This inquiry is in aid of criminal proceedings. A similar provision in a United States Customs Statute, where in revenue cases the case for the prosecution was to be taken as admitted unless the defendant produced his books in Court, was held to be void as applied to a suit for a penalty or forfeiture of the defendant's goods: *Boyd* v. *United States* (5).

[ISAACS J. referred to *Adams* v. *New York* (6); *Hale* v. *Henkel* (7).]

This is a criminal case just as is an inquiry by a grand jury: *Counselman* v. *Hitchcock* (8); *Hale* v. *Henkel* (9). Under sec. 15B the person questioned must be in a position to raise all matters which go to show that he is not bound to answer: *Inter-State Commerce Commission* v. *Brimson* (10). The primary object of sec. 15B is to get evidence. If that is one of the objects

(1) 163 U.S., 228.
(2) (1891) A.C., 272, at p. 282.
(3) 104 U.S., 78.
(4) 208 U.S., 8.
(5) 116 U.S., 616.
(6) 192 U.S., 585, at p. 597.
(7) 201 U.S., 43.
(8) 142 U.S., 547.
(9) 201 U.S., 43, at p. 60.
(10) 154 U.S., 447, at p. 479; 155 U.S., 1.

the section is void. That that is the object see secs. 15B (4), 15C, 15D, 15E. Not only is the information wanted but also the means of proving the offence. If sec. 15B is valid the Court cannot inquire into the ground of the Comptroller's belief: *Robinson* v. *Sunderland Corporation* (1); *Addyston Pipe and Steel Co.* v. *United States* (2). If this is not really a power of discovery which should be exercised by a Court, it is a power which should be exercised by the Inter-State Commission whose power of adjudication is an exception out of the judicial power: *Inter-State Commerce Commission* v. *Brimson* (3), and the Commission must be created before the power can be exercised: See secs. 101 *et seq.* of the Constitution. Sec. 15B by making the answers compulsory, and making them evidence against the person who answers, offends against sec. 80 of the Constitution, at any rate in respect of indictable offences. The right to a trial by jury implies the ordinary common law incidents for the protection of an accused person: *Cooley's Constitutional Limitations*, 7th ed., pp. 287, 442, 453; *Callan* v. *Wilson* (4).

[ISAACS J. referred to *Harvard Law Review*, April 1908; *Inter-State Commerce Commission* v. *Harriman* (5).]

One of those incidents is that a man shall not be compelled to give evidence against himself: *Montana Co.* v. *St. Louis Mining and Milling Co.* (6); *Thompson* v. *Utah* (7); *Capital Traction Co.* v. *Hof* (8).

The legislative, executive, and judicial powers of the Commonwealth are not only separate but are mutually exclusive. A power that is found to be an exercise of the judicial power cannot be invested in any authority except a judicial authority. The legislative power may add to the executive power by creating new laws, and, whatever may be the definition of the judicial power, Parliament can enlarge its scope but cannot change its nature, but the executive and judicial powers must remain distinct. Each of the three Departments of Government has of necessity certain inherent powers, amongst others, that of informing itself of things necessary to carry out its functions. Thus the Execu-

(1) (1899) 1 Q.B., 751.
(2) 175 U.S., 211.
(3) 154 U.S., 447.
(4) 127 U.S., 540, at p. 549.
(5) 157 Fed. Rep., 432.
(6) 152 U.S., 160, at p. 169.
(7) 170 U.S., 343, at pp. 347, 349.
(8) 174 U.S., 1.

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tive may issue royal commissions, with power to compel witnesses to answer questions; Parliament may invest a committee of either House with a similar authority. So it is equally inherent in the judicial power that steps shall be taken to obtain information on matters necessary to an adjudication. When, therefore, an Act of Parliament purports to confer ancillary powers of this kind, which may be ancillary to either the judicial or the executive power, it is the duty of this Court to separate the ancillary powers from one another. If one of these ancillary powers is conferred upon a Department which has not the power to which it is ancillary, then the whole authority goes, or at least the particular ancillary power goes. The question, then, is whether the particular function in question properly and in substance falls within the realm of the judicial power. It is not sufficient to cut out of sec. 15B the thing which is aimed at and say that the section is innoxious. The function of the Comptroller under sec. 15B is to obtain evidence, and that is quite as much an ancillary to the judicial power as is a proceeding to perpetuate testimony: *Daniell's Chancery Practice*, 7th ed., p. 1271; or a bill for discovery.

[HIGGINS J. referred to *Black's Constitutional Law*, 2nd ed., p. 419.]

If a Court of Insolvency were created by the Commonwealth with power of compulsory examination, and a provision that evidence thus obtained from the insolvent might be used against him on his trial for an offence, the power of examination would be ancillary to the judicial power, and could only be conferred upon a Court. Even if sec. 15B were for the purpose of enabling the Attorney-General to institute proceedings, the power conferred would not be ancillary to an executive power, for the Attorney-General in instituting proceedings is not acting as an executive officer of the Government, but in aid of the judicial power. There is no executive power given to the Comptroller to which the power in sec. 15B can be ancillary. The only person who can act upon the information obtained is the Attorney-General. The power given in sec. 15B is not different in kind from that given to a Justice of the High Court by sec. 19 (5). Sec. 15B must mean either that a particular offence must be

believed to have been committed, and that the offence must be set out with sufficient particularity to enable this Court to say whether it is an offence at all, or else that the Comptroller is not obliged to set out the particular offence or who is engaged in it. In the latter view, then, upon a prosecution for not answering a question, this Court can never decide whether there was any offence alleged or whether there were any grounds for believing that an offence had been committed, and the Comptroller's determination of facts and law would be conclusive.

Duffy K.C. and Dr. *Cullen* K.C. (with them *Starke*), for the respondent. Secs. 5 and 8 of the *Australian Industries Preservation Act* 1906 read literally and naturally are within the powers conferred by sec. 51 (xx.) of the Constitution. If they are not, they should be cut down so as to be within that power. Sec. 51 (xx.) of the Constitution gives the Commonwealth Parliament authority to create corporations and to make laws with respect to everything which has relation to the powers and scope of corporations. The real question is whether these sections are in fact legislation dealing with corporations or legislation dealing with some other subject and applying it to corporations. The power extends to regulating the internal management and restraining the external affairs of corporations, and, in particular, it extends to enabling Parliament to forbid corporations doing certain things. By the *Federal Council of Australasia Act* 1885, sec. 15, power was given to deal with the "status" of corporations. See *Quick and Garran's Australian Constitution*, p. 604. When the Constitution was granted there were provisions in the United States Constitution and in the *British North America Act* 1867 dealing with the power of the federal authority to legislate as to corporations. In the former case Congress had only an ancillary power to deal with corporations. It might create corporations for several purposes, mainly under the Inter-State and foreign commerce power, and could prevent interference by State laws with corporations so created. In the latter case under secs. 91 and 92 the Provinces had power to create corporations with provincial objects only, and the Dominion had power to create corporations for all other purposes, either

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under the general residuary power or to carry out the specially enumerated powers. In the Australian Constitution the words of the *Federal Council of Australasia Act* referring to "status" are omitted, and the words used in sec. 51 (XX.) are much wider. They merely define the object of legislation.

[ISAACS J. referred to *Employers' Liability Cases* (1).]

There is no reason why the power as to corporations should not be read as being equally as large as that as to aliens (sec. 51 (xix.)): *Robtelmes* v. *Brenan* (2). If sec. 51 (xx.) does not give power to create corporations, there is an incidental power in the Commonwealth Parliament to create corporations in order to carry out the other powers, and sec. 51 (xx.) gives power to deal with those corporations as well as corporations created by the States and foreign corporations. The power is a general one to legislate as to these corporations, though not necessarily an exclusive power. It would be a proper limitation for the Commonwealth Parliament to impose on a corporation created by it that the corporation should not monopolize any part of the trade of the Commonwealth, and the Commonwealth Parliament could give such a corporation power to hold land, although that would not prevent a State Parliament from enacting that no land should be held in that State by such a corporation. If the Commonwealth Parliament can make such provisions as to corporations it creates, it can do so also as to State created and foreign corporations, and conditions which manifestly might be imposed on the creation of a corporation may equally be imposed on corporations which the Parliament already finds created. So the Commonwealth Parliament may limit the capacities of corporations created by the States or of foreign corporations to do certain things which under the law of a State they may lawfully do.

[GRIFFITH C.J.—The words of sec. 51 (XX.), if taken alone, may be wide enough to confer such a power, but can such a power be reconciled with the implied prohibition in sec. 51 (I.) against interfering with intra-State trade and commerce ?]

Although an exercise of the power may inconvenience a State, that does not prevent the exercise being valid. The words of sec. 51 (XX.) must be given a fair meaning and, if so interpreted,

(1) 207 U.S., 463, at p. 493. (2) 4 C.L.R., 395, at p. 404.

they give a power to interfere with the internal trade and commerce of the States, the implied prohibition is of no avail. Secs. 5 and 8 are really legislation dealing with corporations. It is similar to a provision that federal public servants should not join secret societies. The mere fact that the Act was called one dealing with secret societies would not affect its character or validity as an Act dealing with federal public servants.

The provisions of sec. 15B do not interfere with the right to trial by jury provided for in sec. 80 of the Constitution. That a man shall not be compelled to incriminate himself is not an incident of trial by jury, and the Commonwealth Parliament may compel him to do so if it chooses just as has been done in the States and elsewhere: *Evidence Act* 1890 (Vict.) sec. 56; *R.* v. *M'Cooey* (1); *Callan* v. *Wilson* (2); *Cooley's Constitutional Limitations*, 6th ed., pp. 379, 389; *Miller's United States Constitution*, pp. 313, 485; *Phipson on Evidence*, 4th ed., p. 197.

[ISAACS J. referred to *United States* v. *Patterson* (3).]

The inquiry authorized by sec. 15B is not judicial. It is the duty of the Comptroller to find out whether an offence has been committed and by whom, and he is given the power in sec. 15B with the object of getting information from any person to enable him to give that information to the Minister. No judicial proceeding is begun until the Attorney-General directs a prosecution. *Kilbourn* v. *Thompson* (4) does not support the contention that this is a judicial proceeding. It only decided that, in investigating a matter as to which it had no power of investigation, Congress had no power to commit for contempt. Where the subject matter was in the jurisdiction of the Senate it was held in *In re Chapman* (5) that there was power to commit for contempt. It is essential to a judicial proceeding that rights of some sort shall be determined or that the Court must be in a position to determine something.

[ISAACS J. referred to *R.* v. *Local Government Board* (6); *Miller's Lectures on the United States Constitution*, pp. 313-315.]

The determination of the Attorney-General to prosecute is not judicial, and this inquiry is merely to enable him to come to a

(1) 5 V.L.R. (L.), 38.
(2) 127 U.S., 540, at p. 549.
(3) 150 U.S., 65.
(4) 103 U.S., 168.
(5) 166 U.S., 661.
(6) (1902) 2 I.R., 349, at p. 373.

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determination. There is nothing in this inquiry which characterizes it as being ancillary to the judicial power. Similar powers are given to executive officers under the *Customs Act* 1901, sec. 234 (see also secs. 38, 195, 196); *Audit Act* 1901, sec. 13; and *Census and Statistics Act* 1905, sec. 18. If sec. 15B contained nothing about the evidence being used on a subsequent prosecution, undoubtedly the inquiry would be merely an administrative inquiry, and the fact that it may be so used does not alter the nature of the inquiry.

An act, which if done by a judicial authority is an exercise of the judicial power, is not necessarily an exercise of the judicial power when done by an executive authority.

An inquiry made in order to determine whether judicial proceedings shall be instituted is not judicial: *People* v. *Hayne* (1); *Sutherland's Statutes and Statutory Construction*, 2nd ed., vol. I., p. 10; *Bouvier's Law Dictionary*, vol. II., p. 42. Even if this is an exercise of the judicial power, the Comptroller is either a Court formed for the particular purpose, or he is a delegate of the Court for the particular purpose, and is in the same position as a commissioner for taking evidence. This power is not one which can only be exercised by the Inter-State Commission. As to the origin and powers of the Inter-State Commerce Commission in the United States, see *Inter-State Commerce Acts* 1887 and 1893; *Snider's Annotated Inter-State Commerce Commission*; *Kentucky and I. Bridge Co.* v. *Louisville and N.R. Co.* (2); *Inter-State Commerce Commission* v. *Cincinnati N.O. and T.P. Railway Co.* (3).

Sec. 51 (xx.) gives the Commonwealth Parliament power to put the law as to companies upon a uniform basis throughout the States in the same way as in the case of the law as to other commercial matters. If in sec. 51 (xx.) the word "companies" were used in place of the words which are used there, the scope of the sub-section would extend to matters which are ordinarily to be found in a Statute as to companies. The only object of using the particular words is to exclude domestic non-trading and non-financial corporations. If a Commonwealth Act is directed

(1) 17 Am. St. R., 211, at p. 217. (2) 37 Fed. Rep., 567.
(3) 64 Fed. Rep., 981.

to something which differentiates corporations from individuals, it is within sec. 51 (xx.). Corporations always have been the subject of special legislation. See *Customs and Inland Revenue Act* 1885 (48 & 49 Vict. c. 51), sec. 11. The prohibition in secs. 5 and 8 of the *Australian Industries Preservation Act* 1906 bear a real relation to the peculiar qualities of corporations as distinguished from individuals, and the Court should not say that the law is not one relating to corporations unless it is clearly shown that no such relation exists. Under sec. 51 (xx.) the Parliament can forbid the corporations from engaging in intra-State trade at all, and so it can permit them to engage in that trade on certain conditions only. The Parliament can prohibit those companies from doing what the laws of the States permit, although it is not contended that it can authorize the doing of acts which a State law forbids. The express power given by sec. 51 (xx.) must not be cut down by the powers reserved to the States: *The King* v. *Barger* (1); *Citizens Insurance Co. of Canada* v. *Parsons* (2). Under sec. 15B the forming by the Comptroller of a belief is the only condition precedent to the inquiry. He need not have any complaint. The forming of a belief is not an exercise of the judicial power: *R.* v. *Arndel* (3); nor is the making an inquiry: *Clough* v. *Leahy* (4). If sec. 15B is to be regarded as legislation as to evidence, it is authorized by sec. 51 (xxxix.) as being incidental to a power vested in the federal judicature: *Fong Yue Ting* v. *United States* (5). If sec. 15B enables a person on his trial to be questioned, it does no more than is done lawfully under the *Customs Act* 1901. The section does not infringe the provisions in the Constitution as to trial by jury. Under English law admissions made at a Coroner's inquiry may be used at the trial of the person who makes them: *Archbold's Criminal Practice*, 22nd ed., p. 300, and also those made by a bankrupt: *R.* v. *Scott* (6). The Commonwealth may as to criminal procedure depart from that which ordinarily prevails: *Riel* v. *The Queen* (7). He also referred to *Moses* v. *Parker* (8);

(1) 6 C.L.R., 41, at p. 69.
(2) 7 App. Cas., 96.
(3) 3 C.L.R., 557.
(4) 2 C.L.R., 139, at pp. 154, 156, 162.
(5) 149 U.S., 698, at p. 729.
(6) 25 L.J.M.C., 128.
(7) 10 App. Cas., 675, at p. 678.
(8) (1896) A.C., 245.

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United States v. *Ferreira* (1). This is not a matter which can be dealt with only by the Inter-State Commission. Sec. 101 of the Constitution only confers a power to create the Commission, but imposes no duty to create it, and when created Parliament need not confer upon it all or any of the powers as to trade and commerce, but may entrust some or all of them to the ordinary administration of the law.

Mitchell K.C. in reply. The power of inquiry is not an independent power, but a means to an end, and the question of its validity only becomes of importance when it is compulsory. Under the Constitution compulsion can only be exercised as a means of executing some power belonging to that Department of Government to which that end belongs. A compulsory power of inquiry as to whether a crime has been committed, and by whom, is in the nature of a judicial proceeding which, in a Government having specified and separate powers like the Government of the Commonwealth, can only be exercised by one of the Courts referred to in sec. 71 of the Constitution. This is so whether the compulsory power includes power to compel a person, against whom the charge is alleged, to answer or not. If it does include that power, additional reason is afforded for the invalidity of the power of inquiry. In such a Government as that of the Commonwealth the power of compulsory inquiry can only be exercised otherwise than by a Court when it is auxiliary or incident to the purpose of some legislative or executive power or function —using executive as including administration. In such a Government a compulsory power of inquiry into a matter, in respect of which relief or remedy, whether civil or criminal, can only be given in a Court, is an exercise of the judicial power of that Government. As to sec. 15B, the Comptroller has no administrative duty—as far as this part of the Act is concerned—in the shape of administering the Act apart from making this inquiry. So that the duty of inquiry is not ancillary to any other duty which the Comptroller has, and he is in the same position in this respect as if the duty of inquiry were deputed to a police officer. The constitutionality of an Act is to be tested, not by what

(1) 13 How., 40.

has been done in the particular instance, but by what may be done.

[He also referred to *In re Pacific Railway Commission* (1); *Ah Yick* v. *Lehmert* (2); *Judiciary Act* 1903, sec. 68 (2); *Stephen's History of the Criminal Law*, vol. I., pp. 216, 221; *R.* v. *Borron* (3); *R.* v. *Adamson* (4); *Law* v. *Llewellyn* (5); *United States* v. *Ju Toy* (6); *Dicey's Conflict of Laws*, 2nd ed., pp. 534, 545; *Ashbury Railway Carriage and Iron Co.* v. *Riche* (7); *Brice on Ultra Vires*, 3rd ed., p. 43; *United States* v. *Dewitt* (8).

GRIFFITH C.J. referred to *Cox* v. *Coleridge* (9); *Munster* v. *Lamb* (10).

O'CONNOR J. referred to *Westlake's Private International Law*, 4th ed., p. 358.

ISAACS J. referred to *Inter-State Commerce Commission* v. *Baird* (11); *Watson* v. *M'Ewan* (12).

HIGGINS J. referred to *Cooley's Constitutional Limitations*, 7th ed., p. 250.

Duffy K.C. referred to *In re Mercantile Bank*; *Ex parte Millidge* (13).]

Cur. adv. vult.

June 7.

The following judgments were read:—

GRIFFITH C.J. These appeals are brought from convictions for breaches of sec. 15B of the *Australian Industries Preservation Act* 1906 in refusing to answer certain questions put to the appellants by the Comptroller-General of Customs.

That section provides that if the Comptroller-General believes that an offence has been committed against Part II. of the Act, or if a complaint is made to him in writing that such an offence has been committed, and he so believes, he may, by writing under his hand, require any person whom he believes to be capable of giving any information in relation to the alleged offence to

(1) 32 Fed. Rep. 241, at p. 253.
(2) 2 C.L.R., 593.
(3) 3 B. & A., 432, at p. 439.
(4) 1 Q.B.D., 201.
(5) (1906) 1 Q.B., 487.
(6) 198 U.S., 253.
(7) L.R. 7 H.L., 653, at p. 672.
(8) 9 Wall., 41.
(9) 1 B. & C., 37.
(10) 11 Q.B.D., 588.
(11) 194 U.S., 25.
(12) (1905) A.C., 480.
(13) 19 V.L.R. 527; 14 A.L.T., 269.

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answer questions and produce documents in relation to the alleged offence, and it imposes a penalty of £50 on any person failing to do so.

Secs. 4, 5, 7, 8, and 13 are, so far as material, as follows:—

Sec. 4. (1) "Any person who, either as principal or as agent, makes or enters into any contract, or is or continues to be a member of or engages in any combination, in relation to trade or commerce with other countries or among the States—

"(*a*) with intent to restrain trade or commerce to the detriment of the public; or

"(*b*) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers and consumers,

"is guilty of an offence.

"Penalty: Five hundred pounds."

Sec. 5. (1) "Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which, either as principal or agent, makes or enters into any contract, or engages or continues in any combination—

"(*a*) with intent to restrain trade or commerce within the Commonwealth to the detriment of the public, or

"(*b*) with intent to destroy or injure by means of unfair competition any Australian industry the preservation of which is advantageous to the Commonwealth, having due regard to the interests of producers, workers, and consumers,

"is guilty of an offence.

"Penalty: Five hundred pounds."

Sec. 7. (1) "Any person who monopolizes or attempts to monopolize, or combines or conspires with any other person to monopolize, any part of the trade or commerce with other countries or among the States, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence.

"Penalty: Five hundred pounds."

Sec. 8. (1) "Any foreign corporation, or trading or financial corporation formed within the Commonwealth, which monopolizes or attempts to monopolize, or combines or conspires with any

person to monopolize, any part of the trade or commerce within the Commonwealth, with intent to control, to the detriment of the public, the supply or price of any service, merchandise, or commodity, is guilty of an offence.

"Penalty: Five hundred pounds."

Sec. 13. (1) "Any offence against this Part of this Act (not being an indictable offence nor an offence against secs. 15B, 15C, or 15E of this Act), shall be tried before a Justice of the High Court without a jury.

"(2) Any offence against this Part of this Act committed by a person who has previously been convicted of any offence against this Part of this Act shall be an indictable offence."

The appellants, Huddart Parker & Co., are a corporation duly formed under the laws of the State of Victoria. The appellant Appleton is their manager.

The Comptroller-General, purporting to act under sec. 15B, called upon the appellants in both these cases to answer certain questions to which it is not necessary to advert in detail. In Huddart Parker & Co.'s case the written requirement recited that the Comptroller-General believed that the offences had been committed against the provisions of secs. 5 and 8 of Part II. of the Act in connection with the trade in coal.

In Appleton's case the recital was that he believed that offences had been committed against secs. 4 and 7 of Part II., also in connection with the trade in coal.

No objection was taken on the ground of want of particularity in the statement of the alleged offences in relation to which the questions were put.

Both appellants contend that sec. 15B is *ultra vires* of the Commonwealth Parliament. Huddart Parker & Co. further contend that secs. 5 and 8 are *ultra vires*. I will deal first with the latter contention.

Secs. 4 and 7 are limited in terms to matters in relation to trade or commerce with other countries or among the States, and it is not suggested that these enactments are not within the first of the powers enumerated in sec. 51 of the Constitution. Secs. 5 and 8 are not so limited as to subject matter, but are limited to foreign corporations and trading and financial corporations

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formed within the Commonwealth—adopting the language of pl. XX. of sec. 51. It is common ground that secs. 5 and 8, as framed, extend to matters relating to domestic trade within a State, and the question is whether the power to make laws with respect to "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth" extends to the governance and control of such corporations when lawfully engaged in domestic trade within the State. If it does, no limit can be assigned to the exercise of the power. The Commonwealth Parliament can make any laws it thinks fit with regard to the operation of the corporation, for example, may prescribe what officers and servants it shall employ, what shall be the hours and conditions of labour, what remuneration shall be paid to them, and may thus, in the case of such corporations, exercise complete control of the domestic trade carried on by them. In short, any law in the form "No trading or financial corporation formed within the Commonwealth shall," or "Every trading or financial corporation formed, etc., shall," must necessarily be valid, unless forbidden by some other provision of the Constitution.

It is not seriously disputed that the words of pl. XX., if they stood alone, might be capable of such a construction, but the appellants contend that it is not the true one. The respondent relies on the literal meaning of the words, which, he says, confer an express power which is not to be cut down by implication. In support of this view he contends that the words are large enough to include the creation of trading and financial corporations, and that the power to create a corporation implies a power to attach to the corporation when created any condition whatever that Parliament may think fit.

It may be that this consequence would follow so far as regards the internal affairs of a corporation so created, whether it would or would not also follow as to their dealings with strangers. But I am of opinion that the words in question do not on their face purport to deal with the creation of corporations. In the case of foreign corporations it is obvious that the Parliament cannot create them. The formation and regulation of corporations in general is one of the matters left to the States, and in my judgment the words "formed within the limits of the Commonwealth"

mean formed under State laws. They may be large enough to include corporations formed by the Commonwealth itself within territory under its exclusive jurisdiction, and corporations created by the Commonwealth itself as instruments of government; but an express power is not necessary for either purpose.

In my opinion the meaning of pl. xx. is that in the case, as well of trading and financial corporations formed within the Commonwealth, as of foreign corporations the Commonwealth must take them as it finds them, and may make such laws with respect to their operations as are otherwise within its competence.

The appellants further contend that the provisions of secs. 5 and 8 are not really laws with respect to corporations, but laws with respect to trade and commerce. Reference was made to the decision of the Judicial Committee in the case of the *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (1), in which the question for decision was whether a provision of a Dominion Statute, which prohibited railway companies created by the Dominion Parliament from contracting out of a liability to pay damages for personal injuries to their servants, was within the competence of that Parliament. The validity of this provision was attacked on the ground that it was in substance an interference with "property and civil rights," a matter reserved to the Provincial legislatures. It was not disputed that the power to make laws for through railways was entrusted to the Dominion. The question for determination was thus stated by Lord *Dunedin*, who delivered the judgment of the Board (2):—"The point, therefore, comes to be within a very narrow compass. The respondent maintains . . . that this is truly railway legislation. The appellants maintain that, under the guise of railway legislation, it is truly legislation as to civil rights." And, after referring to the occasional overlapping of the field of Dominion and Provincial legislation, he proceeded (3):—"Accordingly, the true question in the present case does not seem to turn upon the question whether this law deals with a civil right—which may be conceded—but whether this law is truly ancillary to railway legislation."

(1) (1907) A.C., 65.
(2) (1907) A.C., 65, at p. 67.
(3) (1907) A.C., 65, at p. 68.

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So, in the present case, it is said, the question must be asked whether the provisions of secs. 5 and 8 are truly ancillary to the power to make laws with respect to certain corporations, whatever that may extend to, or are an invasion of the field of domestic trade, a matter which is reserved to the States. As to their being an assertion of a right to enter that field there can be no doubt. I am disposed to accept the argument of the appellants on this point, but it is, I think, better to consider it in conjunction with a further argument, founded upon decisions of this Court which I have neither the right nor the inclination to review.

I have already said that the words in question, if they stood alone without any qualifying or controlling context, might be capable of bearing the wide construction claimed by the respondent. Is there then anything in the context of the Constitution to require a more limited construction ?

In *The King* v. *Barger* (1) the majority of the Court said:—"The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If, then, it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected."

In the *Union Label Case* (*Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2)), referring to the power to legislate with respect to trade and commerce, I said (and my brothers *Barton* and *O'Connor* agreed with me):—"The power to legislate with respect to 'trade and commerce' conferred by sec. 51 (1) is not unlimited. In the case of *United States* v. *Dewitt* (3), *Chase* C.J., delivering the judgment of the Supreme Court, said:—'That Congress has power to regulate commerce with foreign nations and among the several States and with the Indian tribes, the Constitution expressly declares. But this express power to regulate commerce among the States has always been understood as limited by its terms,

(1) 6 C.L.R., 41, at p. 72.
(2) 6 C.L.R., 469, at pp. 502-3.
(3) 9 Wall., 41, at p. 43.

and as a virtual denial of any power to interfere with the internal trade and business of the separate States; except, indeed, as a necessary and proper means for carrying into execution some other power expressly granted or vested.'

"This doctrine has been the foundation of a great number of decisions as to the validity of the legislation of Congress, and it has never been doubted.

"The same doctrine follows from the literal words of sec. 51 (i.) of the Australian Constitution, which confers the grant of power, not in general terms, but only as to 'trade and commerce with other countries, and among the States.' This is, emphatically, an instance in which the rule *expressio unius exclusio alterius* must be applied.

"It follows that the power does not extend to trade and commerce within a State, and consequently that the power to legislate as to internal trade and commerce is reserved to the State by the operation of sec. 107, to the exclusion of the Commonwealth, and this as fully and effectively as if sec. 51 (i.) had contained negative words prohibiting the exercise of such powers by the Commonwealth Parliament, except only, in the words of *Chase* C.J., 'as a necessary and proper means for carrying into execution some other power expressly granted.' It follows that, in order to warrant such an interference with the trade and commerce of a State as would be authorized by the extended meaning claimed for the words in question, it must be shown that such a power of interference is a necessary and proper means of carrying into execution the power to legislate as to trade marks. If such an invasion of the exclusive powers of the States was intended, it is strange that the power should have been conferred in language which seems at first sight so inadequate for the purpose.

"In my opinion, it should be regarded as a fundamental rule in the construction of the Constitution that when the intention to reserve any subject matter to the States to the exclusion of the Commonwealth clearly appears, no exception from that reservation can be admitted which is not expressed in clear and unequivocal words. Otherwise the Constitution will be made to contradict itself, which upon a proper construction must be impossible."

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It is a corollary to this rule that, if there be an exception from the reservation, the extent of that exception must be equally clearly and unequivocally expressed, and that so far as the exception does not extend the reservation remains in full force. I cannot accept the doctrine that if an invasion of the sphere of the State is admitted for a limited purpose the reservation altogether disappears. The invasion is only permitted so far as it is necessary to enable the power in question to be exercised, and the extent of the permitted invasion is determined and limited by the same necessity.

The Constitution is therefore to be construed as if it contained an express declaration that power to make laws with respect to trade and commerce within the limits of a State, and not relating to trade and commerce with other countries or among the States, is reserved to the States except so far as the exercise of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament.

Is then the enactment that trading and financial corporations shall not enter into certain contracts or combinations relating to domestic trade wholly within a State a necessary and proper means of carrying into execution some other power expressly granted by the Constitution—in this case a power to make laws with respect to such corporations?

The contracts and combinations mentioned are governed by State law, and are either lawful or unlawful under that law. If the Commonwealth Parliament can declare an act of a trading or financial corporation in relation to domestic trade which is lawful under State law to be unlawful, it can, *e converso*, make lawful a similar act of such a corporation which is unlawful under State law. A more flagrant invasion of the spheres of the domestic law of trade and commerce and the domestic criminal law can hardly be conceived.

In *Peterswald* v. *Bartley* (1) the Court said:—"In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred

(1) 1 C.L.R., 497, at p. 507.

upon the Commonwealth. The Constitution contains no provision for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the State to regulate the carrying on of any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so."

Some confusion has, I think, been caused by failing to distinguish between acts which are *ultra vires* of a corporation and acts which, though otherwise within the powers of a corporation, are prohibited by positive law. In neither case can the corporation effectually do the act. But, although the effect is identical, the cause is quite different. The distinction is well pointed out in *Westlake's Private International Law*, at p. 358, and by Lord *Cairns* in *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1). A foreign corporation, or trading or financial corporation formed within the Commonwealth, may be unable to enter into a valid contract within a State with respect to a particular subject matter, either because it has not capacity to enter into contracts relating to that subject matter, or because the particular contract is forbidden by law. The denial of capacity to the corporation to enter into contracts relating to the subject matter of domestic trade or the particular branch of that trade may rest with the Commonwealth. But the conditions governing the validity of a contract relating to any subject matter rests with the legislature having control of that subject matter, which, in the case of domestic trade, is the State legislature. The importance of this distinction is apparent when it is remembered that a particular intent is an element of the offences created by

(1) L.R. 7 H.L., 653, at p. 672.

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secs. 5 and 8. The entering into the contracts or combinations specified without that intent is not prohibited. The sections, therefore, are not directed to the capacity of the corporation, which is assumed, but to their behaviour while acting within their capacity.

In my judgment the words of pl. xx. are not clear and unequivocal, but are open to two constructions, and, applying the principles which I have stated, I think that they ought not to be construed as authorizing the Commonwealth to invade the field of State law as to domestic trade, the carrying on of which is within the capacity of trading and financial corporations formed under the laws of the State. In other words, I think that pl. xx. empowers the Commonwealth to prohibit a trading or financial corporation formed within the Commonwealth from entering into any field of operation, but does not empower the Commonwealth to control the operations of a corporation which lawfully enters upon a field of operation, the control of which is exclusively reserved to the States.

For these reasons I think that secs. 5 and 8 are beyond the constitutional power of the Commonwealth, and that the appeal of Huddart, Parker & Co. should be allowed.

The objection as to the validity of sec. 15B rests upon different grounds. It is said—and truly—that the enactment authorizes compulsory discovery in aid of criminal proceedings for offences, which in some cases are indictable, and that such offences are, under sec. 80 of the Constitution, triable by jury. And it was contended that such discovery, which may be obtained from the person alleged to be guilty of the offence, and used against him (see par 4 of sec. 15B), is inconsistent with the right to trial by jury. It was also contended that such discovery, being ancillary or incidental to an intended exercise of judicial power, is itself an exercise of that power, and can only be committed to a federal Court or a Court invested with federal jurisdiction. It was further contended that, if the power to compel discovery for such a purpose is not a part of the judicial power, it is an incident of the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and the laws made

thereunder, which is a duty entrusted by sec. 101 of the Constitution to the Inter-State Commission.

Sec. 71 of the Constitution provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court and in such other federal Courts as the Parliament creates, and in such other Courts as it invests with federal jurisdiction. It follows that the Parliament has no power to entrust the exercise of judicial power to any other hands. The Comptroller-General of Customs is not such a Court. The question for determination, then, is whether this compulsory discovery appertains to the judicial power. It was argued that the proceeding objected to is in principle analogous to the examination of witnesses before a justice with a view to the commitment of an accused person for trial on indictment; that in the event of the accused being tried before a Justice of the High Court without a jury the analogy would be complete, while, if he were tried on indictment and a further investigation before justices were necessary (which may be doubtful), the result would only be to divide the preliminary inquiry into two stages not differing in essential quality; that such proceedings before justices are always regarded as judicial proceedings, that they must, therefore, be regarded as an exercise of the judicial power; and further that the interrogation of witnesses with a view to the administration of either the criminal or civil law is a matter that is in practice in British countries entrusted to judicial tribunals, and must, therefore, be regarded as within the term "judicial power" as used in sec. 71 of the Constitution.

I am disposed to accept the argument of analogy between the powers conferred on the Comptroller-General and those exercised by examining justices. I think that it may also be conceded that of recent years justices exercising this function have been sometimes regarded and spoken of as exercising judicial functions. It becomes important, therefore, to inquire what is the true nature of their functions. On this point the case of *Cox* v. *Coleridge* (1) is very instructive. At common law the original function of justices of the peace was executive, and in no sense judicial, all the judicial functions which they have lately exer-

(1) 1 B. & C., 37.

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cised having been conferred by Statute. The origin and history of their power to examine witnesses with a view to commitment for trial was pointed out in that case by *Best* J.

At first a person accused of crime was arrested and kept in confinement until he could be brought to trial. Then the Act 1 Richard III. c. 3 authorized justices to grant bail to persons accused of felony. This power was abused, and the Act 1 & 2 Ph. & M. c. 13 directed that before the justices admitted accused, *i.e.* arrested, persons to bail, they "shall take the examination of the said prisoner, and information of them that bring him" before them, and certify the examination to the justices of gaol delivery. The object was, as pointed out by the learned Judge, not to institute a judicial inquiry, but to obtain information to be given to the justices of gaol delivery. This information having been found useful, the Act 2 & 3 Ph. & M. c. 10 was passed, by which the provisions of the former Act were extended to cases in which bail was refused, the object still being to give assistance to the Judges. In the words of *Best* J. (1):—"So far was this examination from being a judicial inquiry, which means an inquiry in order to decide on the guilt or innocence of the prisoner, that, as the law was administered a few years after the passing of these Statutes, the justices, even where it appeared that a prisoner was not guilty, were not to discharge him without bail: *Dalton*, c. 164. The modern practice is, indeed, different, and is more consistent with law and humanity; and I refer to *Dalton*, only to show that it could not then have been the opinion of the profession that this examination was anything like a judicial inquiry."

In the same case *Abbott* L.C.J. said (2), speaking of the nature of the proceeding before examining justices:—"What is it? It is only a preliminary inquiry, whether there be sufficient ground to commit the prisoner for trial. The proceeding before the grand jury is precisely of the same nature, and it would be difficult, if the right exists in the present case, to deny it in that." *Holroyd* J. said (3):—"A magistrate, in cases like the present, does not act as a Court of Justice; he is only an officer deputed

(1) 1 B. & C., 37, at pp. 53-4.
(2) 1 B. & C., 37, at pp. 49-50.
(3) 1 B. & C., 37, at pp. 51-2.

by the law to enter into a preliminary inquiry, and the law which casts upon him that jurisdiction, presumes that he will do his duty in inquiring whether the party ought to be committed or not."

I think that this case, which was decided in 1822, must be taken as an authoritative exposition of the law on the subject as it then stood. It is true that since that time many laws have been passed both in England and Australia regulating the procedure in such inquiries, but I do not think that they have the effect of altering the essential nature of the inquiry, which cannot be regarded now, any more than then, as an exercise of judicial functions. If this is the correct view, it follows that the inquiry by the Comptroller-General, whether regarded as a substitute for, or as a preliminary step to, an inquiry by justices, cannot be regarded as a judicial function, and the foundation for this argument consequently fails.

Again: It is plain that the power which, by sec. 71 of the Constitution, is to be exercised by Courts is a power of such a nature that an appeal will lie to the High Court from anything done in its exercise. It is equally plain that an appeal does not lie to any Court either from an order of commitment or an order of discharge made by examining justices. For this reason also I think that the proceedings before them cannot be regarded as an exercise of judicial power.

Apart from these considerations, I am of opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

With regard to the argument that, since it is the general practice to entrust the interrogation of witnesses to judicial tribunals' that function must be regarded as an exercise of judicial power, I think that both the premises and the inference are faulty. Many such interrogations are no doubt so entrusted, but many others,

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relating to matters of administration, are entrusted to other authorities. And I have already shown that in the most nearly analogous case the function, although entrusted to persons who for other purposes exercise judicial functions, is not regarded as itself an exercise of such functions.

Some decisions of the Supreme Court of the United States, and in particular the case of *Kilbourn* v. *Thompson* (1), were referred to, but I am unable to derive any assistance from them, although they contain *dicta* which at first sight support the appellants' argument. The actual decision in the cases turned upon quite different points from those now under consideration.

With regard to the argument that compulsory examination of a suspected person is inconsistent with the right of trial by jury in the case of indictable offences, it is sufficient to say that the doctrine expressed by the maxim *nemo tenetur seipsum accusare* was introduced into English law long after the institution of trial by jury; that its application has frequently been excluded by Statutes in the case of indictable offences (*e.g.*, offences against the bankruptcy laws); and that the rule is rather one of evidence than one relating to trial by jury.

This objection therefore also fails.

It remains to consider the objection that the power sought to be conferred on the Comptroller-General by sec. 15B could only be lawfully entrusted to the Inter-State Commission. Sec. 101 of the Constitution is as follows:—"There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder."

The language is analogous to that of sec. 61, which declares that the executive power of the Commonwealth extends to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It is contended that sec. 101 is in effect an exception from, or proviso to, sec. 61, so far as relates to the execution and maintenance of laws relating to trade and commerce, and that pending the appointment of the Commission the

(1) 103 U.S., 168.

execution and maintenance of these laws, whatever that phrase may mean, is in abeyance, just as the right of action by a State against the Commonwealth or another State was in abeyance until the establishment of the High Court. It was pointed out that before the establishment of the Commonwealth great difficulties had arisen in the United States of America with respect to the execution of the trade and commerce laws of that Republic, and that an Inter-State Commission had been created for that purpose. It was also pointed out that the duties to be performed in the execution of such powers are of great complexity, and require the exercise of a fine and impartial discretion. Accordingly, it is said, it was provided by sec. 103 that the members of the Commission should have a fixed tenure of office so as to be free from political pressure. It is contended that these provisions are inconsistent with the entrusting of the execution and maintenance of the trade and commerce laws to ordinary members of the Public Service. On the other hand, it is said that the words of sec. 101, although in form mandatory, are from the nature of the case directory only, and that on any other construction any laws which the Parliament might pass as to trade and commerce would be nugatory until the Commission were appointed. This objection, however, would not apply to the punishment of offences created by such laws, since it could not have been intended by sec. 101, whatever it means, that the institution of criminal proceedings should be taken out of the hands of the Commonwealth law officers.

Grammatically, sec. 101 appears to me to be open to two constructions, according as the words "for the execution and maintenance," &c., are read as merely qualifying the words "powers . . . necessary," or are read as if they immediately followed the words "shall be," that is, as if the language of the section were transposed, so as to begin with the words "For the execution and maintenance," &c.

I am disposed to think that the words qualify both "shall be" and "powers . . necessary," but I do not think the point is material.

For, supposing that the Inter-State Commission had been established, and that it was desired to prosecute a person suspected of

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a breach of some enactment in a law relating to trade and commerce the violation of which was made an indictable misdemeanour, could it be suggested that a preliminary inquiry as to the guilt of the suspected person before justices in the ordinary way is prohibited by sec. 101? I think not. If this is the correct view, it must be because such an inquiry, held in the ordinary course of law, is not, in any view of the meaning of sec. 101, one of the matters entrusted solely to the Commission. It follows also, I think, that the inquiry directed by sec. 15B, whether regarded as substitutional or preliminary, is equally free from the supposed prohibition.

For these reasons, I think that the provisions of sec. 15B are not *ultra vires* of the Commonwealth Parliament, and that Appleton's appeal fails.

BARTON J. Secs. 4 (1) (*a*) and 7 (1) of the *Australian Industries Preservation Act* 1906, which apply only to the second of these appeals, are not called in question. They are, indeed, in terms and in meaning, clearly within the legislative authority with regard to "trade and commerce with other countries, and among the States," given by the Constitution in sec. 51 (1). Sec. 15B, though common to the two appeals and attacked alike in both, need not be considered in connection with the first of them, the company's appeal, if the Court comes to the conclusion that secs. 5 (1) (*a*) and 8 (1) of the Principal Act are invalid as in excess of constitutional authority. I proceed first, then, to the consideration of those enactments. It is of interest to begin by comparing secs. 4 (1) (*a*) and 7 (1) with secs. 5 (1) (*a*) and 8 (1) in order to elucidate the effect of the latter. Remembering that by the interpretation clause of the Act "person" includes corporation unless a contrary intention appears, and placing sec. 4 side by side with sec. 5, and sec. 7 side by side with sec. 8, it becomes clear that the intentions of Parliament in both secs. 4 (1) (*a*) and 5 (1) (*a*) could all have been fulfilled by sec. 4 (1) (*a*) so far as oversea and Inter-State commerce are concerned, whether the offender was an individual or any kind of corporation; and that the two sections cover precisely the same ground to that extent. It is thus in respect only of the regulation of contracts and combinations in

relation to the domestic trade of the States, that Parliament has deemed it necessary to make separate provision by sec. 5 (1) (*a*). An exactly similar result stands out upon a comparison of secs. 7 (1) and 8 (1).

It is thus manifest that the real object of secs. 5 (1) (*a*) and 8 (1) is rightly or wrongly to enter for the purpose of those sections the domain of the domestic or internal commerce of the States. That is a legislative act not in terms or by implication authorized by the commerce power in the Constitution (sec. 51 (1)). As indeed is apparent on the face of that expressed power, it so defines the limits of the federal law-making authority that by the clearest implication, so strong in its effect that an express prohibition would have been superfluous, it excludes from the bounds of that granted power, as we have more than once decided, the whole of any trade or commerce which begins and ends entirely within the confines of any one State: *The King* v. *Barger* (1); *Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.* (2). That class of trade and commerce is reserved to the States respectively by sec. 107 of the Constitution, for it has not been "exclusively," or at all, "vested in the Parliament of the Commonwealth," nor has it been "withdrawn from the Parliament of the State."

The operation, then, of secs. 5 (1) (*a*) and 8 (1) upon contracts and combinations, in relation to what may be called Intra-State, as distinguished from Inter-State, commerce is forbidden by the Constitution in sec. 51 (1) unless we can find elsewhere in the federal charter some power which purports to authorize it, and which can be read as an exception to that prohibition. If any such power exists it must, if possible, be read as an exception only.

Where, then, is that authority to be found? In argument, the source of it was said to be in sec. 51 (xx.) of the Constitution. No other provision was adduced, and if the authority is not there, I can find no trace of it. The terms of that power are that the Parliament may "make laws for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations . . . formed

(1) 6 C.L.R., 41. (2) 6 C.L.R., 469.

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within the limits of the Commonwealth." The respondent urges that this power is so general in its terms that it is ample to authorize the regulation of these classes of corporations to the extent attempted—that is, even as to their dealings in internal State trade; so that the federal Parliament may prohibit and penalize any kind of such trade dealings even when the State within whose competence they are sanctions them, either expressly or by silently leaving them to the operation of the common law. It is argued that the sub-section gives all this power because where there is authority to incorporate there is power to impose conditions on the grant of incorporation; and that the words are so general, and by themselves so unrestricted, that the power to incorporate must be included. I leave aside the question as to the imposition of conditions, because that is only material to the argument quoted if the words themselves give power to create the classes of corporations enumerated. As to foreign corporations, the creative power exists elsewhere, *ex vi termini*. That being so, there is no good reason given why the Constitution should be taken to have intended to give that power in respect of the other class — trading or financial corporations formed within the limits of the Commonwealth—within which class the appellant company falls, because it is incorporated under the company laws of the State of Victoria. I think the sub-section is carefully framed to place this class of corporations on the same footing as foreign corporations with regard to the stage at which they become subject to federal legislation. Before a foreign corporation can become so subject, it must have been formed in the country of its origin; before a trading corporation can become so subject, it must have been "formed within the limits of the Commonwealth"; but not under the authority of the Commonwealth any more than its foreign congener. On this construction "formed within the limits of the Commonwealth" means formed under the law of a State, and this I take to be the true meaning. I add two further considerations. First, finding associated as the subjects of the power, a class as to which creative powers could not possibly be conferred, and a separate class as to which such a power might if intended be granted, one would expect such an intention, if it existed, to be expressed in something like definite

terms by way of distinction between the two classes. So far is that from being the case that the grant is couched in terms which rather import that its limits as to each class as nearly coincide as the nature of the case admits. The other consideration is, that where a right to create a class of corporations is intended to be given, the framers of the Constitution knew how to make the intention unmistakeable, for they have done so in par. (xiii.) of the same section: ("Banking . . . also . . . the incorporation of Banks . . .").

The claim of creative power, therefore, seems to fail, and with it the authority to enact these provisions so far as it is based on such a power.

Taking then sub-sec. (xx.) to authorize the dealing with both classes of corporations on the same footing—that is, the footing that neither class is a creature of federal legislation—does the sub-section, so read, constitute an exception to the otherwise exclusive reservation to the States of the power to deal by legislation with matters within the field of their internal or domestic trade?

Any power to constitute such an exception must be couched in clear and unambiguous terms. It is not sufficient that it is capable of being read as an exception, if it is equally capable of being read as subject to the reservation of that field in favour of the States; for the reservation is effected by what *Chase* C.J., in the *United States* v. *Dewitt* (1), speaking for the Supreme Court as to the meaning of the commerce power, truly described as "a virtual denial of any power to interfere with the internal trade and business of the separate States." The Australian Constitution in sec. 51 (1), as we have already decided, contains a similar reservation as the direct and necessary consequence of language identical save in its omission of one sphere of trade which does not exist here—namely, that with the Indian tribes. Sub-sec. (xx.) is equally capable, apart from that reservation, of being read in either of the ways I have stated. To overcome, or to be read as an exception to, the reservation, it would, as its framers must have known, have had to be expressed in language which admitted only of the former of these constructions. It is

(1) 9 Wall., 41., at p. 44.

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impossible to contend that it is so expressed. Therefore, it is not such an exception.

Sections such as 5 (1) (*a*) and 8 (1) might have been sustained in the United States had they been, to use other words of *Chase* C.J. in the sentence just quoted (1), "a necessary and proper means for carrying into execution some other power expressly granted or vested"—that is, some power other than the trade and commerce power—or, as he put it elsewhere in the same judgment (1), "an appropriate and plainly adapted means" to that end. The Australian Constitution in sec. 51 (xxxix.) gives expressly a corresponding power as to "matters incidental to the execution of any power vested by this Constitution in the Parliament," &c. The term "incidental" is at least as wide as the term "necessary and proper." Sub-sec. (xxxix.) is no doubt made an express power for more abundant caution, although it would certainly have been implied in the absence of express bestowal. But before this legislation can be justified under that power, we must be satisfied that the State field of commerce has only been entered incidentally to the execution of the power granted by sub-sec. (xx.). That is to say, the primary object of the legislation must be, not the interference with the forbidden subject of State trade, but the control of the corporations the subject of the grant. If that were not so, the substantive power and the incident would be made to exchange places, an operation which no one will attempt to support as a valid exercise of power. Now the object (I say nothing of the motive) of the Acts of which these sections form part is proclaimed by their whole purview to be truly stated in their title. It is "the preservation of Australian industries and the repression of destructive monopolies." The provisions as a whole are directed to the attainment of that object by means of prohibition, punishment and machinery. By sec. 2 the legislation is divided into three parts—I., Preliminary; II., Repression of monopolies; III., Prevention of dumping. It is, therefore, by the repression of monopolies that Part II. essays to carry out the object of the Acts. The provisions, even apart from the heading and the title, leave no room for argument on that point. By secs. 4 (1) (*a*) and

(1) 9 Wall., 41, at p. 44.

7 (1) it is sought to effect this avowed purpose, so far as the conduct penalized is in the course of trade or commerce with other countries or among the States; by secs. 5 (1) (*a*) and 8 (1) it is sought to cover also, as far as posssible, the field of trade or commerce within the respective States. The former process is not forbidden, but the latter is. To get over that difficulty sec. 5 (1) (*a*) and 8 (1) are framed by way of penalizing the obnoxious contracts and combinations if made by corporations of the classes so often mentioned. So far as external and Inter-State trade is concerned this would have been virtually tautological, as I explained at the outset of this opinion. So that the clear object of referring to the corporations is that the field of State trade may be successfully invaded. Now, bearing in mind, "not the motive which actuates the legislature," or "the ultimate end desired to be attained," which are irrelevant (*The King* v. *Barger*) (1), but the substantive purpose of the Acts as a matter of construction gathered from their entire tenour, aided, if that were not superfluous, by sec. 2 and the title, it becomes transparent that the endeavour of the provisions now challenged is to secure some legislative control of the forbidden subject of State trade for the better repression of monopolies, and that the attempted use of sub-sec. (xx.) is only incidental to that endeavour. Such an expedient will not avail to pierce the shield which the Constitution throws round the internal trade of the States. This is the very converse process to that held valid in the *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (2), and *Toronto Corporation* v. *Canadian Pacific Railway Co.* (3). There it was held that the Dominion Parliament might enter the field, reserved to the Provinces, of "Property and Civil Rights" for the purpose of making provision ancillary and appropriate to the effective execution of powers expressly granted to the Dominion, and outside the jurisdiction of the Province. That would be a justification here if the true construction of the enactments challenged were similar. But here we find, not a resort to the field reserved for the more effective execution of a power expressly bestowed, but the invocation of an expressed power as a mere means of effectively invading the forbidden field. I repeat that

(1) 6 C.L.R., 41, at p. 67. (2) (1907) A.C., 65. (3) (1908) A.C., 54.

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it is the converse process. To resort for a moment to the vernacular, the dog can wag the tail, but it by no means follows that the tail can wag the dog. See also on this point the *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association* (1), where we held, notwithstanding the absence from the Constitution of any express power for the purpose, apart from sub-sec. (xxxix.) of sec. 51, that industrial organisations might lawfully be incorporated for the more effective execution of the power granted by the Constitution in sub-sec. (xxxv.).

I am of opinion, therefore, that secs. 5 (1) (*a*) and 8 (1) of these Acts, in so far as they deal with the domestic trade of the States, are in no wise incidental or ancillary to the execution of sec. 51 (xx.) of the Constitution, and that the invasion of that sphere is prohibited by the Constitution. Hence, I am bound to hold that these provisions are invalid, and that the company is entitled to succeed.

Not dissenting from any of the reasons of the Chief Justice, I have still felt it desirable to state at some length my views as to the two enactments which I think must be pronounced invalid.

As to the second appeal, that of Appleton, I think the inference from *Cox* v. *Coleridge* (2) is too strong to be withstood, and that sec. 15B is not an exercise of the judicial power; and I cannot find that it is impeachable on any other of the grounds taken. Agreeing fully as I do with the judgment of the Chief Justice as to this section, I feel that I ought to refrain from adding unnecessarily to this opinion, especially under present circumstances. But it is contended that the section is invalid as giving the Comptroller-General powers of claiming and enforcing discovery in matters of trade which, even if not within the judicial power, cannot be reposed in any authority other than the Inter-State Commission, an authority not yet established. Not only do I think that such an inquiry as is authorized by sec. 15B is not a matter solely within the competence of that Commission, but I wish to say that, unless arguments be adduced in some future case much more compelling than any I have yet heard, I shall not be disposed to hold that the execution and maintenance of federal laws within the commerce power, any more than of the

(1) 6 C.L.R., 309. (2) 1 B. & C., 37.

trade and commerce clauses of the Constitution, are in abeyance until the establishment of the Commission. If sec. 101 is mandatory in any sense, it appears to me to be a mere mandate to Parliament, which it may be the political duty of Parliament to obey, but not a mandatory enactment in the judicial sense. If there is any power to enforce it, the power, like the duty, is political. Nor can I, as at present advised, think that inability to enforce the commerce laws can be intended by the Constitution as the consequence of any failure to establish the Commission. I have not heard or found anything to justify the contention that the charter intended to render laws, otherwise constitutional, inoperative in the hands of the people and their Courts. That would be punishing the people for the Parliament's delay. The strong inclination of my opinion is that the grammatical construction of the Inter-State Commission section is not such as to warrant the contention put forward.

I am of opinion that the attack on sec. 15B fails, and, therefore, that Appleton's appeal must be dismissed.

O'CONNOR J. The appeal in each of these cases is brought to test the validity of a conviction for refusing to answer questions asked by virtue of sec. 15B, sub-sec. 2 of the *Australian Industries Preservation Act* 1906. In the first case Huddart, Parker & Co. were interrogated in reference to an offence alleged to have been committed by them under sec. 5, sub-sec. 1 (*a*), and sec. 8, sub-sec. 1, of the *Australian Industries Preservation Act* 1906. In the second case the questions were asked of their manager, Mr. Appleton, and had reference to an offence alleged to have been committed by him under sec. 4, sub-sec 1 (*a*), and sec. 7, sub-sec. 1 of the same Act. It may be taken that the creation by the Act of all the offences alleged was an appropriate means for the enforcement of its provisions. In considering the appellants' first objection, however, it becomes necessary to distinguish the offences alleged against Appleton from those alleged against the company. The sections in respect of which the first mentioned offences arise have relation only to trade or commerce with other countries or amongst the States, and it is not disputed that the right to enact them is included in the powers conferred

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on the Commonwealth Parliament by sec. 51 (i.) of the Constitution. But those under which offences are alleged against the company apply to all trade and commerce within the Commonwealth, including that confined within the limits of one State. Contracts made in the course of trade and commerce so confined are part of a subject matter left by the Constitution exclusively in the hands of the State. If, however, those sections are valid, it has now become a criminal offence on the part of any corporation of the class named to enter into contracts in the course of that trade contrary to the requirements of the Commonwealth Act whatever the State law on the subject may be. It must, of course, be conceded that such an interference with a State's control over its purely internal trade and commerce would be in general outside the ambit of the Commonwealth power. The respondent, however, points out that those sections relate only to things done by "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth," and he contends that their enactment amounts to nothing more than a lawful exercise of the powers conferred by sec. 51 (xx.) of the Constitution. The appellants, on the other hand, maintain that the provision of the Constitution relied on cannot be construed so as to justify such an interference with the State's control over its own internal commerce as the section so interpreted must necessarily involve. That is in substance the question raised by the first objection which it will be observed applies only to the offences alleged against the company. To get the full meaning of sub-sec. (xx.) it must be read with the opening words of the main section. So read it as follows:—

"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."

In the early part of the argument the respondent's counsel claimed that the sub-section conferred on the Commonwealth Parliament practically unlimited powers of legislation with respect to the class of corporations mentioned. The plain words of the sub-section render that interpretation impossible. Later

on he put forward an alternative construction, claiming for the Parliament a much less extensive ambit of authority. It is upon this latter contention that the real controversy in the case must turn. For the purposes of the limited claim it is admitted that the power of creating such corporations is not in the Commonwealth, but in the foreign country or Australian State from which they may respectively derive their existence as legal bodies. But, taking them as being in existence, it is contended that the Parliament can at least regulate the conditions under which they shall be allowed to carry on business within the limits of the Commonwealth. It is claimed that the power to regulate those conditions includes that of controlling the corporations in the conduct of their business within the Commonwealth, and that it is within the limits of such a power to impose conditions compelling them to refrain from entering into the class of contracts forbidden by secs. 5 and 8 of the *Australian Industries Preservation Act* 1906. It may well be that the authority conferred by the sub-section is in reality a power to prescribe the conditions under which these corporations shall be allowed to enter upon business within the Commonwealth. But, as I shall point out later, the Constitution, taken as a whole, necessarily limits that power. The respondent, however, claims that under it any conditions whatever may be prescribed, that it enables Parliament to enact with respect to any of these corporations, even those engaged solely in trade and commerce confined within the limits of one State, laws for the regulation of every detail in the transaction of their business. Whether such a claim can be supported depends entirely upon the true meaning of sub-sec. (xx.) as read with every other part of the Constitution. Before entering upon an examination of the sub-section, it will be well to bear in mind the principle now firmly established in this Court that the Constitution, like any other instrument, must be construed as a whole. Where it confers a power in terms equally capable of a wide and of a restricted meaning, that meaning will be adopted which will best give effect to the system of distribution of powers between State and Commonwealth which the Constitution has adopted, and which is most in harmony with the general scheme of its structure. The case of the *Attorney-General for New South*

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Wales v. *The Brewery Employés Union of New South Wales* (1), generally known as the *Union Label Case*, which is one of the latest instances of the application of the rule, may be quoted as illustrating also an underlying principle of the Constitution of vital importance in the interpretation of the sub-section now under consideration. In that case the matter at issue was whether the word "trade mark" was to be interpreted in the wide sense as meaning any mark used in trade, or in the narrower sense which it has acquired as a legal expression by common consent of legislatures, Courts, and International Trade Conventions for many years. In the judgment of my learned brother the Chief Justice, after referring to the terms in which the power to deal with "Commerce with other countries, and among the States" has been conferred by sec. 51 (1) of the Constitution, this passage occurs (2): —"It follows that the power does not extend to trade and commerce within a State, and consequently that the power to legislate as to internal trade and commerce is reserved to the State by the operation of sec. 107, to the exclusion of the Commonwealth, and this as fully and effectively as if sec. 51 (1) had contained negative words prohibiting the exercise of such powers by the Commonwealth Parliament, except only, in the words of *Chase* C.J., 'as a necessary and proper means for carrying into execution some other power expressly granted.'" We must, therefore, recognize at the outset that the Constitution, while empowering the Parliament of the Commonwealth to legislate with respect to foreign corporations and financial and trading corporations formed by the laws of any State, also vests in each State exclusive control over its own purely internal trade and commerce. The grant of power to the Parliament must thus be so construed as to be consistent as far as possible with the exclusive control over its internal trade and commerce vested in the State. Bearing in mind these principles, I now turn to the sub-section, but before considering its language it may be well to advert for a moment to the subject matter with which it purports to deal. In this connection it will be useful to bear in mind one aspect of the law as to corporations to which *Westlake* has directed attention in his book on *Private International Law*,

(1) 6 C.L.R., 469.

(2) 6 C.L.R., 469, at p. 503.

4th ed., p. 358:—"The regulation of any artificial person, in matters concerning only itself or the relations of its members, if any, to it and to one another, must depend on the law from which it derives its existence. That law is its personal law, or in other words it is domiciled in the country of that law. If in other countries it enters into relations with outside parties, the first question to be asked is whether by the laws of those countries it is permitted to do so in its artificial character. In case of the affirmative, its dealings with outside parties must stand on the same footing as those of a natural person domiciled abroad."

By the words of the sub-section the power of legislation is given with respect to foreign corporations and trading or financial corporations formed under the laws of any State, that is to say, corporations already created, or to use *Westlake's* expression, "artificial persons" already in being owing their existence to the law either of the foreign country or of the Australian State under which they were incorporated. By the very terms of the grant authority to create these corporations is necessarily excluded. Except in the sub-section under consideration the Constitution gives no general power to deal with corporations. Speaking generally, therefore, the power of creating corporations, that is, the power to give them legal existence and to regulate their form, their incidents, the relations of their members to the corporation and to one another, is left to the States. The express or implied authority conferred by the Constitution on the Commonwealth Parliament to create corporations as instruments for the carrying out of Commonwealth powers I leave out of consideration as being immaterial in the question now before us. The authority conferred by the sub-section being thus restricted to making of laws with respect to corporations actually in being, it would appear to be plain that the field of legislation marked out for the Commonwealth Parliament extends no further than the regulation of the conditions on which corporations of the class described shall be recognized, and permitted to carry on business throughout the Commonwealth. But here we are met by the ambiguity which creates the present difficulty. Is the power thus to regulate unlimited as the respondent avers, enabling Parliament to impose con-

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ditions which will have the effect of controlling the objects, nature and methods of the corporation in the carrying on of its business in its trading in every detail, no matter to what extent such control may encroach on the power of the State over its own internal trade, or does the sub-section itself convey in its very terms, as the appellants contend, a limitation which, while giving full operation to the power conferred, will not be inconsistent with those portions of the Constitution which leave to the State exclusive power to regulate its own internal trade? In my opinion the subsection when rightly construed does contain such a limitation, and the ambiguity disappears when we take into consideration the position of such corporations at the time when the Constitution was passed, and the defect in the legislative powers then existing in Australia of dealing with them, which it was one of the objects of the Constitution to remedy. Great Britain, adopting the rule of comity of nations in that respect as part of its own laws, recognized foreign corporations as legal entities. Speaking generally, the self-governing communities of the Empire had similarly adopted the same rule of comity, thus giving foreign corporations similar recognition. Each of these communities was however at liberty, subject to Imperial or international obligations, to decline to adopt the rule of comity, or to adopt it with qualifications, and to lay down its own conditions as to the terms on which it would recognize artificial persons created under the laws of other countries.

In that position stood each of the Australian Colonies, and in that respect each of them was a foreign country to the other. Their mutual recognition of corporations created under each others' laws rested on the same footing as their recognition of foreign corporations. At that time, therefore, there was no power, except the British Parliament, which could give an indefeasible right to a foreign corporation, or to a corporation which owed its existence to the laws of any Australian State, to carry on business in every part of Australia. It was necessary in the interests of Australian trade and commerce that authority to make such a law should exist in Australia. As such authority could from its nature be exercised only by the federal power, it was expressly conferred on the Parliament of the Commonwealth by the sub-section under

consideration. It is true that the power as conferred extends beyond that necessity, and includes that of making laws with respect to the conditions under which a business or financial corporation may trade in the State which created it. That additional authority, however, was necessary to secure for the people of the whole Commonwealth the advantage of uniformity in the conditions under which all such corporations should be recognized and allowed to trade throughout Australia. In the light of the circumstances it may fairly be taken that the framers of the Constitution intended by the sub-section under consideration to confer on the Parliament of the Commonwealth just that power which was wanting in the legislative bodies then existing in Australia—the power of making a uniform law for regulating the conditions under which foreign corporations, and trading or financial corporations created under the laws of any State, would be recognized as legal entities throughout Australia. As part of that power there would be necessarily implied the authority to impose on those corporations all such conditions on admission to recognition as would be appropriate or plainly adapted to the object of the sub-section and not forbidden by the Constitution. (See the judgments of this Court in the *Jumbunna Case* (1)). Recognition of a corporation as a legal entity involves a recognition of its right to exercise throughout Australia its corporate functions in accordance with the law of its being, that is, the law by which the foreign or State law gave it existence as a legal body. Recognition may be absolute or on conditions. It is unnecessary here, even if it were possible, to make a comprehensive statement of the matters which might be the subject of such conditions, but it may be stated generally that Parliament is empowered to enact any law it deems necessary for regulating the recognition throughout Australia of the corporations described in the section, and may, as part of such law, impose any conditions it thinks fit, so long as those laws and the conditions embodied in them have relation only to the circumstances under which the corporation will be granted recognition as a legal entity in Australia. It may, for instance, prohibit altogether the recognition of corporations whose constitutions do not provide certain safeguards and

(1) 6 C.L.R., 309.

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securities for payment of their creditors. It may impose conditions on recognition to attain the same ends. As a preliminary to recognition it may insist upon compliance with any conditions it deems expedient for safeguarding those dealing with the corporation. In the effecting of objects within these limits it must have the right to encroach on State powers to such an extent as it may deem necessary. But when once recognition has been granted—when once the corporation has, in Australia, the status of a legal entity—the limit of the power conferred by the sub-section is reached. The corporation then becomes a legal entity within the Commonwealth, subject to the laws of the Commonwealth and of the States in the same way as any other legal entity. In respect of trade carried on entirely within the limits of any one State it is within the cognizance of State laws and State administration in the same way and to the same extent as any other legal entity within the State would be in the like circumstances. By such interpretation only can full effect be given to the power conferred by the sub-section on the Parliament without derogating from the power to control its own internal trade and commerce which the Constitution leaves exclusively in the hands of the State. For these reasons I am of opinion that the power conferred by sub-sec. (xx.) must be construed as being limited to the making of laws with respect to the recognition of corporations as legal entities within the Commonwealth, and that its provisions do not justify the making of laws for regulating and controlling the business of a corporation coming within the section when once the corporation has been recognized as a legal entity within the Commonwealth, and is exercising its corporate functions in carrying on its business within Australia. It follows that the appellant corporation, having been recognized as a legal entity and as such having entered into the internal trade of a State, cannot be controlled in the carrying on of its business as attempted in secs. 5 and 8 of the Statutes now under consideration. I am, therefore, of opinion that in so far as the internal trade of the State is concerned there was no power in the Commonwealth legislature to create the offences mentioned, and therefore no valid foundation for the proceedings taken under sec. 15B.

I turn now to the series of objections involving the question

whether the Constitution authorizes the procedure for compulsory interrogation enacted in sec. 15B. The Principal Act declares that offences are to become under certain circumstances indictable. As such they must under sec. 80 of the Constitution be tried by a jury. Answers given under the compulsion of sec. 15B incriminating the person interrogated are by sub-sec. 4 of that section made admissible against him in the event of his subsequent trial. It is contended that that provision is a violation of the right of trial by jury intended to be preserved by the Constitution to every person tried for an indictable offence. The objection is not difficult to answer. What are the essential features of a trial by jury? I adopt the following from the definition approved of by Mr. Justice Miller in his lecture on the Constitution of the United States (1893 ed. at p. 511). It is the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact arising either in a civil litigation or in a criminal process. The principle that a witness shall not be compelled to criminate himself has become a principle of British criminal law, departed from no doubt in special instances, as in the case of offences against the bankruptcy laws, but still maintained and administered as part of the great body of British criminal jurisprudence. But it is no part of the system of trial by jury, and the authority of the Parliament of the Commonwealth to create and punish offences as incidental to the exercise of the powers conferred by the Constitution would certainly extend to the modification of any principle of British criminal law, no matter how fundamental, so long as the modification is not forbidden expressly or impliedly by the Constitution. There has been no attempt to show that any portion of the Constitution other than sec. 80 has any bearing on the matter.

Another objection founded on the Constitution is in my opinion equally untenable, namely, that powers such as those conferred by sec. 15B can under the Constitution be exercised only by the Inter-State Commission, and it is contended that until the Commission is appointed all powers, which the Parliament is by sec. 101 empowered to vest in it, must remain in abeyance. The power of making laws with respect to trade and commerce with other countries and among the States includes the power of

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enacting all provisions necessary to secure their efficient administration and observance. Sec. 61 expressly vests in the Government of the Commonwealth all executive powers necessary for the execution and maintenance of Commonwealth laws. Apart from other objections, and leaving sec. 101 for the moment out of consideration, it could not be denied that these provisions would empower the Parliament to confer on any officer of the Executive Government all powers necessary for maintaining and enforcing all such laws. Can it be successfully contended that sec. 101 cuts down the general powers thus vested in the legislature? It is true that with regard to the appointment of an Inter-State Commission the words of the section are mandatory. But there is no obligation imposed on the Parliament to vest in the Inter-State Commission, even if it were constituted, any more power than they may deem necessary for the execution and maintenance of the provisions of the Constitution relating to trade and commerce. Bearing in mind that it was universally known when the Constitution was framed that it was to be applied as an operative instrument to the trade and commerce of Australia immediately on the inauguration of the Commonwealth, and that many months would necessarily elapse before laws could be enacted or even a Parliament got together, it is difficult to see how full effect could be given to the Constitution as a whole by construing sec. 101, not as an enabling section enlarging the powers conferred by secs. 51 and 61, but as a restrictive section, as indicating an intention in the framers of the Constitution that the powers essential for the execution and maintenance of laws relating to trade and commerce should remain in abeyance until the necessary Statutes had been passed for the constitution of an Inter-State Commission. Having regard to these considerations I am of opinion that sec. 101 is entirely enabling, and that it no way cuts down the power of the Parliament under secs. 51 and 61 to enact such a provision as that now under consideration for the administration and enforcement of laws relating to Inter-State trade and commerce.

I come now to the last objection, which applies to both cases, that the authority conferred by the section in question upon the Comptroller-General is part of the judicial power of the Com-

monwealth, which sec. 71 of the Constitution directs shall be vested in a Court, and that the Parliament of the Commonwealth had no authority to confer any such power on an executive officer. In my opinion the powers to be exercised by the Comptroller-General and those appointed by him are not judicial powers in the sense in which that word is used in the Constitution. On the contrary, they are powers necessarily included in the executive functions of Government. The power of inquiry for the purpose of administration and, under Parliamentary Government, for the purpose also of informing the legislature, is an essential part of the equipment of all executive authority. In every grant of power by the Constitution to the Parliament of the Commonwealth there is necessarily included the right of enacting such provisions as may be necessary to render the power effective. The right to ask questions, which, as was pointed out by this Court in *Clough* v. *Leahy* (1), the Executive Government has in common with every other citizen, is of little value unless it has behind it the authority to enforce answers and to compel the discovery and production of documents. It is to make the power of inquiry effective for the purposes of Customs administration, for instance, that sec. 234 of the *Customs Act* 1901 authorizes the recovery of penalties against those who fail to answer questions or produce documents when requested so to do by Customs officers acting under the authority of secs. 38, 195, 196, and 214. The powers of compulsory interrogation conferred on executive officers of Government under the *Audit Act* 1901, under the *Immigration Restriction Act* 1905, and under the *Census and Statistics Act* 1905 rest upon the same basis. There are cases also in which official inquiries as a preparation for executive action may involve the necessity of exercising *quasi* judicial functions—cases in which it is expedient to hand over to executive officers the ascertainment of facts upon which executive action is to be taken, such, for instances, as misconduct in an officer, military or civil, the nature and foundation of claims against the Commonwealth, the value of property and the amount of compensation to be paid where the Government has exercised its right of expropriation. The finding of the relevant

(1) 2 C.L.R., 139.

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facts in such cases by some such method is essential to the ripening of matters for executive action. In Australia the Commonwealth Statutes relating to defence, the public service, and the acquisition of land for public purposes are instances in which such *quasi* judicial powers have been conferred on executive officers in aid of administration. An illustration of another kind is the ordinary magisterial inquiry which may result in the committal for trial or in the release of persons charged with offences, and in which, as was decided in *Cox* v. *Coleridge* (1), the magistrate exercises not judicial but ministerial functions. In America the wide powers of the Inter-State Commission, which rest entirely upon the right of Congress to make laws for the regulation of Inter-State trade, are a striking illustration of the same kind. Another is to be found in the Statutes referred to in the case of *United States* v. *Ferreira* (2). Those Statutes directed the Judge of the Territorial Court of Florida to receive and adjudicate upon certain claims by Spanish officers arising under a treaty between the United States and Spain, and to report his decision thereon to the Secretary of the Treasury, together with the evidence, upon which the latter, on being satisfied that a claim was just and equitable, was authorized to pay the amount. It was held by Chief Justice *Taney*, delivering the judgment of the Court, to be too clear for argument that the learned Judge of the Territorial Court did not act judicially, but only as a Commissioner, to ascertain and adjust on behalf of the Executive Government and for their information the amount, if any, to be paid to claimants under the treaty. Turning now to sec. 71 of the Constitution it is plain that, whatever may be covered by the expression "judicial power" as used in that section, it cannot include the making of inquiries such as I have described in aid of the execution and maintenance by the Government of the laws of the Commonwealth. The making of such inquiries by the Executive Government or by authorities appointed and constituted by them are, as I have pointed out, well known functions of an Executive Government, and necessary for the efficient discharge of their duty. The right to make laws vesting such powers of inquiry in executive officers

(1) 1 B. & C., 37. (2) 13 How., 40.

where necessary must therefore be taken as included in every power of legislation conferred by the Constitution. The Commonwealth legislature have in the exercise of their power with respect to trade and commerce deemed it expedient to vest these functions of inquiry in the Comptroller-General of Customs. In doing so they have, in my opinion, acted within the authority conferred by the Constitution, and they have done no more than equip that portion of the Executive which administers the *Australian Industries Preservation Acts* 1906-1907 with powers of effective inquiry which are particularly needed in the administration of an Act of that kind. So far I have dealt with the matter on the basis of the power conferred by sec. 15B as being included in the necessary equipment of every properly constituted Executive, and as being therefore necessarily included in the powers conferred on the Parliament and Executive of the Commonwealth. It was, however, contended by Mr. *Mitchell*, on behalf of the appellants, that even admitting that the Comptroller-General or his officers were not themselves acting judicially, yet in the use that could be made of the section the power was one not in aid of executive admistration, but of judicial proceedings. He argued that as answers extracted from a person interrogated might, if he were subsequently tried, be used in evidence against him, the proceeding was analogous to the taking of evidence *de bene esse* by a Commissioner acting under the order of the Court, that although the Commissioner in such a proceeding is not himself acting judicially, yet the taking of the evidence is clearly a part of the judicial proceedings in the cause, and that similarly the power exercised by the Comptroller-General being in aid of prosecutions or civil proceedings under the Act was an exercise of federal power within the meaning of sec. 71 of the Constitution. The obvious answer is that there is an essential difference between the two proceedings. When a Judge orders the examination of a witness by commission the evidence is taken on behalf of the Court by its representative, under its order, in a cause pending, and is clearly part of the procedure in that cause. When the Comptroller makes his requirement under 15B there can be no proceeding pending in a Court. He is not empowered to use the section with reference to an offence when once it has been

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brought within the cognizance of the Court. The power to prevent any such interference by the Executive with a case pending before the ordinary tribunals is undoubtedly vested in this Court by the Constitution. I take it therefore as clear that, at the stage when the Comptroller-General is authorized to apply the provisions of the section, the suspected or alleged offence is no more within the cognizance of a Court than if it were under preliminary consideration by the Police Department. At that stage it is merely a subject of departmental inquiry in respect of which no member of the public has any right to interfere. The Comptroller-General may act on his own initiative or he may act on a complaint in writing. He can act only when he has arrived at a belief that an offence has been committed. But he is not bound to apply his mind to arriving at a belief, nor is he bound to act when he has arrived at a belief. He may disregard all information he may have on the subject, and refuse to take any action. The answers when obtained may be put in evidence on the trial of any issue in which they would, according to the ordinary rules of evidence, be admissible. The difference made by the Act is this: On the trial of the person interrogated for an offence under the Act, if his answers are otherwise admissible against him, he will not be permitted to take the objection that they tend to criminate him. On the other hand, there is nothing to compel the Comptroller to put the answers in evidence, nor has the person interrogated any greater right to call for their production in evidence than he would have in regard to any other documents in the hands of the Government. Such being the scope, purposes, and incidents of the interrogation, I have come to the conclusion that there is no ground for the contention that the section confers any judicial power on the Comptroller, or that it empowers him to act in aid of judicial proceedings. I have been unable to find in the proceedings any of the characteristics of the exercise of judicial power no matter how widely that expression may be construed. Nor can I see in the section anything more than a provision for conferring on the Comptroller-General the power of rendering inquiries in the administration of the Acts in question as effective as those which are authorized by similar provisions in the *Customs Act* 1901, and in the other

Acts I have referred to. Under these circumstances I am of opinion there is no ground for the objection that the sub-section in question provides for the exercise of judicial power which ought to have been vested in a Court. That ground, therefore, must fail in both cases, and as, however, no other objection was taken in Appleton's case, that conviction must be affirmed and the appeal dismissed. In the case of Huddart, Parker & Co. Proprietary Ltd., although this last ground fails, the first objection must as I have pointed out be upheld. In that case, therefore, the conviction must be set aside and the appeal allowed.

ISAACS J. Appleton's case arises under secs. 4 and 7 of the *Australian Industries Preservation Act* 1906 and relates to Inter-State trade and commerce.

The proceedings are not attacked for invalidity of those sections, but on the grounds that sec. 15B, introduced by the later Act —No. 5 of 1908 sec. 4—is unconstitutional for several reasons.

The first ground upon which sec. 15B is challenged is that the power of obtaining the discovery which may be required by the Comptroller-General is a part of the judicial power, and therefore not to be exercised except by the Court. The question of what is judicial power cannot arise in a unitary State in the precise form in which it presents itself here, because, where the legislature is supreme, the only question is the ascertainment of its will. For this reason English precedents of a strictly decisive character are not to be obtained. It is only where, as in the United States of America and Australia, the legislature is itself bound to conform to an organic law that the question becomes acute. Even in America we do not find a perfect analogy because the judicial power of the United States is not only vested in the Courts, but is limited in extent to the ten descriptions of cases specified in the Constitution, so that the test of what is "judicial power," is not to be found by merely ascertaining the ambit of the judicial power which the Courts there possess. I have found no assistance from any of the American cases cited. The case most nearly recognizing a general test is one I have since examined:

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Prentis v. *Atlantic Coast Line* (1) where *Holmes* J. says:—"The nature of the final act determines the nature of the previous inquiry." Still in the domain of purely British jurisprudence there is to be found sufficient to elucidate the problem. The term "judicial power" is essentially a British phrase. It was not invented by those who in 1787 framed the American Constitution. Many of those distinguished men were trained in the science of the law, and were familiar with the Commentaries of Sir William Blackstone published in 1768. In those Commentaries the student of American law can find the basis of much that has been decided by the Courts. And among other things we may there find the threefold division of "legislative power," which the learned author says is "vested by our Constitution" in Parliament (vol. I., p. 147), the "executive power," which he says (p. 190) is "vested" in the King or Queen, and the "judicial power"; and as to this the learned author says (p. 267) "by the long and uniform usage of many ages, our Kings have delegated their whole judicial power to the judges of their several Courts," and he adds that this jurisdiction "the Crown itself cannot now alter but by Act of Parliament." In other words, he points out that the judicial power is by constitutional usage and law vested in the judicature. At p. 269 occurs this important passage:—"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, but not removeable at pleasure, by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any State, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power." This is enlarged upon by the learned commentator, but it is sufficient to observe in passing that the phrase "judicial power" is repeatedly used by him, but always to indicate what he calls "the administration of common justice." This is shown by one sentence (p. 269):—"Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose *decisions* would be then regulated only by their own opinions, and not by any

(1) 211 U.S., 210, at p. 227.

fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe."

In vol. III., p. 25 he indicates directly what is an exercise of the judicial power:—"In every Court there must be at least three constituent parts, the *actor*, *reus*, and *judex*: the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or *judicial power*, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy."

Here then is plainly the inspiration of the American Constitution in regard to the separation of the three departments of State, and the terminology applied to each, and none the less is this a legitimate source of instruction for the purposes of our own Constitution. The passages I have quoted seem to me a key to the meaning of the terms we are now considering.

A great many cases may be found in which the word "judicial" is applied to acts authorized to be done. But the word "judicial" by itself is ambiguous. The expression "judicial power," understood as the power which the State exerts in the administration of public justice, in contra-distinction from the power it possesses to make laws and the power of executing them, is not in the least ambiguous. It is I believe correctly stated by *Palles*, C.B. in *The Queen* v. *Local Government Board* (1) that "to erect a tribunal into a 'Court' or 'jurisdiction,' so as to make its determinations judicial, the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights." "By this," said the learned Chief Baron, "I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happen-

(1) (1902) 2 I.R., 349, at p. 373.

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ing of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the *power* authorizing it is *judicial*." There we get a modern use of the term "judicial power."

Taking these high authorities as affording the guiding principles for our present purpose, it appears to me the objection to sec. 15B that it is an exercise of the judicial power is untenable. It is ministerial, and its analogue can be found in almost every Customs Act. If the power be judicial in one case it must be so in the other, and it would be no answer to say that, because judicial powers were prior to the Constitution exercised by non-judicial instruments, they could in face of express words of the Federal Constitution be similarly exercised now. Manifestly if one instance is invalid the other must be, whatever the inconvenience. The true position, however, is in my opinion that in neither case are liabilities imposed or rights affected by any determination of the Comptroller-General, and, resting the matter on the broad distinction of Blackstone, the Comptroller-General's action in no sense amounts to "administration of public justice," or regulates by any determination of his the life, liberty or property of the person interrogated.

I should not omit to notice an argument tending to establish that the Comptroller-General was called into action by a charge of an offence, or that he necessarily launched a charge, and that the charge of an offence was the basis of his interrogation, and consequently the proceeding was of a judicial nature. But that is not so. The Comptroller-General does not charge anyone with an offence. If he forms a belief upon material before him that an offence has been committed, he may search for the information as to whether his *primâ facie* belief is correct or incorrect, and may require any person to answer questions or produce documents in relation to the alleged offence. This involves the requirement that the person of whom information is demanded shall himself be informed with reasonable certainty of the nature of the alleged offence, that is, of the offence which the Comptroller-General believes has been committed. Obviously it need not be set out

with great particularity, because the very object of investigation is to learn the real facts, but enough must be stated to enable a person whose sources of knowledge are placed under requisition to know what it is he has to tell or produce. Up to this point, however, no criminal charge is made; no person has been called upon in a legal proceeding to defend himself before a judicial officer. It is mere investigation with a view to inform the mind of the Executive whether the law has or has not been observed, and, if not, whether the nature of the contravention is such as to merit further action. See *United States* v. *Patterson* (1). This objection therefore fails.

The next objection to the validity of the section is that it violates sec. 80 of the Constitution, which guarantees trial by jury in indictable offences, by insisting upon self-incrimination.

The essence of the objection is that self-incrimination is inconsistent with trial by jury. No direct authority was or could be adduced in support of this contention; but several cases were cited which were decided upon the Fifth Amendment of the American Constitution declaring that no person "shall be compelled in any criminal case to be a witness against himself." Those cases, such as *Counselman* v. *Hitchcock* (2), determined that in face of the amendment it was unlawful for the Inter-State Commission to insist upon questions the answers to which might in the then state of the law be used against the witness in a further prosecution. But all that line of decisions depends entirely upon the express provisions of the Constitution quoted, and in *Brown* v. *Walker* (3) the Supreme Court traces the origin and establishment of the principle *nemo tenetur seipsum accusare*, and points out that the American States were so impressed with the wisdom of the rule followed by the British Courts that they made it a part of their fundamental law, and by that means a maxim, which in England was a mere rule of evidence, became clothed in America with the impregnability of a constitutional enactment. The American Courts never, so far as I am aware, rested this principle on the jury system.

Sec. 80 of the Constitution retains, in respect of trials on

(1) 150 U.S., 65, at p. 68. (2) 142 U.S., 547.
(3) 161 U.S., 591, at pp. 596-7.

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indictment for Commonwealth offences, the provision of Magna Charta that the issue shall be determined "*per legale judicium parium suorum*," so jealously preserved in the American Constitution.

The whole meaning and essence of the requirement is that a jury, and not a judicial officer, shall pronounce upon the guilt or innocence of the accused. But the rule as to self-incrimination is outside the scope of that provision; it is still a mere evidentiary rule, applicable to all criminal offences, indictable or otherwise, and open like all rules of evidence to Parliamentary regulation.

The third objection raised to the validity of sec. 15B is that, assuming the functions committed to the Comptroller-General are administrative, sec. 101 of the Constitution vests them exclusively in the Inter-State Commission. The contention ultimately depends on the propriety of the construction suggested that the creation of the Commission is compulsory, that its special constitutional function, mandatory and inalienable, is to execute and maintain the provisions of the Constitution, in relation to trade and commerce and of all Commonwealth laws made thereunder, and for that purpose Parliament may grant such powers of adjudication and maintenance as it deems necessary.

There are several serious objections to this construction which may be thus stated. Though the creation and organization of the Commission at some time is contemplated as a certainty, the only express constitutional necessity for its action is in relation to interferences with State railway preferences and discrimination.

The contention relied on inverts the language of the section. The powers which the Commission is to have are only such as Parliament may in its discretion confer as being in its opinion necessary to be conferred on that body for the execution and maintenance of the trade and commerce. No others are contemplated by the Constitution except those expressly given with reference to railways.

Again, the Constitution in its distribution of powers enacts that the "execution and maintenance" of the Constitution and the laws of the Commonwealth are exerciseable by its Governor-

General on the advice of his Executive Council (secs. 61 and 62).

Judicial power is vested in Courts (sec. 71).

Sec. 51, sub-sec. (xxxix.), empowers the Parliament to legislate as to matters incidental to powers granted. These are fundamental provisions of the Constitution, and are not expressly abrogated.

Sec. 101 is an exceptional constitutional permission to Parliament which is additional and subsidiary.

Adjudication is placed on the same footing as administration, and if the contention that sec. 61 is entirely displaced is sustainable at all, it applies as much to the case of judicial power as to that of administrative power: see sec. 73 (iii.).

And it is hard to perceive the limit of the operation of such a contention. Ministerial control, and to a great extent judicial action, would be entirely superseded, in the ordinary operation of government by a body entirely independent of the Executive, and not responsible to Parliament, and not necessarily trained in the law. Its duties could not be fulfilled without an immense staff all over Australia operating side by side with, but altogether separate from, the regular members of the Public Service. I am quite unable to accept this view of the section. If for any reason Parliament thought it desirable to invest the Inter-State Commission when created with the duties of inquiry under the *Australian Industries Preservation Act*, it could certainly do so, but I cannot agree that the only alternative to this is executive paralysis in regard to all the trade and commerce provisions established by the Constitution or enacted by the legislature. And yet that extraordinary position is essential to this branch of the appellants' argument.

I am, therefore, of opinion that sec. 15B is valid, and as no other reason was urged by the appellant in Appleton's case, his appeal fails.

In Huddart, Parker's case there is the further question whether the provisions contained in secs. 5 and 8 of the *Australian Industries Preservation Act* go beyond the powers granted to the Parliament by the Constitution. The words of that instrument are short and clear. They declare that Parliament shall, subject to the Constitution, have power to make laws for the

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peace, order and good government of the Commonwealth with respect to (xx.) "Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." The enactments are said to be invalid because they relate to the Intra-State business of the companies designated. The distinct unambiguous words of the power, couched in language quite unequivocal, do not—so it is urged—mean what they say, but are to be abridged when the rest of the Constitution is considered.

I at once assent to the principle that the whole document must be looked at to ascertain the meaning of every part of it. The language in one part may modify the language in another. No rule of construction is more firmly established. But it is only one of several rules declared by the highest authorities, and all of which must when necessary be observed. One of universal application is that though we are to examine every part of the instrument we must be guided by its language alone as applied to the subject matter, and it is not permissible to wander at large upon a sea of speculation searching for a suitable intent by the misty and uncertain light of what is sometimes called the spirit of the document, for that is largely fashioned subjectively by the preconceptions of the individual observer. In *Cargo ex "Argos," Gaudet* v. *Brown* (1), the Privy Council adopted the words of *Tindal* C.J. in the *Sussex Peerage Case* (2):—"The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the Statute are in themselves precise and ambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The *words themselves alone* do in such case best declare the intention of the law giver." That, I consider, precisely fits the present case, but the learned Lord Chief Justice adds an alternative situation which will presently be found of considerable application. Unless the language is adhered to, and fair and full effect given to the words employed, construed according to the recognized British rules of interpretation, there cannot in my opinion be any certainty or stability in the Constitution.

Now, at the time the Constitution was framed and passed into

(1) L.R. 5 P.C., 134, at p. 153. (2) 11 Cl. & F., 85, at p. 143.

law, there were certain established canons of constitutional construction which had been laid down by the Privy Council and applied to various Imperial grants of governmental power, and if there be any judicial utterances which the framers of the Constitution can be supposed to have had in view, and to have guided them in fashioning that instrument, such decisions pre-eminently occupy that position. Those canons are as binding upon me as if they were contained in an Act of the Imperial Parliament—and although in cases coming under sec. 74 the decision of this Court upon the construction of the Constitution in a particular case is not appealable without its consent—yet not even there am I liberated as a Judge from observing the rules of interpretation which are authoritatively laid down for the guidance of His Majesty's tribunals oversea. Besides, this is not a case under sec. 74, and so my duty is clear beyond question to follow the Privy Council's decisions where applicable. The Judicial Committee in *The Queen* v. *Burah* (1) said by Lord *Selborne* L.C., speaking of the Indian legislature, that it "has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, *plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.*" That is the first position, the powers whatever they may be are plenary. The principles so stated have been applied to the Federal Constitution of Canada (see *Hodge* v. *The Queen* (2)), and have recently been extended by this Court to our own Constitution in the *Opium Cases*. But it is said, not inaccurately, that the "limits" of the power have still to be ascertained, and so the immediate difficulty is untouched by that passage. Lord *Selborne* did not fail to perceive that argument, and he met it in this way (1):—"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legis-

(1) 3 App. Cas., 889, at p. 904. (2) 9 App. Cas., 117.

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lative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no *express* condition or restriction by which that power is limited . . . it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions." I call particular attention to the word "express." Lord *Selborne's* words stand out in letters of light, they are clear, comprehensive and complete, they illuminate the whole field of constitutional interpretation, and, properly applied, cannot fail to guide us to a true sense of the meaning of the legislature. Fortunately we are not without authoritative application of these principles to the Australian Constitution itself. Laying aside the question of one Government impeding or interfering with the exclusive functions of another, or in other words derogating from the express words of the grant and attempting to govern that other, a position entirely foreign to the Constitution, and as I read the judgment in *Webb* v. *Outtrim* (1), not supported by their Lordships, the express ruling of the Privy Council in that case as to the principle of interpretation is, as I conceive, of binding force upon this Court, and I do not feel at liberty to depart from it. Before going further let me say that the real basis of the argument of the appellants is that the States possess the reserved powers, and consequently control over internal trade, and therefore, agreeably to American interpretation laid down in *United States* v. *Dewitt* (2) in the year 1869, there is an implied prohibition against touching internal affairs inhering in all the powers granted to the Commonwealth Parliament however wide the language may be, unless you find it removed by express words or necessary implication. Now this is precisely what is denied by the Judicial Committee. Personally I agree with that decision, but if I did not, still, as I am not justified in running counter to the clear judgment of that tribunal in a matter respecting which the law gives it controlling authority over this Court, I conceive I should in any case be compelled to hold the same. It rejected the view that there is an inference that the framers of the Australian Constitution intended its provisions

(1) (1907) A.C., 81 ; 4 C.L.R., 356. (2) 9 Wall., 41.

should receive the American interpretation of implied prohibitions. It held that the doctrine of implied prohibition was not applicable to this Constitution. This exactly follows Lord *Selborne's* view, and so far as it is confined, as in this case, to those who are the subjects of Government and is not extended to Governments themselves, I consider the ruling both coercive and convincing. The principle of *Webb* v. *Outtrim* (1), as so determined, has been, I may observe, recently applied in a provincial income tax case by the Supreme Court of Canada in *Abbott* v. *City of St. John* (2), affirming the judgment of the Supreme Court of New Brunswick, and formally overruling the doctrine of *Leprohon* v. *Ottawa* (3), a doctrine which *Duff* J. said (4) had been already so thoroughly undermined by decisions of the Judicial Committee as no longer to afford a guide to the interpretation of the *British North America Act*. (See *Deakin* v. *Webb* (5)). But it is really that doctrine of implied prohibition which is invoked here, for of course no one can pretend there is an interference with any governmental function of a State.

Sec. 107 of the Constitution is relied on by my learned brothers who have preceded me. No doubt that section expressly reserves certain powers to the States. But an inspection of the clause at once discloses that the reservation of a power to a State does not imply prohibition to the Commonwealth. The reserved powers are those which are not either *exclusively* vested in the Commonwealth, or *withdrawn* from the States. But a power may be *concurrent* in both; and such a power is reserved to the State though existing also in the Commonwealth. Consequently reservation to the States cannot be taken as the test of whether a given federal power includes the right to affect internal trade, and cannot amount to a prohibition express or implied. It is always a question of *grant*, not of prohibition, unless that is express.

It would, therefore, in my opinion, be an infraction of the rule laid down by Lord *Selborne* L.C. in *The Queen* v. *Burah* (6) for me to cut down by any implied prohibition, whatever force the affirmative words would otherwise have upon a fair construction

(1) (1907) A.C., 81; 4 C.L.R., 356.
(2) 40 C.S.C.R., 597.
(3) 2 Ont. App. R., 522.
(4) 2 Ont. App. R., 522, at p. 619.
(5) 1 C.L.R., 585, at p. 606.
(6) 3 App. Cas., 889.

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of the Constitution, or as that learned Lord said, to enlarge constructively the conditions and restrictions expressly set by the Imperial Parliament.

With reference to *United States* v. *Dewitt* (1) I would observe that, even if I agreed with the wide meaning placed by my learned brothers who have preceded me on the words used by *Chase* C.J., I could not see my way to incorporate his dictum into the Australian Constitution, and then construe that document as if the Imperial legislature had enacted his words. If the interpretation placed on his observations be correct, it applies equally well to everything excluded from the various enumerated powers; and, inasmuch as manufacturing and mining companies are not included in paragraph (xx.), they ought *primâ facie* by parity of reasoning to be excluded from the commerce clause, and the taxation clause, and the bills of exchange clause, notwithstanding the generality of the words, because it is quite *consistent* with a restricted construction of the language of those clauses to regard the unspecified classes of corporations as entirely reserved to the States. Those corporations are not, expressly or by necessary implication, contained in those powers except upon a fair construction of the words themselves, and are not there at all if this doctrine of implied prohibition be applied to the several clauses referred to.

But whatever the worth or the consequence of the dictum in *United States* v. *Dewitt* (1), having to choose between *Chase* C.J. as interpreted, and the repeated opinions of the Privy Council, I have no room for hesitation, but am bound to construe the words of the Constitution according to their natural meaning and without reference to implied prohibitions. The whole contest here centres round the question which of these two authorities should govern us; because, as no word or syllable in the Constitution can be pointed to which expressly or by necessary implication cuts down the *primâ facie* meaning of paragraph (xx.), any attempted reconcilement of that paragraph with a more restricted construction must, consciously or unconsciously, involve the acceptance of the *Dewitt* doctrine and the extension of it, by the corollary stated by the learned Chief Justice—an exten-

(1) 9 Wall., 41.

sion, in my opinion, absolutely necessary to support the view contrary to that which I hold.

What, then, on ordinary principles of construction, is the extent of the power to make laws in respect of "foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth?" I speak of the direct power, not of what is ancillary to the power, as, for instance, the incidental power of providing a penalty for disobedience. This case makes the question one not of ancillary powers, but of actual direct power. In the first place, it is a separate and independent power complete in itself, and additional to the commerce power. The commerce power is exerciseable wherever that subject exists, whether individuals or corporations are engaged in it. The power over corporations is exerciseable wherever these specific *objects* are found, irrespective of whether they are engaged in foreign or Inter-State commerce, or commerce confined to a single State. Next, it is clear that the power is to operate only on corporations of a certain kind, namely, foreign, trading, and financial corporations. For instance, a purely manufacturing company is not a trading corporation; and it is always a preliminary question whether a given company is a trading or financial corporation or a foreign corporation. This leaves entirely outside the range of federal power, as being in themselves objects of the power, all those domestic corporations, for instance, which are constituted for municipal, mining, manufacturing, religious, scholastic, charitable, scientific, and literary purposes, and possibly others more nearly approximating a character of trading; a strong circumstance to show how and to what extent the autonomy of the States was intended to be safeguarded. The federal power was sufficiently limited by specific enumeration, and there is no need to place further limits on the words of the legislature. Another thing is clear, that corporations to come within the legislative reach of the Commonwealth must be corporations already existing. It is not a power to create corporations. When such a power was intended to be given it was expressly mentioned as in paragraph (xiii.), and federal incorporation necessarily includes a granting of all capacities and the enactment of all ancillary provisions for internal procedure, even though these matters would otherwise be

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exclusively within State jurisdiction: *Tennant* v. *Union Bank of Canada* (1); and *Toronto Corporation* v. *Bell Telephone Co. of Canada* (2). Foreign corporations are *ex vi termini* already existing, and the Australian trading and financial corporations subject to the power are those "*formed* within the limits of the Commonwealth." The words quoted would be meaningless if the power of creation, either in the first instance, or by way of adding capacities were included. Indeed, this follows from the nature of a corporation. It is entirely a legal conception. Nowhere is the notion better stated than in the celebrated *Dartmouth College* v. *Woodward* (3), where *Marshall* C.J. said:—"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."

The creation of corporations and their consequent investiture with powers and capacities was left entirely to the States. With these matters, as in the case of foreign corporations, the Commonwealth Parliament has nothing to do. It finds the artificial being in possession of its powers, just as it finds natural beings subject to its jurisdiction, and it has no more to do with the creation of the one class than with that of the other.

But laying aside creative power, what is left? It cannot be merely the power to legislate for the corporations with relation to Inter-State and foreign commerce. That, as already indicated, is conferred to the fullest extent by the first sub-section, and to confine paragraph (xx.) to that would give no meaning to its very definite words.

Again, to restrict its operation to internal company regulation would be absurd. Apart from the inherent improbability of investing the national authority with merely subordinate functions while retaining to the State the superior power of incorporation which, effectively exercised, could go far to nullify the inferior power, there are serious practical difficulties. I am unable, therefore, to accept the argument that what the Consti-

(1) (1894) A.C., 31.
(2) (1903) 6 Ont. L.R. 335, at p. 342; (1905) A.C., 52.
(3) 4 Wheat., 518, at p. 636.

tution has handed over to the Federal Parliament is simply the body of company law. That would include all the prohibitory and creative provisions contained in the State Statutes; it would also include the power to alter the conditions of a company's existence, which is equivalent to creation, and to annihilate the corporation altogether—which I think is, equally with creation, outside the region of federal competency. (See *Westlake on Private International Law*, 4th ed., p. 359). All this, I think, the language of the Constitution has left to the States. I take the power to legislate "for the peace, order, and good government of the Commonwealth with respect to foreign corporations, and trading and financial corporations formed within the limits of the Commonwealth" to be a power to act upon certain beings, which are found and remain in actual existence, possessing a fixed identity, a defined ambit of potentiality, having certain capacities and faculties unalterable by the Commonwealth, beings ready to act within their sphere of capabilities in relation to the people of the Commonwealth. Necessarily you cannot legislate for such corporations except with respect to some extraneous circumstances or events, whether trade, or finance, or contracts, &c., and there is nothing in the Constitution which says anything about the object, primary or secondary. I adhere to my view regarding purpose, motive, and objects expressed in *Barger's Case* (1). The power does not look behind the charter, or concern itself with purely internal management, or mere personal preparation to act; it views the beings upon which it is to operate in their relations to outsiders, or, in other words, in the actual exercise of their corporate powers, and entrusts to *the Commonwealth Parliament the regulation of the conduct of the corporations in their transactions with or as affecting the public.* Many of the matters that in one aspect are internal—such as balance sheets, registers of members, payment of calls, &c.—may in another aspect and in certain circumstances be important elements in connection with outward transactions, and have a direct relation to them, and so fall incidentally within the ambit of federal power. The same may be said of legal proceedings, remedies, and so on, including winding up proceedings so far as necessary to satisfy creditors, but

(1) 6 C.L.R., 41.

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not so far as extinction. But whether any given provision is part of the federal power or not must, as I view it, depend on whether it includes or is necessarily incidental to the control of *the conduct of the corporations in relation to outside persons.* This follows from the process of reasoning and elimination that the language itself forces upon us when effect is given to every word.

Federal creation and extinguishment of foreign corporations are impossible; federal creation of a domestic corporation already formed is equally impossible; extinguishment of a domestic corporation, the creation of which is entrusted to another authority, is, to say the least, in the highest degree improbable, particularly when no substitutive power of creation is entrusted to the federal authority. Creation and continued existence of a corporation connote full and unalterable capacity; and that necessarily implies internal administration, which, besides, presents as a substantive subject every reason for retention in the same hands as being a subordinate power to that of creation, and none for transference alone to a national legislature; and, therefore, viewing a corporation as a completely equipped body ready to exercise its faculties and capacities, it must be that *outward exercise* which naturally and inevitably remains as the subject of federal control.

This disposes of the contention that, if these sections be valid, the Commonwealth Parliament would be entirely at large, and that a schedule of wages and hours could be prescribed for these corporations, so also as to the qualifications of their directors; all that is purely internal management and equipment, and in no way directly affects the exercise of their capacities of trading or their financial operations or other public capacities, nor is it incidental to the control of their activities. It is a species of legislation appertaining to the Parliament whose creature the corporation is: *per* Privy Council in *Grand Trunk Railway Case* (1). Nor could the Federal Parliament exempt these corporations from any other of the general responsibilities attaching to them under State law, as, for instance, the payment of municipal rates, or the liability for nuisance as property holders, or enact for them offences appertaining to general police law, and

(1) (1907) A.C., 65, at p. 68.

arising, so to speak, in the course of daily life, apart from their trading and financial operations.

An illustrative instance is afforded by the decision of the Privy Council in two cases arising under the Canadian Constitution. The first is *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1). By the Canadian Constitution "railways" are placed within the exclusive jurisdiction of the Dominion Parliament, whereas "property and civil rights" are assigned exclusively to the Provinces. The parish of Notre Dame de Bonsecours, the local municipality, notified the railway company to clean out one of its railway ditches. The company refused on the ground that the Dominion alone had jurisdiction over the railway. The Privy Council, speaking by Lord *Watson*, drew the line clearly, and so as to indicate the guiding principle. The Judicial Committee held that the railway—*quâ* railway—that is as to construction, repair and alteration of the railway, and as to its constitution, powers and management, in other words its creation and the exercise of its powers in connection with the public, was entirely under the Dominion; but *as landowner* having a ditch which unless properly cleansed would be a nuisance to other landowners, it was subject to the provincial law. This is emphasized by the subsequent case, *Madden* v. *Nelson and Fort Sheppard Railway* (2), where a provincial Act which required fences to be erected for the protection of cattle was held *ultra vires*, on the ground that it affected the railway as a railway and not as a landowner. And as the contracts and combinations prohibited by the Statute in the present case are obviously an overt exercise of corporate trading and financial objects and capacities, and in relation to the public, it follows that the enactments directly regulate acts of the corporations *quâ trading or financial corporations* in the precise sense indicated by the Privy Council in the *Bonsecours Case* (1) with regard to railways. Just as their incorporation distinguishes them from natural individuals, so their trading or financial capacities distinguish them from other corporations, and it is as necessary to give effect to the words "trading" and "financial" as to the word "corporation." A power to alter their

(1) (1899) A.C., 367. (2) 1899) A.C., 626.

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internal management would not give that effect, but would cross the line of demarcation between these and other corporations as plainly as a general criminal law would obliterate the distinction between corporate bodies and ordinary individuals. But unless there remains the power in some way to regulate or control their external actions in the exercise of their capacities, the power is a mere shadow.

The Canadian cases are especially strong in their bearing upon this case because, although the Provinces have specific powers, and the Dominion some specific and all the residuary powers, it was not held in the *Bonsecours Case* (1) that, because the Dominion had the residual powers, therefore the specific powers of property and civil rights granted to the Provinces must by a doctrine of implied prohibition be *primâ facie* cut down. The specific power was fairly construed on its own basis and full effect was given to it. The same principle was followed in 1908 in *Toronto Corporation* v. *Canadian Pacific Railway Co.* (2). The Dominion Parliament, exercising its exclusive powers over railways, authorized the railway committee to require the respondent company to protect a street by certain gates and watchmen, and to apportion the cost between the company and the appellant corporation, the City of Toronto. This the committee did, and the question was whether the legislation was *ultra vires* of the Dominion legislature under its specific powers. The Judicial Committee, speaking by Lord *Collins*, rested on two principles—(1). That there may be a domain where provincial legislation passed under one power, and Dominion legislation passed under a different power may overlap, the matters regulated falling for one purpose under one exclusive power and for another purpose under the other exclusive power, and, if they do so overlap, the Dominion legislation prevails; and (2) that the "Railway" was expressly made subject to the Dominion, and there was no *express provision cutting down that power.* His Lordship said that the provincial jurisdiction over "property and civil rights" was quite consistent with a jurisdiction specially reserved to the Dominion in respect of *a subject matter* not within the jurisdiction of the Province. Much more clearly is

(1) (1899) A.C., 367. (2) (1908) A.C., 54.

that so where the States have not specific powers carved out, but have reserved to them merely such powers as, upon a fair construction of the powers expressly granted to the Commonwealth by the Constitution, and the grant of which to the Commonwealth was the very purpose of the Constitution, are not bestowed upon the Federal Parliament exclusively, and where the States hold even those powers subject to any overriding federal legislation where they are concurrent. In view of the more recent cases I have not thought it necessary to enter with any minuteness into *Citizens Insurance Co. of Canada* v. *Parsons* (1), but as it was argued at length I shall state one or two of the relevant principles enunciated by the Privy Council. These were: (1) A specific grant of power to one authority is not overridden by an express general grant to another. I would repeat that still less can it be overridden by a mere residuary gift; (2) "Civil rights" should not be narrowed to mean "status of persons." The words in their fair and ordinary meaning included the rights arising from contract, and those rights are not included in *express* terms in any Dominion power; (3) The Dominion Parliament had power to incorporate and equip corporations with capacities for Dominion purposes, that is, confer on it a *status*. But the Province could so legislate as to prevent the *exercise* of the capacities conferred. "And," said their Lordships (2):—"if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed Mortmain Acts, *though the corporation would still exist and preserve its status as a corporate body.*" To the same effect *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (3). The Privy Council's view of "status" in *Parson's Case* (1), is in itself a sufficient answer to the suggestion that the Federal Parliament could affect the *status* of the company in the strict sense; the distinction being drawn between the status, or totality of capacities of a corporation, and the legality of their exercise. *Lindley on Companies*, 6th ed., at p. 1226, similarly differentiates between the two conceptions.

(1) 7 App. Cas., 96.

(2) 7 App. Cas., 96, at p. 117.

(3) 9 App. Cas., 157, at p. 168.

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The appellants' argument in support of the limitation to mere *status* assumes one of the most dangerous experiments, particularly in a Constitution, namely, the introduction of a word of limitation which the framers have not inserted. The word "status" is not found in the power, any more than "incorporation" or "recognition," and I have no more right to insert one of the words than any of the others. A similar argument was raised in *Parsons Case* (1), that "civil rights" meant the "status of persons." The Privy Council refused to give effect to it and said (2):—"Their Lordships cannot think that the latter construction is the correct one. They find no sufficient reason in the language itself, nor in the other parts of the Act, for giving so narrow an interpretation to the words 'civil rights.' The words are sufficiently large to embrace, in their fair and ordinary meaning, rights arising from contract, and such rights are not included in *express* terms in any of the enumerated classes of subjects in sec. 91." In other words, notwithstanding the Dominion had the residual powers, the Privy Council declined to cut down express words as fairly interpreted, by anything but inconsistent words equally *express*. That is exactly in point here. If all that was meant was to overcome a State prohibition against trading by corporations of other States, sec. 117 dealing with subjects of the Crown could easily have been made sufficient. If a mere parliamentary power to negative such a State prohibition were intended that also could have been explicitly stated. If "recognition" of corporations were the only object of the power the word would have been used as in paragraph (xxv.), where the recognition of law records and proceedings is provided for. But no special necessity was felt to do this, and therefore no such division has been made. And, further, if such were the intention, there is no reason occurring to me why other corporations were not similarly treated, as, for instance, manufacturing and mining companies. The recognition of these and other corporations is as important as that of the two specially selected. But in addition to what I have already said there exists a specially strong historical reason for rejecting the view that status or recognition only was aimed at in paragraph (xx.). By the *Federal Council of Australasia*

(1) 7 App. Cas., 96.

(2) 7 App. Cas., 96 at p. 110.

Act 1885 (48 & 49 Vict. c. 60), the Imperial Parliament, by sec. 15 (*i*) conferred upon the Federal Council the power, among others, of legislating in certain events with regard to "*status* of corporations and joint stock companies in other Colonies than that in which they have been constituted."

Status only was within the power and it was the status outside the Colony of origin, and it was as to all Australian corporations and joint stock companies. This was intelligible though perhaps difficult to work, unless it meant merely recognition. But recognition of a foreign corporation is a well understood term. It is different from the validity or effect of its transactions. As to recognition there never was any trouble or difficulty: *Lindley on Companies*, 6th ed., p. 1221, points out that it is an established rule of private international law that a corporation duly created according to the laws of one State may sue and be sued in its corporate name in the Courts of other States. No new power was needed for this purpose, for there was no gap to fill. The common law provided for the case; and no suggestion ever appeared in Australia to threaten it. But, says the same learned author (at p. 1226): "Although a corporation duly *created* in one State, is *recognized* as a corporation by other States, the *transactions* of that corporation are governed, not by the law of the State creating it, but by the law of the place where those transactions occur, *and* by the constitution of the company." It was the law as to the corporate *transactions* that needed specially to be provided for if national uniformity were desired, not *recognition* of the corporation which was already uniform. And therefore in the Federal Constitution significant departures were made in the language from that used in the *Federal Council of Australasia Act* 1885. (1) "Status" disappears and no longer limits the power. (2) Joint stock companies unincorporated disappear. (3) All Australian corporations except trading and financial disappear. (4) Foreign corporations are inserted. (5) The power is no longer restricted to Colonies other than those of origin but extends also to the State of origin, because the express limitation is struck out.

Is this not a clear and unmistakeable indication that the legislature intended to give more than what it had formerly given "status"? And when giving that further power it cut down the

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classes of corporations to which it was to be applied, namely, to those whose business operations were likely to extend beyond the State of origin, but, to have uniformity, the power was to be applicable all over Australia, even within the State of origin. It was something beyond Inter-State commerce, and was to attach to the operations of the designated bodies wherever those operations might take place. That is the way the words appeal to me.

It was practically conceded that the Federal Parliament could entirely forbid a foreign company doing any business whatever in Australia, or it might be that permission to enter the field of trade might be given on conditions. But it was contended that the conditions must be preliminary only, and, once the corporation was lawfully stationed on the field of internal trade, it was beyond the reach of the Federal Parliament, except, perhaps, that a failure to continue the observance of a condition might terminate the right to trade at all; in short, that, though public protection or uniformity of law at the hands of some national authority was necessary, it must, whatever its urgency, stop at the preliminaries to trading.

To some extent the grant of power has admittedly overstepped the line of demarcation separating jurisdiction as to Inter-State and foreign trade from that concerning purely Intra-State trade. See the judgment of the learned Chief Justice in *The King* v. *Barger* (1). And once that line is passed, where is the new line to be consistently drawn, except where I have drawn it? I have shown that on the affirmative side the words are not satisfied by mere recognition; and on the negative or prohibitory side, what is the authority for drawing it at exclusion which, besides recognition, is also admitted by my learned brothers' view? Nothing in the Constitution lends itself to that result—no solitary authority English or American gives any countenance to it. So far as they go the American cases are opposed to it. In *Pembina Mining Co.* v. *Pennsylvania* (2), *Field* J., basing his statement on several authorities, says:—"The absolute power of *exclusion* includes the right to allow a *conditional* and *restricted exercise* of its corporate powers within the State."

And how can the power once admitted at all be sensibly divided?

(1) 6 C.L.R., 41, at p. 69.

(2) 125 U.S., 181, at p. 186.

What reason is there in permitting the Commonwealth Parliament to deny to a foreign company all business whatever, whether beneficial or hurtful to the general public, and yet in not permitting the Parliament to allow the company to do business that is innocuous, but, as the challenged sections provide, to exclude business that is harmful to the people of the Commonwealth? Again: in the case, say, of a New South Wales trading corporation with powers limited to the State in which it is formed, what is the power which is conceded by the appellants to the Commonwealth Parliament? It cannot expel them from New South Wales. That is plain. Compulsory recognition by the very State is superfluous. The Commonwealth Parliament admittedly cannot lop off any capacities: it cannot add to them. All that is for the State. The only authority left is mere prohibition against trading at all in New South Wales, either absolutely or subject to some preliminary conditions, but it is said that, permitted to trade at all, its operations are entirely subject to State control. In all this contention I confess I see nothing but endless intricacy and bewildering confusion.

Will this doctrine of preliminary or conditional permission or prohibition stand a practical test? As the argument claims exclusive State power on the actual field of operations, it is obvious that penalties may lawfully be imposed by the State at every point of corporate action, a power which could altogether nullify a mere general permission of the Commonwealth to trade. It is inconceivable that so futile a power, as paragraph (xx.) would then be, was solemnly handed over to the nation. Further, a conditional prohibition, once the condition was fulfilled and the corporation legally stationed on the field, might in many cases be equally futile and leave the gravest injury without remedy unless the States chose to give it. Preliminary precautions, in the case of trading and financial corporations, cannot of themselves determine rights or ensure relief against actual wrongs committed. This depends on the substantive law; and a federal security, for example, might, having regard to a State law, be an idle formality or else become a mere licence fee. A so-called security, whether in money or publication of balance sheet, or whatever it might be, insisted on by the Commonwealth law,

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would on the appellants' assumption be utterly valueless to persons actually injured, except so far as the corporation committed a breach of State law. There might be no State law applicable to the injury, or it might vary in every State. This, I am convinced, was not the object of the Federal Constitution. Take the present case: how would a federal provision requiring foreign companies to comply with the law prevent the actual crushing of individuals by a powerful combination, which no State law prohibited? And if it is to be left to the State to say whether such combinations are permissible, the requiring a deposit is only ancillary, and no advantage is gained by creating a double power to do that. So, to limit the clause in the way contended for, again requires the introduction of words which have not been inserted, and which would constitute a vital alteration of the actual language used.

It was practically conceded that the Federal Parliament could entirely forbid a foreign company doing any business whatever in Australia, or might grant permission to enter the field of trade upon conditions. It was contended, however, that the conditions must in a sense be preliminary only, and as long as the company was lawfully stationed on the field of internal trade, it was beyond the reach of the Federal Parliament, except that, perhaps, a failure to continue the observance of a condition might terminate its right to trade at all. If, however, that is within the permitted authority of the Commonwealth Parliament—and it appears to me that so much at least is quite consistent with the opinions of my learned brothers—the ultimate result may be that equally great control may be exercised by the Parliament, but at much greater necessary cost to the corporations concerned. Mere power to recognize corporations I put aside, because I cannot for a moment think this great national power was created for the special and exclusive benefit of corporations, and not in any way for the protection of the general public. And if there is power to impose conditions of trading on foreign corporations, it applies necessarily to Australian corporations, and these conditions must be within the discretion of the Parliament. Further, the power, whatever it is, must apply to corporations already existing at the date of the law as well as to those which thereafter come

into existence. So that a valid law might be passed by the Federal Parliament, enacting that *if* any such corporation engaged in such a transaction as those struck at by the challenged sections, its power of trading at all should thereupon cease, it must forthwith quit the permitted area, or, in other words, henceforth there should be, as the learned Chief Justice has said, a denial of the capacity to enter into contracts relating to domestic trade, or a particular branch of that trade. The difference in result would be that the penalty must be not £500 or £1,000, but the whole franchise of the company, or its franchise as to a particular branch of that trade. It can hardly be a consolation to these corporations to know that the Federal Parliament may find itself driven to protect the public, even though the cost to the company may be its very existence in Australia. This, however, besides being very hard on the corporation itself, gives no redress to persons actually injured—it prevents future wrongs, but leaves the past untouched. And if the Federal Parliament is to be entrusted with such radical powers even in respect of a company doing purely State business, what possible reason can exist for cutting down the primary meaning by denying the milder power such as is exercised in secs. 5 and 8, which it is admitted are within the literal terms of the Constitution, and, as I think, cannot be denied without impliedly inserting other words? The States too would scarcely see much shelter in a doctrine which conserved to them the exclusive right to fine a man, but allowed the Commonwealth to hang him.

Now, on the other hand, there is strong affirmative reason for giving to the plain words of the power their ordinary and natural meaning. Before the Constitution was framed it was common knowledge in Australia that the affairs of trading and financial corporations, whether formed in Australia or abroad, had been the cause of much business strain and anxiety, that the general public entering into contractual relations with them as depositors, investors or shareholders, had unfortunately found the need of some powerful controlling authority to give greater security than had hitherto been afforded by the law. To some extent more effective State legislation could and did follow. But the increase in the formation of corporations for all kinds of

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business enterprises, commercial, industrial and financial, is one of the most notable characteristics of modern life. They are incorporated in one State, and can take the capacity to trade in all, and the freedom of Inter-State trade introduced by the Constitution increased the likelihood of their doing so. Not only have they many advantages expressly and directly flowing from the language of the law, but by their inherent nature, and proceeding from their very magnitude, their wealth, the influence that mere numbers inevitably bring, they possess a power which few individuals can hope for. This power may be exerted for the public good, but it may not, and, where it is not, the danger is proportionate to the power. The mere fact of combination is therefore a feature of so much commercial importance as to create in itself strong ground for the distinction in sub-sec. (xx.) of sec. 51 of the Constitution. Said Lord *Macnaghten* in *Quinn* v. *Leatham* (1):—"That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of *Bowen* L.J. and Lords *Bramwell* and *Hannen* in the *Mogul Case* (2). A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord *Fitzgerald* observes) when one man has to defend himself against many combined to do him wrong." So, too, *Harlan* J. in *Northern Securities Co.* v. *United States* (3):—"If Congress legislates for the protection of the public, may it not proceed on the ground that wrongs when effected by a powerful combination are more dangerous and require more stringent supervision than when they are to be effected by a single person?" And at p. 340, quoting from another case:—"Men can often do by the *combination* of many what severally no one could accomplish, and even what when done by one would be innocent. . . . *There is a potency in numbers when combined*, which the law cannot overlook, where injury is the consequence." Add to the power of numbers, the facilities of extension, the comparative personal

(1) (1901) A.C., 495, at p. 511. (2) 23 Q.B.D., 598; (1892) A.C., 25.
(3) 193 U.S., 197, at p. 335.

immunity of the individuals who compose the corporation, and the other special features of these artificial beings, and there presents itself a sufficient reason for handing over to a strong national authority for uniform and effective treatment, should it consider the occasion requires it, the comparatively vast and far-reaching transactions of foreign and trading or financial corporations.

Why, then, should we shut our eyes to the obvious facts of life, and the practical reasons which confront us, and why, as was said in one case, should we go "hunting for reasons" to cut down the plain words of the Constitution, and so deprive them of their ordinary signification in frustration of the intention of the Constitution, at all events as that may be gathered on the face of the document?

At this point the further words of *Tindal* L.C.J. in *The Sussex Peerage Case* (1) become important:—"But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the Statute." The ground and cause of making this Statute, the Federal Constitution, was for the better government of the Australian people, to select certain powers, and subject to express limitations, to place them unreservedly for uniform treatment on national considerations in the hands of a strong central authority to be exercised as if Australia were one undivided country and without regard to State lines. The ground and cause of this particular sub-section are too fresh in the public minds to be easily forgotten. The words of trust and reservation as to all the powers conferred are alike plain, and were intended to be plain. There is no need to search for implied prohibitions.

Looking on the face of the document I find nothing to detract from the natural signification of the unequivocal English terms employed. The appellants' argument really assumes an unwilling grant of power to a dangerous hand that might use the power rashly, and asks for a consequent narrow construction of powers. Again and again that has been held a purposeless argument in a

(1) 11 Cl. & F., 85, at p. 143.

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Court of law: *Bank of Toronto* v. *Lambe* (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2).

But once that argument disappears, what rational justification is left to limit the natural effect of the words tried by Lord *Selborne's* rule? I am unable to see why it is beyond the competency of a Federal Parliament, under the powers expressly conferred upon it, to say that foreign corporations and Australian trading and financial corporations shall not, except under liability to penalties, overtly exercise their capacities so as designedly to injure the Australian people or crush Australian industries.

For these reasons I am of opinion this appeal also should be dismissed.

HIGGINS J. The question as to the validity of secs. 5 and 8 of this Act is undoubtedly difficult; but to my mind the difficulty lies, not so much in determining that the Federal Parliament has exceeded its powers under sec. 51 (xx.), as in fixing precisely the limits of that power.

We have to examine (1) the power conferred; (2) what has been enacted as under that power.

(1) The only power on which the Federal Parliament relies is as follows (sec. 51):—"The Parliament shall, *subject to this Constitution*, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—(*inter alia*) (xx.) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth." It has always to be remembered that the State Constitutions continue as before, subject, however, to the Constitution (sec. 106); and that every power of a State Parliament continues unless it is by the Constitution exclusively vested in the Commonwealth Parliament or withdrawn from the State Parliament. Before the Constitution each State had power to make any laws that it saw fit for the people within its borders. The State power is the rule, the Federal power is the exception; and those who argue for the Federal Parliament must establish therefore, affirmatively, that power has been given to it to make the enactment in question—power under sub-sec. (xx.); for, as my brother *Isaacs* has pointed

(1) 12 App. Cas., 575, at p. 587. (2) (1898) A.C., 700, at p. 713.

out, it is not here contended that any incidental or ancillary power, under sub-sec. (xxxix.), or otherwise, will suffice. The power has been given by sub-sec. (xx.), or not at all.

(2) What, then, has been enacted? Shortly stated, this Act, in secs. 4 and 7, forbids, as to Inter-State and foreign trade, certain contracts and combinations, intended to restrain or to monopolize trade, or to destroy Australian industries by unfair competition; and they are forbidden to persons as well as to corporations. These sections are admittedly laws "with respect to" Inter-State and foreign trade within sec. 51 (I.) of the Constitution; and it is only because they do regulate such trade that they are valid. But then come secs. 5 and 8 of the Act, under which precisely the same kind of conduct is forbidden as to trade of any kind, whether internal to a State or not, but it is forbidden to corporations only; and we are asked to treat the very same words as were used in secs. 4 and 7 as now being legislation, not with respect to trade, but with respect to corporations. To say the least, this is a startling change of front. Secs. 4 and 7 indicate that the Parliament regards all such contracts and combinations as bad, not bad in the case of corporations only; and it is obvious that secs. 5 and 8 are confined to corporations merely because the Parliament thinks it has power to legislate with respect to such contracts and combinations in the case of corporations and not in the case of persons. This consideration does not settle the matter, however; for whatever Parliament thought, whatever was Parliament's motive, the question remains, is this a law "with respect to"—that is to say, as I understand it, *on the subject of*—corporations.

If the argument for the Crown is right, the results are certainly extraordinary, big with confusion. If it is right, the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal Parliament is competent to enact licensing Acts, creating a new scheme of administration and of offences applicable only to hotels belonging to corporations. If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its

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employés less than 10s. per day, or charge more than 6 per cent. interest, whereas other corporations and persons would be free from such restrictions. If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is right, the Federal Parliament can repeal the *Statute of Frauds* for contracts of a corporation, or may make some new *Statute of Limitations* applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are, for ordinary purposes, left to the State legislatures. But these arguments from inconvenience are not conclusive. The question still remains, are these secs. 5 and 8 legislation "with respect to" corporations, or are they legislation with respect to trade, commerce and industry?

Now, how are we to determine what is the subject of any law, of any legislation, when two or more things that might be subjects of legislation are mentioned in it? The mere fact of mentioning corporations in these secs. 5 and 8 does not necessarily make them a law "with respect to"—*on the subject of*—corporations. If a Licensing Act provides that the Licensing Court shall not transfer the licence of a wife to her husband unless the husband be approved by the Court as a holder of a licence, we should not call it legislation "with respect to" marriage or of marital relations. If an Act provides that every marriage shall be celebrated in presence of two witnesses of full age, and shall be registered, we should not call it legislation "with respect to" witnesses, or "with respect to" infancy, or "with respect to" registration. The first is a law "with respect to" dealing in intoxicating liquors; the second is a law "with respect to" marriage. To use the words of the Privy Council in *Russell* v. *Reg.* (1), we must find what is "the primary matter dealt with." We must find "the true nature and character of the legislation in the particular instance under discussion . . . in order to ascertain the class of subject to which it really belongs." Is this a law substantially with respect

(1) 7 App. Cas., 829, at p. 839.

to corporations, or is it a law substantially with respect to trade? The regulation of trade combinations is "the primary matter dealt with" (to use the phrase of *Russell* v. *Reg.* (1). As Lord *Watson* said during the argument of *Attorney-General for Ontario* v. *Attorney-General for Quebec* (2) "that which it" (the Act) "accomplished, and that which is its main object to accomplish, is the object of the Statute" (as distinguished from the motives which influenced the legislature).

Personally, I feel no doubt that that which these sections "accomplish, or attempt to accomplish," the "true nature and character of these sections," their direct primary and dominant object, is the regulation of trade. The first and principal question in ascertaining what is the subject of any particular legislation would seem to be, in most cases, what kind of obligations are imposed. This test was expressly or impliedly accepted in *R.* v. *Barger* (3) by, I think, all the members of the Court; for the point on which the minority differed from the majority of the Court was finally that the minority regarded Parliament as having imposed an obligation to pay Excise, whereas the majority thought that Parliament had imposed an obligation to observe certain labour conditions.

Here, as it seems to me, the obligations imposed are obligations as to trade, commerce and industry; therefore the sections come under the head of laws with respect to trade, commerce and industry, although applied to corporations only. In short, we have here, not a law "with respect to" corporations, but a law "with respect to" combinations. It is a law, substantially, "with respect to" trade, and not a law, substantially, with respect to corporations. My opinion, as will be seen, rests simply on the construction of sub-sec. (xx.) as one of the powers conferred by sec. 51 of the Constitution, and on an examination of secs. 5 and and 8 of this Act for the purpose of finding the true nature and character of the impeached legislation.

It has been said that this power as to corporations is quite as large as the power with regard to "naturalization and aliens" (sub-sec. xix.). I have no doubt that it is; but I think that any

(1) 7 App. Cas., 829, at p. 839.
(2) Lefroy's Legislative Power in Canada, p. 418.
(3) 6 C.L.R., 41.

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valid law with respect to aliens must be directly regulative of aliens as aliens, just as any law with respect to corporations must be directly regulative of corporations as corporations. At the same time, it is more difficult, from the nature of the subject, to conceive a law referring to aliens which is not aimed at regulating aliens, than it is to conceive a law referring to corporations which is not aimed at regulating corporations. It may be that, in some cases—*e.g.*, if the Federal Parliament prescribed that no aliens shall use the *Statute of Frauds* or the *Statute of Limitations* as a defence, that all aliens shall be taught certain religious doctrines, or that no alien shall work in factories, or be supplied with beer—the Act should be treated as an Act with respect to other subjects, and not with respect to aliens. But the position is not so clear, and in each case the classification of the law would have to be determined by the Court after a careful scrutiny of the nature and object of the law in its entirety.

But, it is asked, what then is the exact scope of the power in sub-sec. (xx.)? I think it is my duty to face this question, but I do not wish to be taken as giving any final or exhaustive definition. In the first place, this sub-sec. (xx.) does not give any power to incorporate companies. Such power of incorporation as the Federal Parliament has is implied, not express, not direct and independent, but ancillary, incidental to its other powers. This sub-section applies only to corporations which have been formed abroad, or (if trading or financial) by the States. But there is ample scope provided for the Federal Parliament by this sub-section. It can regulate such companies as to their status, and as to the powers which they may exercise within Australia, and as to the conditions under which they shall be permitted to carry on business. It is well established that each country has a right to prevent a foreign corporation from carrying on business within its limits, either absolutely, or except upon certain conditions: *Hooper* v. *California* (1); and this principle seems to be at the basis of sub-sec. (xx.). The Federal Parliament can, in my opinion, prescribe what capital must be paid up, probably even how it must have been paid up (in cash or for value, and how the value is to be ascertained), what

(1) 155 U.S., 648.

returns must be made, what publicity must be given, what auditing must be done, what securities must be deposited.

The Federal Parliament controls as it were the entrance gates, the tickets of admission, the right to do business and to continue to do business in Australia; the State Parliaments dictate what acts may be done, or may not be done, within the enclosure, prescribe laws with respect to the contracts and business within the scope of the permitted powers. An Act which forbids to corporations, and punishes, a contract which is within the permitted powers, is not an Act "with respect to" corporations *as such*, it is an Act with respect to contracts. A distinction of an analogous kind has been recently recognized in this Court in a section of a very different character. In the *Steel Rails Case* (*Attorney-General of New South Wales* v. *Collector of Customs for New South Wales*) (1), sec. 114 of the Constitution came under discussion. It forbids the Commonwealth to "impose any tax on property of any kind belonging to a State." Certain steel rails had been bought by the Government of New South Wales, and imported; and it was held that the import duty was payable, because duty was imposed, not on property *as property*, but on the act of importation, the movement of property. The subject of the tax there was not property, but the movement of property; the subject of the law here is not corporations, but the contracts of corporations—the contracts which corporations may make within the ambit of the powers permitted by the Commonwealth Parliament to be exercised. There is power in sub-sec. (1) to make laws "with respect to" a certain number of actions and transactions—Inter-State and foreign trade. There is power in sub-sec. (xx.) to make laws "with respect to" certain actors—to wit, corporations. The Federal Parliament has no power, in regulating the actors, to regulate, in whole or in part, transactions which do not belong to Inter-State or foreign trade. It can confer on a corporation power to hold lands as a matter of corporate capacity; but the State legislature, having the control of the lands within the State, can forbid such lands to the corporation, can prescribe laws in the nature of mortmain: *Colonial Building and Investment Association* v. *Attorney-General of*

(1) 5 C.L.R., 818.

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Quebec (1). The Federal Parliament can, as it were, regulate the terms of admission into a field and of remaining therein, but it cannot make a law imposing a penalty for picking a turnip.

The distinction may be fine, but it is clear, and necessarily incidental to the fine distribution of powers and subjects between federal and State legislatures in a complex society. The Federal Parliament can regulate corporations as to status, capacity, and the conditions on which business is permitted. But it is for the State Parliament to regulate what contracts or combinations a corporation may make in the course of the permitted business. The principle on which the distinction is based is not peculiar to federations, or novel to British law; for, according to the Privy Council, the *status* of a person in a Colony (*e.g.* as alien or subject) may have to be determined by the law of England, while the law of the Colony decides what rights and liabilities are attached to the status thus ascertained: *Donegani* v. *Donegani* (2); *In re Adam* (3). In fine, if the *Statute of Limitations* or the *Statute of Frauds* or the common law as to contracts is to be altered or repealed, even as to corporations, it must be altered or repealed by the State Parliament, which can deal with private persons as well as with corporations, and can secure uniform treatment.

In dealing with questions of constitutional powers, I take it that our duty is first to ascertain the meaning of the sub-section (in this case sub-sec. xx.), construing the Constitution as we would construe an ordinary Act of Parliament, and secondly, to look for the subject matter of the Act impeached, the things or the actions regulated, the target aimed at, as distinguished from the motive which influenced Parliament. It may seem a paradox; but the best way to find the subject of any Act is to find its object—what the Act accomplishes, or aims at accomplishing. I mean what it directly or immediately accomplishes, or aims at accomplishing, not what was the ulterior motive in the minds of the legislature. An Act may impose a tax on land values. The *object* of the Act is to get money from landowners by taxation. The *subject* of the Act is—to use the classification of sec. 51—

(1) 9 App. Cas., 157, at p. 166. (2) 3 Knapp., 63.
(3) 1 Moo. P.C.C., 460.

taxation. But the *motive* of the Act may be to induce land-owners to part with land which they do not put to use; and with the motive this Court has nothing to do. As to these sections 5 and 8, if anyone were asked, without any reference to the Constitution, what do these sections accomplish or aim at accomplishing, the answer would surely be—unhesitating—that it is the direct prohibition of unfair restraint of trade, unfair competition, monopoly.

It was urged by Dr. *Cullen* that if the legislative prohibition is found to bear a real relation to the peculiar qualities of a corporation distinguishing it from natural persons, then the Court will not pronounce that it is not a law relating to corporations, unless it be clearly shown that no such relation exists. But, in the first place, secs. 4 and 7, to which I have already referred, show that the prohibition, in the same words, is applied to persons as well as to corporations (in Inter-State and foreign trade), and that it does not bear any real relation to the peculiar qualities of a corporation. In the second place, this argument involves an inversion of the logical position. Those who support a federal law must show affirmatively that it is made "with respect to" some federal subject; and the mere fact that aliens, or corporations, or something else named in the list of federal subjects, are mentioned in the law, and are affected by the law, is not enough. In short, the thirty-nine articles contained in sec. 51 are subjects for legislation, not pegs on which the Federal Parliament may hang legislation on any subject that it likes.

I adhere to the view which was expressed by my brother *Isaacs*, and by myself, in *R.* v. *Barger* (1), that the Federal Parliament is like a specific legatee of powers, and the State Parliament is like a residuary legatee, and that it is a mistake to treat the internal trade of a State as forbidden to the Federal Parliament until the utmost limits of all the powers conferred on that Parliament by sec. 51 have been ascertained. But it is quite true that if we look at sec. 51 (1) alone, and no further, the internal trade of a State is excluded from the Federal Parliament, is forbidden to the Federal Parliament. Further on we find that the forbidden area is narrowed by the gift of express

(1) 6 C.L.R., 41.

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power to the Parliament to legislate with regard to bills of exchange, &c. I am disposed to think that even sub-sec. (xx.) narrows the forbidden area further, but not to the extent claimed for the respondent. Under sub-sec. (xx.) why should not the Federal Parliament legislate even as to a limited company which carries on a drapery business in a single city of one State? But although the forbidden area of the internal trade of a State is narrowed by the gift of a power to the Federal Parliament to make laws with respect to bills of exchange, I cannot find that the Constitution further narrows it by any gift to the Federal Parliament of power to make laws with respect to contracts. I accept fully the doctrine laid down in *Gibbons* v. *Ogden* (1), and I therefore treat this power conferred by sub-sec. (xx.) as "complete in itself," as a power which "may be exercised to its utmost limit and acknowledges no limits other than those prescribed in the Constitution." But we have first to find out what the power is, and for this purpose we have to consider and construe the whole of the clauses in sec. 51 "so as to reconcile the respective powers and give effect to all": *Citizens Insurance Co. of Canada* v. *Parsons* (2). It is not enough to say what the meaning of sub-sec. (xx.) would be if it stood by itself, if there were no other powers given. As the Privy Council has pointed out in the case just cited, and in other cases, we must construe the Constitution as one whole document, on ordinary principles of construction, "so as to reconcile the respective powers and give effect to all." On this principle I am driven to treat this power in sub-sec. (xx.) as a power to legislate with respect to corporations as corporations. Beyond this limit, the area for which the State legislatures can legislate is to be found.

So far, my reasoning has been applied to our own Constitution, mainly to its own words as they stand, and on ordinary principles of interpretation. I do not approve of the practice so often adopted of rushing to American cases for points—to cases which, owing to the differences in the Constitution, are as often misleading as helpful. But many cases have been cited from the United States and from Canada, and it is worth while to see whether any principles have been laid down in these countries

(1) 9 Wheat., 1.

(2) 7 App. Cas., 96.

which conflict with what seems to be the natural reading of our Constitution. In the United States Constitution the expressions used in the gift of powers are so various ("to lay and collect duties," "to establish an uniform rule of naturalization," &c.) that we cannot hope for much authority on the present subject. Yet it may be not unworthy of notice that a State legislature can require and enforce a licence for the sale of certain patented articles, whatever the Federal Act with respect to patents may prescribe as to the rights and privileges of the patentee: *Webber* v. *Virginia* (1). The Canadian Constitution has, however, like ours, a single phrase covering all the subjects of legislation. In secs. 91 and 92 of the *British North America Act*, the power, as expressed, is "to make laws in relation to matters coming within" certain "classes of subjects" mentioned. But there is this difference, amongst others, that there is a specific list of powers conferred on the Provincial Parliaments, as well as a specific list of powers conferred on the Dominion Parliament. The residuary powers belong to the Dominion Parliament; and therefore we are more likely to get help from cases which deal with the limits of the provincial powers. The Provincial Parliaments, for instance, have power to legislate as to "municipal institutions in the Provinces." But if a Provincial Parliament attempt to give to municipal institutions a power to deal with the liquor traffic, the provincial law is void: *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). On the other hand, a Provincial Parliament has been held to have power to prescribe the cleaning of a ditch belonging to the Canadian Pacific railway, although it has no power to regulate the structure of the ditch—a Dominion matter; for the line of distinction sometimes has to be very narrow: *Canadian Pacific Railway* v. *Parish of Dame de Bonsecours* (3). In the *Citizens Insurance Co. of Canada* v. *Parsons* (4), an Ontario Act had prescribed that certain conditions should be deemed to be included in every contract for fire insurance. The Dominion Parliament had the regulation of trade and commerce; and it was assumed, for argument sake, that fire insurance was a part of trade and commerce. Yet it was held that the

(1) 103 U.S., 344.
(2) (1896) A.C., 348, at pp. 363-4.
(3) (1889) A.C., 367.
(4) 7 App. Cas., 96.

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Ontario Act was valid, that the regulation of trade and commerce, the power committed to the Dominion, did not include the regulation of the contracts of a particular trade. I do not refer to these cases as settling the point which we have to decide. It is easy to point out distinctions in our Constitution. I refer to them as showing that, under a Constitution which presented similar difficulties, the reasoning which I have applied to the Australian Constitution (sec. 51) has not been rejected—has been, indeed, substantially adopted.

As for the lengthy arguments with regard to the constitutionality of sec. 15B of the Act of 1908, I think that it is not necessary for me, after what has been said by my learned colleagues, to give my reasons at length for concurring with them in their opinion that the section is valid. I cannot regard the functions of the Comptroller-General under that section as being in any sense judicial, still less as being an exercise of the judicial power of the Commonwealth. The numerous cases and expressions which have been cited on this subject have been pressed on us, I think, without due regard to the circumstances, and to the peculiarities of the United States Constitution, and especially to the express provisions therein against self-crimination and "due process of law." I concur also with my colleagues in refusing to accept the view that the powers conferred by sec. 15B on the Comptroller-General are powers which cannot, under the Constitution, be exercised except by the Inter-State Commission, which is not yet created. It is sufficient for me to say that, although the Constitution uses mandatory words as to creating an Inter-State Commission, it leaves it to the discretion of Parliament to say what powers should be bestowed on the Commission; and even when the powers have been bestowed, it by no means follows that the powers must be bestowed exclusively on the Commission. Subject to any law that may be made by Parliament as to the Inter-State Commission and its powers, the Governor-General in Council—virtually the Ministers and officers—can exercise any of the executive power of the Commonwealth (secs. 51, 61 of the Constitution).

The result is, in my opinion, that secs. 5 and 8 are invalid for the purposes of this conviction of this corporation, and invalid so

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far as they apply to trade and commerce, as well as industry, other than that referred to in sec. 51 (1); but that sec. 15B of the Act of 1908 is valid.

Appeal of Huddart, Parker & Co. Propy. Ltd. allowed.

Appeal of Appleton dismissed.

Solicitors, for the appellants, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor, for the respondent, *C. Powers*, Commonwealth Crown Solicitor.

B. L.

Foll *Waterside Workers Federation* v *Gilchrist Watt & Sanderson Ltd* (1924) 34 CLR 482

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H. C. OF A. 1909.

SYDNEY, *April* 14, 15, 16, 19, 20, 21, 23.

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

Jurisdiction of Commonwealth Court of Conciliation and Arbitration—Industrial dispute extending beyond the limits of one State—Undertaking carried on by one employer in two States—Relationship of employer and employé—Temporary cessation of work owing to dispute—Conditions precedent to jurisdiction—Acquiescence in jurisdiction by party seeking prohibition—Discretion of High Court—Excess of jurisdiction—Matters not in dispute between the parties—Submission of dispute by plaint—Prohibition quoad—Commonwealth Conciliation and Arbitration Act 1904 (*No.* 13 *of* 1904), *secs.* 19 (*b*), 38 (*u*)—*The Constitution* (63 & 64 *Vict c.* 12), *sec.* 51 (*xxxv.*), (*xxxix.*).

Where the employés engaged in different branches of one industry carried on in different States by a single employer take concerted action in making a