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their offences. The goods were worth about £66, apart from any profit made.

On the whole, viewing the general conduct of the defendants in relation to the Customs as intensifying the necessity for a severe penalty, and having regard also to the fact that the offences are not isolated acts, but are, so to speak, of a typical business nature, I am of opinion justice would not be done if I were not to impose the maximum penalties. I accordingly convict the defendants of the offences charged, and impose penalties —£265 13s. for the first offence and £200 for the second.

The defendants must pay the costs of the action.

Judgment for plaintiff with costs.

Solicitor, for plaintiff, *Powers*, Crown Solicitor.
Solicitors, for defendants, *Hill & Talbot.*

Varied *A-G (Cth)* v *Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644

Cons *Yougarla* v *WA* (1999) 21 WAR 488

Appl *Yougarla* v *WA* (1999) 153 FLR 385

[HIGH COURT OF AUSTRALIA.]

THE COLONIAL SUGAR REFINING CO. LTD. AND OTHERS . . . . . } PLAINTIFFS;

AND

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AND OTHERS. } DEFENDANTS.

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MELBOURNE, *Sept.* 24, 25, 26, 27, 30; *Oct.* 4, 22.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Constitutional law—Powers of Commonwealth—Compulsory inquiry—Incidental power—Inquiry as to matters outside powers of Commonwealth Parliament—Royal Commission, powers of—Judicial power of Commonwealth—Granting of immunity in State Court—Royal Commissions Act 1902-1912 (*No.* 12 *of* 1902—*No.* 4 *of* 1912), *ss.* 6B, 6DD—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (xxxix.)-128.

Practice — Action against Crown — Declaratory judgment — Injunction — Threatened illegal act.

Practice—High Court—Appeal to Privy Council—Certificate of High Court—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 74.

A power to enact a law compelling persons to give evidence on matters as to which the Executive Government of the Commonwealth thinks it desirable to collect information to be made use of in exercising any existing power of the Commonwealth Parliament is "incidental" to the execution of that power within sec. 51 (xxxix.) of the Constitution.

But, *held*, by *Griffith* C.J. and *Barton* J. (*Isaacs* and *Higgins* JJ. dissenting), that such an incidental power does not extend to enacting a law compelling persons to give evidence on matters information as to which is relevant only to a possible amendment of the Constitution under sec. 128 thereof.

Held, therefore, that the *Royal Commissions Act* 1902-1912 is within the power of the Commonwealth Parliament to enact, but (by *Griffith* C.J. and *Barton* J., *Isaacs* and *Higgins* JJ. dissenting) that it should be construed as intended to apply to compelling evidence on such limited matters only.

Sec. 6DD of the *Royal Commissions Act* 1902-1912, which purports to give a qualified protection in State Courts from the criminative effect of admissions made by a witness on examination before a Royal Commission, is within the power of the Commonwealth Parliament to enact.

Sec. 6B, even if invalid as an attempt to confer part of the judicial power of the Commonwealth upon a Royal Commission, is severable from the rest of the Act.

Pursuant to the *Royal Commissions Act* a Royal Commission was appointed to inquire into the sugar industry, and a summons was issued to the manager of the plaintiff company to attend and give evidence and produce documents before the Commission, notice being given to him of the intention of the Commission to ask certain specified questions and to produce certain specified documents. Before the summons was returned the plaintiff company and its officers brought an action against the Attorney-General and the members of the Commission claiming a declaration that the Act was invalid and a consequent injunction to restrain the members of the Commission from proceeding upon the summons, and, alternatively, if the Court held that the whole Act was not invalid, a declaration that the manager was not bound to answer questions or produce documents relating to matters as to which the Federal Parliament had no present legislative power or which were not relevant to the subject matter of the Commission.

Held, by *Griffith* C.J. and *Barton* J. (*Isaacs* and *Higgins* JJ. dissenting): (1) That the Commission could not lawfully ask questions, or demand the production of documents, relevant solely to :—

(*a*) The internal management of the affairs of the company ;

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(*b*) The operations of the company outside the Commonwealth, except so far as they related to the conditions of carrying on the sugar industry irrespective of the persons by whom it was carried on;

(*c*) Matters relating to the value of particular parts of the property of the company, except such parts as were actually and directly employed in the production and manufacture of sugar within the Commonwealth;

(*d*) Details of salaries paid to officers of the company, except so far as they were relevant to the actual cost of such production and manufacture.

and (2) that the plaintiffs were entitled to a declaration and injunction accordingly.

The Court being equally divided in opinion, a certificate pursuant to sec. 74 of the Constitution was granted.

MOTION referred to the Full Court.

Under and pursuant to the *Royal Commissions Act* 1902 by letters patent dated 24th October 1911, a Royal Commission was appointed, consisting of Sir John Hannah Gordon, Chairman, and Albert Hinchcliffe, Murray McCheyne Anderson, Martin Howland Shannon, and Thomas William Crawford, to inquire into:—

"The sugar industry in Australia, and more particularly in relation to—

"(*a*) Growers of sugar-cane and beet,

"(*b*) Manufacturers of raw and refined sugar,

"(*c*) Workers employed,

"(*d*) Purchasers and consumers of sugar,

"(*e*) Costs, profits, wages and prices."

The Commission took a large body of evidence, and they summoned Edward William Knox, the general manager of the Colonial Sugar Refining Co. Ltd., and the directors of that company to testify and to produce documents, and those persons were served with a list of documents which they were required to produce and a list of questions which they were informed they would be asked. On 1st May 1912 Knox attended the sitting of the Commission and a request by him to be allowed to read a statement relating to the affairs of the company before being asked questions having been refused, the sitting was adjourned. Subsequently new summonses to attend were served upon Knox and the directors, who refused to attend, and informations were laid

against them by the secretary to the Commission for failing to attend and produce documents. One of the informations, that against Sir Henry Normand McLaurin, was heard, and he was fined £25 for non-attendance, and directed to pay the costs. The other informations stood over.

The *Royal Commissions Act* 1912 afterwards became law and under it a new Commission was issued to the same persons to inquire into the sugar industry of Australia, with particular relation to the five subjects enumerated in respect of the first Commission, and also the following:—

"(*f*) The trade and commerce in sugar with other countries,

"(*g*) The operation of the existing laws of the Commonwealth affecting the sugar industry,

"(*h*) Any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient."

It was also directed that the inquiry to be made should be deemed to be in continuance of that entrusted to the Commission by the letters patent of 24th October 1911, and that the evidence taken thereunder should be considered by them as if taken in pursuance of the new authority.

On 7th September 1912 a summons to attend and give evidence and produce documents, a long schedule of which was attached to the summons, was served on Knox.

An action was then brought by the company its directors and general manager against the members of the Commission, William Jethro Brown, who had been appointed Chairman in place of Sir J. H. Gordon, and the Attorney-General of the Commonwealth, claiming by the writ a declaration that the *Royal Commission Act* 1902-1912, or, alternatively, certain sections of it, were beyond the powers of the Federal Parliament, and that the plaintiffs were not bound to attend any sittings of the Royal Commission on the sugar industry appointed under that Act, and also an injunction to restrain the Commission from preceeding further upon the summons issued to the plaintiff Knox or from asking questions or compelling the production of documents in respect of subjects beyond the power of Parliament or not relevant to the terms of the Commission. The plaintiffs then obtained an order *nisi* for a writ of prohibition to restrain

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the defendants other than the Attorney-General in the terms of the writ and also moved for an injunction to the same effect.

The motion was referred to the Full Court.

Mitchell K.C. and *Lamb* (with them *E. M. Mitchell*), for the plaintiffs. An injunction may be granted in a case of this kind to avoid multiplicity of actions: *Smyth* v. *Ames* (1). The Court will interfere to restrain criminal proceedings if those proceedings interfere with the plaintiffs' right of property: *Dobbins* v. *Los Angeles* (2); *Davis and Farnum Manufacturing Co.* v. *Los Angeles* (3). The Court has jurisdiction in these proceedings to determine the various matters raised: *Dyson* v. *Attorney-General* (4); *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (5).

[HIGGINS J. referred to *Lloyd's Bank Ltd.* v. *Medway Upper Navigation Co.* (6).]

The *Royal Commissions Act* 1902-1912 is invalid. Its language is wide enough to confer on Royal Commissions powers as to matters which are beyond the powers of the Commonwealth to deal with, and its intention is to confer those powers. Sec. 1A, by the use of the words "connected with the peace, order, and good government of the Commonwealth," without any of the limitations imposed by sec. 51 of the Constitution, indicates that intention. See also secs. 1B, 2. Secs. 6B and 6C purport to confer on Royal Commissions part of the judicial power of the Commonwealth and are invalid: *Interstate Commerce Commission* v. *Brimson* (7). Sec. 6DD in effect prescribes what the State Courts shall or shall not regard as evidence, and is invalid: *Brown* v. *Walker* (8); *Jack* v. *Kansas* (9); *Hale* v. *Henkel* (10). The intention being indicated to go outside the federal powers, the Court cannot limit the meaning of the Act so as to hold it valid: *Owners of s.s. Kalibia* v. *Wilson* (11). Sec. 6DD, if invalid, is not severable, as without it the Court will not presume that the legislature would have enacted the rest of the Act: *R.* v. *Com-*

(1) 169 U.S., 466, at p. 516.
(2) 195 U.S., 223, at p. 241.
(3) 189 U.S., 207.
(4) (1911) 1 K.B., 410, at p. 420; (1912) 1 Ch., 158, at p. 167.
(5) 6 C.L.R., 469, at p. 498.
(6) (1905) 2 K.B., 359.
(7) 154 U.S., 447.
(8) 161 U.S., 591, at p. 606.
(9) 199 U.S., 372.
(10) 201 U.S., 43.
(11) 11 C.L.R., 689, at p. 704.

monwealth Court of Conciliation and Arbitration; *Ex parte Whybrow & Co.* (1). The power to legislate as to compulsory inquiries by Royal Commissions is an incidental power within sec. 51 (xxxix.) of the Constitution. It must be limited to matters with which the Parliament may deal effectively by legislation and does not extend to matters which, by an amendment of the Constitution, may be brought within the power of the Commonwealth Parliament. If the Act with the limited meaning is valid, the Commission are only entitled to ask questions and enforce the production of documents which are relevant to the subject matter of the inquiry. They are not entitled to inquire as to private and domestic affairs of the company, or as to its business outside the Commonwealth, except so far as the latter affects its business within the Commonwealth.

Duffy K.C. and *Arthur*, for the defendants. If the Act is held to be invalid for any reason an injunction should go, but, if the only matter to be determined is validity of certain sections of the Act which are severable, or the right of the Commission to ask certain questions or questions of a certain nature, an injunction should not go, nor, if the motion could be moulded so as to ask for a declaration instead of an injunction as to these matters, should a declaration be made. There is not the relation existing between the plaintiffs and any of the defendants, nor is there any injury or threatened injury, which would justify an injunction now or at the hearing of the action. In *Dyson* v. *Attorney-General* (2) the questions had already been asked and the next thing would be a prosecution for not answering them, and each of some millions of people had to make up their minds whether he would answer the questions or stand the risk of a prosecution. The power of the Federal Parliament to enact the *Royal Commissions Act* is an incidental power conferred by sec. 51 (xxxix.) of the Constitution, or does not exist at all. Under sec. 128 of the Constitution, the Parliament is given power to do something subject to a clog, and that clog is removed by the approval of the people of the Commonwealth. Incidently to the exercise of that power Parliament, or the Executive Government

(1) 11 C.L.R., 1, at p. 54. (2) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

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for it, can make inquiries and compel answers for the purpose of determining how that power should be exercised. As the Constitution can be amended in any way, these inquiries can be made on any subject excepting only State instrumentalities. Sec. 2 of the Act must be read as limited to those Commissions which it is within the power of the Parliament to create. If it is incidental to the powers of Parliament that there should be compulsory inquiries, it must also be incidental that conditions should be annexed to the making of those inquiries. That section is severable. The intention was to give all the protection possible to witnesses, and, if some of that protection fails, the rest remains. It is impossible for the Court to say that any of the questions proposed to be asked may not be relevant to the matters submitted to the Commission, and it is the duty of the plaintiffs to show that they cannot be relevant.

Mitchell K.C., in reply, referred to *Malmesbury Railway Co.* v. *Budd* (1); *Boyd* v. *United States* (2); *Burghes* v. *Attorney-General* (3).

[ISAACS J. referred to *Barraclough* v. *Brown* (4).]

Cur. adv. vult.

Oct. 4.

The following judgments were read:—

GRIFFITH C.J. This is an action brought by the plaintiff company, its directors, and its general manager, Mr. E. W. Knox, against the Attorney-General of the Commonwealth and the members of a Royal Commission appointed under the *Royal Commissions Act* 1902-1912 to inquire into the sugar industry in the Commonwealth.

The plaintiffs claim a declaration that that Act as it now stands is invalid, and a consequent injunction to restrain the members of the Commission from proceeding upon a summons directed to the plaintiff Knox requiring him to attend as a witness before the Commission and to produce certain books and documents relating to the affairs and operations of the plaintiff

(1) 2 Ch. D., 113.
(2) 116 U.S., 616, at p. 627.
(3) (1911) 2 Ch., 139, at p. 156; (1912) 1 Ch., 139.
(4) (1897) A.C., 615.

company. Alternatively, if the Court should be of opinion that the Act is not invalid, they ask for a declaration that he is not bound to answer questions or produce documents relating to matters as to which the Federal Parliament has no legislative power or which are not relevant to the subject matter of the Commission.

The plaintiffs rely upon the case of *Dyson* v. *Attorney-General* (1), as showing that the Court has jurisdiction to make such a declaration, and contend that under the circumstances of the case the grant of an injunction would be necessary or proper consequential relief. The plaintiff in that case had received a notice from the Commissioners of Inland Revenue requiring him to make returns of his property upon forms which accompanied the notice, and pointing out that a failure to make a return within a specified time would entail a penalty not exceeding £50. He thereupon brought his action against the Attorney-General, asking for a declaration, *inter alia*, that he was under no obligation to comply with the notice. It was objected by the Attorney-General that the plaintiff should wait until he was sued for the penalty, but the Court overruled the objection. The case in the King's Bench is reported upon an application to strike out the statement of claim. *Cozens-Hardy* M.R., after referring to Order XXV., r. 5, which corresponds to Order IV. of the *High Court Rules*, said (2):—"I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party. The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which rule 5 might with advantage be applied. But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say, 'Wait until you are attacked

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158. (2) (1911) 1 K.B., 410, at p. 417.

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and then raise your defence,' and may dismiss the action with costs. This may be the result in the present case. That, however, is not a matter to be dealt with on an interlocutory application. It is pre-eminently a matter for the trial. In my opinion the plaintiff may assert his rights in an action against the Attorney-General and is not bound to proceed by petition of right."

Farwell L.J. said (1):—"The next argument on the Attorney-General's behalf was *ab inconvenienti*; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court." After referring to three recent cases of that nature, he proceeded:—"In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare* v. *Attorney-General* (2): 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred.' I venture to hope that the former salutory practice may be resumed. If ministerial responsibility were

(1) (1911) 1 K.B., 410, at p. 423.

(2) 1 Y. & C. Ex., 197, at p. 208.

more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subjects against departmental aggression."

The case then came on for trial, and the Court made the declaration asked for. On appeal to the Court of Appeal the Master of the Rolls adhered to the opinion which he had previously expressed. *Fletcher-Moulton* L.J., after pointing out that on the first appeal he had contented himself with deciding that the case was not one for the exercise of the power of summarily stopping an action before trial, went on to say (1): "But I was fully in agreement with my brethren in the conclusions to which they came on the other points, and more especially I wish to express my hearty concurrence in the views they expressed on the argument *ab inconvenienti*. So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

I take leave here to remark for myself that the number of persons aggrieved by attempted departmental aggression is, in my opinion, relevant only to the manner in which the Court should exercise its discretion and not to its jurisdiction.

The Act now under discussion imposes a penalty not exceeding £500 upon any witness who refuses to answer any question relevant to the inquiry put to him by the Commissioners, or refuses without reasonable excuse to produce any document

(1) (1912) 1 Ch., 158, at p. 168.

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which he has been summoned to produce, and a penalty not less than £500 and not exceeding £1,000, with imprisonment, for any subsequent offence committed after conviction for a first offence. It might well be that the objection taken on the first occasion proved to be ill-founded, in which case he would be liable for each subsequent refusal to the minimum penalty of £500.

The proceeding in respect of which a declaration was asked and granted in *Dyson's Case* (1) was an attempt by Government officials, purporting to act under statutory authority, to extort information as to the private affairs of an individual with respect to which they had no authority to inquire. The proceeding objected to in the present case is an attempt by a Government instrumentality to obtain information as to the plaintiff company's affairs with respect to which it is alleged that they have no authority to inquire. The substantial question in both cases is the same, viz., whether the Government instrumentality has or has not authority to make the inquisition. If there is any distinction between them, it is that there is more imminent danger of serious injury in the present case than in *Dyson's* (1).

If the plaintiff Knox fails to attend the Commission, or refuses to answer any of some hundred of questions of which he has received notice, or to produce any of, I suppose, some thousands of books and documents mentioned in the summons with which he has been served, he will be liable to a penalty not exceeding £500 for the first refusal and not less than £500 for each subsequent refusal, and to imprisonment. I do not see any distinction in principle between the liability of hundreds of persons to a single penalty and the liability of one person to hundreds of penalties. Apart from this, the right of property of the plaintiff company in their books would obviously be seriously affected if, rather than allowing their general manager to undergo these punishments, they were to authorize him to produce a vast quantity of books and documents for which *ex hypothesi* the Commissioners have no authority to ask.

An injunction was not asked for in *Dyson's Case* (1), and indeed could not be as the action was framed. But, if it appears to the Court that at the hearing of the suit a declaration will be made

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

denying to the Government department or instrumentality the power which it seeks to exert to the injury of the plaintiffs, then if (contrary to what might be expected) that department or instrumentality threatens in the interval to exert the power, the arm of the Court would be very short if it could not protect the plaintiffs in the interval. As well tell a man who is threatened with the bastinado that he must wait and bring his action for damages after the disciplinary power has been exercised. The objection to a present declaration by the Court is purely technical, and does not go to the jurisdiction It is indeed so purely technical that it might be obviated by taking out a summons for directions. I entertain no doubt as to the jurisdiction to grant an injunction under such circumstances, apart from the well recognized jurisdiction to do so to prevent multiplicity of actions, and am only surprised that it should be necessary to decide such a point. Sec. 31 of the *Judiciary Act* makes short work of such objections.

In my opinion the jurisdiction of the Court both to make a declaration of right and to grant an injunction is clearly established in any of the following cases: (1) If the Act itself under which the alleged power is claimed is wholly invalid; (2) If the Government instrumentality is attempting to exert under cover of a valid Act powers which are not capable of being conferred on it by the Commonwealth Parliament; or (3) If it is attempting to exert under cover of the instrument creating it, powers which that instrument does not confer. I think it immaterial whether the instrument under which the power is asserted is an Act of Parliament, or letters patent purporting to be issued under an Act of Parliament, or letters patent validly so issued.

As to the declaration, *Dyson's Case* (1) is conclusive. As to the injunction against the defendants other than the Attorney-General the case of *Nireaha Tamaki* v. *Baker* (2) is equally conclusive. We are not now concerned with technical questions of joinder of parties.

I will deal first with the objection to the validity of the Act as a whole. The power on which the *Royal Commissions Act* is based is that contained in pl. xxxix. of sec. 51 of the Consti-

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158. (2) (1901) A.C., 561, at p. 576.

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tution, "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." Possibly, indeed, such a power would exist by necessary implication without express statement. It has been for a long time, as pointed out by this Court in the case of *Clough* v. *Leahy* (1), the practice of the Crown in all parts of the British Dominions to appoint Commissioners to make inquiry concerning matters as to which the Executive Government thinks it desirable that information should be collected to be made use of in the administration of the affairs of the country or for the guidance of Parliament. In the United Kingdom the attendance of witnesses before such Commissions has in general been voluntary, but in some cases special Statutes have been passed to compel the giving of evidence, usually with a protection, absolute or conditional, against the risk of self-crimination. The collection of information for such purposes may be necessary for the good government of the country and for the improvement of its laws. It follows that a compulsory law to provide for its collection is "incidental," in any sense in which the word can be used, to the execution of the powers of Government.

This is not indeed disputed. The objection is founded in the first place upon the contention that this incidental power of compelling information is limited to matters within the existing area of federal power. This proposition seems to me to be so self-evident that no argument can make it clearer.

It is however contended, on the other hand, that, since by an amendment of the Constitution any matter whatever might be brought within the federal area, and since the two Houses might submit a proposed amendment of the Constitution, of whatever nature, to the electors under sec. 128, an enforced inquisition into any subject whatever is incidental to the exercise of existing federal powers. The argument proves too much. It implicitly denies the whole doctrine of distribution of powers between the Commonwealth and the States, which is the fundamental basis of the federal compact. If it is sound, every inhabitant of the

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

Commonwealth is liable to an inquisitorial investigation conducted under the federal power as to his most intimate private affairs, and as to all his doings in the large sphere of action reserved to the States by the Constitution. Land tenure, education, domestic trade and commerce, State taxation, State railways, are some instances. But perhaps the best illustration is afforded by sec. 116 of the Constitution, which provides that :—

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

If the argument for the Crown is sound, the Federal Executive can at any time appoint a Royal Commission to investigate the tenets of any religious body in the Commonwealth, its assets, the administration of its revenue, and the internal management of its institutions, on the pretext that the Constitution might possibly be amended by omitting sec. 116. Such an inquisition is unthinkable. I will waste no more words upon this contention.

The next contention of the plaintiffs is that if this view is accepted the Act in question is bad because on its face it purports to authorize inquisitions into any matter whatsoever. I agree that its language is capable of that interpretation. But, applying the ordinary rules for interpretation of the language of legislatures of limited authority, I think that the Act must be construed as intended to apply only to matters within the ambit of federal power. This objection therefore fails.

It was further suggested that sec. 6B, which purports to authorize the issue of a warrant for the apprehension and detention of a person who does not attend when summoned as a witness, is invalid as an attempt to confer part of the judicial power of the Commonwealth upon an administrative body. I express no opinion on this point, for sec. 6B is clearly severable from the rest of the Act.

A more serious objection was based upon sec. 6DD, which purports to give a qualified protection in State Courts from the criminative effect of admissions made by a witness on examination before a Commission. It was contended that the attempted

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protection was ineffectual, and that as Parliament did not intend to compel, without that condition, the provision for compulsion must fail with the ineffectual condition.

I think, however, that if Parliament has, as I think it must have, a power to compel information on the subjects necessary for the effectual performance of federal functions, the power to protect witnesses from the consequences of self-crimination may fairly be regarded as incidental to that power. It was so said, if not finally decided, by the Supreme Court of the United States in *Brown* v. *Walker* (1). In that view any law of a State under which the criminating admissions would be admissible in evidence against the witness would be in conflict with the law of the Commonwealth, and the latter would prevail.

In my opinion, therefore, all the objections to the validity of the Act fail.

I will next deal with the objections taken to the questions of which the plaintiff Knox has had notice, and to the production of the documents which he has been summoned to produce. It is contended that the Court cannot at the hearing make a declaration, and that, even if it can, there is no such danger to the plaintiffs as to warrant the grant of an injunction. I have already dealt with the first point. As to the second it is sufficient to say that a deliberate assertion by a defendant of a right to do the alleged wrong complained of is a sufficient threat to justify the grant of an injunction. Mr. *Duffy* emphatically asserts the right of the Commissioners to ask all the questions, and require the production of all the documents, and refuses on their behalf to be guided by any opinion of the Court not embodied in a judicial declaration, which, perhaps, for technical reasons, cannot be made at this stage, or in an injunction. I infer as a fact that the defendants intend to prosecute for any refusal.

Two objections are taken by the plaintiffs: (1) that some of the information sought to be enforced is not relevant to any matter within the area of the federal power; and (2) that it is not relevant to any of the matters as to which the Commissioners are authorized by the Commission to inquire.

Those matters are thus stated in the Commission:

(1) 161 U.S., 591.

"The Sugar Industry in Australia, and more particularly in relation to :—

"(*a*) Growers of sugar cane and beet ;

"(*b*) Manufacturers of raw and refined sugar ;

"(*c*) Workers employed in the sugar industry ;

"(*d*) Purchasers and Consumers of sugar ;

"(*e*) Costs, profits, wages, and prices ;

"(*f*) The Trade and Commerce in sugar with other countries ;

"(*g*) The operation of the existing laws of the Commonwealth affecting the sugar industry ; and

"(*h*) Any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient."

It is plain that information on such matters might be very valuable for the purpose of the Customs and Excise laws, if not for other purposes of Commonwealth Government.

But the constitution and regulation of trading corporations, such as the plaintiff company, are not matters within the area of federal power, any more than the private and domestic affairs of individual citizens : *Huddart Parker & Co. Proprietary Ltd.* v. *Moorehead* (1). In that case this Court held that pl. xx of sec. 51 of the Constitution does not confer upon the Commonwealth Parliament power to control the operations of corporations formed under State laws which are lawfully exercising their corporate functions within the Commonwealth. For the present purpose it is sufficient to say that the federal power does not extend to interference with the internal or domestic management of the affairs of such a corporation. It is only when it operates in the federal area that it becomes a subject of Commonwealth control, and then only to the same extent as an individual carrying on like operations. It would, indeed, for the purposes of the present case be sufficient to say that the Commission does not purport to authorize inquiry into any such matters. Yet many of the questions of which the plaintiff Knox has had notice, and many of the documents which he has been summoned to produce, are only relevant to them. The phrase "internal management" has been so often used by the English Courts to denote the line of

(1) 8 C.L.R., 330.

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demarcation between matters which concern the members of a company *inter se* as distinguished from their relations with the rest of the world, or,—to use a common expression—the line of demarcation between its subjective and objective operations, that I think it may safely be adopted to denote the distinction which I mean.

Again: the plaintiffs contend that inquisition into the conduct of the operations of the plaintiff company outside the Commonwealth is neither within the area of federal power nor within the scope of the inquiry authorized by the Commission, except so far as it relates to the conditions of carrying on the sugar industry in the abstract, dissociated from the personality of the persons by whom it is carried on.

In my opinion, this contention is valid for the reasons already given as to the first objection.

But when we depart from these broad lines I recognize the difficulty of formulating in advance any definition of relevant or irrelevant questions other than that which is recognized by Courts of justice and based on common-sense, namely, that the connection between the particular question and the issue, *i.e.*, in this case, the subject matter of inquiry, must not be too remote.

It is objected by the plaintiffs that inquiries as to the manner in which the plaintiff company for its internal purposes distributes the total estimated value of its present assets into particular items, and as to the estimated value of these items are too remote. A similar inquiry was held in *Dyson's Case* (1) to be unauthorized under the circumstances of that case. I think this objection is well founded; and I think that the same considerations apply to the details of salaries paid to its officers except so far as they are relevant to the actual cost of production and manufacture.

In my opinion the plaintiffs will be entitled at the hearing to a declaration to the foregoing effect as against the defendant Commissioners, whether they will or will not be entitled to it as against the Attorney-General.

Beyond these matters I do not, at the present stage, think it necessary or desirable to formulate the dividing line between relevant and irrelevant questions.

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

The result is that, unless counsel for the Commissioners agree to let the motion stand to the hearing, as suggested from the Bench, on the understanding that they will not in the meantime assert powers which the Court in its present judgment denies to them, an injunction should be granted to the hearing or further order to restrain the defendant Commissioners from requiring the plaintiff Knox to answer any questions or to produce any documents which are relevant only to

(1) The internal management of the affairs of the plaintiff company;

(2) The operations of the plaintiff outside of the Commonwealth except so far as they relate to the conditions of carrying on the sugar industry irrespective of the persons by whom it is carried on;

(3) Matters relating to the value of particular parts of the property of the plaintiff company except such parts as are actually and directly employed in the production and manufacture of sugar within the Commonwealth;

(4) Details of salaries paid to officers of the plaintiff company except so far as they are relevant to the actual cost of such production and manufacture.

Further consideration of the motion should be adjourned to the hearing, with leave to bring it on in the meantime on two days' notice to the defendants.

BARTON J. The action in the course of which this motion is made, is brought by the plaintiff company, its directors, and its general manager, Mr. Knox, against the Attorney-General for the Commonwealth and the members of a Royal Commission appointed on 4th September last to inquire into and report upon the sugar industry. The subject matter of inquiry is thus defined in the letters patent constituting the present Commission: "The sugar industry in Australia, and more particularly in relation to:—

(*a*) Growers of sugar cane and beet;

(*b*) Manufacturers of raw and refined sugar;

(*c*) Workers employed in the sugar industry;

(*d*) Purchasers and consumers of sugar;

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(*e*) Costs, profits, wages and prices;

(*f*) The trade and commerce in sugar with other countries;

(*g*) The operation of the existing laws of the Commonwealth affecting the sugar industry;

(*h*) Any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient."

The *Royal Commissions Act* was passed in 1902. Under it by letters patent dated 24th October 1911, his Honor Mr. Justice *Gordon* (chairman) and the defendants Messrs. Hinchcliff, Anderson, Shannon and Crawford, were appointed Commissioners to inquire into the sugar industry, with particular relation to the first five of the eight subjects just enumerated. The Commissioners took a large body of evidence, and the plaintiff Knox and the directors of the company were summoned to testify and to produce documents, having first received a schedule of documents with a list of fifty-nine questions which it was proposed to ask, many of them relating to the internal affairs of the company, and not, as I think, to any of the subject matters then or now defined. Disputes arose between the directors and their manager, and the Commissioner, and prosecutions for failing to attend and give evidence, without reasonable excuse, were instituted against all the plaintiffs, but pressed only against one, who was fined for that offence. Then the *Amending Act* was passed by the Federal Parliament, receiving the Royal Assent on 19th August last. On 4th September the letters patent now in question were issued, appointing the gentlemen already named a Commission to inquire into the matters already mentioned. The scope of the inquiry was thus extended, and it was directed that the inquiry to be made should be deemed to be in continuance of that entrusted to them by the letters patent of October 1911, and that the evidence taken thereunder should be considered by them as if taken in pursuance of the new authority. Then, on 9th September, the plaintiff Knox was summoned to attend before the Commission on the 16th of that month, "then and there to give evidence upon oath on the investigation of *the matters referred to the said Commission* for inquiry and report" and to produce documents, a long schedule of which was attached to the summons. There-

upon these proceedings were instituted. Since their commencement Sir John Gordon has resigned by reason of ill health, and Professor Jethro Brown has been appointed and made Chairman in his place.

The objects of the action are to obtain against all of the defendants certain declarations, and against the defendants other than the Attorney-General an injunction founded upon the declarations. In the meantime the plaintiffs seek to be protected by an interim injunction directed to these defendants. Shortly described, the declarations sought are (*a*) that the defendants are asserting powers of inquiry under the *Royal Commissions Act* 1910-12, which is itself beyond any authority given by the Constitution, and is therefore as a whole invalid; (*b*) that, assuming the legislation to be valid, some of the powers of inquiry which the defendant Commissioners are in fact asserting are such as could not validly be given them because such inquiries relate to subject matters which are not within the legislative powers of the Commonwealth; (*c*) that, apart from these two propositions, the Commissioners are asserting certain powers of inquiry which, if they could lawfully be given them, are not conferred on them at all by their letters patent.

The first of the propositions embodied in the declarations claimed would, if established, justify a total disregard of a summons to give evidence and to produce documents. The second would justify only a refusal to give evidence, or to produce documents, in respect of inquiries which the Executive are not authorized by the Constitution to institute. The third would justify only a refusal to testify, or to produce documents, in respect of inquiries outside the scope of the Commission, assuming its real scope to be defined in accordance with the Statute, taken as valid.

The injunction claimed in the writ is in the alternative, so as to restrain the Chairman and the members of the Commission from the assumption of such powers as the Court may declare them not to be entitled to exercise; and the present action seeks protection in the meantime. It is obvious that the Court will not grant this motion unless it is of opinion that a *primâ facie* case for a declaration has been made out as a basis. Whether in

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that event it will make any order at this stage is a matter for the exercise of its discretion.

If a person summoned as a witness fails without reasonable excuse to attend or to produce documents required of him, or if he refuses to be sworn, &c., or to answer any question relevant to the inquiry he is declared by the Act guilty of an offence, and is made liable to a maximum penalty of £500. But if, having been convicted of any such offence, he is afterwards convicted on information by the Attorney-General of any of these offences, the minimum penalty is £500 and the maximum £1,000, and he is liable, in addition, to be imprisoned "for such period, not exceeding three months, as the Court thinks fit to order." See secs. 5, 6, and 6E. That the Court has jurisdiction to entertain an action such as this, and in its discretion to make a declaration, is, I think, apparent on an examination of the case of *Dyson* v. *The Attorney-General* (1). The nature of that case has been fully described. Unwilling as I am to add to the quotations which my learned brother has made from the judgments, I think it will be useful to refer to some further expressions of the members of the Court of Appeal. *Cozens-Hardy* M.R., after referring to *Hodge* v. *The Attorney-General* (2) said (3):—"This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs." It was objected that no relief was sought except by declaration—which in the present action is the case as between the plaintiffs and the Crown—and that no such relief ought to be granted against the Crown there being no precedent for any such action. To this the Master of the Rolls replied that the absence of any precedent did not trouble him. He referred to sec. 50 of the old *Chancery Procedure Act* 1852, under which it was held that a declaratory decree could only be granted where there was some equitable relief which might be granted if the plaintiff chose to ask for it, but he pointed to Order XXV., r. 5 under the *Judicature Act* (Order IV. of the Rules of this Court), under which no

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

(2) 3 Y. & C., Ex., 342.

(3) (1911) 1 K.B., 410, at p. 416.

action or proceeding is open to objection on the ground that a mere declaration is sought, and the Court may make binding declarations of right whether any consequential relief is or could be claimed or not. He held this to apply to an action in which the Attorney-General, as representing the Crown, is a party. *Farwell* L.J., with reference to the then plaintiff's allegation that the Commissioners had exceeded their powers by making inquiries not authorized to be made, and in other ways, said (1):—"It would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty." He pointed out that the case was not one for a petition of right. "The Crown," he said (2) "is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines." The learned Lord Justice then dealt briefly with the argument that there was no precedent for such an order as was sought, which he answered as the Master of the Rolls had done, and passed on to the objection that the penalty made the neglect to answer the questions a criminal or quasi-criminal offence, and that the Court of Chancery would not interfere in such a case. Though this might very well have been true before the Judicature Acts, it was otherwise, he pointed out, since their passage. (This Court is in the same position in this regard as the High Court in England.) Then come the passages already quoted by my learned brother the Chief Justice. The argument *ab inconvenienti* was met with the answer that declaratory orders are in the discretion of the Court and will not be made in cases where the Court sees that its jurisdiction is being invoked unreasonably or unnecessarily, and it will punish with costs those who are in fault. None of the objections on this score seemed to the learned Lord Justice (3) to weigh in the scale with the convenience and the advantage to the public interest of speedy and easy relief to the subject who has good ground to complain of "the exercise

(1) (1911) 1 K.B., 410, at p. 421. (2) (1911) 1 K.B., 410, at p. 422.
(3) (1911) 1 K.B., 410, at p. 423.

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of statutory powers by Government departments and Government officials." He made incisive reference to recent cases in which the Court had curbed the growing tendency of such authorities to "act as they pleased," "without interference by any Court," while they "were represented by the law officers of the Crown at the public expense." But this is not all. On the trial of the case *Horridge* J. made a declaratory order that the notice and the returns required were unauthorized, and that the plaintiff was not under any obligation to comply with them. The Attorney-General appealed, but the appeal was dismissed (1) by the same Court which had previously refused to hold that the plaintiff was without a reasonable cause of action. *Fletcher Moulton* L.J. had not on the previous appeal given a formal decision on the point decided by the other members of the Court as to the discretionary jurisdiction in cases of the kind. On this occasion he dealt with the question in complete agreement with the Master of the Rolls and with *Farwell* L.J. The latter did not deal again with this particular question on the second appeal; but the former said some words which are worthy of attention in the present case, namely (2):—"In my judgment on the interlocutory appeal, to which I adhere, I pointed out that the jurisdiction to make a declaratory order is discretionary. And it has been urged by the Attorney-General that in our discretion no order ought to be made. I am bound to say that, assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise. It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of non-compliance. A general declaration is pre-eminently desirable in these circumstances. And I am a little surprised that the Commissioners do not welcome a decision which will guide their action in the future. Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant."

Before leaving this branch of the case I would refer to sec. 31 of the *Judiciary Act*. This Court is empowered, in the exercise of its original jurisdiction, to "make and pronounce all such judgments as are necessary for doing complete justice in any

(1) (1912) 1 Ch., 158. (2) (1912) 1 Ch., 158, at p. 166.

cause or matter pending before it. Reading Order IV. with this section, and sec. 32 of the *Procedure Act*, I think they must dispel any doubt of the jurisdiction, if any doubt remained.

I am of opinion then that this Court has jurisdiction, in the exercise of its discretion, to make a declaratory order against the Crown and with it the Commissioners, so as to determine the rights of the defendant Commissioners.

Is there then a *primâ facie* case for a declaration on any of the grounds on which it is sought? If there is, then comes the question whether we ought to grant the injunction. Whether on the ground that the legislation is wholly invalid, or that the inquiry, the right to make which is asserted against the plaintiffs, is wholly or partly directed to subjects on which the Commonwealth is without power to legislate, or that there is an assertion against the plaintiffs of a right to inquire on matters all or some of which are outside the scope of the letters patent, is it true that the Commissioners are without lawful authority attempting to inquire into the affairs and to overhaul the books and papers of the plaintiff company, and that unless the Court intervenes, resistance on the part of the directors and manager will expose them to the risk of numerous heavy penalties and imprisonment?

I take first the question of the validity of the legislation. The plaintiffs attack both Acts, or rather, the two in combination; they say the first Act is invalid by itself and the second invalid by itself, and also that if the first is valid if taken by itself, that does not save it, for the second, not being valid, is so interwoven and combined with the first as to infect it.

It is common ground that the power under which these Acts were passed is contained in paragraph xxxix. of sec. 51 of the Constitution, and that the legislation must be "incidental to the execution of . . . power vested by this Constitution in the Parliament." These are the words on which both sides rely. Where the Commonwealth has power to legislate on any subject, such as Taxation, Bounties, the Customs, Inter-State or foreign Trade, there is a power in the Executive, even apart from Statute, to make inquiry on that subject, if necessary by Royal Commission. Were this executive power withheld, it would in

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many cases be impossible for the central Government to acquire the information necessary to equip it for intelligent legislation. An Act to regulate the issue of Royal Commissions of inquiry and to confer on them authority to obtain information, by compulsion where necessary, is beyond all question a beneficial incident of the exercise of constitutional power. But seeing why the information is necessary, we see also what are the limits within which legislation to be valid must operate. The necessity for the information is that the Executive or the Parliament, &c., may know how to apply the knowledge gained; for instance, by legislating wisely. Where there is not a constitutional power, the necessity for inquiry on the part of the Executive does not exist—at least in the contemplation of the Constitution, the fruit of inquiry being in this connection, "*id sine quo res ipsa esse non potest.*" In truth this power of inquiry would exist if there were no paragraph xxxix., as a necessary incident to the legislative powers conferred. The members of this Court expressed themselves with some fulness on the subject of incidental powers in the *Jumbunna Case* (1). The limit, then, of the incidental power of inquiry is to be found in the extent of the existing legislative or executive or other power in the exercise of which the results of inquiry are to be applied. In the present case the powers intended to be exercised after the report of the Commission were evidently legislative, for it is difficult to imagine any other range of powers to which information on any of the subjects (*a*) to (*h*) in the letters patent can be referable, whether the question be one of External or Inter-State Commerce, Taxation (such as import and Excise duties), Bounties, or what not, perhaps all of them.

But the defendants place a much wider interpretation on the incidental power. True, they say, it extends to the gathering of all such information as will be ancillary to the exercise of an existing constitutional power. But, it extends much further. "The Parliament," say they, "has power to amend the Constitution, only, we grant, with the consent of the people in accordance with sec. 128. But that too is a power of legislation, and if the Executive thinks of bringing down proposals to amend the

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

Constitution it is entitled to institute inquiries by Commission into the whole subject of the proposal and to legislate to give any such Commission effective means of extracting information." This proposition has quite an engaging look until one comes to examine it more closely. Amendments to the Constitution may be proposed in any direction and to any extent, and if both Houses concur they may be submitted to a Federal and State Referendum and afterwards, if there carried, to the Governor-General for the Royal Assent. But did the framers of the Constitution, in framing paragraph xxxix., look upon the power to amend the fundamental law by popular vote as a power of the Parliament in the ordinary acceptation of that term? In practice an ordinary proposed law has surmounted its last obstacle when both Houses have agreed upon it. A proposed amendment of the Constitution is, at that stage, only at the beginning of its troubles. It has no chance of life until it has the assent of a majority of the people in a majority of the States. That is not legislation in the ordinary sense of the word, for legislation is made complete by parliamentary action—involving the Crown and both Houses—while a proposed amendment of the Constitution, having the assent of all three of these, and no warrant from the electors, would be simply lifeless—impotent as a law, unhatched as an amendment. But if it had been the intention of the framers of the Constitution to include any adjuvant to constitutional amendment within paragraph xxxix., that provision could not have been in its present form. In a close and careful draft of proposed legislation, if it had been intended to authorize legislation incidental to the grant of every power, either existing or possible as the result of an amended Constitution, the paragraph would have used some short and comprehensive form of words to say so. There would have been no need of an enumeration of depositaries of power such as the paragraph contains; and if nevertheless that plan had still been adopted, then the intention that unexercised powers given to the people by Referendum should carry incidental rights of federal legislation, apart from the proposal of amendments by joint action of the Houses, would have been clearly expressed.

But there is another and a fatal answer to the argument. The

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claim may be stated thus: The two Houses may together refer any proposed amendment to the electors. Such a proposal may embrace anything whatsoever which is not in the Constitution. Hence it is "incidental" and constitutional within paragraph xxxix. to prescribe by Statute, without proposing any amendment, a compulsory inquiry into anything whatsoever. That is the proposition reduced to plain English, and it would warrant the simple form "Matters incidental to anything" in place of the present words of the paragraph. Apart from the self-condemnation which its mere enunciation carries, the proposition ignores the very root-idea of the Constitution, the division of the entire area of Government by which certain powers are distinctively left to the federal authority and the remainder are reserved to the States. There would be no subject of exclusively State or exclusively private concern into which the Commonwealth might not institute an inquisitorial search, with power to inflict penalties as great as those we see in the new *Royal Commissions Act* on everyone who dared to make a claim to mind his own business. It is no answer to point to the great powers of inquiry possessed by the States. These belong to them as attributes of plenary legislative power. There is not even a resemblance between the two positions. It would surprise constitutionalists to be told that the Federal Executive has power to issue Commissions with compulsory powers to inquire into the extinction or possible extinction of the rights of the States under such sections as 111 and 124.

I am of opinion, therefore, that the right of the Federal Executive to hold an inquiry by Commission, or to regulate by Statute the institution and conduct of such an inquiry, exists only as incidental to a present power vested in the Commonwealth by the Constitution, and no such ancillary legislation and no such inquiry can lawfully pass beyond the sphere of the power to which it is incident.

As to the sections instanced by the plaintiffs as in whole or in part invalidating the legislation, I think the effect of sec. 2 of the Act of 1902 is not to authorize an unlimited inquiry into any subject imaginable. The section must be read on the principle laid down in *Macleod* v. *Attorney-General for New South Wales*

(1), so as to refer merely to any inquiry which the Federal Executive has constitutional power to make. The other sections of which the plaintiffs complained are with one exception clearly severable, so that even if they or any of them are severally invalid, the consequence is not the invalidity of the whole Act. As to the remaining sec. 6DD, the position is somewhat different. I rather think it is not severable. But then I think it may be supported as a valid exercise of a power incident to the right to exact information, for the protection of the testimony extracted is ancillary to such a power. Although, I have doubts, I am not prepared to hold this section to be invalid.

I do not therefore think that the Act as a whole is *ultra vires* whatever may be the objections on that score to separable sections of it.

The summons served on the plaintiff Knox cannot therefore be disregarded.

As to the cases in which the inquiries upon which the Commission purports to insist are said not to be authorized by the legislative powers, and those in which the Commission is said to be asserting power, to inquire on matters not within the scope of the letters patent, I do not propose to enter into detail, for I fully agree in the statement of the Chief Justice as to the principles on which the Commission should act. That the Commissioners are in these respects acting beyond constitutional powers on the one hand, and beyond the scope of their inquiry on the other, I am free from doubt.

I am therefore of opinion that a *primâ facie* case has been made for a declaration against all the defendants in respect of such actual and intended exercises of power, but not in respect of the alleged invalidity of the Act.

The only remaining question is whether an injunction can and ought to be granted as against the defendants other than the Attorney-General. The affidavit of Mr. Knox shows clearly that there is grave cause to apprehend that the Commission will, unless restrained, continue in the course on which it has entered, with danger to the deponent and probably the directors in respect of their liberty, and

(1) (1891) A.C., 455.

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to the company in respect of the books and documents the possession of which is indispensable to the proper carrying on of their business and the protection of their rights of property. With these statements sworn to, it is to my mind immaterial that the writ does not contain a statement of threat and intention which is usual in a statement of claim asking for an injunction when the time comes to file one. The danger is shown, and the defendants insist on their right to proceed as they have begun.

That such an injunction may properly be granted the case of *Nireaha Tamaki* v. *Baker* (1) is a sufficient authority, for I think the Commissioners are officers of the Crown *pro hac vice*; although their authority could be superseded by the Executive.

If being grantable, it ought not to be granted, it is difficult to imagine a case for such interim protection. To use the words of *Cozens-Hardy* M.R., with reference to a declaratory order in *Dyson* v. *The Attorney-General* (2):—"I am bound to say that, assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise . . . Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant." And it must be kept in mind that a declaration cannot be made without consent before the hearing, and nothing but an injunction will protect the plaintiffs in the meantime from danger, to liberty and property, which the attitude of the Crown shows to be imminent.

ISAACS J. One question is whether on the undisputed facts, this action lies at all. But for the purpose only of obtaining the opinion of the Court as to whether the *Royal Commissions Act* 1902-1912 is wholly invalid, Mr. *Duffy* raises no objection to the Court dealing with the case. The position so far is precisely the same as in *Williams* v. *North's Navigation Collieries* (1889) *Ltd.* (3), where the Court of Appeal, though not convinced of their legal power to make a declaration, nevertheless, at the request of both parties, expressed their views on a point of law of general importance. That precedent should, I think, be followed in the present instance.

(1) (1901) A.C., 561, at p. 576. (2) (1912) 1 Ch., 158, at p. 166.
(3) (1904) 2 K.B., 44.

The Act is said to be wholly invalid for several reasons which I shall refer to in order. (1) The first reason given is that it purports to enable the Governor-General to issue a Commission to make inquiry into and report upon matters entirely outside, the powers of the Commonwealth Parliament.

Involved in this are two considerations: First, whether the Act says so, and, next, if it does, whether it is illegal to say so.

The portion of the enactment to be interpreted in order to establish its actual scope are these words in sec. 1A:—"Any matter . . . which relates to or is connected with the peace, order, and good government of the Commonwealth, or any public purpose or any power of the Commonwealth." The words "peace, order, and good government of the Commonwealth" are manifestly intended to refer to the objects mentioned so far as they fall within Commonwealth authority. "Public purposes," it was said, included any State purpose. That would be unexpected in a Federal Statute, and is contrary to the primary construction of the clause which naturally, and not ungrammatically, connects "public purposes" with the succeeding words "of the Commonwealth." It is worthy of observation that where Parliament wishes to include a State Court that is expressly mentioned. (Sec. 6DD).

Then comes the final phrase "or any power of the Commonwealth." That is the widest possible form of expression. It embraces all powers of the Commonwealth, of every nature, whether Executive, judicial, or legislative. Whatsoever powers the Commonwealth as a juristic entity possesses under the terms of the Constitution—large or small, conditional or unconditional, definite or indefinite, and by whatever organ exercisable, those powers, each and all of them, may, on the clear interpretation of the Act, be made the subject of inquiry.

Actually existing powers are alone within it. No power that is merely possible of acquisition, no power yet uncreated, comes within its ambit. In a word, the Statute embraces every present power of the Commonwealth of Australia, and no others.

Among the powers granted to the Commonwealth—as a Commonwealth—by the Imperial Parliament, and now existing, is that of amending the Constitution.

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It seems therefore impossible to avoid the conclusion that that power is included in the statutory phrase "any power of the Commonwealth." To deny it is equivalent to denying the power of the Commonwealth to amend the Constitution.

This at once brings us face to face with the question—Is it competent to the Federal Parliament to legislate for the purpose of obtaining information on matters forming the subject or groundwork of proposed amendments to the Constitution? No one asserts any right to legislate so as to enforce any desired power in advance, by regulating conduct in accordance with that potential authority, or by laying down or enforcing any obligation which that power alone would authorize.

But the right claimed, apart from other and admitted powers, is strictly limited to obtaining information as to existing circumstances, in order to enable the Crown, the Houses of Parliament, and the people of the Commonwealth to judge for themselves whether any amendment of the Constitution in the given direction is desirable at all, and, if so, then of determining the extent to which the amendment should go.

It is said by way of objection that the only power to legislate —apart from substantive grants of parliamentary power—is that contained in sub-section xxxix. of sec. 51 of the Constitution, and that the power conferred by sec. 128 is not within its terms. But the language of sub-sec. xxxix. is extremely wide, and is not confined to sec. 51 or Part V. in which it is found. It speaks of "any power vested by this Constitution"—not this section or this Part—"in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." *Ex facie* its application, therefore, is quite beyond the previously enumerated powers in sec. 51, and to ascertain its full operation we have the whole range of the Constitution to consider.

It is contended that while it mentions the Parliament, the Houses, the Government—that is the Executive, the Judiciary, any Department, and any officer, it omits to mention the people of the Commonwealth. Then on the basis that the power of the Commonwealth contained in sec. 128 to amend the Constitution

is legislation by the people and not by Parliament, it is asserted there is a fatal flaw which deprives the people of the Commonwealth of the means of obtaining the information necessary for the proper and safe exercise of the power entrusted to them. To put the contention in a nutshell—it is this:—The whole combined force of the Sovereign, the two Houses of legislature, and the people of the Commonwealth when engaged in the responsible and momentous duty of considering a proposed alteration of the Constitution affecting federation and States alike is unavailing to compel any solitary individual in Australia, who chooses to defy them, to give the smallest particle of information, however relevant, desirable or necessary that information may be.

To admit such a power it is said would be dangerous, because it would enable the Commonwealth at will to probe and expose the private and domestic affairs of citizens, a sphere of action reserved to the States. But in the first place, State action is impossible. No State Parliament has any authority in connection with amending the Federal Constitution, and a State inquiry for that purpose would be outside its contemplated ambit. Even if that were not so, no State can act beyond its territorial limits; if we could suppose all the States willing to co-operate in the most harmonious way, there would be six inquiries entirely unconnected, each confined to its own limits, all operating by different persons, using various methods, reporting on fragmentary materials to different authorities, and none of them to the Commonwealth. That is at the best. The State Governments, or some of them, might not wish to co-operate or on the same lines, and putting it at the highest, the Commonwealth would be dependent on the favour of the States for even an approach to the due and efficient exercise of its own exclusive function.

The suggested danger of admitting such extensive powers is a well known and time honoured contention. Fanciful extremes are always easy to conjure up. The power of taxation might be exerted to exact 99 per cent. of all income. It is possible to conceive the Commonwealth or any other Parliament as ready to plunge into every excess, and there is no need for that purpose to go beyond admitted powers. The most recent and by no

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means least authoritative refutation of this method of argument comes from the Judicial Committee in the recent case of *Attorney-General for Ontario* v. *Attorney-General for Canada* (1). Their Lordships speaking by Lord *Loreburn* L.C. said that such a view has a double aspect. It is first a commentary on the wisdom of such an enactment, and as to this branch of the argument the Lord Chancellor made some observations which apply equally to the Executive as to the legislature, because these branches are equally independent of the judiciary. Altering "Canada" to "Australia" those observations are apposite to the present case.

His Lordship said (2):—"It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the Constitutional law of Canada."

Then come some important observations on this second aspect of the argument. The Lord Chancellor said (2):—"In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the *British North America Act*, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the Statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominion or to the provinces, within the limits of the *British North America Act*. It certainly would not be

(1) (1912) A.C., 571.

(2) (1912) A.C., 571, at p. 583.

sufficient to say that the exercise of a power might be oppressive, because that result might ensue from abuse of a great number of powers indispensable to self-government, and obviously bestowed by the *British North America Act*. Indeed it might ensue from the breach of almost any power."

This pronouncement of the Privy Council in favour of a broad construction of a written instrument of Government is a valuable addition to the canons of constitutional interpretation. It in effect sums up in a conclusion on the subject of incidental powers, the fully reasoned opinion of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1). Even apart, then, from sub-sec. xxxix. of sec. 51, the usual and ordinarily incidental power of Parliament to obtain and authorize information for the purpose of its legislation would be regarded as existent somewhere in Australia, and incidental to the power of legislating by way of amendment.

Doubtless the frame of the Canadian Act differs from that of the Australian Act. But in the cardinal feature referred to by the Lord Chancellor they are alike. Self-government is the key-note of each Constitution. If comparison can be made in this respect, it is in favour of the Australian Act because that contains the power of amendment which is absent from the Canadian Act.

Since, as I have shown, the power does not exist in the States, where does it reside if not in the Commonwealth?

A detailed examination of the words of sec. 128 will further elucidate the position. No one can deny that the power of amendment is a legislative power of the Commonwealth. It can be nothing else. Now sec. 1 of the Constitution declares that the legislative power of the Commonwealth shall be vested in a Federal Parliament which shall consist of the Queen, a Senate and a House of Representatives.

Turning to sec. 128, we find that its normal operation, as evidenced already in a number of amendments, is that a bill—a proposed law—is passed by both Houses by an absolute majority and submitted to the people. Then says the section:—"If in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it *shall* be presented to the Governor-General for the Queen's assent."

(1) 4 Wheat., 316, at pp. 406-411.

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Thus we have the ordinary forms of British legislation preserved, with a modification to meet the case of an irreconcilable difference between the Houses—lately finding an analogue in Imperial legislation—the *Parliament Act* 1911 (1 & 2 Geo. V. c. 13)—and then a condition of public approval introduced before the Royal Assent. But still the Royal Assent is the final and necessary step, as in all other cases, to transform the proposed law into a law. The form of two constitutional alterations already passed illustrates this. I refer to No. 1 of 1907 (*Constitution Alteration (Senate Elections)* 1906), and No. 3 of 1910 (*Constitution Alteration (State Debts)* 1909). They begin :—" Be it enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, with the approval of the electors, as required by the Constitution, as follows," &c.

Would any one deny that the Sovereign when giving his assent is performing a legislative act ? If not, can it be denied that the Houses are equally performing a legislative act when passing the Bill ?

But the people's approval in this instance takes by specific statutory direction the place of ministerial advice which the common law assumes in ordinary cases. That approval once given, the Bill *shall* be presented to the Governor-General for his assent. The people do not legislate, they approve of the proposed legislation by Parliament. They do not propose any amendment of the Constitution, and they do not alter or amend a line or a letter of the proposed law. They do not even suggest any alteration of it. They simply approve or disapprove of the proposed legislation. If they disapprove, then Parliament cannot legislate ; if they approve, Parliament can and does legislate.

Now there are two other points worthy of notice in sec. 128. The first is that at least two and not more than six months must elapse between the passing of the Bill and its submission to the people.

What is the underlying reason for a two months' interval ? Plainly to have full opportunity for consideration. But of what use is time for consideration unless in connection with the relevant facts and circumstances ? On the plaintiffs' argument

this is all illusory if the facts are in possession of persons unwilling to disclose them.

The other point observable in sec. 128 is that Parliament is expressly empowered to prescribe the manner in which the vote is to be taken. That I apprehend will be admitted to be a legislative power with incidental authority under sub-sec. xxxix. of sec. 51. But if this minor authority is a legislative power, why is not the larger and more important function of which the minor one is a mere appendage, to be regarded as a legislative power, accompanied, it is true, with special restrictions, but none the less a legislative power.

If further we pursue the practical operation of passing a proposed law for amendment by either House and consider what is the power of that House in connection with the Bill we find sec. 49 of the Constitution in point. By its provisions Parliament has power to legislate as to the powers of the Houses and in the meantime they have those of the House of Commons. But that is plainly only for legislative functions, and unless the authority given by sec. 128 is a legislative function it is difficult to see how sec. 49 applies to it.

It is, however, impossible to conceive its non-application. That demonstrates that the House could by legislation obtain power to inquire in the course of a proposed amendment of the Constitution into the circumstances relevant to the proposed amendment.

If then the two Houses can receive that power, why cannot the two Houses conjointly with the Sovereign enable the Crown, the other constituent element of Parliament, to inquire, and to inquire effectively, into the same circumstances, so that a non-political body may collect and report upon them for the enlightenment and safety of the whole people of the Commonwealth? Whether this question be approached from the broad standpoint of constitutional necessity, or the strict and narrower line of technical construction, I am led without personal doubt to the conclusion that the Commonwealth Parliament has full power to pass the Act under consideration in the ample terms in which it has been enacted.

2. The second reason advanced for invalidating the Act was that sec. 6B conferred judicial powers on a non-judicial

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functionary, and so violated the Constitution. My answer is that the issue of the warrant is not in that case an act of judicial power. See *Appleton* v. *Moorhead* (1), where my reasons are fully stated. The chief ground for the argument that it is judicial consisted in the fact that the President or Chairman, has before issuing the warrant to require proof by statutory declaration that the summons was served. But that is merely a contingency interposed before a ministerial act is permitted to be done.

The issue of the warrant is not a determination, it is an authority to another officer to compel the attendance of the person summoned before the Commission. Then the operation of the warrant is exhausted. Besides, even if that particular section were invalid, it is for the reasons to be presently mentioned separable.

3. The third reason was based on sec. 6DD, which declares inadmissible in State Courts as evidence against a witness on a Commission, any statement or disclosure made by him in answer to a question.

It was said there is no power in the Federal Parliament to enact what shall or shall not be evidence in State Courts—of course in relation to the State jurisdiction. That being reserved for the States, it is said, is excluded from the federal power.

Learned counsel for the plaintiffs contended further that the character of the clause was such that it formed a vital and inseparable part of the scheme, and if invalid the whole of the amending Act must fall. On the other hand, it was urged, though not strongly, that the clause was in any case separable so as to leave the rest valid.

In many cases more than one test of separability would lead to the same result. But in others different results would follow. And the present seems to me to be one of the latter class. It is only by applying the test of a condition that I could regard the clause as inseparable.

It cannot be supposed, reading the Act as a whole, that Parliament intended that the heavy penalties enacted should be incurred without the full condition of immunity granted by the challenged section. The condition is an essential part of the

(1) 8 C.L.R., 330, at pp. 382, 383.

scheme. This is in substance the test applied to by-laws by the Courts of England, as Lord *Kenyon* C.J. in *R.* v. *Company of Fishermen of Faversham* (1), and *Watson* B. in *Blackpool Local Board of Health* v. *Bennett* (2), the latter Judge asking whether "the good part is independent and unconnected with the bad."

The all important point, then, is whether the section is valid. The question is not whether the State has power to declare what shall be evidence in its own Courts, but whether what has been done is included directly or indirectly in some grant of power to the Commonwealth.

The power to compel the attendance of witnesses and their answers to questions, includes a discretion as to the best means of eliciting the truth, and manifestly one method of inducing a man to speak the truth is to free him from any apprehension of prejudice from doing so.

The evidence extracted might otherwise be misleading and so tend to defeat the object of the enactment. Complete immunity in this respect being then within the power of the Commonwealth Parliament, it follows that if a provision for that purpose overlaps an inconsistent State law, or practice, sec. 109 of the Constitution confers paramountcy on the federal law. It is not that the Commonwealth Parliament is invading a State power, but the position is as put by *Marshall* C.J. in *Gibbons* v. *Ogden* (3), in these words:—"All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical." This provision is therefore lawful, and the whole Act is valid. I would here add, that if the section be good as incidental to an admitted Commonwealth power, though affecting a State Court, it is difficult to see why any question put by the Commission, throwing light on the legitimate subject of Commonwealth inquiry under a federal power, is to be shut out because, apart from that power, it is within State jurisdiction. The two conclusions seem to me irreconcilable.

3. I now pass to the question of how far an injunction may be granted or a declaration made. The rule of this Court—as my

(1) 4 T.R., 352, at p. 356. (2) 4 H. & N., 127, at p. 137.
(3) 9 Wheat., 1, at p. 204.

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learned brother *Higgins* has pointed out to me—specially limits the power to "an action properly brought." So we have to see whether it is properly brought, apart from the claim for a declaration. Whatever be the extent of this rule as to declaratory judgments, this much is clear, that, as Lord *Loreburn* L.C., speaking for the House of Lords, said in *Glasgow Navigation Co.* v. *Iron Ore Co.* (1):—"It was not the function of a Court of law to advise parties as to what would be their rights under a hypothetical state of facts." In the present case we are asked to determine the rights of the parties as they would be in events which have not arisen, which may never arise, which depend upon the reason and discretion of Royal Commissioners, and which no one on the part of the Crown, including the Commissioners themselves, has ever threatened, or suggested as intended, or even likely, to arise in the future. Those events, apparently, have never yet been considered by the defendants. The plaintiffs say they fear those events may arise, but their fear is not enough to justify judicial action. The cases of *Dyson* v. *The Attorney-General* (2) and *Burghes* v. *The Attorney-General* (3) are thought to be precedents applicable to the present case. To me they seem none, and on the contrary, when their *ratio decidendi* is looked at, they are inferentially adverse. No injunction was claimed or granted, but even as to a declaration the distinction is marked. There the Finance Commissioners, having no authority except under a certain Statute, and having only strictly defined powers under that, sent to the plaintiffs certain questions, with a definite requirement to answer them in a given time, less than the Act permitted, and in a wrong form, and added in express words an intimation which amounted to a distinct threat that unless their demand, which was illegal, was complied with, proceedings would be taken to recover the statutory penalties. Thus it will be noticed that (1) The questions were actually put; (2) it was unlawful to put them; (3) a specific threat was made to enforce the penalties.

Here on the contrary (1) no question has ever been asked. (2) It is lawful for the Crown to ask any question: *per* the learned

(1) (1910) A.C. 293, at p. 294. (2) (1911) 1 K.B., 410; (1912) 1 Ch., 158.
(3) (1912) 1 Ch., 173.

C.J. in *Clough* v. *Leahy* (1). (3) There has been no threat in Court or out of Court, either to enforce penalties which is the all important matter for this purpose, or indeed of any kind.

A list of intended questions was sent—obviously to save time and facilitate inquiry, and I assume there is still an intention to ask them. But if it is lawful to ask, no declaration of its illegality can be made, even though it be equally lawful to refuse an answer.

Now the Statute being held lawful, the first ground of objection suggested in the writ disappears. So far as the action is based on the terms of the Commission, it seems to me to be trivial. In the first place, the Crown itself, and the Attorney-General as representing the Crown, cannot be limited in their powers of asking questions by any restriction on the authority they give to their agents, and in any case an injunction or declaration would be futile because the Commission could be enlarged in an hour to cover all the powers in the Constitution, and a Court does not grant futile orders. There is really no case whatever against the Attorney-General on either ground, and, the Act being valid, the case should not be entertained against the Commissioners. But it is said there is an intention to put the questions, and as the plaintiffs have resolved to refuse an answer, albeit it is suggested on reasonable grounds and because the questions are irrelevant, it is assumed the Commissioners are sure to be unreasonable and to act illegally, and will no doubt threaten and endeavour to enforce the penalties, and therefore this action lies in advance to guard against such a hypothetical state of facts. Now, in my opinion, the judgments of the learned Judges in the English cases cited afford no support to so wide a proposition. In *Dyson* v. *Attorney-General* (2), *Cozens-Hardy* M.R., first points out that the statement of claim alleges that the Commissioners have threatened to enforce the penalty for failure to make the return. Then (3), he states the proposition that the penalty which is threatened to be enforced is one which the Court can entertain, and adds that that suggests that "the Attorney-General ought to be liable to an action in so far as he

(1) 2 C.L.R., 139, at pp. 156-157. (2) (1911) 1 K.B., 410, at p. 414.
(3) (1911) 1 K.B., 410, at p. 415.

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threatens to enforce a penalty based upon non-compliance with an unauthorized notice." *Farwell* L.J. (1), says it would be a blot on our system of law if no one could obtain a decision as to the limits of the Commissioners' power without waiting to be sued for a penalty. But he nowhere suggests that anyone may at any time come and ask a decision of the Court upon a hypothetical state of facts. On the contrary, he states (2) the ground of his decision that the action lies in these terms :—"The plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines."

In *Dyson* v. *Attorney-General* (3), *Cozens-Hardy* M.R. says :—"It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of non-compliance. A general declaration is pre-eminently desirable in these circumstances."

Fletcher Moulton L.J. (4) deals with the question of inconvenience, and thinks there is no objection to the action on that score, and adds "there must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

Farwell L.J. said he adhered to his former judgment in all respects.

In *Burghes's Case* (5) *Fletcher Moulton* L.J. said :—"But in any case the Commissioners are bound to see that their notice contains no unauthorized statement substantially equivalent to a *threat*." Consequently it is plain that the pivotal fact on which the whole assumption of jurisdiction turned was the *threat* to enforce the penalties if the questions actually put were not answered.

The absence of that fact in the present case entirely deprives those cases of any analogy to this. The case of *Nireaha Tamaki*

(1) (1911) 1 K.B., 410, at p. 421.
(2) (1911) 1 K.B., 410, at p. 422.
(3) (1912) 1 Ch., 158, at p. 166.
(4) (1912) 1 Ch. 158, at p. 168.
(5) (1912) 1 Ch., 173, at p. 185.

v. *Baker* (1) bears upon this in two aspects. The plaintiff sued the New Zealand Commissioner of Lands for illegally offering his land for sale. The Attorney-General was not joined. Lord *Davey* for the Judicial Committee said (2):—"Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action; but it follows, from what their Lordships have said as to the character of the action, that in their opinion he was neither a necessary nor a proper party."

In *Dyson's Case* (3) the Attorney-General was made defendant because it was the Attorney-General, as was pointed out by *Cozens-Hardy* M.R., who had to sue for the penalty which was threatened. And see *per Farwell* L.J. in *Burghes's Case* (4).

The divergence I have pointed out between that case and the present is not the only difference. The Finance Commissioners were a statutory body having a strict duty marked out by Act of Parliament. The legality of their action depended on facts ascertainable and ascertained at the time, few in number, and not dependent on discretion. Here, on the contrary, it is the acknowledged power of the Crown to ask any question it desires, and entrusting to Commissioners a duty with a discretion not controllable by the Judiciary or any other constitutional authority but that which conferred it. The Statute gives power to summon any person to attend for the purpose of giving evidence, and that summons is clearly valid. Nevertheless it is sought to declare it unlawful, and to restrain the Crown and the Commissioners from even requiring the attendance of the witness. The summons to produce documents is in no way repugnant to any statutory provision and there is nothing on the face of it making it wholly void.

It is difficult to over-estimate the consequences of the suggested interference by the Court at the present stage of the proceedings. We are utterly unacquainted with the circumstances

(1) (1901) A.C., 561.
(2) (1901) A.C., 561, at p. 576.
(3) (1912) 1 Ch., 158.
(4) (1912) 1 Ch., 173, at p. 189.

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and facts already proved to the Commission, or known by it, respecting the sugar industry; further circumstances may yet be adduced before it. We are not aware what may be disclosed or may require to be investigated on a perusal of documents confessedly admissible or by oral testimony. It may yet transpire that the questions and documents now sought to be excluded may be brought into manifest relevance and direct importance, even if they are not in that position at present. In any case they may be indirect but useful tests of statements directly made. The task of the Commission is an investigation, and it would be unprecedented and most embarrassing to tie it down to such rigid rules as are suggested. This Court is not in a position, and from the nature of the case cannot possibly be in a position, to say whether the documents or suggested questions are irrelevant or will be so when demanded or asked, or that they cannot possibly become relevant. We cannot without usurping the function of another branch of government anticipate the situation which may arise when a question is put, or a document called for. Still less can we, consistently with observance of the line of demarcation between the Judicial and Executive departments, anticipate the course of action which the Commissioners in their discretion may take in the event of a refusal to answer or produce. They must be credited with reason and justice as much as ourselves, and if any reasonable excuse is offered, or if irrelevancy is indicated, we are not to assume they will proceed to insist, and still less to threaten. I do not say this with a view to advise them, for that is outside my province; but only with a view of stating what reasons influence my opinion.

If the convenience of the matter be considered, I think it is entirely against the plaintiffs. The inconvenience of their being allowed to proceed and test, say one question or one document, so as to raise a concrete case, if they are threatened or proceeded against, is insignificant compared with the alternative of granting an injunction and declaration couched in general terms, against Commissioners charged with the responsible discretionary duty of obtaining information for Parliament on an important public question. It could hardly be expected that men would continue in their duty, or could satisfactorily perform it, if they were

compelled to do so under a constant peril of personal imprisonment, or at least of legal proceedings, for violating an injunction or a solemn declaration of right, if they happened to insist on a question or a document which exceeded the technical general limitation devised by a Court.

In any case, having examined the questions challenged and the summons to produce, I fail to see any necessary excess of power. I will refer to two or three objections only. The first is that internal management of the company is outside the scope of the inquiry. It is obvious, however, that the character of internal management may seriously affect the actual or apparent condition of the industry. Another is the length of time for which information is required. This is no objection because legislation may look to an indefinite future and in that case a longer period of retrospect may prove a more reliable basis for consideration. The third is as to foreign production of sugar. It seems to me quite obvious that the conditions and extent of, and other circumstances affecting, foreign production are most material in connection with any consideration or determination of Parliament as to importation or taxation of the foreign product or the encouragment of Australian industry. And it seems to me perfectly impossible for a Court to dictate to the other branches of the Government how far they are entitled to go in informing their minds so as to discharge their respective constitutional functions.

In my opinion the application wholly fails, and should be dismissed.

HIGGINS J. This is an extraordinary motion; and the action itself, in its main aspect, is without precedent. Ancient as is the practice of issuing subpœnas to witnesses to give evidence or to produce documents, there seems to be no instance yet in which the witness has sued for a declaration that he is not obliged to answer or to produce, or for an injunction against proceedings under the subpœna; and yet he runs the risk of attachment, as well as of an action, if he disobey the subpœna. Under this Act he runs the risk of a penalty. The plaintiffs rely on the recent case of *Dyson* v. *Attorney-General* (1). In that case, the Court of Appeal held that it had jurisdiction to make a declaration to

(1) (1911) 1 K.B., 410; (1912) 1 Ch., 158.

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the effect that a taxpayer was not under an obligation to answer certain questions contained in a form issued as under the authority of the recent *Finance Act* in Great Britain. But the Court was there influenced by the fact that millions of taxpayers were concerned, and by the jurisdiction of equity to prevent multiplicity of actions; and, above all, the questions objected to had actually been asked. They did not rest on mere intention or probability; and the penalty for a failure to answer was proximate and actually threatened—not contingent or hypothetical. The questions here suggested may never be asked, or they may be asked in another form or as incidental to other questions, and the witness may not then object to answer. The documents mentioned may never be called for, or if called for may be produced—in whole or in part. All depends on circumstances.

The exact force and scope of Order XXV., r. 5, of the English *Judicature Rules* have never been satisfactorily settled. *Warrington* J. has laid it down that the plaintiff still must have a cause of action, notwithstanding this rule: *Offin* v. *Rochford Rural Council* (1). What is the cause of action here? *Collins* M.R. objected to making a declaration where the declaration "would not be ancillary to the putting in suit of any legal right,"—whatever those words mean: *Williams* v. *North's Navigation Collieries* (1889) *Ltd.* (2). But a tenant for life can get a declaration that his estate has not been divested: *Austen* v. *Collins* (3); and probably a person claiming an estate in remainder can get his right to that estate declared during a tenancy for life.

Order LV. of our High Court rules does not go so far, apparently, as the English rule; for the declaration of right to be binding must be made "in an action properly brought." However, whatever view one may have as to the meaning of the rule, or as to the power of Judges to create jurisdiction for themselves where there was none before, it is clear that the power to make such declarations ought to be very sparingly used and jealously watched, and that the declarations will not be made except in very special circumstances: *Attorney-General* v. *Scott* (4);

(1) (1906) 1 Ch., 342.
(2) (1904) 2 K.B., 44, at p. 49.
(3) 54 L.T., 903.
(4) 20 T.L.R., 630.

Baxter v. *The London County Council* (1); *Faber* v. *Gosworth Urban District Council* (2); *Grand Junction Water Works Co.* v. *Hampton Urban District Council* (3); *Honour* v. *Equitable Life Assurance Society of the United States* (4); *North-Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (5). The Court is very slow to make a declaration as to future or reversionary rights: *per* Lord *Davey*, *Barraclough* v. *Brown* (6); and it should be still slower to declare as to a contingency, if certain questions be asked, or if a certain document be actually demanded in evidence. The objection is far from technical; it goes to the very root of judicial action.

But assuming that there is jurisdiction to make such a declaration, assuming that the matter lies wholly in our discretion, this is, to my mind, clearly a case in which, as a matter of discretion, the application should be refused. Questions which may seem to us, if they are taken singly and on first appearance, irrelevant to the exercise of any power of the Commonwealth, or irrelevant to the inquiry directed by the Commission, may turn out, as the inquiry develops, to be eminently relevant. Much depends on the course which the uncontested evidence will take. It would be much better to wait till some definite question is actually asked and objected to, or some definite document is called for and refused, rather than attempt to define the limits of the inquiry by anticipation, rather than draw a "circle premature" by way of boundary. This course of caution is all the more incumbent on us as we are asked to pronounce against the doings of a Parliament created by the Constitution, and against the proposed action of a Royal Commission created to aid Parliament and the Executive.

If, indeed, the whole Act were invalid, as the plaintiffs alternatively contend, an order for injunction in the terms of clause 9 of the writ, as sought in this motion, might be the most expedient course, if it were legitimate; but I agree with my learned colleagues that the Act is not invalid. We have been treated to the class of argument which has now become so usual

(1) 63 L.T., 767.
(2) 88 L.T., 549.
(3) (1898) 2 Ch., 331.
(4) (1900) 1 Ch., 852.
(5) (1906) 1 Ch., 324; (1906) 2 Ch., 498.
(6) (1897) A.C., 615.

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on the part of people who do not like an Act of the Federal Parliament. As I pointed out in the *Land Tax Case, Osborne* v. *Commonwealth* (1), they look in every nook and cranny of the Act to find some petty provision which this Court may be induced to regard as transgressing the limits of the federal power, and then they urge that if that provision is bad the whole Act must be bad, as the Act would be "substantially different" without it. It does not matter that the erring provision does not affect the party before the Court in the slightest; any provision will serve the purpose of these barren intellectual gymnastics. But I concur with my learned colleagues in their decision that the Act is not invalid, and I need not add to what they have said. I prefer, however, to put my decision on the ground that there is nothing in the Act which exceeds the powers of Parliament; for I find that on the question of a test of severability of provisions my views do not seem to be orthodox.

Coming now to details, I find the following material dates:—

19th August 1912—An Act amending *Royal Commissions Act* 1902.

4th September 1912—Royal Commission signed by Governor-General appointing five Commissioners and requiring them to inquire into and report upon "the sugar industry in Australia," and more particularly in relation to, etc.

5th September 1912—Summons issued under Act to Mr. Knox, general manager of the Colonial Sugar Co., requiring him to attend before the Commission on 16th September "to give evidence upon oath on the investigation of the matters referred to in said Commission to inquire into and report" and to produce certain documents specified or referred to in the summons or in the schedule thereto.

10th September 1912—Writ issued by the Company and its directors and manager against the members of the Commission. The Federal Attorney-General has been added as a defendant.

11th September 1912—Notice of motion for an interlocutory

(1) 12 C.L.R., 321, at p. 371.

injunction "in terms of the 8th, 9th and 10th claims endorsed on the writ."

Now, the eighth claim becomes the only important claim of the three, when the Act and its sections are held to be valid. It is a claim (so far as material) for an injunction restraining the members of the Commission from asking questions or compelling the production of documents which are (*a*) in respect of a subject matter as to which the Federal Parliament has no power to legislate; (*b*) are not relevant to the terms of the Commission. Of course, an injunction in such terms would be not only contrary to the practice of the Courts, but useless, and even improper. No one, I think, denies that the questions ought to be relevant to the inquiry directed, and that the inquiry must be relevant to some function of the Commonwealth. An injunction in the terms asked would, therefore, not be directed to the matters in difference between the plaintiffs and the defendants. It would give no pronouncement, no guidance to the defendants. A defendant, if he is to be liable to contempt process for breach of an injunction, is entitled to know what the Court regards as the limits of the forbidden ground, and he ought not to be told vaguely that he must not exceed his function: *Cother* v. *Midland Railway Co.*. (1); *Warden &c. of Dover* v. *London, Chatham and Dover Railway Co.* (2); *Low* v. *Innes* (3); *Hackett* v. *Baiss* (4); *Parker* v. *First Avenue Hotel Co.* (5). But I cannot help thinking that the vagueness of the claim in this case is due mainly to the real intrinsic difficulty which faces the plaintiff, to the difficulty of drawing the line as to relevancy, the difficulty of establishing that some of the questions to be asked, or some of the documents to be produced, cannot under any possible circumstances be relevant to the inquiry or to the constitutional powers of Parliament. Mr. *Mitchell* has, however, at the close of his case, gallantly essayed the task.

In the first place, it is urged that the Commission has no right to inquire into the business, trade and assets of the company outside the Commonwealth, with certain exceptions which plain-

(1) 2 Ph., 469, at pp. 471, 472.
(2) 3 De G. F. & J., 559.
(3) 4 De G. J. & S., 286, at pp. 295-296.
(4) L.R. 20 Eq., 494, at pp. 499.
(5) 24 Ch. D., 282, at p. 286.

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tiffs' counsel have, naturally enough, found it very difficult to define. If this were a purely foreign company—foreign to Australia—and if the Commission thought fit to inquire into all its workings with the view of understanding the conditions necessary for the sugar industry as regards taxation, as regards protection, as regards bounties, &c., why should the Commission be debarred from getting information on the subjects referred to from the manager if he happen to be within the jurisdiction? If the inquiry were directed to the defence of Australia, could not the Commission question an Indian officer as to the history of the health regulations applied to the Indian Army during the past hundred years? There is no ground for saying that any of the questions suggested in this case cannot possibly be relevant to the inquiry directed by the Commission; and unless they must be irrelevant the witness must answer. The same answer applies to the objection to show the "domestic management and working of the company and the disposal by the company of its profits" after they have been earned. The disposal of the profits may be material as showing, or as testing, the true financial position and capacity of the company, and the means by which it attained its prosperous condition. The law makes no arbitrary distinction between what is called "the domestic management" of a great corporation and the other details of its business. It is quite true that injury may be done to a company by the disclosure of certain of its methods to its rivals; but the degree of restraint proper in a question as to such matters, and the publicity which ought to be given to the evidence, are matters for the discretion of the Commission — not matter for the ruling of this Court. The questions to be asked, the documents to be produced, the publicity to be given to evidence, are matters which have been entrusted by the King to the wisdom of the Commission. The responsibility lies on the Commissioners, not on this Court; and nothing would do more harm to the influence of this Court within its own proper sphere than for the Court to dictate to a co-ordinate body, appointed by or under the same authority, unless we find that body actually going outside the law. As to the fourth head of subjects objected to—the valuation of the company's business and undertaking, or of any branch thereof,

or any property—the same observations apply. But, in stating this position, I do not want to be taken as implying that the witnesses brought before the Commission are under any obligation to make out reports, or to make valuations, or to qualify themselves for giving evidence. They must state what they know or believe, if asked; but I cannot find any legal duty to acquire knowledge or to collect information.

In answering these questions, I have assumed that the Commission under the Act as amended has intimated an intention to ask the questions mentioned in Exhibit D,—"a list of some questions intended to be addressed to the Colonial Sugar Refining Co." This list was supplied under a previous commission on the 19th January 1912, before the Act of 1900 was amended. It was supplied voluntarily, probably with a view to enabling the witnesses coming from the company to know beforehand the subjects to which they were to be asked to address their minds, and to enable the Commission to get the information desired with as little loss of time as possible—loss of time to the witnesses as well as to the Commission; but it is by no means clear that the Commission, acting under the Act as amended, meant to rely on the notice given under the Act before amendment—meant to ask in detail the questions appearing in Exhibit D; for the Commission has not repeated the notice of questions, although it has repeated the notice to produce documents. It may well be that having regard to the attitude taken by the general manager and the directors under the previous Commission, the members of the Commission have determined simply to rely on the summons to attend and to produce documents—Exhibit O. But inasmuch as there has been no express disclaimer of intention to question on the lines of Exhibit D, I have thought it better, under the circumstances, to assume that the intention remains, although I am by no means satisfied that it does.

If it is improper to make a declaration at the trial, it follows that an interlocutory injunction should not be granted. But the converse does not hold; it does not follow that such an injunction should be granted if it be proper to make a declaration at the trial. As for the Attorney-General, why should he have an injunction issued against him? He has not done anything under the

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commission; he has not—nor has the Government—indicated any intention to attempt to enforce the penalties for disobedience, or any intention of any kind. As for the other defendants, the members of the Commission, there is no immediate danger of any irreparable or other injury. There is not even any statement, such as that which used to be necessary to prevent bills from being demurrable, that the defendants threaten or intend to press any questions, or to insist on the production of any documents. There is, indeed, a statement (paragraph 21) that the directors and general manager are "afraid" that the chairman "will cause houses to be broken into for the purpose of having apprehended and brought before the said Commission and there detained in custody." But this fear is groundless. The alleged fear that the documents will be impounded and detained does not apply to documents which the plaintiffs refuse to produce. These powers of apprehension and detention are not applicable to the case of a witness refusing to give evidence or to produce documents; they are only applicable to the case of a witness failing to attend (sec. 6B). Then, as to the form of the injunction proposed, we have only to imagine ourselves to be in the position of the Commissioners, anxious to carry out the King's directions, and at the same time to obey the law as declared by the Court, to see what embarrassment the order, in its proposed form, must occasion them. There is no adequate guidance afforded by the terms of the order, and the Court, in its endeavour to relieve certain witnesses of the risk of possible penalties, is putting the Commissioners in grave perplexity in asking questions, and in danger of attachment for contempt.

According to my view, the plaintiffs have not shown that any of the questions asked or documents demanded are necessarily irrelevant to the powers conferred on Parliament under sec. 51 of the Constitution as to taxation, bounties, commerce with foreign parts or between States, &c. But I see no reason for doubt that Parliament and the Executive can confer on the Commission power to make inquiries with a view to the exercise of any other function of the Commonwealth (*e.g.* under secs. 52, 96, 121, 122, 123, 128), and amongst these functions I include the function of framing a bill for the amendment of the Constitution

under Part 8. Under sec. 51 (xxxix.) Parliament may make laws in respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth"; and this power of framing and passing proposed laws for the amendment of the Constitution, and of submitting them first to the people and then to the Governor-General for acceptance, is, in my opinion, such a power as is referred to in sec. 51 (xxxix.). In short, Parliament has no less power of inquiry before committing itself to taking part in the gravest step of all—the amendment of the Constitution—than it has in relation to ordinary Bills. I am of opinion that the motion should be dismissed, and with costs, as being an extraordinary device to elicit the opinions of this Court by anticipation.

Injunction granted until the hearing of the action or further order restraining the members of the Royal Commission from requiring the plaintiff Knox to answer any questions, or produce any documents, which are relevant only to the matters set out in the judgment of Griffith C.J. above.

Oct. 22.

Duffy K.C. (with him *Arthur*), for the defendants, moved for a certificate under sec. 74 of the Constitution. The application is made for greater caution. The Court having decided that the *Royal Commissions Act* is valid, the only question as to which a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State can possibly arise is as to the power to make compulsory inquiries in aid of the power conferred on the Commonwealth Parliament by sec. 128 of the Constitution. That power however must either be in the Commonwealth, or it does not exist at all. It is not necessary to set up an antagonism between the powers of the Commonwealth and those of the States.

[GRIFFITH C.J.—The power must reside somewhere. Does it

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reside in the Commonwealth or in the States? That seems to be a question of the limits *inter se* of the constitutional powers of the Commonwealth and those of the States.]

If such a question arises, it is so inextricably mixed up with the other questions which the Privy Council may deal with without a certificate of this Court that a certificate should be granted. The fact that the Court is equally divided in opinion is a ground among others for granting the certificate.

Mitchell K.C. (with him *Cain*), for the plaintiffs. The mere fact that an appeal might lie to the Privy Council without a certificate on a part of a case is no reason why a certificate should be granted as to the other part as to which no appeal lies without a certificate. No special reasons have been submitted which did not exist in *Deakin* v. *Webb* (1); *Flint* v. *Webb* (2).

[GRIFFITH C.J.—One reason is that a judgment of a Court which is equally divided in opinion is not generally considered as of great authority. This question is one of very great importance.

ISAACS J.—In *Flint* v. *Webb* (2) there was a means of ending what was called "an intolerable position." Here there is not.]

Duffy K.C., in reply.

GRIFFITH C.J. We think that this is a case in which a certificate should be granted. The question should be stated in a concrete form which I will read.

Certificate granted in the following form:—
Pursuant to sec. 74 *of the Constitution this Court doth certify that, so far as the question whether the Parliament of the Commonwealth has power to make laws for the compulsory examination of witnesses by Royal Commissions touching matters which are not within the ambit of the existing legislative*

(1) 1 C.L.R., 585, at p. 619. (2) 4 C.L.R., 1178.

powers of the Commonwealth, that is to say, such powers as may now be exercised without an amendment of the Constitution under the provisions of sec. 128, *is a question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, the question is one which ought to be determined by His Majesty in Council.*

Solicitors, for the plaintiffs, *Minter, Simpson & Co.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

PRENTICE . . . . . APPELLANT;
DEFENDANT,

AND

THE AMALGAMATED MINING EMPLOYÉS' ASSOCIATION OF VICTORIA AND TASMANIA . . . . . } RESPONDENTS.
COMPLAINANTS,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

Practice—High Court—Appeal from inferior Court of State exercising federal jurisdiction—Procedure—Order to review—No appeal under State law—Rules of the High Court 1911, *Part II., Sec. IV., r.* 1—*Justices Act* 1904 (*No.* 1959) (*Vict.*), *sec.* 21—*Association registered as organization—Rules—Levies imposed on branches—Liability of members to association—Commonwealth Conciliation and Arbitration Act* 1904 (*No.* 139 *of* 1904), *sec.* 68.