[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

KIDMAN AND OTHERS.

H. C. OF A. 1915.

SYDNEY, *Aug.* 30, 31; *Sept.* 1, 2, 3.

MELBOURNE, *Sept.* 16.

Griffith C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Constitutional Law—Legislative power of Parliament—Ex post facto law—High Court—Original jurisdiction—Criminal law—Conspiracy to defraud the Commonwealth—Common law of the Commonwealth—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 75, 76—*Crimes Act* 1914 (*No.* 12 *of* 1914), *sec.* 86—*Crimes Act* 1915 (*No.* 6 *of* 1915), *secs.* 2, 3—*Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *secs.* 30, 71A—*High Court Procedure Act* 1903-1915 (*No.* 7 *of* 1903—*No.* 5 *of* 1915), *sec.* 15A.

Practice—High Court—Reserving questions for Full Court—Criminal trial before Justice of High Court—Judiciary Act 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 18.

The *Crimes Act* 1915, which, by sec. 2, adds conspiracies to defraud the Commonwealth to the conspiracies which by sec. 86 of the *Crimes Act* 1914 are declared to be indictable offences, and, by sec. 3, provides that the Act is to be deemed to have been in force from the date of the commencement of the *Crimes Act* 1914, is a valid exercise of the power of the Parliament of the Commonwealth.

So *held* by the whole Court.

By *Griffith* C.J., on the ground that there is a common law of the Commonwealth applicable to the execution of its powers under which it is an offence to conspire to defraud the Commonwealth; that the Commonwealth Parliament has no power to enact a criminal law which can only operate as an *ex post facto* law, but has power under sec. 51 (XXXIX.) of the Constitution to embody the common law of the Commonwealth applicable to the execution of its powers in the form of a Statute; and that such a Statute, so far as it refers to the Courts in which offences against the law so declared are to be prosecuted, is a law of procedure, and therefore to be construed as retrospective in its operation.

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By *Isaacs, Higgins, Gavan Duffy, Powers* and *Rich* JJ., on the ground that within the limits as to subject matter prescribed by the Constitution the power of Parliament to make laws is plenary, and includes the power within those limits to make *ex post facto* laws; that the power conferred by sec. 51 (XXXIX.) of the Constitution to make laws with respect to matters incidental to the execution of any of the powers therein mentioned is as plenary as any other of the powers to make laws, and that the *Crimes Act* 1915 is a law with respect to matters incidental to the execution of one or more of those powers.

By *Isaacs* J., further, on the ground that the common law of Australia recognizes the peace of the King in relation to the Commonwealth, just as it recognizes the peace of the King in relation to each separate State; and therefore any obstruction to the Crown in the performance of its Commonwealth functions is a justiciable matter of complaint which any Court of competent jurisdiction may entertain.

The High Court has original jurisdiction in trials of indictments for offences against the laws of the Commonwealth.

Quære, whether sec. 18 of the *Judiciary Act* 1903-1915, which authorizes a Justice of the High Court sitting alone, whether in Court or in Chambers, to reserve any question for the consideration of the Full Court, applies to a Justice sitting in the conduct of a criminal trial.

QUESTIONS RESERVED.

On the trial of Arthur Kidman, Frederick William Page, Arthur George O'Donnell and Edward Leslie, *Griffith* C.J. reserved certain questions for the consideration of the Full Court, which he stated as follows :—

1. On 13th May 1915 an indictment, a copy of which is annexed, was filed in this Court by the Attorney-General of the Commonwealth.

2. On 21st June 1915 the said indictment came on before me for trial.

3. On being arraigned the defendant Page pleaded not guilty.

4. The defendants Kidman, O'Donnell and Leslie, by their counsel, moved to quash the indictment upon the following grounds :—

(1) That the Act No. 6 of 1915, so far as its provisions are retrospective, is not within the competence of the Commonwealth Parliament;

(2) That it is not within the competence of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offences against the common law;

(3) That the Act No. 4 of 1915 does not confer upon the High Court original jurisdiction in respect of such offences;

(4) That the indictment is not a matter to which the Commonwealth is a party within the meaning of sec. 75 of the Constitution.

5. I reserved all questions arising upon the said motions to quash the indictment for the consideration of the Full Court, and adjourned the trial to Monday 9th August 1915.

6. The questions for the consideration of the Full Court are accordingly :—

(1) Whether the Act No. 6 of 1915, so far as its provisions are retrospective, is within the competence of the Commonwealth Parliament;

(2) Whether it is within the competence of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offences against the common law;

(3) Whether the Act No. 4 of 1915 confers upon the High Court jurisdiction to deal with such offences;

(4) Whether the indictment is a matter to which the Commonwealth is a party within the meaning of sec. 75 of the Constitution;

(5) Any other questions arising upon the said motions relevant to the original jurisdiction of the High Court with respect to the indictment.

The indictment was as follows :—" The Attorney-General of the Commonwealth of Australia, who prosecutes for His Majesty in this behalf, informs the Court and charges that the said Arthur Kidman, Frederick William Page, Arthur George O'Donnell and Edward Leslie did at Sydney in the State of New South Wales between 29th October 1914 and 8th May 1915 conspire among themselves and with divers other persons to defraud the Commonwealth of Australia of divers and large sums of money by procuring that the Commonwealth of Australia should pay excessive prices for the supply of goods for the use of His Majesty's armed forces raised by the Commonwealth of Australia."

E. M. Mitchell, for the accused Kidman. It is not within the

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power of the Commonwealth Parliament to make a law rendering a man liable to punishment for the breach of a Statute which was not in operation at the time when he did the act complained of, or rendering a man liable to a greater punishment than that prescribed by law at the time when he did the act. Laws of that kind are *ex post facto* laws. The United States Constitution, by Art. I., sec. 9, expressly prohibits Congress from making *ex post facto* laws, but in *Calder* v. *Bull* (1) it was said that the prohibition was only introduced *ex majori cautelâ*, as it would have been implied. See also *Fletcher* v. *Peck* (2). In *Phillips* v. *Eyre* (3) it seems to have been inferentially assumed that the Government of Jamaica had power to make *ex post facto* laws. That may be admitted also as to the States of the Commonwealth. But the powers of the Commonwealth Parliament must be found in the Constitution. The Commonwealth Parliament has no express power to make criminal laws, and the only power to do so must be that to make laws with respect to incidental matters contained in sec. 51 (XXXIX.) Even if there is power under sec. 51 (XXXIX.) to make retrospective laws, such as those validating the past collection of Customs duties, that power does not extend to *ex post facto* laws. See *Donohoe* v. *Britz* (4). To make a man punishable for an act which, when he committed it, was not a breach of the law cannot be incidental to the execution of any power. The words "incidental" and "execution" both connote futurity, and the former word also connotes a means adapted to ensure obedience to a new law. See *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (5). The offence charged here was an offence under the laws of the several States; those laws, by sec. 108 of the Constitution, remain in force until the Commonwealth Parliament legislates on the particular matter, but the Commonwealth Parliament cannot alter those laws retrospectively.

[ISAACS, J. referred to *Satterlee* v. *Matthewson* (6).]

Assuming that sec. 3 of the *Crimes Act* 1915 is *ultra vires*, the High Court has no authority to entertain the indictment. As a matter of

(1) 3 Dall., 386.
(2) 6 Cranch, 87, at p. 135.
(3) L.R. 6 Q.B., 1.
(4) 1 C.L.R., 391.
(5) (1914) A.C., 237; 17 C.L.R., 644.
(6) 2 Pet., 380, at p. 413.

construction the jurisdiction given by sec. 30 (*c*) of the *Judiciary Act* 1903-1915 as to trials of indictable offences against "the laws of the Commonwealth" is limited to offences against the Statute law of the Commonwealth. That section follows the scheme of sec. 76 of the Constitution—sec. 30 (*c*) corresponding with sec. 76 (II.), which gives Parliament power to confer original jurisdiction on the High Court in any matter arising under "any laws made by the Parliament." The term "the laws of the Commonwealth" is used throughout the Constitution as meaning the Statute law. There is no common law of the Commonwealth as to crimes. The necessities of the case do not require that it should be implied that on the institution of the Commonwealth a common law of the Commonwealth came into existence. In the United States it has been held that there is no common law of the United States: *Kent's Commentaries*, vol. I., p. 367; *United States* v. *Worrall* (1); *United States* v. *Hudson* (2); *United States* v. *Coolidge* (3); *United States* v. *Eaton* (4); *Wheaton* v. *Peters* (5); *Ex parte Bollman* (6); *Bucher* v. *Cheshire Railroad Co.* (7).

[GRIFFITH C.J. referred to *R.* v. *Munslow* (8).

ISAACS J. referred to *Cohens* v. *Virginia* (9); *Tennessee* v. *Davis* (10); *Western Union Telegraph Co.* v. *Call Publishing Co.* (11).]

If the High Court has jurisdiction as to crimes, it can only be under sec. 75 of the Constitution, but that section only gives jurisdiction in civil matters. The Commonwealth is not a party to a criminal prosecution so as to bring the case within sec. 75 (III.).

Barton, for the accused O'Donnell. The object of sec. 51 (XXXIX.) of the Constitution was to invest the Commonwealth Parliament with powers similar to those vested in the Congress of the United States by Art. I., sec. 8 (17), of the American Constitution, and was not to make a new grant of power which stood on the same footing as the powers already enumerated. The method of enumeration is inconsistent with such a new grant. That being so, the word

(1) 2 Dall., 384, at p. 391.
(2) 7 Cranch, 32.
(3) 1 Wheat., 415.
(4) 144 U.S., 677, at p. 687.
(5) 8 Pet., 591, at p. 655.
(6) 4 Cranch, 75.
(7) 125 U.S., 555.
(8) (1895) 1 Q.B., 758.
(9) 6 Wheat., 264, at p. 399.
(10) 100 U.S., 257.
(11) 181 U.S., 92, at p. 101.

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"incidental" must be interpreted in the same way as the words "necessary and proper" have been interpreted in the United States —that is to say, as meaning "conducive": *Legal Tender Cases* (1); *United States* v. *Fisher* (2); *Hepburn* v. *Griswold* (3); *M'Culloch* v. *Maryland* (4).

[HIGGINS J. referred to *Hodge* v. *The Queen* (5).]

The punishment of an act which has already been done during the exercise of some federal power cannot be incidental to the exercise of that power.

Leverrier K.C. and *Rolin* K.C. (with them *Flannery* and *Windeyer*), for the Crown. Within the limits of jurisdiction as to subject matter the legislative power of the Parliament of the Commonwealth is plenary, and authorizes the Parliament to make *ex post facto* laws as to those subject matters. That is so as to the power conferred by sec. 51 (XXXIX.) as well as to the other legislative powers. The Parliament has under sec. 51 (XXXIX.) power to make an act which at the time it was done was unlawful and punishable under the laws of the States, punishable under a Statute of the Commonwealth. Such a law is incidental to the efficient execution of the power to legislate. It is also incidental to the execution of the executive power of the Commonwealth. It is incidental to the protection of the property of the Commonwealth. In the case of a conspiracy to defraud the Commonwealth its result may not come into operation until long after the conspiracy has taken place. Parliament may have thought that to make an act which has been done and was then punishable by the law of the States punishable by the Commonwealth law would be a deterrent; in that view the law is within the incidental power even if "incidental" means "conducive to."

[ISAACS J. referred to *United States* v. *Fox* (6).]

The word "incidental" is not limited, but has a much wider meaning. A matter is "incidental" to the execution of a power if it has a proximate relation to the execution of the power. Under sec. 76 (II.) of the Constitution the Commonwealth Parliament has

(1) 12 Wall., 457, at p. 534.
(2) 2 Cranch, 358.
(3) 8 Wall., 603, at p. 613.
(4) 4 Wheat., 316, at pp. 408, 421.
(5) 9 App. Cas., 117.
(6) 95 U.S., 670, at p. 672.

power to confer original jurisdiction on the High Court in any matter arising under the laws made by the Parliament. The offence created by sec. 86 (*a*) of the *Crimes Act* 1914 of conspiring to commit an offence against the law of the Commonwealth is such a matter, and includes a conspiracy to defraud the Commonwealth, which is an offence against the common law of the Commonwealth. The High Court has therefore jurisdiction to entertain this indictment apart from the *Crimes Act* 1915. There is a common law of the Commonwealth as distinct from the common law of the different States. By virtue of constituting a sovereign entity such as the Commonwealth it is invested with that part of the common law which is necessary to the continued existence of the Commonwealth, or, in other words, so much of the common law as governs the relation of the Sovereign to his subjects. That common law is a matter arising under the Constitution within the meaning of sec. 76 (I.), and under that section the Parliament has by the *Judiciary Act* 1915, sec. 2, given the High Court original jurisdiction in respect of it. Under that common law it is an offence to conspire to defraud the Commonwealth, and under sec. 2 of the *Judiciary Act* 1915 the High Court has jurisdiction in respect of the indictment. The High Court has also original jurisdiction in respect of the indictment under sec. 75 (III.) of the Constitution, the matter being one in which the Commonwealth is a party. [Counsel also referred to *Charles River Bridge* v. *Warren Bridge* (1); *Carpenter* v. *Pennsylvania* (2); *Johannessen* v. *United States* (3); *In re Neagle* (4); *Sutherland's Statutory Construction*, p. 257; *Cooley's Constitutional Limitations*, p. 319; *Hare's Constitutional Law*, vol. I., p. 548.]

[ISAACS J. referred to *Kring* v. *Missouri* (5); *Baltimore and Susquehanna Railroad Co.* v. *Nesbit* (6).]

Mitchell, in reply, referred to *Joint Stock Discount Co.* v. *Brown* (7) as to the difference between "incidental" and "conducive." Sec. 75 of the Constitution only refers to civil proceedings. The Commonwealth is not a party to a criminal prosecution, but the

(1) 11 Pet., 420.
(2) 17 How., 456.
(3) 225 U.S., 227.
(4) 135 U.S., 1, at p. 66.
(5) 107 U.S., 221, at p. 226.
(6) 10 How., 395.
(7) L.R. 3 Eq., 139, at p. 150.

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King is. The offence is against him, and the proceedings are taken in his name. See *Stephen's Commentaries*, 10th ed., vol. II., p. 492.

[ISAACS J. referred to *Young* v. *Adams* (1).]

Sept. 3.

PER CURIAM. The motions to quash the indictment will be refused. The reasons for judgment will be given later.

The following judgments were read :—

Sept. 16.

GRIFFITH C.J. The questions raised for decision in this case arise upon the Act No. 6 of 1915, assented to on 7th May, which enacts (sec. 2) that any person who conspires with any other person to defraud the Commonwealth shall be guilty of an indictable offence, and (sec. 3) that the Act shall be deemed to have been in force from 29th October 1914 (the date of the commencement of the *Crimes Act* of that year). The offence charged in the indictment is alleged to have been committed before that date.

The first question is, in substance, whether the Parliament of the Commonwealth has power to pass a law by which, after an act, indifferent in itself—I use the words of Sir *W. Blackstone*—has been committed, the person who has committed it is declared to have been guilty of a crime and made liable to punishment. Such laws, to which the term *ex post facto* is properly applicable, are forbidden by the Constitution of the United States of America, and have been deprecated by many writers.

In the case of a Legislature of plenary power, such as that of the United Kingdom, no question of the validity of such a law can arise. The question whether a law by which a supreme Legislature imposes penal consequences for a past act which it considers to have been reprehensible and deserving of punishment is morally justifiable appertains to a quite different field of inquiry, analogous to that which comprises the consideration of parental duties with regard to the chastisement of children. Our present inquiry is based upon the assumption that the act retrospectively declared to have been unlawful was not amenable to punishment when committed. For, if it was, very different considerations will arise, as I shall afterwards show. The answer to the question must be found in the terms of the Constitution.

(1) (1898) A.C., 469, at p. 476.

The legislative power of the Commonwealth Parliament is not plenary in the sense that its ambit includes any enactment on any subject whatever. The scheme of the Constitution was, as pointed out by Lord *Haldane* L.C., delivering the opinion of the Judicial Committee in the case of *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1), to select certain subjects, thirty-eight in number, which are enumerated in sec. 51, and most of which were already within the ambit of the legislative power of the federating Colonies, and to confer upon the Federal Parliament power to legislate with respect to them. These subjects do not in terms include a power to legislate with respect to the criminal law. On this point, indeed, the Judicial Committee remarked that "None of them relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth." But pl. XXXIX. of sec. 51 declares to be within the legislative power of the Parliament "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." These words, in the opinion of the Judicial Committee, do no more than cover matters which are incidents in the exercise of some actually existing power conferred by Statute or by the common law (2). So far, indeed, as they relate to the execution of legislative power, they seem to be no more than an express statement of what would be implied without them, since the very notion of law, in the sense of a rule of conduct prescribed by a superior authority, connotes provisions as to the consequences which are to follow from its infraction. The imposition of such consequences, commonly spoken of as sanctions, which are generally in the form of penalties, is in the strictest sense of the term incidental to the execution of the power to make the law itself. With regard to matters incidental to the execution of powers vested in the Executive Government and in the Judicature, the express provisions of pl. XXXIX. may perhaps be necessary. But the meaning of the term "incidental" is the same in all cases.

(1) (1914) A.C., 237; 17 C.L.R., 644.
(2) (1914) A.C., at p. 256; 17 C.L.R., at p. 655.

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As I understand the meaning of the words of pl. XXXIX., the existence of the power, whether legislative, administrative, or judicial, must precede the execution of it, and the occasion for the execution of a power must arise before any matter can be called incidental to its execution. In a different context the word "incidental" might be capable of a wider interpretation. Thus, since a house must exist before it is inhabited, it might be said that the erection of the house is incidental to inhabiting it, or, since it is incidental to the performance of the functions of the Post Office that a letter-carrier shall not be obstructed in the delivery of letters, that an assault upon a letter-carrier committed, say, a month ago, the effects of which now impede the performance of his work, is a matter incidental to the execution of his duty as a letter-carrier. I do not so understand the word.

The phrase "matter incidental to the execution of a power" imports, in my opinion, some matter attendant upon its present execution. A past event, therefore, although it may materially affect the efficiency of the agent in the present execution of a power, cannot, for the purpose of construing the extent of the power to legislate upon it, be said to be a matter incidental to its execution.

If it were necessary to assign *ex post facto* laws, such as those to which I first adverted, to some definite category, I think that the true category would be "Control over the liberty of the subject," as suggested by Lord *Haldane*, or "Reward and punishment of citizens who have deserved well or ill of the State."

For these reasons I do not think that power to pass an *ex post facto* law is conferred by the power to make laws on matters incidental to the execution of a power vested in the Parliament or the Government or Judicature.

In my opinion the power of the Commonwealth Parliament to enact criminal laws is to be found in pl. XXXIX. and nowhere else, and is a power to enact them as sanctions to secure the observance of substantive laws with respect to matters within the legislative, administrative, or judicial power of the Commonwealth, and in that sense incidental to the execution of such powers.

I am therefore of opinion that a law which operates merely as an *ex post facto* law is not within the power conferred by pl. XXXIX.

There is another class of laws which have, in a sense, a retrospective operation, and of which Statutes commonly called Acts of Indemnity and Acts which impose duties of Customs as from the date on which they are proposed in Parliament afford familiar instances. Entirely different considerations are applicable to such laws, and nothing that I have said with regard to *ex post facto* laws is intended to apply to them.

I am disposed to think also that laws validating retrospectively acts of the Executive Government which at the time when they were done were not authorized by law but were necessary under the rule *Salus populi suprema lex* would be within the power. In both those cases the authority rests upon necessity, which cannot be called in aid of an *ex post facto* law.

The next objection formally taken was "that it is not within the competence of the Commonwealth Parliament to confer upon the High Court original jurisdiction in respect of offences against the common law." The objection, as taken, impliedly assumes that the offence charged in the indictment may be an offence against the common law. Before dealing with it, I will consider whether the indictment does charge such an offence. This inquiry raises a large and important question, namely, whether there is any common law in Australia independent of the common law which forms part of the law of the several States. It is contended for the respondents that there is no such law, and American decisions were cited in support of this contention. I remark, in passing, that the Judicial Committee in the *Colonial Sugar Refining Co.'s Case* tacitly assumed (1) that the powers referred to in pl. XXXIX. of sec. 51 included powers "conferred by Statute or at common law," but this language should not, I think, be strained as importing a decision on the point. The principles applicable to the subject seem to be free from doubt. It is clear law that in the case of British Colonies acquired by settlement the colonists carry their law with them so far as it is applicable to the altered conditions. In the case of the eastern Colonies of Australia this general rule was supplemented by the Act 9 Geo. IV., c. 83. The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the

(1) (1914) A.C., 237, at p. 256; 17 C.L.R., 644, at p. 655.

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Sovereign in his capacity of head of the Realm and the protection of his officers in enforcing them, including so much of the common law as imposed loss of life or liberty for infraction of it. When the several Australian Colonies were erected this law was not abrogated, but continued in force as law of the respective Colonies applicable to the Sovereign as their head. It did not, however, become disintegrated into six separate codes of law, although it became part of an identical law applicable to six separate political entities. The same principles apply to laws of the United Kingdom of general application, such as the Statute of Treasons. In so far as any part of this law was afterwards repealed in any Colony, it, no doubt, ceased to have effect in that Colony, but in all other respects it continued as before. When in 1901 the Australian Commonwealth was formed, this law continued to be the law applicable to the rights and prerogatives of the Sovereign as head of the States as before, subject to any such local repeal. But, so far as regards the Sovereign as head of the Commonwealth, the current which had been temporarily diverted into six parallel streams coalesced, and in that capacity he succeeded as head of the Commonwealth to the rights which he had had as head of the Colonies. It is not necessary to speculate as to what would have been the effect of a positive law passed in any of the Colonies making it lawful, *e.g.*, to defraud or conspire to defraud the Colony, for no such law was passed. I entertain no doubt that it was an offence at common law to conspire to defraud the King as head of the Realm, that on the settlement of Australia that part of the common law became part of the law of Australia, that on the establishment of the several Colonies it became an offence to conspire to defraud the King as head of the Colony, and that on the establishment of the Commonwealth the same law made it an offence to conspire to defraud the Sovereign as head of the Commonwealth. Such a law, or to put it in other words, such a right to protection, seems, indeed, to be an essential attribute to the notion of sovereignty. I have, therefore, no difficulty in holding that the indictment in this case discloses an offence against the common law of Australia.

In my opinion the power conferred by pl. XXXIX. extends to enacting in the form of a Statute the unwritten law of the Common-

wealth applicable to the execution of its powers. Such a law would in effect be declaratory only (compare *R.* v. *Munslow* (1)), and any provision contained in it with reference to the Courts in which the offence was to be prosecuted would be in the nature of a law of procedure. A law of procedure is always construed as retrospective in its operation without express words to that effect. I offer no opinion on the question whether if the Statute imposed a greater punishment than that to which the offender was liable at common law it would be valid so far as regards the excess.

But for the reasons I have given I am of opinion that a criminal law which can only operate as an *ex post facto* law is not within the power of the Parliament.

I think therefore that the Act No. 6 of 1915 may be supported as a valid exercise of the power to pass laws incidental to the execution of the administrative powers of the Commonwealth, and that an offence against the law declared by it is therefore also an offence against a law made by Parliament.

The other objections raised on the motion to quash the indictment related to the competence of this Court to exercise original jurisdiction in respect of the offence.

The judicial power is a part of the right of sovereignty. It extends to the administration of justice in respect as well of violations of the law which entail penal consequences as to infractions of civil rights. In primitive societies there is no distinction in principle between criminal and civil actions. In more developed societies the redress of civil wrongs is in practice required to be sought by the party aggrieved, while in the case of violations of the law entailing penal consequences the proceedings are instituted in the name or on behalf of the sovereign authority. This has been for so long a time the rule in British communities that any reference in a Statute to judicial power or its exercise must be interpreted by its light.

The analogy between the two kinds of proceedings is thus expressed in *Chitty on the Common Law* (2nd ed., vol. I., p. 841) :—" Criminal informations, properly so called, are analogous to declarations for the redress of a personal injury, except that the latter are at the

(1) (1895) 1 Q.B., 758.

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suit of a subject for the satisfaction of a private wrong, and the former are in the name of the King, for the punishment of offences affecting the interests of the public. They are accusations or complaints for serious misdemeanors, which, whether they immediately affect the safety of the Crown, or, in the first instance, encroach more nearly on individual rights, require to be speedily repressed for the good of society at large."

It is of the essence of judicial proceedings of a controversial character that there should be a party who seeks to put the tribunal in motion and a party against whom action is sought to be taken. The former is spoken of as the person "at whose suit" the proceeding is taken, and both are spoken of as parties to the proceeding. Bearing this elementary proposition in mind, I turn to sec. 75 (III.) of the Constitution, which enacts that in all matters in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party the High Court shall have original jurisdiction. In my opinion it is a function of the Executive Government of every sovereign State, and therefore of the Government of the Commonwealth, to invoke the aid of the judicial power of the State for any purposes for which it may properly be invoked, which purposes include the punishment of offences committed against its laws. The mode of invoking that aid is by a litigious proceeding which is commonly and properly described in such a context by the word "matter."

It follows in my opinion (1) that the Commonwealth is entitled to invoke the aid of the judicial power for such a purpose, (2) that the proceeding in which it is invoked is a matter to which the Commonwealth is a party, and (3) that the High Court has jurisdiction to entertain it.

Sec. 76 of the Constitution authorizes the Parliament to make laws conferring original jurisdiction on the High Court in any matter (*inter alia*) "(II.) arising under any laws made by the Parliament." The *Judiciary Act* 1915 (No. 4) amends sec. 30 of the Principal Act of 1903 by adding words conferring jurisdiction on the High Court "in trials of indictable offences against the laws of the Commonwealth." It is plain that this Act was passed in intended execution of the power conferred by sec. 76. There was, indeed,

no other power under which it could be passed. So far as the Court already had jurisdiction under sec. 75 (III.) the new law had no effect either by way of addition to or diminution of its jurisdiction. It could, therefore, only have effect as conferring jurisdiction under laws made by the Parliament. The variation of language between "the laws of the Commonwealth" and "laws made by the Parliament" certainly does not suggest that the latter expression was intended to be synonymous with the former. And, having regard to the sense in which the term "the laws of the Commonwealth" is used in the Constitution, *e.g.*, in secs. 61 and 120, and the term "any law of the Commonwealth" in sec. 80, I think it is impossible to contend successfully that they can be treated as synonymous. The only result would be that the enactment was unnecessary.

If, however, I am wrong in thinking that the Court has original jurisdiction in criminal cases under sec. 75 of the Constitution, the Act of 1915 would undoubtedly confer such jurisdiction in trials of indictments for offences created by laws passed by the Parliament. In sec. 3 of the *Judiciary Act* 1915, which stands as sec. 71A of the Principal Act, and which provides that the Attorney-General may file an indictment in the High Court for any indictable offence against "the laws of the Commonwealth" without examination or commitment for trial, the same terms must have the same meaning, as also in sec. 2 of the *High Court Procedure Act* 1915 (No. 5) (standing as sec. 15A of the *High Court Procedure Act* 1903-1915), which enacts that the trial by the High Court of indictable offences against the laws of the Commonwealth shall be by a Justice with a jury. Whether, therefore, I am right or not in thinking that the *Crimes Act* No. 12 of 1914 can be supported as a declaratory Act, I think that the Act No. 5 of 1915 is applicable to the trial of the present case.

For these reasons I am of opinion that the High Court has original jurisdiction in respect of the indictment now in question, and that the motions to quash the indictment should be refused.

ISAACS J. (1) I am of opinion that the retrospective provisions of the Act No. 6 of 1915 are within the competence of the Parliament of the Commonwealth.

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The question depends entirely on the meaning of sub-sec. XXXIX. of sec. 51 of the Constitution. The construction will probably be aided by first considering what is included in the words "any power vested by this Constitution in the Government of the Commonwealth." Whenever any such power is given, there is given with it by implication every ancillary power that is necessary to the existence of the Government, and the proper exercise of the direct power it is intended to execute. Such ancillary powers must, in my opinion, be truly "incident" to the main powers, in other words they must be impliedly included in the grant. That is how I understand the maxim *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*

In *Barton* v. *Taylor* (1) Lord *Selborne*, speaking for the Judicial Committee, and referring to the powers incident to or inherent in the New South Wales Legislative Assembly (without express grant), said that whatever, in a reasonable sense, was necessary for the purposes of its existence and the proper exercise of its functions was impliedly granted by its mere creation. "But," said his Lordship, "for these purposes, protective and self-defensive powers only, and not punitive, are necessary." Further on he observed :—"The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity."

It will, therefore, be clearly observed that where an executive body is created, and has among other functions, that of safe-guarding the revenue and making contracts under which that revenue is to be paid, it has an inherent right of self-protection, and of defending from invasion by direct interference the revenue and the actual making of its contracts. A man attempting to steal Commonwealth treasure may be resisted to death ; a man obstructing any Commonwealth officer in the performance of his duty may be thrust aside with all the force necessary to enable the officer to perform his duty.

All this is implied executive power, but punishment, whether regarded as retribution or as a deterrent, is beyond the scope of the executive power. That is, it is not incidental to it, or to

(1) 11 App. Cas., 197, at p. 203.

its execution, in the sense which would include it by implication in the grant of power. The Executive cannot change or add to the law; it can only execute it; and any change of or addition to law is not incidental when we are speaking of a non-legislative power. But it cannot be maintained that the same considerations apply to the Legislature under sub-sec. XXXIX. If we were to say that nothing is within the range of its power under that sub-section but what is incidental to the power exercised by the Executive, the power would mean nothing. The legislative power must extend further than the limits of mere incidents implied by law. It must have, and by concession it has, power to attach punishment to conduct not already punishable. It may say that any attempted invasion by force on the field of Commonwealth executive powers may not only be resisted and prevented, but also punished. Punishment connotes, from what has already been said, something quite unnecessary to the existence or exercise of the executive functions. But it is nevertheless for legislative purposes within the term "matters incidental to the execution" of the executive power. Punishment is an ordinary means employed by Legislatures to guard and assist the executive power. For the future execution of the power, it is admitted to be appropriate, and within the power granted by sub-sec. XXXIX. But why within that power? Simply because, as Lord *Selborne* says in *Barton* v. *Taylor* (1), "express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*" That is, it becomes a mere matter of interpretation of the actual words used, and in that sense the power is an independent power of legislation as high as any of the preceding thirty-eight in sec. 51. I, therefore, do not agree that it adds nothing to the Parliamentary power which would not be implied if it were omitted.

But if it includes the power to punish future acts which are calculated to obstruct, hinder or embarrass the Executive, why not past acts also of the same nature? I think the Legislature may

(1) 11 App. Cas., 197, at p. 207.

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punish past interference or attempted interference with the Executive. Once there is in active operation some Commonwealth power, any interference or attempted interference is *per se* unlawful. It is contrary to the Constitution or the laws of the Commonwealth, the execution of which is vested in the Crown by sec. 61 of the Constitution. The Executive may have repelled it, but after difficulty; and no State can deal with the matter, nor could the Commonwealth be supposed to be dependent on the State for the vindication of an insult or impediment to the Commonwealth; and it is not the habit of the Imperial Parliament to intervene in such a case. Must the outrage go unpunished? In my view, at the moment it occurs, the Commonwealth being entitled to freedom from molestation, the matter is one incidental to the execution of the Commonwealth power; it does not cease to have that character when completed and past. And being of that character, it would in my opinion be cognizable by the Parliament under sub-sec. XXXIX. No doubt such a law would be an *ex post facto* law, in the sense that certain punishment was attached to the act. But it would not be *ex post facto* converting a lawful act into an unlawful act, even if that circumstance is material. No act that is a breach of the law at the time it is done, is innocent. It may be that the law has not then affixed penal consequences to it; but that does not affect the quality of the act itself. Consequently, such a law as is supposed, though *ex post facto* in relation to the public treatment of the man who has already offended, is not necessarily unjust, and is certainly confined to a "matter incidental to the execution" of a power.

Such a Statute is the English *Trading with the Enemy Act* 1914, followed by the Commonwealth Act on the same subject, but utterly unsustainable retrospectively unless the Parliament has power to pass *ex post facto* laws with reference to the limited subject matters under its control, where it thinks the occasion so grave as to demand such measures. There is no prohibition in the Australian Constitution against passing *ex post facto* laws, as there is in the American Constitution, both as to the States and the United States. The prohibition to the United States apparently assumes that Congress would otherwise have had the power. Therefore, in my opinion, no distinction can be validly drawn between *ex post facto*

laws—regarding them as criminal only—and any other kind of retroactive laws. A retroactive law, that is, a retrospective law in the true sense, is one which "provides that as at a past date the law shall be taken to have been that which it was not" (*per Buckley* L.J. in *West* v. *Gwynne* (1)). That does not include an Act which only alters existing rights as from the date of the Act.

It is obvious that if an *ex post facto* Act is invalid because it is *ex post facto*, it is not because criminal consequences are attached but because it is retrospective, and the same fate must, under the Australian Constitution, attend an Act which attaches civil consequences. Nor can any distinction be founded on the mere difference between making a past lawful act unlawful, and a past unlawful act lawful. (See *Young* v. *Adams* (2).) The question cannot, therefore, turn on whether a Statute is *ex post facto* or not, but whether the subject dealt with—either retrospectively or prospectively—is a subject within the description contained in sub-sec. XXXIX.

Now, punishment is a deterrent, and in the recent case of *R.* v. *Kupfer* (3)—a case under the *Trading with the Enemy Act* 1914—Lord *Reading* C.J. said:—"The object of the punishment is to prevent trading with the enemy; to deter persons who might be tempted for the sake of gain to engage in operations detrimental to the interests of this realm" &c. So long only as the *ex post facto* law deals with matters which were, when they arose, incidental to the execution of a power, and therefore of the same character and quality as if they had arisen since the passing of the Act, I can see no reason why the same consideration of deterrent punishment is not applicable to the past act as to the future. The only distinction that exists between the two is that in the one case there was not the *fear* of punishment when the act was done, and in the other there is. The knowledge of wrongful conduct is the same in both. But the Parliament's powers are not confined to creating fear of punishment by threatening as to future acts, but extend to dealing with the conduct, which in its opinion deserves it, and so conveying the same warning and fear as a plenary Legislature within the ambit assigned to it.

(1) (1911) 2 Ch., 1, at p. 12. (2) (1898) A.C., 469, at p. 476.
(3) (1915) 2 K.B., 321, at p. 340.

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I consequently answer the first question in the affirmative.

(2) As to the second question, except for whatever crimes, if any, arise through contravention of the Constitution, and are not included in sec. 75 (III.), and except for whatever crimes are cognizable under the admiralty and maritime jurisdiction, this question should strictly speaking be answered in the negative.

But the fourth question should be considered with it. Taking the subject matter of the two questions together, the position, in my opinion, stands thus. Sec. 75 (III.) declares that "In all matters in which the Commonwealth . . . is a party the High Court shall have original jurisdiction." "Matters" include all justiciable causes of suit, whether civil or criminal. Prosecutions for crimes are always at the suit of the Crown. (See *Halsbury's Laws of England*, vol. IX., p. 233, and *Short & Mellor's Crown Practice*, p. 2.) The rule of law that the King cannot himself give judgment even in his own Court of King's Bench is, as *Coke* says (4 *Inst.*, 71), because he cannot be judge in his own cause. The learned writer adds: "his own cause" includes "all pleas of the Crown; as all manner of treasons, felonies, and other pleas of the Crown which *ex congruo* are aptly called *propriæ causæ regis*, because they are *placita coronæ regis*."

The third sub-section of sec. 75 therefore includes matters as to which the King in right of his Commonwealth complains of some breach of public law to which a penal consequence is attached. That breach of public law is not confined to Statute law. It is an offence at common law to obstruct the execution of an Act of Parliament (*per Ashurst* J. in *R.* v. *Smith* (1)).

It has been urged, however, that an offence at common law is not a Commonwealth offence—that is, it is not an offence against the King in right of his Commonwealth, but against the King in right of his State in the place where the offence was committed. It is inconceivable that the Commonwealth—which, within its own sphere of power, is supreme—can be left dependent for the effective exercise of its functions upon the permissive action of any State or all of them. The Commonwealth carries with it—except where expressly prohibited—all necessary powers to protect itself and

(1) 2 Doug., 441, at p. 445.

punish those who endeavour to obstruct it. The common law of England was brought to Australia by the first settlers, and remains, as the heritage of all who dwell upon the soil of this continent, in full force and operation, except so far as it has in any portion of the land been modified by a competent Legislature. For State purposes and jurisdiction State laws may provide differently. But they cannot restrict the operation of the Constitution, and whatever it implies is the law of Australia, as much as if it were expressly so written. The necessary implication of unrestrictable right to perform its functions as a sovereign power—because in law it is the King who acts—carries with it the corollary that obstruction to the King in the exercise of his Commonwealth powers is, at common law, an offence with reference to the Constitution, and not with reference to any State law or the State Constitution. It is entirely outside the domain of the States. It was forcibly stated by *Miller* J., when delivering the opinion of the Court in *Neagle's Case* (1), that "there is a peace of the United States." So here, there is a peace of the Commonwealth, not because there is a special common law of the Commonwealth, but because the common law of Australia recognizes the peace of the King in relation to his Commonwealth, by virtue of the Constitution, just as it recognizes the peace of the King in relation to each separate State. The idea was well expressed in the *Western Union Telegraph Co. Case* (2) in these words:—"There is no body of federal common law separate and distinct from the common law existing in the several States in the sense that there is a body of Statute law enacted by Congress separate and distinct from the body of Statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States; and that the countless multitude of inter-State commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the Statutes of Congress." *Mutatis mutandis*, those words are applicable to Australia. *Parke* B. said, in his observations on the codification of the criminal law, "the rules of the common law have the incalculable advantage of being capable of application

(1) 135 U.S., 1, at p. 69.

(2) 181 U.S., 92, at p. 101.

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to new combinations of circumstances perpetually occurring" (see *Brailsford's Case* (1)).

If, then, by the common law, as applied to the new fact or combination, in this case the sovereignty created by the *Constitution Act*, which the King exercises by new representatives in right of the new Commonwealth, it appears that any person in Australia has obstructed or taken any step towards obstructing His Majesty, the Commonwealth, as representing the King in that sovereignty, has a justiciable matter of complaint—a matter capable of judicial solution, according to a settled legal standard. It becomes then a question of curial jurisdiction to entertain that matter. Sec. 75 (III.) says that the High Court of Australia shall have original jurisdiction in all matters wherein the Commonwealth is a party, and, therefore, in such a matter as I have predicated. All that remains is to see whether in a given case the Commonwealth is properly represented. Unless some competent law alters the common law the King in such a cause is properly represented by his Attorney-General—which, of course, means the Attorney-General of the Commonwealth. In *Ex parte Crawshay* v. *Langley* (2) *Blackburn* J. says "in a matter of an offence against the State, the proper officer to prosecute is the Attorney-General."

Certain requirements as to preliminary inquiry and commitment for trial, have been prescribed by sec. 68 of the *Judiciary Act* 1903-1914, but only as regards offences "against the laws of the Commonwealth." The more recent Act No. 4 of 1915, however, by sec. 71A expressly provides that an indictment may be filed by the Attorney-General in the High Court without such examination or commitment where there is charged an indictable offence "against the laws of the Commonwealth." Whatever that last phrase may mean in one place, it means the same in the other.

All that remains is to inquire whether the charge of a conspiracy to defraud the Commonwealth is the charge of an offence of the necessary nature. First, it is established law that the agreement to do an act itself is, in itself, an overt act in advancement of the intention to do the ultimate act agreed upon: *Mulcahy* v. *The*

(1) (1905) 2 K.B., 730, at p. 739. (2) 8 Cox C.C., 356, at p. 358.

Queen (1); *Quinn* v. *Leathem* (2), and *R.* v. *Brailsford* (3). Then, as to defrauding the Commonwealth: "To defraud," says *Buckley* L.J. in *In re London and Globe Finance Corporation* (4), "is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; . . . to defraud is by deceit to induce a course of action." If the Act complained of is one which tends to produce a public mischief, it is an offence against the criminal law: *R.* v. *Brailsford* (5), and the cases there cited.

In the result the chain is complete: (1) jurisdiction in the Court to entertain a charge of crime at common law against the Commonwealth; (2) power in the Attorney-General to represent the Commonwealth; (3) power to indict without the preliminary examination; (4) the requisite character of the charge. To this should be added (5) that the charge is not limited in form to the Statute, and therefore will apply to both the Statute and the common law.

I ought to notice the suggestion that the enactment in the form of a declaratory Statute of what is the common law might be regarded as statutory law of the Commonwealth. I do not think so any more than if the Commonwealth were to pass in the same way a declaratory Act embodying an Imperial Statute. "The law," would owe nothing of its force to Commonwealth enactment. There is no power that can be pointed to in the Constitution enabling the Parliament to enact the common law as such, or to modify the common law as such. What authority it possesses in this respect must arise out of some power contained in the Constitution. If in form enacting a punishment for a common law offence the punishment is declared to be less than that at common law, the Act could be taken as controlling the Courts as to the extent of punishment they could validly impose. It would be a fetter on the power of the Court's discretion as to the sentence that could be passed. That might well be allowable, and to that extent be true law. But otherwise I think a mere declaration of the common law is of no inherent force however convenient it might be for purposes of reference. If, for instance, it

(1) L.R. 3 H.L., 306, at p. 328.
(2) (1901) A.C., 495.
(3) (1905) 2 K.B., 730, at 746.
(4) (1903) 1 Ch., 728, at p. 732.
(5) (1905) 2 K.B., 730, at p. 745.

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incorrectly represented the common law, it would have to be disregarded, unless, of course, it proved to be the valid exercise of some specific power, express or implied.

For the reasons I have given, I agree that the motion to quash the indictment ought to be refused.

HIGGINS J. These questions are reserved, I understand, under sec. 18 of the *Judiciary Act* 1903-1915, as sec. 72 does not apply to the case. It has been assumed, rightly or wrongly, that sec. 18 applies to criminal as well as to civil cases.

The first question is as to the competence of the Australian Parliament to make the provisions of the *Crimes Act* 1915 (No. 6 of 1915) retrospective. By sec. 2 it is enacted (by way of amendment of the *Crimes Act* 1914) that any person who conspires with any other person "to defraud the Commonwealth" shall be guilty of an indictable offence; the penalty attached being imprisonment for three years or less. By sec. 3 it is enacted "This Act shall be deemed to have been in force from the date of the commencement of the *Crimes Act* 1914" (29th October 1914). There is, therefore, no doubt as to the intention of the Parliament to make a conspiracy to defraud the Commonwealth between 29th October 1914 and 7th May 1915 (the date of the commencement of the *Crimes Act* 1915) an indictable offence. There is no doubt that the Act of 1915 was meant to be retrospective; and therefore the numerous cases which lay down the principle of construction against retrospective or retroactive operation are inapplicable. If the Act were an Act of the British Parliament with its plenary powers, the principle of construction must yield to the clearly expressed intention of the Legislature. But the question as to the power of the Federal Parliament—a Parliament which has no power to legislate except as to specified subjects—to legislate retrospectively, remains. For the purpose of the question I may assume—without in any way deciding the point—that, apart from the Act No. 6, a conspiracy to defraud the Commonwealth does not constitute a criminal offence within the State law or otherwise.

Now, there is not in our Constitution, as there is in the *British North America Act* (sec. 91), any power to make laws as to "the criminal law." But our Constitution confers on the Federal Parlia-

ment power to make laws for the peace, order and good government of the Commonwealth "with respect to" a number of subjects specified; including (at the end of the list) "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth." The chief part of the argument has been addressed to this last placitum; but I am by no means prepared to admit that, apart from it, Parliament has no power to make disobedience to any of its laws an offence punishable criminally. A power to make laws "with respect to" a given subject—say, "taxation"—is very wide in scope. It appears to me to be wider even than a "power to levy and collect taxes," as in the United States Constitution. Under the latter phrase there is more room for the contention that the Act in question must be aimed more directly at the object, taxation; and it was therefore expedient to add the "necessary and proper" clause—the power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Under a power to make laws "with respect to" taxation, on the other hand, one would infer that the law in question may be aimed at the things necessarily attendant on taxation, as well as at taxation itself. Yet it is evident from the language of *Marshall* C.J. in *M'Culloch* v. *Maryland* (1), that he was prepared to hold, even independently of the "necessary and proper" clause, that Congress had power to incorporate a bank as a means whereby the powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, to raise and support armies, could be more effectively exercised; as a means whereby the revenue of the United States could be more conveniently collected and disbursed. It is not for us to say whether this conclusion was warranted. Even if we adopt a much less liberal construction of the powers conferred, it seems clear that a power to make laws "with respect to" taxation must enable Parliament to make false returns for purposes of taxation punishable by penalty or otherwise. So too an Act making a conspiracy to defraud the Commonwealth a criminal offence may fairly be treated

(1) 4 Wheat., 316-437

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as an Act made " with respect to " each and all of the subjects of legislation mentioned in the first thirty-eight placita of sec. 51 ; for a fraud on the Commonwealth affects its finances, and to cripple the finances tends to cripple, more or less, the exercise of all the legislative powers, and the execution of all the laws.

But pl. XXXIX. of sec. 51 seems to me to put beyond doubt the power of the Parliament to make laws as to frauds on the Commonwealth and for punishment of those who have been guilty of such frauds or have conspired to commit them. It gives to the Parliament power to legislate with respect to " matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Government of the Commonwealth . . ." The Government of the Commonwealth is the Governor-General acting with the advice of his Executive Council ; and his power " extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth " (secs. 61, 62). The Government has to receive the revenue and pay the expenditure of the Commonwealth (secs. 81-83, &c.). Frauds on the Commonwealth, and the punishment of such frauds, as well as protection from such frauds, are, in my opinion, " matters incidental to the execution " of the powers vested by the Constitution in the Government of the Commonwealth, as well as those vested in the Parliament ; and it follows that Parliament may make laws making such frauds punishable as crimes.

It is urged, however, that past frauds, and past conspiracies to defraud, and the punishment thereof, are not " matters incidental to the execution of any power vested " in the Government ; because they do not help the *future* execution of such powers. The word " future " is not used ; pl. XXXIX. is irrespective of the time of execution, whether past, present or future. No doubt a provision making criminal and punishable future acts would have more direct tendency to prevent such acts than a provision as to past acts ; but whatever may be the excellence of the utilitarian theory of punishment, the Federal Parliament is not bound to adopt that theory. Parliament may prefer to follow St. Paul (*Romans*, IX., 4), St. Thomas Aquinas, and many others, instead of Bentham and Mill. To carry out its powers under the Constitution, the Govern-

ment must have money and property; and to legislate so as to make criminal and punishable any frauds which reduce that money or property, is to "make laws with respect to matters incidental to the execution" of the powers "vested by this Constitution in the Government" as well as of the powers vested in the Parliament. If the frauds, and conspiracies to defraud, which are incidental to the administration of the government, as well as to all big financial undertakings, have not been criminal and punishable before, Parliament can make them criminal and punishable—whether they were committed before, or are committed after, Parliament legislates on the subject.

We have not been referred to any words in the Constitution which point to any limitation of the plenary powers of the Federal Parliament so long as the Parliament keeps within the ambit of the subjects of legislation specifically assigned to it. The British Parliament, admittedly, has power to make its laws retroactive; and I know of no instance in which a Legislature created by the British Parliament has been held to have overstepped its powers by making legislation retroactive. There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it see fit. The maxim runs: *Nova constitutio futuris formam imponere debet, non præteritis.* The word used is "debet," not "potest." This is the British system, whether it be right or wrong. It is not the system of the French Code; for, even in civil matters, it is provided "*la loi ne dispose que pour l'avenir; elle n'a point d'effet retroactif*" (*Code Civil*, 2). The British Parliament, by Acts of attainder and otherwise, has made crimes of acts after the acts were committed, and men have been executed for the crimes; and—unless the contrary be provided in the Constitution—a subordinate Legislature of the British Empire has, unless the Constitution provide to the contrary, similar power to make its Statutes retroactive. The general position is stated by the Judicial Committee of the Privy Council in a case arising as to the validity of an Act passed by the Legislature of the Province of Ontario thus:—

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"When the *British North America Act* enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive power to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but *authority as plenary and as ample within the limits prescribed* by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow" (*Hodge* v. *Reg* (1)). It is to be noticed that these words were used with reference to a provincial Legislature—a Legislature of limited, specified powers. The residuary powers of legislation are committed by the *British North America Act* to the Parliament of Canada ; so that it cannot be said that this unqualified language is inapplicable to the Parliament of Australia, which also has only limited, specified powers. The power of a provincial Legislature to make retroactive legislation is actually exemplified in a case from the province of Quebec—*L'Union St. Jacques de Montreal* v. *Belisle* (2). In that case, it was held by the Privy Council that the provincial legislation was valid although it reduced liabilities under existing contracts. It was not a case of bankruptcy—the debtor was not a bankrupt ; and the power to make laws as to bankruptcy was vested in the Dominion Parliament, not in the provincial Legislatures.

Much stress has been laid, however, on the argument that to make a man punishable for acts already committed, for joining in a conspiracy to defraud the Commonwealth before the Act made it a crime, is not conducive to the protection of the Commonwealth Treasury. Even if the word used were "conducive" and not "incidental," it is by no means clear to me that the enactment, making such a conspiracy before the Act punishable as an indictable offence, is not, or cannot be, a law with respect to matters conducive to the execution of the powers vested by the Constitution in the Parliament and in the Government. Why may not punishment for a conspiracy to defraud before the Act operate possibly as a deterrent against further frauds ? Moreover, by making the conspiracy to defraud before the Act an indictable offence, the

(1) 9 App. Cas., 117, at p. 132. (2) L.R. 6 P.C., 31.

provision for search warrants becomes applicable. Any justice of the peace, suspecting on reasonable grounds that there is in some house anything with respect to which an indictable offence has been, or is suspected on reasonable grounds to have been committed, or anything that on reasonable grounds is believed to be intended for use in committing any such offence, may authorize a constable to enter the house and seize any such thing (sec. 10). The provision now impugned may lead to the recovery of money or goods fraudulently obtained, or to the seizure of things intended to be fraudulently used; or it may lead to men being put under lock and key who have special knowledge of the workings of the departments and who have already conspired to defraud them. But the word actually used is "incidental," not "conducive"; and Parliament may legislate with respect to any matter "incidental" to the execution of any power of the Government. "Conducive" looks to some future result; incidental has no connotation of time. Expenses are "incidental" to the execution of the powers of the Commonwealth as to naval and military defence; they can hardly be said to be conducive to it. In the *Standard Dictionary* "incidental" is explained as meaning "occurring in the course of or coming as the result or an adjunct of something else; concomitant; as *incidental* expenses."

It is clear that pl. XXXIX. of sec. 51 was not meant to limit, it was meant to increase, the powers of Parliament to make laws; and there is not one word, from first to last, to indicate an intention to withhold from the Federal Parliament the same absolute discretion as the British Parliament itself has, with regard to past events as well as present and future—provided that the Federal Parliament confine itself to the specified subjects and matters incidental to the execution of the legislative executive and judicial powers. It is admitted that the Parliament has power to make retroactive laws as to specified subjects of legislation, such, *e.g.*, as "naturalization"; and it would need a violent straining of the wide words of the power to make laws for incidental matters if we were to read into them a prohibition of retroactive laws designed for the enforcement of the substantive laws. If we did so, we should be adding to the Constitution, without express words, the prohibition of *ex post facto* laws

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which is expressly contained in the American Constitution, and omitted from ours.

I am of opinion that the first question should be answered in the affirmative. If this question be so answered it becomes unnecessary to answer the other question. I do not like to commit myself prematurely to any dogma with regard to what is called the "common law of the Commonwealth"; but I concur with the Chief Justice in thinking that the cases in the United States Courts which reject the existence of a common law of the United States, are—to say the least—inapplicable to our Constitution.

GAVAN DUFFY and RICH JJ. The Chief Justice has referred for the consideration of this Court certain questions touching the validity of an indictment. It appears to have been assumed that this could be done, and was done, under the provisions of sec. 18 of the *Judiciary Act* 1903, but no argument was addressed to us as to the meaning and effect of that section. Nothing that we say must be thought to indicate an opinion as to whether it applies to a Justice sitting in the conduct of a criminal trial, as we feel ourselves at liberty to advise the Chief Justice as he requests without determining that point.

The first question is as follows:—Whether the Act No. 6 of 1915, so far as its provisions are retrospective, is within the competence of the Commonwealth Parliament.

Sec. 2 of that Act adds conspiracy to defraud the Commonwealth to the conspiracies already punishable under sec. 86 of the *Crimes Act* 1914, and sec. 3 enacts that the whole Act shall be deemed to have been in force from the date of the commencement of the *Crimes Act* 1914. It was conceded in argument by defendant's counsel that the Commonwealth cannot be defrauded except when exercising one or more of its functions and so executing a power or powers mentioned in sec. 51 (xxxix.) of the Constitution. They also conceded that sec. 2 of the *Crimes Act* 1915 was a valid exercise of the right to legislate with respect to matters incidental to the execution of such powers. We have some doubt as to whether too much has not been conceded. In our opinion much may be said for the view that the words "incidental to the execution of any

power" &c., which are designed to permit the Commonwealth Parliament to legislate for the purpose of facilitating the execution of Commonwealth powers, are incapable of being extended to cover an enactment making acts criminal, not because their effect is to defraud the Commonwealth, but merely because their object is to do so. The question has not been argued, and in deference to the concession of counsel and to the opinion entertained by our brother Judges, we shall not pursue it further. The argument addressed to us by defendants' counsel may be presented thus. First it was said that what they called *ex post facto* legislation, that is to say, legislation making criminal an act which was not so at the time of its performance, is not authorized by the Constitution, and the enormity of such legislation was dwelt on as a reason against finding an authority for it by any implication or under any general words. Nothing, it was said, but express unambiguous words could justify us in upholding its validity. We are not disposed to go this length. The Commonwealth Parliament has plenary power to legislate with respect to any subject matter assigned to it. It is for the Crown to show that the provisions of sec. 3 of the *Crimes Act* 1915 are within such a subject matter, and it is enough if on a fair exposition of the Constitution they appear to be so.

Next it was said that in the phrase "incidental to the execution of any power" &c., in sec. 51 (xxxix.) of the Constitution, the word "incidental" means conducive or helpful, and the word "execution" means future execution, the result being that in order to bring sec. 3 of the *Crimes Act* 1915 within the provisions of sec. 51 (xxxix.) of the Constitution it must be shown to be helpful, "after the passing of the *Crimes Act* 1915," to the execution of some such power. A provision for the future punishment of a crime completed before the passing of the *Crimes Act* 1915, it was said, could not at the time the Act was passed or after that time affect, and therefore could not be conducive to, the execution of any power whether before or after the passing of the Act; and even if it could be incidental though not conducive to the execution of a power in the past, it could not be incidental in any sense to its execution after the passing of the Act.

In our opinion there is no ground for these contentions. The word

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"incidental" does not mean helpful or conducive. That which is merely consequential on the execution of a power may be incidental to its execution though it is not helpful or conducive to it; and "execution" means execution at any time during the existence of the power. The test as to whether the subject matter of an enactment is incidental to the execution of a power is not whether it can affect the future execution of such power, but whether it is or has at any time been so related to the execution of the power for the time being as to be incidental to it. When a power comes into existence there must also be in existence matters incidental to the execution, and other matters may from time to time become incidental to it. All such matters are subject to the legislative power of the Commonwealth by virtue of sec. 51 (xxxix.) of the Constitution; their character is fixed and remains. As time passes they may cease to be incidental to the further execution of the power, but they never cease to be incidental to its execution as a whole.

If it were necessary to do so, we should be prepared to decide that the provisions of sec. 3 of the *Crimes Act* 1915 satisfy the test proposed by defendants' counsel. They say that it is necessary for the validity of that section that it should be capable of conducing to the execution of some power after the passing of that Act. We think it is capable of doing so. It is true that the conduct sought to be punished by sec. 3—the conspiracy—so far as it is completed, cannot be induced or prevented or in any other way affected by the proposed punishment, but it is not the conspiracy but the object to be obtained by the conspiracy, the defrauding of the Commonwealth, that interferes with the execution of the power and makes the punishment of the conspiracy a matter incidental to that execution. In the case of a conspiracy before the passing of the Act to defraud the Commonwealth after the passing of the Act, the power to punish the conspirators may prevent the defrauding of the Commonwealth after the passing of the Act; in any case Parliament may think and rightly think that punishment of offences committed before the passing of the Act would be likely to deter persons from obstructing the execution of powers in the future. If we take the collection of Customs duties by way of a concrete example of the execution of a power, might not Parliament reasonably think that the most effective

means to prevent the perpetration of frauds in the course of such collection, and so protect and facilitate the execution of the power, would be not merely to provide for the punishment of those who offended in the future but to actually punish offenders in the past? If so, Parliament would be at liberty to adopt those means.

We answer question 1 in the affirmative, and our affirmative answer renders it unnecessary to answer any of the other questions referred to us.

POWERS J. On 13th May 1915 an indictment was filed in this Court by the Attorney-General of the Commonwealth. The offence charged in the indictment is that the parties accused "*did* at Sydney," &c., "between 29th October 1914 and 8th May 1915 conspire among themselves and with divers other persons to defraud the Commonwealth of Australia of divers and large sums of money by procuring that the Commonwealth of Australia should pay excessive prices for the supply of goods for the use of His Majesty's armed forces raised by the Commonwealth of Australia."

On 21st June 1915 the indictment came on before the learned Chief Justice for trial. On being arraigned some of the defendants, by their counsel, moved to quash the indictment upon certain grounds. The Chief Justice reserved all questions arising upon the motion for the consideration of the Full Court, and adjourned the trial.

Five questions were submitted for the consideration of this Court, of which the following are copies:—[His Honor here read the questions set out in the special case.]

I do not think it is necessary to decide, at present, under what authority the questions were submitted to this Court; we are justified in answering them.

The substantial question raised in this case is an exceedingly important one, namely, whether the Parliament of the Commonwealth has power to pass what is generally called an *ex post facto* law—that is to say, a law by which, after an act has been committed which was not punishable by any Commonwealth Statute at the time it was committed, the person who committed it is declared to have been guilty of a crime and to be held liable to punishment.

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The charge against the accused was made under sec. 86 of the Act No. 12 of 1914 (*Crimes Act* 1914) as amended by Act No. 6 of 1915 (*Crimes Act* 1915). The amendment made by sec. 2 of Act No. 6 of 1915 was to add par. (*e*) to sec. 86 of Act No. 12 of 1914.

Sec. 86 now reads :—" Any person who conspires with any other person . . . (*e*) to defraud the Commonwealth shall be guilty of an indictable offence."

Sec. 3 of the Act No. 6 of 1915 reads :—" This Act shall be deemed to have been in force from the date of the commencement of the *Crimes Act* 1914."

The Act No. 6 of 1915 was assented to on 7th May 1915.

The accused contended that sec. 3 of the Act No. 6 of 1915, declaring that the Act should be deemed to have been in force from the date of the commencement of the *Crimes Act* 1914 (namely 29th October 1914), was *ultra vires* because the Commonwealth had no power to pass *ex post facto* laws such as have been referred to. It was not contended that Parliament could not pass retroactive laws such as indemnity Acts or Acts validating past collections of duties of Customs, and similar laws.

The offence charged in the indictment is alleged to have been committed after the passing of the *Crimes Act* of 1914, but before the passing of the Act No. 6 of 1915. The United States Constitution forbids the passing of *ex post facto* laws. Our Constitution does not contain such a prohibition, and it does not give express power to pass such laws. Such laws are very properly generally deprecated, but the Parliament of Great Britain since the declaration of war has thought fit to exercise its undoubted plenary powers to pass *ex post facto* laws for the defence of the Realm, however objectionable such laws are.

As there is no express power given in the Constitution to Parliament to pass such laws, the power must be found in the Constitution ; that is, the power must be necessary for effectually carrying into effect the powers vested in Parliament, or incidental to some express power given by the Constitution, or incidental to the execution of any power vested by the Constitution in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

In the case referred to during the argument, *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1), the Judicial Committee did state that "none of them" (pl. I. to pl. XXXVIII. inclusive) "relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth." I do not, however, find in that judgment anything to indicate that the Judicial Committee had any doubt about the control of the Commonwealth Parliament over the liberty of the subject, so far as it had power to legislate with respect to the thirty-eight subject matters set out in sec. 51, or with respect to the matters set out in pl. XXXIX., above referred to; nor do I find anything in that judgment inconsistent with the judgment of the Judicial Committee in *Hodge* v. *The Queen* (2), where Sir *Barnes Peacock*, in delivering the judgment of the Privy Council, said:—"It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the *British North America Act* enacted that there should be a Legislature for Ontario, and that its Legislative Assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament . . . ."

Those remarks referred to a Constitution with limited specified powers. The same remarks apply to our Constitution. It may, I think, therefore be taken for granted that there is full plenary power in the Commonwealth Parliament to pass legislation with respect to the matters referred to in sec. 51, and that the Parliament

(1) (1914) A.C., 237, at p. 255; 17 C.L.R., 644, at p. 654.

(2) 9 App. Cas., 117, at p. 132.

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has control over the liberty of the subject so far as is necessary to efficiently carry out any of the powers vested in it, or so far as is *incidental to the execution* of any power vested in it by the Constitution, *or vested in the Government of the Commonwealth*, or in the Federal Judicature, or in any department or officer of the Commonwealth (pl. XXXIX), and so far as to prevent any interference with the exercise of any of the powers vested in the Government, &c.

I think it must also be admitted that, if there is not any power to pass *ex post facto* laws in respect of all the subject matters referred to in sec. 51, there is no power to do so with respect to any of them.

Sec. 51 gives power to the Commonwealth Parliament (*inter alia*) "to make laws for the peace, order, and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth." The war at present raging has, I think, proved beyond question that it was necessary for the defence of the Empire to pass *ex post facto* laws, and the British Parliament passed such laws. The war has also proved, I think, that it was necessary, for the proper *defence of the Commonwealth* during the present war, *and during any future war*—apart from pl. XXXIX.—that Parliament should have the power to pass *ex post facto* laws to prevent assistance being given to the enemy.

I do not find anything in the Constitution—an instrument of government—to lead me to hold that the Commonwealth Parliament, entrusted with the defence of the Commonwealth, is so impotent a body that aliens, neutrals or Australian subjects may defy His Majesty's Imperial Proclamation, and the Governor-General's Proclamation, upon the declaration of war, and openly commit breaches of a "Trading with the Enemy Proclamation," without any possibility of punishment by a Commonwealth Statute; and that only those breaches which are committed after a Commonwealth Act has been assented to are punishable in Australia, especially as Parliament may not be sitting at the time war is declared.

I personally think it is not only incidental to the defence of the Commonwealth, but also absolutely necessary for the proper defence

of the Commonwealth, that the Commonwealth should have the power to punish by *ex post facto* laws any persons who, in Australia, defy His Majesty's Proclamation or the Governor-General's Proclamation, even if the Proclamation forbids acts that are not, at the time the Proclamation is published, acts punishable by common law or State laws, if the acts interfere with the exercise of any power vested in Parliament or in the Government of the Commonwealth, and that can only be done by the people knowing that the Commonwealth Parliament has power to pass *ex post facto* laws.

The power appears to me to have been exercised in England solely as incidental to the execution of the power to defend the Realm and for the purpose of defence. See the Imperial Proclamations and the Imperial Acts.

If the Commonwealth Parliament has power in time of war to pass *ex post facto* laws to prevent interference with the efficient defence of the Commonwealth, it has power to do so at any time. What laws it passes (if passed with respect to a matter as to which the Commonwealth has power to make laws) it is for Parliament, not this Court, to say. If it has power to pass *ex post facto* laws for the naval and military defence of the Commonwealth, it has power to pass *ex post facto* laws incidental to the execution of any power vested by the Constitution in the Government of the Commonwealth, or in any department or officer of the Commonwealth.

It is undoubted that power has been vested in the Government of the Commonwealth to obtain and protect its public funds, so necessary for the execution of all the powers vested in it. The law in question—No. 6 of 1915—remains in force only during the war. Parliament has evidently thought it necessary to pass *ex post facto* legislation to prevent those frauds upon the public revenue which, unfortunately, are frequently committed against Governments in time of war.

The particular fraud charged in this case is in connection with goods supplied to His Majesty's armed forces in Australia during the war.

It was admitted that sec. 86 of the *Crimes Act* (as amended by the Act No. 6 of 1915, clauses 1 and 2) is *intra vires*; that is, that the Parliament had power to deal with the *subject matter in question*,

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and to punish persons who defraud the Commonwealth after the Act is passed—that is, it can punish frauds on the Commonwealth in future; but it is contended that it cannot punish frauds on the Commonwealth, however serious, committed before the criminal law is assented to. It is also admitted that a State can pass *ex post facto* laws with respect to any matters not vested in the Commonwealth by the Constitution.

If the Commonwealth Parliament has power to pass laws "with respect to" the *subject matter*, and the powers granted by the Constitution are as plenary and ample within the limits prescribed by sec. 51 as the Imperial Parliament, in the plenitude of its power, could bestow, and Parliament has within those limits the same authority as the Imperial Parliament (see *Hodge* v. *The Queen* (1)), I do not see how it can be properly contended that the power to pass *ex post facto* laws is not included in the plenary power.

The Commonwealth Parliament, I hold, has power to pass *ex post facto* laws when it makes a law with respect to any of the thirty-eight subjects referred to in sec. 51 or with respect to the "matters incidental" previously referred to in pl. XXXIX., provided the laws are necessary for the efficient control of the subject matter or are incidental to the execution of the vested powers.

The power to pass *ex post facto* laws may be based on two grounds :—(1) That the power is necessary as a deterrent to prevent injury to the Commonwealth in the future for want of legislation in times of emergency or danger. The *ex post facto* laws for defence are a fitting example of this power. (2) That the plenary power to legislate on any subject matter within the power of Parliament, or to prevent interference, exists from the time the power is exercised.

The power to pass sec. 86 of the *Crimes Act* in its present form in October 1914 is admitted, because it was incidental to the power vested in the Government of the Commonwealth—it was as incidental in May 1915 as it was in October 1914. As it was incidental to the power in and since October 1914, the Parliament has plenary power to pass *ex post facto* laws with respect to any interference or trespass on the power since October 1914.

(1) 9 App. Cas., 117.

Every other sovereign Parliament in the British Empire (including all Australian State Parliaments) has, so far as I know, the power to pass *ex post facto* laws. In the United States Constitution it was thought necessary to prohibit Congress from passing *ex post facto* laws, and I think such an amendment of the Constitution necessary in our Constitution if it is intended to prevent the Commonwealth Parliament from exercising the plenary power it at present has within the limits of sec. 51, to pass such laws.

The answer to the first question should be Yes.

It was admitted that if the first question is answered in the affirmative it is not necessary to consider questions 2, 3 and 4. It is not therefore necessary to decide whether this Court has original jurisdiction to try criminal offences under sec. 75 (III.) of the Constitution or under the common law of the Commonwealth or of the State, or whether the Commonwealth is a party to a trial on indictment within the meaning of the word "party" in sec. 75 (III.) of the Constitution.

As to question 5: the Act No. 4 of 1915 (*Judiciary Act* 1915) confers on the High Court original jurisdiction to try indictable offences against the laws of the Commonwealth; and an indictable offence against a law of the Commonwealth is charged in the indictment in question.

For these reasons, I am of opinion that the motion to quash the indictment should be refused.

First question answered in the affirmative.

Solicitor, for the Crown, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors, for the accused, *Mark Mitchell & Forsyth*; *Dowling, Taylor & Macdonald*; *P. M. Sanders.*

B. L.