[HIGH COURT OF AUSTRALIA.]

PIRRIE . . . . . APPELLANT;
INFORMANT,

AND

McFARLANE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *May* 21.

SYDNEY, *Aug* 24.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

High Court—Jurisdiction—Question as to limits inter se of constitutional powers of Commonwealth and State—Appeal to Supreme Court of State from inferior Court—Removal to High Court—Exclusion of jurisdiction of Supreme Court—Appeal to Privy Council—Proceedings in High Court—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (XXXIX.), 74, 75, 76, 77 (II.)—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 30, 38, 38A, 39, 40A, 41.

Constitutional Law—Application of State Act to servant of Commonwealth—Regulation of traffic—Soldier driving motor-car without licence—Inconsistency between Commonwealth and State laws—Motor Car Act 1915 (*Vict.*) (*No.* 2702), *secs.* 6, 10, 24—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (VI.), 52, 69, 106, 107, 109—*Defence Act* 1903-1918 (*No.* 20 *of* 1903—*No.* 47 *of* 1918), *secs.* 33, 43, 52, 65, 66, 68, 69, 70, 71, 81, 108—*Air Force Act* 1923 (*No.* 33 *of* 1923), *sec.* 3—*Australian Military Regulations* 1916 (*Statutory Rules* 1916, *No.* 166), *regs.* 488, 494—*Air Force Regulations* 1922 (*Statutory Rules* 1922, *No.* 160), *reg.* 3.

Sec. 40A of the *Judiciary Act* 1903-1920 is a valid exercise of the power conferred upon the Commonwealth Parliament by secs. 77 (II.) and 51 (XXXIX.) of the Constitution.

A question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State arises, within the meaning of sec. 40A of the *Judiciary Act* 1903-1920, in cases in which a decision upon either of the following questions is required for the determination of the case: (*a*) whether such a State Act as the *Motor Car Act* 1915 (Vict.) binds persons who are also officers of the defence force of the Commonwealth; (*b*) whether the

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provision of sec. 40A ousting the jurisdiction of the State Courts and removing the cause to the High Court is effective.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that there is nothing in the Constitution that expressly or impliedly exempts members of the defence force from the State motor-car legislation; that sec. 6 of the *Motor Car Act* 1915 (Vict.), so far as it prohibits any person from driving a motor-car on a public highway without being licensed for that purpose, is not, in the absence of any provision in a Commonwealth law giving to members of the defence force immunity from State laws regulating the use of motor-cars, inconsistent with any provision in the *Air Force Act* 1923 or the *Defence Act* 1903-1918, and, consequently, is not rendered invalid by sec. 109 of the Constitution; that sec. 6 of the *Motor Car Act*, on its proper construction, applies to all persons driving a motor-car on a public highway; and, therefore, that a member of the Royal Australian Air Force who, not being licensed in accordance with the *Motor Car Act*, drives a motor-car on a public highway pursuant to an order of his superior officer, is guilty of an offence under sec. 6 of that Act.

Amalgamated Society of Engineers v. *Adelaide Steamship Co.*, (1920) 28 C.L.R. 129, followed.

D'Emden v. *Pedder*, (1904) 1 C.L.R. 91, distinguished.

Application of State Acts to the Crown in right of the Commonwealth discussed.

ORDER to review removed from the Supreme Court of Victoria to the High Court.

At the Court of Petty Sessions at Melbourne before a Police Magistrate on 18th December 1924, an information was heard whereby William George Pirrie charged that Thomas McFarlane did on 27th November 1924 drive a motor-car on a public highway, to wit St. Kilda Road, without being licensed for that purpose. At the hearing of the information, evidence having been given that the defendant was driving a motor-car at the time and place charged and that he had not a driver's licence, the defendant gave evidence that he was a leading air-craftsman attached to the Royal Australian Air Force, and a duly enlisted member of the Air Force; that under orders he drove various cars belonging to the Air Force; that on 27th November 1924 he was instructed by Lieutenant Harman, whose orders he was bound to obey, to proceed to Flinders Street in order to pick up a certain flight-lieutenant; and that, when the informant asked him for his licence, he was driving an Air Force car under orders and on Air Force business.

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After the evidence had concluded the Magistrate dismissed the information, and in giving his decision said :—" I consider that the principle laid down in *D'Emden* v. *Pedder* (1), as interpreted by subsequent cases, applies to this case. Sec. 6 of the *Motor Car Act* 1915 (Vict.), which requires drivers of motor-cars on public highways to hold licences, would, in my opinion, if it were held to apply to the men carrying out their duties as servants of the Defence Department, be a fettering or interference with the executive powers of that Department. Sec. 24 of the *Motor Car Act* 1915 has been relied upon by the prosecution, but that section is, in my opinion, which is supported by the argument in *Troy* v. *Wrigglesworth* (2), limited to those servants of the Crown who are controlled by the Government of Victoria."

The informant obtained from the Supreme Court of Victoria an order nisi to review that decision, returnable before the Full Court, the ground of the order nisi being that on the evidence the Court of Petty Sessions was wrong in holding that sec. 6 of the *Motor Car Act* 1915 did not apply to the defendant; and on the order nisi coming on for argument before the Full Court, that Court proceeded no further, the following endorsement being made on the order nisi: " On a review of the proceedings brought before the Court and having regard to sec. 40A of the *Judiciary Act* the Court does not propose to proceed further." The relevant documents were, pursuant to that section, transmitted to the High Court, and the order nisi now came on for argument.

There was no appearance for the informant.

Sir *Edward Mitchell* K.C. (with him *Russell Martin*), for the respondent. This Court has jurisdiction in this matter under secs. 30, 38, 38A, 40 and 40A of the *Judiciary Act*. Sec. 38A is authorized by sec. 77 (II.) of the Constitution and sec. 40A by sec. 51 (XXXIX.) as being incidental to sec. 38A. The question of the application of the *Motor Car Act* 1915 (Vict.) to a member of the Air Force when on duty is a question of the limits *inter se* of the powers of the Commonwealth and those of a State. There is a more

(1) (1904) 1 C.L.R. 91. (2) (1919) 26 C.L.R. 305.

direct conflict in this case between the exclusive power of the Commonwealth to legislate as to defence and the legislative power of the State of Victoria than there was in *D'Emden* v. *Pedder* (1) between the Commonwealth law requiring a receipt to be given and the State law requiring a stamp to be placed on all receipts, and the remarks in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2), as to the reasons for supporting the decision in that case, apply a fortiori to the present case.

[KNOX C.J. referred to *Great West Saddlery Co.* v. *The King* (3).]

The law laid down in that case is different from the law laid down in the *Engineers' Case* (4). The *Air Force Act* 1923 and the *Defence Act* 1903-1918 are inconsistent with the provisions of the *Motor Car Act* 1915. A soldier when given an order has not to consider whether in obeying it he infringes the provisions of a State law (see *Defence Act*, secs. 31, 33, 37, 52, 108; *Australian Military Regulations* 1916 (Statutory Rules 1916, No. 166), reg. 494). It is for an officer who gives an order to determine its lawfulness. Unless the Commonwealth has stated in reference to matters of defence that the State laws are to apply, they do not apply. The power of the Commonwealth Parliament as to defence is, by sec. 52 of the Constitution, made exclusive, and sec. 109 is not required to invalidate State laws conflicting with the *Defence Act*, but State Acts in general terms must be read as not applying to soldiers when on duty (*In re Waite* (5)).

Cur. adv. vult.

Aug. 24.

The following written judgments were delivered :—

KNOX C.J. The defendant Thomas McFarlane was prosecuted on an information charging him with an offence against sec. 6 of the Victorian *Motor Car Act* 1915 in that he drove a motor-car upon a public highway without being licensed for that purpose. The evidence showed that the defendant was a duly enlisted member of the Royal Australian Air Force and that on the occasion in question he was on duty driving a car belonging to the Air Force,

(1) (1904) 1 C.L.R. 91.
(2) (1920) 28 C.L.R. 129, at p. 156.
(3) (1921) 2 A.C. 91, at pp. 100, 114, 120.
(4) (1920) 28 C.L.R. 129.
(5) (1897) 81 Fed. Rep. 359, at pp. 363, 370, 371.

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under orders from his superior officer, on Air Force business. It was admitted that he had no licence to drive. The Police Magistrate dismissed the case. He thought that if sec. 6 of the *Motor Car Act* were held to apply to men carrying out their duties as servants of the Defence Department it would fetter or interfere with the executive powers of that Department, and that the decision in *D'Emden* v. *Pedder* (1) governed the case. He held also that the operation of sec. 24 of the *Motor Car Act*, which declares that the Act applies to persons in the public service of the Crown as well as to other persons, was limited to those servants of the Crown who are controlled by the Government of Victoria. The informant applied to the Supreme Court of Victoria for an order nisi to review this decision on the ground that the Police Magistrate was wrong in holding that sec. 6 of the *Motor Car Act* did not apply to the defendant, and on 15th January 1925 an order nisi was made returnable before the Full Court of the Supreme Court.

The application to make absolute the order nisi came on before the Full Court on 17th March 1925, when, after hearing argument, the Court was of opinion that, having regard to sec. 40A of the Commonwealth *Judiciary Act* 1903-1920, its duty was to proceed no further in the matter. Unless the expression by the Supreme Court of this opinion amounts to an order or decision, no order was made or decision given by that Court. In compliance with sub-sec. 2 of sec. 40A of the *Judiciary Act* the proceedings in the matter and the documents relating thereto which were filed of record in the Supreme Court were transmitted by the Prothonotary to the Principal Registry of this Court at Melbourne, and the matter was on 6th May 1925 duly entered in the list of matters set down to come before the Full Court at the sittings of the High Court at Melbourne commencing on 12th May 1925.

On 11th May 1925 the Principal Registrar of this Court received from the Registrar of the Judicial Committee of the Privy Council a cablegram intimating that the Judicial Committee had granted to the informant special leave to appeal from the refusal of the Supreme Court of Victoria. This Court, being of opinion that its duty was to treat sec. 40A of the *Judiciary Act* as valid until it had

(1) (1904) 1 C.L.R. 91.

been declared invalid, and therefore to regard the application to make absolute the rule nisi as a matter properly in the High Court until the contrary was established, intimated that the matter would come on for argument in the ordinary course of business, notwithstanding that special leave to appeal had been given by the Judicial Committee. When the matter was called on for argument neither the informant nor the State of Victoria, which was the real litigant, appeared to support the application to make the order absolute, and the Court thought it proper, in the circumstances, to call on counsel for the defendant to show cause why the order nisi should not be made absolute. It is to be regretted that the matter was not fully argued on both sides, but my regret is tempered by the reflection that, although not represented by counsel, the informant obtains all the relief which he claimed in the Supreme Court. Even a successful appeal to His Majesty in Council could result directly in no more than an order to review the decision of the Police Magistrate, and, in my opinion, that is the order to which the informant is now entitled.

The duty of this, as of every Court, being to take care that it does not go beyond the limits of the jurisdiction conferred upon it, the first question for consideration is whether the Court is properly seised of the matter. It was introduced into this Court by force of secs. 40A and 41 of the *Judiciary Act* 1903-1920, which are in the words following:—"40A (1). When, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court. (2). Thereupon the proceedings in the cause, and such documents if any relating thereto as are filed of record in the Supreme Court of the State, shall be transmitted by the Registrar, Prothonotary, or other proper officer of the Court, to the Registry of the High Court in the State" &c. "41. When a cause or part of a cause is removed into the High Court under the provisions of this Act, the High Court shall proceed therein as if the cause had been originally

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commenced in that Court and as if the same proceedings had been taken in the cause in the High Court as had been taken therein in the Court of the State prior to its removal, but so that all subsequent proceedings shall be according to the course and practice of the High Court."

Three questions call for decision on this part of the case, namely, (*a*) Is sec. 40A a valid exercise of the legislative power of the Commonwealth? (*b*) If so, was the application to the Supreme Court to make absolute the order nisi to review a "cause pending in the Supreme Court"? and (*c*) If so, did there arise in that cause a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State? It is only if all these questions are answered in the affirmative that the application is properly before this Court.

(*a*) The answer to this question depends on the provisions of the Constitution. By sec. 75 it is provided that in certain matters, which it is not necessary to specify in detail here, the High Court shall have original jurisdiction. By sec. 76 Parliament is empowered to make laws conferring original jurisdiction on the High Court in certain other matters including "any matter arising under this Constitution, or involving its interpretation." By sec. 30 of the *Judiciary Act* 1903 Parliament in exercise of this power enacted that the High Court should have original jurisdiction in all matters arising under the Constitution or involving its interpretation. Sec. 77 of the Constitution provides that with respect to any of the matters mentioned in sec. 75 or sec. 76 the Parliament may make laws (II.) defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States and (III.) investing any Court of a State with Federal jurisdiction. Acting on the assumption, which appears to me amply justified, that the expression "any Federal Court" in sec. 77 (II.) included the High Court, Parliament, having by sec. 30 of the *Judiciary Act* conferred original jurisdiction on the High Court in all matters arising under the Constitution or involving its interpretation, proceeded by sec. 38A of that Act to make the jurisdiction of the High Court in some of those matters exclusive of the jurisdiction of the Supreme Courts of the States. That section

provides that "in matters (other than trials of indictable offences) involving any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, the jurisdiction of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States; so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court." These words are too clear to admit of any doubt that the intention of Parliament in enacting the section was to take away from the Supreme Courts of the States any jurisdiction in such matters, whether such jurisdiction "belonged to" them independently of, or was vested in them by, Federal legislation; and the words of sec. 77 (II.) of the Constitution, in my opinion, clearly authorized Parliament to give effect to that intention. Whatever jurisdiction the Supreme Courts of the States had in respect of such matters immediately before the enactment of sec. 38A must have been derived either from Federal legislation or from some other source. The jurisdiction derived from a source other than Federal legislation is aptly described as jurisdiction which "*belonged to*" them, and the jurisdiction conferred by Federal legislation as that "*invested in*" them, i.e., that with which Parliament invested them under the authority given by sec. 77 (III.). It will be observed that sec. 38A was introduced into the *Judiciary Act* 1903 by the amending Act of 1907. This amendment was made in consequence of the decision of the Judicial Committee in *Webb* v. *Outrim* (1) and that of this Court in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2). Its apparent purpose was to remove from the controversy as to the efficacy or the validity of sec. 39 (2) (*a*) the limited class of questions in which, by sec. 74 of the Constitution, appeals from the High Court to the Queen in Council were prohibited unless the High Court should certify that the question was one which ought to be determined by Her Majesty in Council, and thus to ensure the effective operation of that provision. Every question comprised in this limited class was necessarily a question arising under the Constitution or involving

(1) (1907) A.C. 81; 4 C.L.R. 356. (2) (1907) 4 C.L.R. 1087.

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its interpretation, and I entertain no doubt that by virtue of sec. 77 (II.) of the Constitution, construed according to the plain meaning of the words used, the Parliament had power to make a law depriving any State Court of whatever jurisdiction it might have in respect of any such question, whether that jurisdiction arose under a Federal Act or under the Constitution or independently of either of those sources.

Secs. 40A and 41 of the *Judiciary Act* do no more than provide the machinery rendered necessary by the enactment of sec. 38A. The Supreme Court of a State having been forbidden to exercise jurisdiction in any matter involving any question of the class specified, however arising, it became necessary to provide for the submission of such matters to the only superior Court which had jurisdiction to entertain them; and this is all that secs. 40A and 41 purport to do. I may observe, in passing, that the operation of sec. 40A has been limited by decisions of this Court to matters in which a question as to limits of constitutional powers *necessarily* arises, i.e., to matters which cannot be finally determined without deciding a question of that kind (see *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (1)). Secs. 40A and 41 are merely incidental to sec. 38A, and, if that section be within the powers of the Commonwealth Parliament, as I think it is, the Parliament was expressly authorized by sec. 51 (XXXIX.) of the Constitution to enact secs. 40A and 41. I may add that although this Court has not hitherto expressly decided that the sections under discussion are within the powers of the Commonwealth Parliament, their validity has been assumed in several cases in which their provisions have been considered. See, for instance, *In re Drew* (2), a decision of the Supreme Court of Victoria, and the decisions of this Court in *R.* v. *Maryborough Licensing Court* (1); *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (3); *Lorenzo* v. *Carey* (4), and *George Hudson Ltd.* v. *Australian Timber Workers' Union* (5).

(*b*) Was the application to the Supreme Court to make absolute the order nisi to review a "cause pending in the Supreme Court" within the meaning of sec. 40A? This question must be answered in

(1) (1919) 27 C.L.R. 249.
(2) (1919) V.L.R. 600; 41 A.L.T. 65.
(3) (1920) 28 C.L.R. 23.
(4) (1921) 29 C.L.R. 243.
(5) (1922-23) 32 C.L.R. 413.

the affirmative in accordance with the opinion of the majority of this Court in *George Hudson Ltd.* v. *Australian Timber Workers' Union* (1).

(*c*) Did a question arise before the Supreme Court as to the limits *inter se* of the constitutional powers of the Commonwealth and those of a State ? The question which arose was whether a law made by the Parliament of Victoria was binding on a person employed in Victoria in the Defence Department of the Commonwealth, and in order to decide this question it was necessary first to determine as a matter of construction whether the provisions of the Victorian Act purported to apply to persons in the public service of the Commonwealth. If upon its true construction the Victorian Act did not purport to extend to such persons, the charge could not be sustained ; but if, on the other hand, the Act were held to extend to such persons, the further question arose whether the constitutional power of the Victorian Parliament to make laws for the peace, order and good government of Victoria was so restricted by the Federal Constitution as to exclude from the operation of an otherwise valid Act of the Victorian Legislature a member of the Defence Force of the Commonwealth while actually employed in the performance of his duty in that capacity. The decisions in *In re Drew* (2) and *R.* v. *Maryborough Licensing Court* (3), to which I have referred, establish that sec. 40A of the *Judiciary Act* did not impair the jurisdiction of the Supreme Court to determine the first question, and, if that question were decided in favour of the respondent, the further question as to the constitutional powers of the Victorian Parliament could not arise. It is, however, apparent from the course taken by the Supreme Court that in the opinion of that Court the case could not be disposed of without deciding the question of constitutional power ; and it must therefore be assumed that the Supreme Court took the view that, on the true construction of the *Motor Car Act*, its provisions extended to persons in the public service of the Commonwealth. I agree with my brother *Starke* in thinking that, for the reasons about to be given by him, the conclusion at which the Supreme Court must be taken to have arrived on this question

(1) (1922-23) 32 C.L.R. 413. (2) (1919) V.L.R. 600 ; 41 A.L.T. 65.
(3) (1919) 27 C.L.R. 249.

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was clearly right. On this footing it then became necessary to decide whether the Act, so construed, was within the constitutional powers of the Parliament of Victoria. On this question the contention of the defendant was founded on the provisions express or implied of the Federal Constitution and laws made under it; that of the informant on the power of the Victorian Parliament under the Constitution of that State: and it seems to me to follow necessarily that a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of the State of Victoria thereupon arose. It is clear, therefore, in my opinion, that this question also should be answered in the affirmative, and that the application to make absolute the order nisi to review is properly before this Court.

The ultimate question for decision is whether the order nisi should be made absolute. I have said that in my opinion the Police Magistrate was wrong in holding that on the construction of the Act its provisions did not apply to persons in the public service of the Commonwealth. His view that the case was governed by the decision in *D'Emden* v. *Pedder* (1) remains to be dealt with. That decision was considered in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2). The majority of the Court in that case said (3):—"*D'Emden* v. *Pedder* was a case of conflict between Commonwealth and State law. The Commonwealth law (*Audit Act* 1901) made provision as to how public moneys of the Commonwealth were to be paid out: written vouchers were required for all accounts paid (secs. 34 (6) and 46). The irresistible construction of the Act is that these vouchers, which the law requires for the protection of the Commonwealth Consolidated Revenue Fund, are to be under the sole control of the Commonwealth authorities. A State Act making it an offence to give such a voucher except on a condition imposed by the State Parliament, namely, a tax in aid of the State revenue, was, so far, manifestly inconsistent with the Commonwealth law. Sec. 109 of the Constitution applies to such a case, and establishes the invalidity to that extent of the State law. The decision rests on the supremacy created by sec. 109, and is sound." The true basis of the decision in *D'Emden* v. *Pedder*

(1) (1904) 1 C.L.R. 91.
(2) (1920) 28 C.L.R. 129.
(3) (1920) 28 C.L.R., at p. 156.

was stated at p. 157 of the report to be "the supremacy of Commonwealth law over State law where they meet on any field," and it was pointed out that Commonwealth legislation on an exclusive field such as the Post Office might conflict in incidental provisions with State legislation on a main exclusive field or as to incidental provisions. After dealing with other cases the opinion proceeded (1):—"There are other cases in which the doctrine of implied prohibition is more or less called in aid to limit the otherwise plain import of legislative grants to the Commonwealth: it is sometimes difficult to say how far the decision is dependent upon such a doctrine, and therefore we hesitate to pronounce upon those cases, and leave them for further consideration, subject to the law as settled by this decision; but it is beyond any doubt that the doctrine of 'implied prohibition' can no longer be permitted to sustain a contention, and, so far as any recorded decision rests upon it, that decision must be regarded as unsound."

It follows from the opinion expressed by the majority of the Court in the *Engineers' Case* (2), that in the present case the defendant can derive no assistance from the doctrine of implied immunity of Federal instrumentalities nor can he rely on the decision in *D'Emden* v. *Pedder* (3), unless he can establish that sec. 6 of the Victorian *Motor Car Act* is, if applied to him, inconsistent with a law of the Commonwealth. In my opinion he has failed to establish this. The statutory prescriptions to which we have been referred as supporting the contention of the defendant are as follows:—By the *Air Force Act* 1923 authority is given to the Governor-General to raise, maintain and organize an Air Force as part of the Defence Force constituted under the *Defence Act* 1903-1917 for the defence and protection of the Commonwealth and of the several States, and the Royal Australian Air Force is deemed to have been raised under that Act. It is further provided that the *Defence Act* and the Regulations thereunder shall apply to the Air Force and its members. By sec. 52 of the *Defence Act* 1903-1917 the Defence Force is made subject to such regulations for the discipline and good government of that Force as may be prescribed. Sec. 81 provides that any

(1) (1920) 28 C.L.R., at p. 159. (2) (1920) 28 C.L.R. 129.
(3) (1904) 1 C.L.R. 91.

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person who *unlawfully* obstructs or interferes with any member of the Defence Force in the performance of any military service or duty shall be liable to a penalty. Sec. 108 empowers the officer commanding a corps to punish offences against the Act or Regulations committed by any member of the Defence Force. Reg. 494 of the *Australian Military Regulations* 1916 (Statutory Rules 1916, No. 166) provides for the punishment of any person subject to military law who (xii.) disobeys any lawful command given by his superior officer. It was argued that these provisions constituted a law of the Commonwealth commanding any member of the Defence Force to obey the order of his superior officer to drive a motor-car on a public highway in Victoria, although such member was not licensed to drive under the Victorian *Motor Car Act*; that such a law was inconsistent with the law of Victoria forbidding any person to drive a motor-car on a public highway without being licensed for that purpose; and that by force of sec. 109 of the Constitution the law of the Commonwealth must prevail over Victorian law. If the first proposition were well founded, the others would necessarily follow; but, in my opinion, the Act and regulations referred to have not the effect attributed to them. The law of the Commonwealth, i.e., the regulation in question, requires the soldier to obey, not *any* command, but any *lawful* command, and in order to sustain the argument for the defendant it must be shown that the officer who gave the order had lawful authority to order a person not licensed for that purpose under the Victorian Act to drive a motor-car on a public highway in Victoria. A command, to be lawful, must not be contrary to ordinary civil law; and the civil law in Victoria as to the use of highways and the regulation of traffic thereon includes all enactments of the Parliament of Victoria relevant to those matters, subject always to the qualifications introduced by sec. 109 of the Constitution that, if any such enactment is inconsistent with a law of the Commonwealth, the law of the Commonwealth shall prevail. Prima facie, then, sec. 6 of the *Motor Car Act*, which is obviously an enactment dealing with the use of highways and the regulation of traffic, is binding on any person in Victoria whether employed in the public service of the Commonwealth or not.

The Commonwealth Parliament has, in my opinion, undoubted power, by legislation with respect to a subject which is within the ambit of its legislative powers, to override the provisions of any State law, but in the absence of any such enactment the State law must be given its full effect. The provisions of the *Defence Act* and regulations to which I have referred certainly contain no express enactment relieving members of the Defence Force from the duty of obedience to sec. 6 of the *Motor Car Act*, and, having regard to the provisions to which I am about to refer, I think it is clear that no such immunity should be implied. Sec. 43 of the *Defence Act* provides that members of the Permanent Forces shall be exempt from serving as jurors. Secs. 65 and 66 provide for the carriage of members of the Defence Force on State Railways when required by the Governor-General and as prescribed, or on production of passes. The State laws relating to service on juries and to carriage of persons on State or other railways must yield to these provisions. Secs. 68 and 69 authorize members of the Defence Force to do acts amounting to trespasses under State laws, and to the extent of the authority given supersede the State laws on the subject. Sec. 70 exempts members of the Defence Force, in circumstances therein specified, from liability to pay any toll or due, whether demandable by virtue of any State Act or otherwise, at any wharf, landing-place, bridge, gate or bar on a public road. This provision expressly overrides any relevant State law. Sec. 71 authorizes an officer in certain conditions to stop all traffic on any road or water-way. This and the preceding section clearly displace portion of the State law as to use of highways and regulation of traffic. Reg. 488 of the *Australian Military Regulations* exhorts members of the Defence Force to bear in mind that a soldier is not only a soldier but a citizen also and as such is subject to the civil as well as to the military law.

These provisions, I think, show plainly two things, namely, (a) that when the Parliament desired to provide for the immunity of members of the Forces from the provisions of State law it did so in plain words, e.g., in sec. 70 of the *Defence Act*, and (b) that it recognized that the mere fact that a person was a member of the Defence Force acting in the performance of his duty in that capacity

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did not relieve him of the duty of obedience to State laws providing for (*inter alia*) the regulation of traffic.

For these reasons I am of opinion that the Police Magistrate was wrong in thinking that the decision in *D'Emden* v. *Pedder* (1) justified him in dismissing the charge laid against the defendant. The finding by the Police Magistrate that sec. 6 of the *Motor Car Act*, if it were held to apply to men carrying out their duties as servants of the Defence Department, would be a fettering of or interference with the executive powers of that Department appears to me to be wholly irrelevant, having regard to the decision in the *Engineers' Case* (2). The Commonwealth has exclusive power to make laws with respect to matters relating to naval and military defence. If the prohibition against driving a motor-car without being licensed under State law is reasonably capable of interfering with the naval or military defence of the Commonwealth or of the States, the Commonwealth Parliament has ample power by legislation to confer on members of the Defence Force the right to drive a motor-car in the performance of their duty without being licensed under State law. If Parliament choose, it can exempt them from the obligation to obey this provision of the State law; but, in my opinion, it has not yet done so. No repugnant or inconsistent Commonwealth legislation stands in the way of the State law on this subject, and such law remains valid and binding in Victoria by virtue of sec. 107 of the Constitution.

I may add that there is and can be no suggestion that the *Motor Car Act* or this provision contained in it was specially aimed at, or in any way discriminated against, persons in the service of the Commonwealth. There are expressions in the opinion of the Judicial Committee in *John Deere Plow Co.* v. *Wharton* (3) and *Great West Saddlery Co.* v. *The King* (4) which seem to indicate that this consideration may not be wholly irrelevant.

For these reasons I am of opinion that sec. 6 of the *Motor Car Act* was binding on the defendant, and that the order nisi to review the decision of the Police Magistrate should be made absolute.

(1) (1904) 1 C.L.R. 91.
(2) (1920) 28 C.L.R. 129.
(3) (1915) A.C. 330.
(4) (1921) 2 A.C. 91.

Isaacs J. A simple incident in the ordinary administration of Commonwealth defence has given rise to problems of great magnitude and importance. As to one of them, the third problem, I find myself, unfortunately, at variance with the view of the majority. The prevailing view discloses a condition of the Commonwealth law which, in my opinion, Parliament may advantageously consider without delay. If, contrary to my view, which is supported by a very clear decision of the Supreme Court of Canada in *Gauthier* v. *The King* (1), a State Act binding the Crown *simpliciter* binds also the Crown in right of the Commonwealth in the performance of all its executive functions, some Commonwealth legislation seems to me instantly imperative. Further, if, contrary to my view, and contrary to fundamental principles of constitutional law as enunciated in such cases as *Dixon* v. *London Small Arms Co.* (2), it is correct that for the purposes of State legislation all Commonwealth executive officers of Australia, from the Governor-General and the Ministers of State to the junior member of the public service, while engaged in performing their public functions are to be regarded, not as Crown officials representing the King in right of the Commonwealth, but merely as private citizens, and as such amenable to the ordinary State regulations, then again some Commonwealth legislation seems to me imperative. Still, further, if, on those assumptions, those charged with the onerous and always urgent responsibility of national defence—a department of which the affairs are by sec. 52 of the Constitution placed expressly under the *exclusive* control of the Commonwealth Parliament, and are consequently by secs. 106 and 107 deleted from State authority—are to be able to discharge their essential duties free from the fetters which this case in its direct result and its obvious corollaries shows to exist, some amendment of the law is necessary. If public security is not to be permanently assigned in the scale of rights and obligations a position of inferiority, and, indeed, insignificance, compared with the regulation of private motor traffic, the question is naturally one of urgency. There is no reason to fear that Commonwealth officials would hold the lives and limbs of their fellow citizens less sacred than does the Police Commissioner of a State or the fire brigade of a city. For these reasons

(1) (1918) 56 Can. S.C.R. 176.

(2) (1876) 1 App. Cas. 632.

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I examine the law as to this third problem in its place in this judgment with some elaboration, so that those interested may follow the reasons for my opinion.

The first problem is of a novel and delicate character. It touches the propriety of our proceeding to entertain the case at all, having regard to the fact that leave to appeal from the Supreme Court had been granted by the Judicial Committee of the Privy Council. This Court carefully considered the question, and announced its conclusion that it was its duty to hear the matter.

At that time, and indeed until after the reservation of judgment upon the hearing, we were not informed of the grounds of the application to the Privy Council for leave to appeal or of the precise nature of the order made by the Judicial Committee. We have, however, lately had the opportunity of reading a transcription of the shorthand notes taken on that application. From that record it is clear that their Lordships thought it would be well, and might materially assist, if in the meantime this Court were to deal with the matter. The propriety, therefore, placing the question no higher, of our entertaining the case and stating our decision cannot, in view of the expressed opinion of their Lordships, be doubted. The announced conclusion of this Court was necessarily based, not on any such intimation, but upon the view it took of its own imperative statutory duty, a view that will be presently stated. May I add that, in deference to the suggestion that the opinions of this Court might assist their Lordships, I shall endeavour to state my own explicitly and fully.

The second problem, once the case is entertained, is as to the validity of the enactment that commands us to hear the cause. This validity has hitherto been assumed, but now circumstances compel its direct consideration.

Then, supposing the first two problems are surmounted, the *third problem* directly in issue—in itself apparently quite unconnected with the leave to appeal—is of a totally different character. No matter how it may be disguised, its real character is this: *Is the Commonwealth's choice of soldiers to perform military service on public highways throughout Australia* by the recognized modern means of transit on motor-cycles and in motor-cars, a means expressly

sanctioned by Commonwealth Appropriation Acts (see No. 36 of 1923, Divisions Nos. 80 and 85), *restricted* under severe penalties—as the law now stands—*to such persons as the State Commissioner of Police, or other State authority in other States, thinks qualified* to drive such vehicles?—and, as a further restriction, until those persons pay *a tax for the licence*? The penalties and other consequences for contravention of Victorian State law are not slight. They include the following:—(1) The disqualification of a person unlicensed who drives a cycle or car for such time as the Court of Petty Sessions thinks fit; so that the soldier's services in the selected capacity may be utterly impossible if the State Court so decides. (2) For a first offence, a pecuniary penalty up to £10 both for the actual driver and for the person who employs him—probably the officer who commands him to do the unlawful act; and for a second offence, both for the driver and for the person who employs him, a fine up to £25 with imprisonment with or without hard labour up to three months.

It will be readily admitted that this last problem is an important matter both officially and personally for those entrusted with the defence of Australia as legislation now stands. The difficulty is not to be disposed of by saying the Commonwealth Parliament may legislate. Unless present legislation is sufficient, it will be no easy matter to say what will ever be sufficient. This, however, will be more closely dealt with later.

The incident itself which arouses these questions is shortly narrated:—Thomas Joseph McFarlane, the respondent, is a duly enlisted member of the Commonwealth Royal Australian Air Force, and holds the position of leading air-craftsman. Part of his duty is to drive motor-cars belonging to the Air Force. On 27th November 1924 he was ordered by Flight-Lieutenant Harman, his officer in charge, and whose orders he is bound to obey, to proceed along the St. Kilda Road on Air Force duty to pick up Flight-Lieutenant Hepburn. While driving in an Air Force car in obedience to the order, he was stopped at the intersection of Flinders and Swanston Streets, Melbourne, by Police Constable Pirrie, who demanded his motor-driver's licence under State law. McFarlane said he had none, and that he was a soldier. That is the incident itself.

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1. *Duty to Proceed.*—The immediate result of the incident was that Constable Pirrie prosecuted McFarlane under the State *Motor Car Act* 1915. The defendant was thus described: "Thomas McFarlane, c/o Headquarters R.A.A. Force, Reg. No. 134." So that there never was any doubt as to McFarlane's status. The charge was that the defendant "did drive a motor-car on a public highway, to wit, St. Kilda Road, without being licensed for that purpose." The applicable provision in the *Motor Car Act* is sec. 6: "(1) No person shall drive a motor-car upon any public highway without being licensed for that purpose and no person shall employ to drive a motor-car any person who is not so licensed. (2) The Chief Commissioner shall on the application of any person over the age of eighteen years and on being satisfied of the qualification of such person issue an annual licence in the prescribed form to such person to drive a motor-car. (3) A fee of two shillings and sixpence per annum shall be paid for such licence which shall remain in force for twelve months from the date thereof. (4) Any person driving a motor-car as aforesaid shall on demand by any member of the police force produce his licence and if he fails so to do he shall be guilty of an offence against this Act unless he has a reasonable excuse and does within seven days produce his licence at some police station specified by the member of the police force demanding its production." Sec. 8 enacts that "(1) Any Court of Petty Sessions before whom a person is convicted of an offence under this Act . . . (*b*) may if the person convicted does not hold any licence under this Act declare him disqualified for obtaining a licence for such time as the Court thinks fit . . . (5) If any person who under the provisions of this Act is disqualified for obtaining a licence applies for or obtains a licence while he is so disqualified . . . that person shall be guilty of an offence under this Act and any licence so obtained shall be of no effect." Sec. 10 (5) provides that "Whenever any person during the period of his disqualification as aforesaid drives a motor-car he shall be guilty of an offence against this Act." Sec. 21 imposes the pecuniary and prison penalties I have mentioned. Sec. 24 says: "It is hereby declared that this Act applies to persons in the public service of the Crown as well as to other persons." These were the relevant provisions when the prosecution came on for hearing

before the Police Magistrate on 18th December 1924. The Magistrate dismissed the prosecution on two grounds, namely, (1) that it was not competent to the State to impede the performance of Commonwealth functions, and (2) that sec. 24 of the Act, applying its provisions to servants of the Crown, did not cover servants of the Commonwealth. It is obvious that a direct conflict arose between the Commonwealth and the State jurisdictions—the one claiming the military right to proceed independently of State regulation, the other claiming the right to prevent a soldier obeying a military command, because State regulations had not been observed. Before passing on, one observation should be made. Though one of the grounds upon which the Magistrate dismissed the charge was one of construction, it was not construction in the ordinary sense. He was not construing the section as a matter of English or apart from an important point of constitutional law. As a mere matter of words sec. 24 is explicit and, of course, covers every functionary of the Crown. The Crown itself is indivisible. Before Federation a military officer in the State Defence Force would, without question, be covered by the section. But in view of the effect of the constitutional severance of Crown authority, defence now falling to the Crown in right of the Commonwealth and outside the State sphere, is sec. 24 to be read as including Commonwealth military officers? If the State Parliament has the power, subject to countervailing Commonwealth law, to control Commonwealth military operations by such a provision, then the words may be so read. If, on the other hand, the State Parliament has no such power, then the words should, on the principle adopted by the Privy Council in *Macleod* v. *Attorney-General* (*N.S.W.*) (1), be constructively read down to meaning only the Crown services controllable by the State Legislature. But the important thing, as I conceive, to bear in mind is that the Magistrate's decision on the point of construction cannot possibly be reviewed in any intelligible sense without considering and determining a question of constitutional law. The second legal stage of the matter was that the constable—really the State of Victoria—appealed, by order nisi to review, to the Full State Supreme Court, consisting of *Irvine* C.J. and *Mann* J., on 17th March

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

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1925. It is perhaps desirable to pause for a moment at this point in order to see what questions confronted the Supreme Court. That Court had no outlet of escape from deciding a constitutional point. As a first step, practically incontestable, it would, of course, be acknowledged that sec. 24 of the State Act, by its mere linguistic force, applied to the general common law of the British Constitution, included a military officer in the service of the Crown. But then, before getting to the final construction of that section, the Court must perforce do in effect precisely what the Privy Council did in *Macleod's Case* (1), namely, consider the effect of written Constitutions, and so engage itself in a process of determining the limits of constitutional powers *inter se* (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2)). This appears to be inevitable on principle. But there exists a very apposite and very valuable illustration of the principle. It is the decision of the Supreme Court of Canada in *Gauthier* v. *The King* (3) in 1918. On the point of construction that case was followed in 1924 by the British Columbia Court of Appeal in *Montreal Trust Co.* v. *The King* (4). *Gauthier's Case* (5) arose between the plaintiff and the Dominion Government, and the question before the Supreme Court was the meaning and effect of sec. 3 of the *Ontario Arbitration Act*, which was in these words: "This Act shall apply to an arbitration to which His Majesty is a party." The only question, as *Fitzpatrick* C.J. said, was whether "the Crown in right of the Dominion of Canada, is bound by the . . . Act." The Court unanimously held in the negative, and on grounds as applicable to Australia as to Canada. But the point of immediate relation to the problem now dealt with is that in order to arrive at the real extent of the section, notwithstanding its literal terms, it was necessary to have regard to the constitutional principle that "provincial legislation cannot *proprio vigore* take away or abridge any privilege of the Crown in right of the Dominion." Therefore, it was said by *Anglin* J. (now *Anglin* C.J.), whose judgment apparently on this point was concurred in, that "it may be accepted as a safe rule of construction that a

(1) (1891) A.C. 455.
(2) (1917) A.C. 528; 24 C.L.R. 396.
(3) (1918) 56 Can. S.C.R. 176; 40 Dom. L.R. 353.
(4) (1924) 1 Dom. L.R. 1030.
(5) (1918) 56 Can. S.C.R. 176.

reference to the Crown in a provincial statute shall be taken to be to the Crown in right of the Province only, unless the statute in express terms or by necessary intendment makes it clear that the reference is to the Crown in some other sense." It is plain, as I have said, that any attempt to control Dominion action by a reference to the Crown, would, in the opinion of the Canadian Court, have been *ultra vires*. In effect, that Court applied the doctrine of *Macleod's Case* (1). I need hardly add that that is quite a different proposition from the question of how far the State Legislature can bind the *individual*, regarded as a private person and not as the servant of the Crown. The *individual aspect*, which at one time was thought to attract the doctrine of "implied prohibition," stands on a totally different footing. It was dealt with in Canada in *Abbott* v. *City of St. John* (2), a case to which I referred in *Huddart Parker & Co.* v. *Moorehead* (3) for the purpose of getting rid of *Leprohon* v. *City of Ottawa* (4). *Abbott's Case* has since been approved in *Caron* v. *The King* (5). But neither *Abbott's Case* nor *Caron's Case* seems to me to assist in this case. They are concerned with the reconciliation of secs. 91 and 92 of the Canadian Constitution. I can find there no principle governing this case, unless it be the natural and fundamental principle that, where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the *capacity* or *functions* expressly conferred on the other. Such attempted destruction or weakening is prima facie outside the respective grants of power. So far as that is relevant to this case, it is opposed to the appellant's contention. It assumes that an expressly granted power is to be fully exercised subject only to expressed limitations, and is thus in exact line with the *Engineers' Case* (6). Where an express power is given—as, for instance, in pl. xxxv. of sec. 51—it may be exercised, and its full exercise is not controlled by any implied prohibitions, even though a State voluntarily brings itself within its ambit. Where, however, a power—such as defence or

(1) (1891) A.C. 455.
(2) (1908) 40 Can. S.C.R. 597.
(3) (1908-09) 8 C.L.R. 330, at p. 391.
(4) (1878) 2 Ont. App. L.R. 522.
(5) (1924) A.C. 999.
(6) (1920) 28 C.L.R., particularly at pp. 152, 153.

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customs—is *expressly*, by secs. 106 and 107, eliminated from State Constitutions, because made *exclusive* by sec. 52, and transferred *eo nomine* to the Commonwealth, its control is necessarily by force of the very words of the Constitution placed outside the ambit of the State Constitutions and beyond any power of the State to affect it. No State Act can operate on that extraneous field. In the event of an existing Commonwealth power and an existing State power being simultaneously exercised on their admitted respective and *concurrent* fields, then, if there be conflict at any point, sec. 109 applies to adjust the matter. The doctrine that "implied prohibitions" are inadmissible to cut down the exercise of an admittedly granted governmental power is not inconsistent with the position (1) that the State Parliament cannot legislate at all so as to bind the Crown in right of the Commonwealth in the exercise of the very governmental functions *expressly taken from the States and exclusively vested in the Commonwealth*, and (2) that, where there is found inconsistent Commonwealth and State legislation, both competently enacted as far as the range of constitutional power is concerned, the former prevails. The first of these two considerations is inseparably connected with the construction of sec. 24 of the Victorian *Motor Car Act*, and so necessarily involves the construction of the Constitution with reference to the limits of powers *inter se*. Consequently, the first point, namely, the construction of sec. 24, before the Supreme Court, could not be dealt with as an ordinary matter of verbal interpretation. Their Honors, after partly hearing the case, obviously perceiving that position and, seeing that, however regarded, the matter involved a constitutional question *inter se*, falling within the terms of sec. 40A of the *Judiciary Act*, declined to proceed further, and allowed the section to operate of its own force. The limits *inter se* of the respective constitutional powers of Commonwealth and State came into question in a double aspect. They arose, as already shown, in controversy between the litigants, requiring the decision of some Court of Justice. But again they arose when the question presented itself: Which Court? The State Court—apart from the Commonwealth *Judiciary Act* — would have had ample jurisdiction to determine the controversy as to whether the defendant had transgressed the State *Motor Car Act* 1915. The fact that a

constitutional question was involved would add to the difficulty of decision, but would not detract from the jurisdiction. Such was the position when *Webb* v. *Outrim* (1) was decided. But the Commonwealth Parliament, asserting its powers under sec. 77 (II.) of the Constitution, had, by sec. 38A of the *Judiciary Act*, made the jurisdiction of this Court *exclusive* of the jurisdiction of the Supreme Court of the States "so that the Supreme Court of a State shall not have jurisdiction to entertain or determine any such matter, either as a Court of first instance or as a Court of Appeal from an inferior Court." Sec. 40A is a direction for removal complemental to that provision, and sec. 41 is a mandate to this Court to "proceed therein as if the cause had been originally commenced" in this Court. Pursuant to sec. 40A, the proper officer of the Supreme Court transmitted the proceedings in the cause, and such documents relating thereto as were filed of record in the Supreme Court, to the Principal Registry of this Court, where they were received on 6th May with the official endorsement of the Supreme Court's attitude. This Court was therefore *de facto* seised of the cause at latest on 6th May. It was listed and ready for hearing. On 11th May the Judicial Committee of the Privy Council granted the special leave to appeal from the refusal of the Supreme Court, that is, as was understood at the time, its refusal, in obedience to secs. 38A and 40A, to proceed with the hearing of the appeal. After considering the position this Court on 14th May announced its intention to proceed with the hearing. The State Crown Solicitor, by letter of 21st May, informed the Registrar of the Court that the informant had decided not to appear. It was added that this did not imply want of respect but was because "the informant could not consistently seek an order from the High Court of Australia when in the appeal to His Majesty in Council, now pending, he is denying that in point of law there are any proceedings before the High Court, and is contending that it has no jurisdiction." I may say in passing that I would see no inconsistency in the circumstances in appearing under protest on argument as to jurisdiction and contesting the case on the merits. Such a position is not infrequent. Even in the case of arbitrators possessing no such coercive authority as a Court, the authorities are

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

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clear that there is no inconsistency in such a course. See *Sheonath* v. *Ramnath* (1); *Hamlyn* v. *Bettelly* (2), where Lord *Selborne* L.C., with the concurrence of Lord *Coleridge* C.J. and *Brett* L.J., held against inconsistency both as to strictly legal proceedings and arbitrations. On the hearing the informant did not appear. The understanding formed as to the Victorian Court's judicial attitude complained of proves to be correct. The transcribed proceedings state that Mr. *Clauson* K.C., the leading counsel for the petitioner, began by saying that the petition was one for special leave to appeal "not from any order of the Supreme Court of Victoria, because the Supreme Court of Victoria . . . would not make any order at all . . . but they registered the fact that they refused to proceed with the proceedings." This seems to place the merits of the charge against McFarlane entirely outside the limits of the application for leave. Apparently the determination of those merits, which would include the construction of sec. 24 of the Victorian Act, is intended to be left to the Supreme Court if the appeal succeeds, and to this Court if the appeal fails. I say apparently this is so, because in view of such cases as *In re Muir* (3), *In re Assignees of Manning* (4) and *In re Whitfield* (5), which I more fully extracted in 1914 in the *Tramways Case* [*No.* 1] (6), I am somewhat uncertain whether I properly apprehend the ambit or effect of the leave (see also *De Souza's Petition* (7)). I could quite understand it if the case were similar in this respect to *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (8).

But assuming, as I think I ought, that the appeal for which leave has been granted would not extend to the determination of the merits themselves of the controversy in litigation, there remains the second aspect of the constitutional difficulty, namely, whether the *Judiciary Act* provisions altering the jurisdictional law as it stood in 1907 is valid. What Court is empowered by law to determine that question? A "question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth

(1) (1865) 35 L.J. P.C. 1, at p. 6.
(2) (1880) 6 Q.B.D. 63, at p. 65.
(3) (1839) 3 Moo. P.C.C. 150.
(4) (1840) 3 Moo. P.C.C. 154.
(5) (1845) 5 Moo. P.C.C. 157.
(6) (1914) 18 C.L.R. 54, at pp. 78, 79.
(7) (1885) 1 T.L.R. 597.
(8) (1882) L.R. 10 Ind. App. 4, at pp. 16, 17.

and those of any State" includes a question as to any "powers" of the respective political organisms. The powers are not limited to legislative powers or to executive powers or to judicial powers. They are not the "powers" of any specific Department of the organism, but include every power of the organism itself by whatsoever means it assumes to exercise or possess it. Nor is the source of the contested power material. It may be based upon the common law, or on the direct provisions of a written constitution, or on the intermediate authority of a statute founded on the Constitution. The limits are plainly in dispute when a Commonwealth law assumes the power, and that power is denied, to divest a State Court of its pre-existing jurisdiction in a matter within the Commonwealth judicial power and to invest it with Federal jurisdiction at the discretion of the Parliament, in relation to that matter, or to make the jurisdiction of the High Court exclusive. The commanding factor, in my opinion, is what I have described as the mandate to this Court of the Commonwealth Parliament contained in sec. 41 of the *Judiciary Act*. When a Commonwealth Act says this Court shall "proceed" to hear a matter within the judicial power, some clear and cogent reason must be found to justify the Court in disregarding it. When that mandate is seen to be part of a scheme of legislation founded upon the express words of sec. 77 of the Constitution, it is to be obeyed, unless qualified by some other valid legislation or some other portion of the Constitution itself. There is no contrary legislation. Reference to other portions of the Constitution so far from qualifying the mandate makes it specially imperative. Secs. 38A, 40A and 41 are to be read with sec. 74 of the Constitution. They were passed for the definite purpose of preventing sec. 74 of the Constitution either from continuing to be, as it proved to be, a source of conflict between the Privy Council and this Court, or from becoming a mere dead letter. No one who merely reads sec. 74 of the Constitution can suppose it could remain a dead letter or suppose that it was intended as a source of conflict between two final tribunals. No one who reads it as an integral and living part of the instrument of self-government fashioned for the most part by the Australian people themselves and, as it stands, directly accepted by them, could doubt the relative importance of

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the provision. And, going still further, no one already familiar with the history of sec. 74 or reading that history, as, for instance, in *Quick and Garran's Constitution of the Australian Commonwealth*, pp. 228 et seqq., would venture to weaken its clear intention that, on the purely Australian question of the distribution of the totality of governmental powers on this continent, the High Court of Australia—the highest judicial organ created by the Australian people—was to be the final arbiter, unless it voluntarily requested the intervention of the Sovereign in Council. I refer to and incorporate my observations in *Baxter's Case* (1). At one time unfortunately there did arise, as is well known, a conflict of legal opinion between the Privy Council and this Court. It can be found recorded in *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (2) and *Flint* v. *Webb* (3). Circumstances rendered an expression of opinion by the Judicial Committee on the law of that conflict unnecessary (*Commissioners of Taxation* (*N.S.W.*) v. *Baxter* (4)). Notwithstanding a difference of opinion in this Court on the merits of those cases, the whole Court (*Griffith* C.J., *Barton*, *O'Connor*, *Isaacs* and *Higgins* JJ.) were unanimous in maintaining the duty of this Court to regard its decisions in constitutional issues of the nature mentioned as absolutely final and free from revision by the Privy Council except at its own request. That decision still stands unimpaired. The power of the Commonwealth Parliament under sec. 77 (II.) as one means of avoiding conflict was expressly indicated by members of the Bench (5). About four months afterwards, the Commonwealth Parliament enacted the statute No. 8 of 1907, which (*inter alia*) added secs. 38A and 40A to the *Judiciary Act*, and so amended sec. 41 as to bring it into its present form. It cannot, therefore, be denied that the Commonwealth Parliament deliberately confined, so far as it could—unless it deprived State Supreme Courts of all jurisdiction in matters coming within the Federal judicial power—the legal determination of the constitutional distribution of governmental power in Australia to the Australian Court. In my opinion, there are no circumstances in this case which make it competent for me,

(1) (1907) 4 C.L.R., at pp. 1148, 1149.
(2) (1907) 4 C.L.R. 1087.
(3) (1907) 4 C.L.R. 1178.
(4) (1908) A.C. 214; 5 C.L.R. 398.
(5) (1907) 4 C.L.R., at pp. 1114, 1142, 1194.

following my duty as an Australian Judge, to disregard the explicit and prima facie lawful direction of the Australian Parliament in sec. 41 by declining to entertain this matter. It may not in the circumstances be out of place, even at the risk of over-exposition, to further examine the position, so as to make sure of the jurisdiction of this Court to determine the matter. Clearly, in the first place, the Court must, even for the purposes of the day, come to a conclusion as to whether it is a competent Court in relation to the matter in hand. So much must every Court do, unless some competent superior Court has already determined the question. It is clear also that, if the conclusion of a Court rests on a fact which is part of the *res judicanda*, and which it therefore is empowered to try, its conclusion is decisive unless an appeal is given by law. Such cases as *R.* v. *Dayman* (1) and *Colonial Bank of Australasia* v. *Willan* (2) support this view. Where the existence of the jurisdiction depends on a question of law, and that question of law is, as here, *par excellence* the function of the Court to solve, the opinion of the Court upon that question, and consequently upon the jurisdiction, is not to be challenged unless an appeal is given. If, notwithstanding the view taken by this Court as to whether the 24th section of the Victorian Act of 1915, in spite of its generality, applied to Federal military officers by reason of the provisions of the Constitution acting directly or through the medium of a Commonwealth statute, it could be said that this Court was without jurisdiction, it would mean that the decision de facto of this Court was a nullity. If a nullity, any State Court could disregard it and, acting on its own view, determine adversely, subject only to a possible appeal to this Court or to the Privy Council. This would lead to inextricable and most unfortunate consequences. Following the decision of this Court in *Baxter's Case* (3) and *Flint's Case* (4), it seemed to me when we first considered our duty in this matter, and it still so seems, that we were bound to hear it, having full jurisdiction to determine the validity of the sections in question and the consequent effect upon the jurisdiction to determine the merits.

(1) (1857) 7 E. & B. 672, at p. 678.
(2) (1874) L.R. 5 P.C. 417, at p. 443.
(3) (1907) 4 C.L.R. 1087.
(4) (1907) 4 C.L.R. 1178.

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2. *Validity of Secs.* 38A. *to* 41.—For reasons to be gathered from what I have already said, and the cases cited, I entertain no doubt as to the competency of the Commonwealth Parliament to enact the sections referred to. Particularly I would refer to *Commonwealth* v. *Limerick Steamship Co.* (1). Sec. 77 (II.) of the Constitution seems to me too plain to admit of the opposite view. The word "matter" in sec. 76 does not, of course, mean simply the particular constitutional question or other legal question which identifies the litigation with the section. In this it differs essentially from the word "question" in sec. 74. "Matter" means the whole controversy—the matter litigated (see *South Australia* v. *Victoria* (2)). For instance, looking at sec. 75, the "matter" would not necessarily be simply that part of the controversy depending on the construction or effect of a treaty, or that part of the controversy relating to a consul or the Commonwealth. There might be other necessary parties and other essential questions, all of which would be factors constituting the "matter." The controversy is not intended to be decided piecemeal by different tribunals, State and Federal. If, then, the "matter" is once identified as falling under one or other of the specified heads, it is part of the judicial power of the Commonwealth, and may be dealt with as the Commonwealth Parliament has dealt with such matters in the sections under review.

3. *Air Force Act and Motor Car Act.*—The vital question as to the charge laid against McFarlane is this: Is insistence on applying sec. 6 of the *Motor Car Act* to a soldier of the Air Force performing military duty incompatible with the Constitution or the *Air Force Act*? The second ground relied on by the Police Magistrate is in itself sufficient to sustain his decision and dispose of the charge. I assume that, at all events apart from the prohibition in the *Motor Car Act*, the command to McFarlane was lawful and his obedience was lawful. But he was acting *as a soldier*, that is, as a servant of the Crown in right of the Commonwealth (see per Lord *Selborne* in *Dixon* v. *London Small Arms Co.* (3)). The *Motor Car Act* would not, apart from sec. 24, affect servants of the Crown acting officially. This the Parliament of Victoria recognized by sec. 24 in expressly

(1) (1924) 35 C.L.R., 69. at pp. 89, 90. (2) (1911) 12 C.L.R. 667.
(3) (1876) 1 App. Cas., at p. 660.

extending it to Crown officers. But that extension, I entirely agree with the Magistrate, must, having regard to the Federal Constitution, be read as relating only to the privileges of the Crown in right of Victoria, and not as attempting to affect the Crown in right of the Commonwealth. Sec. 52 of the Constitution declares the legislative power of the Commonwealth exclusive in respect of the Department of Naval and Military Defence. The other ground taken by the Police Magistrate is equally sound, namely, that, even if, contrary to the point just dealt with, one can assume the *Motor Car Act*, upon construction, to apply to McFarlane in the circumstances, it is *pro tanto* invalid. And, in my opinion, it is to that extent invalid for two distinct reasons independent of each other. The first is that an enactment expressly or by necessary implication purporting to bind the Crown in right of the Commonwealth in respect of "primary and inalienable functions of the constitutional government" of the Commonwealth—that is, of the King in right of the Commonwealth (see *Coomber* v. *Justices of Berks* (1))—is entirely outside the range of the State Constitution. Those functions were expressly taken from the States and vested *exclusively* in the Commonwealth by the Constitution itself. They are functions that no individual could exercise as a private citizen or otherwise than as representing His Majesty the King. *State Constitutions and parliamentary powers must, by virtue of secs.* 106 *and* 107 *of the Commonwealth Constitution, be read as not extending to powers exclusively vested in the Parliament of the Commonwealth.* The only control of the Crown in respect of those functions rests in the Commonwealth Parliament or, theoretically, in the Imperial Parliament. If that be not correct, the State Parliament by omitting sec. 24 would not affect the Governor of the State in opening the Victorian Parliament, but would penalize the Governor-General as an individual while engaged in representing the King in opening the Commonwealth Parliament. And this, although—except where expresssly stated to the contrary—*for Commonwealth purposes Australia is one undivided territory holding one undivided people and knowing no State boundaries for effectuating its national purposes.* I confess my inability to subscribe to any doctrine that

(1) (1883) 9 App. Cas. 61, at p. 74.

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denies to the King in right of his Commonwealth—his higher right —the common law attributes and prerogatives that admittedly attach to him in right of the States. The fabric of the common law stands behind the words of the Constitution and of every Constitution so far as the written words do not alter it. That is the first reason. The second is the distinct and independent reason depending upon the inconsistency of two concurrently competent sets of enactments on the same field, and governed by sec. 109 of the Constitution. As to the first reason, it is, of course, evident that, had this case arisen in Victoria before Federation, McFarlane would not have been touched by the Act, except for sec. 24. But if so, and if sec. 24 does not apply to the Crown in right of the Commonwealth, by what process of reasoning is he made liable now? The non-application of sec. 24 to the Commonwealth does not destroy the fact that he was acting, not as a private individual, but controlled by law as the representative of the Crown in the performance of a military order. To deny that he was so acting is simply to say that the military order was unlawful because of sec. 6 of the *Motor Car Act*; but that is *petitio principii*. If sec. 6 does not apply to control Commonwealth executive action in relation to defence, there was nothing whatever to make McFarlane's action unlawful. In my opinion, therefore, if sec. 6 be construed as an attempt to control Commonwealth executive action in respect of defence, it is an attempt quite outside the range of State legislative power and bad for that reason. That is quite independent of sec. 109 of the Constitution, which assumes legislative powers on both sides but conflicting in their exercise.

As to sec. 109, the point is that, assuming sec. 6 of the State Act, as applied to the Commonwealth Military Service by sec. 24, to be within the State constitutional power, it comes into competition with the *Air Force Act* and must therefore give way. If the latter Act, either expressly or impliedly, empowers the Commonwealth military authorities at their discretion and upon their own professional judgment as to qualifications to choose their own motor-car drivers or motor-cycle drivers for the purpose of public defence, it is necessarily incompatible with a State law which insists that no one shall be so employed unless his qualifications are approved by

the Chief Commissioner of Police in his absolute discretion. Still further is it incompatible if, as this State Act does, a licence fee is required for the soldier's right to drive. That is not a tax on property, and so the soldier is not protected by sec. 114 of the Constitution. When the two Acts are compared and applied respectively to the subject of defence, the most grotesque consequences follow if in the present case the State Act applies so as to make McFarlane's act of obedience to his superior officer an offence visited with a penalty and possible total disqualification. The charge against him, as will have been noted, is not for negligent or reckless driving, not for exceeding the bounds of strict military duty and doing unnecessary damage, nor for trespass or some other clearly civil wrong outside the fair limits of a soldier's duty. It is simply and solely that he was found, while strictly conforming with his duty, driving a military motor-car belonging to the Crown upon a public highway in Victoria without the permission of the Chief Commissioner of Police. The venue might have been 100 miles from Melbourne, it might have been on the most unfrequented road in Victoria, he may be the most skilful of drivers, he may have been, and the assumption is that he was, driving in the most skilful manner. The offence, if it be an offence, would be the same in each case. The point of the charge is that a soldier must not drive a motor-car or ride a motor-cycle on any public highway in Victoria, as the law now stands, without a permit from the Chief Commissioner of Police. Is the law of Australia, as applicable to this case, so utterly ridiculous as the information in this case asserts it to be? In my opinion, and most unhesitatingly, it is not. To deal with one general observation that at once occurs to the mind, no doubt the State *Motor Car Act* is designed to serve individual protection. But in a far higher degree the *Defence Act* stands for the protection of the whole community. Whatever force the former object carries to the mind, it must give way before the wider and more fundamental necessity of the general security which was the prime impulse of the Constitution, and without which the *Defence Act* itself would be meaningless. I may first complete the conspectus of the *Motor Car Act* in relation to the subject matter of the Air Force. Sec. 4 requires registration of the motor-car itself by the Commissioner

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of Police. If sec. 6 applies, so does sec. 4, which would prevent the Commonwealth using motor-cars and motor-cycles on any public highway under the same penalties as attach to sec. 6. Then sec. 15 empowers the State Executive to regulate even the construction of motor vehicles and their various parts and the conditions under which they may be used. Regulations, when gazetted, have the force of law. Sec. 16 enables the State Governor in Council to prohibit the use of motor-cars altogether on roads where he thinks it especially dangerous. The opinion of the Governor-General as Commander-in-Chief and of the defence authorities counts for nothing, whatever they may think of the necessity from a defence point of view. Since Australia, for defence purposes, is one country, every inch of which is necessary to be under the care and control of the Commonwealth, whose express and exclusive constitutional duty it is to protect every State as well as the people generally, the proposition that the *Motor Car Act* effectively controls the Defence Department, is, to say the least, astonishing.

I now consider the *Air Force Act* 1923, to see whether it is open to that conclusion. The Act consists of only three sections, but they are of the most comprehensive nature. The effective section is the third. Sec. 3 declares in sub-sec. 1: "There shall be an Air Force, to be called the Royal Australian Air Force, which may be *raised, maintained and organized* by the Governor-General *for the defence and protection of the Commonwealth* and shall be part of the Defence Force constituted under the *Defence Act*." Sub-sec. 2 adopts the existing Air Force, raised under the *Defence Act*, and places it under the *Air Force Act*. It says, it "shall be deemed to have been raised under this Act, and the members thereof, without any re-appointment or re-enlistment or the taking of any fresh oath, shall be subject to this Act." Sub-sec. 3 applies the *Defence Act* (except Part XV.) and the regulations thereunder—subject to any regulations made under the *Air Force Act*—to the Air Force. Sub-sec. 4 gives power of disbandment. Sub-sec. 5 excludes the application of the Imperial Army Acts. Though not a word is said as to the force being even an armed force, the broad comprehensiveness of sub-sec. 1 is unmistakable. The terms "raised, maintained and organized" are the parliamentary sanction to do what the *Bill of*

Rights declared, and what every annual Army Act declares, cannot in time of peace be done without parliamentary consent, namely, "the raising or keeping a standing army." History tells us how much that included. The words in an affirmative form were further necessary as regards the Air Force as a permanent force by reason of sec. 31 (2) of the *Defence Act*. How comprehensive is the authority conferred by the *Defence Act*, within the contemplation of Parliament itself, is strikingly evidenced by sec. 7, which declares: "Nothing in this Act shall be taken as an appropriation of any public moneys." If Parliament thought it necessary to insert these negative words, it indicates very clearly that the generality of the affirmative provisions of the Act has been intentionally adopted to confer a discretion limited only by the terms of the Act itself. It is trite law that, in the words of Lord *Selborne* L.C. (*Small* v. *Smith* (1)), "when you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done and against which no express prohibition is found, may and *ought*, prima facie, to follow from the authority for effectuating the main purpose by proper and general means." The word "organize" is in itself of large connotation. It certainly includes planning and creating the structure of the Air Force as an efficient working organism, arranging its order of ranks, appointing its members to their several posts and allotting their respective duties. Reference to the *Oxford Dictionary* will show the general significance of the word, and also that it was used with reference to the Duke of Wellington's "organization" of military establishments.

This power conferred on the Governor-General by sec. 3 (1) as to the *Air Force Act* is in itself, and also by reason of sub-sec. 3, on precisely the same footing as the power contained in sec. 33 of the *Defence Act* 1903-1918. Besides the regulations adopted by sub-sec. 3, regulations have been made under the *Air Force Act* 1923 itself (Statutory Rules 1923, No. 154). There are two regulations that deserve special reference. One is reg. 488 which, as amended, says:—"It is to be borne in mind that a soldier is not only a soldier, but a citizen also, and as such is subject to the civil as well as to the

(1) (1884) 10 App. Cas. 119, at p. 129.

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military law. Offences of a military character are enumerated in the Act and Regulations and the Army Act." The latter reference to the Army Act is of course inapplicable to the Air Force. The other regulation is reg. 494, by which it is provided :—" When not on active service every person, subject to military law, who commits any of the following offences, that is to say . . . (xii.) disobeys any lawful command given by his superior officer . . . shall on conviction by Court Martial, or by a civil Court, be liable to suffer one or more of the penalties set forth in regulation 495." Those penalties are severe, and include imprisonment with hard labour up to three months and discharge with ignominy.

These two regulations, reg. 488 and reg. 494 (xii.), should be considered together. Each has a history. The admonition in reg. 488 is not a novel enactment, but is the restatement of a fundamental principle of British jurisprudence. Sir *James Mansfield* C.J. in *Burdett* v. *Abbot* (1) said that because men are soldiers they do not cease to be citizens, but have all the rights and duties of other citizens. But the same may be said of every public functionary, as a Judge, a Minister of the Crown, a member of Parliament, counsel or witness in a Court of law. They have each a special status which for the due performance of their public functions carries with it special duties, rights and immunities that are outside the scope of ordinary citizenship. It would be illegal to do anything to weaken their obligation or their power to render the necessary public service (*Wood* v. *Victorian Pier and Pavilion (Colwyn Bay) Co.* (2)). But, taking the case of a Federal Judge or a Commonwealth member of Parliament, can it be seriously contended that in relation to the actual performance of their official duties they are—simply because they are also citizens—bound to conform to State statutory directions ? I hold without reservation that not even prima facie have they any obligation to observe State law *in the performance of their Commonwealth duties.* And I hold that, even supposing there is not a syllable in any Commonwealth Act which directly or indirectly relieves them of such an obligation. Once the assumption is made that their act is one of actual performance of Commonwealth official duty required by the Commonwealth law, then any State law which

(1) (1812) 4 Taunt. 401, at p. 449. (2) (1913) 29 T.L.R. 317, at p. 318.

intervenes and prescribes any limitation or qualification or condition on the performance of that duty is necessarily inconsistent with the Constitution or some Commonwealth law made under it. If a State law prescribed that no person should write notes in a book unless it had red covers, then, though there is not a word to the contrary in any Federal law, a Federal Judge could, when acting as such, disregard it. But, if Judges and members of Parliament are by the very nature of their duties to be left to their free exercise, unfettered by State legislation, how can that be denied to the Commonwealth Army and Navy created to preserve the existence of the country? No distinction can be made because Judges perform their duties in Court and legislators in Parliament. Soldiers perform their official duty necessarily on the highways of the country as well as in barracks. The duty of a soldier is just as appropriately performed on a highway as that of a policeman in a public street. The point is: Is the Commonwealth official actually engaged in Commonwealth service required or authorized by Commonwealth law? There is *one extremely important distinction between the law of England and the law of Australia*, and, if this be not carefully observed and given effect to, there is likely to be egregious error through a mistaken analogy. In England, the fact that a soldier is also a citizen has this result: that he must obey the law of the country as to citizenship just as much as the law as to military service. It is the same system or body of law which controls him in all his actions. Every citizen is compellable to assist in maintaining order. A soldier is a disciplined and armed citizen, and, if the one body of law prescribes his military character and also—though it may be in another chapter of the same body of law—requires him to aid in maintaining civil order according to the rules of civil law, he must obey whatever the law says. The law regulating his duties of ordinary citizenship, if in conflict with the military law and if later, must control his duties as a soldier. The military law may be read as subject to the law prescribing his duties as a civilian. It is in fact the one system of law—a unitary system of government—and the principle of jurisprudence referred to is applied to the statutory law. It is on this basis that the English doctrine stands. And so it was in Australia before Federation. But under our Constitution an entirely different rule must be

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observed. Defence is in Commonwealth hands; ordinary citizenship in State hands. Neither has the right to prescribe on the field of the other. If the fields overlap, the Constitution gives priority to the Commonwealth regulation. But Commonwealth defence can never be abridged by State law. No obligation as a civilian can exist in conflict with a man's duties as a soldier. The Constitution by sec. 119 says that "the Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence." *A soldier acting for this purpose is acting not in his capacity of State citizen but as a soldier of the Commonwealth.* It is therefore not the case of one body of law prescribed by the same Parliament and, therefore, speaking with but one voice as to one event, but the case of two bodies of law prescribed by different Parliaments and the will of one to be necessarily fulfilled as to a given subject whether the other speaks on the matter or not. In other words, military commands, lawful by Commonwealth law, are not susceptible of denial or abridgment by State law as to citizenship. All the observations of English jurists on this subject have to meet this fundamental distinction.

We have then to see what is the status of a soldier, since that is the dominant factor. Now, the status of a soldier is his relation to the Australian community as a whole, and as a component part of the particular organism authorized by and created under the relevant *Defence Act.* That status is assumed by enlistment, and its obligations are measured by the requirements of Federal law. It was well said by *Brewer* J., for the Supreme Court of the United States, in *In re Grimley* (1):—"By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties." In *United States* v. *Union Pacific Railroad Co.* (2) *Grimley's Case* was cited with approval, and it was said: "It is the actual enlistment, the oath of allegiance, that changes the status from a civilian to soldier." This change of status from civilian to soldier is at the root of this part of the case. It involves military service

(1) (1890) 137 U.S. 147, at p. 152. (2) (1919) 249 U.S. 354, at p. 359.

under the Crown represented by the Commonwealth. Nothing but the competent legislature can sanction interference with the service his status demands. The State Parliament is not the competent legislature in respect of Commonwealth functions either in respect of main or incidental powers. I cannot for a moment assent, for instance, that the *Motor Car Act* prevents the Postmaster-General from employing motor-drivers tested by his own departmental officers, without the necessity of approval by the State Commissioner of Police, to collect His Majesty's mails and convey them from post office to post office or to the railways or ship for despatch. There is nothing in the Post Office Act, any more than in the *Defence Act*, expressly to touch the operation of the *Motor Car Act*.

There are several State Acts prescribing that it is unlawful to carry or possess firearms without a State licence. True, dating from pre-federation days, one exception is in favour of naval and military forces. But could any sane person contend—even though nothing is said on the subject in the Defence Acts—that the right of the Commonwealth Army and Navy to carry arms depends to-day on the permission of the States? Even if State Acts stood with the prohibition unabridged, who would be bold enough to assert that every soldier and sailor who in the course of his public duty carried a rifle or a revolver in Australia was an offender and liable to punishment for breach of State law? But that is the inescapable consequence of supporting the information in this case. I give one actual instance precisely analogous to the present case. The recent Victorian *Firearms Act* 1921, sec. 23 (1), enacts that "a person shall not have in his possession any pistol (whether the same first came or comes into his possession before or after the commencement of this Act) unless the same is registered in his name in the prescribed manner and the registration is in force." The registration is to be "in the prescribed manner," which means in accordance with whatever regulation the State Governor in Council makes (sec. 40). Then, the Chief Commissioner of Police is to be satisfied that the applicant is a person who can be permitted to have in his possession a pistol without danger to the public safety or to the peace, and the applicant is to furnish the Commissioner with whatever particulars may be prescribed. Registration lasts

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for three years, and then must be renewed. No exception is made in respect of this *registration* requirement in favour of Naval or Military or Air Forces. This is all the more significant since special exemption is given to these Forces from other provisions of the Act, as *carrying* without a *permit* (sec. 25), the exemption being expressly limited to *that section*. A policeman may under sec. 26 demand production of the certificate of registration of any person whom he believes to be carrying an unregistered pistol (except certain cases of antiques mentioned in the Act). If a certificate of registration is not produced, then the policeman may seize and detain the pistol. By sec. 28 the penalty for contravening sec. 23 (1) is up to £50 and imprisonment for three months. This provision of State law stands in no other position *qua* a soldier in the Commonwealth forces, than does sec. 6 of the *Motor Car Act*. But who can deny the grotesqueness of applying it to the military forces? If McFarlane be an offender, there must be in the Australian Army and Navy many thousands of callous offenders against the *Firearms Act* awaiting retribution. The possibilities of the *Firearms Act* are, however, not yet exhausted. Sec. 32 makes it unlawful for any person, without the authority of His Majesty the King or of the Governor-in-Council or a Commonwealth Act relating to the Commonwealth Forces, to manufacture, sell, carry or have in his possession any weapon of whatever description designed for the discharge of any noxious liquid, noxious gas or other noxious thing. The penalties are, of course, necessarily heavy. But, apart from the general implication I have referred to, how is the manufacture or possession of such a weapon authorized by the Commonwealth Acts? Again there would be a punishable contravention of State law on the theory of McFarlane's culpability.

It is common knowledge that aeroplanes and their adjuncts, petrol and gear, are as vital to the defence of a country as are rifles—in some circumstances more so. Motor-cars in modern tactics are essential adjuncts in military operations. A regiment on the march may be much better informed, and more quickly informed, of what is ahead of them, if preceded by an air force using motor transport for reconnaissance purposes. Defence, it must be remembered, is not confined to active warfare. Training is an essential part of it.

To put into the field men untrained or inadequately trained, except in dire necessity, is very like murder. The use of the best equipment and of the best and most perfect accessories is, in my opinion, well within the comprehensive terms in which Parliament has legislated.

Intimately bound up with the principle of the relation of military status and civilian citizenship is reg. 494 (xii.), which involves both the soldier himself and his superior officers. Substantially, that form of words took shape in the *Mutiny Act* of 1749 as the result of great discussion and has continued. The lawfulness of a command must necessarily depend upon the relevant circumstances at the time it is given. But in this case the facts give rise to no discussion, and McFarlane, as well as his superior officer, must be assumed to have known the law. Judges may err as to the law with impunity; a soldier placed between the Scylla of military punishment and the Charybdis of civil penalties may have to suffer if he mistakes his legal duty. But let us ask ourselves, in order to test the legality of the command to McFarlane, "what ought he in law to have done?" The law, that is, the resultant law, did not speak to him with a double tongue. It required him to adopt one course, and one course only—either to obey or to refuse. Could he legally have said: "The law requires a licence from the Police Commissioner and, as I have not that and he may never give one, I must refuse to break the law"? Had he been ordered to shoot down an unoffending bystander, the law would have required him to refuse, because that would have been transparently outside a lawful command. And so the question is: Should he have refused on the ground that to comply was illegal? To maintain that he broke the law by obedience is to contend that he would have observed it by a refusal to comply. But to maintain that and at the same time to preserve the Defence Force as efficiently organized under the National Constitution for the protection of the Commonwealth seem to me irreconcilable propositions. The question is which of the two prevails? The answer is not difficult. It is common knowledge that the original and an ever-active stimulus to create a federated Australia was the recognized necessity of placing the national defence of this continent unreservedly in the hands of one central authority for effective and uniform treatment. The very nature of the subject demands

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that complete power shall rest in the one authority. Uniformity is essential. Instant execution of protective orders may be vital. The law we are dealing with must be the same in war as well as in peace. Varying State regulations operating to confuse, delay and hamper, and perhaps prevent, operations considered essential by those having the sole responsibility for the defence of the nation (*The Zamora* (1)) are necessarily impediments and might be critically dangerous.

It was suggested in argument that a soldier might, if unrestrained by traffic regulations, dash into traffic regardless of property and life. That is a double-edged objection. So might a policeman in pursuit of a criminal, or so might a fire brigade rushing to the scene of a fire. But the objection, which is of the ever-recurring type, has its standing answer, namely, that possibility of abuse is no argument against the existence of a power. With the known safeguards of constitutional and civil government, the words of Lord *Dunedin* in *R.* v. *Halliday* (2) are apposite: "The danger of abuse is theoretically present; practically, as things exist, it is in my opinion absent." I am fully aware, as already mentioned, that it is urged that, as everything depends on the construction of the Commonwealth Acts, Parliament may so alter its legislation as to cover the present case. If it were a simple matter to free Commonwealth administration from State interference by any general form of express enactment, I should not, apart from the question of exclusive powers, bestow so much attention on the present appeal. But is it so simple? In the first place, the Commonwealth Parliament has no power to repeal a State enactment operating on a State field of legislation (see *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (3)). That is solely within the province of the State Parliament. All that the Commonwealth Parliament so far as sec. 109 is concerned can do, as it seems to me, is to legislate on its own field in such a way that, whether from its express terms or the legitimate implication of the language and scheme adopted, its enactment so occupies that field that the operation of the State law in question would be incompatible. Implication is as powerful

(1) (1916) 2 A.C. 77, at p. 107.
(2) (1917) A.C. 260, at p. 271.
(3) (1896) A.C. 348.

for this purpose as explication. It is obviously impossible for the Commonwealth Parliament to search out and collect all the various existing State regulations interfering with its departmental operations and severally legislate in some way to the contrary, and then to follow day by day new State regulations by Federal laws specially directed to them and counteracting them. But, if this be conceded, what can be found wanting in the necessary implication from the present Defence Acts? I find it impossible to attribute to Parliament, when it framed its bold comprehensive authorization to the Executive on this great subject, that blindness or inattention to the high considerations mentioned which I should feel forced to assume if those considerations were left unprovided for. For instance, the contrary view would lead to this situation:—On some important occasion a despatch-rider, we will suppose, carrying a confidential order, is sent on a motor-cycle from Sydney to Adelaide. Can anyone believe it was *the intention of Parliament* (for that is the problem), by using the unlimited terms found in its Acts, that, before the soldier could start a step on his mission, he must get permission from the New South Wales State motor authority, a permission which might be refused? Supposing that to be obtained, then when Albury is reached the rider, under penalty like McFarlane, must not dare to travel on the broad national road into Wodonga and thence to Melbourne without a similar permission from the Victorian Commissioner of Police in Melbourne. But, when secured, that is necessarily valid only as far as Serviceton. Again, the South Australian authorities must be approached for similar permission. At last, if fortunate enough either to receive the necessary permission or, if not, then to elude the vigilance of the State police, the confidential messenger of the Defence Force is able triumphantly to reach his destination. I am not able to subscribe to such an interpretation of the law.

Sec. 70 of the *Defence Act* ought to be referred to, as it was specially debated with respect to the comprehensiveness of the statute. It is not unique. In substance it is found also in the *Post and Telegraph Act*, in sec. 13. When carefully read, so far from tending to limit Commonwealth freedom of action that section supports it. The section frees the Department from tolls even under "Acts"—that

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is, Commonwealth Acts—and even includes State Acts and otherwise. But it distinctly assumes the freedom of defence vehicles with arms or prisoners to pass unmolested, and certainly with no idea that the driver is in any circumstances thereby offending against the law.

I take my stand, then, in this case, which is really a test case for much Commonwealth legislation, on the exclusive powers of the Commonwealth in the Department of Defence and on the necessary implication of the Acts mentioned and of the Appropriation Acts, and hold that the orders McFarlane received were lawful commands from a superior officer, which he was bound to obey, and that the 6th section of the *Motor Car Act* 1915 was as to him in those circumstances invalid by secs. 106, 107 and 109 of the Constitution.

HIGGINS J. I have read the judgment of the Chief Justice, and I agree with him in the opinions—(a) that sec. 40A of the *Judiciary Act* is within the powers granted by the Constitution to the Federal Parliament (chap. III., sec. 77); (b) that sec. 6 of the *Motor Car Act* 1915 of Victoria is binding on the defendant, as there is no Federal Act to the contrary; (c) that the defendant was guilty of an offence under the Victorian Act in driving the motor-car without a licence—even though he was a military man acting under military orders when passing through the streets; (d) that the order nisi for review should be made absolute. I do not propose to add anything to that which my learned brothers have said as to the circumstances under which we proceeded with this case in its due order on our list. To proceed was our duty.

The Police Magistrate considered that the principles laid down in *D'Emden* v. *Pedder* (1) applied to this case. In that case, however, the Court had before it what it regarded as two inconsistent Acts, State and Federal—a State Act which forbade the giving of any receipt without a State stamp, and a Federal Act which required a receipt to be given even if unstamped.

Some of the dicta in *D'Emden* v. *Pedder* (1), however, cannot be regarded as law, since the decision in the *Engineers' Case* (2). The Police Magistrate says: "Sec. 6 of the *Motor Car Act* 1915, which requires drivers of motor-cars on public highways to hold

(1) (1904) 1 C.L.R. 91. (2) (1920) 28 C.L.R. 129.

licences, would, . . . if it were held to apply to men carrying out their duties as servants of the Defence Department, be a fettering or interference with the executive powers of that Department." Dicta used by the Court in *D'Emden* v. *Pedder* (1) favour the view that a general State law, applying to all persons using the streets, a law designed for the safety of the public and making no discrimination, need not be obeyed by the Federal officer. This would involve that a Federal officer—whether of the Customs, or of the Post Office, or of the Defence Department, &c.—using the street in pursuance of his duty, may drive on the wrong side, at a speed of 60 miles per hour, and may disregard the policeman directing the traffic. Such a grotesque result of the Constitution must startle the unsophisticated. It was held also on the same principle that a Federal officer is not liable to State income tax although he gets the same benefit from the State's activities as others (*Deakin* v. *Webb* (2); *Baxter* v. *Commissioners of Taxation* (*N.S.W.*) (3)). It was held that Federal properties are exempt from municipal rates, although they enjoy the benefit of the municipal services (*Sydney Municipal Council* v. *Commonwealth* (4)). It was held that the Commonwealth is entitled to have its transfers of land registered under the State Act without paying the State any stamp duty on transfers (*Commonwealth* v. *New South Wales* (5)). It was held that a Commonwealth Act which applied the provisions of the Conciliation Act to employer and employees in State undertakings was invalid (*Railway Servants' Case* (6)). It was held that a night-soil contractor is entitled, if his contract be with the Commonwealth, to remove night-soil from Commonwealth premises without taking out the licence required by the municipality (*Roberts* v. *Ahern* (7)). Without prejudging these and other similar cases, should the same questions arise again, I may say that the questions will have to be considered now in the light of the *Engineers' Case* (8). This *Engineers' Case*, indeed, overruled *Deakin* v. *Webb* and the *Railway Servants' Case*.

(1) (1904) 1 C.L.R. 91.
(2) (1904) 1 C.L.R. 585.
(3) (1907) 4 C.L.R. 1087.
(4) (1904) 1 C.L.R. 208.
(5) (1906) 3 C.L.R. 807.
(6) (1906) 4 C.L.R. 488.
(7) (1904) 1 C.L.R. 406.
(8) (1920) 28 C.L.R. 129.

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All these decisions are based ultimately on a decision of the Supreme Court of the United States in the case of *McCulloch* v. *Maryland* (1). In that case there was a clear attempt on the part of the legislature of Maryland to injure, to destroy by taxation, the newly-created National Bank of the United States; and, in place of deciding that the National Congress could by Act forbid the payment of the tax—isolate the Bank, as it could isolate a fortress, from State attacks—the Supreme Court propounded the doctrine that *all* taxation of a Federal agency was illegal. Subsequently the same Court propounded a correlative right of a State to be immune from Federal taxation. But it may now be taken to be established in Australia, as well as in England, that this doctrine, in its extreme form, will not be accepted. As the Chief Justice has pointed out, if and so far as a member of the Defence Force ought, in the opinion of the Federal Parliament, to be exempted from the operation of the State laws, that Parliament has only to say so by an Act; and the Federal Act prevails over any State Act so far as they are inconsistent (Constitution, sec. 109). Great care will, of course, have to be taken in framing such a Federal Act; as an Act which goes too far in excluding State Acts will produce much injustice and confusion.

The view taken by this Court in the *Engineers' Case* (2), and in this case as its corollary, will no doubt have far-reaching—and, if I am entitled to say so, wholesome—reactions. The decisions based on *McCulloch* v. *Maryland* (1) have never been undisputed; and the judgment of the present Chief Justice cannot therefore be accused of any startling novelty. Twenty or twenty-one years ago the decision that a Victorian, employed in the Post Office, who paid Victorian income tax before Federation, had not to pay it after Federation, was much canvassed among lawyers and in the public press; and men wanted to know where this principle was to be found in the new Constitution. I was at the Bar at the time; and it may not be amiss for me to mention (for I can speak more definitely as to my own acts than as to the acts of others), that I ventured to express my doubt as to the law laid down in the Income Tax Case, in the *Commonwealth Law Review*, vol. II., 1904-1905, p. 97; and when

(1) (1819) 4 Wheat. 316.

(2) (1920) 28 C.L.R. 129.

I came to the Bench, I freely expressed my doubt (*Baxter* v. *Commissioners of Taxation (N.S.W.)* (1)). Subsequently, from time to time, I regarded it as my duty to reiterate my doubt on suitable occasions, and to express my hope that the cases based on *McCulloch* v. *Maryland* (2) would be reconsidered (see, e.g., *Steel Rails Case* (3); *Wheat Lumpers' Case* (4); *Engineers' Case* (5)). Moreover, we have the support of certain decisions of the Judicial Committee of the Privy Council as to similar problems arising in Canada. In *Bank of Toronto* v. *Lambe* (6) a direct tax was imposed by a Province, under sec. 92 of the Canadian Constitution, upon banks which carried on business within the Province, and it was held to be enforceable against a bank incorporated by Act of the Parliament of Canada. It was urged that the Canadian Parliament had powers under sec. 91, and that the Parliament could not exercise these powers freely if Canadian banks were to be treated as being subject to taxation by the provincial legislature; and *McCulloch* v. *Maryland* was cited in support. The Judicial Committee refused to apply to the Canadian Constitution the principles of that case (7):—"The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures under sec. 92, which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under sec. 91. . . . If they" (their Lordships) "find that on the due construction of the Act a legislative power falls within sec. 92, it would be quite wrong of them to deny its existence because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."

This position has been adhered to consistently in a series of recent interesting cases—*John Deere Plow Co.* v. *Wharton* (8); *Great West Saddlery Co.* v. *The King* (9); *Caron* v. *The King* (10). In Canada, the powers given to the Dominion Parliament under sec. 91 and the powers given to the provincial legislatures by sec. 92 are mutually

(1) (1907) 4 C.L.R. 1087.
(2) (1819) 4 Wheat. 316.
(3) (1908) 5 C.L.R. 818, at p. 852.
(4) (1919) 26 C.L.R. 460, at pp. 471, 472.
(5) (1920) 28 C.L.R. 129.
(6) (1887) 12 App. Cas. 575.
(7) (1887) 12 App. Cas., at p. 587.
(8) (1915) A.C. 330.
(9) (1921) 2 A.C. 91.
(10) (1924) A.C. 999.

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exclusive; but, by the concluding words of sec. 91, "any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces." The Judicial Committee held, in *Great West Saddlery Co.* v. *The King* (1), that a company incorporated by the Dominion, with power to trade in any Province, may be subject to provincial laws of general application, such as laws imposing taxes, or relating to mortmain, or *requiring licences* for certain purposes; but a provincial legislature cannot validly enact for the enforcement of such laws sanctions which would sterilize or destroy the capacities and powers which the Dominion has conferred. "It is only where there is actual inconsistency that the effect of the concluding words of sec. 91 can be invoked" (2). In *Caron* v. *The King* (3) it was held that a Minister of the Government of a Province was liable under the Dominion Income Tax Acts to pay the tax even in respect of his ministerial salary and "sessional indemnity" as a member of the Legislature. In the same case the Judicial Committee approved of the Canadian case of *Abbott* v. *City of St. John* (4), in which it was held, *è converso*, that the Provinces had a right to impose income tax upon Dominion officials resident within them in respect of their official salaries. These words of *Davies* J. in that case are quoted by the Judicial Committee with approval (5):—"The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that, when exercised, the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents. . . . It is said the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and, in this way, paralyze the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials but for a general undiscriminatory tax upon the incomes of residents and that Dominion officials could only be taxed upon their

(1) (1921) 2 A.C. 91.
(2) (1921) 2 A.C., at p. 117.
(3) (1924) A.C. 999.
(4) (1908) 40 Can. S.C.R. 597.
(5) (1924) A.C., at pp. 1005, 1006.

incomes in the same ratio and proportion as other residents. At any rate, if, under the guise of exercising power of taxation, confiscation of a substantial part of official and other salaries were attempted it would be then time enough to consider the question and not to assume beforehand such a suggested misuse of the power."

The Judicial Committee laid great stress on the fact that the Income Tax Acts were not discriminating statutes, but statutes for imposing on all citizens contributions according to their means, irrespective of the source. There seems to be no doubt, therefore, that the Judicial Committee would treat this undiscriminating law for the protection of the public in the streets as binding on Federal servants, if *on its true construction* it applies to them.

The only question covered by the only ground for the appeal, as stated in the order nisi, is, does the law apply to Federal servants? The precise words are: "That on the evidence the said Court of Petty Sessions was wrong in holding that sec. 6 of the *Motor Car Act* 1915 did not apply to the defendant." But this ground naturally follows the line of reasoning of the Police Magistrate, who, after referring to *D'Emden* v. *Pedder* (1) and subsequent similar cases, said that sec. 6 would "*if it were held to apply* to men carrying out their duties as servants of the Defence Department, be a fettering or interference with the executive powers of that Department." It is clear that the Magistrate decided that sec. 6 did not apply on the constitutional ground; and this ground, for the reasons which I have stated, is no longer tenable. The Police Magistrate referred to sec. 24 of the same Act, and said it was limited to those servants of the Crown who are controlled by the Government of Victoria. The words, taken from the English *Motor Car Act* 1903, sec. 16, are these: "It is hereby declared that this Act applies to persons in the service of the Crown as well as to other persons." There is no reference to sec. 24 in the order nisi; but I shall assume that the effect of sec. 24 may be treated as included under the question as to the effect of sec. 6. In my opinion, sec. 6 would apply to the defendant even if there were no sec. 24. Such a section as sec. 24 is often necessary, or at least expedient, where the Legislature wants to affect servants of the Crown by an Act; because, prima facie, "the law made by

(1) (1904) 1 C.L.R. 91.

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the Crown, with the assent of Lords and Commons, is made for subjects and not for the Crown" (*Attorney-General* v. *Donaldson* (1)). For this reason, it was held, that the British *Locomotives Act* 1865, regulating speed on highways, was not binding as to a locomotive owned by the Crown and driven by a servant of the Crown on Crown service (*Cooper* v. *Hawkins* (2)). This decision was given on 15th July 1903; and in the Act amending the *Locomotives Act*, 14th August 1903, and dealing for the first time specifically with motor-cars, this sec. 16 was included. The position in England was simple; for there there is no federation, and there is no distinction between the King in his Federal capacity and the King in his State capacity; here there is the distinction. The King in his State capacity is presumed, prima facie, not to mean to bind himself; and it is generally expedient to use express words in a State Act in order to bind him and his State servants. But in a State Act no such presumption arises as to Federal servants—servants of the King in his Federal capacity; and where there is no such presumption, there is no need for express words. The Act is passed by the State Legislature within its powers, for the regulation of motor traffic in the highways; and for that regulation to be effective *all* the traffic must be bound; and all the traffic is bound unless the Federal Parliament, consisting of the King, Senate and House of Representatives (Constitution, sec. 1), enact within its powers some Act, or regulation under an Act, to the contrary effect, for servants of Federal Departments. So far as the laws are inconsistent, the Federal Act prevails (sec. 109). Sec. 24 merely gets rid of the presumption that the King in his State capacity did not mean to bind himself; it leaves the universality of the prohibition in sec. 6 as it was—"*no person* shall drive a motor-car upon any public highway without being licensed for that purpose." In the converse case, where the State Government claimed exemption from import duty for wire-netting which it had imported, urging the rule that the Crown was not bound except by express words, it was held by all the Judges of this Court that that rule in a Commonwealth Act applies to the King as head of the Commonwealth Government, not to the King as head of the State Government (*R.* v. *Sutton* (3)).

(1) (1842) 10 M. & W. 117, at p. 124.
(2) (1904) 2 K.B. 164.
(3) (1908) 5 C.L.R. 789, at pp. 797, 801, 806, 814. 816-818.

If then, the rule be excluded from application, there can be no doubt that, as a matter of ordinary grammatical construction, it is impossible to find in this universal negative, "no person," any exception in favour of Federal servants. The intention of the Victorian Legislature is clear; and that intention must be carried out unless and until the Commonwealth Parliament say not.

The result of this case, if the view which my learned colleagues the Chief Justice and *Starke* J., and myself, have expressed be adopted, will be to make it clear that a soldier is also a citizen and must obey the laws of the State in which he is, as well as the Federal laws. There is nothing in what I have said inconsistent with the doctrine that the Crown, through all the British Dominions, is one and indivisible. The Crown is one and indivisible; but the Crown acting with the advice and consent of the Australian Federal Parliament is distinct in aspect and function from the Crown acting with the advice and consent of the State Legislature, and distinct from the Crown acting with the advice and consent of the British Parliament. Perhaps, if we must bring the position within recognized legal categories, we may say that the Dominion and State Parliaments are distinct agencies of the Crown; and when the State agency legislates, it had better say expressly—as the law stands—that it means to bind itself, if such be the intention.

In my opinion, the Court of Petty Sessions was wrong in its decision, and the order nisi should be made absolute.

RICH J. This case comes to us via the Supreme Court of Victoria under the provisions of sec. 40A of the *Judiciary Act*. But for the fact that the Privy Council on 11th May 1925 had granted to the prosecutor special leave to appeal from the course taken by the Supreme Court in refusing to proceed with the appeal by the prosecutor, this would have been an ordinary case. This Court would have entertained and decided it without question unless its jurisdiction was denied, in which case the objection would have been considered and dealt with. Having been informed of the special leave, this Court thought it was bound to proceed, being already seised of the case and having regard to its constitutional duty. Perusal of the notes of the proceedings before the Privy Council

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leads me to observe that that proceeding now will be actually in conformity with the wishes of the Board. Treating the point of jurisdiction to entertain the matter as if it were formally questioned before us, I am of opinion that the effect of the *Judiciary Act* and the Commonwealth Constitution, especially sec. 74, is to confer exclusive jurisdiction on this Court, in the events that have happened, to hear and determine this case.

The next question is that which the Magistrate had before him, namely, should the soldier be convicted under the Victorian *Motor Car Act* 1915 for driving a motor-car on a public highway without complying with the requirements of that Act? The Police Magistrate dismissed the case on two grounds—(1) that on its construction the statute did not apply to the defendant when acting in his character of soldier, and (2) that, assuming it even expressly applied to him in that character, it would have been so far inoperative. The first point does not depend on any doubt as to verbiage. It depends entirely on constitutional law. That constitutional law goes back at last to a question whether the State Parliament can validly regulate the official duties of Commonwealth officials. That being a necessary step in the reasoning as to construction, there is involved a constitutional question *inter se* between Commonwealth and State whichever answer is given to the question.

The second question, as to whether the provision is valid, of course involves such a question whatever answer is given. The Supreme Court, I may observe in passing, was therefore bound to hold its hand according to prior decisions of this Court and according to my own present view. This Court consequently cannot remit the case to the Supreme Court under any circumstances, whatever conclusion it comes to on the subject matter of the charge. That clears away, so to speak, the preliminary obstacles to our deciding the subject matter of the information.

I have read the judgment of my brother *Isaacs*, and I agree with his reasons for thinking the charge was rightly dismissed. In my opinion the Magistrate was right on both grounds taken by him. I may compress the reasoning in this way:—The Defence Acts are, except where specially restricted, couched in the broadest

terms, which leave all necessary details for Commonwealth administration. Either there is power under those Acts to use motor-cars or there is not. If there is not, the order was unlawful. If there is power, it was lawful by Commonwealth law. But, if it was lawful by Commonwealth law, any State Act purporting to say it was unlawful is necessarily in collision with the Commonwealth law. If in collision, sec. 109 of the Constitution is conclusive and makes the State Act to that extent invalid. Moreover, even apart from any special provision of Commonwealth law, I am unable to see how a State law can validly dictate to the Commonwealth in what manner or under what conditions it is to perform the executive functions expressly and exclusively committed to it by the Constitution. As I am unable to accept the argument that it is unlawful by Commonwealth law to use motor-cars for military purposes, it follows that the State law is not applicable and the result is as I have stated.

STARKE J. The defendant, Thomas McFarlane, was charged before the Court of Petty Sessions at Melbourne with a contravention of sec. 6 of the *Motor Car Act* 1915 (Vict.). That section provides that "no person shall drive a motor-car upon any public highway without being licensed for that purpose." It was not disputed by the defendant that he drove a motor-car on a public highway without being licensed for that purpose. But it was proved that he was a member of the Royal Australian Air Force, which is part of the Defence Force of Australia, and that he was driving the car in the course of his duties as a member of the Air Force and pursuant to the orders of an officer thereof. Consequently, it was contended that the defendant, as an officer of the Defence Force, was immune from the State law, either because the *Motor Car Act*, on its proper construction, did not extend to him or because that Act was invalid and inoperative to the extent that it fettered, interfered with or controlled the performance by the defendant of his duties as an officer of the Commonwealth. These contentions were upheld and the information dismissed. An order nisi to review the decision was granted by the Supreme Court of Victoria and made returnable before the Full Court. But, on this order coming on for hearing,

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the order nisi was endorsed as follows: "On a review of the proceedings brought before the Court and having regard to sec. 40A of the *Judiciary Act* the Court does not propose to proceed further." The matter was, by virtue of the *Judiciary Act*, sec. 40A, and without order, thus treated as removed to this Court. All the relevant documents were, pursuant to sec. 40A, sub-sec. 2, transmitted to this Court, the parties proceeded to prepare a transcript of the record, and on 6th May 1925 the matter was listed for hearing, as described by the Chief Justice. On 11th May the Judicial Committee granted special leave to appeal from the refusal of the Supreme Court to proceed with the hearing of the order nisi.

The shorthand notes of the argument before the Committee are before us, but not the formal Order in Council issued upon their Lordships' advice. It is doubtful, I think, if the Committee appreciated the fact that no order has been made by the Supreme Court. Their Lordships, however dealt with the case on the basis that the Supreme Court had wrongly declined jurisdiction: that assumes a decision of some sort by the Supreme Court, or leave to appeal would not, I apprehend, have been given (see *In re Muir* (1), *In re Assignees of Manning* (2), *In re Whitfield* (3) and the observations made in *Colonial Bank* v. *Warden* (4); cf. *Hurrish Chunder Chowdry* v. *Kali Sundari Debia* (5)).

Should this Court proceed with the matter at all in view of the Order in Council made on the advice of the Judicial Committee? It was in point of fact seised of the case before the Order was made. But that is relatively unimportant, and at best merely a matter of comity as between the two tribunals. This Court might well, I think, defer to the Judicial Committee, if that were all that was involved in the present case. The Supreme Court, however, refused to proceed, in view of the provisions of sec. 40A of the *Judiciary Act*: that section provides that "when, in any cause pending in the Supreme Court of a State, there arises any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional

(1) (1839) 3 Moo. P.C.C. 150.
(2) (1840) 3 Moo. P.C.C. 154.
(3) (1845) 5 Moo. P.C.C. 157.
(4) (1846) 5 Moo. P.C.C. 340, at pp. 348 et seqq.
(5) (1882) L.R. 10 Ind. App. 4.

powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be by virtue of this Act, and without any order of the High Court, removed to the High Court." The intention of the Parliament, in matters on which questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States or of the States *inter se* or in which Federal jurisdiction is involved (*Judiciary Act* sec. 39 (2)), is clear and distinct: it is emphatically to this Court that these questions must be brought, under the laws made by the Parliament. And it is not for this Court to abdicate its functions or to refuse a jurisdiction intended by the Parliament to be exercised by it (see *Flint* v. *Webb* (1)). But, if the Court is to exercise that jurisdiction in the present case, then it must be satisfied that the case falls within the terms of sec. 40A, and also, of course, that the section is within the authority of the Parliament of the Commonwealth. The proceedings by way of order nisi to review constituted " a cause pending in the Supreme Court " of the State of Victoria within the opening words of sec. 40A (see *Hudson's Case* (2)). But did there arise any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States ?

If the cause can be decided without the determination of any such question, then sec. 40A does not withdraw the cause from the Supreme Court or remove it into this Court. But if the cause cannot be decided without the determination of a question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, then sec. 40A operates to withdraw it wholly from the Supreme Court and remove it to this Court (see *In re Drew* (3) ; *Attorney General for the Commonwealth* v. *Balding* (4); *R.* v. *Maryborough Licensing Court* ; *Ex parte Webster & Co.* (5)). If the Magistrate was right in his opinion that sec. 6 of the *Motor Car Act* 1915 is limited to those servants of the Crown who were controlled by the Government of Victoria, no constitutional question arises and the case is outside the provisions of sec. 40A. But if he was wrong, then did the other grounds of immunity raised by the defendant

(1) (1907) 4 C.L.R. 1178.
(2) (1922-23) 32 C.L.R. 413.
(3) (1919) V.L.R. 600 ; 41 A.L.T. 65.
(4) (1920) 27 C.L.R. 395.
(5) (1919) 27 C.L.R. 249.

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involve any question as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States ? The *Motor Car Act* was undoubtedly enacted pursuant to the constitutional powers of the State, but it encountered, according to the argument for the defendant, the constitutional prohibition against interference with Commonwealth instrumentalities (*D'Emden* v. *Pedder* (1)) or legislation enacted by the Commonwealth pursuant to its constitutional powers and inconsistent with the State legislation. That, in my opinion, directly raises questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State (*Jones* v. *Commonwealth Court of Conciliation and Arbitration* (2)).

Now, if the Supreme Court had been of opinion that the *Motor Car Act* 1915 was limited in its operation to those servants of the Crown who were controlled by the Government of Victoria, then it ought, I apprehend, to have disposed of the case according to its own decision in *In re Drew* (3). But it was evidently of opinion that questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the State necessarily arose, and required determination in the case. Consequently, it gave no decision, and proceeded no further with the cause, in accordance with the provisions of sec. 40A of the *Judiciary Act*. And in taking that course the Supreme Court acted, in my opinion, in strict accordance with the law. It will be convenient, however, to postpone consideration of the construction of the *Motor Car Act* to a later stage, and to consider now the validity of the provisions contained in sec. 40A of the *Judiciary Act*.

The Parliament enacted the section for the express purpose of avoiding conflicts between the Judicial Committee and this Court upon questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States or of the States *inter se*, and for the purpose of giving full effect to the provisions of sec. 74 of the Constitution. "The plan adopted, therefore," as is rightly said by Professor *A. Berriedale Keith* in his work on *Responsible Government in the Dominions*, vol. III., p. 1372, "is to debar the Supreme Courts from ever pronouncing a *decision* on any question

(1) (1904) 1 C.L.R. 91.
(2) (1917) A.C. 528; 24 C.L.R. 396.
(3) (1919) V.L.R. 600; 41 A.L.T. 65.

in which the rights of the Commonwealth and of the States, or of the States *inter se*, are at issue, and thus every such case falls to be decided by the High Court, which by refusing a certificate for an appeal could make itself the final arbiter." It is, perhaps, interesting to note the opinion of Professor *Keith* (*ibid.*, p. 1372): "That the law is *intra vires* the Commonwealth Parliament appears perfectly clear, and it may be said to be not only a sensible and satisfactory solution of a difficulty, which brought both the High Court and the Privy Council into some degree of contempt, but to be in keeping with the spirit of the Constitution, which was intended to reserve to the High Court such constitutional cases."

The provisions of sec. 40A must be considered in connection with Part VI. of the *Judiciary Act*, "Exclusive and Invested Jurisdiction," secs. 38, 38A and 39. The provisions of sec. 40A are the complement of sec. 38A. This Court has examined sec. 39 and upheld its validity under the powers contained in secs. 76 and 77 of the Constitution. The reasons are set forth in *Baxter's Case* (1), *Lorenzo* v. *Carey* (2), the *Limerick Steamship Co.'s Case* (3) and *Hudson's Case* (4), and need not be repeated here. But the reasoning which upholds sec. 39 necessarily supports the power of the Parliament to enact the provisions of secs. 38 and 38A; for the exclusive jurisdiction vested in the High Court by those sections is founded upon the same words in sec. 77 of the Constitution as is the exclusive jurisdiction vested in the High Court by sec. 39. If the one section be valid, the others must, for the same reasons, be also valid. And sec. 40A, as the complement of sec. 38A, is sustained as incidental to the power contained in sec. 77, and also as expressly authorized by reason of the power conferred by sec. 51, pl. XXXIX., of the Constitution.

The case must, therefore, be examined on its merits. It is urged that the *Motor Car Act* is limited, on its proper construction, to the servants of the Crown controlled by the Government of Victoria. By sec. 24 it is declared that the Act applies to persons in the public service of the Crown as well as to other persons. Now the Crown is one and indivisible (cf. *Williams* v. *Howarth* (5); *In re Oriental Bank Corporation*: *Ex parte Guillemin* (6)). But, it is said, the

(1) (1907) 4 C.L.R. 1087.
(2) (1921) 29 C.L.R. 243.
(3) (1924) 35 C.L.R. 69.
(4) (1922-23) 32 C.L.R. 413.
(5) (1905) A.C. 551.
(6) (1884) 28 Ch. D. 634.

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section only applies to persons in the public service of the Crown considered as the executive authority in relation to the statute in question (cf. *R.* v. *Sutton* (1); *Gauthier* v. *The King* (2)). If this be so, then the rule of construction that the Crown is not bound by a statute unless specially named or clearly intended should be "applicable only in the determination of the question whether the King, as representing the community whose legislation is under consideration, is or is not bound by the enactment . . ." and "cannot be applied to determine whether the enactment binds the King as representing" the Commonwealth (*O'Connor* J. in *R.* v. *Sutton* (3); *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (4)). This line of argument really avoids difficulties without solving them. The real solution must depend upon the powers or immunities given to or conferred upon the State and Commonwealth Governments by their Constitutions. The Commonwealth power of defence cannot exempt soldiers from the obligation of all State law, nor can the power of the States to regulate the use of motor-cars within their territories be used so as to destroy or abrogate or derogate from the Commonwealth power of defence (cf. *John Deere Plow Co.* v. *Wharton* (5); *Great West Saddlery Co.* v. *The King* (6); *Attorney-General of British Columbia* v. *Attorney-General of Canada* (7)). "The only principle that can be laid down for such cases is that legislation the validity of which has to be tested must be scrutinized in its entirety in order to determine" if the provisions of the State law are repugnant to or inconsistent with the law of the Commonwealth (*Great West Saddlery Co.* v. *The King* (8)). Now, the *Motor Car Act* regulates the use of motor-cars in Victoria, and is designed to preserve the public safety and security. That is a subject matter wholly within the domain of the States and prima facie one in which they have plenary power to make laws for the peace, order and good government of the States and to bind all persons within their respective territories. The argument denying the power of the States to affect Commonwealth officers based upon some prohibition expressed or implied

(1) (1908) 5 C.L.R. 789.
(2) (1918) 56 Can. S.C.R. 176.
(3) (1908) 5 C.L.R., at p. 806.
(4) (1908) 5 C.L.R. 818.
(5) (1915) A.C. 330.
(6) (1921) 2 A.C. 91.
(7) (1924) A.C. 222.
(8) (1921) 2 A.C., at p. 117.

in the Constitution can no longer be sustained (*Engineers' Case* (1), adopting the view of the Judicial Committee in *Webb* v. *Outrim* (2), *Caron* v. *The King* (3), and overruling such cases as *Deakin* v. *Webb* (4), *Baxter* v. *Commissioners of Taxation* (5) and the *Railway Servants' Case* (6)). So the immunity claimed in this case must rest upon some law enacted by the Parliament (*Engineers' Case*; *D'Emden* v. *Pedder* (7)) coupled with sec. 109 of the Constitution, which provides that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid." How, then, is the *Motor Car Act* 1915, and particularly sec. 6 thereof, inconsistent with any law of the Commonwealth?

A soldier or a member of the Air Force does not cease to be a citizen: if he commits an offence against the ordinary criminal law, he can be tried and punished as if he were a civilian. The command of an officer cannot justify a breach of the law (*Burdett* v. *Abbot* (8); *Australian Military Regulations* 1916, reg. 488, and *Air Force Regulations* 1922, No. 160, reg. 3; *Manual of Military Law* (1924), issued by the War Office, pp. 17-18, 213-224 et seqq.). The Constitution, sec. 51, pl. VI., it is true, confers upon the Parliament of the Commonwealth the power to make laws for the peace, order and good government of the Commonweath 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 law of the Commonwealth; and the States cannot, without the consent of the Commonwealth, raise or maintain any naval or military force (sec. 114). And by force of sec. 52 of the Constitution the Parliament has exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to matters relating to the Department of Defence. Under the powers so conferred by the Constitution, the *Defence Act* 1903-1918, the *Air Force Act* 1923 and various regulations, have been made—the regulations particularly material to the case being the

(1) (1920) 28 C.L.R. 129.
(2) (1907) A.C. 81; 4 C.L.R. 356.
(3) (1924) A.C. 999.
(4) (1904) 1 C.L.R. 585.
(5) (1907) 4 C.L.R. 1087.
(6) (1906) 4 C.L.R. 488.
(7) (1904) 1 C.L.R. 91.
(8) (1812) 4 Taunt. 401.

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Australian Military Regulations (Statutory Rules 1916, No. 166) and the *Air Force Regulations* (Statutory Rules 1922, No. 160). An Air Force is organized under the Defence and Air Force Acts with all necessary arms and equipment for training in peace and service in war. And its government, discipline, and military duty are provided for on much the same lines as in Great Britain. These Acts restrict to some extent the civil rights and duties of soldiers, but nowhere do they exempt them from obedience to the civil law. If the Imperial Parliament had prescribed that no person should drive a motor-car upon any public highway in Great Britain without being licensed for that purpose and declared that the law should apply to persons in the public service of the Crown as well as to other persons, the duty of soldiers to obey that law would be clear (see *Motor Car Act* 1903 (3 Edw. VII. c. 36); cf. *Cooper* v. *Hawkins* (1)). This duty would be superimposed upon their military obligations and in no wise inconsistent with them. What difference does it make that in Australia the Constitution has distributed legislative power between the Commonwealth and the States? Unless there be some limitation upon the States, expressed or implied in the Constitution, with respect to interference with persons who are Federal officers, then the case must be founded upon some inconsistency between the law of the State and the law of the Commonwealth. There is no express limitation in the Constitution, and the *Engineers' Case* (2) denies any such implied limitation. When a power exists in the States, then "they are entitled to the same complete independence in its exercise as is the national government in wielding its own authority," subject only to the provisions of sec. 109 of the Constitution (cf. *Cooley's Principles of Constitutional Law*, 3rd ed., p. 35). The *Motor Car Act*, it is said, will paralyze the Defence Forces of the Commonwealth and impair the efficiency of their service: they cannot, in Victoria, be trained in peace nor used in war without the sanction of the State. Extravagant arguments such as this may well be considered when the State passes legislation calculated to lead to such dangerous consequences (cf. *Caron* v. *The King* (3)). All the State has done in this case is to regulate

(1) (1904) 2 K.B. 164.
(2) (1920) 28 C.L.R. 129.
(3) (1924) A.C. 999.

the use of motor-cars and to require all citizens to observe provisions for the preservation of public safety and security. The Act is directed to acts of a purely local character, and its object is peculiarly within the authority of the State. It is not aimed particularly at the Defence Forces of the Commonwealth, nor is it in opposition to any express provision of the laws of the Commonwealth. A civil duty is, no doubt, established for all citizens using the public highways of Victoria, reasonable in itself and in no wise interfering with or infringing the military duties and obligations of the Defence Forces of the Commonwealth. Again, we were urged to consider the possible consequences of sec. 4 of the Act relating to the registration of motor-cars. Must the Commonwealth, it was said, register all its motor vehicles required for defence purposes? It will be time enough to answer that question when it arises. It may be found that sec. 4 does not require either the Commonwealth or the State Governments to register any motor vehicle. But, however that may be, the Commonwealth has ample legislative power to maintain its Forces free from any inconvenient legislation of the States.

The Magistrate, in my opinion, was wrong in his decision, and the defendant should have been convicted of the offence charged against him. The case is, I suppose, a test case, for the offence was trivial. A nominal penalty without costs will sufficiently maintain the law, and establish a principle evidently of some importance to the Commonwealth and State Governments.

Order absolute. Respondent convicted of offence charged and fined one shilling.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

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

B. L.