A SURVEY OF THE

EXECUTIVE POWER OF THE COMMONWEALTH

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REMEDIES AGAINST THE CROWN.	Morgan.
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INTRODUCTION.

INTRODUCTION

It is an axiom that British legal and political institutions are not a manufacture but a growth. The device of the representative assembly itself, which was the incalculable contribution of England towards the solution of the world problem of government, was not the creation of any brilliant mind, but a gradual evolution from inconsiderable beginnings. Systems of government are not static but dynamic; and particularly is this true of the British system. The representative Parliament, once confirmed in its control of the public purse, made its way rapidly to omnipotence, and during more than a century while society remained in essentials unchanged, it wielded a power which was almost as unqualified in fact as it was and still is in theory. But the fundamental changes in the characteristics of communal life which, beginning with the Industrial Revolution, have continued ever since with accelerating momentum, could not fail to involve a profound re-adjustment in methods of government. The new conditions are more than a mere objective contrast with the old. The change has been psychological as well; there is ground for the belief that there has been an increasing tolerance of detailed restriction of individual liberty; though here one enters a dubious realm in which cause and effect are hard to distinguish.

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In France and Germany the consequence of these social changes has been the development of an elaborate self-contained system of official law known in the former country as the Droit Administratif. In British Communities, the reaction has been the increasing substitution of the

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Executive for Parliament as the dominant instrumentality of government. Laws made by the Legislature and expounded by a secure and independent Judicature have been largely replaced by rules and regulations proceeding from the Executive or subordinate public authorities, the incidence of which upon the individual is determined either by special tribunals responsible to the administration, or by the arbitrary decisions of public Departments. "Partly owing to the increasing complexity of industrial and social conditions," wrote Sir John Marriott recently, "partly under the subtle influence of a Civil Service consciously or unconsciously permeated by the ideas of Fabian Socialism, partly in deference to the prevailing fashion which derides the principle of laisser faire and to the growing demand for governmental guidance and control in all the affairs of life, partly, it may be, from sheer inability to cope with the insistent demand for legislation which shall cover every department of human activity, Parliament has manifested a disposition to give more and more discretion to the Administrative Departments" (Liberty and the Law - Edin. Review, Oct. 1929, p. 343). In the course of a century, the population of Great Britain has barely quadrupled itself, while the class of public officials has been multiplied by more than twelve.

It was typical of the British tradition that this shifting of the centre of gravity was gradual, and even more typical that it was in a large measure unconscious. For thirty years the jurists on whom the people relied to guard their liberties had significant facts before them, and, on the whole, saw nothing amiss. Only during the last decade have a succession of great lawyers, Lord Hewart, Lord Sankey, Professor C.K.Allen, Sir John Marriott and others, been moved to warn the British people that they stood in the

presence of an organised supplanting of the sovereignty of Parliament and the jurisdiction of the Courts, and therein of serious constitutional danger. Institute of Patent Agents v. Lockwood was decided in 1894. It was left for Lord Hewart in 1929 to draw public attention to its significance. But the British legal consciousness is now fully aroused to the importance of the problem, even though there is as yet no very clear agreement as to what should be done about it. "There is at the present time," says Professor C.K.Allen in a recent collection of essays under the title of Bureaucracy Triumphant, "a profound and widespread dissatisfaction with the relations between Crown and subject."

AUSTRALIAN INTEREST IN THE QUESTION.

The awakening to a perception of closely corresponding tendencies in Australia has been in the nature of a sequel to the arousing of interest in England. But during the last three years there have been signs that the stimulus from abroad has begun to exercise a profound influence not only on legal but, what is even more important, upon political opinion. Particularly has the brilliant, penetrating attack on administrative methods recently made by the Lord Chief Justice of England in The New Despotism contributed to produce this result.

Witnesses before the Royal Commission on the Constitution drew attention to the question from the standpoint of the Commonwealth, and the Report itself contains a brief but compendious statement upon the issues thus raised (pp85-86). Again, in 1929, a Select Committee was appointed by the Senate to take evidence and report upon the need for (inter alia)

a Standing Committee to scrutinise the mass of regulations and ordinances descending in an increasing flow upon the tables of the Houses. The inquiry elicited evidence from some of the foremost jurists of the Commonwealth, and indicated unmistakably the serious attention which the growth of bureaucracy in this country is now receiving. (Parlty.Papers 1929-1930, No.S.1.).

DIVISION OF OPINION.

It is not to be supposed that the attitude of commentators is unanimously critical of the expansion of administrative activities that has taken place. Dr. Port, another recent writer, regards it with equanimity, and is apparently in favour of its encouragement, under suggested safeguards, to even further lengths (Administrative Law). In Australia, also, there are those who look with approval on the development. "Legislation under a paternal government," writes Professor K.H. Bailey, "requires a detailed application quite beyond the reach of any deliberative assembly, and many subjects of legislative power are so technical and experimental....that the greater flexibility of administrative action is to the public advantage." Modern legislation, he says, is necessarily becoming a mere "declaration of principles" (A.L.J. Vo.4, p.10). Giving evidence before the Senate Select Committee above referred to, Sir Robert Garran, not unnaturally perhaps, was fully satisfied that the trend of affairs in the Commonwealth was in no sense prejudicial to the public interest. He saw no need for a Standing Committee on regulations, which, in his opinion, "would not discover very much to find fault with." (Transcript of Evidence pp.33-37)

THE FIELD TO BE EXPLORED.

Notwithstanding the evidences of Australian interest that have been mentioned, there has been next to nothing written upon the subject as it affects the Commonwealth. The Royal Commission and Select Committee referred to above have served a valuable purpose in fixing attention upon contemporary constitutional tendencies. Beyond this, a few notes and reviews and two recent articles by Professor K.H.Bailey of Melbourne in the Australian Law Journal are all that have appeared. "Australian literature on this subject," says Professor Bailey in the first of these articles, "is as yet very meagre, so meagre that any fruitful discussion must needs be based on a preliminary outline of the facts themselves. (A.L.J. Vol. 4, p.7).

The object of this work is to supply something more detailed than such an outline, to serve in some measure as an Australian basis for discussion of what may before very long be regarded as the most intractable constitutional problem that has confronted the British people since the dawn of responsible government. It cannot, indeed, be said that there is any lack of material for such a purpose. If little has so far been said by the jurists and publicists of the Commonwealth, at least the Statutes and the official records of sub-legislation contain ample evidence, awaiting co-ordination and comment, of the extent to which bureaucratic power has grown since the inception of Federation. The decisions of the High Court are rich with informative and significant matter, not only on the law affecting the Executive as it stands to-day, but on the historical aspect. They enable the development of administration to be seen in perspective

as a process of growth; and furnish evidences that that process is still unarrested.

The survey of the executive power of the Commonwealth falls naturally into three main divisions. The first is the examination of that power in its relation to the limits set by the Constitution. The second is the field in which administrative tribunals or authorities have been invested with powers of deciding the rights of individuals. The third section concerns the sphere in which the Executive exercises legislative power, through the medium of regulations ordinances and by-laws, or of proclamations and orders.

QUASI-JUDICIAL AND ARBITRARY DECIDING POWER.

The acquisition by the Executive of the power of deciding the rights of subjects is characterised by Robson (Justice and Administrative Law) as "one of the most striking developments in the British Constitution during the past half-century." It has in recent years, in the words of a man who is perhaps the leader of contemporary legal thought in England, "caused anxiety not only in the public mind but among trained lawyers." (Lord Sankey - Speech at Mansion House, July 1929). The warnings which distinguished English writers have lately given are numerous and in strong terms. "Statute after Statute", says Professor G.H.Morgan, "conferring semi-judicial powers upon Government departments, has introduced administrative law into this country, but it is too often administrative law without its judiciary - administrative jurisdiction without a Court to exercise it, statutory authority without any equity to temper it." (Introduction

to Public Authorities and Legal Liability - Robinson, p.lxv).
And again; "There is an ever growing tendency, constitutional traditions and safeguards notwithstanding, to confer more and more discretion, often of a substantially judicial kind, on officials of the great Departments of State who practically cannot be made responsible" (Pollock - The Genius of the Common Law, p.43). Instances of such comments might be multiplied.

This tendency has been scarcely less marked in the Commonwealth than in England. The authority conferred ranges from that of administrative tribunals conducting their proceedings in legal fashion to that exercised on the arbitrary fiat of an unidentifiable government official. In its extreme form the authority may go as far as one instance which, in the words of Isaacs J., involved the "investing of the Minister with a czar-like power, resting on his own secret unchallengeable conception of what inter-State trade was desirable in the public interests, and his own unascertainable will in that respect, to expropriate property without explanation and at certain loss to the individual" (James v. Cowan 43.C.L.R. 386 at p.406).

The challenge which such a method of deciding individual rights offers to the principle of the Rule of Law, which the late Professor A.V. Dicey regarded as a vital and abiding feature of the British constitutional system, needs no emphasis to give it point. "There are cases," said Lord Sankey recently in an address to the University of London, "where the modern tendency has been to make the Department both judge and prosecutor, to the exclusion not only of the right except in very limited circumstances to appeal to the public Courts, but also to the exclusion

of those rights of being heard and of hearing what is said against one, which we had come to regard as the heritage of every Englishman", (The Times, April 5, 1921). These words are in no sense too strong to apply to the powers exercisable by the Attorney-General of the Commonwealth under the Crimes Act 1914-1932, to mention an example in criminal law, as well as to many similar powers affecting the civil rights of Australian citizens.

ASSUMPTION OF LEGISLATIVE FUNCTIONS.

The advance of rule-making by administrative authorities from its original essentially subordinate position to that of being the source of by far the greater body of law affecting the subject is a separate and no less important matter. This tendency, leading to the use of the "skeleton Act" with wide regulation-making powers is again capable of striking illustration from the law of the Commonwealth. "The rule making power", says Professor Bailey, "has been largely exercised. In point of mere bulk, the statutory rules(even without the Ordinances made for the government of the Federal Territories, which in some cases stand upon a different footing) now far exceed the legislation which has emanated from Parliament itself....In the regulations concerning posts and telegraphs, primary producers' assistance, customs and excise, trade and commerce, and quarantine, there is much that cannot possibly be described as anything but the enactment of substantive law." (A.L.J. Vol.4, p.9).

One recent step in the government of the Commonwealth has given a marked impetus to the growth in importance of the Executive as a legislative authority. This was the passing

of the Transport Workers Act 1928-1929, an Act which constituted an abdication by Parliament of its own functions to a degree unprecedented in the records of Federation. It has been responsible, by reason of the many questions which have arisen under it, for considerable clarification of the law. Among its consequences have been a constitutional conflict of the first order between the Senate and the Executive Government, and three important decisions of the High Court. The most recent of these which is not yet (July 1932) officially reported, is especially valuable. It deals finally with a number of aspects of sub-legislative power, including the ultimate limits of the power under the Constitution (Victorian Stevedoring Co. v. Dignam, 46, C.L.R.). The width of those limits, as they must now be understood, adds further significance to the present subject as a matter for legal study in the Commonwealth.

SCOPE OF THIS WORK.

It is naturally not the purpose of the present work to establish any particular view, hostile or otherwise, of the constitutional tendencies which have been outlined above, although one may entertain an opinion, and comment on specific instances has not been entirely refrained from. The object has been rather to deal in a detailed fashion, within the limits of the ground covered, with, firstly, the extent and nature of the field actually occupied at the present time by the Commonwealth Executive, and secondly, the legal principles and restrictions which constitute the controlling conditions of the exercise of power within that field. Under these two heads must fall the bulk of the material upon which any polemical discussion of the question in its relation

to the Commonwealth would necessarily be based.

In view of this aim, it has been considered that the organisation of the public service, and the body of law statutory and otherwise covering the relations between the Crown and its officers is beyond the proper scope of this work, except where these matters may here and there become relevant for special reasons. Similarly, the position of the Crown as a litigant in the regular Courts, which has been given considerable attention by some of the writers above mentioned, has not been dealt with in the pages that follow. This subject derives its importance in Great Britain from what is considered by authors to be the seriously unsatisfactory nature of the remedies available in that country against the Crown. The individual litigant is under no corresponding disadvantage in Australia. A discussion of the whole question, and a comparison of the English with the Australian system to the advantage of the latter, are to be found in Professor G.H.Morgan's Introduction to Public Authorities and Legal Liability (Robinson).

Again, the circumstances under which the assistance of the Courts can be invoked to control or compel executive action through the issue of the prerogative writs of prohibition, quo warrento, certiorari, and mandamus, is a special branch of the law. It has for the most part no exclusive reference to the Commonwealth, and has been fully and ably dealt with in the work last referred to and elsewhere. Except incidentally, therefore, the exposition of this subject does not form part of the present work.

One matter, on the other hand, has been dealt

with in a manner somewhat more ample than a treatment having relation solely to the Commonwealth might seem to warrent. This is the question of the conditions of validity of sub-legislation. The reason for dealing with certain aspects of this subject from a general as well as a purely local standpoint, is that it does not appear to have anywhere received from text-writers a comprehensive treatment. Even Halsbury dismisses it as a matter deserving only of incidental discussion.

THE QUESTION OF POLICY.

Still less is it within the province of what is here being attempted to make any comprehensive suggestion as to what, if anything, ought to be done, either to curtail the activities of the Executive, or to reduce them to a fuller measure of control. This is a particularly interesting aspect of the inquiry, but one on which our foremost legal theorists are still largely at variance. The opinions held seem to place their sponsors, very broadly, into two groups. The first consists of those who would seek to restore in their entirety the traditional institutions of the Sovereignty of Parliament and the Rule of Law. To this section belong Lord Hewart, and, on the whole, Professor Allen. The last named author has at least once written strongly in favour of the creation of an "explicit.....and scientific" system of administrative law (Law in the Making, p.348), but it appears that this must be read subject to the important qualification which he makes

in Bureaucracy Triumphant (p.105) that any such scheme must be "developed in harmony with the traditional principles of the general legal system."

The other group is made up of those who would devise and establish a special code of Administrative Law comparable to that existing on the Continent. Among these is Dr. Port, who, amongst other proposals, advocates the regularising of executive justice by the creation of tribunals of experts in the work of administration. Allen is critical of the suggestion, and says; "This demand for specialist tribunals is invariably based on the assumption that modern administrative law raises questions of such extreme technicality that they are quite beyond the competence of ordinary judges. But this assumption has little foundation in fact" (ibid. p. 104). Lord Sankey is disposed to go to the full length. "If, then, we have taken steps towards the system of droit administratif he writes, "it is surely pertinent to inquire whether we ought not to adopt the real thing, with all the special protection it confers on the subject in France and Germany, and not a perversion of it." (Principles and Practice of the Law To-day, p.17).

On one point all leading English commentators are agreed - that matters ought not to be allowed to drift along as they have been going. The theory of the Constitution still stoutly insists that there is no such thing as British "administrative law." But (it is pointed out) we have the thing without the name, and without the public safeguards which an avowed system carries with

it. Lord Hewart has impaled this condition of affairs on the point of one graphic phrase. It is, he says, "administrative lawlessness."

Opinions have been expressed that the situation in Australia in this regard is not so critical as in Great Britain (Senate Select Committee - Transcript). It is true that certain of the more extreme British devices for freeing public departments from judicial control have not so far been pressed into service in this country. But the tendencies of the hour are unmistakable and disquieting. The problem of the Commonwealth may or may not be regarded as acute to-day. But there is much to create the misgiving that even here the challenge of bureaucracy to the traditional and basic principles of the Constitution will not be long delayed.

PART ONE

CONSTITUTIONAL LIMITS OF EXECUTIVE POWER

CHAPTER 1.

THE EXECUTIVE AND THE CONSTITUTION.

The study of the executive power of the Commonwealth is complicated by the fact that it is an organic part of the Australian federal system. A character of artificiality clings necessarily to governing authorities which are the creation of rigid constitutions with limited powers, and this quality has been to some extent intensified in the case of the Australian Commonwealth by the attempt to work irrevocably into the texture of the Constitution the principle of the "separation of powers" borrowed from the United States. How far that principle has proved unsuitable in its literal form, and how far it has in effect been discarded in the Commonwealth in the course of judicial interpretation will be discussed later. But it may be said that whatever of serious difficulty there has been in defining the Federal executive power has arisen in two chief ways - firstly from the necessity of determining the boundaries which separate it from the legislative and judicial power of the Commonwealth, and secondly from the problem inherent in the Constitution itself of defining the limits of State and Federal activities.

The special position of the Commonwealth executive power, arising out of its Federal character, has been forcibly presented by Isaacs J. in the Commonwealth v. Colonial Combing Spinning and Weaving Co.Ltd. 31 C.L.R. 421 - referred to in subsequent High Court judgments and

hereafter in this discussion as the Wool Tops Case.

After pointing out that in the case of a State, prior to Federation, the executive power had clearly defined territorial limits, and within those limits extended to the full maintenance of the Colonial constitution and laws, he continues (p. 439) "But when the Federal Constitution of Australia was fashioned, the new constitutional unit thereby created had to occupy (besides its own special territories) the same territory as the constituent States, and, so to speak, was superimposed on them geographically. Two conditions had therefore to be satisfied. First the constitutional domain of the new unit had to be delimited and distinguished from the respective constitutional domains of the States, and, next, that could not be done simply in terms of territory." It follows, therefore, that the Commonwealth's executive power must be defined, like its other powers, in the first place in terms of geographical limits, and in the second place with the aid of the juristic device of distribution of powers within those limits.

SOURCE OF THE POWER.

The executive power of the Commonwealth is created by Chapter II of the Constitution, though the provisions there set forth amount to a description only, rather than a definition. The important section is sec. 61, which is in the following terms:-

"The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth."

It is clear that this section accomplishes three things. (1) It vests the executive power of the Commonwealth in the Sovereign; (2) It directs that the power shall be exercised by the Governor-General as the Sovereign's representative; and (3) it broadly indicates the scope of the power (Wool Tops Case 31 C.L.R.431).

As to (1), this is merely introductory, and a declaration of the fundamental principle of English law which is of universal application throughout the British Commonwealth of Nations, that the supreme executive power is vested in the Crown - (Blackstone, Vol.1. p.190; Halsbury, Vol.VI, p.316). It will be necessary to consider the rest of the section in some detail; but before this is done it will be convenient to dispose of the remainder of Chapter II.

SECTIONS 62-70 OF THE CONSTITUTION.

The function of this portion of the Constitution is to constitute the machinery of executive power. It is provided that there shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth (sec. 62). The Council is to consist of the Ministers of State appointed by the Governor-General (sec. 64), together with such other persons as he may choose and summon as members (sec. 62).

Sec. 63 provides that references in the Constitution to the Governor-General in Council shall mean the Governor-General acting with the advice of the Federal Executive Council. It should be noted in connection with the definition contained in this section that by virtue of the Acts Interpretation Act 1901-1932

the expression "Governor-General" by itself in any Act of Parliament is to have the same meaning as is here attached to "Governor-General in Council."

The Governor-General may appoint officers, who shall be Ministers of State, to administer the government departments. They shall hold office during pleasure (sec. 64). This and the foregoing sections of the Chapter are to be taken as implying that the principle of responsible government is a fundamental element in the Constitution (Baxter v. Commissioner of Taxation 4 C.L.R. at pp. 1105-1107; Engineers' Case, 28 C.L.R. at pp. 146-148; Wool Tops Case, 31 C.L.R. at p.434). The Ministers of State, provisionally established at seven (sec. 65) now number nine (Ministers of State Act 1917).

By sec. 67 it was laid down that, until other provision was made by Parliament, the appointment and removal of all officers other than Ministers was to be vested in the Governor-General in Council. The power of appointment might be delegated, but not that of removal. Other provision has now been made, with regard to removal of officers, by the Commonwealth Public Service Act 1922-1931, conferring on the Public Service Board the power to remove from the service any officer who "appears to the Board to be inefficient or incompetent" or otherwise unfit to discharge his duties. (See Bradshaw v. The Commonwealth 36 C.L.R. 585). The Commonwealth Public Service Act does not apply to the Territories (Trower v. The Commonwealth 34 C.L.R. 587).

Provision is also made for the salaries of

Ministers (sec. 66), the command by the Governor-General of the defence forces (sec. 68) and the transfer of departments the Commonwealth legislative power with regard to which by virtue of sec. 52 is made exclusive, (sec 69). By a final section of permanent importance (sec. 70), all executive powers and functions which were formerly exercisable by State Governments or authorities in respect of matters transferred by the Constitution to the Commonwealth were to become vested in the appropriate agent of Commonwealth power.

THE GOVERNOR-GENERAL.

The second declaration of sec. 61, that the power is "exercisable by the Governor-General as the Queen's representative", has to be considered in its relation to sec. 2, which is as follows;-

"A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him".

The "powers and functions" referred to in this section are not any part of "the executive power of the Commonwealth" with which Sec. 61 is concerned, but have their basis in the prerogative. To ascertain what powers are exercisable under sec. 2 regard must be had to the instruments which, taken together with the Constitution Act, establish the office of Governor-General. These instruments are (1) the Letters Patent of the 29th. October

1900, (2) The Instructions under the Royal Sign Manuel and Signet of the same date, and (3) the Commission making the appointment. The instructions have been amended in certain comparatively unimportant respects.

It is unnecessary to refer in detail to the contents of these instruments. The general grant of power is in the Letters-Patent, and reads as follows:-

> "And we do hereby authorise and command our said Governor-General to do and execute in due manner, all things that shall belong to his said command, and to the trust we have reposed in him....".

His power and authority for so doing is to be the Constitution, the Instruments, and any subsequent Order-in-Council, or direction of the Sovereign through a Secretary of State. The powers specifically conferred by the Instruments are not of great scope. Professor Harrison Moore has pointed out that certain of them are superfluous as being already vested under the Constitution (Moore; Commonwealth p.162. See secs. III. IV and V of Letters Patent.) Another section of considerable practical importance, rehting to the power of the Governor-General to appoint deputies, is included for the purpose of giving full effect to sec. 126 of the Constitution (Letters Patent sec VI). A portion of the Royal prerogative as to the pardoning of offenders is conferred by the Instructions (sec VIII).

Despite the use of the phrase "Her Majesty's Representative" in sec 2 and a similar phrase in secs. 61 and 68, it seems clear that the powers of the Governor-

-General are strictly limited by the terms of the authorisation referred to above. "The sole effect of the phrase is to emphasise the delegate character of the office and its powers". (Moore; Commonwealth p.161).

"In short" said Higgins J. in the Wool Tops Case 31 C.L.R. 421 at 453, "the Governor-General is not a general agent of His Majesty, with power to exercise all His Majesty's prerogatives; he is a special agent with powers to carry out the Constitution and the laws, and such powers and functions as the King may assign to him." (see Commercial Cable Co. v. Government of Newfoundland 1916 2 A.C. at 616).

This is in accordance with the law as laid down by the Privy Council with regard to Colonial Governors in a number of cases. Thus in Musgrave v. Pulido, 5 A.C. 102, after considering the collected cases, the Privy Council said "It is apparent from these authorities that the Governor of a Colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him". (See also Cameron v. Kyte 3 Knapp P.C. 332; Hill v. Bigge 3 Moore P.C. 476; and Sprigg v. Sigeau 1897 A.C. 239).

In this connection it is of interest to note that the status of Governor-General was reviewed at the Imperial Conference of 1926. A representative Committee presided over by Lord Balfour reported in the following terms:

> "We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the

Governor-General as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative. In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any department of that Government." (House of Commons papers: Summary of Proceedings p.16).

The Governor-General has never been, in law, the representative of His Majesty's Government, though no doubt until recent years he has been so in fact. There has been a practical change, which the Imperial Conference, by adopting the report quoted, has formally placed on record. It is a much more doubtful question, depending upon the meaning of words, whether the Governor-General can be described as "holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty

the King in Great Britain". In my case it is submitted that whatever may be the de facto position now, for example in relation to the power of making war and peace, arising from the implications of dominion status, the legal position remains unchanged. (Cf. as to legislative powers of the Dominions, the Statute of Westminster 1931. This Statute has not so far been adopted by the Commonwealth.)

THE WOOL TOPS CASE.

The final words of sec. 61, "and extends to the execution and maintenance of this Constitution and of the laws of the Commonwealth," indicate in terms which are the reverse of definite, and no doubt deliberately so, the scope of the executive power.

The meaning and effect of the words were considered in detail by the High Court in the Wool Tops Case 51 C.L.R. 421. In that case the Executive Government of the Commonwealth had with every formality purported to make certain agreements with a company engaged in manufacturing wool tops. It was unanimously held that in the absence of any statutory authority, of which there was none, the Constitution did not enable the Executive Government either to make or to ratify the agreements. In the judgments of the majority of the Court, the ratio decidendi was reduced to the following simple terms:-

(1) If valid the acts must have been done within the limits set by sec. 61 - i.e. in the maintenance or execution of either

(a) the laws of the Commonwealth, or (b) the Constitution.

(2) "Laws of the Commonwealth" meant Acts of the Parliament of the Commonwealth; and there was no Act of Parliament in the maintenance or execution of which the acts could be alleged to have been done.

(3) The acts were clearly not done in maintenance of the Constitution.

(4) They were not done in execution of the Constitution since execution of the Constitution means doing something immediately prescribed or authorised by that document, without the intervention of legislation.

Hence the acts were not within sec. 61 and there was no power to do them.

Isaacs J. in a notable separate judgment, reaches the same conclusion; but in so doing, he does not rely on sec. 61. He refuses to treat that section as being more than descriptive, and rejects the contention that "the written words of the Constitution applied to sec. 61 form the only necessary solving test." The section describes but does not define the domain of executive power. It sets limits to the field in which that power may lawfully operate; but the question of whether in a given case within that field it does operate lawfully is left undetermined by sec. 61. "Having ascertained in a given case that the constitutional domain has not been transgressed, we may have to go further and find whether on that field in the circumstances the power in fact exerted was lawful (p.440).

The learned Justice deals with the war prerogative (p. 442) and although he rejects it as an authority for the acts in question, he points to its existence as showing the insufficiency of the words of sec. 61 if they be regarded as a definition. He is prepared to give a wider meaning than the majority of the Court to the phrase "maintenance of the Constitution". The actual words of the Constitution are not alone to be regarded. "The mere fact of the creation of the Executive Government carries with it some constitutional consequences, unwritten, it is true, but nevertheless very real, that Courts recognise and that are included in the term "maintenance of the Constitution" (p. 441). This line of reasoning as to the meaning of the Constitution is supported by Starke J.

The principle laid down in the majority judgments is clear and easy to follow. If it is sought to justify an executive act under the authority of sec. 61, the act must be one to maintain or execute the Constitution or the provisions of some Commonwealth Act of Parliament. However, it is obvious that the converse is not necessarily true. If an executive act is within the scope of the authority, it may still be, as Isaacs J. points out, unlawful in the particular circumstances. For example, the executive act may be unlawful as being an unauthorised usurpation by the Executive of the functions of the Legislature or the Judicature. The inquiry when and how such a situation may arise is one of basic importance in defining the executive

sphere, and must presently be undertaken in some detail.

DELEGATION OF EXECUTIVE POWER.

One further point on the meaning of sec.61 may be mentioned. In R. v. Macfarlane; Ex parte O'Flanagan 32 C.L.R. 518 the daring contention was raised that the deportation power there being considered had been unlawfully committed to the Minister of Home and Territories, in contravention of sec. 61 expressly reposing it in the Governor-General. The argument did not even earn a reference in most of the judgments. Knox C. J., mentioned it only to dismiss it in four lines. It was, he said, "clearly untenable." If carried to its logical conclusion, it would "deny to Parliament the power to provide by legislation for the performance of any ministerial act by any person but the Governor-General".

CHAPTER II

EXTERNAL LIMITS OF EXECUTIVE FUNCTION.

It was pointed out in the preceding Chapter that if sec. 61 is to be regarded as fixing the external limits of the executive power of the Commonwealth, it still leaves us with scant guidance as to the location of the boundaries which separate that power from the field occupied by the Legislature and the Judicature, or, to use the word which, coming originally from America, has gained general acceptance, the Judiciary. For a long time after Federation, the nature of these boundaries was a matter on which much confusion existed. The line between the Executive and the Judicature was the first to be definitely drawn; the boundary between executive functions and those of Parliament has had to wait for its final definition for a decision of the High Court which at the moment of revision of this Chapter is still unreported. (Victorian Stevedoring Co. v. Dignam 46 C.L.R.)

DOCTRINE OF SEPARATION OF POWERS.

A great deal has been said and written in connection with British representative government generally, and particularly in connection with the government of the Commonwealth, about the doctrine of "separation of powers." This doctrine

tends to-day to be somewhat discredited, mainly because too much has been claimed for it, and because it has been sought to elevate it to the status of a fundamental and inviolable principle, instead of what it in reality is in the case of most of the Constitutions of the British Commonwealth of Nations - a mere predication concerning the broad aspect necessarily worn by any system of representative government.

Halsbury says, in introducing the Title of "Constitutional Law", "The sovereign power, or government of the country, comprises the legislature, or body which makes the laws, the executive, or authority which carries the laws into effect so far as they relate to the public services, and the judiciary, which enforces the due observance of the laws" (Laws of England Vol vi p. 317). In The Mechanism of the Modern State, Sir John Marriott goes so far as to say: "To-day, in all civilised states, the three functions of government are clearly distinguished, and each function is assigned to its appropriate organ" (Vol I p.336).

On the other hand, Robson in his recent work, Justice and Administrative Law, speaks of the "legendary separation of powers" and adds that, while the various functions of government may be accepted as imperfectly designated under three heads, 'it does not by any means follow that we must consign ourselves to that antique and rickety

chariot known as the Separation of Powers, so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas" (p.12). Mr. Robert Menzies K.C. giving evidence before a recent Senate Select Committee, said: "I have never been a strong believer in the separation of the three arms of government. I do not think that any English writer ever thought that there was a separation of the three arms of government until a French observer said so" (Parlt. Papers 1929-30, No. S1.P. 42).

It is submitted that the now accepted view of the doctrine is that expressed by Professor C.K.Allen, who says: "It does not lie in the mouth of English lawyers to insist fanatically on that doctrine.....But it goes to the other extreme to deny any validity whatever to the doctrine of the separation of powers. From the point of view of mere convenience, it rests upon a sound and useful principle, for, provided that room is left for necessary exceptions, it represents a good working basis, and probably the only basis, for the normal distribution of public power" (Bureaucracy Triumphant, p. 58).

SEPARATION OF POWERS AS A RIGID INSTITUTION.

The foregoing excerpts present views of the doctrine of separation mainly as it applies to the unwritten Constitution of Great Britain. But in the

case of the Commonwealth of Australia there was an important reason for supposing that the doctrine meant something more definite, and that there was in fact a legally established and perhaps entirely rigid separation of powers. The reason was that the Constitution itself appeared to have said so.

Indeed, so far as the actual structure of the Constitution had been able to achieve it, the theory of separation seemed to have been built into the very fabric of the Commonwealth. The first three Chapters of the Constitution dealing with the organs of govefnment, are ordered with the evident purpose of establishing the tripartite division. Chapter I begins with the words: "The legislative power of the Commonwealth shall be vested in a Federal Parliament....." and Chapters II and III begin with appropriate words following the same formula as to the executive and judicial functions respectively. To quote Dixon J. in Victorian Stevedoring Co. v. Dignam (supra), "The arrangement of the Constitution and the emphatic words in which the three powers are vested by secs. 1, 61 and 71, combine with the careful and elaborate provisions constituting or defining the repositories of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described."

The American example was, of course, the decisive influence which led the makers of the Constitution to adopt this structural separation; but, as has already been indicated, the fact of the division of powers was far from being peculiar to the United States. The formalism with which it had been invested was the American feature; and this in its turn, represented the attempt to set down in rigid and permanent form what the fathers of the United States perceived to be the general character of the Constitution of Great Britain. Attention had been first drawn to this aspect of British government by Montesquieu in 1749 (Esprit des Lois Book XI Chap. 6.), and shortly afterwards Sir William Blackstone, writing a bare twenty years before the framing of the United States Constitution, exalted the division to the status of a basic principle of government, and brought it directly under the notice of English speaking people (Commentaries, Vol I, pp. 147, 190,267.) There can be no doubt that these two writers exercised a powerful influence over the American Convention of 1787. Isaacs J. has in this connection referred to Blackstone as the "inspiration of the American Constitution" (Huddart Parker v. Moorhead 8 C.L.R. 330 at p. 383.

But if driven snow be grasped in the hand it becomes ice. The elusive conventions of the English Constitution could not be reduced to a

syston of mathematical rigidity without making the result something very different from the model it was sought to copy. In England, the division of powers as Montesquieu found it was, like so many other British political and legal institutions, the result of evolutionary growth. The British method, if it should be called a method, is inductive. Its principles are not a priori in character, but are generalisations springing naturally from the way in which numberless practical problems have been solved.

So far as there was any doctrine of the English Constitution, it was all against the separation of powers. The theory was the centralisation of every power in the King; and when time and circumstances resulted in the distribution of those powers among various agents, the whole system remained consistent with the theory. The judicial power became separated as a matter of necessity in very early times. "By the long and uniform usage of many ages," Says Blackstone (Commentaries Vol.I, p. 267), "our Kings have delegated their whole judicial power to the judges of their several Courts." The protracted struggle which finally established the supremacy of Parliament over the Sovereign, familiar in outline even to the most casual student of English history, was needed to bring about the practical separation of the

legislative and executive functions. But even when these processes were completed, there were no rigid lines. The division had not been laid down; it had grown up.

In this history lies the basic reason why the interpretation by the Courts of parallel rigid Constitutions in the Commonwealth and the United States respectively has diverged in the manner which will presently be examined. A fundamental contrast between the British and the American theory is apparent. In England, the whole constitutional power comes from a supreme ruler, who is still, in theory, the central governing authority. "It is the King in Parliament", says Inglis Clark, "who makes the laws; and it is the King in Council who executes them; and it is the King's Courts that interpret and declare the laws." (Australian Constitutional Law.)

The important consequence follows that the Sovereign, having thus distributed power among his various agents, can on the advice of his Parliament make laws altering the distribution. The King in Parliament remains the sole and supreme authority to determine how and by whom executive and judicial power shall be exercised. This is the point made by Professor Harrison Moore when he says: "Our political doctrine is not that of a sovereign people

committing limited powers of government to their agents. Self-government has been parliamentary government, and consequently the disposal of executive and judicial duties as well as of subordinate powers of legislation has devolved upon the organ vested with the general power to make laws." (Commonwealth p. 95).

In the United States, on the contrary, the power is conferred on the governing authorities by an outside entity, i.e. the people. Thus, the law-making authority (i.e. Congress), instead of being the fountain of all power, as is the King in Parliament in Great Britain, is the mere repository of a special function which it is bound itself to discharge - the function of legislating. It follows inevitably that Congress cannot make laws interfering with the functions of the Executive and Judiciary; for these are coordinate organs of government, whose respective spheres are derived from as high an authority as is that of the law-maker itself.

At the time of Federation, it was already firmly established that the model on which all the Legislatures of the self-governing parts of the British Empire were deemed to have been fashioned was the Imperial Parliament itself. The Privy Council has lost no opportunity of pointing this out. (E.g. Hodge v. The Queen, 9 A.C. 117; Webb v. Outtrim, A.C. 81). It follows that in the case of the State Legislatures of Australia, for example, which possess

written but not rigid Constitutions, there is no more to be found any shackling and arbitrary separation of powers than there is in Great Britain. To quote Harrison Moore: "It may be assumed that the separation of powers is in the States no more than a rule of expediency subject to political sanctions. These sanctions must, it is submitted, be found in the State itself." (Commonwealth, p.96).

THE ORIGINAL PROBLEM.

It will be seen, therefore, that the founders of the Constitution of the Commonwealth presented the High Court with what was, on the face of it, a somewhat complex problem. The Constitution Act, it appeared from precedent and general principle, conferred upon the Commonwealth Parliament powers that were as full, within their limits of territory and subject matter, as those of the Imperial Parliament on which it was modelled. Such powers would prima facie extend to the disposal of every function of government as the Legislature might think fit. Yet, in the same rigid Constitution that created this Legislature, the Executive and the Judicature were, it equally appeared, set up as coordinate organs, a consideration which led Harrison Moore to say, as late as 1910, "In the case of the Commonwealth Parliament it is impossible to avoid the conclusion that the separation of powers was intended to establish legal limitations on the powers of the organs of government, and that the Courts are required to

address themselves to the problem of defining the functions of those organs" (Commonwealth, p. 96).

The problem, then, created by the Constitution was that the vital British theory of the supremacy of Parliament had somehow to be reconciled with arbitrary isolation of the three powers, a device alien to the British tradition (and indeed found nowhere else in the British Empire - Inglis Clark, p.31) which appeared to have been made a feature of the rigid federal system. It was obvious that the substance of the difficulty concerned the Executive. Little trouble could arise on the border-land between legislative and judicial functions. But the investing of an Executive with the duties, at times of a legislator, and at others of a judge, was even in 1900 an increasingly common phenomenon of British government. Was this forbidden by the Commonwealth Constitution? It was evident that either the supremacy of Parliament or the doctrine of separation would have to make concessions in the interpreting of the Constitution. It is proposed now to examine the manner in which this question, vital as it is to the delimitation of the field covered by the executive power of the Commonwealth, has been dealt with by the High Court.

JUDICIAL RECOGNITION OF THE PRINCIPLE

IN THE HIGH COURT.

From the first, in such cases before it raised the issue, the High Court took the stand that the separation of powers, as a general principle applicable to the Commonwealth Constitution, was a reality and had a definite meaning. In New South Wales v. The Commonwealth 20 C.L.R. 54 where it was held that the Interstate Commission could not be erected into a Court within the meaning of Chapter III of the Constitution, Isaacs J. said "When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity" (p. 88). and Rich J. (at p.108) was even more explicit in his affirmation of the doctrine. See also Huddart Parker v. Moorhead, 8 C.L.R. 330 at p.393.

A series of subsequent cases, all likewise dealing with the demarcation of the executive sphere from that of the Judicature, either expressly or tacitly depend upon the same attitude. These cases will have to be referred to more fully in a later appropriate place. But in none of them, until the final resolution of the question in Victorian Stevedoring Co. v. Dignan (supra), was there any express suggestion that the operation of the distribution of powers in the Commonwealth was in truth lopsided - that is was effective as between

the Executive and the Judicature, but ineffective as between the Executive and the Legislature. Indeed, such a result must be regarded as more in the nature of a fortuitous development than as a necessary legal consequence of the words of the Constitution. Even at the last, in the Victorian Stevedoring Co's Case, Dixon J. concedes that the intention of the Constitution was something very different from the way it has been worked out. "But an independent consideration", he says, "of the provisions of the Commonwealth Constitution, unaided by any such knowledge (of American precedents), cannot but suggest that it was intended to confine to each of the three departments of government the exercise of the power with which it is invested by the Constitution, the doing of that which can be done in virtue only of the possession of such a power."

CHAPTER XII

THE EXECUTIVE AND THE LEGISLATURE.

"When they adopted the distribution of powers which they found in the Constitution of the United States", said Dixon J. in Victorian Stevedoring Co. v. Dignam 46 C.L.R., "the framers of the Constitution of the Commonwealth of Australia were, of course, by no means unaware of the significance given to the distribution and of the consequences flowing from it." In order, therefore, to appreciate the meaning of the doctrine when fully carried out in a rigid Constitution, so far as it seeks to prevent the exercise of legislative power by the Executive, it is necessary to take a brief glance at the Constitutional records of the United States.

LEGISLATIVE DELEGATION IN THE UNITED STATES.

The principle that Congress may not delegate its legislative functions has undergone little relaxation during the century and a half of American constitutional interpretation. One writer (cit. Port, Administrative Law) says that the rule has now become in practice that Congress may not delegate its legislative powers "unless it

is convenient to do so." It is submitted that this view cannot be supported from the cases, though there has unquestionably been some degree of concession to expediency in the application of the principle to particular instances (See the observations of Holmes J. in Springer v. Government of Philippine Islands (1928) 277 U.S. 230 at p.245). "A constitution" says Dr. Port (Administrative Law p. 258) "is no unchanging body of definite rules, however rigidly its framers attempt to make it so, but an adaptable instrument which will inevitably change to meet the new demands that development makes upon it." In this sense there has no doubt been some adaptation in the application of the principle, in order to cope with the phenomenal growth in complexity of the task of American government since 1787. But that the principle itself has undergone no drastic re-statement is evident from a perusal of the numerous authorities.

Field v. Clark, 143 U.S. 649, decided in 1891 and more than once relied on in the High Court, is instructive to show the definite shape in which the rule appeared when the Constitution of the Commonwealth was framed. "That Congress", said the Court at p. 692, "cannot delegate legislative power to the President is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the Constitution." But the Court explained that the Act being challenged, which authorised the President to suspend

the operation of tariff provisions in certain events, was not inconsistent with this principle. "That the President was required to do", it was said, "was simply in execution of the Act of Congress. It was not the making of law. It was part of the law as it left the hands of Congress that the provisions, full and complete in themselves.... should be suspended in a given contingency." This reasoning contains the substance without the name of what appears in Baxter v. Ah. Wey 8 C.L.R. 626, and R. v. Burah 3 A.C.889 as the theory of "conditional legislation".

No decision of the United States Supreme Court goes very far beyond what can be justified with the aid of that theory, and it is unnecessary to examine the many other cases in detail. Monongahela Bridge Co. v. United States 216 U.S.177 decided in 1910, United States v. Grimaud 220 U.S. 506 of the following year, Interstate Commerce Commission v. Goodrich 224 U.S. 194 decided a year or two later, and Mutual Film Corporation v. Industrial Commission of Ohio 236 U.S. 230, of 1915, all contain unequivocal reiterations of the prohibition. The very recent authority of Hampton & Co. v. The United States, 276 U.S. 394, re-affirms the separation of ~~legislative~~ powers almost more emphatically than ever. (See further Willoughby: Vol. II p. 1259 et seq; Story:

Constitution, par. 519; Cooley: Constitutional Limitations, p. 127).

INTERPRETATION BY THE HIGH COURT.

The course of exposition by the High Court of the constitutional relations of the Executive and Legislature of the Commonwealth is a striking example of evolutionary interpretation. Reference has already been made to the acknowledgments by that Court that, whatever it might be found precisely to involve in the way of consequences, there was in fact a separation of powers inherent in the plan of the Constitution. This was accompanied in the early stages by a definite tendency to ascribe to the separation of legislative and executive functions the same legal results as in the United States. Then followed a long interval during which nothing was said and a great deal happened. When the question came again under the notice of the High Court, it was necessary to have regard, amongst other things, to an already established practice in the working of the Constitution which virtually ignored the separation of the Executive from the Legislature in the American sense altogether. Perhaps this was responsible for some evident judicial reluctance to grapple finally with the problem involved and place the constitutional position on a plain footing. At last, however, the Transport Workers Act 1928-1929 confronted the doctrine of

separation with so audacious a challenge that the final settlement of the issue could wait no longer.

The cotem of cases which form the stepping-stones in this course of development begins in 1909, with the decision in Baxter v. Ah. Wey, 8 C.L.R. 626. In that case, the grant under the Customs Act 1901 sec. 52 (g) of authority to the Governor-General to prohibit the importation of any goods by proclamation was attacked as an unconstitutional delegation of legislative power to the Executive. The section was upheld. But the significant thing is that the finding of the Court was not that the delegation was constitutionally permissible, but that there was no delegation. R. v. Burah, 3 A.C.889, in which the Judicial Committee had enunciated the theory of conditional legislation, was held to govern the facts. Thus Griffith C.J. says: "In truth the whole question in this case was disposed of by the Privy Council in R. v. Burah." Isaacs J. states the ground of his decision as follows: "The proclamation stands per se as a mere fact. That fact, however, has certain consequences prescribed by the Parliament itself.....The Governor-General does not legislate using that word in the true sense." Higgins J. declares that "there is not here in fact any delegation of the law-making power." O'Connor J., the final member of the Court, speaks of the section as "conditional legislation", and

Police on Field v. Clark (supra) and other American cases.

It is true that both Griffith C.J. (p.632) and Isaacs J. (p.643) use words which seem to suggest that even if they had been compelled to regard the section as a delegation of legislative power they would still have upheld it. But the ground chosen for the decision avoids the necessity for facing this issue, which is left without any definite pronouncement. What was it, then, that deterred the Court from declaring that even if Parliament had delegated its functions, it was perfectly competent to do so? It could only have been a sense that, in the words of Harrison Moore, "the separation of powers was intended to establish legal limitations on the powers of the organs of government", and an unreadiness as yet to part company with the interpretation which had been given in the United States to the same constitutional scheme.

But if the striking feature of Baxter v. Ah Way was its reservations, a still more remarkable thing was that it was thenceforward apparently accepted as having said all that it had merely hinted at. It was to be many years before the charge of usurping legislative power was again

levelled against the Commonwealth Executive in the High Court; and when this ultimately happened in Roche v. Kronheimer 29 C.L.R. 329 much had taken place in the interval. A growing practice on the part of Parliament of delegating wide regulation-making powers to the Executive had been suddenly accelerated by the Great War. Under the power conferred by the War Precautions Act 1914-1916 to make regulations "for securing the public safety and the defence of the Commonwealth" the Legislature virtually abdicated its law-making functions in favour of the Executive. A number of cases depending upon regulations made under these war powers were decided by the High Court, but both in argument and judgment the protagonists of the doctrine of separation of powers were silent. Challenged from many angles, the regulations were never attacked on the basis ground that they were an unwarranted exercise of legislative power.

In 1921, however, the point was raised in Roche v. Kronheimer (supra), where the delegation being attacked was the authority given to the Governor-General by the Treaty of Peace Act 1919 to "make such regulations and do such things as appear to him to be necessary for carrying out, and giving effect to" the Economic Clauses of the Treaty of Versailles. It was argued that this was "a handing over of the whole power of legislation

on a particular matter to the Executive" (p. 331).

The Crown in defence of the Act relied on Baxter v. Ah Way (supra).

But whether the point would have been upheld or not if it had been taken in an earlier day, it was quite evidently too late for it to succeed in 1921. The Court dismissed the whole matter in three sentences, the last of which was: "It is enough to say that the validity of legislation in this form has been upheld in Farey v. Burvett (21 C.L.R. 433); Fenchurch v. Kiernan (24 C.L.R. 120.); Ferrando v. Pearce (25 C.L.R. 241); and Sickerdick v. Ashton (25 C.L.R. 506), and we do not propose to enter into any inquiry as to the correctness of those decisions."

This very summary disposal of the question may have been an indication of the Court's opinion as to the entire lack of substance in the point relied on. But it seems more probable that it was due to a desire to defer, for the time being, the thorough and extensive reconsideration of the relations of the Executive and the Legislature which it must even then have recognised, would have ultimately to be undertaken. In the four cases cited, as has already been indicated, the issue had never been argued to the Court; although, as Dixon J. points out in the Victorian Stevedoring Co's Case (supra), "in three on them..... an argument raising it would have been relevant,

and in two of these some difficulty might have been felt in treating the authority which had been exercised by the Executive as anything less than legislative." He is of opinion, however, that "the strength in time of War of the defence power.....might conceivably have enabled the Court to confess and avoid an argument based upon the general doctrine of the separation of powers."

The decision in Kronheimer's Case was thus in a general sense inconclusive. Further, it has been pointed out that since the economic consequences of the Treaty had been elaborately defined by the Treaty itself, which in its turn had been ratified by Parliament, the Treaty of Peace Act does not necessarily amount to more than an example of conditional legislation, which would thus carry the position no further than it was taken in Baxter v. Ah Way. In 1925 Dr. Kerr could still write: "The Commonwealth Executive neither possesses nor could have conferred on it by the Legislature discretionary legislative power, as distinct from administrative regulation-making." (Law of the Australian Constitution, p.220).

In 1928, the Transport Workers Act was passed authorising the Governor-General to make regulations having the force of law "notwithstanding anything in any other Act", and on a subject

matter which embraced very important aspects of industry and commerce. An amendment of the following year added further sections, but did not in any practical direction curtail the prigimal grant of power. Clearly, here was no mere authorisation to the Executive to apply and carry out a law which Parliament had laid down. In Huddart Parker v. The Commonwealth 44 C.L.R. 492, where the Act was first considered, the question of whether the degree of delegation could be justified was scarcely relied on at all in argument, although the Court made passing reference to the matter, expressing the view that the form of legislation was sanctioned by Roche v. Kronheimer (supra). In Victorian Stevedoring Co. v. Dignan, 46 C.L.R., however, the separation of powers was made the spearhead of the attack, and the whole question fell under close examination.

VICTORIAN STEVEDORING CO'S CASE.

The Court held that the Act was valid, and by this decision, disposed of any doubt that still existed whether it was within the competence of Parliament to make a genuine delegation of executive power, as distinct from anything that might be distinguished as conditional legislation or otherwise. Lengthy and important judgments were delivered by Dixon and Evatt J.J., and agreement was expressed by Rich J. with that of the first mentioned Justice. Roche v. Kronheimer (supra) was followed. It was said that whatever might

be urged to distinguish that decision, as for example by showing that it was supportable on special grounds, its judgments could not be read in any limited sense, but must be taken as having decided "that a statute conferring upon the Executive a power to legislate upon some matter contained within one of the subjects of the legislative power of the Parliament is a law with respect to that subject, and that the distribution of legislative, executive and judicial powers in the Constitution does not operate to restrain the power of Parliament to make such a law."

With the exception perhaps of Evatt J., the Court does not attempt to reach this conclusion by reasoning from general principles. On the contrary, Rich J., referring to Roche v. Kronheimer, says: "Whatever may be said for or against that decision, I think we should not now depart from it", and Dixon J. regards that case as having decided that "the time had passed" for relying on the separation of powers to prevent legislative delegation. The interpretation of the Constitution which has now been adopted in view of Roche v. Kronheimer, he continues, "may appear to involve an inconsistency or, at least, an asymmetry, and there are not wanting those who think a course of judicial decision no sufficient warrant for anything

so unsatisfactory."

The explanation of this course of decision it is pointed out, "depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law" - considerations to which attention was drawn in some detail in the preceding Chapter of this work. The case, read as a whole, says in effect that the British theory of government permeates the constitutional fabric of the Commonwealth, and must be closely regarded in conjunction with the prima facie seperation of powers. When so regarded it operates unequally upon the Executive in its relation to the Legislature and the Judicature respectively. "The British tradition", says Evatt J., "that judicial functionaries are or should be free from any interference on the part of the Legislature or the Executive has resulted in a <u>special tendency</u> to resist any serious encroachment upon the field of judicial action by agencies of the Executive Government." But, as is emphasised by Gavan Duffy C. J. and Starke J., "legislative power is very different in character from judicial power: the general authority of the Parliament of the Commonwealth to make laws upon specific subjects at discretion bears no resemblance to the judicial power."

REMAINING LIMITATIONS.

The case makes it clear at the same time that there is an ultimate point, remote though that point may be, beyond which Parliament may not go in assigning power to the Executive. "This does not mean that a law confiding authority to the Executive will be valid, however extensive or vague the subject matter may be, if it does not fall outside the boundaries of Federal power....." said Dixon J., "Nor does it mean that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority." The case appears to establish two limitations upon Parliament's power to delegate its functions; the first more or less clearly defined, and the second somewhat obscure.

(1) In the first place, the Commonwealth Parliament is subject to one ultimate restriction, which has nothing to do with the separation of powers, but which is none the less very material in the present connection. Every law passed by Parliament must, to be valid, be capable of being properly described as a law with respect to one or more of the subject matters on which it is authorised by the Constitution to legislate. Obviously a law purporting merely to vest legislative power in the Executive might fall short of being such a

1st. To quote Dixon J: "There may be such a width or such an uncertainty of the subject matter to be handed over that the enactment attempting it is not a law with respect to any particular head or heads of legislative power."

The limitation is stated, it is submitted, somewhat more precisely by Evatt J. He instances the illustration of an enactment to the effect that "The Executive Government may make regulations having the force of law upon the subject of trade and commerce with other countries or among the States." Such a law, he says, would be beyond the competence of Parliament, but not for any reason arising out of the distribution of powers. It could be supported, if at all, only as a law with respect to trade and commerce. But in truth it could not amount to this. It would be no more than "a law with respect to the legislative power to deal with the subject of trade and commerce."

The same Justice gives it as his opinion that the particular circumstances existing at the time of the passing of the law may operate to qualify in an important respect the force even of this ultimate restriction. The presence of an imperative public need, may, as it were, push the limitation further back. Thus, "a law conferring power to regulate in time of war or national emergency .....although clearly a law with respect to legislative power, might also be truly described as a law with respect to the subject matter of naval and military defence, or external affairs or another subject matter."

(2) The second limitation is indicated by Dixon J. only, and in a passing reference. After mentioning the possibility of other "considerations of weight affecting the validity of an Act creating a legislative authority", "being supplied by the distribution of powers, he says: "For instance, its relevence is undeniable to the particular problem suggested in "In re Initiative and Referendum Act (1919 A.C. 935)".

The case referred to was one in which an Act of the Manitoba Legislature providing for alterations in the law to take effect upon approval of the electors at a referendum was held invalid. The main ground on which the Judicial Committee rested its judgment is irrelevant here; but after that ground had been dealt with, the following observations were made on another aspect of the appeal: "Sec. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it so ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies... but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its existence. Their Lordships do no more than drew attention to the gravity of the constitutional questions which thus arise."

It is perhaps impossible to foresee with any precision the forms of legislation which would be obnoxious to the principle here indicated. According to Evatt J. in the Victorian Stevedoring Co.'s Case "every grant by the Commonwealth Parliament of authority to make rules and regulations, whether the grantee is the Executive Government or some other authority, is itself a grant of legislative power." If this be the correct view, then it would seem that the grant of local government powers to a municipal body created for the purpose would be an instance falling within the words used by the Judicial Committee. This, however, cannot be what was intended. Perhaps the attempt to create a semi-independent subordinate Legislature with authority to make laws as to one or more of the subject matters of sec. 51 of the Constitution might under some circumstances raise the issue. In most cases a law to effect such a purpose would be frustrated by the first restriction, which has already been discussed.

Evatt J. seems to hold the view that the Privy Council's observations are directed only against such laws as would have the effect of irrevocably divesting a Legislature of some portion of its law-making powers. If this is the correct view, then the suggested limitation cannot apply to the Commonwealth Parliament, which is unable to divest itself of the power to resume at will any field of law-making which it may have delegated.

DELEGATION TO BODIES OTHER THAN THE EXECUTIVE.

In attempting to fix this somewhat speculative

limit to Parliament's right of delegation, it is important that one aspect of the question should be shortly noted. There is nothing to prevent the Legislature, provided it is acting within otherwise permissible limits, from conferring the right to legislate not only upon the Executive but also upon any other authorities it may select. It is otherwise in the United States, where the maxim delegatus non potest delegare is effective to prevent this being done.

A debt is owed to Dixon J. for having cleared up in the Victorian Stevedoring Co's Case a confusion, which had been conspicuous in certain of the earlier authorities, between the operation of this principle and the consequences of the separation of powers. They are, it is pointed out, wholly distinct. The legal maxim is held to apply in the United States as a result of the basic constitutional theory of that Federation. "Because the powers of government are considered to be derived from the authority of the people of the Union, no agency to whom the people have confided a power may delegate its exercise." But it is a "second doctrine", and Dixon J. reminds us that "it is important to observe that in America the intrusion of the doctrines of agency into constitutional interpretation has in no way obscured the operation of the separation of powers."

The agency doctrine in the United States has a wider operation, as between the Legislature and the Executive, than that of the separation of powers. It

"disables the Legislature", to quote Dixon J. again, "from granting legislative power not only to the Executive but to bodies outside the Federal Government e.g. State Governments." But it has no application to the constitutions of the British self-governing Dominions (R. v. Burah, 3 A. C. 889; Hodge v. The Queen 9 A. C. 117). Consequently, in determining whether the Commonwealth Parliament by any law has in truth "created and endowed with its own capacity a new legislative power not created by the Act to which it owes its existence" within the meaning of In re Initiative and Referendum Act (supra) it is not necessarily a material or even a relevant circumstance that the power is created by investing some authority other than the Commonwealth Executive with the right to legislate.

An illustration of this is found in James v. The Commonwealth 41 C.L.R. 422. The Dried Fruits Act 1928 confers upon "prescribed authorities" the power to impose drastic restrictions on the interstate carriage of fruit. The regulations prescribe that the authorities shall be the Dried Fruits Boards of the States, as already constituted under State legislation. In the case mentioned, the point was raised that the controlling powers could not be reposed in State administrative bodies. In rejecting the contention, Starke J. referred to the plenary authority enjoyed by the Commonwealth Parliament, and continued, "In my opinion, the Commonwealth may select its own agents or licensing

authorities - whether persons resident in a State, or bodies incorporated by a State, or administrative bodies constituted under a State law." (p. 463. See also per Higgins J. at p. 459).

CHAPTER IV

THE EXECUTIVE AND THE JUDICATURE.

What Evatt J. describes in the Australian Stevedoring Co's Case as "the British tradition that judicial functionaries are or should be free from any interference on the part of the Legislature" has, as has already been indicated, been an important factor in securing full effect for the distribution of powers so far as it relates to the province of the Judicature. But this is not the only reason for the unequal operation of that distribution upon the Executive and the Judicature respectively. The words of Chapter III of the Constitution mark off the judicial power as occupying a separate field far more precisely than does the portion dealing with the Executive, perticularly when the inherent character of each of the two branches is taken into consideration.

But even here the resistless growth in complexity and importance of modern administration has had its weight as a factor in the course of interpretation. For the effective separation of the "judicial power" has been achieved only by giving a special and limited meaning to that term. All tribunals, the functions of which cannot be described as involving the exercise of that power in the strict sense in which it has been defined, belong to the province of the Executive. Such tribunals, as

will be seen, exist in bewildering profusion. The most convenient starting-point, therefore, for ascertaining the nature of the dividing line between the Executive and the Judicature is to analyse the meaning which has been attached to the expression "judicial power". As a basis, we turn to the words of the Constitution.

THE TERMS OF THE CONSTITUTION.

The grant of specific powers to the Parliament in secs. 51 and 52 is declared to be "subject to this Constitution". It follows, therefore, that laws made by the Federal Legislature are subject to secs 71-80 of the Constitution, vesting the judicial power of the Commonwealth in certain courts, and laying down the conditions of that power. The validity of any law is dependent upon its not being in conflict with these sections.

In the second place, Chapter III, of the Constitution, comprising these sections, is an exhaustive delimitation of the judicial power. In The Commonwealth v. New South Wales, 20 C.L.R. 54 where the question in issue was whether the Interstate Commission could be erected into a Court, Isaacs J. said, expressing the view taken by the majority of the Court:-

> "Chapter III is headed "The Judicature," and vests the judicial power of the Commonwealth not in the Sovereign simply, or as he may in Parliament direct, but in specific organs, namely, Courts strictly so called.....There

is a mandate to create a High Court; there is a discretionary power to create other Federal Courts; and there is a discretionary power to invest with federal jurisdiction such Courts as Parliament finds already in existence, that is, State Courts. But that exhausts the judicature. And as to Federal Courts, the Justices are to have a specific tenure. And the distinct command of the Constitution is that whatever judicial power - that is, in the contrasted sense - is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals." (p. 89. See also Griffith C. J. at p. 62).

The consequence is that no law can be validly made dealing with any power which is in its nature essentially judicial, by which the Legislature purports either to exercise such power itself, or (which immediately concerns us here) to confer it on the Executive. There is thus much less vagueness and difficulty about settling the boundaries of the judicial power in its relation to the other two branches than is met with in dealing with the limits inter se of the legislative and executive powers, because in defining the field of the Judicature the High Court has adhered to the literal words of the Constitution. The question in each case where a doubtful power is conferred on the Executive resolves itself simply into an inquiry whether such power is "judicial" within the meaning of sec. 71, which begins with the words:- "The judicial power of the Commonwealth shall be vested in....."

and then particularises certain Courts. If the power is judicial it cannot be conferred upon the Executive; but must be entrusted to a Court validly created under Chapter III, and the personnel of the Court must be appointed for life, subject only to the power of removal contained in sec. 72. (Waterside Workers' Federation v. Alexander, 25 C.L.R. 434; British Imperial Oil Co. v. Federal Commissioner 35 C.L.R. 422; Federal Commissioner v. Australian Tesselated Tile Co. 36 C.L.R. 119; Shell Oil Co. v. Federal Commissioner 1931 A.C. 275.)

NATURE OF "JUDICIAL POWER".

The definition of "judicial power", as that expression is used in the Constitution, has been accomplished with the aid of a group of English and Irish authorities, the pronouncements in which have been followed and applied by the High Court. Those authorities, however, had, as might be expected, no express application to the constitutional issue raised by an attempted rigid separation of powers. They were concerned with the definition of the nature of those proceedings to control which the prerogative writs of mandamus and certiorari might properly go. The application of the overseas cases to the Commonwealth Constitution has thus resulted in a narrow and strict delimitation of the judicial power.

Very broadly speaking, "judicial power" is the "power of imposing an obligation upon individuals" (per Brett L. J. in Reg. v. Local Government Board, 10

Q.B.D. 309 at p. 321). But it is a special kind of obligation that must be involved. This appears from a more ample definition by Palles C. B. of Ireland, on which reliance was placed by Isaacs J. in Huddart Parker v. Moorhead, 8 C.L.R. 330). "To erect a tribunal into a Court or jurisdiction", it was said, "so as to make its determinations judicial, the essential element is that it should have power by its determinations within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed or the right affected by the determination only, and not by the fact determined, and so that the liability will exist or the right will be affected, although the determination be wrong in law or in fact."

The learned Chief Baron then goes on to show the distinction between this and the executive power. "It is otherwise", he continues, "of a ministerial power. If the existence of such a power depends upon a contingency.....the happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial." (Reg. v. Local Government Board(1902) 2 I.R. 349 at p. 373). The word "ministerial" is here used in the sense of "administrative", and not in the narrower sense excluding the notion of discretion (Moore: Commonwealth p. 308). The test thus prescribed

is in accordance with that applied for the purposes of the separation of powers in the United States. Thus, in Prentis v. Atlantic Coast Line 211 U.S. 210 at p. 227, Holmes J. says "The nature of the final act determines the nature of the previous inquiry."

This principle for determining the ambit of the judicial power has been repeatedly applied by the High Court. Thus Griffith C. J. says in Huddart Parker v. Moorhead 8 C.L.R. 330 at p. 357 "I am of opinion that the words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." See the whole case, and particularly Isaacs J. at pp. 381-384. The definition quoted from Griffith C.J. has now been strongly approved by the Privy Council in Shell Co. v. Federal Commissioner, 1931 A. C. at 295.

THE TAXATION TRIBUNALS.

A valuable illustration of the line dividing mere administrative power from judicial power is furnished by the Commonwealth legislation with regard to income tax appeals. The Income Tax Assessment Act 1922 provided for a "Board of Appeal" to review decisions of the Comm-

-issioner of Taxation. This Board was declared by the High Court to be invalidly constituted, and the sections of the Act dealing with it to be ultra vires the Constitution in British Imperial Oil Co. Ltd. v. Federal Commissioner, 35 C.L.R. 422, on the ground that Parliament had purported to confer judicial power upon it without making it a Court within the meaning of Chapter III. To meet this decision the Legislature, by the amending Act of 1925, completely reconstituted the tribunal under the name of the "Board of Review." The change was effectual, and the Board as re-established was held to be purely administrative in Federal Commissioner v. Munro, 38 C.L.R. 153, a decision which was affirmed by the Privy Council in Shell Co. v. Federal Commissioner, 1931 A.C. 275.

A brief contrast of the two tribunals is enlightening. In both cases, the members of the Board were appointed for seven years only, with provision for the Governor-General to appoint temporary members in the case of illness, suspension or absence. Neither Board, therefore, could possibly be a Court, within the meaning of the Constitution as interpreted in the Waterside Workers' Case, 25 C.L.R. 434. The essential difference between them, however, is to be found in the nature of the functions alloted to them. Whereas the Board of Appeal was to "hear such cases as are prescribed" and "to make such order" in them as it thought fit, with an appeal "to the High Court in its appellate jurisdiction" on questions of law, the new Board of Review is made

merely a secondary administrative authority standing on the same footing as the Commissioner himself. The new sec. 44 (which is the vital section, conferring the power) provides that: "A Board of Review shall have power to review such decisions of the Commissioner.....as are referred to it by the Commissioner under this Act, and, for the purpose of reviewing such decisions, shall have all the powers and functions of the Commissioner". It is further provided in the same section that the determinations and decisions of the Board are to be deemed to be those of the Commissioner. In the words of the Judicial Committee in the Shell Co.'s Case (supra, at P. 294), "Instead of assimilating the Board to the Court, as in the old sec. 44, the Board in the new sec. 44 is assimilated to the Commissioner". It had already been held by the High Court in Cornell v. Deputy Federal Commissioner 29 C.L.R. 30, that the Commissioner's functions in making decisions as the basis of taxation assessments are of a purely administrative nature.

An important aspect of the distinction, and one on which emphasis was laid by the Privy Council (p.296), is that since the decisions of the Board of Review are deemed to be those of the Commissioner, the wide powers of alteration and addition to assessments possessed by the Commissioner, (sec. 37) are not limited by any decision of the Board. Hence the Board has no ability to make binding and conclusive determinations, which, upon the principle of the definitions cited earlier, is the dis-

-tinguishing mark of judicial power.

This same principle, that there must be some "binding and authoritative decision" has been applied by the High Court in the case of other tribunals. Thus, proceedings which can end in a mere recommendation are not judicial proceedings. This was held in Newcastle Coal Co. v. Firemens' Union, 6 C.L.R. 466, where a recommendation by an Industrial Court to the Governor of New South Wales to appoint a Wages Board (the Court being authorised to make such recommendation by the Industrial Disputes Act 1908 of that State) was held not to be a judicial proceeding. Similarly, a Board constituted under sec. 8a of the Immigration Act 1901 - 1930 with power to recommend deportation is not a judicial tribunal, (R. v. Macfarlane: ex parte O'Flanagan and Kelly 32 C.L.R. 518).

CAPACITY TO ENFORCE DECISIONS.

One of the characteristics of judicial power, which is of the greatest importance in determining whether there has been a purported conferring of such power on a tribunal, is the existence in the tribunal of an ability to enforce its own decisions (Waterside Workers' Case, 25 C.L.R. 434). The reason is that this feature is a vital element in making the decision a "binding determination". As Griffiths C. J. says in the case cited (p. 451) "It is important to observe

that the judicial power includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the whole, the judicial power is undeniably complete." The power to impose penalties is another conclusive indication that judicial power has been conferred (ibid. P.445).

POWER OF INQUIRY.

The power of inquiry, whether by Royal Commission or otherwise, is an executive and not a judicial power (Clough v. Leahy 2 C.L.R. 139, per Griffith C.J. at p 157). The limited field of action of the Federal Parliament does not extend to allow it to pass the legislation which it sought to enact in the Royal Commissions Act 1902-1912, which purported to confer generally upon any Commission that might be appointed by the Governor-General the power to compel attendance of witnesses, answering of questions, and production of documents (Attorney-General for Commonwealth v. Colonial Sugar Refining Co. 1914 A.C. 237). The ground of the Privy Council's decision, however, was not that Parliament could not confer upon a Royal Commission these powers of compulsion, but only that it could not do so generally, in a way that might result in their exercise with regard to matters beyond the legislative powers of the Commonwealth. "Until", said Viscount Haldane, "the Commonwealth

Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject, legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Act in question contains, on the footing that they are incidental to inquiries which it may some day direct."

Parliament can, however, validly confer power to compel the giving of information where the grant is ancillary to one or more of the matters comprised in sec. 51 of the Constitution, without thereby giving judicial power to the Executive. This was held in Appleton v. Moorhead 6 C.L.R. 330. In that case sec. 15b of the Australian Industries Preservation Act 1906 was in question. The section authorised an executive officer, the Comptroller-General of Customs, when he believed that an offence against the Act had been committed, to call upon any person whom he believed capable of giving information to answer questions and produce documents, on pain of a penalty (to be imposed by the Courts) for non-compliance. It was contended by the appellant that this was a conferring of judicial power upon the Executive in violation of the separation of powers imposed by the Constitution.

The Court found that the power given to the Comptroller-General was purely executive in character; and Isaacs J. said (p. 384) "The true position, however, is in my opinion that in neither case are liabilities

imposed or rights affected by any determination of the Comptroller-General, and, resting the matter on the broad distinction of Blackstone, the Comptroller-General's action in no sense amounts to 'administration of public justice' or regulates by any determination of his the life, liberty or property of the person interrogated". The function being discharged was described as a "mere investigation with a view to inform the mind of the Executive whether the law has or has not been observed, and, if not, whether the nature of the contravention is such as to merit further action." It is to be noted that the necessity for the intervention of the Courts before the penalty can be exacted is a vital element. If mere non-compliance with the order of the Comptroller-General had in itself purported to make the person against whom the order was directed liable to the penalty, the position would have been different.

The operation of sec 15b has been since held on its literal meaning to be exhausted once a prosecution has been instituted. (Melbourne Steamship Co. v. Moorhead, 15 C.L.R. 333); But according to Isaacs J. (p. 349), there would have been nothing to prevent the Legislature, had it purported to do so, from extending the power of interrogation to apply even after the prosecution proceedings had commenced. (See on this subject of Inquiry by the Executive. Moore: Commonwealth pp. 310-313.)

ADJUDICATORY POWERS VESTED IN EXECUTIVE.

It is clear from a consideration of the foregoing pronouncements as to the nature of "judicial power" that the mere fact that the exercise of a power involves the discharge of functions of an adjudicatory nature does not in itself make that power judicial. "The tendency of modern legislation," said Viscount Haldane in Everett v. Griffith 1921 I A. C. 631 at p.659 has recently been to entrust to many who are prima facie only administrative officers, functions which have some judicial attributes at all events, although they remain primarily administrators." Again, in Local Government Board v. Arlidge, 1915, A.C. 120, the same learned Lord says (p. 132) "In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial."

These words are emphatically true of the Commonwealth. The Statutes abound with examples of executive tribunals for purposes ancillary to Federal legislation. Broadly speaking, wherever it is necessary to determine facts as a step in the application of Federal legislation, even where the determination seriously affects the rights of individuals, it has been the practice of Parliament to create a special executive authority to deal with the matter, rather than entrust

the determination to a Court. The nature of such tribunals has been judicially referred to as "for the purpose of carrying out executive functions" and consequently "a secondary or incidental function attached to and taking its dominant character from the main purpose", (Federal Commissioner v. Munro 38 C.L.R. at 176). The methods used by the Legislature to confer these powers upon the Executive are most varied, adapted as they are to the conditions of the particular department of administration to serve which the deciding authority is created. The powers conferred likewise vary very greatly; and there are also wide differences in the extent to which these executive authorities exhibit the characteristics of judicial tribunals. This branch of executive power will be considered in a section specially devoted to the subject. The purpose here has been solely to indicate the line which separates all the activities that comprise it from the sphere of judicial power of the Commonwealth, using that phrase in the strict sense of the Constitution.

CONCLUSION.

It is evident, viewing in retrospect the result of inserting the separation of powers into the structure of the Constitution, that while on the one hand the barrier between the Executive and the Legislature has been for all practical purposes swept aside, on the other hand the separation of the Executive from the Judicature has been consistently effective. It may be questioned,

however, how far this effective preserving of the separateness of judicial power has been of great value in safeguarding the rights of subjects from the real peril which it aims to avert - that of having those rights decided under the influence or pressure of the Executive. Chapter III of the Constitution has certainly secured the independence and security of the Federal Judicature. But it has not prevented the frequent and increasing practice on the part of Parliament of withdrawing from the Courts altogether the decision of disputed rights of individuals, particularly where it is their rights against the Crown which are in question. The tendency is, where those rights have to be determined in the course of the administration of Statutes, to commit their decision to executive tribunals, which may use their own methods of arriving at a conclusion (Local Government Board v. Arlidge 1915 A. C. 120) and from which there is no appeal, or at best only a limited right of appeal, to the Courts.

The position comes to this: If rights are to be decided by Courts, then these must be Courts exercising the "judicial power" of the Commonwealth, and with the tenure which the Constitution requires (subject only to a qualification in respect of territories administered under sec. 122 of the Constitution - see Porter v. The King 37 C.L.R. 432). But authority may be given by Parliament to executive officers to decide those rights by administrative as distinct from

ordinary judicial procedure, which means that, except so far as Parliament expressly allows, the rights in question never reach the independent and secure Judicature for determination at all. How far the methods of administrative decision depart from those of Courts of law is a matter which will be closely examined later. The difference is considerable, and in some instances fundamental.

CHAPTER V

THE CROWN UNDER THE CONSTITUTION.

It is not intended under this head to deal with the question of the prerogative, in the sense of meaning thereby "the power of the Crown apart from statutory authority" (Theodore v. Duncan 1919 A.C. 696 at p. 706). In its relation to the Commonwealth, this topic is not one which involves any wide field of executive power, and, in any event, it has been most ably and fully dealt with elsewhere, (See Evatt: "Aspects of the Prerogative"). The study of the formulation and evolution under British law of the doctrine of the unity and indivisibility of the Crown, although of much interest, is likewise outside the scope of this work. It will suffice to say that it was early found that some qualification of this theory in its fullest sense was necessary, in order that it should be satisfactorily applied to Federal systems like those of Canada and the Commonwealth; and to indicate in outline the course taken by judicial exposition in the Commonwealth. The view taken by the High Court on the matter has undergone important modification, and has arrived, in principle at least, at a final shape. But the comparatively recent case of Pirrie v. McFarlane 36 C.L.R. 170, indicates that considerable difficulty may still be encountered in the application of the principle.

It is proposed, further, and in the same

connection, to examine briefly the position of the Crown in the Commonwealth in its relation to the legislative powers of the State Parliaments. This inquiry is directly relevant to the study of the executive power of the Commonwealth, in that it deals with the matter of how far the agents and servants of the Commonwealth, acting in the execution of Commonwealth laws, must be regarded as subject to State legislation.

In one of the first cases decided by the High Court, it was said that "just as the Commonwealth and States are regarded as distinct and separate sovereign bodies.....so the Crown, as representing those several bodies, is to be regarded not as one but as several juristic persons." (Municipal Council of Sydney v. The Commonwealth 1 C.L.R. 208 at p 231). In The King v. Sutton 5 C.L.R. 789 this view was reiterated with greater emphasis, and was made the ground of a decision to the effect that the Customs Act 1901 was binding on the Crown "as representing the State" although it was not so binding upon the Crown in its Commonwealth capacity. Ultimately, the position received a statement in the Engineers' Case 28 C.L.R. 129 at p. 152 which, while discarding the notion of "separate juristic persons", succeeded in reconciling the traditional doctrine of indivisibility of the Crown with the obvious truth that different incidents attached to the Crown in respect of each individual unit of the Australian Federal system. " Distinctions have been relied on," it was said in the

joint judgment of four Justices, "between the 'Imperial King', the 'Commonwealth King' and the 'State King'..... The first step in the examination of the Constitution is to emphasise the primary legal axiom that the Crown is ubiquitous and indivisible in the King's dominions. Though the Crown is one and indivisible throughout the Empire, its legislative, executive and judicial power is exercisable by different agents in different localities, or in respect of different purposes in the same locality, in accordance with the common law or the statute law there binding the Crown."

The theory of the separate persons was in fact part of the paraphernalia of the doctrine of "non-interference" or "implied prohibition" which was being jettisoned in the Engineers' Case. The re-assertion of the indivisibility of the Crown was an essential step in the establishment of the unqualified supremacy of the Commonwealth to the full extent of the written word of the Constitution, which it was the purpose of that decision to achieve. The statement quoted above has been repeated with no more than verbal modification, in later cases. See e.g. Wool Tops Case, 31 C.L.R. 421 at p 439; and Pirrie v. McFarlane (supra) per Higgins J. at p. 219.

THE CROWN AND LEGISLATION.

The settling of the constitutional theory on these lines made it self-apparent that the Commonwealth Parliament could bind the Crown in right of the States by any law which the terms of its written powers

authorised it to pass. At the expense of a not inconsiderable practical change in the distribution of power, the confusion and difficulty involved in drawing a hypothetical line around State instrumentalities of the Crown to protect them from the operation of Commonwealth laws was eliminated. But if the Commonwealth, legislating within its proper sphere, could effectively bind the Crown acting by its State agents, what of the right of a State to pass a law on a matter within its own sphere binding the Crown in right of the Commonwealth?

As to those subjects of legislation in respect of which the States and the Commonwealth enjoyed concurrent power, the matter was clear. If a State Act on such a subject purported to bind the Crown, then prima facie it was effective to achieve this, not only with respect to State agents of the Crown but Commonwealth agents as well. It would fail to bind the Crown in right of the Commonwealth only if there were in existence some valid Federal law which prevented this result. A State Act might for example, in the absence of any Federal enactment, require Commonwealth mercantile vessels to berth at prescribed hours and at specified wharves. How far, then, could State legislation bind the Commonwealth agents of the Crown where those agents were engaged in the discharge of functions exclusively allotted by the Constitution to the Commonwealth, assuming that the State Act, apart from this incidental aspect, was upon a matter falling properly within the reserve powers of the States? Two cases illustrate this question.

Roberts v. Ahern.

The first is an early decision of the High Court, in Roberts v. Ahern, 1 C.L.R. 406. In this case, a Commonwealth postal official was prosecuted under the Victorian Police Offences Act 1890 for removing night-soil from a post office without being in possession of a licence as required by that Act. There were no words in the Act making its provisions binding on the Crown, and it was held that the official was wrongly convicted. The Act, it was said, did not affect the Crown either in its Commonwealth or its State capacity. But the significant point of the case for our present purposes was an interpolation in the argument by Griffith C. J. It was being contended that the Act was impliedly binding on the Crown. "But if the Crown is bound by implication", he said (p. 408), "that must apply also to the Crown as represented by the Commonwealth. The implication must be the same in both cases."

Pirrie v. McFarlane.

The view thus suggested, that a State Act purporting to bind the Crown extended, unless directly prevented from doing so by a valid and inconsistent Commonwealth law, to bind the Crown in right of the Commonwealth also, was to be directly tested in the very much later case of Pirrie v. McFarlane, 36 C.L.R. 170. The decision followed an interval of several years after the re-orientation of constitutional development effected

in the Engineers' Case, and is therefore of much importence.

The essential facts are curiously similar to those of Roberts v. Ahern (supra). Again, a part of the exclusive legislative field of the Commonwealth was impinged upon; and again the right of a State to make the doing of an official act by an agent of the Commonwealth conditional upon his obtaining a State licence was in question. An Air Force officer was prosecuted under the Motor Car Act 1915 of Victoria for driving without a licence. At the time of the alleged offence, he was driving a car belonging to the Air Force, on official business, and under official orders. The effect of the Air Force Act and regulations was that the defendant was bound under penalty to obey "any lawful command" of his superior officer. This time, however, there was a vital new feature. The State Act contained the following words: "It is hereby declared that this Act applies to persons in the service of the Crown as well as to other persons."

It was held that the officer in question was subject to the State Act, and was therefore rightly convicted. The decision was a majority one of three Justices to two; and the reasoning of the prevailing judgments is that in the absence of any expressly inconsistent Commonwealth law, it was not a lawful command to order that the officer should act in defiance of the State requirements as to licensing.

Knox C. J., delivering the principal judgment for the majority, said that prima facie, the Victorian Act was "binding upon any person in Victoria, whether employed in the public service of the Commonwealth or not." It was not disputed that the Commonwealth might have, had it so chosen, expressly relieved Defence officers from the State requirement. But, (it was said) this had not been done in terms, and under the circumstances no immunity could be implied.

"In order to sustain the argument for the defendant" said Knox C.J., "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." To be lawful, the reasoning continued, a command must not be contrary to civil law, and part of such civil law was this Motor Car Act, so long as and to the extent that it was not expressly displaced by an inconsistent Commonwealth law. There was no such last-mentioned law, since the relevant Federal legislation contained no exemption from licensing. Therefore the command was unlawful.

Isaacs J. in a dissenting argument with which Rich J. agreed, appeared to base himself on two positions.

(1) State Constitutions and parliamentary powers must, by virtue of secs. 106 and 107 of the Constitution, be read as not extending to the control of the Crown (even apart from inconsistency) in respect of matters exclusively vested in the Commonwealth (p. 199).

(2) A State law cannot have any application to restrict or condition the performance by a Commonwealth servant of a duty imposed on him by a Commonwealth law passed under an exclusive power to legislate on the subject matter in which the duty was involved. (p.204).

An analysis of what was actually decided by the Court shows that the first proposition of Isaacs J. was wholly rejected, and the second was, on the facts, confessed and avoided. As to the first, it was pointed out that this was no less than a form of the discarded doctrine of non-interference - a doctrine, incidentally, which the personal influence of Isaacs J. had been decisive in destroying. The Imperial Parliament, it was said, could pass a law requiring drivers in Great Britain to be licensed, and if this were made binding on the Crown, it would be the duty of soldiers in Great Britain to obey it. "This duty", said Starke J., "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?" Any such difference could conceivably be of two kinds, and only two. It might rest on some "implied prohibition" of interference with Federal officers to be read into the Constitution. But the Engineers' Case negatived this possibility. Therefore, the difference between Britain and Australia could be found, if at all, only in express limitations in the Constitution. The only relevant limitation was sec. 109 covering the case of inconsistency. Hence, if inconsistency were absent, there was no reason why a

State law should not control the Crown in respect even of exclusive Commonwealth functions.

The second proposition relied on by Isaacs J., that the State could not impose restrictions on the performance of a duty by a Commonwealth servant who was acting under a law made in pursuance of the Commonwealth's exclusive power, was admitted. But it was pointed out that the truth of this rested, once more, on <u>inconsistency and sec. 109.</u> By limiting the commands which must be obeyed to "lawful" commands, the Commonwealth had in effect <u>imposed the licensing condition on itself,</u> and no question arose of Commonwealth functionaries being restricted by State law. There was no inconsistency on which section 109 could operate.

The principle finally deducible from the case is in accord with the view apparently held by Griffith C. J. in <u>Roberts v. Ahern</u> (supra). It is at the same time a direct consequence of the absence of any doctrine of non-interference in the rules of interpretation of the Constitution. In one sense, the sweeping away of that doctrine removed a defensive barrier formerly possessed by the States against Commonwealth power. <u>Firrie v. McFarlane</u> illustrates the converse result. Where a State is legislating on a matter properly falling within the range of its reserve powers, the only limit to the operation of its enactment upon the Commonwealth or its servants is sec. 109 of the Constit-

-ution. In this respect it is immaterial that the State law operates on those agencies or instrumentalities of the Commonwealth which are engaged in executing its exclusive powers. In other words, it is perfectly competent for a State to pass laws binding the Crown in right of the Commonwealth, and such laws are valid to the full extent of their prima facie effect, unless and until they become inconsistent with a valid law of the Commonwealth.

CHAPTER VI

SPECIAL LIMITATIONS OF THE POWER.

THE EXECUTIVE AND PUBLIC FINANCE.

"The Parliamentary guardianship of taxation and expenditure" declared Isaacs J. in the Wool Tops Case, 31 C.L.R. 421 at p. 434, "is the pivot of the Constitution, and the keystone of the arch of personal liberty." In that decision the High Court set at rest any doubts there may have been whether this principle, and its consequences arising from the law as interpreted by the English Courts, were as applicable in Australia under the rigid Commonwealth Constitution as under the English system. The principle results in two important limitations on the power of the Executive, limitations which are the insignia of the supremacy of Parliament. These are that the Executive shall not (1) impose taxation, or (2) appropriate revenue, without unequivocal parliamentary authority. Such restrictions are not to be found in terms anywhere in the Constitution, but follow from the doctrine of responsible government, which, it was said in the case above cited, "is invisibly but none the less inextricably and powerfully interwoven with the texture of the written word."

(1) IMPOSITION OF TAXATION.

The facts in the Wool Tops Case (supra)

illustrate the wide field which is covered by the prohibition against the exercise of taxing power by the Executive. Four agreements made by the Commonwealth with a private company were in question, and certain of them stipulated that the Company would, in return for a consent given by the Commonwealth Government under its War Precautions powers to the sale of wool tops by the Company, pay to the Commonwealth a share of the profits. It was held, by those members of the Court who dealt with the question, that this stipulation as to profits amounted to the imposition of a tax within the meaning of the meaning of the prohibition contained in the Bill of Rights. It made no difference that the imposition was made by what purported to be an "agreement". Still less was it material that the moneys to be paid were referred to in the documents as "licence fees". The authority of Attorney-General v. Wilts United Dairies Ltd. (1921) 37 T.L.R. 884, on closely similar facts, was followed; and reliance was placed on the words of Lord Buckmaster, who had said in that case: "However the character of this payment may be clothed.....in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means."

The Wilts United Dairies' Case was, of course, indisputable authority for the principle, and the only question (which the Wool Tops Case answered) was whether it was applicable to the Commonwealth in the circumstances then being considered so as in effect to place an implied limitation on the defence powers, completely unqualified by express words, which had been conferred on the Executive by the War Precautions legislation. If it were necessary, the principle itself has in fact been further supported by later weighty authority. See Marshall Shipping Co. v. Board of Trade 1923 2 K.B. 343, and Brocklebank v. The King 1924 1 K.B. 647; 40 T.L.R.869.

(2) APPROPRIATION OF REVENUE.

One of the agreements in the Wool Tops Case purported to bind the Government to pay a remuneration to the Company on a stipulated basis, in return for the manufacture by it of wool tops. This was held to amount to an attempted appropriation by the Executive of public revenue. A dictum of the Privy Council in Mackay v. The Attorney-General for British Columbia 1922 1 A.C. 457 at p. 461 was followed, where it was said: "A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorised it either directly or under the provisions of a statute."

On this, as on the other point, the only fully reasoned judgment was that of Isaacs J. Its

terms were evidently endorsed by Higgins J. and Starke J., but the remaining members of the Court preferred to rely on other grounds. Because the words of Mackay's Case were not essential to the decision, Isaacs. J. declared that he felt bound to examine the question apart from this authority, and did so at length. But if these symptoms of hesitancy on the part of the Court might seem to throw any doubt on the principle as affecting the Commonwealth, the doubt is dispelled by later authority. In Auckland Harbour Board v. The King 1924 A.C. 318, the Privy Council was called upon to decide directly whether this limitation on executive power did in fact exist, and, if so, whether it was applicable to the working of the written Constitution of a British Dominion. The Judicial Committee entertained no doubts. On the facts before them there had been a payment by the Executive under an appropriation that had been made subject, by the New Zealand Parliament, to a condition which had never been fulfilled. Declaring the payment illegal, the Committee said: "It has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorisation from Parliament itself. The days are long gone by in which the Crown or its servants, apart from Parliament, could give such an authorisation or ratify an improper payment." (See further Attorney-General v. Gt. S. & W.

Ry. of Ireland 1925 A.C. 754).

VALIDATION OF PAYMENTS.

In The Commonwealth v. Colonial Ammunition Co. 34 C.L.R. 198 it was contended that an unauthorised payment by the Executive was "ratified" by a subsequent parliamentary appropriation of public moneys for the specific purpose for which the payment had been made. Isaacs and Rich JJ. dealt with this argument at length, and wholly rejected it. It was pointed out in the first place, that since Parliament was not identical with the Commonwealth, and could not under any circumstances become a party to a contract, it was impossible for it to stand to the Executive in the relation of principal to agent - consequently there could be no talk of "ratification". The most that Parliament could do was to validate what had been an illegal act.

An appropriation of moneys was no express validation. Could it, then, be an implied validation? "Is the legislative process of granting supply to the Crown and of appropriating public moneys to meet that supply", it was asked, "a validation of every bargain, of every act, tort, or even crime - as it might happen to be at the time - involved in the detailed estimates for which the money is voted?" It was held that this was not the case, and that the contrary view rested on a misconception of the inherent nature of the parliamentary

process of supply and appropriation. The object to which Parliament was directing itself in that process was, it was said, "financial, not regulative," and appropriation of moneys thus had no effect whatever upon transactions by the Executive unless Parliament itself attached some specific legal consequence to such appropriation. The position is, therefore, that any validation of illegal payments must be made by an enactment expressly or by necessary implication achieving that result; and mere appropriation does not of itself suffice to raise such an implication.

LIMITS OF CONTRACTING POWER.

In an earlier Chapter, the Wool Tops Case 31 C.L.R. 431 was discussed from the viewpoint of the exposition contained in it of the general scope of the executive power of the Commonwealth. But the actual point decided lays down an important principle as to the specific power of contracting. The question in issue in the case concerned the capacity of the Commonwealth to make certain agreements. The effect of the decision is that the Commonwealth Executive possesses no general inherent power to contract. It was pointed out (p. 432) that since the administration of departments is directed by sec. 64 of the Constitution, the Ministers "would probably be authorised to make such contracts on behalf of the Commonwealth as might from time to time be necessary in the course of such administration." But apart from this exception (if indeed, it be an exception), any valid agreement must be in maintenance or execution of the written words of the Constitution or some Act of Parliament. Even Professor Harrison Moore had supposed the contracting power to be wider than this. Referring to the making of contracts by the Executive "whenever that is necessary", he says: "For this, no express power appears to be necessary; it follows of necessity from the establishment of the Commonwealth as a new political community" (Commonwealth p. 295).

Such are the general limits of the contracting power. Another limitation, of a specific nature,

is implied from the common law of the prerogative, and is applicable to the Commonwealth. It is often, though somewhat inaccurately, spoken of as the rule that "the Executive cannot fetter itself." If the rule were truly stated in this simple form, it would deny to the Executive the power under any circumstances to bind itself by contract, and the whole system of modern administration would be hamstrung. The kind of contract that is in reality forbidden by the rule is one which if binding would control the future exercise of a discretion reposed in the Crown either by the common law or by Statute. In Watson's Bay Ferry Co. v. Whitfield 27 C.L.R. 268, the High Court described the contract which was there held to offend against the principle as one which placed "an anticipatory fetter on the future exercise of discretion and public action".

Two years later this statement of the matter received confirmation in Rederiaktiebolaget Amphitrite v. The King 1921 3 K.B. 500. Although the decision was only that of a single Justice of the Divisional Court, it was not challenged by appeal and is now accepted as the leading authority. "It is not competent", said Rowlatt J., "for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State."

Since the Executive itself must be the judge, within its own province, of the public necessity (see as to defence, The Zamora 1916 2 A.C. 106) it follows, in the case of the Commonwealth, that the only contracts which the Executive can make so as to bind or control its future discretionary action are those which it has been specially authorised by the Constitution or by an Act of Parliament to make. Contracts necessary in the course of administration are probably authorised by the Constitution, even to the extent of fettering future discretion (Wool Tops Case, supra, at p. 432). Apart from these, all contracts which would have this fettering effect, if they are to be binding upon the Executive, must not only be "in execution of a law of the Commonwealth" within the meaning of sec. 61, but must be expressly or by necessary implication authorised by the terms of that or some other law.

PART TWO

EXECUTIVE TRIBUNALS

AND

DECIDING AUTHORITIES

CHAPTER I

THE EXECUTIVE AND JUSTICE

Courts of Justice vary considerably in outward form, and to the casual observer the full Bench of the High Court might well seem to have little in common with a magistrate sitting in the exercise of summary jurisdiction. But it is a commonplace that the differences are on the surface only. The whole series of regular Courts are marked by basic common features which together represent all that is involved in the traditional conception of the Administration of Justice. It may be true, as Sir Josiah Stamp remarks, that the work of the Judicature is merely a specialised form of general administration which "has acquired an air of detachment" (Current Problems in Finance and Government). But that "air" carries with it, and indeed is itself the product of, elements which are more substantial. Independence and impartiality, formal and undeviating procedure securing that the decision shall be upon evidence after hearing both sides, the combination of the personal presence and action of the Judge with the impersonal and final quality of the consequences flowing from his decision, all these things and others have operated powerfully to attach to the notion of courts of justice a special and established meaning.

In contrast with this is the modern develop-

-ment of "administrative justice". It carries no clear and settled conception of any kind. This may be due in part to its recent appearance as a phenomenon of government; it is very largely due to the heterogeneous nature of the agents employed to give effect to it. But there is a third reason which is beyond question fundamental, and which fixes a gulf between the Courts of law and the paraphernalia of "administrative justice". It concerns a difference of aim. The dominant object of the Courts is to secure that justice shall be done. The first aim of administrative tribunals and of deciding authorities generally is to carry out successfully a scheme of government. No doubt in the administrative mind the idea of doing justice, or at least of not doing actual injustice, will find a place. But there is no emphasis on this. The paramount purpose in the mind of the Minister or other authority is to "make the Statute work". If, in producing this result, questions have to be decided affecting individuals, then let them be disposed of as quickly as possible, and in a way that will create the least friction in the wheels of the departmental machine.

Executive decisions are made by an astonishing variety of authorities, ranging from at the best, formally constituted Boards of experts to at the worst, the nameless government clerk who may be permitted to clothe his whim with the force of a pronunciamento issuing from a Department of State. This is as true of the

Commonwealth as it is of England. The agencies by which the Executive carries out its deciding functions present the variegations of a tropical growth, and this has prevented "administrative justice" in the Commonwealth from becoming identified with any recognised standard or method. It not only has no "air of detachment"; it lacks, in a greater or less degree according to the particular instance, the elements from which such an atmosphere can emanate.

The principle adopted in interpreting the Constitution, that strict judicial power may not be conferred on Commonwealth authorities unless these are created as Federal Courts in accordance with sec. 72, affords a means of orientation in our present inquiry. Wherever a Commonwealth body is performing functions of decision and is not a Court in the strict sense, it may be assigned to the field of the Executive. So much may be laid down definitely. But this is the only fixed line we have to guide us. Once the boundary is crossed, and the field of the Executive is entered generalisations become unsafe, if not impossible. Close to the boundary, there are tribunals which, although not exercising strict judicial power, have a great many of the attributes of a Court. As one moves further on into the overgrown wilderness of executive deciding authorities, other bodies are encountered which are not judicial in any sense, but purely administrative. The character of these has been described by the House

of Lords as that of "an organisation with executive functions"; and they have been held to be entitled to follow "the procedure which is their own", irrespective of whether such procedure conforms to judicial standards or not (Local Government Board v. Arlidge, 1915 A.C. 120).

Farther still along the paths that lead away from the area of jurisdiction of the Courts of Justice are found the class of instrumentalities which are dealt with later in a special Chapter under the heading of "Arbitrary Authorities" (Chapter IV, post). They consist sometimes of a Department as where the power is entrusted to the Minister, at other times of a single person as, for example, a prescribed officer, and are invested with power to make a final decision on questions of fact affecting individuals. By the form in which the power is conferred, the decisions of these authorities have in many cases been made immune from review or appeal of any kind. The person adversely affected is precluded even from showing that there were no grounds at all for the decision. Bodies or persons acting in this capacity are not tribunals in any sense, for they are under no obligation to hear both sides (or either side, for that matter) before arriving at a conclusion. The word "tribunal" necessarily carries with it the notion of a hearing - cf. Webster's Dictionary where "tribunal" is defined as a person or body of persons having authority to hear and decide disputes so as to bind the disputants." In most cases where these authorities are called upon to function, the rights of

the Crown against individuals are in question.

Such is a preliminary outline of the nature of the field of "administrative justice". The two next following chapters will be devoted to an examination of those deciding authorities which can properly be called tribunals. Under this broad heading will fall all instrumentalities of decision after hearing, from the quasi-judicial type most nearly approximating to Courts of Justice, to the purely administrative class, the methods of which offer a strong contrast to those of the Judicature. The first task will be to find some fixed criterion, in the light of which they can be examined and compared.

CHAPTER II

EXECUTIVE TRIBUNALS.

The truism that no deductive conclusion can be reached without premises can be re-stated from a less obvious but equally sound angle by saying that every judgment or opinion is the result of comparison with a standard. Accordingly, if any useful inferences are to be drawn from the study of the various executive tribunals, this must be achieved by adopting some common standpoint from which they may be examined. The best method of approach seems to be to take those features which are the accepted and traditional insignia of the Courts of Justice, and, adopting them as standards, see how far the various executive tribunals of the Commonwealth adhere to them or depart from them.

THE STANDARDS.

In this connection the Judicial Committee has in a recent judgment set forth some negative propositions. "A tribunal is not necessarily a Court" it was said in Shell Co. v. Federal Commissioner 1931 A.C. 275. "because (1) it gives a final decision (2) nor because it hears witnesses on oath (3) nor because two or more contending parties appear before it between whom it has to decide (4) nor because it gives decisions which affect the rights of subjects (5) nor because there is an appeal to a Court (6) nor because it is a body to which a matter

is referred by another body." But in saying this, it may be assumed, the Privy Council is not to be taken to deny that the presence of some or all of those elements in combination may make the tribunal a Court. The significance of the passage in the present connection is the implication that the features enumerated are those ordinarily found in association with Courts of Justice.

W.A. Robson, in Justice and Administrative Law, expresses the view that the "primary characteristics" of pure judicial functions are twofold. They are, he says, "(1) the power to hear and determine a controversy and (2) the power to make a binding decision which may affect the person or property or other rights of the parties involved in the dispute." This, however, is a very summary and general statement of the matter, and was clearly not intended by its author to be regarded as exhaustive.

Dr. Port's Tests.

In grappling closely with the difficult task of defining the boundary between Courts and executive tribunals under the unwritten constitution of England, Dr. Port makes a more detailed analysis (Administrative Law). He isolates seven "judicial standards", and lays down the test of whether a tribunal is judicial or executive as being the degree of variation from them which it exhibits. These standards, to paraphrase them somewhat for brevity, are as follows:-

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Normal judicial tribunals should be:

(1) Composed of persons trained in the law.

(2) Invested with security of tenure.

(3) Privileged.

(4) Concerned with the decision of legal rights.

(5) Conducted with uniform rules of evidence and procedure, calculated to ensure a just decision.

(6) Provided with means for enforcing their decisions.

(7) Open to the public.

It is proposed in this Chapter to adopt these seven standards and apply them to the executive tribunals of the Commonwealth. It is submitted, however, that even this list does not exhaust the main characteristics, and that there are at least two more which require consideration. Normal judicial tribunals should also be marked by:

(8) The right of parties to have legal assistance.

(9) The identifiability of the deciding mind.

The first of these last mentioned features is perhaps not of chief importance; the second is of a fundamental nature. But they are both bound up together in the sense that they are concerned with the question of how far a full and formal hearing is given to the person

whose rights are being decided.

I. LEGAL TRAINING OF MEMBERS.

The test of whether the personnel of a tribunal is trained in the law must be regarded only as one of the more slender criteria of judicial character. Its presence is inconclusive, and its absence is no guide at all. Magistrates, some of whose functions are clearly judicial, are not legally trained in the ordinary sense. Executive tribunals are as a rule almost solely concerned with questions of fact, though there are exceptions to this. Thus, a notable exception is found in the Commonwealth Employees' Compensation Act 1930.

The Statute just mentioned helps to illustrate the varying practice of the Legislature in the matter of appointing lawyers to positions on executive tribunals. In that instance, although the Act prescribes a detailed scheme of accident compensation, the law of which has to be worked out and applied, the deciding authorities are the Commissioner (sec.6) or his delegates (sec.7), and there is nothing at all said as to qualifications. On the other hand, the Assessment and Entitlement Appeal Tribunals set up by the Australian Soldiers' Repatriation Act 1920-1931 to decide claims to war pensions are respectively to consist of three members, one of whom, the Chairman, must be a barrister or solicitor of five years' standing. The Immigration Act 1901-1932 sec. 8A requires that

the Chairman of the Deportation Board shall be a person who is or has been a Judge or a Police, Stipendiary or Special Magistrate. The Income Tax Assessment Act 1922-1931 is silent as to the qualifications of the Board of Review which it constitutes, and the Privy Council has recently observed that it was apparently the intention to make this Board a body of "business men" in contradistinction to the Courts. (Shell Co. v. Federal Commissioner 1931 A.C. 275).

II. SECURITY OF TENURE.

No executive tribunal created by the Commonwealth Legislature is given the same degree of security of tenure as the Judicature. Indeed it may be assumed that one of the motives, in many cases, for creating special executive bodies to determine matters in dispute, instead of leaving these questions to the ordinary Courts, is to secure to the Crown a measure of control over the deciding authority through its power of determining the appointment.

The tenure given varies a great deal. Thus, at one extreme, are found the Deportation Boards provided for in the Immigration Act 1901-1932, and the Special Tribunals which may be appointed under the Industrial Peace Act 1920, for settling industrial disputes over the head of the Arbitration Court. These tribunals are purely ad hoc, being appointed only for the particular emergency with which they deal.

The respective Acts are silent on the matter of tenure, and this means that the persons constituting the tribunals are removeable at will. In the words of Griffith C.J., in Ryder v. Foley 4 C.L.R. 422 at p. 435, "It is an implied term in the engagement of every person in the public service that he holds office during pleasure, unless the contrary appears by statute." This is so even though the officer concerned has been appointed for a term of years which has not expired (Carey v. The Commonwealth 30 C.L.R. 132). Another tribunal of the same kind, i.e. constituted for a particular purpose only, is the Board of Inquiry which may be set up by the Board of Commissioners under the Commonwealth Public Service Act 1922-1931 to inquire into offences by senior officers. A further example of a deciding authority holding office at pleasure is the Chairmen of the curiously constituted Appeal Board under the Commonwealth Railways' Act 1917-1925, who is "to be appointed from time to time by the Minister" (sec 53). The Commissioner under the Patents Act 1903-1930 (who by the Designs Act and the Trade Marks Act is constituted the Registrar under those Acts "until the Governor-General otherwise determines"") and the Registrar of Copyrights under the Copyrights Act 1912, are in each case officers invested with important deciding functions. They are without any prescribed security of tenure. The Commissioner under the Commonwealth Employees Compensation Act 1930 is in the same position. Finally, the Courts of Marine Inquiry, constituted under Part IX of

the Navigation Act 1912, and entrusted with quasi-judicial duties of a highly important nature, are likewise dependent for their employment upon the will of the Executive.

In some cases the members of the tribunal have their tenure governed by the Public Service Act. This is the case, for example, with the Chairman of the Board of Appeal which is, under sec. 55 of that Act, charged with the hearing of appeals by public servants from the Chief officer's decision in respect of alleged offences. Where this is the position, the Crown's right of arbitrary dismissal no longer obtains. It has been held that the Public Service Act operates to transfer the power of dismissing officers vested by the Constitution sec. 67 in the Governor-General in Council and to vest it entirely in the Board of Commissioners, in respect of all officers coming under the operation of the Public Service Act. (Bradshaw v. The Commonwealth 36 C.L.R. 535).

The tenure of an officer who comes under the Public Service Act, however, is very little more secure by reason of such a position, at any rate so far as his strict legal rights are concerned. By sec. 67 of that Act the Board of Commissioners may compulsorily retire any officer who "appears to the Board or the Chief officer to be inefficient or incompetent or unfit to discharge or incapable of discharging the duties of his office efficiently." The adequacy of the grounds upon which the Board may in any instance take action

under this section cannot, at any rate in the absence of bad faith, be called into question before a Court (R. v. Arndel 3 C.L.R. 557; Lloyd v. Wallach, 20 C.L.R. 299).

There are, however, a number of Federal tribunals constituted in a much more formal fashion. The chief of these are (1) the Board of Commissioners of the Commonwealth Public Service; (2) the Superannuation Board; (3) the Board of Review for income tax purposes; (4) the Tariff Board; (5) the Commission, State Boards, and Appeal Tribunals created by the Repatriation legislation; (6) the Valuation Boards for land tax assessment; and (7) the Public Service Arbitrator.

The details of the constitution of these tribunals, so far as the tenure of their members is concerned, are subject to considerable variation. There are, however, certain general features which characterise them:-

(1) The members are appointed for a term of years. In two cases the term is fixed at seven years, which is the longest tenure provided for. In other instances a discretion as to the duration of the term is left to the Executive, the maximum, only, being fixed by the Legislature. In the case of the Tariff Board, the tenure, by the law as now amended, is to be not less than one year or more than four.

(2) Power is given to the Governor-General to suspend any member for "misbehaviour or incapacity",

and in some cases, for other reasons. This power is always coupled with a requirement that a statement of the cause of the suspension shall be laid before Parliament within seven days after the suspension, or where Parliament is not sitting at the time, within seven days after its next meeting. What happens after the suspension and report to Parliament is regulated according to two different methods. In the case of the Superannuation Board, the Tariff Board and the Public Service Arbitrator it is directed that the member shall be restored to office unless within a prescribed time varying from twenty-one to forty days each House passes an address or a resolution requesting his removal from office by the Governor-General.

The other method, which has been applied to most of the remaining tribunals of the group, is to reverse the consequences of inaction on the part of Parliament. Thus, where a member of the Board of Public Service Commissioners, the Board of Review, the Valuation Boards, or the Repatriation Commissioners and Appeal Tribunals is suspended, he is required to be restored to office only if an address is presented by the Houses praying for his restoration; and in default of such address the Governor-General may declare the office of the suspended member vacant. The time allowed for presenting such an address is in every instance sixty days.

In addition to this procedure of suspension

and report, it is provided in all but one of the Acts constituting this last mentioned class of tribunals that, on the receipt of an address from both Houses in the same session praying for the removal of a member, the Governor-General may remove him from office. This method of removal is not made applicable to the Repatriation Appeal Tribunals.

(3) It is provided in every case that a member shall be deemed to have vacated his office in the event of certain contingencies.

These contingencies vary under the different Acts. Those commonly inserted are:-

(a) engaging in paid employment outside duties of office;

(b) becoming bankrupt or insolvent;

(c) absent from duty without leave for prescribed period.

and in some instances,

(d) becoming permanently incapable of performing duties.

(4) Salaries are usually in the discretion of the Executive.

The exceptions are the Board of Commissioners of the Public Service, the Public Service Arbitrator, and the Tariff Board, whose salaries are specially fixed by the respective Acts. In all other cases the members of tribunals are to receive "such remunerations as the Governor-General determines". No doubt where a member

has been appointed at a salary for a term of years this constitutes a contract binding on the Crown. But the Superannuation Act 1922-1931 providing for a Board, to be appointed for a term not exceeding seven years, expressly declares that the remuneration shall be such as the Governor-General "from time to time determines."

Such, then, is the degree of security of tenure granted by Parliament to Commonwealth executive tribunals. It is not great. As has been seen, in respect of the more elaborately constituted bodies, Parliament must either expressly or tacitly sanction any removal. But even in these instances the Executive retains another powerful weapon in its hands, in that the appointment in every case is for a comparatively short period. In all but one or two cases the length of that period is, at the time of appointment, in the discretion of the Executive. Consequently, the express provision which is inserted in every Act authorising appointments for a term, that the members "shall be eligible for re-appointment," is ill-calculated to ensure a spirit of healthy independence on the part of the tribunal. The effect of this condition of affairs is that these deciding authorities are to a very material extent agents of the Crown. Such a position has its serious aspect.

THE CROWN AS JUDGE IN ITS OWN CAUSE.

A glance at the nature of the tribunals

enumerated above reveals that they are engaged in deciding questions which closely affect the interests, and in most cases the actual rights of the Crown as against its subjects. Some judicial disparagement has in recent years issued from the highest source concerning the term "natural justice" (Local Government Board v. Arlidge 1915 A.A. 120 at 138), but if there is still one principle comprehended in the phrase, it is that no one shall be judge in his own cause.

It has been stated that "although administrative exercise of judicial powers implies that administrative authorities are often judges in their own cause, the risks run are not so great as they would be if our traditional standards were on a lower plane." (Port: Administrative Law p. 341). But it is disquieting to contrast with this view the long array of judicial dicta drawing attention to administrative departures from those "traditional standards".

A remarkable collection of instances where English Judges have felt constrained to comment in strong terms on the poor ethical standard set for itself by the Crown as a litigant is to be found in "Bureaucracy Triumphant" by C. K. Allen. The key-note of these dicta is an emphasis upon the "growing tendency" of Government departments and officials "to claim the right to act without regard to legal principles and without appeal to any Court" (per Farwell L.J. Dyson v. Attorney-General, 1911 1 K.B. 410).

Having regard to the very much smaller

volume of decided cases in this country, observations of the same kind by Australian Judges have certainly been no less frequent. Thus Griffith C. J., after lengthy experience in the High Court, declared that he was inclined to think that in some parts of the Commonwealth "the old-fashioned, traditional and almost instinctive standard of fair play to be observed by the Crown in dealing with subjects.....is either not known, or thought out of date" (Melbourne Steamship Co. v. Moorhead, 15 C.L.R. 333, at p. 342). This stricture was mild compared with the observations of Isaacs J. in a case decided in 1930, where in the course of further unvarnished comment, he said: "The Ministerial action, relied on and defended as it is, is so opposed to British fair play and the commonsense demands of justice that nothing short of express and intractable words would induce me to accept it as sanctioned by Parliament."

Again, as recently as January 1932, Halse Rogers J. in granting a mandamus against the Milk Board (N.S.W.) spoke as follows: "I think it should be put on record that a public department through its counsel has taken up the attitude that it is not bound by its own communicated decisions, and that the virtual promise of the Board is of no effect. Such an attitude appears to me to show that the Board has no appreciation of moral obligations" (Ex parte Wylie, 49 W.N. 15). And see the remarkable attempt of the Crown to cut away the rights of its adversary, during the actual trial of those

rights, by making a new regulation, in Sendall v. Federal Commissioner 12 C.L.R. 653.

These examples are not reassuring. It may be urged that the observations quoted must be regarded as dealing with particular instances and not warranting general application. But even if this view be adopted, it does not dispose of the objection in principle to the Executive's being the arbiter of its own rights against the subject. It need not be denied that those who serve the Crown, and particularly the persons who serve it upon the various tribunals we are now considering, may be entirely conscientious and free from any intentional bias whatever. The mischief of the situation remains. A member of a Board would require the mental self-discipline of a superman not to be at least subconsciously influenced by the fact that one of the parties between whom he was deciding had control of his living. It may be true, as Robson suggests, that a member of a tribunal stands in no great practical danger of being thrown out of employment because he displeases the administration. But the executive power of promotion and regression is a weapon which is no less effective and constantly employed.

III. PRIVILEGE.

Some of the executive tribunals of the Commonwealth are given a special statutory immunity from actions for any nonfeasance or misfeasance in

connection with the prescribed duties of such tribunals. The provisions conferring immunity take different forms, and have so far, it would appear, received no judicial interpretation. Analogous provisions are not to be found under English law, the position there having been treated generally by the Limitations of Actions and Costs Act 1842, and the Public Authorities Protection Act 1893, which give a limited general protection to authorities in respect of "any act done in.....execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority." (See sec.1 of the latter Act). The English protection takes the form of prescribing (1) a limited time to bring actions, (2) the giving of notice of action, (3) specially favourable terms as to costs, and (4) the right to tender amends in answer to unliquidated claims.

The Commonwealth statutory provisions go a great deal further than this. Thus the taxation tribunals (i.e. the Board of Review and the Valuation Boards), and the Board of Commissioners of the Public Service, are protected by a provision that "No action or suit shall be brought or maintained against any person who is or has been a member of the Board for any nonfeasance or misfeasance in connection with his duties." In the case of the Valuation Boards the words used are "act or omission". Apparently, the immunity thus

conferred is, for all practical purposes, as complete as that enjoyed under a common law rule of the highest antiquity (Halsbury, Vol. 23, para. 668, note x), by the ordinary Courts of the land. This immunity extends even to cases where malice or corruption is alleged, provided only that the tribunal is acting in its authorised capacity. A minor distinction exists between the privilege applying to superior and inferior Courts respectively, in that in the former case jurisdiction in the respect of the act complained of is presumed, whereas in the case of an action against a Judge of an inferior Court jurisdiction must be affirmatively proved by the defendant (Carratt v. Morley (1941) 1 Q.B. 18). The protection conferred on the Commonwealth tribunals above-mentioned is undoubtedly of this latter kind, and it would be necessary for the defendant in any action to establish affirmatively that the alleged wrong was committed "in connection with his duties." See as to the meaning of "misfeasance" Re Kingston Cotton Mills Co. 1896 1 Ch. 331.

The Public Service Act section adds the following words: ".....nor shall any action or suit lie, nor any costs be payable, in respect of any proceeding before the Board or a member thereof". The meaning of this, if it is intended thereby to add anything to what has been said in the earlier part of the sub-section, is somewhat obscure. Possibly the effect of it is to extend the protection even to cases where the Board has exceeded its duty under the Act and is acting without authority. But whether a claim against

the Board for an act done in excess of jurisdiction would constitute an action "in respect of any proceeding" seems to be a question of considerable doubt.

Sec. 8 of the Commonwealth Employees' Compensation Act 1930, giving protection to the Commissioner under that Act and to his delegates, is differently worded. It is provided that, apart from the prescribed right of appeal from decisions, "no action suit or other proceeding shall be instituted, brought or maintained against the Commonwealth or the Commissioner or any delegate of the Commissioner in respect of any action or determination taken or made under this Act." At first sight it might appear that the immunity thus conferred extends to a case of acting without statutory authority; but probably it would not so extend, as such a case would not be one of an "action taken under this Act".

Most of the other tribunals, including the Superannuation Board, the Tariff Board, the Repatriation authorities, and the Public Service Arbitrator, have no statutory immunity vouchsafed to them at all. This, of course, does not mean that they are without any protection, for they are entitled by the common law to the qualified privilege which attaches to all quasi-judicial persons or bodies, using the adjective here in the wider sense of including all those who have authority or discretion to decide upon matters affecting other persons.

The extent of this protection is that "in the absence of fraud, collusion, or malicious motive, they are not liable to any civil action at the suit of any person aggrieved by their decisions or by words used in the course of the proceedings." (Halsbury Vol. 23 para.685).

These tribunals are not, however, entitled, except perhaps in one instance which will be presently mentioned, to the absolute privilege attaching to Judges. Much doubt existed formerly, created by some words in Dawkins v. Lord Rokeby L.R. 8 Q.B. 255, where absolute immunity was held to apply to a military Court of inquiry, as to how far the rule extended beyond the ordinary Courts of Justice. This doubt was set at rest in Royal Acquarium Society v. Parkinson, 1892 I Q.B. 431, where Lopes L. J. said: "It is however a privilege which ought not to be extended. It belongs, in my opinion, to Courts recognised by law, and to such Courts only." (p. 451). Lord Esher pointed out that the ground of the decision in Dawkins v. Lord Rokeby was that "the case was one of an authorised inquiry before a tribunal acting judicially, that is to say, in a manner as nearly as possible similar to that in which a Court of justice acts in respect of an inquiry before it." Fry L.J. said: "Consider to what lengths the doctrine would extend if this immunity were applied to every body which is bound to act judicially in the sense of deciding fairly and impartially.....I say that there is ample protection afforded in such cases by the

ordinary law of privilege."

COURT OF MARINE INQUIRY.

The possible exception referred to above is the Court of Marine Inquiry, for which provision is made under Part IX of the Navigation Act 1912. This tribunal, which is in a curious position, will be referred to later in greater detail. Sec. 356 of the Navigation Act 1912 declares that it shall be a "Court of Record", and by sec. 370, it is to have "all the powers of a Court of summary jurisdiction." It has no security of tenure, and is therefore not a Court within the meaning of Chapter III of the Constitution. But apart from a section to be mentioned, it would seem to be clearly within the field of complete immunity as defined in Royal Acquarium Society v. Parkinson (supra).

Sec. 384, however, provides that :-

(1) "No action shall lie against any official for anything done under the provisions of this Act, unless direct proof of corruption or malice be given".

(2) Any action shall be commenced within three months.

(3) In the event of a nonsuit or verdict for the defendant, treble costs are to be awarded against the plaintiff.

The word "official" is not defined by the Act. The question is whether as used here it extends to include the members of the Court of Marine Inquiry. If it does, then the effect of it seems to be actually

to cut down the measure of protection which the Court would enjoy under the rule of the common law. In place of absolute privilege, the Court is to have protection only where corruption or malice is not proved, which in this respect virtually assimilates it to the position at common law of those tribunals to which qualified privilege attaches. Sub-secs. (2) and (3) are, of course, on the lines of the English legislation earlier referred to.

IV. DECISION OF LEGAL RIGHTS.

The test of whether legal rights are being decided by a tribunal is one upon which much emphasis is laid both by the Courts and by theorists, from the viewpoint of its value as a criterion of the judicial quality of the tribunal. It has been greatly relied on by the High Court for deciding in particular cases whether a tribunal is exercising judicial power requiring it to be validly constituted as a Federal Court; although, of course, its value in that connection is indicative only, and in no sense conclusive. The test is also of service for the purpose of making a broad internal classification of executive tribunals themselves.

The question of what constitutes the decision of legal rights was much canvassed in Waterside Workers' Federation v. Alexander 25 C.L.R. 434. This case contains a considerable amount of reasoning, which

does not leave the mind entirely clear, as to the difference between "the judicial power concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment proceedings are instituted" and "the arbitral power to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties, in relation to each other." In the case of the arbitrator, according to Isaacs and Rich JJ. at p. 463, "his opinion may take any form the law provides; it may be called an order, or an award. But his declaration does not make it law." Griffith C.J. on the other hand, was unable to see the force of the distinction. "For myself", he says, "I cannot understand the creation of a tribunal except for declaring and giving effect to some right existing at the time of such declaration and giving effect."

To state the distinction clearly as a principle is no easy task. The line between the ascertainment and application of an antecedently existing right and the declaration of a new right depending for its existence on the opinion of the tribunal declaring it is a tenuous one, tending to fade and become blurred as one seeks to discern it. For example, a plaintiff in an action for breach of contract in an ordinary Court of Justice is engaged in enforcing his

already existing right; but the plaintiff who asks the same Court in its equitable jurisdiction to grant him specific performance of the same contract is not demanding the fulfilment of an existing right, but seeking discretionary relief. In the latter case, he is asking to be clothed with a new right, which emerges, not spontaneously from the facts themselves, but from the Court's discretionary opinion on those facts. Yet in both cases, the Court is deciding legal rights, using the word "legal" in the broad sense in which we are concerned with it here.

It may be said that even in the case of the equitable claim the Court is administering known principles, and it ought to be possible, in theory at least, for those principles to be considered as applied to the facts at the moment the situation calling for relief arose, so that the right might be deemed to be created antecedently to its declaration by the Court. There is much force in this, and if it is the correct view it goes far towards obliterating the distinction. For if this can be said of a Court thus exercising its discretionary powers, it is also true of most executive tribunals. One would thus be brought back to the view of Griffith C.J., that the creation of a tribunal to decide between parties can have, as an intelligent purpose, only the declaring and giving effect to an existing right.

One other notable sentence should be quoted from the same case. Barton J. says (p.453):

> "If a law allows anything to be claimed by one person against another and grants it to him <u>as a right</u> against that other, the Legislature means by its law that that right exists, whether it existed as a right declared by law before the claim, or whether on the other hand, the claim of it when substantiated is recognised by law as a right."

The insertion of the words underlined, while making the statement unassailable, seems to leave it somewhat less enlightening. It would appear to be at once profoundly true and unnecessary to emphasise that when the Legislature grants something to a person "as a right", it means that that right exists. It is submitted, with respect, that if this phrase were deleted, the passage as it then would read would state the true position. The question then becomes in any instance, whether the Legislature has actually granted something, the grant to be effective in certain circumstances, and <u>has given power to a tribunal merely to determine finally if those circumstances exist</u>, or whether on the other hand the Legislature has granted nothing, but has invested a tribunal <u>with the power to make the grant or withhold it after applying a discretion to each set of facts.</u>

The test is far from being a conclusive one, but it may

be broadly said that a tribunal of the first class has one of the characteristics of a judicial body, while the characteristic of the latter class is primarily administrative.

It will be found that, however difficult it may be to lay down a general principle, the difficulty in specific instances often disappears on reference to the terms of the particular statute creating the tribunal. An illustration of this is to be found in the War Gratuity Acts 1920, and the method of administration employed thereunder. The Acts directed that a gratuity was to be paid for war service to specified classes of persons, and that questions of doubt as to the qualification of individuals to receive the gratuity were to be resolved by a "prescribed authority" to be constituted by regulation. When the regulations are consulted it is found that a complete organisation of deciding authorities was created. There was to be a Central War Gratuity Board and subordinate Boards, with full power to summon witnesses, administer an oath and require the production of documents. Qualified provision was made for appeal from the subordinate Boards to the Central Board (Statutory Rules 1920, Nos. 85, 217).

Clearly, then, here are tribunals with authority to hear and decide claims, and according to whose decision the gratuity is to be paid or withheld. But a reference to the Statute shows instantly that there is

in this case no question of rights, antecedent or otherwise. Sec 8 (1) provides that: "The war gratuity payable under this Act shall not be claimable or recoverable by any person as a matter of right, but shall be deemed to be a free gift by the Commonwealth.....and may in any case be withheld or deferred or subjected to terms and conditions as the prescribed authority, having regard to the interests or deserts of the claimant, thinks just and proper."

We shall now refer briefly to two other Acts with similar objects, i.e. which are concerned with the distribution of financial benefits to classes of persons. First, the Invalid and Old-age Pensions Act 1908-1931. The machinery of this Act presents unusual features which will be considered later. At the moment, it is enough to say that claims for pensions are to be determined finally by the Commissioner or Deputy Commissioner appointed under the Act. Here, the right, if any, to a pension is of a very limited kind. The truth may well be that it is not a right at all. In the first place, the sections delimiting the classes of persons who are to receive pensions speaks of them as "qualified" to receive peneions - not "entitled". Secondly, by sec. 42, it is provided that the pensions are to be held "subject to all the provisions of this Act and to the provisions of any other Act"which may be passed in the future. Reference to the "provisions of this Act" reveals that they include an

uncontrolled power in the Minister to "cancel, suspend or reduce any pension if he considers it expedient to do so." (Sec. 37).

The second Act is the Australian Soldiers' Repatriation Act 1920-1931. This Act is equally concerned with the payment of pensions, to be awarded and assessed by tribunals; but it is clear that they are on a different footing. Sec. 23 provides that "the Commonwealth shall be liable to pay" pensions in accordance with the Act, and refers to "the right of any person to payment by way of pension."

CLASSIFICATION OF TRIBUNALS.

Considered from the standpoint of whether they are concerned with the decision of legal rights, the executive tribunals can be grouped broadly into three classes.

(1) There are FIRSTLY those which clearly are engaged in determining the legal rights of those who appear before them. Examples of these are the Repatriation authorities just cited, the Board of Commissioners of the Public Service, the authorities under the Patents, Trade Marks, Copyrights and Designs Acts, the Court of Marine Inquiry (in respect of some of its duties), the Board of Directors under the Commonwealth Bank Act 1911-1929 with respect to appeals by officers of the Bank, and the Commissioner under the Commonwealth

Employees Compensation Act 1930.

(2) SECONDLY, there are tribunals whose decisions affect the legal position of the persons concerned therein, but which do not, on a strict view decide legal rights, because Parliament has in fact not conferred any rights. Professor Harrison Moore says:-

"It appears to be in the power of the Legislature to commit the performance of administrative services to the uncontrolled discretion of any officer. In such a case no right having been conferred, no right is infringed if the service or privilege is withheld." (Commonwealth, p. 320). Among this class are numbered the War Gratuity and Invalid and Old Age Pensions tribunals mentioned above. In the High Court, Isaacs J. has repeatedly stated the position of authorities of this kind in the following way. The decision of the authority, he says, has no virtue in itself to affect the position of the persons concerned. It is the law of Parliament which is the effective power. All that the authority does is to make a decision, which Parliament has directed shall, when made, have certain consequences bearing upon the application of the statutory law. The decision is a "mere event in fact, owing any effect to the parliamentary enactment." (Le Mesurier v. Connor 42 C.L.R. 481 at p. 506). It is "the incidental or ancillary determination of circumstances as a factum for the operation of the legislative will" (Federal Commissioner v. Munro 38 C.L.R. 153 at p. 176).

The Income Tax Board of Review, as reconstituted after the decision in British Imperial Oil Co. v. Federal Commissioner, 35 C.L.R. 422, is an example of a tribunal in this class. As has been seen earlier, when the limits of the Constitutional judicial power were being considered, the Board of Review is to hear any appeal from a decision of the Commissioner, and its decision, except on questions of law, is to be final. But by Sec. 44 of the Income Tax Assessment Act its determinations or decisions are deemed to be those of the Commissioner himself. In Federal Commissioner v. Munro (supra), Knox C.J., delivering a dissenting judgment, was of the opinion that "the legal rights and obligations inter se of the Crown and a subject" were being determined by the Board (p. 165). Isaacs J., however, held that all that had been done was to "entrust successive administrative functionaries to consider and review assessments, making the final decision the governing factum fixing the taxpayer's liability". The judgment of Isaacs J. was subsequently expressly approved by the Privy Council. It follows from the wording of sec. 44J of the Land Tax Assessment Act 1910-1930 that the Valuation Boards set up under that Act are in the same position.

It should be noted that in addition to the tribunals which are being considered here there are a large number of administrative authorities under various Acts, (in many cases the Executive itself, acting as the Governor-General in Council), which are not

tribunals, but which are invested with the power to make decisions. These authorities have a feature in common with tribunals of the type of the Board of Review, in that their decisions fall exactly within the principle discussed above; i.e. they constitute events upon which the legislative will operates. This group will be considered separately in the Chapter on "Arbitrary Authorities" (post).

(3) The THIRD class of tribunals comprises those which do not, by the conclusions at which they arrive, affect the legal position of the persons with whom they deal at all. These bodies have merely a recommending or reporting function, although, no doubt in every case, the recommendations furnished by them are made by the respective Statutes a basis for further action by some executive authority. The following are examples of tribunals of this description:-

(a) The Tariff Board, which apart from its main function of inquiring into and reporting upon the necessity for changes in the tariff, may also be directed to inquire into (1) certain disputes arising out of any Customs Tariff or Excise Tariff, and (2) any question whether a manufacturer is "taking undue advantage of the protection afforded him by the Tariff." (Tariff Board Act 1921-1929, sec. 15). On these matters a report is to be furnished to the Minister of Trade and Customs, who is forbidden by

the Act to take any action until he has receiv-
ed it.

(b) The Court of Marine Inquiry. While this body has certain powers of final decision (see above), it is also charged with functions of inquiry. See for example Navigation Act 1912, sec. 376, providing for references to the Court of charges of "incompetency or failure of duty or drunkenness" made against pilots. The Court is to hold an inquiry and recommend to the Minister what punishment, if any, should be inflicted.

(c) Magistrate dealing with Pensions claims. As part of the machinery for determining claims under the Invalid and Old Age Pensions Act 1908-1931, a Magistrate is to hear evidence and "investigate the claim." Having done so he has power (sec. 31) to "recommend the claim" or postpone it for further evidence, or recommend its rejection.

(d) Deportation Board. It is provided by the Immigration Act 1901-1932 that the Minister may summon certain persons before a Board constituted in accordance with sec. 8A of that Act, to show cause why they should not be deported. After inquiry, the Board may recommend their deportation.

V. RULES OF EVIDENCE AND PROCEDURE.

The question of whether a tribunal is bound by law to follow a fixed course of procedure and to take its evidence according to set rules is one of much significance in determining the true nature of the tribunal. The test has been treated as important by the High Court on more than one occasion. (See for example Waterside Workers' Federation v. Alexander 25 C.L.R. 434 at 482; British Imperial Oil Co. v. Federal Commissioner, 35 C.L.R. 422 at 438). In defining the "Courts" to which the full immunity of judicial privilege attaches, Fry L.J. said in Royal Acquarium Society v. Parkinson 1892 1 Q.B. 431 at 447, "Courts..... have generally a fixed and dignified course of procedure, which tends to minimise the risks which might flow from this absolute immunity. These considerations do not apply to bodies such as I have mentioned". The bodies to which he had been referring included Assessment Committees and Boards of Guardians.

A high authority exists for the proposition that complete freedom as to rules of law and procedure has the effect of stripping a tribunal of any essentially judicial character. The decision is Moses v. Parker, 1896 A.C. 245. In that case special leave was being sought from the Privy Council to appeal to it from a decision of the Tasmanian Supreme Court sitting as a special land tribunal constituted by statute.

sec. 8 of the authorising Act (Claims to Grants of Land Act 1858 - Tas.) directed that the Court was to be "guided by equity and good conscience only, and by the best evidence that can or may be procured, although not such as would be required or be admissable in ordinary cases;" and was not to be "bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever." The Privy Council, in refusing leave, held that the effect of this provision was that the Court, sitting in this capacity, was "expressly exonerated from all rules of law or practice", and that therefore the propriety of its decision could not be inquired into on appeal. It was definitely stated that "Their Lordships cannot look upon the decision of the Supreme Court as a judicial decision admitting of appeal", (p. 248).

PROCEDURE AS A TEST OF "JUDICIAL POWER".

It does not follow from the circumstance that a tribunal has been given a wide latitude in respect of evidence and procedure that it is not exercising judicial power within the meaning of Chapter III of the Constitution. This is seen from the decision in British Imperial Oil Co. v. Federal Commissioner (supra). In that case the High Court held that the Income Tax Board of Appeal was invalid, as having been invested with judicial power in breach of the Constitution, although it was provided by sec. 53 (1) of the Income

Tax Assessment Act 1922 that ".....a Board shall not be bound in its consideration of any question by any rules of evidence, but in forming its decision shall be guided by good conscience and the facts of the case." The Commissioner of Taxation sought to defend the Board of Appeal by proving that it was not exercising the functions of a Court, and to establish this, the section quoted and the decision in Moses V. Parker (supra) were relied on.

In spite of this, the High Court held that the judicial character of the investiture of the Board of Appeal was established, and Moses v. Parker was distinguished. Isaacs J. emphasised, as he had earlier done in The Tramways Case (No.1) 18 C.L.R. 54 at p. 72, that the vital point on which the Privy Council had based its decision was that by the express words of the Tasmanian Act the tribunal was freed from "all rules of law". This, it was said, was not the effect produced by sec. 53 (1) of the Income Tax Assessment Act, since the Board of Appeal was at least bound to follow the Act, and "Could not in the majority of instances arrive at a final conclusion without previously forming an opinion as to the intention of the Legislature".

It is noteworthy that when in consequence of the High Court's decision, the Board of Appeal was reconstituted as the "Board of Review" sec. 53 (1)

was omitted altogether. Presumably this was to emphasise its purely administrative character by eliminating anything that would seem to require a proceeding in the nature of a trial at all.

DISPENSATION WITH EVIDENCE AND PROCEDURE.

The Board of Review, however, is almost the only instance, among the formally constituted executive tribunals of the Commonwealth, in which there is not some provision dispensing with ordinary rules of procedure and evidence. Another exception is the Valuation Board for land tax purposes. In the Acts relating to nearly all the other tribunals, there is an express provision that they "shall not be bound by any rules of evidence". See for example, the Repatriation Appeal Tribunals(sec. 45A (2); the Employees' Compensation Commissioner,(sec. 6 (5); and the Public Service Arbitrator,(sec. 13) (The sections mentioned are in each case the relevant sections of the particular governing Act). A variant of this evidence provision is found in the Commonwealth Public Service Act, sec. 57 (2), which provides that "It shall be the duty of the Board of Inquiry or Appeal Board to make a thorough investigation without regard to legal forms and solemnities, and to direct itself by the best evidence whether the evidence is such as the law would require or admit in other cases

or not."

In some cases it would appear that the tribunals are entitled to gather the materials for decision in any way at all, quite irrespective, not only of rules of evidence, but of whether the information is put before the authority during a hearing, or gathered in the most casual fashion from some outside source altogether. Thus the President or other judge of the Arbitration Court, sitting as a tribunal under the Excise Procedure Act 1907 for the determination of an applicant's qualification for assistance under the Bounties Acts, is authorised to "inform his mind on any matter in such manner as he thinks just." (sec. 5); and similarly with the Public Service Arbitrator (sec. 13). The Board of Inquiry and Appeal Board under the Public Service Act is in each case to act upon the best evidence "which it can procure or which is laid before it" (sec. 57 (2)). The words underlined seem to have the clear meaning that these bodies are entitled to decide questions upon material which has never been given in evidence at all at any hearing in the presence of the parties. For all the legal protection given in this last instance to an accused officer of the Public Service, it may well be that he will never even know of or be given an opportunity to answer the vital piece of evidence obtained in the shape of some departmental report, which may constitute the turning

point in the tribunal's decision.

This kind of provision is the indelible hall-mark of the administrative tribunal. How far executive methods may go in this direction, even without express statutory authority, when the deciding authority is a purely administrative body such as a public department, is shown by the clear and final decision in Local Government Board v. Arlidge, 1915 A.C. 120, referred to by Professor Allen in Bureaucracy Triumphant as Arlidge's Case "of evil memory". In that case the respondent had appealed to the Local Government Board, in accordance with the provisions of the Housing, Town Planning, etc., Act 1909 (Eng.), from the refusal of a local authority to determine a closing order made in respect of a dwelling house. It appeared from evidence given on behalf of the Board that part of the material, upon "a full and careful consideration of which" (1914 I K.B. at p. 164) it based a determination dismissing the appeal, was comprised in three reports of their inspector, none of which was ever disclosed to the respondent. A request to be permitted to see them was refused.

The House of Lords held that the respondent had no right to see the reports. Lord Moulton said (p. 151): "No such right is given by statute or by an established custom of the department. Like every

administrative body, the Local Government Board must derive its knowledge from its agents, and I am unable to see any reason why the reports which they made to the department should be made public."

Yet in the Act the proceeding is definitely called an "appeal", the Board is directed (sec. 39) to draw up rules of procedure, and the House of Lords accepted the contention, based upon the decision in Board of Education v. Rice, 1911 A.C. 179, that the Board was bound to "fairly listen to both sides." It might have been thought difficult to escape from the cogent reasoning of the Court of Appeal (Rex v. Local Government Board; Ex parte Arlidge 1914 1 K.B. 160) where Buckley L.J. said (p.188): "Natural justice requires that the mind of the deciding officer shall not be affected by original statements of fact not communicated to the person to be affected by the decision and upon which he has never been heard. In my opinion, the reports of the inspector ought to be disclosed to the appellant, and he ought to have an opportunity, if he thinks fit, to deal with them. It is not consistent with natural justice that the mind of the tribunal should be swayed by statements which are not communicated to the appellant, and with which he is given no opportunity to deal.....An order cannot be justly made against any man upon evidence not disclosed to him so that he may rebut it if he can."

However, the law now is clear, and by reason

of the observations used by the House of Lords in declaring it, the term "natural justice" must for the future be considered to bear a much less plain and significant meaning than had been formerly supposed to attach to it. (See 1915 A.C. at p. 138).

By the terms of the Commonwealth Acts mentioned, it would seem that there is express statutory authorisation to do what it was held in Arlidge's Case can be done by some administrative authorities without it. The Australian sections have not so far been tested, and it may be that the High Court would lean towards finding some distinction arising from the nature of the tribunal, rather than be driven to apply the full rigour of the English law.

In addition to the provisions as to evidence, there is nearly always included in the Acts constituting the Commonwealth tribunals a direction to the effect that a broad, and in effect a non-legal, view is to be taken of the questions before them. There is no doubt that this is an expression through the legislature of the prejudice, vague but unquestionable, which exists in the popular mind with regard to legal methods. Thus, the Magistrate inquiring into Pensions Claims, the Public Service Arbitrator, and the tribunal under the Excise Procedure Act 1907 are directed to decide "according to equity, good conscience, and the substantial merits of the case, without regard to technicalities or legal forms". The Repatriation Appeal Tribunals are to observe "substantial

justice and the merits of the case;" while the Board of Inquiry and Appeal Board for the Public Service are to act "without regard to legal forms and solemnities." The Commissioner for Employees' Compensation, holding fast to the sheet-anchor of "equity, good conscience and the substantial merits of the case" is directed to disregard "technicalities of legal precedent" as well as all "rules of evidence".

One may be permitted to doubt whether provisions of this kind really tend to secure the larger and fuller justice which they are no doubt designed to achieve. A vital merit of the Court of Justice, resulting from the combination of the various features being traversed in this Chapter, is its quality of consistency. It is the application of known principles to the facts of the particular case that determines the decision, and not the personal predilections of the Judge. Still less does the result of a case depend on temporary considerations of expediency. A Court hearing an income tax appeal will not be influenced by the fact that the Government of the day is financially pressed, and is placing acute reliance on income tax as a source of revenue from which to meet its commitments. If it is replied that neither is this a motive which would influence an administrative tribunal which has been freed by statute from law and precedent, the answer is that it may be a matter of utmost difficulty to know just what are

the factors which have led the mind of the deciding authority to its conclusion.

W. A. Robson, who is, on the whole, a sympathetic commentator on administrative law in England, is constrained to admit that "one of its weakest features" is the disinclination of the tribunals "to enunciate clearly for the benefit of the public principles which they intend to follow. The decision of the tribunal", he says, "emerges ex cathedra, and none can question its wisdom, since none know the considerations which moved the mind of the authority" (Justice and Administrative Law, p. 204).

It follows, in the case of some of the Commonwealth tribunals, as for example the Compensation Commissioner, that in return for the problematical gain of having applied to a case someone's personal notion of what constitutes "equity and good conscience" the advantages of certainty and consistency are thrown overboard. The loss is a serious one. The best thing of all, no doubt, for a party, is to have a case for relief. But if this is denied to him, he wants, if possible, to be certain that he has no case, in order that he may not embark upon a fruitless and perhaps costly proceeding. The disregard of precedent and set rules of law, procedure, and evidence, leaves the litigant face to face with the personal equation of the tribunal as the measure of his rights. "Good conscience" is a poor substitute for certainty.

COMPULSORY GIVING OF EVIDENCE.

One further matter under the general head of procedure falls to be mentioned. This is the question of power to secure evidence by compulsory methods. It is clear that the Executive, apart from statutory authority, has no power of this description. "Nor can the Crown" says Griffith C.J. in Clough v. Leahy 2 C.L.R. 139 at p. 156, "enforce the answering of a question by an individual, unless some law confers the authority to do so." He goes on to make it clear that the power of inquiry is enjoyed by the Crown apart from statute only to the same degree as with individuals, and stops short of the right of compulsion in the same way. (See also Colonial Sugar Refining Co. Ltd. v. The Attorney-General, 15 C.L.R. 182, where this position is tacitly accepted by all parties and the Court, and Moore: Commonwealth, p. 321).

The power to obtain evidence compulsorily, is, broadly speaking, a judicial characteristic, and constitutes one of the features which assist in distinguishing those tribunals which are quasi-judicial from the purely administrative bodies. The power is a normal attribute of Courts; but it is also attached to many executive bodies by the express words of the relevant statutes. Emphasis was placed upon this characteristic, as an aid in distinguishing those

tribunals which are analogous to Courts from those which resemble executive officers, in Board of Education v. Rice, 1911 A. C. 179. At p. 182, Lord Loreburn L.C., referring to the Board of Education, points out that it must act fairly in its decisions, and continues: "But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses.....The Board is in the nature of an arbitral tribunal."

The usual practice of the Legislature in respect of Commonwealth executive tribunals is to insert a provision that the tribunal may (a) summon witnesses (b) take evidence on oath or affirmation and (c) require the production of books and documents. A power of this kind is vested in the Tariff Board, the tribunal under the Excise Procedure Act 1907, the Repatriation Board and Appeal Tribunals, the Magistrate dealing with Pensions Claims, the Public Service Arbitrator, and the Boards of Inquiry and Appeal and the Board of Commissioners, for the Public Service. With regard to the Court of Marine Inquiry, the Navigation Act 1912, sec. 364 provides that it shall have such powers of compelling attendance of parties and witnesses "as are prescribed", and full powers have now been prescribed by regulation (S.R. 1923 No. 85). The Income Tax Board of Review is given "all the powers

and functions of the Commissioner" for the purposes of its duties, and by Sec. 97 of the Income Tax Assessment Act 1922-1930 one of those powers is the power to require any person to appear and give evidence on oath and to produce books and documents. In the case of the Valuation Boards for land tax purposes, no power of this nature is expressly given by statute, but it has been conferred by regulation. (See S.R. 1927 No. 160, Regn. 36). Under the Customs Act 1901-1925 and the Excise Act 1901-1923 the Minister for Trade and Customs is authorised where the person concerned consents, to hold an inquiry into and determine disputes between "any officer and any person." For this purpose the Minister is given full power to obtain evidence by compulsion.

The Commonwealth Employees' Compensation Act 1930 makes no provision of this kind, and indeed provides no machinery for a hearing at all, notwithstanding that sec. 6 gives "power to examine, hear and determine" all questions arising under the Act. It should be noted that in all cases where an officer or other identifiable person is authorised to "hear and determine any matter" the power to receive evidence, examine witnesses and administer an oath are implied by the Acts Interpretation Act 1901-1932 sec. 34. No power to compel either the attendance of witnesses or the answering of questions is introduced

by the force of this section.

Wherever provision is thus made for the power to take evidence, it is necessarily coupled with further words making failure to give or produce the evidence a punishable offence. The penalty, however, can never be inflicted by the tribunal itself, as this would involve the exercise of judicial power. As Professor Moore says, no executive authority can "by any determination of its own, create, by the mere force of that determination a duty to answer questions. The question of whether the witness is bound to answer the questions can only be determined by the Court which is invoked to impose the penalties." (Commonwealth p. 322).

VI PROVISION FOR ENFORCING DECISIONS.

Where a tribunal is invested, not only with authority to make decisions, but with the means of carrying those decisions into effect, this feature is almost conclusive to show that the tribunal is exercising judicial power in the narrow sense of the Constitution. "The judicial power" says Barton J., (Waterside Workers' Case 25 C.L.R. 434 at p. 451) "includes with the decision and the pronouncement of judgment the power to carry that judgment into effect between the contending parties. Whether the power of enforcement is essential to be conferred or not, when it is conferred as part of the

whole, the judicial power is undeniably complete."
This principle was the ratio decidendi in that case. It was held that so long as the Arbitration Court was confining itself to making awards it was acting administratively only, but when it began to enforce them it was acting judicially. Hence, the enforcing power in the Commonwealth Conciliation and Arbitration Act 1904-1915, was held to have been invalidly conferred on a President of the Court appointed only for seven years.

The line could scarcely have been drawn more tersely than by Isaacs and Rich JJ. when they said (p. 464) "The arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and if it finds it, then proceeds if necessary to enforce the law."

The law being in this shape, it will not be expected that we should find conferred upon the Commonwealth executive tribunals any power of enforcement of decisions. With regard to most of them, no question of the kind can arise; but as a few of them present special features from this standpoint, it will be of value to pass them briefly in review.

In the first place, it follows from what has

been said under the earlier heading of "Decision of Legal Rights," that the group of tribunals with merely reporting or recommending functions can be disposed of immediately. These comprise the Tariff Board, the Pensions Magistrate and one or two others. Next come the Taxation Boards, whose decision is deemed to be that of the Commissioner. Here again no question of enforcement of a tribunal's decision arises. It is not the finding which is enforced, but the statutory law, and the finding is merely the fact or event specified by the Legislature - a condition on the occurrence of which certain obligations are to arise by statute. Then there are bodies such as the Commonwealth Employees' Compensation Commissioner, and the Repatriation Tribunals whose function is to make or refuse to make decisions against the Crown, and no machinery is either provided or necessary for enforcing these. The Public Service Arbitrator is another instance of this kind. Sec. 16 of the Arbitration (Public Service) Act 1920-1929 enacts, in a provision which appears to be one of imperfect obligation, that "The Commissioner, and the Permanent Heads and Chief Officers of the several Departments of State, and all persons in the Public Service, shall comply with the provisions of any determination of the Arbitrator made under this Act." But apart from this, there is nothing in the way of enforcement machinery.

The authorities under the Public Service Act,

however, are invested with powers of inflicting punishment, in the form both of pecuniary penalties and of regression, which seem hard to reconcile with any purely executive character of those authorities (See Commonwealth Public Service Act 1922-1931 sec.55). Again, the Court of Marine Inquiry under Part IX of the Navigation Act 1912 would appear to be invested with powers of enforcement not at all consistent with the executive status which the tenure of its personnel requires that it should possess. The position of this latter tribunal will be more fully considered later in an individual examination of its characteristics.

VII. PUBLICITY OF PROCEEDINGS.

The right of the public to admission has been authoritatively declared to be a vital characteristic of the Courts of Justice, unalterable except by the Legislature (Scott v. Scott, 1913 A.C. 417). The exceptions to this general rule are of a kind which actually tend to strengthen the rule, since they relate only to those cases where the administration of justice becomes impracticable unless the proceedings are heard behind closed doors. But the principle itself has been entirely rescued, by the strong judgments of the House of Lords in the case mentioned, from steady encroachments by judicial dicta over more than half a century. Lord Shaw of Dunfermline, in

the course of an outstanding judgment, confirms the principle of the open Court in forceful and picturesque language. The measures which had been taken in the case before him to prevent any public hearing of a suit for nullity of marriage appeared to him, he said, "to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.....What has happened is a usurpation - a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand." (p. 477).

Thus, the common law stands to-day, more definitely than ever, for the principle of the open Court. Parliament, both here and in England, has placed certain minor limitations on that rule in particular cases. But it remains broadly true that full publicity is an essential attribute of a Court of Justice.

When one leaves the field of the Courts and enters that of the executive tribunals the uniform rule of publicity disappears. The practice of the Legislature varies, providing in some instances for public

hearings, in others for a discretion in the tribunal to exclude the public, and in others again for no publicity at all. As regards England, this state of affairs has been scathingly criticised by Lord Hewart, in his recently published work "The New Despotism", which constitutes a powerful indictment of administrative methods. "The departmental policy of secrecy, which is inveterate," he says, (p. 48) "is in itself sufficient to condemn the system under which the public departments act as tribunals to decide disputes of a judicial nature.....It is a queer sort of justice that will not bear the light of publicity." Lord Hewart's summary of the English position shows at a glance that the practice of committing questions affecting individuals to decision by departmental tribunals without publicity of any kind has gone much further in England than it has in Australia.

The type of English tribunal against which the Lord Chief Justice's criticism is mainly directed is the departmental authority, invested with power to give an unappealable decision without sitting and taking evidence at all. An example of this was the Local Government Board in Arlidge's Case, previously cited. Another instance, to pick out one of many, is the Roads Act 1920 (Eng.) sec.14 (3), which provides that where a licensing authority refuses to issue a licence to ply for hire with an omnibus, "the applicant

shall have a right of appeal to the Minister of Transport.....and the Minister shall have power to make such order thereon as he thinks fit." It is clear from the reasoning of Arlidge's Case that such a section does not require a hearing in the ordinary sense to be had at all - nor does it require that the issue should be determined by the Minister in person. It is enough if the matter is settled by ordinary departmental methods and the Minister takes responsibility for the decision. It follows that there is no opportunity for publicity. The decision is made and notified, no doubt after considering all proper representations, but the actual processes by which the decision has been reached are secret. It is these methods which are attacked by Lord Hewart.

Instances of this kind are rare in the law of the Commonwealth, and a glance at the formally constituted tribunals shows that publicity is, on the whole, by no means ill-provided for. Thus it is enacted that the proceedings of the Court of Marine Inquiry, and the settling of cases by the Minister under the Customs and Excise Acts respectively, shall be conducted in public. The Public Service Arbitrator is to take his evidence in open Court unless, "for reasons affecting the public interest," he otherwise orders. The Board of Review and the Valuation Board are to sit in public or in private at the election of the taxpayer (S.R. 1927 No.159 R. 43 and No. 160 R. 35). The Public Service Appeal Board and the Board of Inquiry, investigating a charge against any officer, are given "the

right to direct that the inquiry shall be held in public or in private." The Invalid and old-age Pensions Act 1908-1931 contemplates an inquiry in camera, but provides (sec. 30) that it "shall be in open Court, if for any reason the magistrate deems it advisable." The proceedings of the Repatriation Appeal Tribunals are not to be open to the public, though no doubt this is conceived in the interests of the applicants for assistance themselves, to whom, it must be admitted, the Act accords very full protection by way of rights of re-hearing and onus of proof.

Two other cases present themselves in which there is no provision for publicity. The first is the Superannuation Board, determining disputes under the Superannuation Act 1922-1931. The second is the Commissioner for Employees' Compensation. Both these tribunals appear to be fashioned after the English model, in that there is no provision for anything resembling a formal trial of the questions to be decided. The respective Acts require merely that the questions arising shall be determined by the authorities. Parliament has not concerned itself with how this is to be done, and neither the Acts or the regulations thereunder prescribe any procedure for a hearing at all, still less for a public hearing, of evidence on the matters in dispute.

VIII THE RIGHT TO LEGAL ASSISTANCE.

It might be thought on first consideration

that so long as a tribunal actually conducted a hearing and gave the person affected an opportunity to give any evidence, oral or documentary, which he might desire to give, the adequacy of the hearing would not be much affected by his being debarred from having legal assistance. But this is not the truth, as any member of the legal profession who practises in the Courts, and every Judge and Magistrate knows very well. The pitiable plight to which the average individual, untrained in the methods of logical presentation of a case, is reduced when he appears "in person" is a familiar spectacle even in so simple a jurisdiction as that of the Petty Sessions Courts. To require by law that a man must be deprived of the benefit of expert presentation, and must be left to confuse or forget altogether the vital parts of his case, to admit propositions which are not true and could never be proved, and to have false evidence given against him which he is powerless to test and expose, can hardly be a provision calculated to ensure a fair full and just hearing of a case.

The Arbitration (Public Service) Act 1920-1929 provides (sec. 19) that: "No person or organisation shall in any proceeding under this Act be represented by counsel or solicitor." In inquiries under the Excise Procedure Act 1907 the rule is the same, but may be departed from by consent of all parties and leave of the tribunal itself. The Australian Soldiers'

Repatriation Act 1920-1931 elaborately discriminates against lawyers by providing with respect to proceedings before the Appeal Tribunals (sec. 45R) that the appellant shall be entitled "to be represented, at his own expense, at the hearing by a person other than a legal practitioner." Sections like these can only be regarded as yet another expression through Parliament of that popular prejudice against legal methods which we discerned earlier, in the numerous provisions emancipating the executive instruments of justice from "legal precedent" and "solemnities", and "any rules of evidence". If the public opinion which presumably secures the insertion of sections like these were better informed, it would be seen that they tend to destroy the chief protection the community possesses against arbitrary decision and miscarriage of justice.

The common law is that, apart from statutory exclusion of such a right, a person is entitled to appear before an executive tribunal by any agent or representative, legal or otherwise, whom he may select. This was established in The Queen v. The Assessment Committee of St. Mary Abbotts, 1891 1 Q.B. 378 where the Court of Appeal held that an Assessment Committee was bound to hear the manager of a ratepayer's association who had been appointed by an objector to represent him. This authority has been expressly followed by the High Court in R. v. The Board of

Appeal 22 C.L.R. 183, a decision with regard to the Board under sec. 50 of the Commonwealth Public Service Act 1902-1915 (now repealed). See also Jackson & Co. v. Napper: In re Schmidt's Trade Mark, 35 Ch. D. 162 per Stirling J. at p. 172.

IX THE IDENTIFIABILITY OF THE DECIDING MIND.

"The decision of a Court", writes Lord Hewart (The New Despotism p. 36), "is in every important respect sharply contrasted with the edict, however benevolent, of some hidden authority, however capable, depending upon a process of reasoning which is not stated and the enforcement of a scheme which is not explained." He is here attacking the state of affairs which has been produced in England by the passing of a considerable number of statutes conferring power on the Minister or other head of a Government department, and sometimes on the department itself, to decide questions the true character of which is judicial. He points out that such provisions really mean that the questions are "to be decided by some official, of more or less standing in the department, who has no responsibility except to his official superiors.....The official who comes to the decision is anonymous, and, so far as interested parties and the public are concerned, is unascertainable" (p. 43).

One or two examples of the English enactments complained of have already been referred to. A further

specimen is the Education Act 1902 (Eng.) sec 7 (3), which provides that where any question arises "between the local education authority and the managers of a school not provided for by the authority, that question shall be determined by the Board of Education." It will be well to examine briefly the status and powers of tribunals thus established as defined by the House of Lords; for although such authorities are rare under Commonwealth legislation, they are by no means unknown. The section from the Education Act 1902 (Eng.) quoted above presented itself for interpretation by the House of Lords in Board of Education v. Rice, 1911 A.C. 179. Lord Loreburn L.C. said (p. 182): "They must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial.....They can obtain information in any way they think best....."

This case represents a cautious preliminary exploration of a new problem. Four years later the Lord Chancellor's words were elaborated in bolder fashion in Local Government Board v. Arlidge 1915 A.C. 120. It might have been supposed from a study of the brief judgments in the first-mentioned case that although the Education Act did not require a trial, it at least required, in the ordinary sense of the word, a hearing. Any such notion was disposed of in Arlidge's Case. "I do not think", said Lord Haldane, "the Board was

bound to hear the respondent orally, provided it gave him the opportunities he actually had" (p. 134). The House of Lords emphasised that the analogy of judicial procedure was wholly inapplicable, and approved the dissenting judgment of Hamilton J. in the Court of Appeal, who had said: "In my opinion, the question whether the deciding officer 'hears' the appellant audibly addressing him, or 'hears' him only through the medium of his written statements, is in a matter of this kind one of pure procedure" (1914 1 K.B. at 191).

It is clear that the significance of the question whether there was to be a hearing at an actual sitting, or nothing of the kind, lay, from one point of view, in the fact that upon it depended the identifiability of the judge. The respondent Arlidge vigorously pressed this point, but without avail. "It is said that the respondent," said Lord Shaw of Dunfermline (p. 135) "as the lessee of a house declared to be insanitary, is entitled to get behind that pronouncement and to ascertain which, in this great department of State, were the actual mind or minds which judged his case.....In my opinion this demand is unjustifiable." The position was summed up in a way that finally placed it beyond doubt by Viscount Haldane L.C. (p. 133) :- "The Minister at the head of the Board .....is responsible not only for what he himself does but for all that is done in his department..... He is expected to obtain his materials vicariously through his officials, and he has discharged his duty

if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it."

It follows from the application of this principle that in respect of the tribunals to which it applies, the safeguard of personal responsibility for decisions, which obtains in respect of the Courts, entirely disappears. So also do all the other devices which have been evolved over centuries for ensuring that right shall be done - rules of evidence, publicity, testing by cross-examination, consistency of decision, and the rest. To quote the biting phrases of Lord Hewart (The New Despotism, p. 35): "It may well be that, in a particular case, a perfectly correct opinion might be obtained from some anonymous person, incapable of identification, who heard none of the parties to the controversy, but who brought his individual reason to bear in private upon a miscellaneous bundle of correspondence.....But it is manifest that an opinion so arrived at differs by the whole width of the heavens from the decision of a Court." Although the examples of this kind of legislation by the Parliament of the

Commonwealth are few, the matter derives some added importance from the fact that the most extreme instance is of quite recent appearance and may well be thought to be significant as indicating the legislative tendency of the present day. Three examples will be given, and it is to be noted that they bear the common feature of each being concerned with the Public Service of the Commonwealth.

The outstanding example just referred to is the Commonwealth Employees' Compensation Act 1930. The Commissioner under that Act who is to determine claims for compensation is a mere figurehead, and is authorised to delegate all his functions to his subordinates. As will be seen later when this particular deciding authority is subjected to a more detailed examination, we have here a pure example of a public department discharging the functions of a Court, and deciding, by its own methods, private rights which are normally determined judicially. A right of appeal to a local Court (sec. 20) goes some distance, but only some distance, in the direction of tempering the disadvantages of this system.

The second instance is that afforded by the Audit Act 1901-1926, in the provision made for surcharges by the Auditor-General in respect of deficiencies or unauthorised expenditure, and appeals there-

-from (secs. 42-44). It is provided that when any officer or other person has been so surcharged with any sum, the person surcharged "shall have a right of appeal to the Governor-General. Whereupon the Governor-General "after such investigation as he considers equitable" may make such order as shall appear to him to be just and reasonable. Clearly, although called an "appeal", this section (sec. 44) requires no more than a mere administrative decision. In view of the words last underlined, it would seem that it is not even necessary that the Governor-General or his deputy should "fairly listen to both sides" in accordance with the rule in Board of Education v. Rice 1911 A. C. 179.

The third case is the Superannuation Act 1922-1931. Sec. 78 provides that "Any dispute under the Act shall be determined in the first place by the Board". A right of appeal is given from the Board's decision to a single Justice of the High Court. This is not an instance of very wide importance, but it is plain that here again, the decision of the Board is one to be arrived at by the administrative methods of a Government department and not by means of a formal hearing. Apart from the expressly given right of appeal, the Superannuation Board would appear to stand in exactly the same position as the Education Board under the Education Act 1902 (Eng.) considered in Rice's Case.

ACCESS TO COURTS

Since the broad purpose of administrative systems of decision is to provide a substitute for decision by the Courts, it is not surprising to find that the right of access to the latter by way of appeal and otherwise is severely restricted. In some cases it is totally excluded. Thus the Industrial Peace Acts 1920, providing for the creation of Special Tribunals, declares that no award or order of such a tribunal "shall be challenged, appealed against, reviewed, quashed or called in question, or be subject to prohibition mandamus or injunction, in any Court on any account whatever."

These strong words are reproduced in the Arbitration (Public Service) Act 1920-1929 as applying to determinations made by the Arbitrator under that Act.

It is provisions of this type, more common in England than in Australia, which led Lord Hewart to write: "It may well be that departmental decision is, within strict limits and for defined purposes, even desirable. But why should it be screened and withdrawn from examination by Courts of Law? There may be many unsustainable reasons, but there is no good reason why departmental officials should have the power.....of giving a decision which an aggrieved person is unable to submit to the test of judicial inquiry." On the other hand, Robson contends that if administrative

decision in its proper sphere serves any useful purpose at all "we must accept it as a system in the main independent of the Courts of law, and reject any proposal to subject it to the contingent control of those Courts." Otherwise, he points out, it will be impossible for the administrative system to retain or evolve any seperate characteristics. Clearly the variance in view between these two learned authors hinges upon the opinion held by each of the desirability, from a public standpoint, of the seperate characteristics which are in fact being developed. Even Robson, however, believes that "the existing right of review on questions of jurisdiction and procedure should undoubtedly be preserved" (Justice and Administrative Law p. 309).

What the "existing right" amounts to depends upon the particular instance. In the two Commonwealth examples cited above there is no right of review or control at all. Other instances present themselves in which the Courts have a right of intervention which is of negligible extent and value. In Board of Education v. Rice 1911 A.C. 179, the matter in issue was one in which the Board of Education had been given a statutory power of final decision. The House of Lords found that the action of the Board had proceeded upon so profound a misconception of the issue as not to amount to a decision at all. Under these circumstances all that could be done was to require the Board

to approach the question anew and decide it. Once that decision had been made it was beyond attack. The statutory finality sheltered it like the closing of a fireproof door. The Arlidge Case, 1915 A.C. 120, has already been referred to at length. Suffice it to say, that Robson himself sums up its effect in these words: "Henceforth, the government offices in Whitehall were, within their prescribed sphere, to take their place side by side with the courts of law.....as wielders of final and absolute authority rather than as the producers of mere provisional conclusions subject to review in the royal courts of justice" (ibid. p. 148). This does not leave great scope for the "existing right of review."

On the whole, the tendency of Commonwealth legislation has not been strong in the direction of protecting executive tribunals from any surveillance by the Courts. In addition to the examples given of the Special Tribunals and the Public Service Arbitrator, it is provided that the decision of the Commissioner upon claims for invalid and old-age pensions shall be "final and conclusive and without appeal." Findings by the Appeal Board for officers of the Commonwealth Bank are to be "final and conclusive". The decision of the Public Service Appeal Board is to be "final", as is likewise that of the Minister in the exercise of his consent jurisdiction under the Customs and Excise Acts. Unlike the first examples cited, these various forms do not

exclude the jurisdiction of the Court to control the authorities by means of the prerogative writs.

Apart from these cases, the legislative practice is mostly to allow a right of appeal to the Courts of greater or less extent. Thus, there is a general right of appeal from decisions of the Commissioner on questions affecting patents and other industrial property; and anyone aggrieved by findings of the Superannuation Board may appeal to a Justice of the High Court. Recourse to the same Court may be had from the taxation tribunals, but in this case the appeal is confined to questions of law.

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CHAPTER XII.

EXAMINATION OF CERTAIN TRIBUNALS.

In the immediately foregoing pages a great many of the individual features of the executive tribunals of the Commonwealth have been touched upon, and it will be unnecessary to refer to those matters again. Certain of the tribunals, however, present aspects for consideration which up to the present either have not been discussed at all or have been inadequately dealt with. It is proposed to consider these special cases in the present chapter.

(1) THE COURT OF MARINE INQUIRY.

The constitution of this body is contained in Part IX of the Navigation Act 1912, although this portion of the Act was not brought into operation by proclamation until 1st. March, 1923. Its functions are generally defined (sec. 356) as "to hear and determine appeals charges complaints inquiries and references under this Act." Its main concern is the investigation of shipping accidents and dealing with charges of incompetency or misconduct on the part of masters or officers of ships.

With the exception of locking the life

tenure of its personnel needed to make it part of the Federal Judicature, this Tribunal has been equipped with nearly all the ordinary incidents and characteristics of a Court of Justice. Thus, it is enacted that Courts of Marine Inquiry "shall be Courts of Record" (sec. 356), the scope of the powers vested in them is referred to as "jurisdiction" (Part IX Passim) and any such Court is to have "all the powers of a Court of summary jurisdiction in the State in which it sits (sec. 370). It can make orders as to costs (sec. 371), cancel the certificate of any master or ship's officer in a proper case, and commit him to prison if he fails to deliver up his certificate after being ordered to do so (secs. 372-375). It may, on appeal from the Minister, make a final order for the detention of a ship on the ground of its unseaworthiness (sec 210).

These attributes, which appear to be clearly judicial in their nature, are combined with other features of an administrative character. Thus, it has no inherent power to compel answers to questions, and specific provision is made, on the usual model for executive tribunals, creating an offence of refusing to answer, punishable in another jurisdiction. The Court is to make any inquiry the Minister may request it to make within its jurisdiction (sec. 365), and when so requested by the Minister to inquire into certain offences, it is to do no more than "recommend to the Minister what punishment, if any, shall be inflicted" (sec. 376).

Tenure. The tenure of members of the Court is clearly at the will of the Executive only. Sec.356 provides that "The Governor-General may, by proclamation, establish Courts of Marine Inquiry at such places as he thinks fit" and ".....may, by proclamation, revoke the establishment" of any such Court.

Constitutionality. It is submitted that in view of the above features, and notwithstanding some judicial dicta which seem to suggest the contrary, the Court of Marine Inquiry has been invalidly invested with judicial power, and a great deal, at all events, of Part IX is ultra vires the Legislature of the Commonwealth. The validity of the constitution of the Court was expressly challenged in The King v. Turner; Ex parte Marine Board of Hobart, 39 C.L.R. 411. The Chief Justice and three other Judges delivered a joint judgment based upon reasons which dispensed with the necessity of deciding the question. Isaacs J., however, in the course of a dissenting judgment, deals briefly with the matter at p. 442. "Notwithstanding the truth he says, "that the Marine Court is not a Court within the judicature provisions, the answer to the objection is that the functions committed to it are not necessarily judicial. They are such as may be, and not infrequently are, entrusted to administrative bodies as well as to judicial bodies". It appears from the context of these remarks that they are concerned particularly with sustaining the section under consideration in the case (sec. 364) which, unlike some of the

others in Part IX, might fairly be said to prescribe functions which are "not necessarily judicial."

Higgins J., also dissenting, says at p.450, that he holds the "positive opinion that such an officer as Mr. Turner, holding an inquiry into a collision of vessels, is not exercising the judicial power of the Commonwealth"; and he bases this view upon the High Court's decision upholding the reconstituted Income Tax Board of Review (38 C.L.R. 153).

It will be seen, then, that on the question of validity four Justices are silent, while two in effect confine their opinion in favour of the Act to sec. 364, authorising an inquiry into collisions etc. This section is no doubt capable of being regarded as administrative in character, and by force of sec. 2 (2) directing that the Act is to be considered ut res magis valeat quam pereat it can survive the invalidity of other portions of Part IX. (See Newcastle & Hunter River Steamship Co. v. Attorney General 29 C.L.R. 357 at p. 369). And it is, of course, true that the use of the word "Court" or even the phrase "Court of Record", is not in itself conclusive as to the purported judicial character of the tribunal (Waterside Workers' Case 25 C.L.R. 434 and esp. p. 467). But it is submitted that the sections mentioned above, making provision for the exercise of punitive powers, the making of binding determinations, and the enforcement of orders could not be defended against attack, having regard to the tests laid down for delimiting the judicial

power, and discussed earlier in this work.

(2) THE INVALID AND OLD-AGE PENSIONS TRIBUNAL.

The method of determining claims under the Invalid and Old-age Pensions Act 1908-1931 is a unique mixture of quasi-judicial and purely administrative machinery.

In the first place, the claimant is to furnish a claim on a prescribed form, in which he shall "affirm all the qualifications and requirements and negative all the disqualifications under this Act". A heavy penalty attaches for untrue statements in this claim.

Next follows an official inquiry. "Upon receipt of a pension claim the Registrar shall cause to be made such investigations as appear to him desirable, or as are directed by the Deputy Commissioner....." and for this purpose he may "require any person whom he believes to be in a position to do so to furnish to him, for submission to the Magistrate, a confidential report" as to the circumstances or transactions of the claimant (sec. 28).

The Registrar then transmits the fruits of this inquiry, and presumably his opinions thereon, to the Magistrate who is to hear the claimant's case. It is provided that the Governor-General "may appoint such Special Magistrates of the Commonwealth as he thinks necessary" for the purposes of the Act, and by sec. 29

the Registrar is required to refer to the Magistrate with the claim "a full report of the result of the investigations which have been made." He must also "notify the claimant of the time when and place where he is required to attend to support his pension claim."

After the matter has been thus elaborately pre-judged by the Registrar in the absence of the claimant, the Magistrate, at the time and place notified, is to "proceed to investigate the pension claim, for the purpose of deciding whether the claimant is entitled to a pension, and, if so, at what rate." Although this ultimate proceeding is, like the Registrar's activities, called an "investigation" it is clear from the provisions made in regard to it that it is to be of the nature of a quasi-judicial hearing upon evidence. Thus, the proceedings "shall be in open Court, if for any reason the Magistrate deems it advisable", and "evidence may be taken at the hearing from members of the police force.....or any other persons whatsoever." The Magistrate, however, is to be unhampered" by any rules of evidence", and is to act according to "equity, good conscience and the substantial merits."

One might suppose that a challenge to good conscience on the very threshold of the investigation would be the fact that the Magistrate is required to act upon and have his judgment influenced by "confidential reports" the only meaning of which term can be that such reports are not to be available to the

claimant. The latter has therefore to call his evidence while entirely in the dark as to what statement may have been made about him and his affairs on hearsay from "any person" whom the Registrar thinks fit to call upon for a report. Such, however, is the procedure which Parliament has decreed. It does not appear from the statute that even the fact that the reports have been obtained must be disclosed to the claimant. It is surely only the trivial nature of the matters involved (trivial, that is, objectively, though not from the personal standpoint of the claimant) which prevents such a system from being condemned as opening the way to serious injustice. It is true that the continuance of the payment of pensions is dependent entirely on the will of the Executive, which may cancel them at any time without cause shown (sec. 37), but this does not dispense with the propriety of having a just procedure for dealing with claims.

After the hearing, the Magistrate recommends the claim, or its rejection. The recommendation is then transmitted to the Deputy Commissioner or, in some cases, the Commissioner, who shall "determine the application." The function of the Magistrate being purely a recommending one, no question of his exercising judicial power, in its constitutional sense, can arise.

A right of appeal, of a kind, from the findings of the Magistrate, is provided by sec. 32. When

there is a recommendation for rejection, the Magistrate is to specify the material points which he finds to be disproved. The claimant may then in respect of such matters "appeal to the Minister who may cause an investigation thereof to be made by the Commissioner or a Deputy Commissioner, whose decision shall be final and conclusive and without appeal."

In view of the necessarily impecunious nature of the applicants for relief, and the general right of arbitrary cancellation of pensions possessed by the Executive, it is no matter for surprise that the High Court has not so far been called upon to interpret the Act.

(3) THE INTERSTATE COMMISSION.

This body is provided for by secs. 101-104 of the Constitution. Sec. 101 declares that "There shall be an Interstate Commission, with such powers of adjudication and administration as the Parliament deems necessary "for the execution and maintenance of the terms of the Constitution in relation to trade and commerce." The appointment of the members of the Commission is to be by the Governor-General in Council, for seven years (sec. 103), subject to removal within that time on an address of both Houses, for proved misbehaviour or incapacity. The functions of the Commission are more particularly indicated by sec. 102 and 104, though there is no exhaustive description of those

functions. The Commission is especially charged with the task of "adjudging" how far discriminating railway rates in force on State railways constitute a preference or discrimination which is "undue or unreasonable, or unjust to any State." The tribunal "was not intended to supersede executive action or judicial control, or to have a branch of the civil service to execute its decrees" (see Report of Royal Commission on Constitution, p. 54).

The only legislative effort under these sections has not proved auspicious. In 1912 the Interstate Commission Act was passed establishing a Commission of three members, one of whom was to be of experience in the law. The Commission was to be a body corporate capable of suing and being sued. It was charged with "the duty of investigating" matters affecting manufacture, markets, bounties, tariffs, wages, employment and other similar subjects, together with any other questions that might be referred to it by resolution of either House of the Parliament. In addition, it was empowered to inquire into certain matters affecting the commercial use of rivers.

Part IV of the Act forbids undue railway discrimination in accordance with secs. 102 and 104 of the Constitution. The giving effect to this Part, however, depended on Part V, which purported to make the Commission a Court of record (sec. 23). The title to Part V. was "Judicial Powers of the Commission"

and under this heading power was sought to be conferred "to grant all relief to which any of the parties are entitled" in respect of any claim, to declare State regulations void, to grant injunctions, and to fix penalties. For the effecting of these purposes, the Commission was to have "all such powers rights and privileges as are vested in the High Court" (sec 36).

In The Commonwealth v. New South Wales, 20 C.L.R. 54, it was held that Part V. was ultra vires the Commonwealth and wholly invalid. The Commission could not be made a Court, it was said, notwithstanding that the Constitution provided a right of appeal from its decisions to the High Court in its appellate jurisdiction. The word "adjudication" in sec. 101 of the Constitution connoted quasi-judicial and not judicial functions. The Court held that the Commission could be no more than a branch of the executive government, "a great, perhaps a unique government Expert Department."

"The dominant words in sec. 101," said Isaacs J. (p. 92), "are 'the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder'. These words denote the purpose and nature of the power to be conferred, and mark their limit. Courts do not execute or maintain laws relating to trade and commerce. Those words imply a duty to actively watch the observance of those laws, to insist on obedience to their

mandates, and to take steps to vindicate them if need be. But a Court has no such active duty; its essential feature as an impartial tribunal would be gone."

After this blow, the Commission continued to discharge its legitimate functions of inquiry, and was used by regulation for the purpose of price and rent fixation under the War Precautions Act (See S.R. No. 254 of 1917). The Government, however, became unenthusiastic about its value, and when the offices of all three Commissioners ultimately became vacant through resignation or lapse of time, no further appointments were made. The tribunal derives its contemporary interest from the fact that the Royal Commission on the Constitution has recommended that it should be reconstituted (Report p. 249).

(4) COMMISSIONER FOR EMPLOYEES' COMPENSATION.

This tribunal, constituted under the Commonwealth Employees' Compensation Act 1930, is charged with the responsibility of awarding compensation in cases of injury or accident sustained by employees of the Commonwealth. The Act extends to all employees subject to the Public Service Act, and includes "any person who has entered into or works under a contract of service or apprenticeship with the Commonwealth".

Something has already been said about this authority, and a brief treatment will be sufficient here.

The duties of the Commissioner in determining claims for compensation involve as their essential basis and object the applying of a legal scheme to particular facts and giving a decision as a result of such application. This is undoubtedly a task which is prima facie judicial in its character. Again, the Act itself, so far as it is concerned with the scheme of relief - that is to say, the nature of the cases which come within the Act, the making of claims and the principle of assessment of compensation - follows closely the general model of other workers' compensation systems in operation in the British Empire. The substantive law is familiar enough - it is the adjectival provisions which make the Act noteworthy.

For although the general purpose of the law is judicial in character, the means of giving effect to that purpose are purely administrative. There is no provision for any formal hearings, any definite tribunal. It is true that sec. 6 provides that "The Commissioner shall have power to examine, hear and determine all matters and questions arising under this Act and the regulations." But the House of Lords has laid it down in the cases considered earlier that this does not necessarily mean a trial, or indeed anything more than a mere departmental examination of representations made to the Commissioner by the

applicant for relief. (Local Government Board v. Arlidge, 1915 A.C. 120).

When sec. 7 is referred to, it is seen that for all the provision the Act makes against the contingency, the claim for compensation might be determined by the Commissioner's junior typiste. It is provided that "The Commissioner may be writing under his hand delegate all or any of his powers and functions (except this power of delegation." The Secretary to the Treasury, it is declared (sec. 5), "shall be ex officio Commissioner for Employees' Compensation". The Minister in charge of the Bill in the Senate, in answer to a question, stated that "no additional expenditure would be incurred" in respect of this appointment, although "the position in regard to deputies might be different" (Fed. Hansard vol. 113, p. 4705), thus showing that the Commissioner was to have only nominal responsibility.

It is not surprising that we look in vain in this Act for any power to compel the attendance of witnesses or the answering of questions. The Act does not contemplate methods of reaching the truth for which this power would be of service. The Regulations are as barren as the statute of anything that would suggest that a trial, or any procedure resembling it, is to be employed. The purposes of the Bill, said the Minister frankly, were to be achieved by "administration" in place of the pre-existing method under

which claims were decided "by agreement, arbitration, or by the Court." (Fed. Hansard Vol. 126, p. 5626). The practical meaning of this is that every claim for compensation is to be determined by an official of the Treasury Office, who will have before him a file of papers in connection with it. No opportunity is to be afforded for testing the accounts of eye-witnesses for error or bias by means of cross-examination. The worker having made his claim, supported by such material as, in his inexperience, he is able to get, can then only await a formal notification from the Department informing him of its fate. The tribunal thus becomes the same kind of anonymous departmental official the entrusting of judicial decisions to whom is deprecated by Lord Hewart in "The New Despotism."

The unsatisfactory nature of this plan is to some extent mitigated by the provision in sec. 20 that "any person affected by any determination of the Commissioner" may "appeal to a County Court" against it, and "such appeal may be in the nature of a rehearing." But consideration reveals that this right is not likely to be any very great protection against a possible failure of justice at the hands of the Department. In every instance the determination by the Commissioner will have been made without the worker's having had any legal representative to assist him

in the presentation of his case. There is nothing requiring any reasons for the determination to be given to the applicant; and he has few facilities for making up his mind, (even if he were competent to do so) whether an appeal would have any prospects of success.

It is perhaps doubtful whether the provision that the appeal "may" be in the nature of a re-hearing does not virtually mean that it shall be so, but in any event the County Court would probably follow the line indicated. Such a course would mean that the only material before the Judge would be that which had been (a) furnished by the applicant, or (b) collected by the Department, for the purposes of the official decision. No doubt the line would not be strictly drawn against later evidence, but the judicial examination of the matter must surely be compromised by the fact that the Judge has to re-hear a case of which there has been no previous hearing at all in the judicial sense, but only a decision based on a departmental investigation.

(5) COURTS-MARTIAL

By secs. 86-100 of the Defence Act 1903-1927 provision is made for the establishment of Courts-martial. It was held in Dawkins v. Lord Rokeby L.R. 8 Q.B. 255 that a military Court of Inquiry "though not a court of record, nor a court of law, nor coming

within the ordinary definition of a court of justice, is, nevertheless, a court duly and legally constituted, and recognised in the articles of war and many Acts of Parliament" (per Kelly C.B. at p. 266). See Co-partnership Farms v. Harvey-Smith, 1918 2 K.B. 405, where this view was elaborated, as applied to a "local military tribunal". "The question I have to decide is, therefore," said Sankey J. (at p. 409) "under which category does this local tribunal fall? Does it come within that which I may describe shortly as a judicial tribunal, or does it come within a merely administrative tribunal?" The learned Judge examines at length the constitution of the tribunal, and although in that case it had no power to administer an oath, places it unhesitatingly in the former class.

Sec. 88 of the Commonwealth Defence Act applies to Australian Courts-martial the English law as to procedure, composition, powers, effect of findings and certain other similar matters, except so far as otherwise expressly provided. The decisions as to the judicial nature of the functions of military courts must be taken to place them in the quasi-judicial group of executive tribunals, so far as the Commonwealth is concerned. They are, of course, clearly outside the Federal Judicature, and are instruments of the Executive. An American authority has said that "although their legal sanction is no less than that of the Federal Courts, being equally with them authorised by the Constitution, they are, unlike

these, not a portion of the judiciary of the United States.....Not belonging to the judicial branch of the Government, it follows that Courts-martial must appertain to the executive department, and they are in fact simply instrumentalities of the executive power." (Thayer's Leading Cases in Constitutional Law, p. 52).

Power is given by the Defence Act to Courts-martial to punish for contempt of court, to summon witnesses, administer oaths, and compel answers to questions and the production of documents (secs. 89-95). Persons charged may be assisted by counsel, and where the offence is capital shall be entitled to have counsel assigned to them. A Court-martial is empowered to impose the penalties provided in the Act for particular offences, and, in addition, to dismiss or regress the offender and order him to pay damages for injury to Commonwealth property. The High Court has not had an opportunity to consider whether the conferring of these powers constitutes an infringment of Chapter III of the Constitution.

Under the common law, Courts-martial, like the inferior civil Courts, are subject to the supervision and control of the civil Courts of higher degree. The intervention of the latter takes the form of the issue of one of the prerogative writs, including that of certiorari (See Halsbury Vol. 25, p. 90). The Defence Act 1903-1927, however, provides

(sec.100) that: "No proceedings of any Court-martial constituted or appointed under this Act shall be set aside or deemed void for want of form, or be removed by certiorari or otherwise into any civil Court."

(6) THE REPATRIATION TRIBUNALS.

The group of deciding authorities established under the Australian Soldiers' Repatriation Act 1920-1931 is distinguished as being the most elaborate system of administrative adjudication existing in the Commonwealth. Indeed, it would be difficult to find a parallel for it anywhere in the Empire, particularly when it is considered how comparatively limited is the field in which this intricate structure has its operation. The organisation consists of the following:-

(a) A Repatriation Board (three members).

(b) The Repatriation Commission (three members).

(c) The War Pensions Entitlement Appeal Tribunal. (three members).

(d) The Assessment Appeal Tribunals. (three members).

(e) Provision for Local Committees.

In the first instance, each State Board is charged with the duty of determining in respect of any claim, whether the death or incapacity on which the

claim is based is due to war causes, what is the extent of the dependency if any, and at what rate the pension should be assessed.

An appeal lies from the Board's decision to the Commission; and apart altogether from appeal, the Commission has a general right of review of the Board's assessments and determinations whenever it appears that "sufficient reason exists."

If the claimant sustains a second reverse at the hands of the Commission, he may then appeal, on the issue of whether the death or incapacity resulted from war causes, to a War Pensions Entitlement Appeal Tribunal. This may be done at any time <u>within twelve months</u> of the Commission's determination.

It is necessary to keep a clear head to follow the intricacies of what happens after this.

1. If the Appeal Tribunal thinks there is no further material evidence adduced beyond that which was before the Commission, it decides the appeal.
2. If it thinks such evidence has been adduced before it, the matter is <u>referred back to the Commission.</u>
3. In the latter case, the Commission duly reviews the claim and notifies the Appeal Tribunal of its fresh determination. If this is adverse to the

claimant, the Appeal Tribunal shall decide the appeal on the evidence the Commission had before it.

Even this is not the end.

4. If "at any time after the decision of an Appeal Tribunal" the appellant submits further relevent evidence to the Commission the latter authority shall "reconsider the claim."

5. Whereupon, if the Commission is still of an adverse mind, "the appellant may within twelve months" of this further decision appeal again to the Appeal Tribunal.

6. The Commission may deem the new evidence not to be relevent, and in such event makes no further decision. In this contingency the appellant may, within twelve months, again have recourse to Appeal Tribunal which shall decide whether the new evidence was in fact relevant. If the decision on this is favourable to the appellant, the Tribunal shall consider the new evidence and decide the appeal.

But the Commission is not yet functus officio.

7. "The Commission may at any time after a decision by an Appeal Tribunal..... appeal in writing to the Tribunal upon any further evidence relating to the

appeal which, in the opinion of the Commission, is relevant thereto"

(sec 45K).

If and when finality is reached under the foregoing provisions, the question of the claimant's right to a pension has at last been established. But the amount is another question. After the pension has been assessed in the first place by the State Board, and the assessment reviewed by the Commission, the claimant may then appeal to one of the Assessment Appeal Tribunals, of which there are two operating in separate areas of the Commonwealth.

It is interesting, after examination of this involved machinery, to note the words of the Repatriation Commission itself in its 1930-1931 Annual Report to Parliament under sec. 58 of the Act. "In most cases" says the Report, "an adverse decision results in an appeal through every statutory appellate body against the Commission's decision, as well as the employment of every other means to secure reconsideration of the application."

The local Committees provided for under Part IV of the Act are wholly subject to regulation as to their nature, constitution and functions. They are to be appointed by the Commission, after selection "in the prescribed manner" and are to have such powers

"as are prescribed". The Commission is to appoint an executive of seven members for each Local Committee, and the powers of these executives are likewise to be provided for by regulation. The powers so far prescribed as exercisable by the Committees include raising funds, receiving contributions in kind, organising voluntary services, etc.

A noteworthy feature of the proceedings before the tribunals is that on the question of whether the death or incapacity was the result of war service, the onus of proof is placed by sec. 45W upon the Commission and not upon the claimant.

(7) THE BOARD OF REVIEW.

The tribunal now constituted under the name of the Board of Review by Part V of the Income Tax Assessment Act 1922-1931 has already been glanced at from a number of angles in the foregoing pages, and most of its characteristics have been touched upon. Some comparison of it with the old Board of Appeal, declared invalid in the British Imperial Oil Co's Case, 35 C.L.R. 422 has also been attempted. It remains to examine here the functional side of the Board of Review. The inquiry into the precise nature of its powers and duties casts an interesting light upon it, and reveals it as par excellence an example of the true executive tribunal. Its character was pithily

described by the Privy Council in Shell Co. v. Federal Commissioner 1931 A. C. 275 when it was said that the Legislature had in effect told the taxpayer: "If you want to have the assessment reviewed judicially, go to the Court. If you want it reviewed by business men, go to the Board of Review."

In Federal Commissioner v. Munro 38 C.L.R. 422, where the Board, as reconstituted to avoid the impeachment of usurping judicial power, was first considered by the High Court, Knox C.J. was unable to admit that this aim had been achieved. It still had power, even in its new guise, he reasoned, to determine as between the Commissioner and the taxpayer the legal right of the one to demand and obligation of the other to pay money as taxation. "I find it impossible", he said (p. 165) "to regard a tribunal invested with such a power as a mere administrative body, or as a mere adjunct to or agent or instrument of, the Executive Government, exercising portion of the executive power of the Commonwealth". In this view, however, he was entirely alone, the remaining five Judges being definitely of the opinion that the Board of Review must be regarded as "a mere piece of administrative machinery" (per Higgins J. at p. 201). This was the conclusion reached by the Privy Council in upholding the High Court's decision (Shell Co. v. The Federal Commissioner (supra).

The effect of the wording of sec 44(1) of the Act, directing that the Board "shall have all the powers and functions of the Commissioner in making assessments" etc. and of that of sec. 51 (4) which states that "The Board, on review, shall give a decision and may either confirm the assessment or increase reduce or vary the assessment" is to place the Board in the position of the Commissioner himself with regard to such cases as may be referred to it. It has the power not merely to direct that some change be made in an assessment, but to make the change itself.

Reg. 45(1) of the Income Tax Assessment Act Regulations 1927 imperfectly interprets this intention of the Legislature. This regulation requires that: "A Board shall give a written decision on each review and shall forward copies to the Commissioner and to the taxpayer, and the Commissioner shall, unless the decision has been appealed from, give effect to the decision within 30 days after the receipt thereof.

The misunderstanding of the position by the Department which is discernible in this regulation led to a curious position in Federal Commissioner v. West Australian Trustee Co. 43 C.L.R. 20. In that case it appeared that on receipt of the Board's decision in writing, which was in favour of the taxpayer, the Commissioner issued a fresh assessment, reducing the amount to conform with the finding. This was

in accordance with the form of that finding, which was, on the face of it, a direction that the assessment should be amended, and not an amendment in itself.

The Commissioner thereupon proposed to exercise his right to appeal on a question of law under sec. 51(6), only to be told by the High Court that he had lost it. He had not, by his alteration, given effect to the Board's decision, for this was, by its own inherent force, completely effective to alter the assessment. Instead, he had exercised his power under sec. 37 conferring upon him a general right of alteration at his discretion, and in so doing had destroyed the original assessment which alone could form the basis of appeal. "The only assessment now in existence", said Knox C.J. (p. 23) "is the amended assessment, and that having been issued by the Commissioner, he has no right of appeal against it". Dixon J. said that in his opinion the Act meant that "the functions of the Commissioner are again to be performed by the Board" and that reg.45 ought not to be construed as requiring the Commissioner to make a re-assessment. "The Board", he said, "is authorised by the Act to give formal shape and validity to its own decisions..... The Commissioner had thus "superseded the act of the Board from which he desires to appeal."

Inconclusive Nature of Findings.

The case just discussed illustrates one

somewhat remarkable aspect of the Board's decisions. They are, in one sense, entirely inconclusive as between the parties. The power which the Commissioner in that case exercised in order to conform with the finding of the Board, apparently under the impression that this was a necessary step, is available to him at any time after a finding, and is exercisable in conflict with that finding. No doubt if the Commissioner made a fresh assessment directly overriding the decision of the Board of Review, such action would be fruitless, as further recourse by the taxpayer to the Board would result in the amount as originally fixed by that tribunal being restored. But the power exists none the less, and may be susceptible of use so as to qualify the Board's findings in unexpected ways. The inconclusive nature of the Board's work was remarked on by the Privy Council, which relied on this feature amongst others to rebut the suggestion that judicial power was being exercised. "No assessment of his (the Commissioner's) even when paid, is conclusive upon him", said Lord Sankey, speaking for the Judicial Committee. "He retains under sec. 37 the fullest power of subsequent alteration and addition, and it would appear that that power remains with him notwithstanding any decision in respect of the same assessment by the Board of Review". (Shell Co. v. Federal Commissioner, supra, at p. 296).

Valuation Boards.

The foregoing observations apply substantially

to the Valuation Boards erected to revise assessments under the Land Tax Assessment Act 1910-1930.

The power of alteration of assessments entrusted to the Commissioner is not, in form at all events, so unqualified as that given to him with regard to income tax. Except for the purposes of rectifying an omission or making a reduction, his right to alter assessments is confined to cases where he is "of the opinion that there has been an evoidance of tax by attempted evasion." (sec. 21). The power was originally expressed in terms which closely approximated to those of sec. 37 of the Income Tax Assessment Act 1922-1931. The present section was substituted by an amendment of 1927.

CHAPTER XV.

ARBITRARY AUTHORITIES.

Under this somewhat inadequate general title it is proposed to deal with all those cases in which absolute power is conferred on officers of the administration to decide finally matters affecting the rights liabilities or status of individuals. Such instances are numerous, and in some of them the authority conferred is as far reaching as it is unchallengeable. The statement that the decisions of such officers effect the rights of the persons concerned must be taken as subject to the qualification that where the Legislature has made the existence of the right dependent upon the decision of the officer such a decision cannot be said to "affect" rights as they exist at the time of the decision. Thus, Professor Moore says: "It appears to be in the power of the Legislature to commit the performance of administrative services to the uncontrolled discretion of any officer. In such a case, no right having been conferred, no right is infringed if the service or privilege is withheld." (Moore: Commonwealth, p. 320). But, even so, the decision has the effect of giving or denying rights, and it is of scant comfort to an individual who has been seriously affected by a determination, for example, of the Commissioner of Taxation

to inform him that no right of his has been infringed.

Where a discretion of this uncontrollable kind is conferred on a Minister or other public authority, it is described by the Courts as "administrative". This term is used to distinguish it, on the one hand from the large class of authorities bound to approach the task of decision judicially, and on the other from the innumerable functions imposed upon officers which are ministerial only, involving no discretion of any kind. This phrase "administrative discretion" has acquired a definite meaning in the connection we are now considering, and is fully sanctioned by usage. It will be necessary to keep the conception involved in it distinct from the use of the term "administrative" earlier in this work as applied to a particular class of tribunals, of the kind considered in Local Government Board v. Arlidge 1915 A.C. 120, which were held in that case to be entitled to follow their own departmental methods as contrasted with those of a Court, although they still remained bound to "act judicially."

NATURE OF ADMINISTRATIVE DISCRETION.

So far, in this Part, we have been dealing exclusively with the formally constituted tribunals of the Commonwealth. Whatever their individual characteristics, these bodies possess the common

feature of being established for the express purpose of deciding upon evidence in a judicial fashion. There could be no doubt that all of them - with the possible exception of the appellate authority under sec. 44 of the Audit Act 1901-1926 - are bound by the rule in Board of Education v. Rice, 1911 A.C.179, and must "fairly listen to both sides." But when Lord Loreburn, after using those words, continues: ".....for that is a duty lying upon every one who decides anything", he must not be taken to mean that this duty is always enforceable upon an officer who is empowered by statute to make decisions in the course of administration, however gravely such decisions may affect the position of individuals. It will be seen presently that in a large class of cases the executive officers charged with the duty of making determinations must be considered to be wholly absolved from any obligation to hear the person against whom the determination moves.

"The tendency of modern legislation" it was stated by the House of Lords not long ago, "has recently been to entrust to many who are prima facie only administrative officers, functions which have some judicial attributes at all events, although they remain primarily administrators" (Everett v. Griffiths 1921 1 A.C. 631 at 659). We are enlightened as to the meaning of the term "judicial" by the words of

May C.J. in Reg. v. Dublin Corporation, 1878 2 L.R. Ir. 371 at 376, who says that it "does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but for the purpose of this question (i.e. the question in the case before him) a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others." This definition has been expressly approved by the House of Lords as being of general application. If it may be taken as fairly describing what elements are comprised in the term "judicial attributes" quoted above, then some of such attributes are certainly to be found in the instances of executive determination that now fall to be considered.

For example the Commissioner of Taxation is a "competent authority"; he decides, or must be presumed to decide, "upon consideration of facts and circumstances" and his decision has the effect of "imposing liability". Yet the common feature that marks both the Commissioner and the other authorities to which reference will be made is that so long as these officers fall into no error of law as to the extent of the power of decision that has been vested in them, or as to the formalities with which it must be exercised, their determinations are almost entirely untrammelled by any possibility of review or even examination by the Courts.

The finely drawn and not altogether clear distinction between these arbitrary authorities and the quasi-judicial tribunals which must act on evidence and are bound to listen to both sides is best illustrated by two decisions, both from the reports of the Privy Council. The first is De Verteuil v. Knaggs, 1918 A.C. 557, where the question was the nature of the power given to the Governor of Trinided by the law of that Island to transfer the indentures of immigrants from one employer to another. The words of the enactment were "If at any time it appears to the Governor, on sufficient ground shown to his satisfaction, that" etc. The Privy Council said that from these words "there is an obvious implication that some form of inquiry must be made, such as will enable the Governor fairly to determine whether a sufficient ground has been shown to his satisfaction for the removal of indentured immigrants," although, it was said, "..... it is not suggested that he holds the position of a judge or that the appellent is entitled to insist on the forms used in ordinary judicial procedure." The Court expressed the view that "in making such an inquiry there is, apart from special circumstances, a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought

forward to his prejudice" (p. 560).

The second case is Leffer v. Gillen 1927 A.C. 886, reversing a decision of the High Court of Australia. In view of the diametrically opposite nature of the ratio applied, the resemblance of the facts to those of De Verteuil v. Knaggs (supra) is at first sight startling. A land settlement agreement with a soldier purchaser under a South Australian repatriation scheme provided that "if at any time.....the vendor" (i.e. the Minister of Repatriation) "is satisfied on such evidence as he deems sufficient that by reason of incompetency or personal disability the purchaser is incapable of managing the said land" the Minister might determine the agreement. It was held that these words imposed a merely administrative function on the Minister, who "might form an opinion on such materials as he himself thought sufficient without giving the respondent an opportunity of being heard or of meeting allegations to his prejudice." Their Lordships said: "There is nothing in the words used to suggest as essential to the satisfaction of the vendor any particular form of inquiry, judicial or otherwise.....Merely to inform the person affected of what was in contemplation would be useless unless he was also given some particulars of the information on which the vendor proposed to act, and to give such information, if it consisted,

as it probably would, of reports from the Minister's officers, would render their position impossible."

De Verteuil v. Knaggs (supra) was among the authorities cited, and it was said in the judgment that "In their Lordships' opinion the cases referred to in argument have no bearing on the present case." The distinction can be looked for only in the words "sufficient ground shown to his satisfaction" contrasted with "satisfied on such evidence as he deems sufficient". It must be taken that while the latter phrase allows an unfettered discretion, the words "sufficient ground shown" make the facts themselves, and not merely the authority's opinion of them, the governing element in the determination.

However great the difficulty which may arise from the use of various forms of words in conferring the official discretion, some of those forms which are in frequent use now have their meaning and effect fairly clearly settled.

Thus, the phrase "has reason to believe" which is frequently employed, has received a definite interpretation. In Lloyd v. Wallach, 20 C.L.R. 299, one of the War Precautions Regulations was under consideration. The regulation authorised the Minister of Defence where he "has reason to believe that any naturalised person is disaffected or disloyal" to order the internment of such person. Griffith C.J.

said: "I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it.....It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant." Isaacs J. at p.309, said: "He is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency, or the reasonableness of the belief founded upon them". And in Boucault Bay Co. v. The Commonwealth 40 C.L.R. 88 where the same phrase was being considered, Isaacs J., delivering a judgment concurred in by the whole Court, said: "I personally cannot assent to the implication.....that the Minister's function was not purely administrative but was of a quasi-judicial nature which required an inquiry."

In Lloyd v. Wallach (supra), the Ministerial position was undoubtedly strengthened by the fact that the act was done in a time of grave national emergency under the defence power, and involved a question of high public policy. Consequently, the observations in that case as to the impossibility of challenging the sufficiency of the facts or the reasonableness of the belief where the phrase in question is "has reason to believe" must be read subject to some limited

measure of qualification when applied to other circumstances. The extent of that qualification will be considered presently in an appropriate place. But the proposition that the phrase in question confers an administrative discretion only, and requires neither an inquiry nor the application by the authority of any judicial methods, is established beyond question.

A like decision was reached in R. V. Arndel 5 C.L.R. 557 on the meaning of the words "has reasonable ground to suppose". In that case Barton J., although unassisted by the series of English and Australian decisions which have since appeared, was able to make a general analysis of the nature of executive action, laying down with striking clearness and precision the principles which have in fact been applied by the later authorities. Dealing with the argument that where the official duty was evidently to reach a determination upon facts, the function of the officer was inescapably judicial, he said: "This would be perfectly true if the discrimen were merely between the judicial and the ministerial: if everything that did not belong to the one class belonged to the other. But here we find an attempt to eliminate a third factor, wider perhaps in its operation than either of the two mentioned. The field of administrative operations covers immeasurably the greatest area of the work of government".

The learned Justice pointed out that action in this field involved the constant collection of facts and the vigilant exercise of judgment and

discretion. Many acts formerly administrative must now be considered ministerial, being "performed almost automatically" at the behest of Parliament, or prescribed by regulation under statute. "But", he continued (p. 577), "the administrative part of the work of government must still be the largest as long as prompt and discreet action on facts first to be ascertained is the first duty of the public servant, whether permanent in office or responsible to Parliament. If the act now challenged is within this larger area, then it is not judicial and it is not ministerial. On the contrary, it was said, the duty was "purely administrative", and the performance of it was therefore not enforceable by mandamus.

The principle of the refusal of mandamus is that the prerogative jurisdiction of the Courts cannot be invoked to compel the performance of a duty which is owed by officers in their capacity of servants of the Crown. Cf. Reg v. The Lords Commissioners of the Treasury, L.R. 7 Q.B. 387, at p. 394, where Cockburn C. J. said: "We must start with this unquestionable principle, that where a duty has to be performed by the Crown this Court cannot claim even in appearance to have any power to command the Crown." On the other hand, the rule as to the absolute nature of the discretion is not one peculiar to and arising out of the position of government officers as servants of the Crown. It is unconnected with the prerogative,

and is of universal application wherever an administrative discretion has been created. This is shown by the case of Allcroft v. The Bishop of London 1891 A.C. 666, where the Bishop was authorised by statute to take certain action "unless he shall be of opinion, after considering the whole circumstances of the case." Referring to the contention raised in argument, Lord Bramwell said (p. 678: "It seems to me that this is equivalent to saying that his opinion can be reviewed. I am clearly of opinion it cannot be. If a man is to form an opinion, and his opinion is to govern, he must form it himself on such reasons and grounds as seem good to him."

The foregoing observations and instances will serve to indicate in outline the nature of the administrative powers which are here being dealt with under the heading of "arbitrary authorities". It is proposed now to pass in review some of the more noteworthy examples of the conferring of such powers by the Commonwealth Parliament.

THE COMMISSIONER OF TAXATION.

Foremost in scope and importance among instances of administrative discretion are the powers of the Commissioner of Taxation. He is responsible for the assessment and collection of taxation from five different fields, namely income, land, entertainments, sales, and estate duty. It will be of value to refer

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to the first of these fields, covered by the Income Tax Assessment Act 1922-1931, in some little detail, in order to illustrate the nature of the powers conferred on the Commissioner.

The Act is one of the longest in the statute-book, comprising eighty pages of the officially printed edition. The basis of the whole machinery, as the most casual scrutiny will show, is the opinion of the Commissioner. Almost every question of fact that may arise in the course of making assessments is to be determined according to the measure of that opinion.

A FEW EXAMPLES follow.

Sec.16 (h) - Assessable income is to include proceeds from the sale of "live stock (not being live stock which, in the opinion of the Commissioner or a deputy Commissioner, were ordinarily used by that person as beasts of burden or as working beasts)".

Sec. 16B - Profits "which have in the opinion of the Commissioner, been properly applied to replace a loss of paid-up capital" are not to be taxable in certain cases.

Sec. 17 (2) - "If the Commissioner is of the opinion that there is no evidence, or insufficient evidence, of such market value, the sale price shall be deemed to be the

amount which in the opinion of the Commissioner fairly represents that value."

Sec.23 - This section provides for allowable deductions from income. There shall be deducted, inter alia:-

(1) "such sum as the Commissioner thinks just and reasonable" as representing wear and tear and depreciation.

(2) "bad debts.....to the extent that it is proved to the satisfaction of the Commissioner" that such debts are bad debts.

and

(3) wire netting costs, in favour of a pastoralist "who proves to the satisfaction of the Commissioner" that certain facts exist.

One strong illustration which will suffice to stand for all the rest is found in sec.23. It is short, and worth quoting in full:-

"When any business which is carried on in Australia is controlled principally by persons resident outside Australia, and it appears to the Commissioner that the business produces either no taxable income or less than the ordinary taxable income which might be expected to arise from that business, the person carrying on the business in Australia shall be assessable and chargeable with income tax on such percentage of the total receipts (whether cash or credit) of the business,

as the Commissioner in his judgment thinks proper."

JUDICIAL INTERPRETATION.

The first case in which the High Court had to consider the nature of this discretion was Cornell v. Deputy Fed. Comm., 29 C.L.R. 39. The phrases there being examined were "in the opinion of the Commissioner", and "if the Commissioner is satisfied." The real point decided in the case is that the powers vested in the Commissioner are not judicial in the sense of infringing Chapter III of the Constitution. But the words of the Court at p. 47 - "His power is merely to determine as an administrative officer whether in his opinion the company has distributed.....a fair proportion of its profits" - were adopted thenceforward by the High Court as an authoritative definition of the Commissioner's position.

The decision was relied on in Thomson v. Federal Commissioner, 33 C.L.R. 73, where Starke J. said: "The Court is not, in my opinion, authorised by the Acts to substitute its opinion or satisfaction for that of the Commissioner". The same rule was applied in Robinson v. Federal Commissioner, 39 C.L.R. 297, where, interpreting sec. 17 (supra) about the sale of live stock, Rich J. said: "This sub-section does not allow me to substitute my opinion for that of

the Commissioner.....although I cannot refrain from observing that I think that the Commissioner's interpretation of sub-sec. 4 is too narrow."

The nature of the Commissioner's discretion is more closely revealed by the decisions on sec. 21 of the Act, which confers a highly important function upon him. The section provides that where a company does not by a date fixed by the Commissioner distribute two-thirds of its taxable income, "the Commissioner shall determine whether" a further sum could reasonably have been distributed, and shall assess against the Company the further taxation which would have been payable by the shareholders if the distribution had been made. In Federal Commissioner v. The Australian Boot Factory Ltd. 38 C.L.R. 391, it was held that the determination of the Commissioner under this section "cannot, in an action by the Commissioner to recover the amount so determined by him to be payable by a company, be challenged on the ground that there were no relevant facts known to the Commissioner at the time of his determination on which he could reasonably have determined as he did." Isaacs J. said: "The question is really unarguable since the decision in Cornell's Case."

So far as sec. 21 and the word "determination" are concerned, it was decided in Federal Commissioner v. Australian Tesselated Tile Co., 36 C.L.R. 119, that

the word itself implies a communication of what is determined to the taxpayer, and that there is no "determination" until this step has been taken.

MOREAU'S CASE.

A more detailed consideration of the Commissioner's position was finally undertaken in Moreau v. Federal Commissioner, 40 C.L.R. 65. The phrase in question was "has reason to believe" from sec. 37 - the same phrase as was interpreted in Lloyd v. Wallach and Bougault Bay Co. v. The Commonwealth (supra). The words of Isaacs J. are so germane as to require quotation at a little length. "His conclusion", he said (p. 68), "is not a judicial decision, but an administrative decision. It does not determine anything but the Commissioner's own official duty to proceed.....The decision is not to be preceded by any judicial or quasi-judicial inquiry; it is not and could not be subject to any appeal. His 'reason' may be the result of official information, or his own investigation, or may come from any source he considers reliable.....The Commissioner is not bound to look for corroboration or further test. His reason is not to be judged of by a Court by the standard of what the ideal reasonable man would think. He is the actual man trusted by the Legislature and charged with the duty of forming a belief.....and no other tribunal can substitute its standard of sufficient

reason in the circumstances, or its opinion or belief for his."

Then, the learned Justice indicates a qualification of this principle of conclusiveness as applied to the Commissioner. "Unless the ground or material on which his belief is based is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason cannot be overridden." This is the qualification which was foreshadowed in an earlier part of this Chapter. It will be seen that it does little more than protect the taxpayer against actual bad faith on the part of the Commissioner, a contingency the possibility of which is so remote as to be of no great practical importance. No doubt it might conceivably happen that gross departmental carelessness would be responsible for an entirely irrational decision. But the continued persistence in such a decision after attention had been drawn to the circumstances by the taxpayer could only amount to something very like bad faith.

It is not yet certain that these views of Isaacs J. are accepted in their entirety by the High Court. Thus in Federal Commissioner v. Clarke, 40 C.L.R. 246 at p. 306, Rich J. says: "Did the Commissioner have 'reason to believe'? The answer seems to depend upon the meaning and effect of that expression. In Moreau v. Federal Commissioner of Taxation my

brother Isaacs discussed it and has given a very wide meaning to it.....I cannot help thinking that the Legislature intended that the assessment itself should state what reason the Commissioner had for his belief, leaving the taxpayer to attack its sufficiency if he thought he could do so." And see the doubt expressed by Higgins J. at p. 289. Isaacs J., however, adheres to his earlier views, saying that the Act does not contemplate, in his opinion, "a curial diving into the many official and confidential channels of information to which the Commissioner may have recourse to protect the Treasury." Probably, even if any further qualification of the doctrine of conclusiveness is ultimately established, it will not be greatly wider than the limited one suggested by Isaacs J. himself in Moreau's Case (supra).

NO RIGHT TO BE HEARD.

There are some portions of the Act which from their very nature involve a right on the part of the taxpayer to be heard, although without impairing in any way the absolute nature of the Commissioner's discretion, exercisable after he has received the representations made to him. These are the cases where the burden is on the taxpayer of establishing various matters to the satisfaction of the Commissioner, as a condition precedent to obtaining some relief from taxation. See e.g. sec.18(1) as to rebates, and sec.23 (supra) as to

deductions. With regard to these matters, the initiative comes from the taxpayer, who must place evidence before the Department as the basis of his claim for the exercise of a discretion in his favour.

Where this element is not present, however, and the Commissioner is entitled to base his decision on such information as he chooses to rely on, there is no right whatever for the taxpayer to be heard on the question, however seriously the determination, when made, may affect him. Dealing with sec. 37, Isaacs J., in Moreau v. Federal Commissioner (supra), stated the position as follows: "He may, if he thinks right, call upon the taxpayer for an explanation, or he may think that unnecessary, inadvisable or useless. Fair play would, of course, usually induce him to give the taxpayer the fullest opportunity to explain, but that is not legally inexorable".

In Federal Commissioner v. The Australian Tesselated Tile Co.(supra) the discretion under sec.21, the effect of which has been set out above, was considered from the viewpoint of how far the taxpayer has a right to be heard. The case is inconclusive on this matter, and not easy to follow. The head-note alleges it to have been decided by Isaacs and Rich JJ. that there was no right to be heard. A study of the judgments does not reveal that this was decided by anyone. Rich J. expressly disclaims any intention to decide the point. Isaacs J. goes no further than to say that the rule in Local Government Board v. Arlidge 1915 A.C.120

applies to the extent that the Commissioner is entitled to follow departmental, as distinct from judicial methods. But it will be remembered that emphasis was laid in that case on the essentiality of a hearing of some sort, whether oral or not (see for example p.141, applying the decision in Board of Education v. Rice, 1911 A.C. 179). It is, therefore, not at all clear what Isaacs J. must be taken as deciding with regard to the right of hearing. The other three Justices deemed it unnecessary to refer to the question.

It is submitted, however, on the authority of the dictum in Moreau's case (supra) and of the various decisions on administrative discretion dealt with at the beginning of this Chapter, that there is in general, no right on the part of the taxpayer to be heard before decisions or determinations are made. (See also P.&O. S.N. Co. v. Leslie 82 L.R. 137, and Eastern Extension Co. v. Commissioner of Taxation, 24 N.Z. L.R. 303).

RIGHT TO CHALLENGE ASSESSMENT.

It is perhaps hardly necessary to point out that there is no inconsistency between the doctrine of the conclusiveness of the Commissioner's opinion and the rights given by the Act to challenge the assessment. "An 'assessment'," says Isaacs J. in R. v. Deputy Federal Commissioner; Ex parte Hooper, 37 C.L.R. 368 at p. 373, is not a piece of paper: it is an official

act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, <u>including sometimes his own opinion,</u> of the amount of tax chargeable to a given taxpayer." The notice of assessment is made conclusive evidence of its due making, and of the correctness of the amount and other particulars stated therein for all purposes except that of an appeal (sec. 39). But the taxpayer may object, upon grounds stated, to the assessment, and at his option have his objections referred either to the Board of Review or the High Court.

If the matter goes to the Board of Review, then all the Commissioner's opinions and determinations that may have been involved in the assessment are open to attack. This is because the Board of Review, by virtue of sec.44, stands in the position of the Commissioner himself, and is to have "all the powers and functions of the Commissioner in making assessments, determinations and decisions under this Act" which assessments etc., when made, are to be deemed to be those of the Commissioner. But on appeal to the High Court, the only question can be <u>whether, assuming the matters left by the Act to the discretion of the Commissioner to have been rightly decided</u>, the assessment is one which in all the circumstances is authorised by the Act.

<u>CERTAIN MISCREETIONS EXPRESSLY MADE REVIEWABLE.</u>

What has been said in the foregoing pages about the conclusiveness of the Commissioner's

discretion is subject to a statutory qualification made by the amending Act of 1930, inserting a new section 51B. It provides that in respect of "any opinion, decision or determination of the Commissioner" under secs. 21A, 23(l)(n), and 29(2), "whether in the exercise of a discretion conferred upon the Commissioner or otherwise", a taxpayer dissatisfied with an assessment involving such opinion etc. is to have "notwithstanding anything contained in this Act" full rights of objection and appeal in respect of the discretionary decision.

It may well be that this new section has another effect besides merely placing these particular discretions on a special footing. It is possible that, the Legislature having now expressly said that these decisions of the Commissioner are reviewable, it must be deemed, on the principle of expressum facit cessare tacitum, to be saying also that all other discretionary decisions under the Act are beyond question, thus disposing of whatever doubts may have been entertained as to the correctness of the rule laid down by Isaacs J.

Two other features of the Income Tax Assessment Act require brief mention.

RELIEF IN CASES OF HARDSHIP. Sec 95 of the Act provides that there shall be a Board consisting of the Commissioner, the Secretary to the Treasury, and the Comptroller-General of Customs, or such substitutes as the Minister may appoint, for considering cases

of hardship. In such cases, "where it is shown to the satisfaction of the Board" that owing to various circumstances the exaction of the full amount of tax "will entail serious hardship" the Board may release the taxpayer wholly or in part from his liability. It is clear that here as elsewhere in the Act, the power being exercised is purely an administrative discretion.

CERTIFICATE TO PERSONS LEAVING AUSTRALIA.

One of the most notable instances of discretion vested in the Commissioner to be found in the whole Act is contained in sec. 54. It is thereby enacted that every person who is about to leave Australia must apply to the Commissioner for a certificate either that no tax is payable by him or that satisfactory arrangements have been made for payment thereof. The Commissioner "upon being satisfied as to the facts, may issue a certificate accordingly." A heavy penalty may be exacted from any ship-owner who authorises a person to travel without the certificate first having been produced.

It is a serious thing to give power to an administrative officer to prevent any Australian citizen from leaving the country until that officer is "satisfied" about something. The inquiry whether income tax is payable may turn upon a question destined to await its final answer at the hands of the High Court. No

provision for appeal against an unwarrantable refusal of a certificate is made in the Act. In view of the law as to the conclusiveness of the Commissioner's discretion, it is hard to see what protection any individual has against an oppressive use of this power. No doubt it may be said that in practice the discretion is not exercised capriciously; but this has nothing to do with the question of whether it should exist at all, in its present uncontrolled form, in a nation whose political system is one of self-government, and not government by the public service. A similar power is also contained in the Sales Tax legislation. (See Sales Tax Assessment Act (No.1) 1930-1931, sec. 27).

OTHER TAXES FOR COLLECTION OF WHICH COMMISSIONER IS RESPONSIBLE.

It is unnecessary to refer in any detail to the other taxing Acts under which the Commissioner of Taxation is the authority responsible for collection. They all contain similar grants of discretion to the Commissioner, though none of them is so rich in these as the Act just considered.

The Land Tax Assessment Act 1910-1930 provides that in certain cases the Commissioner is to have a discretion to exempt persons from particular provisions of the Act "if he is satisfied" that

specified facts exist. These provisions contain the further words; "as to all of which matters the decision of the Commissioner shall be final and conclusive." (See secs. 37(1) and 42A). It is submitted that this addition probably does not give any further strength to the Commissioner's decision. In the absence of circumstances amounting to bad faith on the part of the Commissioner, his discretion would be in any case unreviewable, and where actual bad faith could be shown it seems doubtful whether the proviso would afford any protection, since it could be contended that there had not been any decision duly made under the Act at all. There is, however, authority which suggests that if the Commissioner's attitude amounts to a virtual refusal to make a decision at all, a Court would be justified in ordering him to approach the question and decide it (See Allcroft v. Bishop of London 139 1 A.C. 666 per Lord Bramwell at p. 678). This, of course, would involve no inconsistency with the principhe of the conclusiveness of the decision once it had in fact been made.

By the amending Act No.30 of 1927 Valuation Boards were constituted to review the decision of the Commissioner on objections by land taxpayers. Reference has already been made in an earlier Chapter to the nature of these Boards. They are similar to the Income Tax Boards of Review in that their functions are of a reviewing nature only, and any decision made

by a Valuation Board "upon such review shall..... be deemed to be a decision of the Commissioner" (sec.44S).

The administration of the Sales Tax Acts is liberally assisted by the vesting of discretion in the Commissioner. The machinery for these Acts is contained in the Sales Tax Assessment Act (No.1) 1930-1931. One example of the Commissioner's powers may be given. Sec.18 provides (inter alia) that where in respect of certain sales "the circumstances are such that, in the opinion of the Commissioner, the vendor or the purchaser is directly or indirectly in substantial control of the business operations of the other, and it appears to the Commissioner that the amount for which those goods were sold is less than their fair market value in the ordinary course of trade, the sale value shall be altered by the Commissioner to the value which in his opinion would be the fair market value....." The Act calls into service the Board of Review under the Income Tax Assessment Act 1922-1930 for the purpose of reviewing questions of liability to sales tax (See definition, "Board of Review" sec.3, and Part VII).

The Estate Duty Assessment Act 1914-1929 and the Entertainments Tax Assessment Act 1916-1924 confer similar discretions on the Commissioner. The latter Act is distinguished by the fact that it makes

no provision whatever for appeal against the Commissioner's decision as to liability. There is no procedure prescribing the issue of formal assessments, conclusive against the taxpayer in an action for recovery of the tax; and the way in which questions under the Act have been tested is by refusing to pay the tax and appealing to the High Court from the verdict of the inferior Court which tries the action.

THE BOUNTIES ACTS.

A large number of Acts authorising the payment of bounties on production have been passed from time to time by the Commonwealth. In recent years legislation of this nature has made its appearance more frequently. The Acts are in most cases made to cover only a limited period of time varying from one to ten years, and in consequence the operation of many of them has become exhausted by efflux ion of time.

The necessity for considering the Bounties Acts here arises from the fact that their administration is placed by the Acts themselves in respect of a number of important matters entirely under the discretion of the Minister of Trade and Customs. No doubt this is done upon the principle that, a bounty being a gratuitous payment made as a matter of grace by the Commonwealth, no rights of an indefeasible nature should be given to the recipients. The sums of money involved,

however, are large, and the Minister's decision may mean life or death to an industrial enterprise affected by it; and it might well have been thought better to have had some more constant and dependable test then the Minister's opinion for determining questions arising under the Acts.

At the present time Acts conferring bounties are in operation in respect of iron and steel, sulphur, wine, the cotton industries, flax and linseed, gold and wheat. In addition, the Papua and New Guinea Bounties Act 1926 authorises the payment of bounties upon various products of those Territories when imported into Australia. The last mentioned Act and the Wheat Bounty Act 1931 involve little in the way of administrative discretion, and are not further discussed here. The others are worth somewhat closer examination. They are the Iron and Steel Products Bounty Act 1922-1929, the Sulphur Bounty Act 1923, the Wine Export Act 1930-1931, the Cotton Industries Bounty Act 1930, the Flax and Linseed Bounties Act 1930, and the Gold Bounty Act 1930-1931.

All these Acts possess the common feature that the granting of assistance is made to depend upon the fulfilment by the claimant of conditions expressly laid down. The nature of the conditions varies according to the particular case, and the question of whether there has been adequate fulfilment is in every instance a matter for the Minister.

LABOUR CONDITIONS.

One requirement made by the Legislature is common to all the Acts now being considered. It concerns the labour conditions under which the article or substance upon which the bounty is payable is being produced. If the Minister "finds that the conditions of employment of rates of wages, or any of them, observed or paid in respect of any labour employed in the production" are not fair and reasonable, he "may withhold the whole or any part of the bounty payable."

The question of what is fair and reasonable is not left to the Minister to determine. It is provided that he may make application to a Judge of the Commonwealth Arbitration Court "for a declaration as to what conditions of employment and rates of wages are fair and reasonable for labour employed" in the production in question, and this declaration, when made, is to be the standard. But whether the Minister takes any action to refuse the bounty in whole or in part if the standard is not reached, appears to be a matter wholly in his discretion.

The procedure on such applications to the Court is to be regulated by the Excise Procedure Act 1907, an Act originally passed to give effect to the Excise Tariff Act 1906 (declared invalid in R.V.Berger 6 C.L.R. 41) and since applied to nearly all the legislation dealing with bounties. In the more recent Acts,

the Minister is authorised under certain circumstances to appoint his own tribunal for determining what is fair and reasonable, instead of going to the Arbitration Court. Where this is done the tribunal must consist of a representative of employers and employees respectively, and an independent chairman.

EXAMINATION OF PROFITS.

In the case of the Iron and Steel, Sulphur, Cotton Indistries and Flax and Linseed Acts, power is given to the Minister to refuse the bounty in cases where it appears that the enterprise is already profitable without it. Where the net profits of the person or company claiming the bounty exceed a stated percentage on capital in any one year, he may refuse the bounty wholly or in part. This action can be taken only "after inquiry and report by the Tariff Board". The Flax and Linseed Bounties Act 1930 contains a further power to require a refund of bounty where the payment of it has resulted in excessive profits. The Sulphur Bounty Act 1925 enables power to be given to the Minister by regulation to determine what is the amount of capital on which the profits are to be calculated, in the case of any particular producing enterprise.

REASONABLE PRICE TO GROWER. The Wine, and Flax and Linseed Acts provide that "no bounty shall be payable unless the Minister is satisfied" that the grower of the raw product has received or will receive

a price which in the opinion of the Minister is a reasonable price". Under the Wine Act he must further be satisfied that the distiller also will receive a reasonable price, free from any "arrangement or understanding" affecting it.

REASONABLE PRICE TO CONSUMER. Three of the Acts contain a provision that "if, after inquiry and report by the Tariff Board, the Minister is of opinion" that in the light of the circumstances the consumer is being charged an unreasonable price for the product by the recipient of the bounty, he may withhold further payments in whole or in part, and in the case of flax and linseed compel a refund of past payments.

AUSTRALIAN RAW MATERIALS TO BE USED. Two of the bounties are only to be paid if the raw materials used are produced in the Commonwealth. The Minister is given a discretion to modify this requirement if he is satisfied that circumstances have arisen which make the full insistence upon it unreasonable. Any modification of the requirement must, however, be reported to Parliament, and is subject to disallowance.

PROOF OF COMPLIANCE WITH ACT. All the Acts except the Gold Bounty Act 1930-1931 direct that no bounties shall be authorised to be paid unless the producer "furnishes proof to the satisfaction of the Minister" that the requirements of the Act and regulations have

have been complied with.

POWER AS TO EXPORT AND MARKETING.

A group of enactments bearing the titles of "Export Control" and "Overseas Marketing" Acts, dealing with various primary products, contain very important arbitrary powers limiting the rights of individuals in regard to such products. All the Acts now in operation are of comparatively recent origin, the earliest being the Dairy Produce Export Control Act 1924. The other Acts are the Dried Fruits Export Control Act 1924-1930, the Wine Oversens Marketing Act 1929-1931, the Pearl-Shell Overseas Marketing Act 1927 and the Fresh Fruits Overseas Marketing Act 1927. They are all constructed on substantially the same plan.

In the first place a Board of three members is constituted for the purposes of the particular Act, and is charged with functions of a general administrative character. The vital part of the enactment, from our present point of view, begins with a section which says that "for the purpose of enabling the Board effectively to control the export" etc. of the product, the Governor-General may by Proclamation prohibit the export of the product "except in accordance with a licence issued by the Minister subject to such conditions and restrictions as are prescribed after recommendation to the Minister by the Board."

Upon the issue of such a Proclamation the Minister may grant to any person desiring to export the

product a licence to do so. The licence is to be for the period specified therein, and "shall be granted upon such terms and conditions as are prescribed". Then follows this important sub-section:-

> "Where the Minister is satisfied, on report by the Board, that any person to whom a licence under this section has been granted has contravened or failed to comply with the terms or conditions upon which the licence was granted, the Minister may cancel the licence."

The machinery is completed by the addition of a provision imposing a substantial penalty for exporting without a licence.

It is obvious that this legislation involves the widest possible powers of interference with and even abrogation of the rights of exporters. A glance at the Regulations reveals the very considerable lengths to which the Executive has already gone in pursuance of these powers. Thus, the Regulations under the Dairy Produce Export Control Act 1924 provide the following amongst the "terms and conditions" to which the licences are subject:-

(a) The licensee shall insure each shipment with such company or companies as the Board determines.

(b) He must also ship all produce through such shipping companies as the Board determines.

(c) He "shall, after fourteen days' notice from the Board, withhold from shipment such proportion of dairy produce as the Board determines."

(d) He must also upon notice comply with any further conditions or restrictions that may be prescribed after the licence is granted.

And on the mere "satisfaction" of the Minister that any of these conditions have been infringed, the exporter may be deprived of his licence, and, as a result, of his right to export at all. There is not, cannot be, any appeal. The right of decision reposed in the Minister of Migration and Markets is a pure administrative discretion. He must act after, but not necessarily upon, report from the Board. But neither the Board or himself are required to hear the representations of the man whose living may depend upon the Ministerial satisfaction. The exact requirements of the Regulations as a condition of holding licences vary somewhat under the different Acts, but the example quoted above represents the substance of what is prescribed in each case. The Acts contain further instances of administrative discretion, but the matters dealt with above overshadow the rest in importance.

No doubt there are admirable reasons of national policy for the institution of machinery for control of the export of primary products; and doubtless too there are adequate reasons for making that machinery flexible to a high degree, so that it may be applied by the Executive to the changing conditions of industry. But when these things have been said,

ing the existence or continuance of substantial and important individual rights depend completely upon the unreviewable judgment of the Minister or some official of his Department who does duty for him. Attention was drawn to one of the Acts, as a far-reaching example of executive power, in the Report of the Select Committee of the Senate which in 1929-1930 inquired at length into the need for appointing a Standing Committee to review Statutory Rules and Ordinances (See the evidence of Professor Bailey, Report p.23).

The South Australian Dried Fruits Act, conferring powers somewhat more drastic in character than, but still closely analogous to, those exercisable under the corresponding Commonwealth legislation, recently claimed the attention of the High Court in James v. Cowan 43 C.L.R. 386. Isaacs J. described the executive action which had been taken in that case as having necessarily proceeded on the assumption that the Act had invested the Minister "with czar-like power, resting on his own secret unchallengeable conception of what interstate trade was desirable in the public interests, and his own unascertainable will in that respect, to expropriate property without explanation and at certain loss to the individual." In holding as he did that action of this kind was not

authorised by the Legislature, Isaacs J. was alone. The remainder of the Justices upheld what had been done.

NATIONALITY.

An example of an administrative discretion conferred in the most express terms is contained in the Nationality Act 1920-1930. It is provided that the Governor-General may issue a certificate of naturalization to aliens who "satisfy" him that they have complied with certain specific conditions. It is declared by the Act that "The grant of a certificate .....shall be in the absolute discretion of the Governor-General, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision." (See secs.7(3) and 8(2)). He may also issue special certificates to certain persons "in his absolute discretion".

The Naturalisation Act 1903-1917, now replaced by the above Act, provided that "where the Governor-General is satisfied that it is desirable for any reason that a certificate of naturalisation should be revoked", he may revoke it. It was contended in Meyer v. Poynton 27 C.L.R. 436 that this required the disclosing, for its examination, of some "reason" on which the Governor-General had acted. Starke J., however, said: "One argument was that the revocation did not contain the reason of the Governor-General, and therefore was bad. But the Statute, by the words used,

places the revocation of the certificate entirely in the discretion of the Governor-General, and his decision cannot, nor can his reasons for it, be canvassed in any Court of law."

PROHIBITION OF POSTAL TRANSMISSION.

An example on which the High Court was early called upon to pronounce judgment is contained in the Post and Telegraph Act 1901-1923, sec 57. That section provides that "If the Postmaster-General has reasonable ground to suppose any person to be engaged either in the Commonwealth or elsewhere in receiving money for any valuable thing" for a number of specified undesirable purposes, he may by order prohibit all deliveries through the post to such person. In R. v. Arndel, 3 C.L.R. 557 an order under this section, disclosing no grounds for its making, was challenged by way of mandamus. The line of attack was the one with which we are now familiar that there must in fact be reasonable grounds on which the Postmaster-General can form an opinion before he can take action under the section. The Court, however, held that "The Postmaster-General, in determining whether he has reasonable grounds to suppose" etc., "is not exercising a judicial or a merely ministerial function, but is exercising a discretion, and must form his own independent judgment." Consequently, it was said, there was no right of the person affected to be heard, and no right to examine, or even to have disclosed, any

grounds that might exist for the action taken.

A contrast is apparent between the above section and sec. 29, giving power to the Deputy Postmaster-General to remove any newspaper for certain reasons from the list of publications registered for transmission by post. Under this latter provision no arbitrary powers are conferred, but the officer mentioned "may from time to time subject to appeal.....call upon the proprietor.....to show cause why such publication should not be removed from the register and if sufficient cause be not shown he may remove it..."

CONCLUSION.

The foregoing examples do not by any means exhaust the instances of administrative discretion to be found in Commonwealth law, though the chief of them have been covered. Enough has been said to show how widely this device of giving officers or Ministers the power to make important and unreviewable decisions is being availed of.

The point made by Lord Hewart that a new and anomalous method of government is being engrafted on to the traditional British democratic system, seems to be not without its application to Australia, and to be forcefully illustrated by the foregoing examples. The fundamental principle by which the rights of the subject were made secure was that his own representatives in Parliament made the laws, and the function of

the Executive was merely to carry them out. Some minor departures in practice have doubtless always been necessary. But from the day when the struggle of the people against the prerogative ended in the triumph of Parliament until the second decade of this century, the exceptions were so unimportant as to serve only to throw the principle into bolder relief. A specific and ascertainable law was the measure of a man's rights - he had only to apply the law to his own facts to know his position. To-day as we have seen, the habit is growing by which Parliament no longer makes laws, but gives power to make them - does not lay down rights and duties but leaves them to depend on official beliefs and opinions.

To state the matter in another way, the measure of certainty and security enjoyed by the subject sprang originally from an ascertainable law applied to the concrete facts of each case. In the kind of situation discussed in this Chapter these conditions of certainty do not exist. In place of the facts themselves, as ascertained by judicial methods and under proper safeguards, there is substituted <u>the departmental opinion on the facts,</u> arrived at by any method, or no method at all, under the cloak of official secrecy, and with no safeguards whatever except where actual bad faith can be shown. It may be said, indeed, that bad faith can, as a matter of actual fact, never be shown. The question whether it existed would depend upon facts not within the reach of the individual who sought to establish it;

and it would be the duty of the Courts to presume that the officers of the Crown were acting honestly. Under these circumstances the presumption would be well-nigh irrebuttable.

But the real difficulty for the individual lies in the fact that the <u>law itself</u> as applied to his case, is no longer ascertainable. True, he can see for himself what provision the Legislature has made on the matter, but the question of what part of the enactment, if any, applies to him <u>depends upon the official opinion of the facts.</u> The consequence is that in determining the facts, the officer or Minister as the case may be, also determines <u>the law to be applied</u> to the particular case.

It has been pointed out that these determinations are far from being, in actual fact, determinations of the actual officer or Minister who is expressly authorised by the revelant enactment to make them. They are departmental decisions. No doubt there are cases in which the matter is deemed to be of sufficient importance to be handled by the head of the particular Department. But this is not required or even expected of him, as the House of Lords has clearly explained for us (<u>Local Government Board v. Arlidge 1915 A.C.120, at p. 133</u>).

It should be remarked by way of qualification that the Legislature has not always left the official

opinion to be the final element in the ascertainment of rights, even where a discretion has been given by statute. Thus under the Customs Act 1901-1930,sec.119, where the Collector of Customs refuses a Certificate of Clearance to a ship, the master may apply to the Minister. If the Minister also refuses it, an action lies against the Commonwealth if the refusal was "without reasonable and probable cause." The issue of the Certificate is made conditional upon the "satisfaction" of the Collector as to certain specified matters. In certain cases, also, it is provided that before exercising a discretion unfavourably to the person affected the authority must call upon him to show cause why the discretion should not be so exercised (See e.g. Australian Industries Preservation Act 1906-1930, sec.19 - Comptroller-General certifying that person engaged in importing goods with intent to destroy or injure Australian industry - and Post and Telegraph Act 1901-1923, sec 29 - removal of newspaper from register of transmissible papers). But the instances where the administrative discretion is thus tempered or controlled are few and insignificant when the whole field is taken into consideration.

CHAPTER V.

DEPORTATION.

It is proposed in this Chapter to consider the question of powers conferred upon the Executive with regard to deportation. This field of executive action is a singularly important one, involving as it does a vital control over the liberty of persons whose only offence in the majority of cases is a technical one created by statute as a basis for the exercise of the power, and who may even in some instances come within the reach of that power without any fault or action of their own.

There are a number of statutory provisions dealing with the matter, of which the most important are to be found in the Immigration Act 1901-1932. The other statutes providing for deportation are the Crimes Act 1914-1928, the War Precautions Act Repeal Act 1920-1928, the War Precautions Act 1914-1916 under which the Aliens Restriction Order 1915 was made, and the Unlawful Associations Act 1916-1917. The two last mentioned Acts ceased to operate shortly after the War, but their historical interest as Commonwealth experiments in deportation entitles them to some examination.

EXTENT OF THE DEPORTATION POWER.

Apart from special circumstances, it would not, of course, be within the province of this work to examine the legislative powers of the

Commonwealth in this connection, except so far as they affect the functions with which Parliament has charged the Executive. But since the matter is essentially an administrative one, the laws dealing with which are in the main a mere grant of power and discretion to the Executive, it will be necessary to examine briefly the scope of the Federal power.

The power to deport foreigners who have not acquired status as Australians has long been beyond question. In Robtelmes v. Brenan 4 C.L.R. 395, the Court held that: "It is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community. The right of a nation", the decision continued, "to expel or deport foreigners from the country is as unqualified and undeniable as the right to exclude them from entering the country, whether they are alien friends or enemies." On the other hand, the precise limits of the Commonwealth power to deport persons who have acquired in greater or less degree an Australian citizenship are still involved in some obscurity, and the High Court decisions on the question have served to show how complex are the considerations involved rather than to bring the law to any state of certainty.

The difficulty of fixing the exact limits within which deportation is possible extends not only to the ascertainment of the persons within reach of the

power, but also to the determination in respect of what subjects of legislation it may be exercised. In Ex parte Walsh and Johnson; In re Yates 37 C.L.R. 36. it was urged by Isaacs J., who has consistently taken a liberal view of Commonwealth power, that "deportation, as a means of self-protection in relation to constitutional functions", is within the competency of Parliament whether the person to be deported "is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia." He elaborated the view that such a power might be properly exercised in respect of all or any of the placita of sec.51 of the Constitution. "I am unable to see" he says (p.97), "why Parliament could not, in protection of the Commonwealth in respect of defence, customs, coinage or immigration, for instance, enact that any person who has been shown to the satisfaction of the Minister to be a spy, a traitor, a smuggler, a coiner, or an importer of prostitutes, might be summarily deported."

This question of the ultimate limits of the deportation power was not fully considered by the rest of the Court, either in this or in any other decision. In the case quoted from, the nature of those limits was partially raised by the terms of sec.8AA of the Immigration Act, which, enacted (sub-sec.2) that "When any such Proclamation" (i.e. that a state of serious industrial disturbance exists)"is in force, the Minister, if he is satisfied that any person not

born in Australia has been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth, and that <u>the presence of that person in Australia will be injurious to the peace, order, or good government of the Commonwealth in relation to matters in respect to which the Parliament has power to make laws</u>" may take steps to have him deported.

The majority of the Court did not find it necessary to consider what range of legislative subjects were matters to which the deportation power was or could be fairly incidental, but confined itself to the particular section in question. The tendency was definitely towards a cautious and conservative delimitation of the power. Reliance was placed by Knox C.J. and Higgins and Starke JJ., who formed the majority, upon the judgment of the Privy Council in the <u>Colonial Sugar Refining Co's Case, 1914 A.C. 237;</u> and the passage was quoted in which, after referring to the specific subjects assigned by sec. 51 of the Constitution to the Federal Parliament, the learned Lords said: "None of them relate to that general control over the liberty of the subject <u>which must be shown to be transferred</u> if it is to be regarded as vested in the

Commonwealth." Higgins J., after pointing out that certain placita of sec.51 of the Constitution were couched in such terms as to allow deportation of aliens (pl.xix), of a race such as the Kanakas (pl.xxvi) and of immigrants (pl.xxcii), reaches the conclusion that "such an interference" (i.e. with the liberty of the subject)" must rest on a substantive independent power, such as the analogous powers as to aliens, as to Pacific islanders, as to the influx of criminals" (p.119).

The majority were clearly of the view that whatever the powers in respect of which the weapon of deportation might be used, it could only be so used in respect of a power under which Parliament had actually made laws, and for the purpose of those laws. This ruling struck at the very basis of the latter half of sub-sec.(2) of sec.8AA. Thus, Starke J., after saying that the effect of this portion of the Act is that "if the presence of the person be injurious to the peace of the Commonwealth in relation to a matter in respect of which no law has been made, he may, in certain circumstances, be deported", continues (p.135): "The Judicial Committee has, in my opinion, expressed the view that such legislation as this, unconnected with the exercise of any specific legislative power, is ultra vires and beyond the power of the Commonwealth Parliament" (Colonial Sugar Refining Co.'s Case, ibid, at p.251).

Knox C.J. (pp. 70-71) emphasises the bearing upon this question of sec. 61 of the Constitution, in view of the duty imposed upon the Executive to give effect to the section. "It is clear" he says, "from the words of sec. 8AA that.....the power to deport is given where the injury apprehended relates to a merely possible exercise of the legislative powers of the Parliament, or to a possible, but not actual, duty of the Executive to execute and maintain the laws, and is not confined to cases in which Parliament has exercised its power to make laws." It follows from this definition of the meaning of the section that power is here conferred of the Executive in wider terms than the Constitution permits. Sec. 61 limits the executive power as extending to "the maintenance and execution of this Constitution and the laws of the Commonwealth", and it was held in the Wool Tops' Case, 51 C.L.R. 421 that the phrase "laws of the Commonwealth", in this connection, means "Acts of Parliament of the Commonwealth."

In the result, it was held that, on the wording of the section, it could not be treated as an exercise of any power except the immigration power, under which the whole Act purported to be passed. This was not because of any inapplicability of deportation as an incident of the exercise of the trade and commerce or other powers, but because those powers had

into operation by the Legislature. It was further held by a majority of the Court that the immigration power does not authorise Parliament to legislate, as to deportation or otherwise, with respect to persons "who, having immigrated to Australia, have made their permanent homes there and so have become members of the Australian community." The same judges rejected the contention that Parliament had here legislated retrospectively so as to attach conditions to the immigration of persons who had arrived and become permanent Australian citizens before the passing of the Act. It was not decided whether, if this had in fact been done, it would have been a valid exercise of the immigration power.

The following propositions seem to be the result of Ex parte Walsh and Johnson:

(1) The weapon of deportation is available only in aid of a valid existing law of the Commonwealth.

(2) Whether persons can be deported under any particular power depends first upon whether Parliament has validly exercised that power in passing the law to which deportation is made incidental, and secondly, whether deportation is properly incidental to the purposes of that law.

(3) No person can be deported under the immigration power if at the time he comes under the operation of the section he has made his home in Australia as a permanent member of the community, unless, perhaps, by an expressly retrospective law attaching conditions to his original immigration.

(4) Deportation is not necessarily a punitive process requiring judicial action to enforce it, but is a proper matter to be entrusted to the Executive. See per Knox C.J. at p.60; and per Isaacs J. at p. 96, where he says: "If it (i.e. deportation) is enacted not as a punishment for crime but as a political precaution, it must be exercised by the political department - the Executive - and possibly on considerations not susceptible of definite proof."

There are certain further matters arising out of this decision which will be considered presently in a more appropriate place. We shall now examine briefly the various legislative provisions of the Commonwealth conferring deportation powers upon the Executive.

DEPORTATION POWERS EXERCISABLE BY EXECUTIVE.

(1) Immigration Act 1901-1932.

The powers under this Act fall into two main groups. The first relates to "prohibited immigrants", and the second is exercisable in respect of the committing or alleged committing of acts detrimental to the Commonwealth by persons not born in Australia.

Sec. 7 provides that "Every prohibited immigrant entering or found within the Commonwealth... shall be guilty of an offence" and shall be liable to a penalty, and in addition to or substitution for

such penalty "shall be liable pursuant to any order of the Minister to be deported from the Commonwealth."

"Prohibited immigrant" proves on examination to be a term covering a very wide field. It is defined in sec. 3 under fifteen heads and includes persons suffering from various forms of mental or physical unfitness, criminals, insurrectionists, and others with anti-social tendencies, persons deported from other countries, and persons who are not the holders of regular passports. It is worth while to quote a few sub-sections of sec.3, to show how widely the net has been cast.

> "(a) Any person who fails to pass the dictation test: that is to say, who, when an officer.....dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer."

> "(f) Any person who, in the opinion of an officer, is likely, if he enters the Commonwealth, to become a charge upon the public by reason of infirmity of mind or body, insufficiency of means to support himself, or any other cause."

> "(gh) Any person declared by the Minister to be in his opinion, from information received.....through official or diplomatic channels, undesirable as an inhabitant of, or visitor to the Commonwealth."

This is followed by sec.3K, giving to the Governor-General power to prohibit by Proclamation, either absolutely or conditionally, the immigration into the Commonwealth of "aliens of any specified nationality, race, class or occupation in any case where he deems it desirable so to do" for certain reasons.

Included in the reasons are "(b) because the persons specified in the Proclamation are in his opinion unsuitable for admission into the Commonwealth."

There is also provision made in the Act for various persons who have entered Australia to be required to pass the "dictation test" subsequently, and on failure to do so, such persons are to be deemed prohibited immigrants.

Obviously, these sections have been so widely drawn that it is possible for the Executive to declare any immigrant at all to be a prohibited immigrant, and if he gets in, to deport him forthwith upon establishing the facts (or the official belief or opinion, as the case may be) before a Court. Incidentally, the establishing of the necessary elements in the Crown case is rendered very sure and easy by sec.5, sub-secs. (3) to (5) inclusive, and particularly sub-secs.3, 3A and 3B. These sub-sections constitute the most extreme example to be found of a tendency, very common under Federal legislation, to direct the Court to presume accused persons guilty of offences against the Commonwealth until they have proved themselves innocent. The validity of these particular provisions was challenged in Williamson v. Ah On 39 C.L.R. 95 on the ground that the effect of the presumptions against the alleged prohibited immigrant was to direct the Court to take for granted the fact of immigration of the

person charged, which fact must be proved to exist before the case could be within the competency of the Legislature at all. The Court by majority upheld the provisions. But it may well be thought, that, even though valid, they go further than is compatible with justice.

It remains to add, in order to show how effective the power of prohibition is, that the meaning of sec. 3(e), dealing with the dictation test, is that the examining officer shall select the language with which the test is to be made, and not the immigrant (Chin Gee v. Martin, 3 C.L.R. 649). However, the power to deport prohibited immigrants is not of such great importance for our present inquiry as the second group of powers which we now approach. It is not often necessary to use it, since the measures for preventing the ingress of objectionable immigrants are almost entirely effective. The constitutional right to vest in the Executive the function of deporting them under the immigration power is unquestionable, and rights of Australian citizenship can scarcely be involved.

Secs. 8A, 8AA and 8AB, forming the second group, confer powers of a somewhat different character, since they do not purport to depend upon the device of declaring the persons whom it is sought to depart to be prohibited immigrants. Sec. 8A provides that "where the Minister is satisfied that within five years after the arrival in Australia of a person who was

not born in Australia" such person has become a criminal, a lunatic, or a pauper, or is living on the earnings of prostitution, he may order that the person be deported. If the Minister is satisfied that such a person is an advocate of various forms of political violence, he may by notice in writing summon him to appear before a Board to show cause why he should not be deported. Sec. 8AA has already been quoted above. It aims at the deportation, during a time of "serious industrial disturbance" proclaimed as such by the Governor-General, of persons who are in any of various ways embarrassing the Government of the Commonwealth. Sec. 8AB covers the case of a person convicted, during the three years preceding the proposed deportation, of an industrial offence, where the Minister is satisfied that the acts constituting the offence were acts tending to embarrass the Commonwealth in ways similar to those specified in sec. 8AA.

The validity of sec. 8A has been expressly declared by the High Court in R. v. Macfarlane; Ex parte O'Flanagan and Kelly, 32 C.L.R. 518. In Ex parte Walsh and Johnson (supra) sec. 8AA was also held valid. Sec. 8AB has not yet been adjudicated upon, but appears to stand in exactly the same position. It is clear from the judgments in the two decisions cited that secs. 8A and 8AA can be supported only under the immigration power. This is almost certainly true also of sec. 8AB. In consequence, a limitation which,

as we have seen, emerges from the decision in Ex parte Welsh and Johnson (supra), must be read into all three sections. They must be construed subject to the qualification that they do not apply to persons who have made their permanent homes in Australia and have thus "become members of the Australian community". A further limitation following from the same decision is that in order to come within the scope of the immigration power, the persons concerned must have immigrated to Australia after the establishment of the Commonwealth.

THE DEPORTATION BOARDS.

All three sections have the common feature of requiring the person to appear before a Board, to show cause why he should not be deported from the Commonwealth. This Board requires close examination. It is apparently not contemplated by the Legislature that any Board should be of a permanent nature, but rather that a Board should be appointed as arising circumstances may require, to deal with any particular emergency. At all events this has been the practice. The only requirement as to the constitution of the Board is that it should have as Chairman a person who "holds or has held the office of Judge, or Police Stipendiary or Special Magistrate." It consists of three members in all, who are to be appointed by the Minister (Sec. 8A (2) and (3)). The Boards have no prescribed tenure, and are entirely the creatures

of the Executive. Their duties are indicated only in the most sketchy manner. It is provided that if (a) the person summoned does not appear, or (b) the Board recommends that he be deported, the Minister may make an order for his deportation.

The functions of the Board are purely administrative in character. In R. v. Macferlane; Ex parte O'Flanagan and O'Kelly, 32 C.L.R. 518 it was contended unsuccessfully that by sec. 8A judicial power had been conferred upon an executive tribunal in contravention of Chapter III of the Constitution. The Court was unanimous against this view. It was pointed out that the Board was the mere instrument of executive power. "The Board's recommendation", said Isaacs J. (p. 536), "has no legal force whatever, beyond being a necessary safeguard against either the undue use of ministerial power or even a mistaken opinion of a Minister when all the facts are known. It is a guarantee provided by Parliament to the individual that he has a non-political and unprejudiced opinion on the merits before an adverse decision by the Executive is possible." Higgins J. says (p. 569) "In principle, I am unable to distinguish an inquiry made by this Board from an inquiry made by police under Government orders."

ARBITRARINESS OF PROCEDURE.

There is not wanting, particularly in

Ex parte Walsh and Johnson, evidences of the opinion of the High Court that the machinery thus established represents the high water mark of arbitrary executive action. "It will be noticed" said Higgins J. in that case (p. 113), analysing sec. 3AA in words that are worth quoting at some length, "that the person need not be connected in any way with the serious industrial disturbance; that his hindering of the transport of goods or passengers may be a lawful hindering.....; that 'prejudice of the public' means prejudice in the opinion of the Minister for the time being - a political officer; that the hindering may have occurred many years before the Minister acts; that the person's presence here need not be injurious because of that hindering.....; that the Minister may be satisfied without taking any evidence; that the Board is to consist of three members, all appointed by the Minister who is already satisfied as to the facts; that the Board need not determine whether the facts as to which the Minister is satisfied are true or not, and that the Minister may order deportation and the incidental arrest and detention, on a mere recommendation of the Board (with no grounds stated) that the person be deported."

It may well have been in part the considerations thus forcibly presented which weighed with the Court to lead it to the conclusion that citizens of the Australian community were not within reach of the section. Indeed, as will presently be seen,

the two Justices who found themselves unable to construe the section in so limited a fashion made the arbitrariness of the proceeding in the particular case an actual ground of their decision. What Higgins J. thought of the granting of such a power to the Executive (and the purposes of it) may be inferred without difficulty when he says: "It is obvious that if one political party may banish opponents another political party may act likewise. But it is not for us to consider these provisions from the point of view of wisdom or statesmanship; no crudity; no folly, no subversal of time-honoured principles of British liberty, will entitle us to treat this section as being invalid."

NOTICE OF "ACTS" MUST BE GIVEN.

It will be recalled that under the provisions of sec. 9AA, a person cannot be summoned to show cause before the Board until the Minister "is satisfied" that he has been concerned in acts directed towards all or any of various ends detrimental to the Commonwealth. On the facts of Ex parte Walsh and Johnson, it appeared that no notice had been furnished to the two respondents before the Board of the nature of the acts as to which the Minister in their particular case was satisfied.

The majority of the Court followed reasoning which lead to the release of Walsh andJohnson on

the ground that the section did not effectively reach them at all, and these Justices did not therefore need to consider the regularity of the procedure that had been followed. Isaacs and Rich JJ., however, while holding that the section did not cover Walsh, as he had immigrated to Australia prior to the establishment of the Commonwealth, found in favour of Johnson on the ground that the failure to notify him of the acts found to have been committed was fatal. Isaacs J., in particular, was emphatic. "But what does slow cruse involve?" he asked (p. 105), "Does it mean that without anything whatever alleged or charge notified, a man must affirmatively prove to an irresponsible tribunal that he is not unfit to remain in Australia? The argument is that the Minister may disregard all the 'acts' he has previously been satisfied of, and, armed only with the Board's recommendation or only with the failure to appear, may for any other reason he selects, order deportation. If that were true, I think arbitrariness and despotism could no farther go. But I for my part decline altogether to attribute that meaning to the Parliament of this country."

The same Justice also gave it as his opinion that in the absence of any words in the Act requiring a specific charge to be laid before the Board, the only matters which it was competent for the Board to consider were the particular "acts" as to which

the Minister was satisfied.

CRIMES ACT 1914-1932.

In 1926, as a consequence of the political and industrial conditions then existing, the Crimes Act was amended by the insertion of a new "Part IIA", the sections of which are numbered 30A to 30R. A series of new crimes are created, of the kind which are known, in the language of modern political science, as "industrial offences". The sections providing for deportation are three in number, namely secs. 30C 30J and 30Q. For the purposes of these provisions, the Act does not invoke the assistance of any Board or other tribunal to secure the banishment of the offenders, but enacts that upon conviction of any of the offences specified in the sections the person convicted shall be liable to the imprisonment imposed by the Court, and "in addition (if he was not born in Australia) to deportation by order of the Attorney-General". Once a person is convicted of the offence, the question of whether deportation is to follow is a matter purely in the discretion of the Executive.

The first deportation section, 30C, extends to anyone "who by speech or writing advocates or encourages" (a) the overthrow by violent means of the Commonwealth Constitution, or (b) the overthrow of

established government in Australia or elsewhere, or (c) the destruction of Commonwealth property or property used in interstate or overseas trade.

Sec. 30J has its operation made dependent upon the Proclamation by the Governor-General (familiar already from our study of the Immigration Act) of the existence of a "serious industrial disturbance." It covers any person who, while such a Proclamation is still operating, takes part in or continues, or incites to, urges, aids or encourages" a lock-out or strike in relation to (a) interstate or oversees transport, or (b) the provision of any Commonwealth public service. This section may well be regarded as having a strong political flavour. The wisdom or otherwise of the policy of creating industrial offences of this nature, and entrusting to the Executive the power of enforcing the ultimate consequence of deportation where a conviction is recorded, is, of course, not a matter proper for discussion here. But it is noteworthy that despite what might have been thought to be opportunities for the use of this section on more than one occasion, no Government has so far attempted to employ it.

The third deportation section, 30Q, is of an ancillary character, and is designed to remedy one of the weaknesses discovered in the Unlawful Associations Act 1916-1917 (a war-time experiment

to which some reference will be made later). It provides that "any person who has been deported under this Act who returns to the Commonwealth" shall be guilty of an offence and may be deported again.

THE 1932 AMENDMENT.

The powers outlined above are those created in 1926. They have recently been very materially added to by the Crimes Act 1932, which inserts further sections in Part IIA. It is provided (sec. 30AA) that on application to the High Court by the Attorney-General, any body of persons can, after being offorded an opportunity to show cause, be declared an unlawful association. When such a declaration has been made, the Attorney-General may, by order under his hand, direct that any person, not born in Australia, who, at the date of the application, was a member of that body of persons, shall be deported from the Commonwealth" (Sec. 30L). The term "unlawful association", which is defined in sec. 30A, includes any body of persons "which by its constitution or propaganda or otherwise advocates or encourages" seditious objects, or various specified forms of violence.

As Part IIA now stands, the only substantial difference between its provisions and those of the drastic Unlawful Associations Act 1914-1917 is the requirement that a declaration shall be obtained from the Court. Once this has been done, persons may be

deported by Ministerial order <u>without any necessity for individual trial or proof of personal association of the deportee with the unlawful objects.</u> This is, to say the least, a startling type of provision to be included as part of the criminal law.

So far, none of the deportation powers contained in these two amendments to the Crimes Act has come under the notice of the High Court. If and when this happens, the question will arise whether the Attorney-General, in exercising the unfettered discretion vested in him, is not in fact acting judicially. This will resolve itself into the inquiry whether the view taken by the Bench in <u>Ex parte Walsh and Johnson</u> (supra) that deportation under sec. 8AA of the <u>Immigration Act</u> is <u>preventive and not punitive</u> applies equally to this Act. It may be well that the power to deport in this case is really to be regarded as punitive. It has its place in an Act dealing with crime and punishment; and a significant circumstance is that by sec. 30P, when deportation is ordered during the currency of a sentence, the offender is not to be required to serve the remainder of the sentence before being deported. If deportation is, on the proper construction of the Act, ordered by the Executive as a <u>punishment</u> and not, to use the phrase of Isaacs J., a "political precaution",

then, no doubt the power might be held to be judicial and the provisions conferring it on the Executive invalid.

THE WAR GROUP OF POWERS.

The remainder of the Federal deportation powers belong to what may be termed the war group. They are, in the main, now only of academic and historical interest, as with one exception they are no longer in existence.

(1) Unlawful Associations Act 1916-1917.

Sec. 2 of this Act limited its operation to the duration of the war and six months thereafter, and its operation is consequently long ago exhausted. It defined "unlawful associations" as including one specified organisation, and any others advocating or encouraging violence, and also any organisation "which the Governor-General.....declares to be in his opinion" an association belonging to the general class above mentioned. A number of offences were created, and in respect of three of them, relating to becoming or remaining a member of an unlawful association or illegally inciting or encouraging, sec. 6 provided as follows:-

> "Any person who is convicted of an offence under any one of the last three preceding sections and who fails to satisfy the Attorney-General that he is a natural-born British subject born in Australia, shall be liable in addition to the punishment imposed on him for the offence, and either during or upon the expiration of his term

> of imprisonment, to be deported from the Commonwealth pursuant to any order of the Attorney-General."

The validity of this section was never challenged in the High Court. It would probably not be assailable on the ground that the Attorney-General was exercising punitive and therefore judicial power, since the war emergency could be relied on to stamp it with a precautionary character. But it appears from Ex parte Walsh and Johnson (supra) that that the question might have arisen whether failure to satisfy the Attorney-General that the proposed deportee was not an Australian born British subject was sufficient to bring him within reach of the power with regard to aliens or immigration. Some of the observations of that case were strong to point out "that an act founded on the belief of the Minister as to the extent of a power was not an act in respect of the subject matter of the power." In any event, the section was probably supportable with the aid of the defence power, which, according to the doctrine of Farey v. Burvett, 21 C.L.R. 433, is to be given a much more liberal interpretation in time of war than it bears in peace.

(2) Aliens Restriction Order 1915.

This was an order made under sec. 5 of the War Precautions Act 1914-1916, which provided that

"the Governor-General may by order published in the Gazette make provision for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth, and in particular..... (b) for deporting aliens from the Commonwealth. The deporting power under the order was contained in paragraph 2J, of the Aliens Restriction Order 1915, added by an amendment of 1st March, 1916, the simple terms of which were:-

"The Minister may order the deportation of any alien, and any alien with respect to whom such an order is made shall forthwith leave and thereafter remain out of the Commonwealth."

The High Court held in Ferrando v. Pearce, 25 C.L.R. 241 that para.2J did not make the Minister the judge of whether deportation in any case was desirable in the interests of public safety. The Governor-General must (it was said) be taken to have decided in advance that it was necessary for the public safety and defence that any person concerning whom the Minister might make an order under para. 2J should be deported. "His order" said Isaacs and Rich JJ. (p. 256) "is only a fact upon which the Governor-General's Order 2J operates by its own force." The validity of the paragraph was upheld; and it was decided further that a ministerial order thereunder was none the less valid because its real purpose was

to enforce the return to an allied country of a national of that country who was liable to military service there.

Two other decisions on para. 2J require brief reference. In Meyer v. Poynton, 27 C.L.R. 456, it was held that para. 2J does not require communication to the alien of an order made under it for the purpose of giving the order efficacy and effect. It was said that: "It may be and probably is true that the plaintiff would not be guilty of an offence if he remained within the territory of Australia without knowledge of the order". But the duty of the officers of the Government to carry out the order rested upon the making and not the communication of the order. The case of Jerger v. Pearce, 28 C.L.R. 566, decided that "the order need not be in any particular form, and if from the words used it clearly appears that the Minister directs the deportation, that is a sufficient order."

WAR PRECAUTIONS ACT REPEAL ACT 1920-1923.

Sec.9 of this Act confers a deportation power, and may fairly be included in the war group although the legislation was not passed until 1920, because it represented the continuance in one respect

of the general emergency powers conferred for war purposes by the War Precautions Act.

The section provides that a British subject arriving from overseas and refusing to take a prescribed oath of allegiance is to be treated for all purposes as a prohibited immigrant under the Immigration Act. It further enacts that: "Any person who having made or subscribed such oath or affirmation, is found by a prescribed tribunal to have said or done anything in violation of that oath or affirmation, shall be liable pursuant to any order of a Minister of State to be deported from the Commonwealth."

This section is still in force. No "tribunal" appears to have ever been prescribed. No doubt, if the occasion arose, an ad hoc tribunal would be prescribed to deal with the particular case as has been the practice under the Immigration Act.

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PART THREE

NATURE AND CONDITIONS

OF EXECUTIVE LAW-MAKING.

CHAPTER I

THE EXECUTIVE AS A LEGISLATIVE AUTHORITY.

The whole tendency of modern legislation is towards the elimination of detail from the actual terms of Statutes. These tend more and more to contain references merely to essentials; the highlights only of the subject are covered; or to use another figure, the bare framework of the legislative structure is all that is erected. The filling in is left to the Executive. Down to the last quarter of the 19th Century, the English parliamentary draftsman had the duty imposed upon him of providing, so far as it was humanly possible, for every contingency of any importance which might arise in the course of the administration of each enactment. The English Metropolitan Streets Act 1867 is an admireble example of the old style, in which the Imperial Parliament was able to put aside for a day the government of an Empire and make legislative prohibitions against such acts as carrying a ladder more than thirty-five feet long, or unloading wine-casks across the footway.

The practice of to-day forms a striking contrast. "Many modern Statutes" writes Sir John Marriott, M.P. for York and well-known constitutional

authority "are mere cadres, giving a very inadequate idea of their ultimate scope. They lay down general rules and leave it to the appropriate departments to give by means of Statutory Rules and Orders, flesh and blood to the legislative skelcton." He gives as an English illustration of the modern style the Factory and Workshops (Amendment) Act 1929. "The Act", he says, "consists of two operative clauses which are contained on half a sheet of paper. Before the ink on that paper was dry, the Secretary of State for the Home Department laid on the table of the House a paper containing six closely printed pages of Statutory Rules and Orders." ("Liberty and the Law" - Edinburgh Review, Oct. 1929, P.343).

It is not long since such methods would have been universally condemned as a grave departure from the principles of the Constitution. To-day, they are accepted as a normal feature of government. This changed attitude is illustrated by reference to the words of Sir Courtenay Ilbert, written in 1901, when, after referring to the Continental practice of passing Statutes which did no more then enunciate a principle, he said: "Such extensive delegation of legislative powers would not be tolerated in England" (Legislative Forms and Methods, P.39).

These developments in England have found their reflection in the legislative methods of the

Commonwealth. Many Federal Statutes are virtually meaningless without reference to the voluminous regulations made under their authority. Instead of Acts carefully adapted to the facts with which they are to grapple, we find legislation containing a mere sketchy indication of a purpose. For the rest, "the Governor-General may make regulations prescribing all matters which are required or permitted or necessary or convenient to be prescribed" for giving effect to the Act.

Some significant figures were given before the Select Committee of the Senate, which recently held an inquiry into the necessity for establishing a Standing Committee to scrutinise Regulations and Ordinances. A witness stated that while the Commonwealth Acts of Parliament from 1901 to 1927 covered 3,708 pages, the Commonwealth Statutory Rules for the same period covered a total of no less than 11,263 pages. "The attention of your Committee", says the Report, "was directed to a number of bills passed by Parliament, the chief effect of which was to give a regulation-making power to the Executive." The Committee makes reference, among other instances given, to the Air Force Act 1923, consisting of three sections, the regulations under which number no less than 513.

The Executive as a legislating authority is a developing constitutional conception, which is probably far from having reached its final shape.

Lord Salisbury, speaking at a London public banquet in 1929 in response to the toast of "His Majesty's Ministers" said frankly: "The Government is growing in importance every day. The Government is absorbing more and more of the power which used to belong to Parliament." (The Times, May 4, 1929). Despite the fact that the Commonwealth has a rigid constitution, this progressive tendency is unquestionably visible in Federal legislation. The more extreme examples of delegation of law-making power are the more recent ones. In the early years of Federation the regulating power was availed of only for what was originally supposed to be its sole legitimate purpose - the filling up of the structure of general principles of which the Acts consisted with the background of detail which followed consequentially from those principles, and enabled them to be applied to facts. The Transport Workers Act 1928-1929 and the High Court decisions upholding it mark the latest milestones in a far journey from that early view. Some of the leading jurists of the Commonwealth who wondered in 1909 whether the Governor-General could prohibit the importation of opium are still with us. They see that to-day by virtue of half a dozen lines of regulating power conferred in a Statute he can take away men's livelihood, and in doing so may override any existing law of the Commonwealth as he thinks fit.

No doubt a factor of the very greatest

importance in the development of regulations as an instrument of government was the Great War. During the War, and to a large extent for long afterwards, Parliament abdicated its functions in favour of the Executive. It was a time of exceptional legislative activity, as is inevitable when rapidly changing conditions have to be dealt with, and when a whole nation has to be reorganised as a fighting unit. But the legislation was all carried out by the Executive. The War Precautions Act 1914-1916 conferred powers of regulation which were far wider than anything which had previously been granted by Parliament, or even conceived as possible by constitutionalists. The War passed, and years afterwards, wrenched from the reluctant hands of the Executive, the War Precautions Act went also; but the discovery by Ministers and the civil service of the facility with which they could govern a nation without the intervention of Parliament remained as an abiding and significant factor.

"Ever since the making of regulations under the War Precautions Act assumed such proportions, regulation making has increased almost by geometrical progression," said Mr. R. G. Menzies, K.C., giving evidence before the Senate Select Committee. "The popular form of legislation to-day is to give an Act a title and then to confer on the Governor-General or the Governor the power to make regulations." Such a statement of the position may not be free from

hyperbole, but contains much substance.

What has been said above as to legislation by the Executive has particular application to regulation-making powers. There are other methods of sub-legislation which, although not of such general application, are no less important in their respective fields. In the first place there is the making of proclamations and orders in Council, the precise character and use of which must be discussed in a Chapter devoted to them. These forms are not, as a general rule, of a true legislative nature, though in some instances they exhibit this quality unmistakably. Secondly there are the ordinances made for the Territories. These also will be dealt with in detail at an appropriate stage. They are essentially legislative, in outward form as well as in substance, and cover the whole field of law-making for Territories which, in the words of R. v. Bernasconi 19 C.L.R. 629, are "not yet in a position to enter into the full participation of Commonwealth constitutional rights and powers."

CHAPTER II

LIMITS OF REGULATION-MAKING POWER

It is proposed to examine here the considerations which limit the authority of the Executive to make regulations, with special reference to the standards laid down in this regard by Australian Courts. The inquiry necessarily involves some review of the attitude of the English law generally towards sub-legislation; and, since the wider aspect seems to have been but little traversed by text-writers, it will not be out of place if it is given some attention in the pages that follow.

The only ground on which regulations which have duly complied with all the formalities required to be observed in their making can be declared invalid is that they are ultra vires the statutory power under which they purport to be made. Other apparent reasons for invalidity are found on analysis to rest on the same basis of excess of the authority contained in the Act. An examination of these prima facie reasons follows.

1. Unreasonableness.

This statement underlined above is made not without diffidence, in view of some remarks of high

authority which suggest that regulations, even although within the statutory authority, can be scrutinised by the Courts from the standpoint of whether they are reasonable, and in a proper case declared void for unreasonableness.

Thus, so eminent an author as Craies declares: "Most if not all statutory rules may be regarded as forming part of the general law and as being legislative or executive acts, although they are the acts of a subordinate and delegated authority. In this respect they differ somewhat from by-laws which are confessedly subordinate and are subject to review as well as interpretation by the Courts, but the difference is one of degree only, except in cases in which Parliament has expressly or impliedly forbidden the Courts to test the validity of a statutory rule." (Craies: Statute Law (4th.Ed.) p. 262). And Vaughan Williams L.J., in R. v. Local Govt. Board; Ex parte Arlidge, 1914 1 K.B. 160 at p. 175, says: "Rules made under statutory authority may, in my opinion, be inoperative because they are ultra vires, or inconsistent with the principles on which English law is based."

One looks in vain for any further evidence in support of this contention. There is much to the contrary. Thus in Halsbury Vol. 27 at p. 124 it is stated that "Statutory Rules and Orders and bye-laws differ from Statutes in that it may be open to the

judiciary to question their validity, to examine if they have complied with conditions precedent and in the case of bye-laws to consider if they are reasonable." In Institute of Patent Agents v. Lockwood, 1894 A.C. at p. 360, Lord Herschell L.C. says: "Therefore there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but that very substantial difference that it is open to consideration whether it be so or not". See also R. v. Walker L.R. 10 Q.B. 355 per Lush J. at p. 358.

It is submitted, therefore, that so far as this suggested ground of invalidity is concerned the statement at the commencement of this Chapter is correct, and that whatever of real foundation there is for the contrary view lies in the fact that in the great majority of cases, unreasonableness will necessarily involve an overstepping of the statutory authority. The test of unreasonableness, as laid down for by-laws, is now placed so high that cases coming within it are rare; and it would need strong express words in an Act of Parliament to induce a Court to hold that a flagrantly unreasonable regulation was authorised. If words clearly authorising it were found in the enactment, however, there would be no recourse but to hold it valid.

2. Indirect Motive.

Similarly, the presence or absence of some

ulterior or misteken purpose on the part of the administrative authority making the regulation is not (except where actual dishonesty is alleged) a matter proper for the consideration of the Courts, unless such wrong purpose has the effect of taking what is done outside the statutory authority. Cases which may seem to suggest the contrary are found to depend upon the circumstance that, in the Statutes involved in those cases, observance of a given purpose had been made an express condition of exercising the power. (E.g. Marquess of Clanricarde v. Congested Districts Board 31 T.L.R. 120; Municipal Council of Sydney 1915 A.C. 338).

Narma v. Bombay Municipal Commissioner, L.R. 45 Ind. App. 125, was a case where the Commissioner, having power to prescribe the line of a street, drew the line in such a manner as to acquire land, and with that object. Lord Sumner said, at p. 129, "Even if it were proved, as it is not, that the creation and preservation of a regular line on the north side of the road was no part of the Commissioner's object, though it certainly was an incidental result of his scheme, their Lordships can find nothing in the Act which either entitles the appellants to investigate his motives or has the effect of invalidating his action on account of the purpose, with which in fact he prescribed the regular line of the street." The result is that from the aspect of purpose also the question is simply

whether the thing done with a particular purpose conflicts with or goes beyond the Act. If the Act directs a specific purpose to be observed, a regulation with another purpose may well be invalid. Except to this extent, purpose is irrelevent.

A striking Commonwealth illustration of this position was recently presented by the facts in Victorian Stevedoring Co. v. Dignan, 46 C.L.R., where one of the later sets of the repeatedly disallowed Waterside Employment Regulations was being considered. The High Court accepted it as having been fully established before it that the real motive of the Executive in making and re-making the rejected regulations was to benefit an industrial organisation, and was thus quite outside the trade and commerce power to which alone the Act and regulations could look for constitutional authorisation. It was held that the power conferred on the Executive to make regulations was so wide that the motive could not be regarded, even for the purpose of determining whether what was done was within the Constitution. "But it is now suggested", said Dixon J., "that in fact the actual exercise of the discretion by the Executive clearly was not directed to the subject of trade and commerce. This contention too is answered, I think, by the legislative character of the function entrusted to the Governor-General in Council. His discretionary power over the subject is as unqualified as that of a legislature, and the actual grounds upon which it is exercised are,

therefore, immaterial."

3. Bad Faith.

Where the object being pursued by the Executive is of a nature involving actual mala fides, a regulation in furtherance of such an object will be void, although there is prima facie conformity with the limits of the statutory power conferred. Isaacs J. emphasises this, and at the same time defines the border between mere indirect motive and actual bad faith, in Jones v. Metropolitan Meat Industry Board 37 C.L.R.252. "That the Board's powers," he says (p. 263), "must be exercised in good faith, that is, honestly, is inherent in the matter.....The good faith, which is the antithesis of fraud in this connection, is....wholly distinct from the notion of mistakenly pursuing a by-purpose. Such a pursuit may in this connection be honest or dishonest. The body pursuing it may genuinely avow it, thinking it permissible. There, the action adopted may be ultra vires, but not male fide. On the other hand, there may be a pretended pursuit of a legitimate purpose that is male fide". Though these words deal specifically only with by-laws, they are undoubtedly applicable also to regulations.

Once again, however, it is suggested that the ground of invalidity, in its ultimate analysis, is that of ultra vires. A regulation may conform to the letter of the governing statute and yet be made in bad

faith. But even if this is the case, it is defeated by the implied proviso which, it is submitted, must be read into every Act of Parliament, that nothing in its terms is to be deemed to authorise the taking of any administrative action otherwise than in good faith.

4. Inconsistency with Other Statutes.

At first sight, it is also a ground for declaring regulations invalid that they are inconsistent with any Act of Parliament other than that under which they purport to be made. Certainly, it is true that in the absence of special circumstances referred to below, a regulation will wherever it is so inconsistent be invalid to the extent of the conflict. But here again the question is really whether a regulation altering other statutory provisions is within the power conferred by its own Statute. Just as Parliament can repeal its own Acts at will, and does in fact sometimes repeal them by the mere process of passing fresh Acts inconsistent with them, so it can, if it so chooses, delegate to the Executive the power to override an Act or any part of an Act, or even to repeal it expressly. (See Chapter on Proclamations and Orders). The only question can be, in any instance where a regulation is inconsistent with other legislation, whether Parliament has in fact so delegated its repealing authority.

It is safe to say that, in the absence of a plainly evident intention, such authority will never

be deemed to have been conferred on the Executive. The intention may be gathered either from the terms of the regulation-making power, or from the nature of the governing Act. So far, with one or two not very important exceptions, no power has been conferred on the Commonwealth Executive to make regulations expressly repealing any portion of Federal Statute law.. One such exception is found in the Seamens' Compensation Act 1911, sec.17. Ordinarily, the authority, if given at all, is one to repeal impliedly by inconsistency. But before a regulation can be validly made having the effect of overriding pre-existing statute law, the power to do this must have been given either expressly or by the clearest possible necessary implication. "Regulations validly made by a Commonwealth authority other than Parliament itself acquire the character of laws of the Commonwealth," said Evatt J. in Victorian Stevedoring Co. v. Dignum 46 C.L.R. "whether they supplant any previous Commonwealth law depends upon the circumstances of the particular case. But if the express will of the Commonwealth Parliament is that a regulation shall prevail over statutes passed by Parliament itself, then prevail it does."

It is possible to imagine cases where although the overriding power has not in terms been given to the regulation-making authority, it is yet indispensably necessary, in order to give proper effect

to the powers which have actually been conferred, that prior Commonwealth statute law should be invaded and modified. In such a case the power to override the Statute might be implicit in the grant of the main power. But ordinarily speaking, the authorisation to the Executive must be explicit. Even with competing statutes the Court leans against treating mere inconsistency as having the effect of repealing an earlier enactment. "Repeal by implication is not favoured," says Maxwell. "A sufficient Act ought not to be held to be repealed by implication without some strong reason.....Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention." (Interpretation of Statutes, p. 268). Applied to sub-legislation, this rule of interpretation involves two consequences. If a regulation is to repeal prior statute law, first, the regulation-making power must either expressly or necessarily involve the power sought to be exercised, and, second, the regulation when made must expressly or by necessary implication purport to effect the displacement of the prior law.

The Transport Workers Act 1928-1929, sec.3 is an example of the conferring in express terms of such a power. The section states that "The Governer-General may make regulations not inconsistent with this

Act, which, notwithstanding anything in any other Act... shall have the force of law....." This is unquestionably an express power to repeal other Acts, not, of course, directly, but by making laws inconsistent with them and having effect in spite of them. The only restriction on this power is that any such regulation shall be in furtherance of the Transport Workers Act itself. When the scope of the Act is regarded it is seen that this is a somewhat inconsiderable limitation.

The same express authority is necessary before a regulation-making authority can override regulations validly made under another Act. There is no Commonwealth instance of such authority being given, except that just cited, in which, of course, it would necessarily be involved. An example in which the overriding power is limited to having effect against regulations made under other Acts, is seen in the State Transport Co-ordination Act, 1931 (N.S.W.) Sec.48 (7) of that Act provides that "Where any by-law, ordinance, or regulation under any Act is inconsistent with any regulation made under this Act, the provisions of the regulation made under this Act shall prevail, and the provisions of the first-mentioned by-law, ordinance, or regulation shall to the extent of the inconsistency have no force or effect."

What has been said above as to the necessity

for the express authority of Parliament before a regulation can thus prevail over other Statutes, and rules made under them, applies, in the case of Commonwealth regulations, only to Commonwealth Statutes and not to those of the States. It is definitely established that any regulation which conforms with the limits of power set by the Act under which it is made is a "law of the Commonwealth", and as such overrides any inconsistent State law to the extent of the conflict, by virtue of sec.109 of the Constitution (Clyde Engineering Co. v. Cowburn, 37 C.L. R. 466).

It should be remarked that before the question of whether the Executive has been authorised to alter the statute law can arise, the preliminary inquiry is whether there is in fact any inconsistency at all. A regulation is not necessarily inconsistent with another law because it makes further provision on the same subject. (See Cullis v. Ahern. 18 C.L.R. 540, and also later in this Chapter where the matter of what constitutes inconsistency is discussed).

INTERPRETATION OF REGULATION-MAKING POWER.

The formula which has been standardised for use in Commonwealth Acts is "The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required

or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act."

If this form is not peculiar to Australia, at least it does not appear to be used at all in the Statutes of the Imperial Parliament. However, the scope of the power conferred by it has now been considered in a number of Australian cases and is fairly well ascertained.

This standard model is not invariable. There are a few instances in which a somewhat different form is used. The variations are not substantial, and where the regular words are departed from, the variants are, to the extent that there is any difference in effect, narrower in scope than the standard form. Thus the Audit Act 1901-1926 says simply that "The Governor-General may make regulations (not inconsistent with this Act) for carrying out the provisions of this Act and in particular for..", and proceeds to enumerate various specific subjects. See also e.g. Commonwealth Public Service Act 1922-1931, sec. 108.

The method of approach to the question whether a regulation is within the authority conferred by its governing Act to make regulations is indicated by Lord Wrenbury in R. v. Halliday 1917 A.C. 260 at p. 305. After saying that the issue is whether a

certain regulation is ultra vires, he continues: "I turn to the Act at once to see what upon its terms are the characteristics - the scope, the purpose, the limits, and the character - of the regulations which the Act allows. I shall then go on to inquire whether the regulation in question falls with them."

In applying this method it is not only the section conferring the regulation-making power which has to be regarded. "It cannot, I think, be denied," said Lord Herschell in Cox v. Hakes 15 A.C. 506 at p. 529, "that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation." Thus in Commonwealth v. Progress Adverts. Co. 10 C.L.R. 457 a regulation was declared ultra vires upon the ground (inter alia) that the Legislature has already made specific provision in the Act itself for matters of the same class as that for which the regulation purported to provide and that the silence of the enactment on the matter covered by the regulation indicated that the latter went beyond the field which Parliament had intended to cover.

DISCRETION TO EXECUTIVE.

The vital words in the standard regulation

making section are "necessary or convenient to be prescribed for carrying out or giving effect to this Act." It has been held that the words "necessary or convenient" contain implicitly a grant of discretion to the Executive, the latter being, up to a point, entitled to rely on its own judgment as to what is covered by those words. Thus Isaacs J. says in Gibson v. Mitchell 41 C.L.R. 275 at p. 279: "Those words in that collocation mean necessary or convenient from the standpoint of administration. Primarily they signify what the Governor-General may consider necessary or convenient, and no Court can overrule that unless utterly beyond the bounds of reason and so outside the power." (sic)

This discretion has been held in a number of cases not concerned with regulations to be implied in the word "necessary". Thus in Stroud v. Wandsworth District Board of Works 1894 A.C.1. where a municipal body was authorised to execute "necessary works" Kay L.J. said, "I think that this word 'necessary', though it is used in the Act of Parliament without additional words, such as 'which shall appear to be necessary' may yet fairly be construed to mean 'necessary' in the opinion of the local board." In A.S.Navigation Co. v. Morse L.R. 4 P.C. 222 "necessary" was in another connection held to mean in effect "highly expedient". See also as to the meaning of this word, as laid down by the High Court, Local

Board of Health of Perth v. Maley, 1 C.L.R. 702;
Widgee Shire Council v. Bonney, 4 C.L.R. 977.

"CARRY OUT OR GIVE EFFECT".

The phrase next in importance to "necessary or convenient" is "carry out or give effect". These words have been specifically paraphrased by Isaacs J. in Carbines v. Powell, 36 C.L.R. 88 at p. 91, where he says: "To 'carry out' the Act means to enforce its provisions. To 'give effect' to an Act is to enable its provisions to be effectively administered. There is little, if any, difference between the two expressions. They both connote that the Governor-General's regulations are to be confined to the same field of operations as that marked out by the Act itself."

LIMITS OF DISCRETION.

The last words of the remarks of Isaacs J. quoted above indicate in a broad fashion the limits which must be taken to exist to the exercise of executive discretion as to what is "necessary or convenient". As was said by Rich J. in Carbines v. Powell (supra): "There is, no doubt, a considerable deal of elasticity in the words 'necessary or convenient' on account of the discretion always given to the Executive. But that discretion is always limited to

carrying out and giving effect to 'this Act'." (p.96). In that particular case the way in which the principle was applied forms a useful illustration. A regulation had been made purporting to prohibit the manufacture of broadcasting equipment without a license. This had been done in alleged pursuance of the powers conferred by the Wireless Telegraphy Act 1905-1919. Higgins J. said, in support of a unanimous decision by the Court, "It is urged that it is necessary or convenient to prescribe regulations forbidding the manufacture of equipment in order to carry out or give effect to the Act.....But there is no prohibition of manufacture of such appliances" (i.e. in the Act), "and reg. 92, therefore, prescribes something which is not necessary or convenient for carrying out or giving effect to the Act, however convenient it might be in other aspects. The regulation oversteps the Act." (p. 95).

The principle was given a complete and precise statement, which has more than once been relied on in other cases, by Isaacs J. in The Bootmakers' Case 11 C.L.R. 311 at p. 338, where he said: "It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met.....The authority must be taken

as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power."

The question, therefore, becomes in every case one of determining the scope of the provisions of the Act. Where, in addition to the general introductory grant of regulation-making power, particular matters are designated under sub-headings, the general words may be cut down by the specific provisions, the scope of which may have to be interpreted. Thus in Commonwealth v. Progress Advertising Co.Ltd. 10 C.L.R. 457, it having been urged upon the Court that it was necessary, to avoid inconvenience in administering the Act, that a regulation prohibiting the private publishing of telephone books should be passed, Griffith C.J. said: "It may be conceded that it is desirable to do s, but the question is whether the provisions of sec. 97, pl.(r), cover such a matter. That is a matter of construction."

Sec. 97(r) of the Post and Telegraph Act as it then stood, which was under consideration in the case cited, affords a further concrete example of the limits of executive discretion. Power was given by it to make regulations for "all other matters and things which may be necessary for carrying out this Act or for the efficient administration thereof." Discussing

the meaning of the words "necessary....for the efficient administration", Griffith C.J. says (p. 450):

"In my opinion, the prima facie meaning of the words now in question is limited to matters of internal administration and matters with respect to which the Department comes in direct contact or relationship with the public.....In case of ambiguity, the presumption is always in favour of liberty."

"NOT INCONSISTENT"

It will be obvious that the words "not inconsistent with this Act", which are always included in the grant of regulation-making power, do not in any materiel degree affect the limits of that power. The judicial pronouncements to which reference has been made above as to the meaning of "necessary or convenient for carrying out or giving effect" to the Act emphasise the obvious truth that no authority can be claimed under an Act for the making of a regulation inconsistent with its terms. Clearly, it would be implied without express words that regulations were not to be inconsistent with the Act. But the Court frequently approaches the question of the validity of a regulation by inquiring as a primary test, whether it be consistent with the law as declared by Parliament; and the method of determining inconsistency has been laid down.

In Cullis v. Ahern 18 C.L.R. 540 where the inconsistency alleged was between a by-law dealing with traffic and a Statute other than that under which the by-law had been made, Griffith C.J. prescribed the test as follows; "In order to establish inconsistency between the by-law and the Statute the latter must be construed as covering the whole ground in respect of which the legislature has legislated, that is, as prescribing completely and exclusively the limits within which the liberty of drivers of motor cycles shall be confined." See Huddart Parker Ltd. v. The Commonwealth 44 C.L.R. 492 where this test was applied by Evatt J. to regulations made under the Transport Workers Act 1928-1929. Although it was said in the last mentioned case that decisions as to conflict between State and Federal law were not in point when the law-making "was proceeding from the legislative and executive branches of the one Government" (p. 522), it will be seen that Griffith C.J.'s test closely approximates to that laid down in Cowburn's Case, 37 C.L.R. 466.

It is submitted that the simplest test and at the same time the one capable of the most general and complete application, is that applied by Lord Campbell C.J. in Edmonds v. The Master Etc. of Watermen and Lightermen, 24 L.J. M.C. 124. "The by-law is not necessarily inconsistent with the provisions and directions of the Act", he said (at p. 128), "although

it forbids what the Act did not forbid. It does not seek to forbid anything which the Act directed to be done, and there is no provision of the Act which, the by-law being enforced, will not have its full operation".

One recent example of the avoidance of a regulation on the ground of its inconsistency with the Act may be given. The ease and effectiveness with which Lord Campbell's test might have been applied to arrive at the result will be apparent. Sec 163 of the Customs Act 1901-1932 provides that in a proper case a refund or remission of duty "shall be made in manner prescribed". A regulation was made requiring that claims for refunds or remissions must be made within three days of over-payment, failing which the claim would not be allowed. In Ira r. Beark Ltd. v. The Commonwealth 50 S.R. 119, the N.S.W. Supreme Court held this to be ultra vires, and said: "It is not a regulation giving effect to the rights conferred by sec. 163. It is a regulation restricting the time within which those rights may be asserted. No such limitation of time is imposed by the Act..... Such a regulation does not give effect to the provisions of sec. 163. It modifies them and is inconsistent with them." The case was clearly one in which, to apply Lord Campbell's principle, the enforcement of the

regulation prevented a provision of the Act from having its full operation. See also Young v. Tooksesis 2 C.L.R. 470, per Griffith C.J. at p. 474.

CONFORMITY WITH THE CONSTITUTION.

It is scarcely necessary to point out that the limits set by the Commonwealth Constitution on the power of Parliament to legislate are equally effective to confine the field of sub-legislation. In other words, the Legislature cannot confer on any subordinate authority the power to deal with matters which it is not itself authorised to deal with. Thus in Cameron v. Dep. Federal Commr. for Tasmania, 32 C.L.R. 68, certain of the income tax regulations were declared invalid on the ground that they had the effect of "discriminating between States or parts of States" and thus went beyond the field allocated to the Federal Legislature by sec. 51(ii) of the Constitution. It was not disputed in that case that, apart from the objection just stated, the regulations could readily have been justified under the regulation-making section of the Income Tax Assessment Act as "necessary or convenient" for carrying out that Act. Regulations made under the Dried Fruits Act 1928 were recently held to be invalid for the closely analogous reason that they had the effect of giving a trade preference to one State as against another, contrary to sec.99 of the Constitution (James v. The Commonwealth 41C.L.R.442).

See also, as to construction by the Court of a regulation-making power so as to avoid the consequence of constitutional invalidity Huddart Parker Ltd. v. The Commonwealth, 44 C.L.R. 492. In that case a grant of power which would otherwise have been upon its necessary interpretation so wide as to be beyond the scope of sec. 51 of the Constitution was held to be valid when "written down" in accordance with Acts Interpretation Act 1904-1932, sec. 15A, which directs that a construction ut res magis valeat quam pereat shall be applied to all Commonwealth Statutes. (This matter is dealt with more fully in the next following Chapter).

CONSISTENCY WITH IMPERIAL LAW.

In the same way as executive power is necessarily limited to the area of the field committed to the Commonwealth Parliament under the Constitution, so it must also observe the same limits as are set to the legislative power of the Commonwealth by the Colonial Laws Validity Act, 1865, sec. 2, providing that any law of (inter alia) the Parliament of the Commonwealth shall be "void and inoperative" to the extent of its repugnancy to any law of the Imperial Parliament extending to the Commonwealth. An instance of regulations which would otherwise have been fully within the competence of the Executive being declared

invalid on this ground is found in Union S.S.Co. of N.Z. v. The Commonwealth, 36 C.L.R. 130, where regulations made under the Navigation Act 1912-1920 were held to be repugnant to the English Merchant Shipping Acts, and inoperative in consequence.

This ground, as a possible cause of invalidity, may be expected to disappear altogether in the near future. The Imperial Statute of Westminster 1931 removes the application of sec. 2 of the Colonial Laws Validity Act 1865 so far as laws made by the self-governing Dominions are concerned. This change, it is provided, is not to have effect with regard to Australia until it is adopted by the Commonwealth Parliament, and this has not up to the present been done.

RETROSPECTIVE OPERATION.

"A statute is retrospective", says Sedgwick, "which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past." Statutory Law (2nd Ed.) p. 160. That the Legislature has the power to pass Acts of this description has been expressly decided in R. v. Kidman, 20 C.L.R. 425.

Indeed, that case goes further, and decides that the Commonwealth Parliament has power to pass an ex post facto law. Such a law belongs to a special category of the genus of retrospective laws. "Thus",

says Chase J., in the American case of Calder v. Bull, 3 Dallas at p. 391, "statutes of oblivion or pardon are certainly retrospective, and literally are both concerning and after the facts committed. But I do not consider any law ex post facto that mollifies the rigour of criminal law, but only those that create or aggravate the crime, or increase the punishment or change the rules of evidence for the purpose of conviction." Blackstone describes ex post facto laws as those by which "after an action indifferent in itself is committed, the Legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it." (Comm. Vol. 1 p.46). We shall briefly consider the position of the Executive with regard to making (1) retrospective, and (2) ex post facto regulations.

1. Retrospective Regulations.

There seems to be no reason in principle why, in a proper case and subject to important considerations to be presently mentioned, the Executive cannot make retrospective regulations. The Courts, however, in accordance with one of the most firmly established of all rules of interpretation, refuse to give retrospective operation to an Act of Parliament unless the Act speaks in unmistakeable terms as to its intention to achieve such a result. "Unless there is some declared intention of the Legislature - clear and unequivocal - or unless there are some circumstances rendering it inevitable that we should take the

other view, we are to presume that an Act is prospective, and not retrospective", said Lord O'Hagan in Gairdner v. Lucas 3 A.C. 601. Similarly, even if the intention to legislate retrospectively is clear, the retrospective effect will be confined narrowly to the minimum consistent with the words of the Act.

The qualifying considerations are, then, that first of all the authority to make retrospective regulations must be conferred on the Executive in terms which, when applied to what has been done, are sufficient to warrant such action; and second, that the regulations made must express an unmistakeable retrospective intention, which will satisfy the above-mentioned rules of interpretation. But if these conditions are fulfilled, there seems to be no reason why retrospective law-making should be any more beyond the compass of the Executive than it is beyond that of Parliament. Cases would necessarily be rare, but the writer has been unable to find a single English decision in which sub-legislation has been challenged on the ground of its retrospectivity. But if there were such a case, then the issue would surely depend on whether the regulations which had been made were within the authority conferred by the Act under which they purported to be made. The Imperial Parliament with its plenary powers could undoubtedly confer such a

power upon an administrative officer or body if it saw fit. The only question would be whether it had in fact done so.

It follows, therefore, that if any reason exists why the Commonwealth Parliament cannot do likewise, the limitation must be found in the Constitution. But the interpretation which has been placed upon the Constitution by the High Court in recent decisions, and particularly in Victorian Stevedoring Co. V. Dignan, 46 C.L.R., as to the Commonwealth Parliament's power of delegation to the Executive, is that this power virtually extends to all or any of the powers exercisable by Parliament itself. If it could be shown to be "necessary or convenient" for the carrying out of the Act, there is not a priori reason why an administrative authority with power to make regulations (e.g. as to building) should not retrospectively dispense with a requirement which it had been equally authorised to impose. The prima facie dilemma that the requirement and the dispensing with it could not at the one instant be necessary and convenient for carrying out the Act is capable of two answers; first, that this might only mean that the regulation originally imposing the requirement would have been found if it had been attacked, to be unauthorised, and secondly, that alterations in the facts to which they applied might have been

such as to enable both the requirement and the dispensation to be justified.

2. Ex Post Facto Regulations.

Ex post facto sub-legislation, (including retrospective regulations altering civil rights unfavourably to the persons affected) are no doubt in a different position as to the degree of explicitness with which the authority must be expressed, but it is submitted that the principles indicated above would still apply. The statement of Higgins J. in Baxter v. Ah Way, 8 C.L.R. at p. 646 that "the Federal Parliament has, within its ambit, full power to frame its laws in any fashion, using any agent, any agency, any machinery that in its wisdom it thinks fit, for the peace order and good government of Australia" was expressly approved in the recent case of Victorian Stevedoring Co. v. Dignan (supra). For example, if the Governor-General were expressly empowered to declare ny regulation the conditions of eligibility for public service appointments during the twelve months preceding the passing of the Act, it is difficult to conceive why this would not be valid.

A more extreme and definitely ex post facto power would be one conferring authority to prescribe what persons were required to obtain trade licenses of one kind or another for the preceding twelve months,

failure to possess which would render them liable to penalties. Whether Parliament's powers of delegation, wide as it now is, involves a power to delegate the authority to make a regulation like this is still a matter to be argued. Dixon J. in Victorian Stevedoring Co. v. Dignan (supra), while emphasising that Parliament could make a law authorising the Executive to legislate on any of the subjects of sec. 51 of the Constitution, "and that the distribution of legislative, executive and judicial powers does not operate to restrain such a law", followed this by a qualification. "This does not mean", he said... "that the distribution of powers can supply no considerations of weight affecting the validity of an Act creating a legislative authority". It is possible that this somewhat dark observation may contain the seeds of a restriction on ex post facto legislation by the Executive. It may ultimately be said that if Parliament wishes to produce so special and unusual a result it must do so by its own express enactment, and not delegate the task to its administrative officers.

The question is perhaps academic only, because Parliament would have to confer the authority in the most explicit terms, incapable of any construction other than that the Executive was to have the power in question, and this, one may assume,

Parliament would be extremely unlikely to do. Still, some of the contemporary delegations to the Executive, particularly in England, suggest that it is not altogether beyond the region of possibility.

Sendall v. The Federal Commissioner.

In one case, the High Court refused to give effect to what appears to have been an audacious attempt by the Executive to destroy the rights against a government department of an appellant who was about to get judgment in his favour. This was Sendall v. The Federal Commissioner, 12 C.L.R. 653. After argument had concluded, and during a few days in which judgment was being withheld by agreement of the parties, a new regulation affecting the matter in issue was made. The regulation prescribed a fresh basis for calculation of land tax, which, if it were applicable to the case before the Court, must have altered the decision. Griffith C.J. commented strongly upon the attempted strategem, which he characterised as "this extraordinary procedure to anticipate a judgment of the Court". He refused to give effect to it on the ground, chiefly, that the regulation "could not have a retrospective effect with respect to a liability which had accrued before it was made".

This is apparently the only Commonwealth

instance where an attempted retrospective regulation has come under the notice of the Court. Its insufficiency to achieve what the learned Chief Justice appears to have been satisfied was its designed purpose is, it is submitted, in no way inconsistent with what has been said above concerning the capacity of the Executive to make retrospective regulations if properly authorised to do so.

The point was that the regulation did not on the face of it purport to have any retrospectivity at all, and that only by receiving a construction wide enough to apply it to accrued as well as to future liabilities could it acquire such an effect. The Court, leaning against retrospectivity, declined to give it such a construction. Suppose that the regulation had purported in express terms to apply to the liability of the appellants, then being determined by the Court. The question would promptly have arisen how far the Executive was authorised to make such a regulation; and the Commissioner would have been called upon to show that a power <u>to interfere with accrued liabilities and rights in part heard cases</u> was necessary or convenient for carrying out the Act - an unenviable task.

But it is suggested nevertheless that if Parliament had chosen to give in clear terms a power to make regulations doing this very thing, and the power had been expressly exercised, there would have

been no alternative but to give effect to it. A case interesting for purposes of comparison, where a closely similar question was involved as to the effect, this time, of an Act of Parliament, on pending litigation is Federated Engine-Drivers v. Broken Hill Pty. Ltd. 16 C.L.R. 245. In that case, the fresh legislation purported to be retrospective, and it was a question of construction of the enactment whether its retrospectivity went to the length of affecting part heard legal proceedings. By the weight of the Chief Justice's opinion, an evenly divided Court held that it did not.

RULES OF COURT.

The observations of this Chapter apply, mutatis mutandis, to Rules of Court made by the judiciary under the authority of statute. These are subject to judicial examination in the same way as regulations made by administrative authorities, and the scope of the power is limited by analogous considerations. See e.g. King v. Henderson, 1898 A.C. 720, esp. per Lord Watson at p. 729, and Ex parte Davis, 7 L.R. Ch.526, per James L.J. at p. 529. Rules of Court are, for example, ultra vires if they prescribe as a matter of procedure a step the failure to take which excludes a litigant from rights which have been unconditionally conferred on him by the Legislature (R. v. Bird: Ex parte Needes 1893 2 Q.B. 340; Merchant v. Dunlop 44 W.N. 103). See also Whitefield

Ltd. v. Starkey 49 W.N.; 82 S.R. (not yet reported), in which the writer appeared as counsel.

BY-LAWS.

Broadly speaking, and in the absence of special circumstances of a kind which will presently be mentioned, by-laws stand in a different position with regard to scrutiny by the Courts from that occupied by regulations. A regulation, provided it can be shown to have been made with due authority from the relevant Act, is, as has been elsewhere said, as good for all purposes as if it formed part of the Act itself. By-laws, on the other hand, in addition to being intra vires, must, it is said, be certain in their terms, positive, not repugnant to the general law, and reasonable (See Halsbury Vol.23 p.394). If these conditions are not complied with, a by-law may be declared null and void, notwithstanding that it might otherwise fall fairly within the scope of the power entrusted by Statute to the subordinate corporation or other authority by which it is made. The modern tendency as evinced in the decisions in Slattery v. Naylor 13 A.C. 466 and Kruse v. Johnson 1898 2 Q.B. 91 is to accord so wide a discretion to the by-law making authority that it is now a matter of the highest degree of difficulty to make a successful attack on a by-law on the ground of unreasonableness.

(See the dictum of Griffith C.J. in Widgee Shire Council v. Bonney 4 C.L.R. 977 at p. 982). But though difficult it is not impossible, and proper cases for the annulling of by-laws as unreasonable may still arise (R. v. Broad 1915 A.C. 1110, at p. 1122 per Lord Sumner).

The type of by-law making power which has resulted in England in the development of this branch of the common law differs, however, from that conferred in the rare instances where by-laws have been authorised by Commonwealth legislation. The power in England has for the most part been entrusted in general terms to local government bodies and vocational associations who have been given a discretion bounded only by the limits of their own legitimate interests, but subject always to ultimate control by the Courts on the principles referred to above.

In Australia, on the other hand, both in Commonwealth and State legislation, the practice has grown up of making the by-laws subject at the time of their promulgation to approval by the Executive Council, and often also to disallowance by the Houses of Parliament. In Jones v. Metropolitan Meat Industry Board 37 C.L.R. 252 it was established that this method had a material effect in limiting the extent to which by-laws made in accordance with it could be

controlled by the Courts.

The by-laws which were under consideration in that case were made by the Meat Board of New South Wales under an Act of that State which provided that "Such by-laws shall be submitted to the Governor for his approval." When approved they were to be gazetted, after which they were to be laid before both Houses of Parliament. The by-laws were to be subject to disallowance by either House during fifteen days. It was sought to have the by-laws in question declared void on the ground of unreasonableness. The head-note declares it to have been held by three of the five judges that "the validity of a by-law which was confined to the subject matters stated.....had been approved by the Governor, gazetted and not disallowed by Parliament, could not be challenged in a Court of law on the ground of unreasonableness. A perusal of the judgments does not make it appear that the door was bolted against such an impeachment quite so uncompromisingly as these words would suggest. But for all practical purposes the decision is not mis-represented.

Isaacs J., delivering a judgment which was in accordance with the opinion expressed by the rest of the Court, said that to declare a by-law void as unreasonable would be a serious step "when Parliament

itself by its silence negatives it, and the Governor-in-Council affirmatively repels it." He then dealt with the facts, which he said were "far removed from any such extreme instance as might conceivably warrant a Court in intervening notwithstanding the combined opinion of the Board, the Crown and two Houses of Parliament."

The effect of this decision is virtually to place any by-laws the making of which is surrounded by the safeguards which existed in that instance in the same position as regulations. Let us see how this applies to the by-laws authorised to be made under Commonwealth law.

There appears to be only one Statute at present in force which contains a grant of power to make by-laws. This is the Commonwealth Railways Act 1917-1925, under sec. 88 of which the Commissioner is authorised to make by-laws for carrying out the Act. It is noteworthy that the power is conferred in the standard formula in use for regulations (i.e. "necessary or convenient" etc.). Sub-sec.(2) is to the effect that no by-law is to have any operation until it has been approved by the Governor-General and published in the Gazette. All the by-laws are to be laid before Parliament within thirty sitting days after their making, but no power of disallowance is expressly provided. It is probable that none is

to be implied (See Chapter on DISALLOWANCE).

The question whether in view of the absence of any right in the Houses of Parliament to disallow the by-laws, the reasoning of Jones v. Metropolitan Meat Board (supra) would apply to them, is one on which there can be only speculation until the High Court has spoken. A further circumstance which may be significant is that the by-laws are declared by sub-sec.(3) not to be Statutory Rules within the meaning of the Rules Publication Act 1903-1916. It is submitted as the better opinion that the reasonableness of by-laws made by the Commissioner could be examined by the Courts.

Two other statutes conferring authority to make by-laws for Commonwealth territories have been recently repealed. These were the Seat of Government (Administration) Act 1924-1929, sec. 16 and the Northern Australia Act 1926, sec. 19. These two sections (except for an amendment in the former one allowing provisional by-laws to be made) were in identical terms. They required that the approval of the Governor-General should be obtained, and that all by-laws were to be laid before both Houses of Parliament within thirty days. They were subject to disallowance by either House. They appear, therefore, to have been covered by the principle of Jones v. Metropolitan Meat Industry Board (supra)

and consequently to have been beyond the possibility of scrutiny by the Courts as to their reasonableness, except, conceivably, under extreme circumstances.

Where by-laws are unexaminable in this respect, they are also, it seems to follow, beyond challenge on the ground of their uncertain or negative character, or on that of their repugnancy to the general law, in the sense in which this is described in Halsbury Vol. 23 p. 394. So far as the necessity of keeping within the limits of the power conferred by the authorising Act and of avoiding direct conflict with statute law is concerned, by-laws stand on the same footing as regulations.

CHAPTER III

STATUTORY RULES OF INTERPRETATION.

In ascertaining the nature and extent of the power to make regulations, regard must be had to the Commonwealth Acts Interpretation Acts, which contain important provisions bearing on the matter.

POWERS BETWEEN PASSING AND COMMENCEMENT OF ACT.

Where an Act is not to come into operation immediately on its passing and contains a power to make rules regulations or by-laws, this power is exercisable, unless a contrary intention appears before the commencement of the Act, for the purpose of bringing the Act into operation. Such rules etc. are not however to have any operation antecedent to that of the Act unless (1) such was the evident intention, or (2) such operation is necessary for bringing the Act into effect (Acts Interpretation Act 1901-1932 sec. 4).

It has been held that the fact that a Statute has not been proclaimed to be in operation does not preclude inquiry into the validity of regulations already made under the Statute (Aust. Alliance Assoc. Co. v. Att. Gen. of Qld. 1916 S.R. (Qld.) 135)

MEANING OF EXPRESSIONS USED.

Expressions occurring in rules regulations or by-laws made under the authority of any Act are to have the same meaning as in the Act conferring the power, unless a contrary intention appears. Where any expression used has received definition in the Acts Interpretation Act 1901-1932, the interpretation to be given to it shall be the one laid down in such definition (ibid. sec.32).

POWER TO ALTER.

A power to make rules, regulations or by-laws includes, in the absence of a contrary intention, a power to rescind, revoke, amend or vary them (ibid. sec.33(3).)

SAVING IN EVENT OF REPEAL.

The Acts Interpretation Act 1904-1932, sec.11, provides that, where no contrary intention appears, the repeal of regulations shall not affect certain matters, viz:- (1) rights, liabilities, penalties, or forfeitures which had become operative under the repealed regulations, and (2) any investigation legal proceeding or remedy in respect of these. Every legal recourse is open with regard to such matters "as if the repealing Act or Regulations had not been passed or made". The contrary intention, if any, must be found in the Act or Regulations effecting the repeal.

This section, it will be remarked, deals only with repeal, and does not cover the case of expiry of regulations. "After a temporary Act has expired", says Craies, "no proceedings can be taken upon it, and it ceases to have any further effect. Therefore, offences against temporary Acts must be punished before the Act expires....." (Statute Law 4th Ed. p.338). A fortiori, this is true of regulations. A consequence of this is that in the War Precautions Repeal Act 1920, which continued in force certain of the War Regulations, and fixed an expiring date for them, special provision had to be made preserving rights and liabilities and the competency of proceedings after these regulations should have expired. Consequently, secs. 3 and 7 of that Act contain sub-sections similar in terms to the Interpretation Act section, with the word "expiration" substituted for the word "repeal".

This omission has now been supplied, so far as civil proceedings are concerned, by a very recent amendment which makes the whole of the two Acts Interpretation Acts applicable to regulations (see post). Sec. 11 of the Acts Interpretation Act 1901 provides that the expiration of an Act shall not affect any civil proceeding previously commenced, which shall continue as if the Act were still in force.

A further omission is that there is no

provision for saving after the disallowance of regulations. The position that is created in such an event was the subject of consideration by the High Court, in Victorian Stevedoring Co. v. Dignan 46 C.L.R. In that case it appeared that the regulations under which the appellants had been convicted had, in the interval between the conviction and the appeal, been disallowed by the Senate. In the result, it was held that this could not be permitted to assist the appellants, because the special character of the appellate jurisdiction of the High Court required it to confine itself to the inquiry whether the decision of the inferior Court was right or wrong when it was pronounced.

But two of the Justices dealt with the further matter of what effect the disallowance of regulations had upon transactions under them, and plainly expressed the view that if it had been open to the Court to deal with the case on the law as it stood at the date of the appeal, there would have been no other course possible than to set aside the convictions.

The disallowance of a regulation, it was said, had the same effect on the rights and liabilities of individuals acquired or incurred under such regulation as the repeal of a statute had at common law, apart from any special statutory interpretation provisions. The consequence, in this respect, of the repeal of a statute is well settled (R. v. Inhabitants of Denton 18 Q.B. 761 at p. 770 per Lord Campbell C.J.; Key v. Goodwin 6 Bing.576 at p.582;

Surtees v. Ellison 9 B.&C. at p. 752). In the last-mentioned case, Lord Tenterden C.J. said: "It has long been established that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." Both Rich and Dixon JJ. were of opinion that these words correctly described the position after disallowance of a regulation. The latter Justice seems to qualify his observations to some extent by making it clear that he is speaking of regulations which are a "real exercise of subordinate legislative authority" and are not made in pursuance of any "mere discretionary authority to determine how and when the statute itself shall operate." It is not easy to see how this can make any difference in principle, or to see how the point is to be ascertained at which the latter kind of authority becomes the former. The remainder of the Court did not express any view on the point.

LAYING BEFORE HOUSES AND TAKING EFFECT.

Sec.10 of the Acts Interpretation Act 1904-1930 which provides, again in the absence of a contrary intention, for the time from which regulations are to have effect, the laying of them before Parliament, and the power of disallowance by either House, is of much importance and is elsewhere discussed at length.

It is noteworthy that neither this nor the other section from the same Act discussed above (sec.11) applies to rules of Court and by-laws as well as to regulations. A result of the omission to cover these additional forms, is, in the case of sec.10, illustrated by the Commonwealth Railways Act 1917-1925. Although the by-laws, the making of which is authorised by sec.88 of that Act, are directed to be laid before Parliament, no power of disallowance is conferred on the Houses; and since the Acts Interpretation Act 1904-1930, sec.10 does not apply to by-laws, the power is not supplied by force of that Act.

ASSIMILATION TO ACTS OF PARLIAMENT.

By an amendment of 1932, it is now declared that both Interpretation Acts are to apply to rules regulations and by-laws, as well as to other executive instruments, as if they were Acts. (Acts Interpretation Act 1932, secs. 2 and 3). The effect of this change, in supplying fresh statutory rules of interpretation for sub-legislation, is not so extensive as might at first appear. As has been indicated above, all the definitions of the 1901 Act were already applicable to regulations etc. by virtue of sec. 32 of that Act, and in addition a number of its provisions

were already expressly applicable by their own force. The 1904 Act, apart from those sections dealing in terms with regulations, is almost wholly confined to the interpretation of penal provisions.

Still, the alteration has the effect of applying a number of additional statute rules (e.g. as to measurement of distance and time) to the interpretation of regulations. It is submitted that even without the express extension made by the 1932 Act the Courts would in practice have treated regulations as analogous to, if not actually part of, Acts of Parliament. Definitely this would have been the case with regulations made under a number of enactments like the Customs Act 1901-1930 providing that "This Act" includes all regulations made thereunder, and the Post and Telegraph Act 1901-1923 giving regulations effect as if enacted in the Act. At all events, the position is now that regulations etc. are, for the purposes of the two Interpretation Acts, completely assimilated to Acts of Parliament.

PRESERVATION TO EXTENT OF VALIDITY.

In 1930 the Acts Interpretation Act 1901 was amended by the addition of a new general rule for the construction of statutes, to the effect that where an Act was partly invalid it was to be so construed as to preserve the valid portion. The Acts Interpretation Act 1932 extends this provision to rules,

regulations and by-laws as well as other executive instruments. It is now directed that any such instrument "shall be read and construed subject to the Act under which it was made, and so as not to exceed the power of that authority, to the intent that where any such instrument would, but for this section, have been construed as being in excess of the power conferred upon that authority, it shall nevertheless be a valid instrument to the extent to which it is not in excess of that power." It is necessary briefly to consider what effect this provision is likely to have in sustaining regulations or parts thereof which would otherwise fail altogether by reason of invalidity. Its operation has not been so conspicuously successful in the case of unconstitutional Acts of Parliament as to lead one to suppose that its effect will be considerable.

It is submitted as a sound proposition that, apart from the new rule of construction, the question of whether the valid and invalid portions of regulations are severable would be answered with reference to the same considerations as are applicable to ultra vires Acts of the Federal Parliament. That is to say, the test is the one applied in the Kalibis Case 11 C.L.R. 689 "whether the Statute with the invalid portions omitted is substantially a different law as to the subject matter dealt with by what remains from what it was while the omitted portions formed part of it."

In the case of regulations, of course, instances for the application of such a test can only rarely arise. Ordinarily, the attack is directed against one regulation, which, more or less, is self-contained. The regulation has a single object, and that an invalid one. Instances, however, obviously may occur in which the question of severability does present itself, and here we must determine the effect of the new rule of construction by seeing what effect the same rule has been given in the case of Statutes. Three cases assist us.

The Navigation Act 1912-1926 sec. 2(2) applies a similar rule to the construction of that Act, and this was considered by the High Court in Newcastle and Hunter River Co. v. Att. Gen. for Commonwealth 29 C.L.R. 357. The whole Court, in a joint judgment, said: "We think this provision is a legislative declaration of the intention of Parliament that, if valid and invalid provisions are found in the Act of Parliament, however interwoven together, no provision within the power of Parliament shall fail by reason of such conjunction, but the enactment shall operate on so much of its subject matter as Parliament might lawfully have dealt with." (p. 369).

Thus encouraged, Parliament in 1930 added a new section 15A to the Acts Interpretation Act 1901, giving the rule a general application. But when the

new section fell to be considered in Australian Rys. Union v. Victorian Rys. Commissioners 44 C.L.R. 319, the sweeping words quoted above were emphatically qualified. Rich J. said, speaking for a majority of the Justices and referring to sec. 15A: "In our opinion it does not affect the matter. We think it cannot mean that when the Court has reached the conclusion, as we have done in this case, that a single and indivisible enactment of the Legislature is invalid, the Court is to turn aside from its judicial duties and, assuming the role of legislator, proceed to manufacture out of the materials intended to compose the old enactment an entirely new enactment with a fresh policy and operation." The following important observation was then made upon the words used in the Newcastle and Hunter River Co's Case. "It may be that a general provision applying to all legislation cannot be given the same operation as a special provision introduced into legislation the precise character of which was before the Legislature."

However, in a still more recent case it has been made apparent that there still remain cases where the rule may have an important effect. This was Huddart Parker Ltd. v. The Commonwealth 44 C.L.R. 492, where two sentences of Dixon J. summarily express the view taken by the majority of the Court. "Here the question is," he said, "whether the law shall have the same operation over all or some only of classes of persons and things which are comprised in distributive

descriptions. In my judgment sec. 15A aptly and properly applies to such a case and requires that the descriptions should be confined in their application within the limits allowed by the Constitution." (See also the whole paragraph, p. 513).

It is submitted that a detailed consideration of the two last cited authorities indicates the existence of a definite though somewhat limited field in which sec.15A, and by analogy the new corresponding provision dealing with sub-legislation, can operate effectively. The Legislature may use words, as it did in the Transport Workers Act 1928-1929, sec.3 (considered in Huddart Parker's Case supra) which on their face have a wider operation than the enumerated powers of the Constitution will support. In such instances, for the Court to hold the operation of those words to be capable of surviving to the extent that such operation was intra vires would ordinarily have been (apart from sec.15A) the making of a new law within the meaning of the test in the Kalibia Case (supra). It seems that in such a case the statutory rule of construction will now enable the valid part of the operation to continue, subject to one all-important proviso. The operation must continue to be the same in character as originally intended, though within the more restricted field.

To illustrate: Where Parliament has made

an undivided law applying to A,B, and C, and the law so far as it extends to B and C is ultra vires, it was formerly the rule that the whole law must fail. "When a legislature" said Griffith C.J. in the Kalibia Case (supra) at p.690, "assumes jurisdiction over a whole class of ships over some of which it has and over others of which it has not jurisdiction, and plainly asserts its intention to put them on the same footing, the Court would in effect be making a new law, if it gave effect to the Statute as a law intended to apply to part only of the class." And the reason for this, he went on to explain, was that "whether the Legislature would or would not have imposed disabilities on some only of the class if they had applied their mind to the subject is entirely problematical".

The position is that now Parliament has eliminated that "problematical" element by making it clear in a general constructional direction that where a law is too wide it intends the same law to have effect in the more limited field. Consequently, to give it such effect is no longer to "make a new law" but only to give effect to what must be taken to be Parliament's expressed will. But there the thing ends. Where the effect of preserving a portion of the operation of a law is not simply a matter of restricting the field of the same law but of making it operate in a different way, sec.15A is of no avail. The question is whether by preserving part of a Statute

"the whole policy and operation of the law would be altered" (per Dixon J. Huddert Parker's Case, supra).

If, in the foregoing reasoning and authorities, the particular Statute authorising sub-legislation be substituted for the Constitution, and an ultra vires regulation or other executive instrument be substituted for an ultra vires Act of Parliament, it is submitted that what has been said applies, without further modification, to the extension of the rule to sub-legislation effected by the Acts Interpretation Act 1932.

CHAPTER XV

FORMAL ASPECTS OF REGULATION-MAKING.

RULES PUBLICATION ACT.

Soon after the establishment of the Commonwealth, provision was made by Statute by the Rules Publications Act 1903 for the publication of statutory rules. In its unamended form, this Act followed the lines of legislation which has had effect in England since 1893, and provided for publicity to be given to rules regulations and by-laws both before and after their taking effect.

The term "statutory rules", so far as the Commonwealth is concerned, takes its meaning from this Act, and is defined (sec.2) as including all rules regulations and by-laws which

(a) relate to any Court or to legal procedure etc. in the Commonwealth,

or, (b) "are made by the Governor-General, or any Minister, or the Interstate Commission, or any Government department".

The definition is, therefore, a comprehensive one. The Act makes provision (sec. 5) for the printing, numbering and sale of statutory rules. Sec. 6 makes the Government Printer's copy evidence of the

due making of the rules. With the exception of secs. 3 and 4, the addition of a regulating power completes the Act.

PUBLICITY BEFORE MAKING.

As the Act originally stood, sec. 3 provided that sixty days before any rules were made "notice of the proposal to make the rules and of the place where the copies of the draft rules may be obtained" should be published in the Gazette. During those sixty days, the section continued, any person might obtain copies of the draft rules, and "any representations or suggestions made in writing by a person interested to the authority proposing to make the rules shall be taken into consideration by that authority before finally settling the rules." Sub-sec.(3) defined the scope of the section, declaring it to apply to all statutory rules made in pursuance of any Act which directs the rules to be laid before Parliament, with the exception of any rules which are required to be so laid for any period before having effect.

The cases not covered by this sub-section were in practice entirely unimportant, since almost every Commonwealth Act, either by the terms of the regulation-making section of the Act itself, or by virtue of the Acts Interpretation Act 1904-1932, directs that the regulations are to be laid before the Houses.

The "exception", as to regulations which did not take effect until an interval had elapsed after the laying before Parliament, was likewise of trifling importance, since only in one instance, that of the Representation Act 1905, has Parliament made such a provision.

PROVISIONAL RULES.

Sec. 4 provided for cases where the delay of sixty days might be prejudicial by enacting that "where a rule-making authority certifies that on account of urgency or any special reason any rules should come into immediate operation" the rules should forthwith take effect, but as provisional rules only. The latter were to continue in force only until ordinary rules were duly made in accordance with sec. 3 to take their place. The importance of sec. 4 was that it afforded the Executive a ready alternative to the somewhat irksome requirements of sec. 3. As in the English Act also, there was nothing to oblige the administration ever to issue confirmatory regulations in place of the provisional ones. Consequently, even before the Great War, the issue of provisional rules had become very frequent. After August 1914, the making of provisional rules which waited in vain for their confirmation became almost the universal plan for rule-making authorities.

REPEAL OF SECS. 3 AND 4.

It may have been the consideration that this deluge of provisional regulations was hardly consistent with the spirit (or perhaps even the letter) of the Act which led to the passing of the Rules Publication Act 1916, repealing secs. 3 and 4. The debates in Parliament on the passage of this measure are significantly meagre. The Bill was introduced in the Senate, where the Minister made a brief speech, rich with confession.

"The confirmation of provisional rules", he said, "is not obligatory, as the provisional rules have full force so long as they are not superseded by the confirmatory rules. It has been found in practice that the method of making regulations by giving sixty days' notice is seldom adopted, recourse being usually had to the provisional system on account of its greater expedition. In many cases.....it has not been found advisable to issue the confirmatory regulations." (Hansard, Vol. LXXXIX p.7823).

The Bill was passed through the House of Representatives without discussion or amendment. Only one voice was raised against it, that of Senator Senior. His words are so pregnant, and show so clear a perception of a constitutional problem which is only now beginning to be generally understood, that a passage from them is worth full quotation:-

"It is the duty of honourable senators to

conserve as far as they possibly can the functions of Parliament. One of those functions, the principal one - is that of legislation. But by virtue of certain provisions which are appended to Bills we frequently find that our powers of legislation have passed into the hands of Departments or of officials in Departments.

To my mind, the two sections of the Rules Publication Act of 1903 which it is proposed to repeal have hitherto largely safeguarded the functions of Parliament. We are now invited at a stroke of the pen to excise these provisions, and to forfeit much more than appears on the surface.....

"I ask honourable senators", he concluded, "not to hand over indiscriminately to the heads of Departments power so vast and far reaching." (Hansard Vol.LXXIX p.7877).

This protest is as apposite to-day as it was then. The fact that he should have been alone in making it is itself significant. How far the repealed sections were of real value, having regard to the ease with which the preliminary publicity could be, and was, evaded is a dubious matter. The Minister in the Senate was able to state in reply to the criticism that has been quoted, that "In the whole

course of fifteen years not a single exception to any proposed statutory rule has been lodged." (Hansard Vol. LXXIX p. 7878). However, the sections appear to be regarded by constitutional writers generally as having had a salutary effect. The mere presence of the check helped to prevent the occasion for its use (See The New Despotism: Lord Hewart, Ch.VI; K.H. Bailey: A.L.J. Vol.4 p.42; Lectures on Delegated Legislation: Carr.).

COMPARISON WITH ENGLISH ACT.

The Act follows fairly closely the English Rules Publication Act 1893, from which it is obviously taken. Before the repeal of secs. 3 and 4. however, the safeguard provided was more exacting against the Executive than in England. The period of notice required to be given was sixty days instead of forty in England. Further, the right to make representations and suggestions was enjoyed in Australia by any "person interested" whereas in England the right is still confined to "any public body". Finally, and of chief importance, the Commonwealth sections applied, as has been seen, to practically all statutory rules. In Great Britain on the other hand a number of the chief Government Departments have been expressly exempted from the operation of the Act.

However, this contrast speaks in the past

tense. The English Act, limited in its scope as it is, has immeasurably more value as a check on the Executive than the disembowelled ruin remaining to the Commonwealth after the 1916 amendment.

RECENT PROPOSED LEGISLATION.

As a result of the closer attention which the question of legislation by the Executive has lately been receiving, an attempt was recently made to restore the excised provisions to the Act. In October, 1931, leave was granted by the Senate to introduce a Rules Publication Bill which was designed not only to re-insert the requirement as to sixty days' notice of proposed statutory rules, but to place an effective check on the making of provisional rules. The latter were not to remain in operation for more than one month unless before the expiration of that period they were approved by each House. If any provisional rules were not so approved, the Bill provided that no provisional rule dealing with the same subject matter might be made at any time before the next session. An amendment submitted by Sir George Pearce proposed to add that either House might at any time disallow a provisional rule, after which "no rule, made during the same session and similar in substance and effect to the rule disallowed, shall come into operation."

However, political considerations intervened,

and the Bill was allowed to lapse.

PROOF OF STATUTORY RULES.

Sec.6 of the Rules Publication Act declares that "any printed paper, purporting to be a copy of statutory rules made by a rule-making authority and to be printed by the Government Printer, shall in all Courts within the Commonwealth be evidence" of the due making and current operation of such statutory rules. In Grieve v. Lewis 23 C.L.R. 413, a case involving a War Precautions regulation, the question was raised whether this meant that the copy had actually to be tendered. The position that arose, and the Court's opinion on it, were succinctly stated by Barton J. (p. 417). "In this case," he said, "a printed paper purporting to be a copy of a statutory rule, and to be printed by the Government Printer, was produced to the Court, and both sides dealt with it as being part of the material before the Court. It was not formally put in or marked as an exhibit. Nevertheless it was made evidence by the course of the case. I think it would be impossible to contend that by virtue of sec. 6 the regulation was not proved."

No reference is made in the case to sec.5 of the Evidence Act 1905 (Commonwealth), which, it seems, would have disposed of the matter. This section provides that evidence of any regulation may be given in various ways, including the mere production

of the Government Printer's copy. Incidentally, the section applies also to proof of proclamations, commissions, and orders.

LAYING BEFORE HOUSES.

How far the laying of regulations before the Houses is a condition precedent to their validity when they are required to be so laid is a question which has been the subject of some apparent conflict of authority - conflict which largely disappears when the principle on which the cases rest is rightly understood. All the chief pronouncements upon and round the subject distinguish between statutory commands as to procedure which are "directory" only, and those which are mandatory or "imperative", the latter class being conditions precedent to the validity, when done, of the thing to which the procedure applies. Thus Craies says: "An order to take effect on gazetting would not be enforced unless it appears that this provision was a condition subsequent or merely directory and not a condition precedent to their taking effect." (Statute Law 4th.Ed. p. 263). As to what are to be regarded as imperative directions, or conditions precedent, we have one important rule of construction to guide us, that "unless the Legislature has in plain words said that a thing is to be a condition precedent, we must not so construe it." (Thompson v. Harvey 4 H.&.N. 254 at p. 262). In some cases the matter is beyond doubt, as in Metcalfe v. Cox 1895 A.C. 328,

where after the Legislature had given directions as to publication etc. it went on to provide specifically that "no such ordinance shall be effectual until it shall have been so published, laid before Parliament, and approved." It is only rarely, however, that Acts of Parliament speak on the matter in such clear terms.

In the case of Commonwealth statutes, the important provision to be interpreted is, of course, sec. 10 of the Acts Interpretation Act 1904-1932. On this section the recent High Court Case of Dignan v. Australian Steamships Ltd. 45 C.L.R. 188 affords some valuable guidance. The decision was actually on the point of whether compliance with the requirements of sec. 10 as to the laying of regulations before Parliament was a condition precedent to the exercise by the Senate of its power of disallowance. Two of the Justices, however, referred to the matter of how far regulations could be valid at all if not laid before Parliament. Thus Starke J. at p. 202, s says: "The implication of this provision, we have been told, is that the regulation-making authority must lay a regulation before each House of Parliament within fifteen sitting days of that House, or else the regulation is void. But no such sanction is to be found in the Act itself, and the suggested implication is quite unnecessary if the purpose of the provision be to apprise the Houses of regulations, and not to prescribe a condition of their power to disallow them."

Dixon J. was even more explicit. "I can find no justification", he says at p. 205, "for the view that if the regulations are not laid before both Houses within the time provided by the Statute they cease to operate. The section does not say so, and it would be strange if such an omission, of which there could often be no public knowledge, operated to annul an existing law."

It is true that the above observations were partly obiter, were out of consonance with the view taken by Gaven Duffy C.J. and Evatt J. who dissented, and received no support from the only other Justice. Regard should therefore be had to certain further authorities on the matter.

In Darrach v. Thomas 31 W.N. (N.S.W.) 22 the Statute in question authorised the Judges of the Supreme Court to make rules for certain appeals, and provided that "all general rules made under this Act shall be laid before both Houses of Parliament within fourteen days." It was held by the Full Court of N.S.W. that the rules became and remained operative although they had never been laid before Parliament. The decision appears to have been regarded with approval by Dixon J. in his judgment referred to above. Another Australian case in point is Bain v. Thorne 12 Tas. L.R. 57 where a Tasmanian Statute required

that regulations made under it should be published in the Gazette and laid before Parliament within fourteen days of their approval, or if Parliament was not then sitting within ten days of the commencement of the next session. It was provided that the regulations, "after such approval and publication as aforesaid shall have the force of law."

The Court based its decision, holding a regulation invalid by reason of its not having been laid before the Houses, on two alternative and mutually exclusive grounds. It was said that "the laying of the regulations on the table of both Houses is part of the publication contemplated in this section and the regulations do not come into force until the whole of the conditions of that section as to publication are complied with." This, the first ground, involved the consequence that even regulations which ultimately complied with the requirements were, until that compliance was complete, wholly inoperative. The other ground was that even if the laying of regulations before the Houses was not a condition precedent to their having any effect, it was at least "a condition precedent to the regulations becoming permanent law as distinct from their becoming temporary law as the outcome of the gazetting."

This case is, of course, distinguishable from

the two cited before it in that the regulations are by the terms of the Statute, not to have the force of law until "after such approval and publication." This provision might well be regarded as inescapably imperative in character, and brings Bain v. Thorne within the class of instances exemplified in Metcalfe v. Cox (supra).

Apart from these cases there seems to be no direct authority whatever on the matter. In Institute of Patents v. Lockwood 1894 A.C. at 357, it was said referring to the provision (similar in nature to sec.10) which was there under consideration as to the statutory rules made by the Board of Trade, that "the laying of them on the table is made compulsory." But the attention of the House of Lords was not then being directed to the question of the effect on the validity of the rules of failure to comply with this requirement. It would need explicit accompanying words to give to "compulsory" as there used the meaning of "a condition precedent to validity."

It thus appears that the dicta of Starke and Dixon JJ. in Digman v. Australian Steamships Ltd. are in accordance with the principles elsewhere enunciated. "No universal rule", said Lord Campbell L.C. in Liverpool Borough Bank v. Turner, 30 L.J. Ch. 379, "can be laid down for the construction of

statutes, as to whether mandatory enactments shall be considered directory only, or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature." (See also Howard v. Bodington 1877 2 P.D. 203). It must now, it seems, be taken that the application of this rule to sec.10 of the Acts Interpretation Act 1904-1932 involves the treating of the requirement as to laying before the Houses as directory only, and not a condition precedent to the validity of sub-legislation; so that Commonwealth rules and regulations remain of full force and effect even if the statutory direction to table them be wholly disregarded.

GAZETTING.

In contrast with the provision of sec.10 just discussed, the requirement of the same section that regulations shall be "notified in the Gazette" is expressly made essential to their valid operation, since they are to take effect "from the date of such notification or from a later date," and not otherwise. This practically disposes of the matter as far as regulations are concerned.

Other forms of executive action, such as orders, however, are sometimes required to be notified in the Gazette without this step being expressly made a condition precedent to their having effect. (See e.g. Navigation Act 1912-1926, sec. 423A). In such cases,

the question of how far gazetting is indispensable to validity must depend on the same consideration as was discussed above in connection with the tabling of regulations - i.e. whether the requirement is imperative or not. The command that executive instruments should be published in an authorised form and place, so that the public may have a certain method of ascertaining the law, seems to have more of essential substance in it than the tabling provision, which was described in Pignam v. Australian Steamships Ltd. as "a mere procedural requirement prescribed for no other purpose than to acquaint the Houses that regulations have come into existence, the annulment of which they might wish to consider." It is conceived, therefore, that ordinarily a direction to publish in the Gazette would, in the absence of words indicating a contrary intention, be treated by the Courts as imperative, and as constituting a vital step in the process of effectively making the instrument which is directed to be so published.

TIME OF TAKING EFFECT.

In the great majority of cases, the time from which regulations are to take effect is governed by sec. 10, and they accordingly operate from the date of notification in the Gazette. Three Acts, however, by express provision, place the regulations

under them on a different footing.

(1) The Immigration Act 1901-1930, sec.3 contains a special proviso that no regulation prescribing a language for the dictation test to be imposed on immigrants "shall have any force until it has been laid before both Houses of the Parliament for thirty days and, before or after the expiration of such thirty days, both Houses of the Parliament, by a resolution, of which notice has been given, have agreed to such regulation." This is the only instance to be found in the Commonwealth statutes where a regulation has to be affirmatively approved by the Houses, although such a requirement is not uncommon in England. Incidentally, it could scarcely be contended here, as it was successfully argued in Dignan v. Australian Steamships Ltd. (supra) that the stipulation with regard to the giving of notice of the resolution is not an "absolute or imperative" direction.

(2) The Representation Act 1905, sec.13 requires regulations to be laid ~~down~~ before the Houses within thirty days of making, and directs that certain of them are not to have effect until (a) the expiration of thirty days after they are laid on the table, or (b) if within that time a resolution has been proposed in either House to disallow it, until the

resolution has been dealt with. It is also provided, of course, that if such a resolution is carried the regulation does not come into operation at all.

(3) Certain regulations under the Quarentine Act 1908-1924, sec. 87 are to come into force in pursuance of an order made by the Minister. They are to have an operation limited to the particular State or locality mentioned in the order, and are to remain in force only for so long as the order directs. They may be renewed by a further order.

CHAPTER V

DISALLOWANCE BY THE HOUSES OF PARLIAMENT.

The power of disallowance is always retained by Parliament in respect of regulations and ordinances made under Federal Statutes. A few Statutes form, or may form, an exception to this general statement and attention will be drawn to these later. It is proposed to examine first the nature and effect of the statutory terms in which Parliament has reserved to itself the power of annulling regulations, and afterwards the working of the machinery thus created.

ACTS INTERPRETATION ACT 1904-1932.

For the most part the annulling power in Federal Statutes is reserved without any express stipulation in the Statute itself, but by force of the Acts Interpretation Act 1904-1932, sec.10. This section is so important as to require to be set out at length. It is in the following terms:-

"Where an Act confers power to make Regulations, all Regulations made accordingly shall, unless the contrary intention appears -

(a) be notified in the Gazette;
(b) take effect from the date of notification,

or from a later date specified in the Regulations;

(c) be laid before each House of the Parliament within fifteen sitting days of the House after the making of the Regulations.

But if either House of the Parliament passes a resolution of which notice has been given at any time within fifteen sitting days after such regulations have been laid before such House disallowing any regulation such regulation shall thereupon cease to have effect."

MEANING OF THE SECTION.

The section is not to be taken to mean that if the regulations are not laid before both Houses within the prescribed fifteen days they are to cease to have effect. Darrach v. Thomas, 31 N.S.W. W.N. 22; Dignan v. Australian Steamships Ltd. 45 C.L.R. 188, per Dixon J. at p. 205. In the last mentioned case, of quite recent date, the effect of the section was elsborately considered by the High Court. The question arose out of the circumstances surrounding the dispute between the Senate and the House of Representatives over the disallowance by the first mentioned Chamber of regulations made under the Transport Workers' Act 1928-1929. The representative of the Government in the Senate having delayed to lay the regulations in question before the House for some days after their promulgation, the Senate took the matter into its own

hands and directed that the regulations should be laid on the table forthwith. On this being done, the House thereupon suspended its own standing orders, and passed at once a resolution disallowing the regulations.

Two questions arose, on appeal from a conviction under the regulations. Firstly, did the section require in order that a regulation should have been properly disallowed, that it should have been laid on the table by a Minister of the Crown at the instance of the Governor-General, the authority empowered to make the regulations? This matter was disposed of with little trouble by the majority of the Court. It was held that since the section did not impose upon any specific person or body the duty of causing the regulations to be laid before the House, it was perfectly competent for the Senate to produce this result by its own act.

The second question presented more difficulty. <u>Was it not mandatory under the terms of the section that notice of motion to disallow should be given within the fifteen days after the laying on the table?</u> In the case being examined the only notice which had been given was before the laying on the table and consequently not within the fifteen days. This notice was subsequently withdrawn.

It was held that the requirement of notice

was not a condition precedent to effective disallowance. The Court applied the well-defined distinction drawn in English cases between "absolute or imperative" and merely "directory" provisions in an Act of Parliament. Where words prescribing the manner in which something is to be done are of the first kind, invalidity is the consequence of departure from strict compliance. Where they are merely directory, no invalidity follows. The Court emphasised that the main object of the section was secure that the regulations should be brought under the notice of the Houses, and that the requirement as to the giving of notice was merely one of machinery designed to achieve this end. To hold that the failure to give notice sterilised the purported disallowance was to "convert into a condition essential to the validity of the disallowance a mere procedural requirement prescribed for no other purpose then to acquaint the Houses that regulations have come into existence, the annulment of which they might wish to consider." (ibid. p. 206).

Dixon J. goes so far as to say definitely that the power of disallowance possessed by the Houses is in no sense dependent upon the laying of the regulations before them at all; and although this view is not expressly taken by the other Judges forming the majority it seems to be fully consistent with their observations. "The real intention of the Legislature appears to me", says Dixon J. (p. 208) "to have been.....to require the regulations to be brought

to its notice, but not to condition its power of disallowance upon this being done, and to require it to begin to act in the exercise of the power before the expiration of a time set running by laying the regulations before it. In my judgment it was open to the Senate to proceed to disallow the regulations before they were laid before the House."

ACTS PRIOR TO 1904.

Prior to the passing of the Acts Interpretation Act 1904, there was no settled model for defining the regulating power, and the restrictions upon it; and considerable variation in the form of the provisions designed for this purpose is apparent. Thus the time within which the regulations had to be laid before the Houses was variously prescribed as seven, fourteen and thirty days. No reference is made in most of these earlier Acts to the requirement of notice before disallowance, introduced in 1904, which was the subject of the decision examined above.

The power itself was conferred in differing forms, which were sometimes narrower in scope than that which was later to be generally adopted. But the feature of these earlier Acts with which we are here concerned is that in a number of cases they contained no power of disallowance of regulations at all. The Acts Interpretation Act 1904-1932, sec.2, limits the

application of the provisions of that Act to legislation passed after its commencement. The result is that the enacting of sec. 10 cannot operate to vest any power of disallowance in the Houses in respect of prior Acts in which no such power was given.

Certain Acts which were passed before 1904 and did not contain any power of disallowance are still in operation without any change having been made in this position (See e.g. the Audit Act 1901-1926, and the Pacific Island Labourers Act 1901-1906). The position under the Service and Execution of Process Act 1901-1931 is obscure. The original section, making no provision for disallowance, was amended in 1918 by eliminating the words conferring the regulation-making power, and substituting a grant of power somewhat differently worded. To this amending Act, sec.10 would prima facie apply. The question arises, however, whether the detailed provision made in the Service and Execution of Process Act as it now stands, with regard to the matters covered by sec.10, does not give its silence on the matter of disallowance the force of a "contrary intention" within the meaning of sec.10 so as to prevent that section from implying the power of disallowance in the amending Act.

Certain other Acts which were passed prior to 1904 and contained no power of disallowance have now been brought into line with the general system by

later legislation (See e.g. the Immigration and Electoral Acts).

ACTS SUBSEQUENT TO 1904.

The almost invariable formula in use since 1904 for conferring the regulation-making power consists of the mere grant of authority to make regulations for carrying out the Act. The form of words employed for this purpose has been analysed and discussed in Chapter II (supra). Except in special cases, nothing is said in the Acts as to laying before the Houses, or disallowance, or the date of taking effect, these matters being left to be implied from the operation of sec.10.

The question mentioned above as being raised by the Service and Execution of Process Act arises also in connection with the Commonwealth Public Service Act 1922, although this stands as a fresh Act passed long after sec. 10. Sec. 97 of the Act gives power to the Commonwealth Public Service Board to make regulations, which are to be approved by the Governor-General, after which they are to have "full force and effect". They are specifically directed to be laid before the Houses of Parliament within seven days, but there is nothing in the Act about the possibility of disallowance. It seems reasonable to suppose that the maxim expressum facit cessare tacitum would apply.

and that a "contrary intention" is manifested by the Legislature, preventing any power of disallowance from being implied.

RULES OF COURT.

Sec. 10 of the Acts Interpretation Act 1904-1930 deals only with regulations and does not extend to cover rules of Court made by Judges under the authority of various Acts for regulating matters of practice and procedure. Special provision is therefore, made in each of such Acts as to the manner of disallowance. In most cases the incidents attached to the taking effect and disallowance of rules are the same as the standard scheme for regulations (See e.g. the Income Tax Assessment Act, sec. 53 and the Commonwealth Conciliation and Arbitration Act, sec. 43). On the other hand, the Judiciary Act 1903-1927 and the High Court Procedure Act 1903-1925 are cast in a form considerably more favourable to the rule-making authority (in this case the Justices of the High Court). It is provided that the rules must be laid before the Houses within forty days after making. In order that any rule should be disallowed it is necessary for either House to present an Address to the Governor-General within the next subsequent forty days praying that it may be annulled, whereupon "the Governor-General may annul it". Perhaps this is an instance

in which the word "may" has the effect of "shall". "'May' always means may", it was said in a recent case, "'May' is an enabling expression; but there are cases in which, for various reasons, as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it" (Sheffield Corporation v. Luxford 1929 2 K.B. 180). The High Court Rules take effect immediately on making, and any annulment of a rule is without prejudice to any proceedings which have been taken under it.

The Service and Execution of Process Act 1901-1928 is an anomalous case. Power is entrusted by sec. 27 to the Judges of the Supreme Court of any State to make rules of procedure. No power of disallowance at all is provided, possibly for the reason that six Legislatures would have to be invested with the right of control. It is noteworthy that a similar position was dealt with in another way under the River Murray Waters Act 1915-1923. It is provided by Sec. 7 of that Act that the regulations made by the Commission should be laid before the Houses of the Commonwealth and of each of the three States concerned. Disallowance is to be effected by the passing of a resolution by each House of any of the four Parliaments within fourteen sitting days after the tabling of the regulations.

ORDINANCES.

The various Territories administered by the

Commonwealth under the powers conferred by sec. 122 of the Constitution are governed by Ordinances, made by the respective administrative authorities. In every case but one, a power of disallowance is reserved to the Houses of Parliament in precisely the same way as in the case of regulations. The times for laying the Ordinances on the table and for disallowing them show some unimportant variation.

The exception is the Papua Act 1905-1924. This Act provides that the Legislative Council of Papua may make Ordinances for the government of that Territory, subject to the assent of the Lieutenant-Governor, who may in any instance, and shall in a number of specified cases, reserve the Ordinance for consideration by the Governor-General. Where it is thus reserved, an Ordinance has no effect until it receives the assent of the Governor-General. Sec. 42 provides that every Ordinance "shall, as soon as may be after being assented to, be laid before both Houses of the Parliament". There is no provision at all for disallowance, and the Acts Interpretation Act 1904-1932 is of course not applicable.

BY-LAWS.

The Commonwealth Railways Act 1917-1925, under which power is given to the Commissioner to make by-laws on a considerable range of subjects, is

the only Commonwealth Statute now in force which authorises this form of legislation. The by-laws must be approved by the Governor-General and published. They must be laid before the Houses within thirty sitting days, but no right of disallowance is reserved. Here again, as with Ordinances, it would seem that the Acts Interpretation Act, sec. 10, is inapt to apply. Even if it did apply, the detailed provision made for all the matters dealt with in sec. 10 would almost certainly constitute an expression of a "contrary intention" within the meaning of that section. See the evidence of Professor K. H. Bailey before the Senate Select Committee (Transcript p.20) "The by-laws made by the Commissioner under the Commonwealth Railways Act can probably be overruled only by an Act of Parliament, and not by a resolution." This statement, of course, refers to by-laws which are intra vires. If they exceed the statutory authority the Courts can deal with them.

Other instances, which have now disappeared through the recent repeal of the authorising legislation, were found in the powers given to the North Australia Commission and the Federal Capital Commission respectively. These Commissions were authorised to make by-laws for specified local government purposes involving a wide sphere of authority. The by-laws were required to be laid before Parliament, and the

normal right of disallowance was expressly reserved to the Houses.

AN ANOMALOUS CASE.

An unusual example of the retention of Parliamentary control over executive action is found in sec. 12A of the Seat of Government (Administration) Act 1910-1931. The "plan of lay-out" of the City of Canberra as formally settled by publication in the Gazette is made subject to a right on the part of the Minister to make any variation he may think fit. Any such variation must be made by written instrument after due notice of intention to vary has been given. The variation takes effect immediately on making, but must within fifteen Parliamentary sitting days thereafter be laid before both Houses. At any time within a further fifteen days either House may disallow the variation by resolution, and thereupon it shall "cease to have effect."

DISALLOWANCE IN PRACTICE.

The question arises how far the check provided by the power of either House to annul regulations is of real value. It cannot be said that this is the case to any great extent. There are a number of factors which join to prevent Parliament

from discharging effectively what if fully performed would be a most valuable function. But the degree of control exerted is shown not unfairly by the relative infrequency of motions attacking regulations.

POWER RARELY USED.

Indeed, except for the remarkable episode concerning the Waterside Employment regulations which is dealt with hereafter, the power of disallowance has been very rarely exercised by the Houses. Professor K. H. Bailey, giving evidence before the Select Committee of the Senate, stated that after a check of the three years 1926-27-28 he had found in the records of the Senate only two motions for disallowance - one directed against a regulation and the other against a Northern Territory Ordinance. Both were unsuccessful.

Nor is the Federal Parliament unique in this respect. Sir John Peden, President of the Legislative Council of New South Wales, affirmed that during thirteen years of parliamentary experience in that House he had known of only one notice of motion to have a regulation disallowed. In that case the Government met the position by withdrawing the offending regulation (See also the evidence of Sir Daniel Levy as to the Legislative Assembly of the same

State, Transcript p. 43).

These facts reveal that whatever may be the apparent potency of the weapon of disallowance, it is called into actual use with significant rareness. No doubt the fact that there is a right of review reserved to the Houses has some effect in restraining bureaucratic excesses, like the birch prominently displayed on the wall of the school-room, which needs only rarely to be unhooked from its nail. As Professor C. K. Allen has said: "These checks are more formidable in theory than in practice.....On the other hand, the mere existence in potentia of Parliament's right of intervention is no inconsiderable safeguard against hasty or arbitrary sub-legislation." (Law in the Making, p. 312).

HOUSE OF REPRESENTATIVES.

One thing is certain. The House of Representatives, at all events, stands in a most unsatisfactory position for exercising an effective control over regulations. In this respect it is in no better and no worse case than any other representive Chamber the support of which is vital to a responsible Ministry. The continuance in office of a Government depends upon its ability to command the vote of the House of Representatives. Regulations are in a direct sense identified with the Government. It follows that a motion for disallowance of a regulation in the Lower

House can hardly fail to be treated as a party question, the defeat of the Government on which would be regarded as a vote of no confidence.

This is not to say that action by the popular House can never be effective to control regulations. Sometimes the mere threat to move a resolution of disallowance may be sufficient to secure the withdrawal of the offending regulation; and in special cases the Government might conceivably be able to treat the question as being of a non-party nature. Broadly speaking, however, it is true to say that whatever thorough and effective supervision of regulations is to be done, must be at the hands of the Upper or revising Chamber. The difficulties attendant upon action against regulations in the popular House are illustrated by the fact that until quite recently the form of the Standing Orders of the Legislative Assembly of New South Wales made it virtually impossible for any member to secure even the discussion of a motion of disallowance (See Select Committee of Senate: Transcript P. 42). An amendment of the Standing Orders to give such motions priority has now remedied the position.

IMPERFECT SCRUTINY.

Another practical reason why the machinery for Parliamentary supervision of regulations is not

genuinely effective is that the volume of regulations is so great and the time and interest of members of Parliament so limited as to preclude any proper examination. One or two opinions given in evidence before the Select Committee of the Senate by men of lengthy Parliamentary experience are worth quoting.

Senator Walter Kingsmill, President of the Senate, said: "Regulations framed under various Acts of Parliament are laid on the table in great profusion, but, generally, little notice is taken of them by ordinary members." "What ever the theory may be", said Mr. R. G. Menzies, K.C., M.L.A. of Victoria, "in practice we find that while Parliament scrutinizes Acts, it does not scrutinize regulations." And Sir Daniel Levy, for many years Speaker of the Legislative Assembly of New South Wales, declares: "In our House, regulations are laid on the table, and they are nobody's business. Nobody cares."

PROFUSION OF REGULATIONS.

No doubt the sheer labour involved in any comprehensive examination of regulations is in itself enough to prevent its being made. Appalled at the magnitude of the task of scrutinising them all, the average member, in the result, does not read any. The Select Committee states in its Report: "They

(i.e. regulations) are so numerous, technical and voluminous that it is practically impossible for Senators to study them in detail and to become acquainted with their exact purport and effect."

This, indeed, was the ground given by the then Prime Minister of Britain in rejecting a proposal for the appointment of Sessional Joint Committees to examine all regulations and departmental orders. In reply to a question on 4th. March 1929, Mr. Baldwin told the House of Commons that the suggestion was impracticable, as a thorough investigation by such a Committee could not be effectively secured "owing to the large number of Statutory Rules and Orders made in every year, to the variety and complexity of the subjects with which they deal and to the fact that many of them are issued during the Parliamentary recess."

The Prime Minister supported this answer with figures showing that for the immediately preceding three years the average yearly number of pages of the official edition of the Statutes was 539 while the corresponding number of pages in the official volumes of Statutory Rules, (more closely printed than the Statutes) was no less than 1,844.

The figures for the Commonwealth are no less striking. If the facts stated by Mr. Baldwin are an argument why a Sessional Committee would prove unequal

to the task of examining regulations, they are also an enlightening comment on the entire futility of leaving the work to individual members. A Committee might accomplish little; but the casual and sporadic attentions of individuals will achieve even less. As matters now stand, the tendency for the disallowance power to lose whatever practical value it has through simple disuse is obvious. "It cannot be disguised", Professor Allen warns us, "that the more rapidly sub-legislation grows, the greater is the danger that Rules and Orders may escape the vigilence of the House, and that ratification by Parliament may become more and more mechanical." (Law in the Making, p. 312).

ACTION BY INTERESTS AFFECTED.

It may be said with some weight that the present system provides, after all, a somewhat better protection against obnoxious regulations than might be supposed. It may well be, so far as the members of the Houses are concerned, that, as Sir Daniel Levy says, the regulations are "nobody's business". But in the majority of cases regulations have an operation affecting particular interests or sections among the public. These persons or interests affected, or someone on their behalf, may be depended upon to assimilate the regulations as they are issued, and to learn their scope and effect. If any gross abuse or injustice is sought to be introduced by regulation,

those against whom it is directed can usually succeed in securing the support of Members to have the matter brought up in Parliament.

But it is a poor sort of Parliamentary control that has to be galvanised into action by the victims themselves of administrative excess. Further, the fact remains that motions for disallowance are rare in the extreme. The most that can usually be achieved is the supreme fatuity of asking the Minister a question; and after this has been suavely and dexterously answered officialdom pursues the even tenor of its way.

WATERSIDE EMPLOYMENT REGULATIONS.

Conflict between Senate and House of Representatives.

During the year 1931, a situation arose in the Federal Parliament with regard to the promulgation and disallowance of regulations, which involved a question of great constitutional interest. The policy of the Government of the day included as one of its facets the introduction of compulsory preference to members of trades unions. To give effect to this object, the Governor-General made regulations under the powers conferred by the Transport Workers' Act 1928-1929, applying the principle of preference

to unionists to the engaging of waterside workers, and providing penalties for breach. The Senate contained at that time a majority hostile to the Government, and keen opposition was aroused by the move because of its effect in postponing returned soldiers to trades unionists in the obtaining of waterfront employment. At the time when the regulations were made, Parliament was in recess; but when the Houses met in March 1931 the regulations were promptly disallowed by resolution of the Senate passed in the prescribed manner.

The Government immediately issued the regulations again, in a form which reiterated the substance of those which had been annulled. The fresh promulgation was made within a few hours of the disallowance. In less than a week from the date of the first resolution the new regulations had met the same fate at the hands of the Senate. But the Ministry was determined. A delay of up to fifteen days in laying regulations before the Houses was permissible under sec. 10 of the Acts Interpretation Act 1904-1930, which governed the situation. Accordingly it was discovered that by the stratagem of allowing some days to elapse before making the regulations available to the Houses, and of having a further set of regulations prepared for immediate promulgation upon disallowance of the existing ones,

it was possible to keep the law as declared in the regulations substantially operative throughout the session, in spite of the bitter opposition of the Senate.

The form of the regulations was somewhat altered with each succeeding issue, with a tendency to elaboration, so that ultimately the original provisions occupying less than half a page of the official copy had grown to more than two pages. Their nature and substance, however, remained unaltered throughout. Altogether, eleven sets of regulations were disallowed by the Senate between March and November 1931. The last batch was issued on November 26, the same day as the last preceding set had been annulled, and Parliament rose before it could be dealt with by the Senate. Before the Houses met again a new Government as its first executive act repealed the regulations. (S.R. Nos. 1 and 2, 1932).

Petition to the Governor-General.

On May 28, 1931, after four sets of regulations had been annulled, the Senate presented an Address to the Governor-General, praying that his approval might be refused for any further regulations in the then current session which should be the same in substance as those already disallowed.

Two grounds were relied on in support of the Address. The first was that the Government's tactics involved the assumption by the Executive of a legislative power which had never been delegated to it. It was urged that a "limited power of legislation" only had been delegated, and that this was subject to the right reserved by Parliament for either House to disapprove of what was done. The inference was sought to be drawn that the regulating power could not therefore extend to the making of regulations in direct conflict with the regularly expressed disapproval of either House as manifested by the act of disallowance.

The second ground appeared to have much less substance. The Senators referred to the rule of practice in both Houses that no question or bill may be offered which is, "substantially the same as one on which their judgment has already been expressed in the current session." May's Parliamentary Practice was cited in support. Constitutional convention, it was contended, required that the Executive should not be free from a restriction which thus rested upon the Legislature.

The Reply.

After a lapse of some days, the Governor-General, Sir Isaac Isaacs, made a lengthy and closely reasoned reply, which must take its place as an

important constitutional document. His Excellency rejected both arguments. He emphasised as a starting point that normal constitutional practice "confirmed, and perhaps strengthened, by the pronouncement of the Imperial Conference of 1926" required that he should act on the advice of his Ministers. He then proceeded to consider whether there were adequate grounds in the instance before him for departing from that principle. He pointed out with regard to the first ground, that there was in fact no question of excess of statutory authority on the part of the Executive, in a legal sense. If there were, the difficulty would speedily be resolved by the Courts. The real question was one of the political desirability of the action that had been taken, and he could find no alternative, under such circumstances but to act on the advice of his Ministers.

"I am unable", he said, "to see how I can justifiably introduce a limitation on the Executive power which Parliament itself has not seen fit to insert." He proceeded to show by reference to Statute that what had been done in this instance was beyond/question authorised by Parliament and therefore necessarily by the Senate. The Regulations became law by force of the Act itself, and without any confirmation by the Legislature. "It is consequently manifest that the only control of the Regulation-making power

provided by the two Houses when passing the Act was control of the Regulations 'after the making thereof'."

The second ground of the address, based on the practice of Parliament during the session "does not", said his Excellency, "appear to me to be inherently applicable to Executive action in making regulations under statutory authority." It was beyond his power, he concluded, to do anything except to follow faithfully the path marked out in the Statute itself, and according to the normal course of responsible government (See Commonwealth Publications, No. 237-F 1740).

The soundness of the Governor-General's view of the position is, of course, not in question. Looked at either from the angle of pure legality or of formal and established convention, the Government's course of action came into conflict with neither.

An attempt was made in Victorian Stevedoring Co. v. Dignan 46 C.L.R. to have the regulations declared invalid on the ground amongst others, of the series of previous disallowances. But the attempt was foredoomed to failure. "Disallowance by either House of a regulation or a series of regulations," it was said by one Justice, "operates so as to bring to an end the regulations from the time of disallowance. But disallowance has no other result, and in particular,

<u>it has no relation whatever to regulations which do not come into existence until a later moment of time."</u> It was pointed out that the <u>Acts Interpretation Act 1901, sec. 33(1)</u> makes the power of regulation-making exercisable from time to time; and that "the Governor-General is the sole judge of the time and occasion, and his statutory powers and their exercise remain unaffected by the termination of a regulation previously made." The Court unanimously rejected the contention raised. One unanswerable argument used in so doing was the impossibility for any Court to say for how long a disallowance should operate to prevent new regulations the same in substance being made.

The course that had been adopted by the Government was, therefore, beyond challenge of any kind. It was startling enough to find that, without acting unconstitutionally, the Executive could keep a sub-law in continuous operation in defiance of the formally and repeatedly expressed disapproval of one House. But, reduced to its elements, this state of affairs was seen to be simply the result of a weakness in the drafting of the <u>Acts Interpretation Act 1904,</u> together with a readiness on the part of the Government to take advantage of it.

<u>Legislative Changes.</u>

So far as this particular opportunity for

the defiance of Parliament was concerned, it was quickly to be removed. The first consequence was that the Senate, by way of amendment to the regulation-making section of the Commonwealth Debt Conversion Act 1931, inserted a provision that "where in any session of the Parliament either House of the Parliament disallows a regulation made in pursuance of this section, any regulation made in that session and the same in substance as the regulation so disallowed shall be void and of no effect." This amendment was accepted by the Lower House without objection. The Senate's action appears to have been in the nature of a gesture, since it was not repeated.

But matters were not allowed to rest. In October, 1931 a Bill was introduced into the Senate to amend the Rules Publication Act in a way that would have frustrated any repetition of the events narrated above. Political changes caused this measure to lapse; but a few months later another Government passed the Acts Interpretation Act 1932 inserting a new section 10A in the original Act. This was to the effect that where in pursuance of sec. 10, either House disallows a regulation by a resolution which remains unrescinded "no regulation, being the same in substance as the regulation so disallowed, shall be made within six months after the date of the disallowance."

Conclusion.

The possibility of a repetition of the Waterside Employment Regulations episode has, therefore, disappeared. But the real significance of the incident has little relation to the requirements of the law. It concerns rather the new lengths to which the Executive is prepared to go, even in open defiance of one branch of the Legislature, to attain an objective of policy. Although unexceptionable from a legal point of view, as the law then stood, the assumption of legislative power which took place was, it can hardly be disputed, open to the gravest criticism on the ground of propriety. The Statute law left the loophole - the significant thing is that the Executive was prepared to seize upon it, in violation of the clear spirit and intention of the law, in order to give effect to its design. The indication is that the virtual subordination of Parliament achieved by inducing it to delegate its power, which is a feature of contemporary government, is engendering a new spirit in the Executive. Administration is becoming more and more impatient of Parliamentary control. No doubt there were bitterly contested political issues involved in the affair. But when these are forgotten, the constitutional precedent will remain. The Executive, with the support only of one House of Parliament, was able and saw fit to assume a <u>legislative power</u> which that House itself

did not possess, and which it was never the intention of Parliament to grant.

SENATE STANDING COMMITTEE ON REGULATIONS.

The whole position in regard to supervision of regulations was seen by the Senate to be highly unsatisfactory, and towards the end of 1929 a Select Committee of that Chamber was appointed to consider (inter alia) the advisability of appointing a Standing Committee on Statutory Rules and Ordinances, to carry out the work of examination. After a careful inquiry, during which much valuable evidence was obtained, the Committee presented in March 1930, a Report recommending the appointment of such a Standing Committee. In the form presented the Report received some criticism, and on the motion of the Minister was recommitted for reconsideration of the method of appointment.

A second Report was presented in July, and after lying in abeyance for almost a year was adopted by the Senate on May 14, 1931. The Committee recommended by this Report was to consist of seven members, four nominated by the Leader of the Government in the Senate and three by the Leader of the Opposition in that Chamber. New Standing Orders 36A, 36B and 37A were prepared and adopted; and at last, on March 17, 1932 the first "Standing Committee on Regulations

and Ordinances" was appointed by the Senate. As well as for other information on this matter, the writer is indebted to Senator Kingsmill, President of the Senate, for the statement that from the time of its appointment the Committee has been in active operation.

Functions of the Committee.

The first Report of the Select Committee contained recommendations of much interest as to the functions of the Standing Committee. These particular suggestions found no place in the later Report, having been deleted, it would appear, as a result of some criticisms voiced by Sir George Pearce.

The original proposal was that the responsibility of the Standing Committee should be in respect of five separate matters. The Committee was to see to it -

(1) that the clause of each bill conferring a regulation-making power does not confer a legislative power of a character which ought to be exercised by Parliament itself;

(2) that regulations are in accordance with the Statute;

(3) that they do not trespass unduly on personal rights and liberties;

(4) that they do not unduly make the rights of citizens dependent upon administrative and not upon judicial decisions;

(5) that they are concerned with administrative detail and do not amount to substantive legislation which should be a matter for parliamentary enactment.

These recommendations cover every vital aspect of the relations between the Executive and Parliament in regard to sub-legislation. They breathe an independent spirit recalling the days before modern conditions had begun to make Parliament the supine creature of the Administration. If the Committee had been in existence during the past decade, and had with the support of the Senate applied these tests, (particularly the first), it would certainly have very greatly increased the prestige of that Chamber. Although mention of these functions was excluded from the adopted Report, there is reason to hope that the Standing Committee will none the less adopt them as the guiding principles of their work. Professor H. K. Bailey, after pointing out that the duties of the Committee involve a heavy task, says: "But with organisation to secure the advantages of continuity and specialisation a real advance should be possible. The very existence of the Committee should prove salutary. The functions proposed are perhaps the most valuable public service that the Members of a House of review can render at the present time." (Administrative Legislation in the Commonwealth A.L.J. Vol. 4 p.38).

It appeared from the evidence before the Select Committee that no such Standing Committee to deal with sub-legislation exists in the Imperial Parliament (Letter from Clerk of House of Commons - Transcript, App.A).

CHAPTER VI

SPECIAL INSTANCES OF LEGISLATIVE DELEGATION.

There are certain statutes of the Commonwealth which confer on the Executive an authority, not merely to carry out the law, but in the fullest sense of the word <u>to make the law</u>. The general plan of these Acts is to define with more or less vagueness the broad purpose towards which the sub-legislative effort is to be directed, leaving the Executive an entirely free hand in carrying out that purpose. The administrative authority is thus expowered to determine for itself, within the very widest limits, what aims shall be pursued, what methods are to be adopted, what obligations shall be imposed on individuals, and what range of matters shall be dealt with. Such Acts authorise the actual creation by administrative means of a body of law. In some cases such as that of the Wireless Telegraphy Act, where the power conferred might, on the face of it, seem not to go so far as this, such a measure of authority has nevertheless been assumed by the Executive, and, in the main, without molestation. The legislation for the Territories, although analogous to the Acts dealt with in this Chapter, has been reserved for separate consideration.

AIR NAVIGATION ACT 1920.

The Air Navigation Act 1920 wears, on the face of it, a most insignificant appearance. It consists of four sections, the first three dealing with title, commencement, and definitions respectively. Sec. 4 declares that "The Governor-General may make regulations for the purpose of carrying out and giving effect to the Convention.....and for the purpose of providing for the control of Air Navigation in the Commonwealth and the Territories." The Convention referred to is the Paris Convention for the Regulation of Aerial Navigation 1913.

Under this unassuming power, the Government made at once a batch of nearly a hundred regulations, covering twenty-one pages of the official publication, and dealing with such varied and important matters as the registration of air-craft and licensing of their personnel, the authorising of aerodromes, and the appointment and powers of tribunals to inquire into accidents.

Nor are the regulations drawn in such a way as to inspire confidence in the Executive as a legislator. Indeed, they are a fair example of one of the chief evils involved in delegated legislation, which is the

tendency for the administrative authority to reserve so

large a measure of discretion to itself that the position of persons subject to the laws is without security or certainty. For example, reg.14 provides that "The Minister may grant to the proprietor of any aerodrome, a license, subject to such conditions as the Minister thinks fit, in respect of the aerodrome." The regulation goes on to empower the Minister, if he "is satisfied that sufficient grounds exist" to cancel or suspend the license, and thereafter when he "is satisfied that the grounds of suspension no longer exist" to restore it once more. This regulation contains the charter of the licensee's rights. All the other regulations about aerodromes are in the nature of restrictions or prohibitions. He might be pardoned if he felt that his legal position was not very illuminatingly defined. (See also regs. 23, 24, 40 and passim.).

THE TREATIES OF PEACE ACTS.

The Acts to give effect to the Treaties of Peace following the Great War are three in number, i.e. that relating to Austria and Bulgaria (No. 40 of 1920), that relating to Hungary (No. 20 of 1921) and the Treaty of Peace (Germany) Act 1919-1920. The three Acts are each in precisely the same form, which can certainly claim to possess the feature of simplicity. A preamble reciting the making of the respective Treaties

is followed by the title of the Act and an intimation that it extends to the Commonwealth Territories. The Acts are then in each case completed by the addition of a section giving the Governor-General power to "make such regulations and do such things as appear to him to be necessary for carrying out and giving effect to the provisions of the said Treaties."

In the vitally important case of Roche v. Kronheimer, 29 C.L.R. 329 which has been recently declared by the High Court to be a final authority for the validity of practically unlimited delegation of law-making power to the Executive, subject only to the observance of the limits of the constitutional field of the Commonwealth, it was the Treaty of Peace (Germany) Act which was being considered. Higgins J., while upholding the form of the legislation, said "Part X of this Treaty clearly involves a grave interference with private rights." A glance at the Treaty, and at the first batch of a long series of regulations the most recent of which appeared in 1930, fully sustains this description. They provide for the complete expropriation of German nationals so far as may be necessary to satisfy large and miscellaneous claims by British nationals for proprietary damage suffered through German action in the War (S.R. 1920 No. 25).

THE AIR FORCE ACT 1923.

In 1923 an Act was passed which, in a

comprehensive two-line preamble, was described as "An Act to provide for the Establishment, Organisation and Government of the Royal Australian Air Force." It consists of three sections only, and pre-eminently belongs to that class of statutes described with subtle irony by Professor Allen as "memorable examples of the unbounded confidence which Parliament reposes in the administration". (Bureaucracy Triumphant, p.55). The only operative section is the third, the first two consisting of title and definitions. Sec. 3 (1) declares that "There shall be an Air Force, which may be raised, maintained and organised by the Governor-General for the defence and protection of the Commonwealth....." Sub.-sec. (2) adopts the then existing Air Force and places it under this new Act. Sub-sec. (3) is quite unique and must be set forth. It provides that: "The Defence Act (except Part XV thereof) and the regulations thereunder shall, with such modifications and adaptations are as prescribed by regulations (which regulations the Governor-General is hereby authorised to make), apply in relation to the Air Force and the members thereof whether serving within or outside the limits of the Commonwealth."

In Pirrie v. McFarlane, 36 C.L.R. at p. 202, Isaacs J. emphasises the broad scope of these brief provisions. "The terms 'raised, maintained and organised,'" he says "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 of a standing army'. History tells us how much that included."

Although new to the Commonwealth, the device of entrusting to the Executive the power at once to apply the Defence Act to the purposes of the Air Force and to modify it in the process of applying it is not original. It is, in fact, obviously taken from the example of the Air Force (Constitution) Act 1917 of the Imperial Parliament. Its uniqueness lies in the circumstance that the power which it delegates to the Executive goes far beyond that handed over by Parliament under the English Act. The latter statute has itself been singled out by text-writers as an extreme example of abdication by the Legislature of its proper functions on a matter of wide scope and importance. (See e.g. Carr: Delegated Legislation p. 14). But on examination it proves to be almost a conservative instance, compared with the Commonwealth Act.

The vital section of the English enactment is sec. 13, which gives power to His Majesty by Order in Council to apply in relation to the Air Force and its adjuncts the provisions of certain legislation, "with the necessary modifications and adaptations." It is plain that the words quoted and underlined reduce

the modifying power to a mere right to make (1) formal alterations and (2) changes which are inherently required in order to make a law with regard to one subject apply to another. The Commonwealth Defence Department, however, has its style completely unhampered by any such restrictions. The Defence Act is applied by Parliament, without the need for any intervening administrative action, but subject to discretionary alteration. The "modifications" which may be made are "as prescribed by regulations", without regard to their necessity. There is, therefore, no obligation upon the Executive to preserve the Defence Act except so far as is thought fit, and the power is in reality one to make a complete law for the Air Force. Incidentally, the application of the Defence Act further confers upon the Governor-General, as exercisable in respect of air matters, the regulation-making power under that Act, with the new feature added that he is authorised to prescribe by "modification" the limits of his own sub-legislative power. It would be difficult to imagine any wider grant of authority.

The whole of the Air Force Act 1923 could be written without effort on a sheet of foolscap. Yet the regulations made under it in 1930, when the Select Committee of the Senate on Regulations made its inquiries, numbered 513, covering 172 pages of printed

matter (Report p.10).

WIRELESS TELEGRAPHY ACT 1905-1919.

A remarkable illustration of the development by sub-legislation of a complete system of law covering a wide and important field is found in the regulations under the Wireless Telegraphy Act 1905-1919, where the Executive has made detailed provision for radio broadcasting without, until quite recently, any reference to Parliament at all. It is certain that when Parliament passed the Act it was never contemplated that the standard regulation-making power which was included should be used to make a new law on a new subject, affecting the whole of the people of the Commonwealth in intimate and important respects.

The Act itself is simply a brief provision for the licensing of stations for the transmission or receipt of messages by means of "wireless telegraphy." It consists only of ten sections. In the Act as originally passed "wireless telegraphy" was defined as including "all systems of transmitting and receiving telegraphic messages by means of electricity without a continuous metallic connection between the transmitter and receiver." In 1919 the march of science resulted in an amendment to insert the words "or telephonic" after the word "telegraphic". Parliament

did not speak again. The Governor-General however, made batch after batch of regulations prescribing rights and obligations in a new field which, from 1922 onwards, began increasingly to be a matter of personal moment to the whole of the population of the Commonwealth.

Many of the regulations so made prescribed very definite interferences with personal liberty. The Statutory Rules 1923 No. 97 introduced the "sealed set" scheme, under which receiving apparatus sold for public use had to be capable of operating only upon one wave length. Such apparatus had to bear a departmental seal; and heavy penalties were provided for breaking the seal or altering the construction of the set, or for selling sets except in accordance with the regulations. Subsequently these regulations were repealed, to be replaced by others more facile of enforcement, although scarcely less drastic. Thus, one regulation inserted by S.R. 1927 No. 3, provided that "The occupier of any dwelling-house in which is installed receiving equipment in respect of which a license is not in force shall be guilty of an offence." With some verbal change, designed to make it more effective, it is still in operation.

In his evidence before the Senate Select Committee on the Standing Committee System, Mr. Robert Menzies K.C. says, referring to the broadcasting

regulations, "I regard them as an outstanding example of legislation by means of regulation. There is every reason to doubt the constitutional validity of any law relating to wireless broadcasting..... These regulations provide for the imposition of financial burdens by means of license fees, and also for the disposition of the money received by way of those fees. They also set out laboriously the rights and duties of broadcasting companies. There we have an elaborate set of legislative provisions dealing with a rapidly growing phase of modern life, and yet those regulations do not proceed, in a strict sense, from Parliament at all." (Transcript p.12).

One of the regulations, purporting to prohibit the manufacture of equipment for broadcast receivers without a license, was declared by the High Court in Carbines v. Powell 36 C.L.R. 88 to be an overreaching of the purposes of the Act and therefore invalid.

In May 1932, the Australian Broadcasting Commission Act was passed, and therein the Legislature for the first time indicated its awareness that a new and complicated department of government had grown up under the outworn wireless telegraphy legislation.

But the new Act touches the subject of broadcasting

only at one point - it provides for the control by a Commission of the transmitting stations and their programmes.

There is significance here, in what Parliament has left undone. Finding that the Executive has, in the absence of any enactment on the matter, legislated completely for broadcasting under its regulation-making power, Parliament has been content to graft one feature on to this body of law, instead of itself taking over the whole task of legislating. Nothing could tend more clearly to show the growing acquiescence of Parliament in the exercise by administrative authorities of those functions of general legislation which properly belong only to Parliament itself.

TRANSPORT WORKERS ACT 1928-1929.

The example par excellence of delegation of legislative authority to the Executive is found in the Transport Workers Act 1928-1929. As originally passed, this Act consisted of no more than a short comprehensive definition of "transport worker", and the following grant of power: "The Governor-General may make regulations which notwithstanding anything in any other Act but subject to the Acts Interpretation Act 1901-1918 and the Acts Interpretation Act 1904-1916

shall have the force of law with respect to the employment of transport workers and in particular for regulating the engagement, service, and discharge of transport workers, and for regulating or prohibiting the employment of unlicensed persons as transport workers, and for the protection of transport workers."

Such was the whole Act.

Under the power, a group of regulations were made requiring all waterside workers to be licensed, and forbidding, under penalty, the engagement of unlicensed workers. An official (called a licensing officer) was invested with power, subject to the right of appeal to a magistrate, to cancel a man's license "for not less than six or more than twelve months", thus effectively depriving him of the right to earn his living during the period of the cancellation.

This savage penalty was made applicable for various delinquencies, which, to say the least, were not of any high order of gravity. They included, for example, that the man whose license was to be cancelled had "refused or failed to comply with any lawful order or direction given in relation to his employment", or had "refused to work in accordance with the terms of an award" of the Arbitration Court, or had "used threatening or abusive language to any waterside worker."

These and the accompanying provisions went a long way, even having regard to the wide authorisation on which

they purported to depend, and the following year, possibly to avoid the danger of an adverse decision upon them, the substance of the regulations was incorporated in the Act as a separate Part. Even as they now stand, with the weight of express parliamentary sanction behind them, these provisions are a sufficiently striking example of bureaucratic control of individual rights.

It is, however, with the regulation-making power quoted above (which survives practically unchanged in the Act as amended) that we are here chiefly concerned. It has been called an "extraordinary form of legislation" (Huddart Perker Ltd. v. The Commonwealth 44 C.L.R. 492 at p. 506.). Its wide-reaching scope has been graphically emphasised by Dixon J. in the very recent and important decision upon it of Victorian Stevedoring Co. v. Dignan 46 C.L.R. "But sec. 3 of the Transport Workers Act", he says, "cannot in my opinion be regarded as doing less than authorising the Executive to perform a function which, if not subordinate, would be essentially legislative. It gives the Governor-General in Council a complete, although of course, a subordinate power over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be pursued as

well as the means to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover, the power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden." And elsewhere the same Justice describes the power conferred as "as unqualified as that of a Legislature."

The entrusting to the Executive of authority to override any existing law is unprecedented in Commonwealth legislation. An illustration of how this grant of power could operate was provided by the Victorian Stevedoring Co.'s Case (supra) where it appeared that the whole purpose and effect of the Waterside Employment Regulations made under the power was to confer on an industrial union a right of preference in employment which at the time was denied to it under a valid and subsisting industrial award made under the Commonwealth Conciliation and Arbitration Act. It was held that the regulations were completely effective to override the award.

The character of the Transport Workers Act, in thus unmistakably making the Governor-General in Council a legislative authority, had one notable result. It compelled the High Court for the first time to undertake the task of clearly settling and

defining the relation of the Executive to the Legislature under the Constitution in the matter of delegation of law-making power. The lines on which that final definition was achieved have been analysed in an early portion of this work, and it suffices to say here that the delegation which had been made was, in the case mentioned above, held to be fully within the competence of the Commonwealth Parliament. The decision marks a vital constitutional advance by the Commonwealth Executive at the expense of the Legislature.

The Transport Workers Act has also been the subject of two other important decisions by the High Court. In one of these, Dignan v. Australian Steamships Ltd. 45 C.L.R. 188, another aspect of executive power was reduced to a state of much closer certainty than had previously existed. This was the matter of disallowance of regulations by the Houses of Parliament, and has likewise been fully discussed elsewhere in this work. In this instance the decision was adverse to the Executive, and resulted in a not inconsiderable strengthening of the legal, as distinct from the practical, control of Parliament over sub-legislation.

IDEAL LIMITS OF SUB-LEGISLATION.

The Acts which have been discussed in the foregoing pages have been singled out, not on account of

the mere volume of the regulations made under them, but on account of the character of those regulations. There are other Acts which have not been mentioned the output of sub-legislation under which far exceeds that under any that have been referred to in this Chapter. Such are, for example, the Defence Act 1903-1927, regulations under which covered 900 pages in the year 1927 alone, and the Navigation Act 1912-1926, under which in the same year 400 pages of regulations were issued. But the aim at the moment is to show the degree to which the Executive is now exercising functions of a truly legislative nature. As Sir Daniel Levy put it, giving evidence before the Senate Select Committee, "The objection is not really that the regulations are so numerous, but that in so many cases they deal with matters that should be incorporated in an Act of Parliament" (Transcript p. 41).

Weighty opinions were expressed before the Committee to the effect that there are definite limits within which sub-legislative activity should be confined. The President of the N.S.W. Legislative Council, Sir John Peden, said that "The power of altering substantive laws dealing with personal liberty, the rights of property, and generally with the rights of the individual, should not be delegated to statutory bodies" (Transcript p. 51). Mr. R. G. Menzies M.L.A. declared it as his view that "No legislative change

should find expression in a regulation....."In my opinion" he said, "legislation by Parliament should deal with principles and fundamental rules, and the details of administration should be left to the Executive". (ibid. p.13). Even Sir Robert Garran, who is definitely inclined to take a benevolent view of administrative activities, seems to accept the position that those activities should stop short of the making of substantive law (ibid. p.35).

No doubt influenced by these opinions, the Committee, in its Report to the Senate, declared that the functions of the Standing Committee on Regulations, which it recommended, should include amongst others the function of seeing that regulations did not "trespass unduly on personal rights and liberties" or "amount to substantive legislation which should be a matter for parliamentary enactment."

CHAPTER VII

PROCLAMATIONS AND ORDERS.

Proclamations and orders constitute a form of sub-legislation distinct from that represented by rules regulations and by-laws or ordinances. A broad distinguishing feature is that they usually in the nature of formal declarations, having an instantaneous rather than a continuing operation. Their function is ordinarily to bring into operation uno ictu some ascertained portion of the statute law which has up to that moment been passive, in the sense of not having applied to the particular facts persons or things to which the proclamation or order makes it apply.

This distinction between proclamations and orders on the one hand, and regulations etc. on the other is far from being complete or satisfactory. Thus, it is possible for a proclamation to have the same kind of operation as regulations (See e.g. Proclamation 10th August, 1915 under the War Census Act 1915). Similarly the power given to the Governor-General under sec. 5 of the War Precautions Act 1914-1916 to make provision "by order published in the Gazette for any matters which appear necessary or expedient with a view to the public safety" is a power, in effect, to legislate by Order-in-Council. The Aliens

Restriction Order 1915-1916 is an example of a very potent law made in pursuance of this section.

It should be emphasised also that even where a proclamation or order is in the nature of a declaration speaking instantaneously, its effects may be of a permanent character by reason of its operation upon the Statute under which it is made.

As to the distinction between Proclamations on the one hand and orders on the other, this is mainly one of form. The proclamation, however, is usually the method of executive action resorted to where the consequences are general in character, affecting the community or a considerable class of persons, while the order has a more limited or particular operation. Here again, however, there are exceptions; and the instances given above from the War Precautions Act cannot be reconciled with the principle of the suggested distinction.

For an English example where the proclamation and the order are prescribed by the Legislature as alternative methods, see Customs Consolidation Act 1876 (Imp.) sec. 43, declaring that "the importation of arms, ammunition, gunpowder or any other goods may be prohibited by Proclamation or Order-in-Council". It may well be that the object of Parliament in prescribing alternative forms was not that they should be used

indiscriminately, but that the proclamation should be used for effecting a general prohibition, while the order should be employed for individual cases, as, for example, the prohibition of particular shipments of goods.

A local instance which well illustrates this difference in use is the Navigation Act 1925, inserting two new sections in the principal Act. The first of these gives the Governor-General power to suspend the operation of the Act. This power must be exercised by proclamation. The second new section gives him power to dispense with the necessity for compliance with the Act in particular cases where he is satisfied as to certain matters. This must be done by order.

FORMALITIES.

With regard to both forms of executive action, the necessary formalities must be strictly complied with, so far as these are prescribed by the Act under which the proceeding is taken or by the Acts Interpretation Act 1901. See Commonwealth v. Colonial Ammunition Co. 34 C.L.R. 198 per Isaacs and Rich JJ. at p. 220.

It is provided by sec.17(f) of the Acts Interpretation Act 1901 that "The Governor-General" shall mean the Governor-General or his substitute acting with the advice of the Executive Council, and

by sub-sec. (j) that "Proclamation" is to mean Proclamation by the Governor-General published in the Gazette. "The Executive Council" and "The Gazette" are also defined.

Provided, however, that the statutory requirements are fully complied with, it does not appear to be necessary that the proclamation or order should be in any particular form. Jerger v. Pearce 28 C.L.R. 588 was a decision on para. 2J. of the Aliens Restriction Order 1915, which provides that the Minister "may order the deportation of any alien." In that case the only thing done by the Minister in the nature of making an order was to endorse the papers, "for necessary action as to deportation". This was held sufficient. Starke J. said, referring to this endorsement, "It was said to be a mere direction to the Secretary to prepare or put in train an order for deportation. But the regulation requires no particular form of words in the order, so long as it clearly appears that the Minister directs the deportation of an alien. The minute does, in my opinion, contain a clear direction or order of the Minister that Father Jerger be deported". The Court indicated, however, that it was "advisable that somewhat more formal orders for deportation should be framed." For another case where an objection taken on the ground of form to a Ministerial notification analogous to an order was unsuccessful, see

Welsbach Light Co. v. The Commonwealth 22 C.L.R. 268.

PROCLAMATIONS.

"Royal proclamations," says Chitty, "seem to be extremely ancient; and, it is most probable, were originally adopted for the purpose of giving additional weight and dignity to the laws" (Prerogatives of the Crown, p. 104). The Statute of Proclamations entitled "An Act that Proclamations made by the King shall be obeyed", empowered Henry VIII in 1539 to issue such proclamations as he on the advice of his Privy Council should think fit. This, however, was the high-water mark of delegation of power to the Crown, and the Statute was short-lived. By the reign of James I the principle was firmly established that the power of the Crown to issue proclamations depended entirely on the will of Parliament (Case of Proclamations Co. Rep. XII 74).

This position has received a modern statement in The Zamora 1916 2 A.C. 77. "The idea that the King in Council or indeed any branch of the Executive has power to prescribe or alter the law to be administered by Courts of Law in this country" it was said, "is out of harmony with the principles of our Constitution. It is true that under a number of modern statutes, various branches of the Executive have

power to make rules having the force of Statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made." - per Lord Parker of Waddington at p. 90. (See also Ex parte Chevasse, 4 De G.J. & S. 655 at p. 662).

In the Commonwealth, the Governor-General, by virtue of secs. 2 and 61 of the Constitution, may exercise, on the advice of the Executive Council, all the prerogatives possessed by the Sovereign, including, so far as those prerogatives extend to authorise it, the issue of proclamations. See H. V. Evatt: Aspects of the Prerogative, p. 313 where, after a consideration of the authorities, he concludes that "the whole body of His Majesty's Prerogatives.....are in respect of the Commonwealth exercisable by the Commonwealth Government, subject only to the question of distribution of prerogative power between Federal and State authorities."

The use of the proclamation in the Commonwealth, apart from the summoning, proroguing, and dissolving of Parliament, is ordinarily to implement legislation, and for this purpose it is entirely the creature of statute. "Though the making of laws," says Chitty, "is entirely the work of a distinct part, the legislative branch, of the sovereign power,

yet the manner time and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate." (Prerogatives of the Crown ibid.) These words fairly describe the uses to which proclamations are put under Commonwealth statutes.

Proclamations nearly always apply to public general cases, although this is not invariable. See for an exception Commonwealth Conciliation and Arbitration Act 1904, sec. 62 (since repealed) giving power to the Governor-General to proclaim that the Act shall apply to any particular industrial association whether registerable under the Act or not. And cf. also Dumom v. Theodore 23 C.L.R. 510, from which it appears that if the proclamations in that case had been limited in their operation to the particular case of the plaintiff, they would have been valid.

A proclamation sometimes represents the exercise of a discretion by the Executive as to the nature of the acts to be done under the statute. Thus the War Census Act 1915 sec. 4 gives power to specify by proclamation what particulars must be furnished for the purposes of the census. Far more often, however, the function of the proclamation is to make the Act under which it is issued apply where it did not apply before, either by bringing

the whole Act or some part of it expressly into force, or by declaring persons, things or places to be within the operation of the Act. Again, it may either initiate or end the operation of the whole or a part of the authorising Act by merely fixing a time or occasion which the Executive has been authorised to declare. Examples of all these varieties of proclamation are to be found in the Commonwealth Statutes.

NO INHERENT EFFECT.

Where a proclamation has been made in pursuance of authority conferred by a statute, it has no virtue or effect of its own, but becomes significant only through the operation of the statute. This has repeatedly been made clear by Isaacs J. in the High Court.

"The Proclamation" he says in Baxter v. Ah Way 8 C.L.R. 626 at p. 641, "stands per se as a mere notification to the world that specified goods are prohibited. The proclamation is a mere fact. That fact, however, has consequences prescribed by the Parliament itself." And again, in a recent case, he says, "Just as an award under the Arbitration Act is no more than a declaration of fact, having no inherent legal effect, but is vitalised by the Act,

that is, by the Legislature, and just as the Governor-General's proclamations under the Customs Act prohibiting the importation or exportation of goods are mere facts, and dependent solely for legal effect on the Customs Act, that is, on the will of Parliament, so the proclamation under sec. 18 of the Bankruptcy Act is a mere event in fact, owing any effect to the parliamentary enactment." (Le Mesurier v. Connor 42 C.L.R. 481 at p. 506). The full implications of these remarks are not free from difficulty. The matter will be discussed further at a later stage.

EXAMINATION OF USE OF PROCLAMATIONS.

Reference to the Statutes discloses that proclamations have been constantly used in Commonwealth legislation as part of the administrative machinery. It is proposed here to examine briefly some of the varying uses to which the device has been put, paying more attention to those instances which present special features.

I. TO CONTROL APPLICATION OF ACTS.

The practice has been very frequent to pass an Act of Parliament, and, instead of giving it immediate effect, to provide that it "shall commence on a day to be fixed by Proclamation." In the table giving the dates of proclaiming of Acts so treated it

appears from the 1930 Volume of the Statutes that no less than 136 Statutes had, up to and including that year, been left to be initiated by proclamation. In a few cases parts of an Act were made to take effect upon the royal Assent being received, while other parts were suspended until they should be proclaimed.

The Privy Council has laid it down that this is a legitimate use of the method of conditional legislation. In Reg. v. Burah 3 A. C. 889, where the question was whether the Indian Legislature had unlawfully delegated to the Lieutenant-Governor the power to apply an Act to particular districts, their Lordships pointed out that the commencement of the whole Act was by its terms made contingent upon the issue of a notification by the same officer.

"Legislation", it was said, "which does not directly fix the period for its own commencement, but leaves that to be done by an external authority may with quite as much reason be called incomplete..... If it is an Act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem a fortiori to be an act of legislation to bring the law originally into operation by fixing the time for its commencement."

It was pointed out, however, that in neither instance was there any act of legislation by the Executive, but that Parliament had "legislated conditionally."

"PIECEMEAL" PROCLAMATION OF ACTS.

A striking instance of the use of this method of bringing legislation into force is furnished by the Navigation Act 1912-1926. It was originally provided simply that the whole Act of 1912, numbering 425 sections, was to commence on a day to be fixed by proclamation. For approximately eight years, nothing was done in pursuance of this power. However, in 1919 an amending Act was passed giving power to the Executive to proclaim the principal Act portion by portion; and following upon this, a series of nine proclamations have been issued, bringing the Act into force a number of sections at a time. There still remain parts of the Act which have never been proclaimed.

There are other instances, though none so extensive, of this power being given to proclaim legislation "piecemeal". (See e.g. Commonwealth Electoral Act 1918-1929).

LE MESURIER V. CONNOR.

In the attempt to fix the limits of permissible executive action in bringing legislation into

operation considerable difficulty is presented by the case of Le Messurier v. Connor 42 C.L.R. 481. Sec. 18 (1)(b) of the Bankruptcy Act 1924 provided that Courts having jurisdiction in bankruptcy should be (inter alia) "such State Courts.....as are specially authorised by the Governor-General by proclamation to exercise that jurisdiction". The question was whether this was a law "investing any Court of a State with federal jurisdiction" within the meaning of sec. 77 (111) of the Constitution.

The majority of the Court, dealing with the point briefly in a joint judgment, held that it was not such a law. It was said that the Act must be regarded as it stood when enacted and before any proclamation was made under it. "It is apparent", said the judgment, "that at that stage, no State Court was invested with any Federal jurisdiction in bankruptcy." The words of the Constitution required that "Parliament should not only define the jurisdiction to be invested but identify the State Court in which the jurisdiction is thereby invested." (p.500).

Isaacs J. dissents in a powerfully reasoned judgment. "What syllable is there in the Constitution", he asks, "to say that the investing must take effect immediately the Act is passed?" On the contrary the power of "investing" is plenary (Hodge v. The Queen 9 A.C. at p. 132). That plenary power may

be exercised either absolutely or conditionally Reg. v. Burah (supra), "and in the latter case leaving to the discretion of the Executive the time and manner of carrying the legislation into effect." He contends that if this section is to be held bad the all-important sec. 39 (2) of the Judiciary Act 1903-1927 cannot be preserved from the same fate.

The argument based on the doctrine of conditional legislation was summarily dismissed by the majority of the Court, with the statement that it was "unable to appreciate the application to this question" of that line of reasoning (p. 499). So little was said under this head that it is not easy to follow how an argument apparently so formidable was disposed of.

No doubt the meaning to be attached to the decision must be that the phrase "make laws investing" in sec. 77 (iii) of the Constitution imports an imperative requirement that the investing shall be completed by the operation of the Act itself without the intervention of the Executive. It is difficult to perceive the basis of this interpretation or to see how to reconcile it with the reasoning of accepted authorities. As Starke J. also dissenting, points out: "The proclamation of the Governor-General has, however, no force apart from the Bankruptcy Act: it

operates and takes effect only by reason of the law made by the Parliament. The jurisdiction in the State Court is invested by the authority of the Act under which the proclamation was issued." (p. 520).

The case must, on the whole, be treated as turning entirely on the wording of the Constitution. The majority of the Court expressly disclaimed any concern with the doctrine of conditional legislation; but it may well be argued that they have by implication set limits to the application of that doctrine considerably narrower than were formerly supposed to exist.

There are other analogous uses of the proclamation, much less common than that of bringing statute law into operation, but illustrating the extent to which the device is availed of, and the varied purposes it can be made to serve.

II TERMINATING STATUTORY SUSPENSION.

The Aliens Registration Act Suspension Act 1926 is a short enactment of two sections, the second of which declares that "The operation of the Aliens Registration Act 1920 is hereby suspended until a date to be fixed by Proclamation, on which date the suspension shall cease."

A recent and striking illustration of this use of the proclamation is the Emergency Legislation Suspension Act 1932, which suspends the operation of the epoch-making Financial Agreements Enforcement Acts. The suspension is to continue indefinitely, subject to the following provision: "The Governor-General may, at any time, by Proclamation, declare that it is in his opinion desirable that the suspension.....shall cease to have effect as on and from a date to be specified in the Proclamation." The issue of such a Proclamation will restore the Enforcement Acts to their full operation from the date so fixed.

III POWER TO SUSPEND THE LAW.

The Navigation Act 1925 amends the principal Act by the insertion of a new section 293A at the end of Part VI, dealing with the licensing of ships for interstate trade. The section gives the Governor-General power, "if at any time he considers it expedient in the public interest to do so", to issue a proclamation suspending the operation of any of the foregoing provisions of Part VI. The suspension is uncontrolled as to time, and may be made to operate "as regards any ship or class of ships, and either unconditionally or subject to such conditions" as the Executive sees fit to impose. The notable thing here is that Parliament has conferred on the Executive the power not merely to proclaim a general suspension

of a law, but to relieve particular persons of its provisions. Professor H. K. Bailey has described this as "a suspending and dispensing power as wide as that which cost James II a throne." (Administrative Legislation in the Commonwealth - A.L.J. Vol. 4 p.38).

It is enacted by the second half of the section that the Proclamation may either specify in its own terms the period for which the suspension is to be effective, or "provide for suspension until the issue of a Proclamation revoking the prior Proclamation."

IV POWER TO TERMINATE ACT.

The War Precautions Act 1914-1916, having declared that the Act is to continue in operation "during the continuance of the present state of war" and for three months afterwards, proceeds to define these words as meaning the period from August 4, 1914 "until the issue of a proclamation by the Governor-General" declaring that the war has ceased. This is a unique instance, in that it is in effect the conferring of a power to repeal an Act by proclamation, the time for the issue of which is in the absolute discretion of the Executive.

The point arose for consideration in Jerger v. Pearce, 28 C.L.R. 588. It is to be regretted that

the argument is not reported, since it is not clear from the brief judgment what were the precise contentions raised. However, the validity of the provision was attacked, and without success. It was claimed that at the date of the hearing (July 1920) the war had in fact ceased, although there had been no proclamation. Starke J. held that on a strict view the war had not ceased.

It is submitted that the only relevance of this issue of fact was as to whether the defence power could still be relied on to support the Act. It was not contended, nor could it have been, that any correspondence between the time of issuing the proclamation and the time of termination of the war in fact was legally necessary. Nor was it suggested, so far as appears, that it was not fully competent for the Legislature thus to give the Executive a power virtually to repeal the Act at its discretion.

V. TARIFF ALTERATIONS.

The Customs Tariff 1921 and the Customs Tariff (N.Z. Preference) 1921 (since repealed) are instances of the use of the proclamation to apply an alternative scheme of customs duties to the products of particular countries, in place of the general tariff. Elaborate safeguards are provided under the first-mentioned Act to ensure that such a proclamation will not be

issued, and when issued shall not be revoked or varied, without scientific inquiry as to the effect of such action on the Commonwealth. In addition to this inquiry, which is to be made by the Tariff Board, parliamentary sanction is necessary in the form of a resolution of both Houses before any such change of policy is undertaken.

VI. PROCLAIMING PENAL LAWS.

In certain instances it is provided that laws of a penal nature may be made to operate by proclamation. The Crimes Act 1914-1928 and the Immigration Act 1901-1932 both contain power for the Governor-General, if he is at any time "of opinion that there exists in Australia a serious industrial disturbance" to make a proclamation to that effect, which is to remain in force until revoked. Upon the making of such a proclamation, certain provisions of the two Acts, until then inoperative, acquire vitality. Actions of individuals in connection with industry, of a kind calculated to prejudice the Commonwealth, thereupon become visitable with deportation, and under the Crimes Act with imprisonment as well. The significance of this power is that the Executive is thereby enabled to create at will offences which did not exist prior to such action. When it is added that the offences which may thus be created are of a wide, vague,

and semi-political nature. It will be seen that a highly important discretion is thus made exercisable by proclamation.

VII. DISCRETIONARY SUSPENSION OF STATE LAWS.

A somewhat remarkable example of power exercisable by proclamation is found in the Quarantine Act 1908-1924. In consequence of considerable confusion, flowing from divided control of quarantine matters, which was in evidence during the pneumonic influenza epidemic of 1919, the Act was amended the following year by the insertion of a new section 2A. The section provides that when the Governor-General is satisfied as to the necessity for such a step, he may by proclamation "declare that any or all measures of quarantine prescribed by or under any State Act shall, for such period as is specified in the Proclamation, cease to have effect."

The effect of this section has not so far (except very incidentally in Ex parte Nelson 42 C.L.R. 209) been considered by the High Court. There seems, however, to be a question whether it is possible to invoke in this way the supremacy given to Commonwealth legislation by sec. 109 of the Constitution. Certainly, it is clear that the Commonwealth Parliament has no power to repeal a State law. "According to the

scheme of the British North America Act" said the Judicial Committee in Att. Gen. for Ontario v. Att. Gen. for the Dominion 1896 A.C. 348 at p. 366, "the enactments of the Parliament of Canada, in so far as these are within its competency, must override provincial legislation. But the Dominion Parliament has no authority conferred upon it by the Act to repeal directly any provincial statute....The repeal of a provincial Act by the Parliament of Canada can only be effected by repugnancy between its provisions and the enactments of the Dominion."

The question arises, then, whether suspension is in any different position from repeal. Does a proclamation which, taken together with the authorising Act, purports simply to suspend all State laws in a certain field, raise an inconsistency between the two laws of the kind that sec. 109 contemplates?

There is an inherent difficulty in finding a principle which will for all purposes satisfactorily delimit the operation of sec. 109. The test of whether Federal and State laws can both be obeyed has been replaced by that of whether the Commonwealth law purports to cover the whole field. (Clyde Engineering Co. v. Cowburn, 37 C.L.R. 466). But however the test be stated, its inadequacy to measure the instance now being examined is apparent, and suggests that that instance does not belong at all to the class

of cases in which sec. 109 may or may not be found to operate. "All that the Commonwealth Parliament so far as sec. 109 is concerned can do, as it seems to me", says Isaacs J. in Pirrie v. McFarlane, 36 C.L.R. 170 at p. 210, "is to legislate on its own field in such a way that whether from its express terms or the legitimate implication of the langunge and scheme adopted, its enactment so occupies that field that the operation of the State law in question would be incompatible."

Under the Quarantine Act section quoted above, it appears that it is not incompatibility with Commonwealth provisions on the same subject-matter which is to displace the State law, but the "satisfaction" of the Governor-General that it ought to be so displaced. It is submitted that consequently the proclamation of the Governor-General probably does not raise a case of inconsistency at all. If this be so, then the proclamation by itself must be ineffective to suspend or otherwise affect the operation of any State law.

In making these observations, it is not overlooked that quarantine is one of the transferred departments, on matters relating to which the Commonwealth is given exclusive power to legislate by sec.52 of the Constitution. Owing to the inherent nature of the subject-matter, however, the operation of this section is in itself insufficient to deprive the States

of quarantine powers. In the words of the Report of the Royal Commission on the Constitution, "The quarantine power has not become exclusive either by the transfer of State departments as authorised by the Constitution, or by legislation covering the whole field (p. 168). In Ex parte Nelson, 42 C.L.R. 209 three Justices declared that "quarantine is a matter over which the States have concurrent power with the Commonwealth - subject to the provision of the Constitution that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail" (p. 217). See also the remarks of Higgins J. at p. 249, and Roughley v. New South Wales, Ex parte Beavis 42 C.L.R. 162.

VIII. POWER TO ALTER ACT.

An unusual instance, to which attention has been drawn by Professor Bailey (A.L.J. Vol. 4 p. 11), is to be found in the Coinage Act 1909. Secs. 3 and 4 of the Act provide that the standard weight and fineness of Australian coins shall be as provided in the Schedule, and that the permissible variation from that standard, or "remedy", shall also be as set forth in the same Schedule.

Sec. 8 of the Act, however, gives the Governor-General power by proclamation to do (inter alia) the following things:

"(c) Diminish the amount of remedy allowed

by the Schedule in the case of any Australian coin;

(d) Determine the least current weight of any Australian coin."

As will be elsewhere noted more fully, proclamations under this section are declared by its terms to have effect "as if enacted" in the Act. "The power conferred", comments Professor Bailey (ibid,) "is thus a power to amend the Act itself. Moreover, it does seem to come very close to that 'handing over of a subject to the Governor-General to legislate upon as he pleases' from which Isaacs J. in Ah Way's case seems to distinguish the legitimate exercise by Parliament of the legislative power of the Commonwealth." Although the power is not of great practical importance, since its exercise must be rare in the extreme, its constitutional significance is considerable.

IX. PROHIBITION OF IMPORTS AND EXPORTS.

The Quarantine Act 1908-1924 confers a power on the Governor-General (amongst others of an important nature exercisable in the same way) to prohibit by proclamation the importation or introduction into Australia of animals, plants etc., and any articles "likely, in his opinion, to introduce any infectious or contagious disease" (sec. 13).

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It is provided that this power of prohibition is to be exercisable either generally or with limitations, and either absolutely or subject to specified conditions. This is in no sense redundant. The need for specific authorisation before limitations or conditions can be imposed is shown by the case of Delaney v. Gant, 40 C.L.R. 174.

The Export Control and Oversees Marketing Acts, of which there are a number relating to various products, all contain the provision that "the Governor-General may by Proclamation prohibit the export from the Commonwealth" of the particular product "except in accordance with a license issued by the Minister subject to such conditions and restrictions as are prescribed".

The Commonwealth Bank Act 1929 amends the principal Act by the insertion of an authority to the Governor-General to proclaim a similar restriction upon the export of gold. This power is to be exercised "where after the receipt of a recommendation from the Board, the Governor-General is of opinion that it is expedient so to do." (sec. 70).

A general power of prohibition of imports by proclamation exists under the Customs legislation. The validity or otherwise of this provision formed the question for decision in Baxter v. Ah Way, 8 C.L.R. 626. There is also a wide power of prohibiting

exportation, which will be referred to presently in another connection.

X. EXTENDING TERRITORIAL APPLICATION OF ACT.

The Trade Marks Act 1922 amends the principal Act by inserting a section which enacts that:

> "This Act shall extend to such other territories under the authority of the Commonwealth (including any territory held under a mandate) as the Governor-General, by Proclamation, declares."

* * * * * * * * * * * * *

CERTAIN PROCLAMATIONS TO BE REPORTED TO PARLIAMENT.

The Customs Act 1901-1930 contains a requirement that any proclamation prohibiting the exportation of goods under certain of the powers to that end contained in sec. 112 "shall be notified to each House within seven days of the issue of such proclamation if the Parliament is in session, but if not in session, then within seven days after the meeting of Parliament."

Under the Australian Industries Preservation Act 1906-1930, a Justice may in certain circumstances make a "determination" that the importation of goods

should be prohibited, and the mere order takes effect, on publication, as a prohibition. Sec. 23 provides that the Governor-General may at any time, by proclamation, rescind such a prohibition in whole or in part. Any such proclamation must be notified to Parliament, together with the relevent determination of the Justice, in the same way as under the Customs Act.

An interesting provision finds a place in the Defence Act 1903-1927, with regard to calling out the Citizen Forces. By sec. 46, the Governor-General is authorised in time of war to issue a proclamation calling those forces out for war service. The proclamation must state the reason for the step. The section then requires that:

> "If the Parliament is sitting, the reason for calling out the Forces shall forthwith be communicated by the Governor-General to both Houses of Parliament.
>
> If the Parliament is not sitting at the date of the issue of the proclamation, it shall be summoned to meet within ten days after that date."

The Statute which immediately suggests itself for comparison with this is the Emergency Powers Act, 1920, passed in England to deal with a situation of industrial crisis. Authority is given under the Act to issue a "proclamation of emergency", after which a wide regulation-making power resembling those under

the War Acts becomes exercisable. Such a proclamation is to be communicated to Parliament forthwith "and, if Parliament is then separated by such adjournment or prorogation as will not expire within five days, a proclamation shall be issued for the meeting of Parliament within five days, and Parliament shall accordingly meet and sit upon the day appointed by that proclamation."

The impossibility of giving effect to such a provision if Parliament should be, at the time of issue of the proclamation, in a state of dissolution, was perceived by Professor Edward Jenks, who, immediately after the making of the proclamation of March 31, 1921 to deal with a grave situation then existing, wrote a letter to the "Times". His comments seem to apply with almost as much force to the section quoted above from the Defence Act.

> "The Act ignores, however, entirely (so far as it appears) the situation which will arise if owing to dissolution there is no Parliament in existence at all", wrote Professor Jenks. "There appears to be nothing inherently impossible in an Executive, faced by a condition of emergency, first dissolving Parliament and then getting an absolutely free hand, by issuing a Proclamation such as that of last Thursday, for a period of at least six or seven weeks..... It seems", he concluded, "to be a curious position for a constitutionally governed country." ("Times", April 5, 1921, p.6).

No doubt the danger, if danger there is, would be greater under the English Act than under the

Defence Act, since emergency powers allowing the Executive to take the whole business of law making and enforcing into its hands have been found to possess a potent attraction for Governments. Still it seems possible that in Australia a Ministry bent on war might so far compromise an international situation that Parliament, when it ultimately met, would find the position beyond its power to mend. At all events, it is manifestly to meet a risk of this kind that sec. 46 has been drawn in its present form; yet equally with the English Act, it contains the weakness which Professor Jenks has remarked.

ORDERS.

Orders may be either Orders in Council, or Orders of a particular authority, usually a Minister. An Order in Council is an Order made by the Governor-General on the advice of a single Minister or else by the Minister himself, or by some other responsible authority.

Where an Order is authorised by statute to be made by "the Governor-General", this power must be exercised by Order in Council unless it appears in the Act that Parliament intends otherwise. This follows from the Acts Interpretation Act 1901-1930, sec. 17(f) which provides that "the Governor-General"

shall, in the absence of a contrary intention, mean the Governor-General acting with the advice of the Executive Council. For a case where this sub-section was discussed, and where the inference of a contrary intention was drawn from somewhat slender considerations, see McLaurin v. Hall, 13 S.R. (N.S.W.) 114.

EXTENT OF PERMISSIBLE DELEGATION.

An Order in Council may give power to administrative authorities to make Orders, and this is not an unlawful delegation of power. See Ferrando v. Pearce, 25 C.L.R. 241. In that case, the Governor-General in Council in pursuance of the power conferred by the War Precautions Act 1914-1916, sec. 5 to make orders for securing the public safety, had made the Aliens Restriction Order 1915. Portion of this Order was to the effect that "the Minister may order the deportation of any alien". It was held, in the case cited, that this did not amount to a delegation of the discretion conferred on the Governor-General in Council. Isaacs and Rich JJ. said at p. 256, "It is evident that unless the Minister's order is annulled in some way, all the acts complained of must inevitably follow, not by force of the Minister's order nor by his discretion or authority. His order is only a fact

upon which the Governor-General's Order 2J. operates by its own force....."

It is evident that this reasoning postulates that the two orders in question were not merely made by different authorities, but were actually of a different kind. The Ministerial Order was a mere "event", in accordance with the doctrine already familiar to us in respect of proclamations. The Order in Council, on the other hand, was not an event or fact, but something capable of "operating by its own force", and of vitalising, and attaching consequences to, the decision of a subordinate authority.

There are prima facie difficulties in this theory. The plenary nature of the Order made by the Governor-General clearly does not arise from its status as an Order in Council. The proclamation in Baxter v. Ah Way, 8 C.L.R. 626 was likewise an instrument made by the Governor-General in Council, yet it was said there that "the proclamation is a mere fact" which had "certain consequences prescribed by the Parliament itself". (per Isaacs J.)

We are forced, then, to look to the nature of the power conferred for the distinction. The wording of sec. 5 of the War Precautions Act is so wide as to give the Executive a virtual carte blanche. In the case of the Customs Act section which formed the

subject of the decision in Baxter v. Ah Way, on the other hand, it could be said, and was in fact held, that Parliament had legislated conditionally. This would point to the conclusion that an order becomes a "mere fact" in those cases only in which Parliament has by the terms of its enactment prescribed all the consequences which are to follow when a designated authority has made a decision of a clearly indicated character. Baxter v. Ah Way was a case of this kind. In such a case, the right of decision could not be delegated by the person to whom Parliament had entrusted it. Delegation would only be possible where the Legislature had vested a plenary authority in that person - an authority to make decisions operating "by their own force".

But is this distinction wholly satisfactory? For illustration, suppose that the Governor-General, in the exercise of his power under sec. 52(g) of the Customs Act had purported to confer on a Minister the power to make orders "that the importation of any goods be prohibited". Could a Ministerial Order prohibiting opium have been supported by the reasoning quoted from Ferrando v. Pearce (supra)? If the reasoning of Baxter v. Ah Way be accepted, it seems that it could not. There would have been, ex hypothesi, no Order in Council capable of "operating

by its own force". If the Order in Council was, as Baxter v. Ah Way says that it actually was, a mere event on which the legislative will operated, then it could have no virtue of its own enabling it to condition its operation upon another event, i.e. the Ministerial Order.

Yet executive action in circumstances almost identical with those just assumed had been upheld in the earlier case of Welsbach Light Co. of A/asia Ltd. v. The Commonwealth 22 C.L.R. 268. The Trading with the Enemy Act 1914 had defined illegal trading for the purposes of the Act as taking part in "any act or transaction which is prohibited by or under any proclamation made by the Governor-General." A proclamation was thereupon issued prohibiting any and all transactions which the Attorney-General should declare by notice in the Gazette to be, in his opinion, of an illegal character.

It was held that this was a perfectly valid proceeding, though the Court was far from unanimous as to the reasons with which this conclusion was to be supported. Griffith C.J. considered that the words "by or under" included the meaning "by the authority of" or in other words, that the Legislature had expressly authorised the delegation. This assumption makes the case readily understandable. It is not, however, relied on by the rest of the Court,

except possibly by Higgins J. who said that Parliament has "legislated conditionally on the declaration of the Attorney-General." But so far as express words went, Parliament had manifestly done nothing of the kind. Isaacs J., however, said: "The declaration which it" (the Proclamation) "authorises is itself, when made, a fact. It is a fact which enables the company with respect to which it is to be made to be identified as one to which the Proclamation applies. There is no delegation of legislative or regulative power to the Attorney-General. It is a declaratory power; the effect of that declaration, if made, is determined by the Governor-General himself in his Proclamation, and that he is empowered to do by Parliament." (p. 281).

The last words of this passage, it is submitted with the utmost respect, appear to beg the question in issue. If the declaration by the Attorney-General is a mere fact, why is not the Proclamation also, on the reasoning of the same learned Justice in the other cases referred to above, also a mere fact or event? The question, stated succinctly, is: When Parliament has legislated conditionally upon the exercise of a discretion by one executive authority, has the latter the power to make that exercise of discretion conditional upon the exercise of a further

discretion by a second executive authority?

If the case just discussed must be taken as deciding that it can, then it is hard to find a common basis for the reasoning in that case and in Ferrando v. Pearce (supra). The matter needs, and doubtless will receive, further exposition by the High Court; but the above authorities, read in the light of the modern tendency on the part of the Court to uphold wide delegations of power, leave no great doubt as to the general direction which that exposition will take.

GOVERNOR-GENERAL ACTS BY ORDERS.

Where a statute specially provides that action which is thereby placed within the power of the Governor-General shall be taken by a specified means that means must, of course, be followed. As has been seen, the requirement that power shall be exercised by proclamation is very frequently inserted. But in all cases where the statute is silent, the appropriate, if not the only, means of action is by Order - that is to say, since "Governor-General" means "Governor-General in Council" (Acts Interpretation Act 1901-1932) by Order in Council.

This rule has in recent years received a statement from the Privy Council. In Mackay v. Att. Gen. for British Columbia 1922 1 A.C. 457 it was sought to enforce a contract against the Crown in right of that Province. It appeared from the circumstances that the contract had been made by the Minister of Public Works purporting to act on behalf of the Lieutenant-Governor in Council. A subsequent Government relied on the defence that there had been no Order in Council authorising the making of the agreement. The point was sustained, the Judicial Committee holding that such an Order was indispensable. "Under these circumstances," it was said, after referring to the facts, "their Lordships must hold that no such Order, nor any resolution amounting to it, existed... If so, this ends the case. For the mere assent of the Ministers of the day to the contract could not, as has already been pointed out, under a constitution such as that of British Columbia, make the contract a legally binding one."

The same principle, however, had been recognised and applied by the High Court long before the decision in Mackay's Case. Thus, in Sydney Harbour Trust v. Wailes, 5 C.L.R. 879 where a New South Wales Act authorised the Governor in Council to "vest" certain land and was silent about the method of doing this,

Griffith C.J. said: "I apprehend that, when power is given to the Governor in Council to do an act to bring about a certain result, it means that he is to use the means provided to carry his power into effect. The powers of the Governor are carried into effect by Order in Council." The Commonwealth v. Colonial Ammunition Co. 34 C.L.R. 198 was a case in which Isaacs and Rich JJ., in a joint judgment, expressly held the same rule to be applicable to action by the Governor-General in Council. Sec. 63 of the Defence Act provided that "The Governor-General may.....do all matters and things deemed by him to be necessary" for purposes of defence. The Justices mentioned said: "We are clearly of opinion that, before any administrative act can be justified under sec. 63 there must be an Order in Council authorising it mediately or immediately" (p.220).

THE STATUTORY ORDER IN ENGLAND.

For historical reasons, the Order in Council is a much more common device in England than it is in the Commonwealth. The imperfect generalisation which was made in the preceding pages about its use in this country - i.e. that it ordinarily purports to deal with some particular case or situation and not to lay down any general rule - cannot be made at

all about its use in England. There, it virtually occupies the place, as, a sub-legislative method, which is held by regulations under Commonwealth law. "The statutory Order in Council", writes C. T. Carr, "is the most important form of delegated legislation". (Delegated Legislation, p.55). For the use of the prerogative Order in Council as a method of colonial government, see Ilbert, Legislative Methods and Forms pp. 172-175. The deluge of war-time statutory orders under the Defence of the Realm Act led Lord Shaw of Dunfermline to drew attention in R. v. Halliday to the constitutional dangers flowing from the unrestricted use of Orders in Council (1917 A.C. at p. 287).

EFFECT OF STATUTORY ORDERS.

As is the case with other formal acts authorised or directed by legislation, a statutory order speaks as if it were part of the Act it implements. As Lush J. says, in R. v. Walker L.R. 10 Q.B. 355 at p. 358, " An order made under a power given in a statute is the same thing as if the statute enacted what the order directs or forbids." And see, to the like effect, Willingsdale v. Morris, 1909 1 K.B. 57 at p. 64; Richards v. Att. Gen. of Jamaica 6 Moo. P.C.C. 381. An interesting point in this connection is the bearing of such a principle upon the question

which was in issue in Le Mesurier v. Connor, 42 C.L.R. 481, discussed earlier in this Chapter, with reference to proclamations. It is a little difficult to see, from the judgments of the majority in that case, how some measure of inconsistency with the above authorities is avoided.

Again like other executive instruments authorised by statute, an order acquires the force of the Act itself only for the purposes of its effect when validly made, and an order which is not fairly within the scope of the authority conferred by the Legislature fails altogether. There has been no attempt in the Commonwealth, up to the present, to place statutory orders beyond possibility of attack in the Courts by inserting special words in the statutory authority to make them. What has actually been done in this direction with regard to proclamations and statutory rules will be examined in the next Chapter.

CHAPTER VIII

ADDITIONAL FORCE GIVEN TO EXECUTIVE ACTS BY SPECIAL WORDS.

One of the most important and significant developments of contemporary legislation both here and in England has been the attempt to remove the making of regulations, as well as proclamations and orders, from any control by the Courts. The aim sought to be achieved has been that of giving to certain instances of subordinate legislation the effect for all purposes of an Act of Parliament, a result which in effect involves the setting up of the administrative authority as co-ordinate with the Legislature.

"AS IF ENACTED IN THE ACT"

This usurpation of the constitutional functions of the Legislature has been attempted in England on a very much more extended front than in Australia and with more boldness. In a considerable number of English Statutes it is provided that regulations and orders made thereunder are to "have effect as if enacted in this Act". Most of the Acts of the Imperial Parliament effecting so formidable a transference of power to the Executive are of post-war origin; although this ingenious machinery for enabling Parliament to abdicate its functions was in fact a

discovery of the last Century (See Patents, Designs and Trade Marks Act, 1883; now repealed).

The grave misgiving with which this type of legislation is regarded by the Courts is exemplified by the words of Lord Justice Scrutton in a quite recent case. Referring to an example before him, he said: "As a matter of constitutional importance, I hope that members of Parliament and Ministers and Parliamentary draftsmen will consider whether this form of legislation is really satisfactory. It may be convenient to Ministers not to have to consider carefully whether the powers they are purporting to exercise are within their statutory authority and the powers delegated to them by statute.....But I cannot think it desirable that when Parliament delegates authority to affect property and persons only if certain conditions are observed, it should then pass clauses which, it may be contended, allow their delegates to contravene those conditions, and make ultra vires orders which cannot be controlled by the Courts which have to administer the laws of the land." R. v. Minister of Health 1930 2 K.B. at p. 148.

COMMONWEALTH INSTANCES.

In the Commonwealth, resort to the device has been more or less limited. It is found in only two Federal Statutes at present in force.

(1) In 1910, a regulation made under the Post and

Telegraph Act 1901 purporting to create an offence of publishing telephone subscriber's lists without the authority of the Department was held by the High Court to be ultra vires and invalid (Commonwealth and P.M.G. v. The Progress Advtg. Co., 10 C.L.R. 457). The indignant sequel was the passing of the Post and Telegraph Act 1910, amending the section in the principal Act dealing with regulations so as to provide (inter alia) that "all regulations made in pursuance of this section shall have effect as if they were enacted in this Act."

(2) The second Commonwealth instance is to be found in the Coinage Act 1909, which having declared in secs. 3 and 4 that the standard weight and fineness of Australian coins and the permissible departure therefrom shall be as set forth in the Schedule, gives power to the Executive to alter these matters by proclamation (sec. 8). It is provided by sec. 8(2) that "every proclamation.....shall have effect as if it were enacted in this Act."

The Northern Australia Act 1926, recently repealed, contained a provision that the Governor-General might, by Proclamation, modify in important respects the powers of the North Australia Commission constituted under that Act. The section (sec. 16) went on to provide that "Any Proclamation issued in pursuance of the last preceding sub-section shall be

of full force and effect as if incorporated in this Act, but may at any time be revoked."

There is another Act, likewise no longer in force, which at first sight appears to afford a further illustration. This is the amending War Precautions Act 1915, which provides (sec. 4) that: "All regulations made prior to the commencement of this Act, purporting to be regulations under the Principal Act, shall be deemed, as from the date of making thereof, to have been of equal validity as if they had been enacted in the Principal Act." This section was held by the Court to dispose altogether of any objection to the regulations to which it refers on the ground of their invalidity, in Sickerdick v. Ashton, 25 C.L.R. 506. The distinction, however, between this section and the example from the Post and Telegraph Act is salient. The object of the War Precautions section was to validate past excesses of statutory authority on the part of the Executive. The regulations which were being incorporated were actually in existence and the section had no prospective effect. It amounted to no more than legislation by reference. See for another example of this, which is still in operation, Seat of Government (Administration) Act 1930, sec. 6.

Although the formula has been used in only a few Commonwealth Statutes, the questions raised by it are of major importance, and touch the constitutional

status of the Executive in so vital a manner that it is desirable to examine, in the light of authority, the interpretation which these words must now be regarded as bearing. The way in which the Courts have dealt with the awkward problem involved is an inquiry of much interest. It was not until last year (1931) that the matter could be said to have reached a stage of comparative finality.

POSITION APART FROM THE WORDS.

The position of regulations apart from the special words is, of course, that they have the same force as the Act itself, provided always that they are made in pursuance of the authority conferred by the Act to which they appeal for their validity. As was said by Lord Alverstone C.J. in Willingsdale v. Norris 1909 1 K.B. 57 at p. 64, "Where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act." But if it appears that the Act relied on is not wide enough to support the regulation purporting to be made under it, the Courts will declare the latter to be ultra vires and void. What, then, is the effect of saying that a regulation is to be treated as a Statute?

INTERPRETATION BY THE COURTS.

LOCKWOOD'S CASE.

The matter first arose for any detailed consideration in the House of Lords case of Institute of Patent Agents v. Lockwood, 1894 A.C. 347. In that case the Act being examined provided that rules made by the Board of Trade were to be laid before the Houses of Parliament for forty days, and in the event of no resolution being carried to annul them were to be "of the same effect as if they were contained in this Act". The rules in question in the case had lain on the table for the prescribed period and had not been disallowed. They were now challenged as being beyond the powers conferred by the Act upon the Board of Trade.

The words of Lord Herschell are so important that they require some quotation.

"My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if, notwithstanding that provision, the rules are open to review and consideration by the Courts..... I own I feel very great difficulty in giving to this provision, that they 'shall be of the same effect as if they were contained in this Act' any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act." (p. 360).

With this view Lord Watson agrees, saying that in his opinion the words "mean exactly what they say." Lord Russell of Killowen takes the same attitude. The fourth and final member of the Bench, Lord Morris, dissociates himself entirely from these observations, declaring that "it is not alone competent for the Courts of Justice to consider, but it is their duty to consider, whether the rules are ultra vires." He supports this view by the argument that the only rules which are to be of the same effect as if enacted in the Act are those which are actually made by the authority of the Act; that an ultra vires rule is not one made under the Act at all, and therefore gets no assistance from the words in question.

The case might well have been thought to amount to an express decision that the rules were as unassailable as an Act of Parliament, and indeed it is treated by the reporter in the head-note as having so decided. But when the decision is examined it appears to rest mainly on other grounds; and after a long interval it was to be learned from the same tribunal that the passages referred to above had a meaning considerably less far-reaching than that which might superficially be attached to them.

However, the nature of the observations made was destined to be the source of much difficulty to the Courts, which did what they could to avoid the full

acceptance of what was manifestly a decision with most serious implications. Baker v. Williams, 1899 1 Q.B. 23; Glasgow Insurance Committee v. Scottish Insurance Committee 1915 S.C. 504; and R. v. Inspector of Cannon Row Police Station, 37 T.L.R. 854 are three of the cases in which the rule was applied, and the earlier jurisdiction of the Court to consider the validity of regulations was held to be completely ousted. On the other hand in Reg. v. Pharmaceutical Society of Ireland, 1899 2 I.R. 132, the Irish Court elaborately distinguished Lockwood's Case. The reasons relied on to support the distinction were various, but on the necessity for making it there was complete unanimity.

STRONG COMMENTS BY JURISTS.

It was not surprising that, with the rapidly increasing use of this legislative device which placed the Executive de facto on a level with Parliament itself, grave warnings were uttered by some of the foremost British jurists as to the unsatisfactory nature of the position being created. Thus Professor C.K.Allen wrote as follows:- "This form of delegation is more than a delegation.....it makes the Executive not merely a delegate but a plenipotentiary..... The result can only be confusion in the working of the Constitution and obscurity in the legal conception of the sovereignty of the State." (Law in the Making, p. 325).

Later, there appeared Lord Hewart's notable book, "The New Despotism", with its outspoken attack, barbed with trenchant satire, upon the legislation and its authors. "Writers of the Constitution have for a long time taught that its two leading features are the Sovereignty of Parliament and the Rule of Law. To tamper with either of them was, it might have been thought, a sufficiently serious undertaking. But how far more attractive to the ingenious and adventurous mind to employ the one to defeat the other, and to establish a despotism on the ruin of both!"

And again: "The old despotism, which was defeated, offered Parliament a challenge. The new despotism, which is not yet defeated, gives Parliament an anaesthetic. The strategy is different, but the goal is the same. It is to subordinate Parliament, to evade the Courts, and to render the will or caprice of the Executive unfettered and supreme!" (ibid. p.17).

RECENT DEVELOPMENT OF THE POSITION.

With the very considerable increase after the Great War in the number of Statutes containing this formula for securing the conclusiveness of regulations the matter began to come uppermost in the Courts with increasing frequency. There followed a series of three cases, the last of them going to the

House of Lords, in which the meaning to be attributed to Institute of Patent Agents v. Lockwood (supra) was a factor of high importance.

The first was R. v. Electricity Commissioners 1924 1 K.B. 171, in which the meaning of the Electricity (Supply) Act 1919 declaring that certain "schemes" were to "have effect as if enacted in this Act" was in question. Though not obliged to decide the matter, the Court of Appeal showed clearly enough a strong reluctance to accept the full implications of Institute of Patents v. Lockwood (supra). Younger L.J. gave it as his view that the phrase "embodies only a scheme which under the Act the Commissioners are given power either to approve or to formulate."

Next, in R. v. Minister of Health: Ex parte Davis, 1929 1 K.B. 619, an attempted ultra vires improvement scheme was defeated by prohibition, the Court justifying action at that stage on the ground, that action later, after a Ministerial order giving the scheme effect as if enacted in the Act, would be impossible. "If check there is to be " says Lord Hewart C.J. himself, "It must be imposed now."

The misgiving and uncertainty which thus existed in the minds of English lawyers was equally in evidence in the Commonwealth, as will be seen later when some reference is made to Australian decisions.

However, at least a partial clarification of the position was at hand, and "the new despotism" even if still "not yet defeated" was to suffer a serious reverse. It seems probable that Lord Hewart's stimulating contribution to contemporary constitutional thought had some part in that result.

YAFFE'S CASE.

In 1929 another improvement scheme was challenged. But this time there was a new and vital fact. The Minister had made his order confirming the scheme, and by virtue of sec. 40 (5) of the Housing Act 1925 such an order "when made shall have effect as if enacted in this Act." Following Institute of Patent Agents v. Lockwood (supra) the Divisional Court held that the order of the Minister made the scheme unassailable. The Court of Appeal declined to accept this view, and granted a writ of certiorari. (R. v. Minister of Health - Ex parte Yaffe, 1930 2 K.B. 98). The Minister appealed, and thus the House of Lords had its first opportunity of amplifying the words of Lockwood's Case since that decision was given. (Minister of Health v. Rex. 1931 A. C. 494).

In the result the House of Lords held that in the particular circumstances there was no irregularity, or exceeding of the power given by the Act, in the scheme as ultimately confirmed by the Order. But

opportunity was taken to deal at some length with Lockwood's Case. The observations made are so important that they must be examined here at a little length.

Attention was drawn to the words of Lord Herschell, where he had pointed out that the problem of conflict between an Act and rules made one with it by the operation of the special words must be treated like any conflict between two separate provisions of an Act of Parliament. "What that comes to", says Viscount Dunedin (p. 503), "is this: The confirmation makes the scheme speak as if it was contained in an Act of Parliament, but the Act of Parliament in which it is contained is the Act which provides for the framing of the scheme.....If, therefore, the scheme as made, conflicts with the Act, it will have to give way to the Act. The mere confirmation will not save it."

Lord Warrington of Clyffe goes even further towards reinstating judicial control of regulations. He says (p. 515) that the decision in Lockwood's Case that the validity of the rules could not be questioned proceeded "on the footing that the rules were within the statutory authority," and "were made in pursuance of the section in question." In this view he is apparently supported by Lord Thankerton (p. 534).

Lord Tomlin says: "The Minister's

jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question." He adds that he sees nothing in Lockwood's Case to prevent this interpretation from being applied.

THE RESULTING POSITION.

What is the result of Yaffe's Case? How does it leave the position? It would be too much to say that it leaves it clear. Two things, however, stand out in the case. The first is the careful avoidance of attempting any general definition of the meaning of the words "as if enacted in this Act". It was this aspect of Lockwood's Case which resulted in the tortuous confusion of interpretation which followed the decision. The second was the obviously very definite resolve on the part of the House of Lords that no countenance should be lent to the full prima facie meaning of the more extreme passages in Lockwood's Case.

No doubt when Yaffe's Case comes to be interpreted, the dominant judgment will be found to be the closely reasoned utterance of Viscount Dunedin, the senior Lord. His words have, therefore, a peculiar importance. He lays it down that a regulation

or order in conflict with the Act must give way. It will be readily seen that the key to the position as it must now be understood is the meaning to be attached to the word "conflict". Does this mean literal conflict between an express provision of the Act and the words of the regulation? If so, the law is still where Lockwood's Case left it. Or does it mean conflict in the sense of going beyond the scope of the Act?

We are assisted in answering this question by some earlier words of Viscount Dunedin in the same judgment (p. 501): "It is evident", he says, "that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether.....it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect it could not be touched."

Here, then, it would seem, is the principle. The "conflict" which will prevent a regulation or order from having effect is not solely literal conflict, but includes any overstepping by the Executive of the "province" allotted to it to such an extent that the action taken could not be said to be in furtherance of the purposes of the Act at all. Where a regulation is thus foreign altogether to the scope of the Act under which it purports to be made, it will not be

preserved by being incorporated with the Act itself.

This brings the statement of the law from the highest tribunal into line with the principle on which Lockwood's Case has repeatedly, though sometimes with much straining of the words of that authority, been distinguished. (see e.g. Reg. v. Pharmaceutical Society of Ireland 1899 2 I.R. 132; Aust. Alliance Insurance Co. v. Att. Gen. of Qld. 1916 S.R. Qld. 155).

It also marks the final rejection of the alternative method of dealing with the situation which had been advocated in Lockwood's Case by Lord Morris, who contended that the Courts should hold that where a regulation was in fact ultra vires it was not made under the Act at all, and therefore could gain no advantage whatever from any special incorporating provision.

LIMITS OF RULE IN YAFFE'S CASE.

The latest statement of the position is very far from leaving the words "as if enacted in this Act" entirely without effect, which would have been the practical result achieved by the interpretation sought to be applied by Lord Morris. The starting-point for determining the region of effectiveness of these words is to consider what kinds of prima facie unauthorised regulations may present themselves.

"A regulation or a by-law", says Griffith C.J. in Young v. Tockasaie 2 C.L.R. 470 at p. 477, "may be ultra vires in the sense that it deals with a subject not within the scope of the power conferred upon the delegated legislative authority, or it may be ultra vires because, although dealing with such a subject, it exceeds the prescribed limits within which the authority may be exercised."

Where a regulation is ultra vires in the first sense mentioned by Griffith C.J., the case will fall within the principle that emerges from Yaffe's Case; that is to say, there will be a conflict between the regulation and the Act which will render the former ineffective. Where, however, the case falls in the second class, and amounts merely to an excess of authority on a matter covered by the Act, the further question will have to be answered, whether the mere excess of authority on the authorised subject-matter involves a conflict with the Act. If it does not, then the words "as if enacted in this Act" will have their full weight, and the regulation will remain effective despite its ultra vires character.

It will be obvious, then, that there is an intermediate kind of regulation between those which are authorised and those which conflict with the Act, where the incorporating words may still have the effect of making operative sub-legislation which would

otherwise be ultra vires and void.

APPLICATION TO COMMONWEALTH INSTANCES.

The application of the rule as explained in Ialfe's Case to the two Commonwealth instances reveals at once what it achieves and what are its limitations in the matter of reinstating the sovereignty of Parliament and the authority of the Courts. In the case of the Post and Telegraph Act, any regulation exceeding the statutory authority clearly enough for it to be said to be beyond the scope of the Act would be held to be in conflict with the statutory provisions and obliged to give way to them. A regulation which, while made without any express authority from the Act, was still sufficiently in furtherance of the general purpose to preclude any suggestion of conflict would on the other hand gain definite assistance from being incorporated with the Act. That is to say, if a regulation is unauthorised by, but not inconsistent with the Post and Telegraph Act, and is at the same time on a subject germane to the purposes of the Act, the special words will prevent the Courts from declaring it ultra vires. The lack of authorisation must go to the point of repugnancy before invalidity follows.

A proclamation under the Coinage Act altering the Schedule would on the contrary be beyond all

possibility of attack, though not for any reason that greatly imperils parliamentary sovereignty. The truth is that when this Act is read as a whole, its proper construction appears to be what the Legislature has inserted the matters prescribed in the Schedule merely as a temporary provision, and has expressly authorised the Executive to alter the provision from time to time. Hence, in altering the Schedule, the Executive is carrying out the will of Parliament as expressed in the Act itself. No question of conflict with the Act can arise, since the only contrary provision in the Act (i.e. the Schedule) is one which, it must be assumed, is intended to be altered.

CURIOUS CONSEQUENCES.

Two somewhat curious results, it has been suggested, flow from the operation of the incorporating words.

1. Construction of Act by Rules.

The first was referred to by Shand J. in Australian Alliance Insce Co. v. Att. Gen of Qld. 1916 S.R. (Qld.) 135. "Where ambiguities are met with in the provisions of the Act, the regulations may, I suppose, be used for the purpose of determing the true interpretation to be put upon these provisions", he said at p. 195. His next words illustrate the difficulties which arise if this somewhat startling

proposition be sound. He pointed out that the Act before him at the moment was rich in ambiguities, and continued: "It is certainly unfortunate that these regulations should have been published at a time when the Houses of Parliament were not in session, for it is obvious that any opinion expressed by this Court as to the intentions of the Legislature, which is in any way based on the regulations, may be repudiated by both or one of the Houses of Parliament as soon as they have an opportunity of exercising their powers of annulling the regulations."

In the New Zealand case of Hills v. Stanford (1904) 23 N.Z.L.R. 1061 such a method of statutory construction was actually employed, and the limits of its permissibility were discussed. Rules had been made under a procedure Act which gave them "the same force and effect as if set out in the Act." It was held that the rules and forms might be looked at and considered in interpreting an ambiguous provision in the Statute. "It is not necessary", it was said by Stout C.J. "to hold that a rule..... which conflicted with the express terms of some section of the Act would be valid. If, however, the rule assumes an interpretation of an unexplained and of a possibly ambiguous phrase, the Court would, in my opinion, hesitate to declare it invalid and made without authority."

Whether the view that the regulations can be thus used for interpreting the Statute will ultimately be found right or wrong, there is strong support for it in the words of Lord Herschell, who declared that the rules of the Board of Trade in Lockwood's Case were to be treated "for all purposes of construction or obligation or otherwise exactly as if they were in the Act."

2. Indestructibility of Regulations.

The second suggested result is that the regulations, however far they depart from the Act, are indestructible. As will have been seen from the extracts quoted from the judgments in Yaffe's Case, it is not therein made plain whether the regulations which are outside the scope of the Act are to be considered as ultra vires and therefore void, or are to be regarded merely as if they were conflicting and at the same time subordinate provisions of an Act of Parliament, to which no force could be given but which remained none the less in existence. On the whole it appears that the former view-point is the one indicated, but the question is one on which there is little guidance.

In these circumstances, it is of interest to note that the latter view was taken in an important Queensland decision, where very close and exhaustive consideration was given to Lockwood's Case, and

the reasoning of Yaffe's Case was brilliantly anticipated. This was Australian Alliance Assurance Co. v. Attorney General of Queensland (supra), in which Shand J. declared that the regulations under consideration were "in direct conflict with the provisions of the Act, cannot be reconciled with them, and.....must be treated as ineffectual. Regulation 52", he said, "comes under this condemnation. It cannot, apparently, be got rid of. It is part of the Act. But as a matter of construction it cannot, I think, be taken to have any effectual operation." (p. 197).

SCOPE FOR FURTHER INTERPRETATION.

The questions just referred to, like others which arise in the matter, must await further explanation. There is room for considerable elaboration of what the House of Lords has so far said. Avoiding the pitfall of generalisation, the Bench in Yaffe's Case confined itself to the particular facts; but although the judgments left doubts still unresolved, the defences of the rule of law have been materially strengthened. More important still, the way has been left open to meet future attempts of the Executive, even of a kind as yet unforeseen, to use Parliament for the purpose of ousting the jurisdiction of the Courts.

AUSTRALIAN DECISIONS.

The Post and Telegraph Act section did not again arise for consideration in the High Court after

the decision on the old Act in Commonwealth v. Progress Advertising and Press Agency Co. Pty. Ltd. 10 C.L.R. 457 until quite recently, when a regulation imposing liability for telephone charges upon certain persons who would not otherwise have been liable was attacked in Gibson v. Mitchell, 41 C.L.R. 275. The case is remarkable. The decision, according to the head-note, was to the effect that the regulation in question "was necessary and convenient for carrying out and giving effect to the Act and was not ultra vires". An examination of the argument and judgments shows that this was in fact the whole question dealt with in the case. There is no mention in the report by either Judges or Counsel of the vital last words of sec. 97 - "and all regulations made in pursuance of this section shall have effect as if they were enacted in this Act". The writer has ascertained that the report is in this respect entirely accurate, and that the attention of the Court was not directed to the words at all. It is submitted that had this been done there would have been an end of the case on the very threshold of the argument, since it would have appeared at once that the question of ultra vires could not arise.

In another of the more recent decisions of the High Court, Lockwood's Case was partially considered. This was Jones v. Metropolitan Meat Industry Board, 37 C.L.R. 252. In refusing to apply the first-mentioned

authority to a set of facts which were readily distinguishable, Higgins J. said, with the concurrence Starke J. (p. 270): "That case needs the closest attention before it be applied." He made other observations indicating the opinion that the case depended entirely upon its own peculiar, if not unique, circumstances. The remainder of the Court expressed no opinion on Lockwood's Case. These views would doubtless undergo some modification if they were now being re-stated, after the decision in Yaffe's Case. Jones v. Metropolitan Meat Industry Board is not the only case in the High Court in which Lockwood's Case has been considered, though nowhere has there been any real grappling with the issue raised by it. See Ferrier v. Wilson 4 C.L.R. 785 at p. 797 per Barton J.; and Huddart Parker Ltd. v. The Commonwealth 44 C.L.R.492.

The only Australian decision in which Lockwood's Case has been fully and carefully considered is in Aust. Alliance Assurance Co. v. Attorney-General of Queensland 1916 S.R. (Queensland) 135. It was held by the Court that, in the circumstances then before it, Lockwood's Case was not an authority that the regulations attacked were beyond challenge or scrutiny. The interpretation of the words of the House of Lords which commended itself to the learned Queensland Judges anticipates with remarkable fidelity the explanation which was ultimately to be given by that tribunal itself. "That sec. 20 would authorise the

(2) Service and Execution of Process Act 1901-1931.

(3) Transport Workers Act 1928-1929.

(4) River Murray Waters Act 1915-1923.

(5) Rules Publication Act 1903-1916.

(6) Defence Act 1903-1927.

and (7) Audit Act 1901-1926.

It seems to be open to doubt what exactly is intended to be achieved by these words. In one sense the phrase labours the already obvious. A regulation duly made under the authority of a statute has the same force as the statute itself; i.e. it has "the force of law", without the need for any words so declaring (See Richards v. Attorney-General of Jamaica 6 Moo. P.C.C. 381; R. v. Walker L.R. 10 Q.B. 355 per Lush J.). Consequently it would appear that, at any rate in the case of certain of the above-mentioned Acts, unless the words are to be regarded as mere superfluity, they must be designed to give the regulations a force and effect which otherwise they would not have possessed.

In one New South Wales case, Tait v. The Pharmacy Board, 2 S.R. 168 it was unsuccessfully contended that the words went to the point of excluding the jurisdiction of the Courts to canvass the validity of regulations to which they applied. Sec. 20 of the Pharmacy Act 1897 (N.S.W.) provided that regulations

Governor in Council to embody in the regulations enactments wholly alien to the scope and objects of the Act of Parliament", says Shand J., "is a proposition which I should be slow to adopt. It has never been so decided, nor do I believe that anything so extravagant would have found favour with any of the learned Judges who decided Lockwood's Case." (See also elsewhere, passim, in the judgments).

A New South Wales decision in which Lockwood's Case was literally followed is found in Ex parte Heffernan 7 S.R. (N.S.W.) 774. The Coal Mines Regulation Act 1902 (N.S.W.) provided that special rules might be established for the working of coal mines. The rules, after complying with formalities, were to be observed "in the same manner as if they were enacted in this Act". This decision is consistent with the latest statement of the law, since, although the rule in question was prima facie ultra vires, no repugnancy to the terms of the Act was or could be put forward. The case therefore forms a good illustration of that class of instances where the incorporating words still have a vitally important effect.

"SHALL HAVE THE FORCE OF LAW".

There is a group of Commonwealth Acts which provide that regulations under them "shall have the force of law". Examples of these Acts are:-

(1) Pacific Island Labourers Act 1901.

made by the Pharmacy Board "shall, when approved by the Governor and published in the Gazette, have the force of law and shall thereupon be laid before both Houses of Parliament." It was held that nevertheless the Court had jurisdiction to consider whether a regulation was ultra vires, and Institute of Patent Agents v. Lockwood 1894 A.C. 347, although strongly pressed upon the Court, was not applied.

The way in which that authority was distinguished, however, was significant. The fact that the Pharmacy Board was a minor authority having cognizance of a particular occupation only, as contrasted with so important a public body as the Board of Trade in Lockwood's Case, was relied on. The implication of this ratio decidendi was that the words "have the force of law" would, under the same circumstances as existed in Lockwood's Case, have had the same meaning as the words there being interpreted, that is to say, the meaning that the regulations were to be deemed to be incorporated with the Act under which they were made.

A few years later, Pring J., referring in Crick v. Harnett 7 S.R. 126 at p. 139 to the decision in Tait's Case, said: "At the same time, I feel a difficulty in reconciling this decision with Institute of Patents Agents v. Lockwood - there does not appear to me to be any substantial difference between enacting that regulations shall have the force of law, and that

they shall be of the same effect as if contained in an Act".

But, with all respect, there does seem to be a very wide difference between saying that regulations are to have the force of law and saying that they are to be treated as part of the authorising Statute. The first does not, and the second does, purport to give a power to amend by addition the law as declared by Parliament. It is the difference between having the force of law, and having the force of statute law.

It would seem that the reasoning of Tait's Case, as well as Pring J.'s dictum quoted above, are indicative of an attitude of mind on the part of the Judiciary towards sub-legislation which now belongs to the past. The day of those decisions was one when it was probably impossible for the most discerning to foresee the ultimate degree to which the laws of the community would be made by regulation; and the Court was therefore less astute to limit the effect of phrases designed to reinforce this branch of executive power.

The modern attitude of the Australian Judiciary towards the phrase "shall have the force of law" is shown by Jones v. Metropolitan Meat Industry Board 37 C.L.R. 252. The Act being considered was the Meat Industry Act 1915 (N.S.W.), which, after setting

out the matters on which by-laws might be made by the Meat Board, provided that "such by-laws shall be submitted to the Governor for his approval, and if by him approved, shall be published in the Gazette, and thereupon but not sooner nor otherwise, shall, subject to this Act, have the force of law". A power of disallowance by Parliament was also included in the section.

It appears to have been the unanimous opinion of the Court that the use of these words did not relieve the Court of its duty to inquire whether the by-laws being attacked were authorised by the Act. Three of the Judges tacitly refused to apply Lockwood's Case; the other two expressly refused. The by-laws being questioned were attacked upon the ground, amongst others, of their unreasonableness. In the event, the Court held that it was precluded from going into this question. But in so deciding, reliance was placed, not upon the words "shall have the force of law", which in this connection were virtually passed over altogether, but upon the fact that the Governor and Parliament had both approved of the by-laws.....the former affirmatively and the latter by not disallowing them. Isaacs J. said (p. 261) after quoting a classic statement of the test of unreasonableness: "But it would be a serious step for a Court to reach such a conclusion by such a test when Parliament itself by its silence negatives it and the Governor-in-Council affirmatively repels it".

On the other hand, the Court without hesitation proceeded to examine the by-laws to see whether they were within the authority conferred; and Higgins J. (at p. 269) says quite definitely that the only by-laws to which the words "shall have the force of law" can be deemed to apply are those made under the powers conferred by the governing Act.

See also Aust. Alliance Assce. Co. v. Attorney-General of Queensland, 1916 S.R. (Qld.) 155, at p. 215, where Lukin J. draws attention to other cases in the High Court where regulations were held to be ultra vires and invalid notwithstanding the presence in the respective Acts of the words we are now considering. In the cases to which the learned Judge refers, however, it does not appear that the question of the effect of the words was argued to the Court.

THE COMMONWEALTH ACTS.

In the case of the Commonwealth statutes mentioned at the beginning of this section, there seems, with regard to most of them, to be no warrant whatever for placing any emphatic interpretation on the words "shall have the force of law". In some instances, indeed, such as the Rules Publication Act 1903-1916, the context, taken in conjunction with the nature of the enactment in which the phrase appears, suggests that

its use amounts to no more than a flourish of draftsmanship conveying the meaning "shall have effect".

In at least one case, however, so simple an explanation is clearly inadequate. This is the River Murray Waters Act 1915-1923, which devotes a special section to the matter. Sec. 8 of that Act declares that "The regulations made and to take effect pursuant to this Act shall have the force of law."

The true explanation of the insertion of this section is probably one connected with the nature and purposes of the particular Act. The River Murray Commission is invested thereunder with considerable powers of control, within the limits of its functions, over the affairs of three States; and the Act was passed before the decision in Clyde Engineering Co. V. Cowburn, 37 C.L.R. 466. Probably the object of the words was to ensure that regulations made under the Act would have all the supremacy over the statute law of the States to be derived from sec. 109 of the Constitution. To state the matter another way, the object was, it is suggested, to give to the regulations the status of a "law of the Commonwealth" within the meaning of that section. Since the decision in Cowburn's Case, of course, it is clear that a regulation validly made is such a law, and that express words to secure this result are mere surplusage.

The Transport Workers Act 1928-1929, and the Service and Execution of Process Act 1901-1931 are

likewise Statutes which in a special sense invade the field of State law, compelling the latter to adjust itself accordingly; and it is possible that the same motive impelled the insertion of the phrase in these enactments also. But the Transport Workers Act, at all events, does not seem to require of necessity that any more serious meaning shall be given to the words than "shall have effect".

CRICK V. HARNETT.

An example which has some significance by way of analogy in support of the less drastic interpretation of "shall have the force of law" is furnished by Crick v. Harnett 7 S.R. (N.S.W.) 126. The Constitution Act 1902, sec. 15 empowered the Legislative Assembly of New South Wales to make standing rules and orders, and went on to provide that "such rules and orders shall .....be laid before the Governor, and being by him approved shall become binding and of force." Lockwood's Case was urged as an authority that the jurisdiction of the Court did not extend to inquire whether a standing order which had complied with the formalities was ultra vires. The majority of the Court held that there was an obvious distinction, in that whereas the words in Lockwood's Case incorporated the sub-legislation with the Act, there was nothing in sec. 15 of the Constitution Act to produce the same result.

This opinion was expressly affirmed by the Privy Council, which, speaking by Lord Macnaghten, in Harnett v. Crick 1909 A.C. 470 at p. 475, said:

"Their Lordships think that the provision in the Act as to the Governor's approval was not intended to have the effect of giving standing orders passed by the Assembly a validity which otherwise they would not have possessed. It seems rather to be a limitation on the powers of the Assembly, making the Governor's approval necessary for the validity of any standing order passed by that body under sec. 15."

EXTREME ENGLISH EXAMPLES.

It should be noted finally that there are lengths of bureaucratic excess to which so far no Commonwealth Parliament has been asked to consent, but which are becoming increasingly common in England, going far beyond the instances we have been considering. An example is furnished by the English Small Holdings and Allotments Act 1908, sec 39(3) which contains the following words:

"..... the Board may..... confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall be final and have effect as if enacted in this Act; and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has

been duly made and is within the powers of this Act".

The instance is valuable for purposes of comparison. It can be paralleled by a number of others. The formula has the effect, to quote Darling J. in Ex parte Ringer, 25 T.L.R. 718, of giving "to an order made by a public department the absolute finality and effect of an Act of Parliament". It is difficult to conceive any honest object, any object other than to protect illegality, in the procuring of the insertion of these words. They are inescapably effective to achieve their purpose. It is reassuring to find Commonwealth statute-book as yet free from any such extreme delegations to the Executive of arbitrary power.

INCORPORATION BY DEFINITION.

In some Commonwealth Acts the regulations made under them are directed to be treated as part of the Act by the definition section, which enacts that "'This Act' includes all regulations made thereunder." See e.g. the Customs and Excise legislation. In the case of the Bankruptcy Act 1924-1932 the provision is made to extend also to Rules of Court.

There can hardly be any doubt that there is nothing in this which can be regarded as cutting down the Court's power to declare regulations to be ultra vires. The provision does not deal with the effect of the regulations at all. Its object is to make the

expression "This Act" what it would probably be even without the definition - a compendious term for the whole body of law, both primary and subordinate, which has its existence by virtue of the Statute. As Professor Bailey says, it amounts to no more than "a warning to the citizen that to ascertain his rights and duties he must look to what is prescribed by regulations, as well as by the Act itself." (Administrative Legislation in the Commonwealth A.L.J. Vol.4. P. 38).

CHAPTER IX

THE TERRITORIES.

Sec. 122 of the Constitution entrusts Parliament with power to "make laws for the government of any territory" (1) surrendered by a State, (2) placed by the Crown under the authority of the Commonwealth or (3) otherwise acquired by the Commonwealth. The Territories at present being governed by the Commonwealth under this section are five in number. The Northern Territory, and the Federal Capital Territory (called in the relevent legislation the Seat of Government), have been surrendered to the Commonwealth by South Australia and New South Wales respectively; Papua and Norfolk Island have been placed under the authority of the Commonwealth by the Crown; and New Guinea falls under the final heading of a Territory "otherwise acquired", having been accepted on the terms that it is to be administered under a League of Nations Mandate in pursuance of the Treaty of Versailles. The legal history of the governance of the Territories is epitomised in the preambles to the respective Acts.

It is plain at a glance that the government of these Territories is rightly to be treated as an important branch of Commonwealth executive power. Griffith C.J. has pointed out that in exercising the

powers conferred on it in this regard, Parliament is authorised both to "legislate directly" and to "create a subordinate legislature" (R. v. Bernasconi, 19 C.L.R. at p. 635). In practice, however, Parliament does neither. It authorises the Executive to legislate. There is an apparent exception in the case of Papua, where a Legislative Council is constituted under the Papua Act 1905-1924. But the method of appointment of its members, and the control exerted through the requirement of approval of its proceedings, leave it virtually the creature of the administration.

It follows, since Parliament has handed over its legislating power under sec. 122 to the Executive, that an examination of the field of administrative action in regard to the Territories involves an inquiry into the limits of Parliament's own power in the same field. This leads us to a study of sec. 122 itself, and of the meaning ascribed to it by the High Court.

CONSTRUCTION OF SECTION 122.

There have not been a great many cases in which the High Court has been called upon to interpret the territorial power conferred on Parliament by sec.122, but enough opportunity has arisen for a fairly clear and comprehensive basis of principle to have been laid down. The dominant note of the pronouncements on the section has been the generously wide limits which have

been set to its operation. Starke J. describes the power conferred as "full and plenary". Higgins J. says: "This power to make laws for the government of the Territory is, so far as appears, unlimited; and it is difficult to see what right we have to limit it by construction." (Porter v. The King; Ex parte Yee, 37 C.L.R. 432).

Most, if not all, of the cases in which the scope of the section has been a material question have been concerned with the issue of how far the powers exercisable by Parliament under it are subject to or controlled by any other provisions of the Constitution. The issue is one which is still being determined inductively; and no statement which can be regarded as final for all purposes has yet been made as to the relation of the section to the remaining Constitutional provisions; but the whole tendency so far has been in favour of its complete independence of those provisions.

The nearest approach to a complete delimitation of the scope of the section is found in a passage from the judgment of Isaacs J. in R. v. Bernasconi 19 C.L.R. 629, the importance of which demands its somewhat full quotation. "It is plain" he says (p. 637), "that that section does not consist merely of additional legislative power over territories beyond the powers already conferred upon Parliament in relation to the

Commonwealth itself, for its language is unrestricted and covers many of the subjects already specified in sec. 51. It is an unqualified grant complete in itself, and implies that a 'territory' is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers. It is in a state of dependency or tutelage, and the special regulations proper for its government until, if ever, it shall be admitted as a member of the family of States, are left to the discretion of the Commonwealth Parliament."

In particular instances, this grant of power has been held not to be cut down by other individual sections of the Constitution. Thus in Buchanan v. The Commonwealth 16 C.L.R. 315 it was sought unsuccessfully to apply to the Northern Territory the force of sec. 55, requiring that taxation laws shall deal only with taxation. Barton J. said: "In the first place, it must be observed that sec. 122, by itself, contains all the necessary power to legislate for a territory. It does not need an assistance from sec. 51 in respect either of taxation or of anything else.....Territories, until they become States, are dependencies, and not in this sense component parts of the Commonwealth; and legislation for them, when it takes the form of taxation, is not in my opinion, the taxation of the Commonwealth which is the subject matter of secs. 51(11) and 55."

In R. v. Bernasconi, 19 C.L.R. 629 the bearing on sec. 122 of another part of the Constitution was considered, when it was held that sec. 80, requiring that "the trial on indictment of any offence against any law of the Commonwealth shall be by jury" did not apply to an offence against a Papuan Ordinance. The principle of the decision is indicated as tersely by an interjection of Isaacs J. in the course of the argument as anywhere in the judgments. "Ought not sec. 80", he asked, "to be read as a qualification upon Chapter III of the Constitution just as sec. 55 is to be read as a limitation upon sec. 51(ii)?" The effect of the case is that the territorial legislative power is as independent of the Judicature provisions of the Constitution as it was held in the earlier decision to be free from the taxation restrictions.

As was indicated above, however, it has not been finally said that the powers under sec. 122 are wholly uncontrolled by any restrictive provision of the Constitution. Thus Starke J., in Porter v. The King: Ex parte Yee, 37 C.L.R. 432 says: "It is unnecessary.....to consider whether certain constitutional limitations - as, for instance, that contained in sec. 116 - extend to legislation in respect of the territories", sec. 116 being that concerning the preservation of religious freedom.

STATUS OF TERRITORIAL LAWS.

An interesting question, raised in R. v. Bernasconi (supra) with regard to sec. 80, but important from other angles as well, is whether a law made under sec. 122 for the government of a territory is a "law of the Commonwealth" within the meaning of that expression as used in the Constitution.

One of the grounds relied on by Griffith C.J. in that case, though it does not seem to be an indispensable part of his judgment, is that the offence against the Papuan law did not constitute an "offence against any law of the Commonwealth" within the intendment of sec. 80. He reasons that sec. 80 relates only to offences created by Statutes passed in the execution of "those functions of government as to which the Commonwealth stands in place of the States." It is such Statutes alone, he says, which are properly to be described as "laws of the Commonwealth." He refers to the use of the phrase in sec. 5 of the Constitution Statute and in secs. 41, 61 and 109 of the Constitution, and continues: "In the last mentioned section it is used in contradistinction to the law of a State. I do not think that in this respect the law of a territory can be put on any different footing from that of a law of a State." This view, and the terms in which it is set forth, are expressly concurred in by Gavan Duffy and Rich JJ. (ibid. p. 640).

The remaining member of the Court, Isaacs J., while reaching the same conclusion in the case, is unable to accept this view of the nature of a territorial law. "In my opinion," he says, "the law alleged to have been contravened is a law of the Commonwealth, because its present force subsists by virtue of the declared will of the Commonwealth Parliament."

This opinion, which is submitted, possesses much cogency, derives support from an observation of Knox C.J. and Gavan Duffy J. in their joint judgment in the Wool Tops Case, 31 C.L.R. 421 at p. 431, where, after pointing out as Griffith C.J. had done the occurrence of the phrase in various places in the Constitution, they continued: "In every case it probably means Acts of the Parliament of the Commonwealth."

It will be seen that the contrary view expressed by the majority of the Court in R. v. Bernasconi (supra) leads at once to much difficulty. The words of Griffith C.J. quoted above can have no other meaning than this: that Acts of the Federal Parliament passed for the purpose of governing the Territories under the powers of sec. 122 are not "laws of the Commonwealth" any more than State Acts of Parliament are to be so regarded. Nor can his words be construed as limited to the phrase as used in sec. 80, for he specifically mentions the other instances where

it is employed. It would follow irresistibly from this that the supremacy given by sec. 109 of the Constitution to "laws of the Commonwealth" over conflicting State laws would not extend to give the same supremacy to Acts of Parliament dealing with the Territories, where these came into conflict with the law of the States. Instances of such last-mentioned conflict would be rare, but can be imagined without difficulty.

More striking still is the possible effect of such an interpretation upon sec. 61 of the Constitution, delimiting the executive power of the Commonwealth. That power is declared to extend to "the execution and maintenance of this Constitution, and of the laws of the Commonwealth." Unless the exercise of executive power in the Territories could be regarded as being for the execution and maintenance of the Constitution (which it seems it could not: see Wool Tops Case, supra) it would not be available at all to carry out laws made under sec. 122 - a logical conclusion which is so absurd as to indicate definitely that the premises must be faulty. It is submitted, therefore, that the view taken by Isaacs J. is the correct one, and that there is no such thing as a "law of the Territory" in contradistinction to a "law of the Commonwealth."

SECTION 122 AND THE JUDICATURE PROVISIONS.

That the powers of sec. 122 were unrestricted by sec. 80 or any other of the Judicature provisions of

the Constitution was, as we have seen, decided in R. v. Bernasconi (supra). It was established in Porter v. The King: Ex parte Yee, 37 C.L.R. 432 that the converse is likewise true. If sec. 122 is unfettered by Chapter III, equally it can gain no help from that source. But the effect of the last-mentioned decision is, further, that sec. 122 has no need of such assistance. Its plenary scope is such that it enables those things to be done, which, in the case of laws made for the Commonwealth proper, can only be achieved with the aid of what Isaacs J. has called the "self-executing provisions" of the Constitution. (Ibid. p.440).

An Ordinance of the Northern Territory purported to give a right of appeal from the Supreme Court of that Territory to the High Court. The question was whether this could be done, in view of the fact that the appellate jurisdiction of the High Court was limited by sec. 73 of the Constitution to the hearing of appeals from specified Courts, among which the Territorial Court could not rank, even if it could be considered a "Federal Court" within the meaning of that section, as it lacked the life tenure required by sec. 72.

This challenge to the validity of the Ordinance might well have been thought formidable. It was met by the answer that although the appellate jurisdiction of the High Court is exhaustively defined in Chapter III of the Constitution - exhaustively, that is,

for the purposes of that Chapter - the plenary nature of sec. 122 enabled further appellate jurisdiction to be conferred in respect of the Territories. Isaacs J. said that he recognised it to be settled law "that 'the judicial power of the Commonwealth' within the meaning of Chapter III, and both original and appellate, cannot be increased by Parliament. "But," he went on, "the judicial power of the Commonwealth is as defined by R. v. Bernasconi, that of the Commonwealth proper, which means the area included within States". The right of appeal was upheld. "Why should we refuse," asked Higgins J., "to give effect to the Act and Ordinance? Sec. 122 is of the same authority as sec. 73."

The consequence of this method of reasoning is that the existence of a right of appeal from a Territorial Court does not involve that the latter is a "Federal Court" in the sense in which that term is used in the Constitution. See the contrary view expressed by Isaacs J. in Mainka v. Custodian of Expropriated Property, 34 C.L.R. 297, expressly disapproved by Starke J. in Porter v. The King (supra) at p. 450, and further contradicted recently in Edie Creek Pty. Ltd. v. Symes, 43 C.L.R. 53. This position results from the independence of sec. 122 from Chapter III of the Constitution, and it follows, therefore, that neither the Executive under its Ordinance making power nor Parliament itself can create a Federal

Court for a Territory, even though life tenure is accorded to its personnel. (See per Griffith C.J. in Mitchell v. Barker 24 C.L.R. 365 at p. 367).

GOVERNMENT BY ORDINANCE.

The system of government now adopted in all the Territories is that of legislation by Ordinances, which the respective Acts of the Federal Parliament authorise the Executive to make. The essence of the method is simplicity, and great freedom and flexibility. More elaborate machinery has been recently tried in connection with the Northern Territory and the Seat of Government, with the object of supplementing the Ordinance-making power, but the Acts creating it have now in each case been repealed; and a reversion has been made to the standard plan formerly in operation. The method in every case except one is to entrust the Ordinance making power in general terms to the Governor-General in Council. The special case of Papua, where what is in form and name a subordinate Legislature has been set up, is actually in no very different position when regarded from the standpoint of practical effect.

Meaning of Ordinance.

There is no magic in the term "Ordinance", which is simply a name for an act of sub-legislation. This is made clear by the House of Lords in Metcalfe v. Cox, 1895 A.C. 328 where Lord Macnaghten says:

"There is no statutory definition of the word 'ordinance'. It is not a cabalistic formula. It is a common English word, with a well-known meaning" (p. 350). Lord Herschell says: "The word 'ordinance' has no technical signification; it means no more than an instrument embodying an order or direction" (p. 338). In that case it was a temporary Commission, charged with the duty of improving the administration of the Scottish Universities, which was authorised to make Ordinances.

From the standpoint of its legal effect, therefore, an Ordinance is in no different category from that of regulations made under those Acts examined in another Chapter which confer sub-legislative power in general terms. The expression has, however, been reserved by the Commonwealth Parliament for use in respect of the Territories, as one denoting a rule made by the Executive in pursuance of a power of the most plenary character to create and to modify at will the whole system of law affecting the residents of a defined area. This wide and important purpose of Commonwealth Ordinances is reflected in their form, which follows closely that of an Act of Parliament. The typical Ordinance bears a title, is divided into sections, and not infrequently concludes with a section conferring a regulation-making power. The use of the term follows a practice widely obtaining under British colonial government.

THE NORTHERN TERRITORY.

In 1910, the part of South Australia now known as the Northern Territory was transferred by that State to and accepted by the Commonwealth for administration under sec. 122 of the Constitution. What might be termed the static basis for the future administration of the Territory was laid by the Northern Territory Acceptance Act 1910, which provided that "all laws" (i.e. South Australian laws) "in force in the Northern Territory at the time of the acceptance shall continue in force, but may be repealed or altered by or under any law of the Commonwealth" (sec. 7(1)).

Specific provision was made for the transfer of executive power to the Commonwealth from South Australia by sec. 7(3), which enacted that all powers and functions exercisable under any South Australian law by the Governor or other authority of that State should be vested in and exercised by the Governor-General or other appropriate authority "as the case requires, or as the Governor-General directs."

Scheme of Administration.

The actual provision for the government of the Territory is found in the Northern Territory (Administration) Act 1910-1931. The Governor-General is authorised to appoint an Administrator, who may

~~may~~ appoint a deputy, subject to the authorisation of the Governor-General for such action, and subject also to any limitations or directions by the Minister as to the powers and functions to be assigned to such deputy. The Administrator is to have no independence of position, but "shall hold office during pleasure."

The power to legislate is contained in Sec. 21, which enacts that until other provision is made "the Governor-General may make Ordinances having the force of law in and in relation to the Territory." This is a slight modification of the power as it had been expressed in the former section, repealed by the Northern Australia Act, the words "in and in relation to" being new. Their absence had been the source of some embarrassment to the High Court in Porter v. The King; Ex parte Yee 37 C.L.R. 432. Every Ordinance is to be notified in the Gazette and to take effect from such notification or from a later date specified in the Ordinance. The same power of disallowance by either House of Parliament is provided as that contained in Acts Interpretation Act 1904-1932 sec. 10 which, of course, does not apply to Ordinances. These incidents of Ordinance-making apply, with trivial variations, to Ordinances in respect of all the other Territories except Papua.

Northern Australia Act 1926.

For the four years 1926-1931 the Northern Territory (Administration) Act, though still unrepealed,

had its operative sections deleted and was virtually superseded by the elaborate legislative experiment contained in the Northern Australia Act 1926. This Act divided the Territory into Northern Australia and Central Australia, and replaced the Administrator by two "Government Residents", one for each part. Each Government Redident had an Advisory Council, half the personnel of which was elected, and half nominated by the Minister. The Advisory Council was charged with the duty of advising the Resident on matters generally and particularly on Ordinances. It did not appear what use the Resident was to make of the advice, as he was given no power himself to make or unmake Ordinances. His task was to "exercise and perform all powers and functions that belong to his office, according to such instructions as are given to him by the Minister." Presumably, the Resident's duty, on being advised, was to advise the Minister, who in his turn would advise the Government, who would ultimately, as the Executive Council, advise the Governor-General.

More than ten pages of this Act were devoted to the detailed constitution of a "North Australia Commission" with a power to make by-laws and many other specified functions. In this connection the regulation-making power entrusted to the Governor-General by the Act is interesting. It specifically authorised him to make regulations (a) for empowering the Commissioner to make by-laws "for any purpose

specified by the Governor-General"; (b) for "more accurately defining" the powers conferred on the Commission; and (c) for specifying other matters "with respect to which the powers of the Commission shall extend." This was doubtless inserted to facilitate adjustment of the Act to the conditions of the Territory; but in view of the elaborate detail with which the Commission was constituted, the effect of the power was to enable the Governor-General to alter the Act by regulation, and to treat this part of the scheme as entirely provisional.

The system of law-making for the Territory under the Northern Australia Act 1926 was still that of the promulgation of Ordinances by the Governor-General, which he was authorised to make under separate powers for North and Central Australia respectively. When the Act was repealed in 1931 this distinction was abolished.

FEDERAL CAPITAL TERRITORY.

The Territory administered under the Seat of Government Acts comprises the actual site of the Federal Capital and an area of surrounding country as well as a coastal area at Jervis Bay. It was accepted from New South Wales by the Seat of Government Acceptance Act 1909 and the Jervis Bay Acceptance Act 1915.

The government of the Territory is now being carried on under the Seat of Government (Administration)

Act 1910-1931. The same provision as in the case of the Northern Territory was made for the continuance as laws of the Territory of State laws in force at the time of acceptance, unless and until these should be altered by the Commonwealth.

The law-making power for the Territory is found in sec. 12 of the last-mentioned Act, which declares (sub-sec. (1)): "The Governor-General may make Ordinances having the force of law in the Territory." This was the formula originally used in the Administration Act for the Northern Territory and the scope of the authority conferred by it was one of the matters for decision in Porter v. The King; Ex parte Yee 37 C.L.R. 432. The contention in that case was that the words "in the Territory" had the effect of limiting the operation of any Ordinance made under the power to things persons and events actually within the physical area of the Territory. The Governor-General had made an Ordinance purporting to confer a right of appeal from the Territorial Court to the High Court, and it was urged that this was an attempt to give an Ordinance force not "in the Territory" but outside it.

The argument was rejected. Isaacs J. said that the purpose of the words was "to indicate that the Ordinance was not intended to transcend sec. 122 of the Constitution.", and that the disputed provision was in truth the law in force in the Territory as to what right of appeal existed to the High Court. Although

the doubt was thus resolved in favour of the Administration, the wording was seen to be unsatisfactory and was, in the case of the Northern Territory, made clearer by later legislation. In the Seat of Government (Administration) Act it remains unaltered, but in view of the High Court's pronouncement it may be assumed that the power conferred by sec. 12 of the Act is co-extensive with that possessed by Parliament under sec. 122.

Plan of City of Canberra.

An interesting example of the giving of an important discretion to a Department, subject to control retained by Parliament, is found in sec. 12A, inserted by a recent amendment. Power is given to the Minister to vary by writing the formally established "plan of lay-out" of Canberra, subject to his complying with two conditions. (1) Before any variation is made, thirty days' notice of intention to vary must be given by publication in the Gazette. (2) Within fifteen days after variation a copy of the instrument by which it is made to be laid before both Houses of Parliament. The variation may be disallowed by either House in the same way as in the case of a regulation or Ordinance. Apart from this power of modification, the Minister is required to follow the plan implicitly.

Seat of Government (Administration) Act 1924-1929.

As with the Northern Territory, the Federal

Capital area was made the subject, for some recent years, of a somewhat elaborate scheme of government, partly superseding that of the 1910 Act and its amendments. Again as in the other case, the scheme has been abandoned and the former system restored. The substituted plan was contained in a lengthy Act of 1924, the principle of which was to place the government of the Territory in the hands of a Commission of three members. Two of these Commissioners were to be nominees of the Crown, the third being elected, and possessing only limited authority as compared with that of his colleagues. The Commission was entrusted with a by-law-making power in respect of a wide range of subjects, and at the same time the Governor-General was authorised to add to the powers of the Commission by regulation to an unlimited extent.

Notwithstanding these detailed provisions, it was the intention that the Ordinance-making power under the 1910 Act should co-exist, but through an oversight this result was not at first achieved. Sec. 12 of that Act had conferred power to make Ordinances only "until the Parliament makes other provision for the Government of the Territory", and the creation of the Commission apparently was such provision. Later, the words quoted were deleted from sec. 12 by amendment, thus ensuring the continuance of the Ordinance-making power. It was held by the High Court in Federal Capital Commission v. Laristan Building Co. 42 C.L.R. 592,

however, that this amendment did not continue the power of the Governor-General to the extent of allowing him to make Ordinances inconsistent with the Seat of Government (Administration) Act 1924-1928; and accordingly, an attempt to cover by an Ordinance giving power to the Commission to make regulations a matter which the Act under which the Commission functioned had authorised that body to deal with by by-laws subject to prescribed conditions was held invalid.

An Act of 1930 abolished the Commission system and restored the original method of Government by Ordinance as the sole basis of administration. In the same Act, a section was included validating the excesses of authority which had occurred in the manner described above.

NEW GUINEA.

New Guinea is in a special position, the limits of the Commonwealth's legislative power with regard to it being fixed with reference to considerations somewhat different from those which apply to other Territories. In the first place, this Territory is administered under a Mandate from the League of Nations, which involves that in some respects at least the Commonwealth stands in the position of a trustee with regard to it. The conditions prescribed by the Mandate must be complied with. These are given the force of a Commonwealth enactment in the New Guinea Act 1920-1926 which by section 15 and 16 thereof sets

forth certain "guarenteee" for the benefit of the native population, and enjoins the making by the Governor-General of an annual Report to the Council of the League of Nations.

The Mandate was accepted by the King for and on behalf of the Commonwealth, and this action was expressly authorised by the Imperial Treaty of Peace Act 1919. It therefore becomes of the greatest significance that Article 2 of the Mandate directs that the Commonwealth "shall have full power of administration and legislation over the Territory, subject to the present Mandate, as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the Territory, subject to such local modifications as circumstances may require."

Source of Administrative Power.

It seems to be the view so far expressed by the High Court that, as a consequence of these factors, sec. 122 of the Constitution is not to be considered as any part of the authority for the government of the Territory. In Mainka v. The Custodian of Expropriated Property, 54 C.L.R. 297, after tracing the devolution of the Mandate through the Sovereign by the authority of the Treaty of Peace Act, Isaacs J. continues: "Thus, starting with the basis of Imperial Statute, there is a connected chain of authority leading to sec.2

of the Ordinance....." He makes no reference to sec. 122 as an element in the position at all.

In the later case of Porter v. The King; Ex parte Yee 37 C.L.R. at p. 450, Starke J. seems to take up the same position. "In truth", he says, "the government of the Territory of New Guinea was not organised under the Constitution nor subject to its complex system. It was organised under the New Guinea Act (No. 25 of 1920) coupled with the Treaty of Peace, the Mandate, and the Imperial Act 9 and 10 Geo. c. 33."

It would appear that these words can only mean that the law-making power for New Guinea does not proceed from sec. 122, but from the Imperial Act plus the terms of the Mandate of which it authorises the acceptance. To state the conclusion another way, it seems to be laid down that the New Guinea Act is not passed under the powers of sec. 122 at all, but under those conferred by the Imperial Act operating on Article 2 of the Mandate.

It is not obvious how this can be the case. Apart from sec. 122 of the Constitution, or from some express or implied enlargement of the scope of that document, the Commonwealth has no power to accept further Territories for administration. Sec. 122, however, gives the widest room for fresh Territories to be added, by providing for those which shall be

"otherwise acquired." If the New Guinea Act does not rest upon sec. 122 but upon the Imperial Statute, then it must follow (1) that the Constitution has been enlarged by the latter enactment so as to provide an independent basis of action by the Commonwealth and (2) that this basis is made the sole and exclusive authorisation to legislate with respect to New Guinea.

The established principles of interpretation do not show that the Imperial Act could have such an effect. The rule is that a Legislature must be presumed to intend that which is the necessary effect of its enactments (James v. Cowan, 43 C.L.R. at p. 409). But the Treaty of Peace Act 1919 is an Act of only two sections, giving His Majesty a very general power to do all things necessary for carrying out the Treaty. It could hardly be a necessary effect of this enactment, even when read together with Article 2 of the Mandate, that the Commonwealth Constitution is excluded as a source of power in relation to New Guinea.

It is submitted, therefore, that there is no legal necessity to take the view that the Territory of New Guinea "was not organised under the Constitution." If this contention be not insisted upon, then the proper construction of the position is that New Guinea is administered, and the New Guinea Act was passed, under the powers conferred by sec. 122, as possibly extended but certainly not curtailed, by the force of the Treaty of Peace Act and the Mandate.

In one respect, it is settled that the Imperial legislation does not extend the powers of sec. 122. That legislation does not enable powers exercisable by the Federal Parliament in respect of the Commonwealth proper under other parts of the Constitution, to be applied to the administration of New Guinea. In Mainka's Case (supra) the question concerned the power to confer on the High Court jurisdiction on appeal from the New Guinea Central Court; and Isaacs J., delivering the judgment, took the view that as a consequence of the operation of the Imperial Act, the Central Court could be made, and had in fact been made, a "Federal Court" within the meaning of Chapter III of the Constitution. This opinion, which was unnecessary to support the decision, has been expressly disapproved, and indeed more or less disowned by Isaacs J. himself, in Porter v. The King: Ex parte Yee (supra). Referring to it, and to Mainka's Case, Starke J. says: "There are some incautious expressions in that case which support the contention." "But," he continues, "the Central Court of New Guinea is not, any more than is the Supreme Court of the Northern Territory, a Federal Court within the meaning of Chapter III of the Constitution."

This means that the doctrine of R. v. Bernasconi (supra) as to the mutual exclusiveness between sec. 122 and the remainder of the Constitution is not affected, in the case of New Guinea, by the words,

backed by Imperial Statute, of Article 2 of the Mandate.

It is submitted, to sum up, that the full powers of sec. 122 to "make laws for Territories..... otherwise acquired" are available for New Guinea; and that although the plenary interpretation which has been given to that section is so wide that it is not easy to see how it may be extended, the possibility exists that it may under some circumstances be added to by the operation of the Imperial Act. It is not, however, so added to as to enable the Commonwealth to make its other law-making powers available for New Guinea.

The New Guinea Act.

The structure of the New Guinea Act 1920-1926 is simple, providing, on the executive side, for an Administrator who is to hold office during pleasure and to perform the functions assigned to him by the Governor-General. By the Administrator's Powers Ordinance 1923 and a number of enlarging amendments down to 1929 he has had assigned to him a power to make regulations for purposes of a local government character such as public health, control of buildings, and the preservation of order. These regulations are to have effect on publication in the New Guinea Gazette, and it is provided that they "shall be subject at any time to disallowance by the Governor-General", such

disallowance to operate from the date of its publication in the same Gazette.

On the legislative side, the Governor-General is empowered to "make Ordinances having the force of law in, and in relation to, the Territory." Although it would probably be contained in this general grant, the power is also expressly given to make Ordinances applying Acts of Parliament of the Commonwealth to the Territory.

PAPUA.

The main successive steps in the governmental history of Papua, from its annexation by Britain down to the Letters Patent of March 18, 1902, under which it was placed under the authority of the Commonwealth, are set forth in detail in the recitals of the Papua Act 1905-1924. This Act completed the transfer by formally accepting the Territory, which had been known as British New Guinea and then for the first time received the name of Papua, on behalf of the Commonwealth.

A far more elaborate system of government has been created by Parliament for this Territory than for any other under the control of the Commonwealth. The Act divides the machinery into two parts. The first is "The Executive Government", consisting of the

Lieutenant-Governor and the Executive Council; and the second is "The Legislative Council".

1. The Executive Government.

The Lieutenant-Governor holds office during the pleasure of the Governor-General, subject to whose approval he may appoint deputies, whose functions, however, are to be subject to limitation and control by the same authority. He may appoint "all necessary judges, magistrates, and other officers of the Territory," but these likewise are to hold office during the pleasure of the Governor-General, by whom all appointments are required to be confirmed. No power of dismissal of officers is entrusted to the Lieutenant-Governor, but he may suspend and report any officer, whose fate, once more, is in the discretion of the Executive of the Commonwealth.

Sec. 22 provides that: "There shall be an Executive Council for the Territory, to advise and assist the Lieutenant-Governor." This body is to consist of nine members appointed by the Governor-General and holding office during pleasure, eight of whom "shall be officers of the Territory." The latter are thus effectively controlled by the Commonwealth Executive through the control of their official positions.

It might have been thought that these

provisions in themselves were adequate to render the Executive Council innocuous, so far as frustrating the purposes of the central authority was concerned. But control does not stop at this point. It is further enacted (1) that the Council can transact nothing unless the Lieutenant-Governor summons it; (2) that when summoned the only business it may consider is that which the same officer sees fit to lay before it; and finally, that when any advice or decision has ultimately been duly obtained from the Council, the Lieutenant-Governor may "if he thinks fit" disregard it altogether and act in opposition to it, subject to the necessity of reporting the incident to the Minister.

2. The Legislative Council.

This body, designated in one High Court Case, perhaps a little enthusiastically, as a "subordinate legislature" (R. v. Bernasconi, 19 C.L.R. at p. 635), is to consist of the Lieutenant-Governor and the Executive Council, together with "five non-official members who shall be nominated by the Lieutenant-Governor and appointed by the Governor-General." To cope with any conceivable embarrassing difference of opinion that might arise even in a body so constituted, it is further provided that "Every non-official member may be removed at any time by the Governor-General".. The Legislative Council may frame its own standing rules

and orders, provided that these "are not repugnant to any instructions from the Governor-General."

The legislative power of this body is contained in sec. 36, which declares that: "Subject to this Act, the Legislative Council shall have power to make Ordinances for the peace, order, and good government of the Territory." The qualifications upon this authorisation are firstly that no Ordinance appropriating revenue is to be proposed except by the Lieutenant-Governor or under his direction, and secondly, the requirements as to assent. Every Ordinance passed must be presented to the Lieutenant-Governor, who may thereupon assent, refuse to assent, or reserve the Ordinance "for the Governor-General's pleasure." To Ordinances of a number of specified kinds he is forbidden to assent, unless they provide in their terms for the obtaining of the Governor-General's approval before they are to have effect.

Effect of the System.

It will be seen that the control of the Commonwealth Executive over all this machinery is detailed and complete, as, of course, it is essential that it should be for ruling a native Territory of this description. Though the institutions created bear some of the outward shape of deliberative assemblies,

the resemblance is one of form only. But it is submitted that the real and substantial merit of the Constitution thus established is twofold. It secures what is in fact, even when stripped of all its trappings of title and procedure, a committee of experts to advise on the making of Ordinances who have the fullest local administrative knowledge it is possible to get. Further, it has the quality of order and permanence.

The alternative method elsewhere in operation of conferring an unfettered power on the Executive to make Ordinances, and thereby to create its own administrative organisation, seems to be open in principle to some objection. Such a plan may well tend to result in shifting policies, and expedients which deal with the continuous problems in a partial and local manner. These elements tend to prevent that cumulative building up of local experience and understanding which is essential for sound Territorial administration. The virtue of elasticity has been claimed for the unrestricted method, but elasticity may easily become another name for haphazardness.

A realisation of the weakness of the last-mentioned system is seen in the short-lived attempts to devise better schemes for the Seat of Government and the Northern Territory. It is submitted that the

basic reason for the failure of those experiments was that they represented a reaction to the other extreme. In place of the former less systematic Ministerial control was substituted the rigidity of decentralised local government bodies. The lack of continuous and effective control by the Commonwealth Executive such as is provided for in the Papua Act 1905-1924 gave room for the defects to develop which led to their abolition. The fact that the Papuan system has endured without substantial amendment for more than twenty-six years is a witness to its soundness of conception. It is submitted that a reproduction of its principles, with necessary adaptations, in the enactments providing for the government of the other Territories would mark an advance on present methods.

Indeed, where the Commonwealth Executive has elsewhere been most successful in its territorial government, it would appear to have been by the deliberate adoption and retention of a system of administration, created by Ordinance, which resembles in essential principle that of the Papuan Constitution. This has been done in New Guinea and, to a degree, in Norfolk Island. The Ordinance No. 5 of 1926 of New Guinea establishes a small "Advisory Council" consisting of five Government officers. The function entrusted to the Council is that of considering and

reporting on (1) proposals for making or varying ordinances, and (2) any matters which may be submitted to it by the Administrator.

NORFOLK ISLAND.

The devolution of the responsibility for the government of Norfolk Island, until it fell ultimately upon the Commonwealth, is set out in two pages of recitals prefacing the Norfolk Island Act 1913. This Act commenced on July 1, 1914, following upon an Imperial Order in Council transferring the Administration of the Territory from New South Wales to the Commonwealth. The scheme of the enactment is at once spacious and simple.

Continuance of Laws.

All laws in operation at the date of the taking over by the Commonwealth are continued in force, subject to a power entrusted to the Commonwealth Executive to alter them by Ordinance. On Dec. 24,1913, a few months prior to the transfer, these laws had been consolidated and codified. By Proclamation in the New South Wales Government Gazette of that date (No. 205), it is declared that "all laws heretofore in force in Norfolk Island are hereby repealed, and the following laws shall commence and come into force." This is followed by 32 laws, each dealing with a different subject, and covering 62 pages of the Gazette.

The system of administration prescribed in this code has with some unimportant variation, been retained ever since, and demands a brief reference.

Administration (Law No. 2)

It is provided that "the executive government of Norfolk Island" is to be vested in an administrator "who shall be appointed by the Governor and who may also be chief magistrate." His duties are, in the main, to "exercise a general supervision over the affairs of the Island" and to "carry out any instructions given him by the Governor."

The Executive Council (Law No. 13)

There is an "Executive Council" consisting of a President and six members. The President and four of the members are to be appointed by the Governor. The other two are to be elected, subject to age and residence qualifications both for voting and elegibility as members. All members hold office for one year.

The functions imposed on this body are analogous to those of a Municipal council or other local government authority. It is to have charge of roads, of commons and reserves (subject to restrictions imposed by the Governor) of public works (where specially authorised by the Governor) and of other minor matters. It has power to carry out road

maintenance and public works by compelling all male residents of the Island between the ages of 21 and 55 either to work or to pay a tax (called a "rate") in lieu of working.

For the purpose of giving effect to its powers, the Council is entrusted with a general power to make by-laws. It is provided that "the by-laws of the Executive Council shall have effect when approved by the Governor, and when such approval is notified to the Administrator, and not otherwise."

It will be seen that the ultimate control is made to repose continuously in the Governor. By the Norfolk Island Act, sec. 4(2) it is declared that "where in any law, rule, or regulation in force in Norfolk Island at the commencement of this Act, any reference is made to the Governor, the reference shall be deemed to be made to the Governor-General," thus effectively transferring this plenary authority to the Commonwealth Executive.

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