LAW REFORM COMMISSION

NEW SOUTH WALES

WORKING PAPER

ON

LEGISLATIVE POWERS

P R E F A C E

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are -

The Honourable Mr. Justice Reynolds, Chairman
Mr. R.D. Conacher, Deputy Chairman
Mr. C.R. Allen
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The Commission puts out this working paper in the course of its work on statute law revision. In the first instance the Commission is furnishing the working paper to the Attorney-General with a view to its consideration by the Standing Committee of Commonwealth and State Attorneys-General.

The Commission is not committed to any of the proposals in the working paper. It is a survey of some long-standing problems and a set of suggestions for their solution. Future events will determine whether the Commission will proceed to make a report on the matters discussed.

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SUMMARY

Paragraphs 1-7. The Law Reform Commission of New South Wales is completing a reference made to it concerning statute law revision. Because many old laws are in force as Acts of the United Kingdom Parliament, the State legislature cannot amend, repeal or re-enact them without authority from that Parliament.

While a request to that end is before the United Kingdom Parliament, it would be opportune to invite that body to confer on the State the principal powers granted to British Dominions under the Statute of Westminster 1931 mentioned in Part II below. It is also opportune to reconsider provisions for the reservation of State Bills and the disallowance of State Acts.

Other States may find these proposals of interest and may wish to be associated in a joint approach to the United Kingdom Parliament so that they may, in effect, become masters of their own statute books.

Paragraphs 8-55. Part I Historical Introduction

In 1886 the Imperial Government began a policy of consulting the self-governing colonies on matters of interest throughout the Empire. When the Australian Colonies became States at Federation, they allowed themselves, partly by misjudgement, partly by apathy, and partly by historical accident, to be excluded from the Colonial Conferences and to lose their direct participation in imperial affairs.

When, in 1926, British constitutional relationships came to be re-examined and re-defined, the Commonwealth Government spoke for Australia without reference

to the States. The consequential Statute of Westminster was passed in 1931 to confer virtual autonomy on the British Dominions in place of old conventional understandings. The Australian States were not brought within the Statute and were not directly consulted about it. They lacked the foresight of the Canadian Provinces which secured to themselves the principal benefits of the Statute.

The Commonwealth of Australia (a "dominion") adopted the Statute of Westminster in 1942, to operate retrospectively from 3 September 1939. Only in the intervening years after 1931 did some of the States realize that they had been left in an inferior position, but their attempts to protect themselves came too late. In several cases the States had failed to act despite recommendations by Crown law, and other, advisers that they should obtain the application to their legislatures of the Statute of Westminster. While the Commonwealth Government enjoyed complete autonomy under the Statute, the States remained, and still theoretically remain, "in a legal status of dependent colonialism".

Paragraphs 56-147. Part II Sections 2 to 6 of the Statute of Westminster

Sections 2 to 4 inclusive are those of greatest consequence. Section 5 relates to the Merchant Shipping Act 1894 (Imperial) - a subject which should be, and is being, dealt with independently. Section 6 relates to colonial courts of admiralty. It has been judicially held that, because of the wording used in section 6, it already applies to the Australian States.

Paragraphs 62-104. A. Section 2 of the Statute of Westminster

This section, so far as the Dominions were concerned, put an end to the doctrine of 'repugnancy' - namely, that laws of Dominions, being repugnant to the law of England, were "void and inoperative". That doctrine was written into the Colonial Laws Validity Act 1865, which continues to bind the Australian States.

The 'repugnancy' concept was suited to the British Empire of a century ago, when communications were poor, and all substantial legislative matters were virtually controlled and supervised by the policy of the Colonial Office. Although the effect of 'repugnancy' has been somewhat softened by the course of judicial pronouncements, it remains as a potential danger to State laws, and is anachronistic.

While recommending that at least so much of the Colonial Laws Validity Act as continues the doctrine of repugnancy be repealed, the Commission points out that two sections of that Act (1 and 5) enable State constitutions to be made "rigid" in certain respects. One example is section 7A of the New South Wales Constitution Act, 1902, which directs a procedure to be followed on any attempted abolition of the Legislative Council. That section, being "rigid", cannot be simply repealed by Parliament. Certain other procedures must be observed to secure any such repeal. To preserve the constitutional powers flowing from sections 1 and 5 of the Colonial Laws Validity Act it would be necessary to ensure the continued operation of those sections or the enactment of something else in their place.

Section 2 of the Statute of Westminster is of particular relevance in that it confers a power of repeal or amendment of Imperial Acts, which is needed for the purposes

of statute law revision.

Paragraphs 105-133. B. Section 3 of the Statute of Westminster

This section confers on the Dominions "full power to make laws having extra-territorial operation". Over many years it has been made clear by decisions of the courts, that the States have such power in respect of laws made for their "peace, order and good government".

Extra-territorial legislation is not law-making for other countries, but legislation which makes relevant to a State or country, facts and events occurring outside its boundaries. Power to legislate in that fashion is a characteristic of a fully sovereign, independent state. Such power has been specifically conferred on most British countries obtaining independence since the second World War.

The informal powers which the Australian States have in this respect should be rendered formal by statutory grant.

Paragraphs 134-143. C. Section 4 of the Statute of Westminster

Section 4 curtails legislation by the United Kingdom Parliament for Dominions, unless the Dominion concerned has "requested and consented" to the enactment of it. This section confirmed a convention existing between the Imperial Government and the Dominions, which still applies to the States. It would be tidier for the States substantially to adopt section 4. That action would also close State statute books to United Kingdom laws which could be made to apply by what is constitutionally called the "paramount force" of the Parliament at Westminster.

Paragraphs 148-200. Part III Proposal for United Kingdom Legislation

These paragraphs set out the Commission's proposals, first by way of commentary and, secondly, as a draft Bill for an Act of the United Kingdom Parliament. The Bill is used merely as a convenient expression of the principles involved: its form will be subject to review by Parliamentary Counsel.

Section 1 of the draft applies to New South Wales the laws of England concerning succession to the throne and regency. At present these matters are covered by convention which, under the federal system of government, is imprecise and potentially confusing.

Sections 2, 3 and 5 apply to the State the substance of sections 2, 3 and 4 of the Statute of Westminster. These are the provisions affecting repugnancy, extra-territoriality, curtailment of United Kingdom legislation for the State unless by request, and the vesting of power in the State to repeal or amend existing or future "Imperial" Acts.

Section 4 re-enacts the material portions of sections 1 and 5 of the Colonial Laws Validity Act 1865 referred to in Part IIA above.

Section 6 declares the Commonwealth of Australia Constitution Act (1900) and the Commonwealth Constitution, the Statute of Westminster 1931, and the proposed new Act, to be "dominant laws" which will remain in force overriding any inconsistent laws of the State.

Sections 7 and 8 deal with anomalies and anachronisms concerning the old colonial practice of reserving specific Bills for signification of the Sovereign's pleasure. The Governor would retain a discretion to reserve, but would in no case be obliged to do so.

Section 9 is intended to prevent the disallowance by the Sovereign of State Acts when assented to by the Governor. The power of disallowance has long since fallen into desuetude.

Section 11 proposes certain consequential repeals of "Imperial" Acts. The remaining sections are formal.

The draft Bill has been framed only with the needs of New South Wales in mind. It could be readily adapted or duplicated for the purposes of any other State desiring to obtain a similar relationship with the United Kingdom Parliament.

1. On 11 March 1966 this Commission received from the Honourable the Attorney General a number of references, including the following:

> 4. To review all Imperial Acts in force in this State (as a first step towards general Statute Law Revision) and so far as practicable, the preparation of legislation to repeal them as Imperial Acts and re-enact such part of them as should remain part of the law of New South Wales.
>
> 5. Following the complete review of the Imperial Acts in force in this State to consider and review all local Acts with a view to their re-enactment where necessary in modern form, retaining the existing spirit and intendment of such Acts, but the Commission to be free to make specific inquiry of the Attorney-General on any aspects arising in the course of its review for determination of policy.

2. Reports on these subjects (L.R.C. 4 and L.R.C. 10) were made in 1967 and 1970 respectively. In particular, L.R.C. 4 dealt with those Imperial Acts which were regarded as being capable of local repeal or re-enactment. A draft Bill submitted with the Report set aside certain Imperial statutes for preservation wholly or in part (Second Schedule). Other such statutes were regarded as incapable of local repeal (Third Schedule). All residual Imperial Acts in force in New South Wales by virtue of reception under the Australian Courts Act 1828[1] were recommended for repeal. The consequential Imperial Acts Application Act, 1969, of this State, implemented all material proposals in the draft Bill.

3. The passing of that Act does not fully dispose of

this Commission's reference under number 4, quoted in paragraph 1 above. To complete it, a re-examination has been made of the Imperial statutes cited in the Second and Third Schedules of the Imperial Acts Application Act, together with a review of all Imperial statutes passed since the commencement of the Australian Courts Act which have continuing effect in New South Wales. They are the statutes more precisely identified in L.R.C. 4 as being "in force here by express words or necessary intendment and by virtue of the paramount legislative force of the Imperial Parliament".

4. This examination and review have opened up a number of fundamental questions as to the legislative relationships between the Australian States and, respectively, the Commonwealth and the Parliament of the United Kingdom. Those questions must be taken into account in order to achieve the object contemplated in the existing reference of securing general statute law revision. In theory and, to some extent, in practice the State Parliament is not, for historical reasons, the exclusive master of its own statute book. Until it becomes so, statute law revision in any complete sense must be, at best, imperfect.

5. Our preliminary research into the subject involved, inter alia, an analysis of the position of the Australian States under the Statute of Westminster 1931.[2] It was agreed, at first informally, that this Commission might prepare a paper for consideration by the Standing Committee of Commonwealth and State Attorneys-General with a view to securing uniformity of action by the States. That objective is desirable, apart from what advantages may be seen in uniformity itself, as intervention by the United Kingdom Parliament will be essential for the proposed course of statute law revision.

A single Imperial Act, or a set of substantially similar Acts, covering the requirements of all the Australian States in this and related constitutional connexions, would probably be more convenient to the Parliament at Westminster and to the Australian legislatures. We note that the Attorney General formally confirmed our authority to proceed with this investigation and working paper in his letter of 12 November 1971 to this Commission.

6. We submit the results of our work in three parts, the scope of which, in summary, is:

Part I Historical Introduction
(The exclusion of the Australian States from Colonial Conferences; the circumstances preceding and surrounding the Statute of Westminster 1931; its adoption by the Australian Commonwealth, but not by the States.)

Part II Sections 2 to 6 of the Statute of Westminster
(An assessment of their relevance to the Australian States with observations on the desirability of their adoption or otherwise for the purposes of the States.)

Part III Proposal for United Kingdom Legislation
(A draft Bill with commentary, dealing chiefly with the position of New South Wales but capable of being applied to all States. The Bill contemplates the adoption by the State of part of the Statute of Westminster, and includes provisions in aid of statute law revision and to resolve some related constitutional anomalies.)

7. Our researches have been greatly assisted by the kind co-operation of the Honourable E. M. Bingham, M.H.A., Attorney-General of Tasmania, J.C. Finemore, Esq., Q.C.,

Chief Parliamentary Counsel of Victoria, (who made available to us relevant government records), and the Librarians and staffs of the National Library of Australia, the New South Wales Parliamentary Library, the Supreme Court Library and the Attorney General's Library, Sydney.

I HISTORICAL INTRODUCTION

8. The present legislative relationship between the United Kingdom and the Australian States can only be understood in terms of history. The former Colonies of Australia acquired self-government at various times between 1850 and 1890. With the passing in 1900 of the Commonwealth of Australia Constitution Act,[3] they became States in a federation. The new Commonwealth Parliament was invested with specific legislative powers, the States retained the residue.

9. Commonwealth and States remained subject to long standing limitations on their autonomy until the passing of the Statute of Westminster 1931 which, on its adoption by the Commonwealth and so far as the Commonwealth was concerned, virtually ended its legislative subordination to the Imperial Parliament. But the Australian States were not brought under the terms of the Statute and still remain outside them. Again, the reasons for the States' exclusion from an essentially beneficial measure can only be understood by reference to history. It is therefore desirable to make a review of the position of the States from 1886 to 1942 before analysing the effects of the Statute of Westminster upon them.

Colonial Conferences: The Decline and Fall of Australian State Representation

10. In November 1886 Edward Stanhope, Secretary of State for the Colonies, addressed a circular despatch to the Governors of all British Colonies under Responsible Government.[4] In furtherance of imperial policy the Queen had been "advised to summon a Conference, to meet in London in the early part of next year, at which representatives

of the principal Colonial Governments will be invited, to attend for the discussion of those questions which appear more particularly to demand attention at the present time".[5] The Conference was to be "purely consultative" so that it was not material that the Colonies have equal or proportional representation.

11. Thus, in April 1887, the first Colonial Conference was held. All of the Australian Colonies were represented, in some cases by men to make their mark in Australian Federation - Deakin for Victoria, Griffith for Queensland and Forrest for Western Australia. New South Wales was represented by its Agent General, Sir Saul Samuel, a former Premier, Sir Patrick Jennings, and a former Attorney General, Robert Wisdom. The representatives were received somewhat patronizingly and it was plain that no substantial issues would be considered. "Apart from the fact that the Colonies found that their opinions in matters of trade and communication were of some importance, the first Colonial Conference had very little effect on the constitutional status of the self-governing Colonies".[6]

12. It was, however, a start, and agreement was reached that such meetings should be held on a regular and more representative basis. So, at the following Conference held between the Secretary of State for the Colonies and the Prime Ministers of the self-governing Colonies in June and July, 1897, all the Australian Premiers attended.[7] Their Governments (excepting that of Western Australia) had likewise been represented at the Ottawa Conference of 1894, directed principally to a discussion of matters relating to the proposed Pacific cable.[8]

13. At the next Conference, in 1902, the Australian States virtually lost their representation by their own short-sightedness and, coincidentally, by the unusual manner in which the meeting was convened. The States were not invited to be present, it being taken for granted by the Colonial Office that they had lost their places at the Conference because of Australian federation. Joseph Chamberlain, the Secretary of State, in addressing delegates who were present, dismissed the Australian position in these terms:

> The main changes in our Conference result from political vicissitudes, and, above all, from the very welcome Federation of the Australian Commonwealth. But although we are lessened in number from that change in composition, I believe that we are all animated by the same spirit, that we all have the same paramount object at heart, namely, if we possibly can, to draw closer the bonds which unite us.[9]

14. The Conference had been convened to coincide with the presence in London of leading colonial figures attending the coronation of Edward VII. The Australian States seemed less concerned about their exclusion from the Conference than they were about a supposed slight to their dignity because their Premiers' invitations to the coronation had been conveyed through the Governor-General of the Commonwealth. According to Professor Keith, this "most improper step" resulted in "the dignified and proper refusal of the Premiers to attend".[10] However, the States salved the Premiers' pride at heavy cost, for their unprotesting absence from the Conference became a powerful precedent. Never again would the voice of the Australian States be heard directly in the

counsels of Empire.

15. At the Australian Premiers' Conference held in Sydney in 1903,[11] State representation for imperial purposes was not canvassed, but the preservation of State rights, as agitated in the Vondel case,[12] occupied some attention. The imperial view of the predominance of the Commonwealth Government in speaking for the Australian people had not been disguised by Chamberlain in a despatch of 25 November 1902 to the Lieutenant-Governor of South Australia, concerning the Vondel incident:

> The aim and object of the Commonwealth of Australia Constitution Act was not to create merely a new administrative and legislative machinery for the six States united in the Commonwealth, but to merge the six States into one united Federal State or Commonwealth, furnished with the powers essential to its existence as such. Before the Act came into force, each of the separate States - subject, of course, to the ultimate authority of the Imperial Parliament - enjoyed practically all the powers and all the responsibilities of separate nations. By the Act a new State or nation was created, armed with paramount powers, not only to settle the more important internal affairs relating to the common interests of the united peoples, but also to deal with all political matters arising between them and any other part of the Empire or (through His Majesty's Government) with any foreign power ... On /the proclamation of the Constitution Act/ Australia became one single entity, and no longer six separate States, in the family of nations under the British Crown, and the external

> responsibility of Australia (except in regard to matters in respect to which a later date was fixed by the Constitution) vested immediately in the Commonwealth, which was armed with the paramount power necessary to discharge it ... The Constitution has in fact placed the Commonwealth as an intermediary between the Imperial Government and the States in regard to the matters assigned to it.[13]

16. The South Australian Government vigorously contested that interpretation in a despatch of 15 February 1903,[14] and declined to acknowledge the Federal Government as an intermediary for future purposes. In that view the State Premiers at the 1903 Conference unanimously concurred. The Premier of South Australia there remarked that "it is quite obvious to me that the Imperial Government are saturated with the Canadian practice, and their only desire is to save themselves as much as possible, and they want the Federal Government to be the medium between the various States and themselves; but however convenient that may be for them, we think we have our rights".[15] Those rights were maintained in this connexion but, for the purpose of representation at the imperial level, they had gone forever.

Attempts to Secure State Recognition

17. In 1906 the State Governments, belatedly sensing their disadvantage, took concerted action in the hope of securing representation at the Colonial Conference to be held in the following year. J.H. Carruthers, Premier of New South Wales, in a Minute to the Governor of 1 June 1906, pointed out that:

> A contemplation of the respective Constitutions of the State and the Commonwealth will serve to show that a very considerable proportion of the subjects which will be discussed at a Conference of representatives of the Colonies are matters of either exclusive or predominating control by the States... The representative of the Government of the Commonwealth at such a Conference ... would only be entitled to voice the views of the Federation in regard to those matters upon which the Federal Government exercises exclusive control, and there is grave objection to permitting any such representative to assume to represent those interests which are peculiarly the concern of the State Government.[16]

18. The Governor transmitted those views to the Secretary of State for the Colonies, while the Premier circulated them to his colleagues of the other State Governments. Between 16 June and 30 July separate approaches in support of New South Wales were made to the Secretary of State by the Governments of Victoria, Queensland, Tasmania and Western Australia. The despatches by the several Governors were formal, excepting that of 16 July 1906 by Sir GeraldStrickland, Governor of Tasmania. While waiving any claim for his State to be accorded any voting rights at the proposed Conference, he made a significant appraisal of the political and constitutional problems at stake:

> From an Imperial point of view, it appears that this request deserves to be welcomed as a spontaneous expression of the anxiety of the State Governments to co-operate in drawing the Empire more closely

together. The decisions of the representatives assembled in conference may afterwards require application through channels commanding the cordial acquiescence of other Colonial statesmen representing the average frame of mind in Australia. This subsequent acquiescence of leaders of thought not present at the Conference will not be so easily obtained, if Australia is only represented by Mr. Deakin or by Mr. Reid. These leaders are commonly believed to represent extremely opposed views on crucial questions - e.g. Protection and Free Trade - on which Australia is so divided that its voice at the Colonial Conference should not depend on the chance of which leader happens to be in power, especially as the same Parliament has been led by both in turn.

From a constitutional point of view, the claim of the State Premier is very strong. Australians, when entering on the Commonwealth, had the Canadian Constitution before them; nevertheless they deliberately decided to maintain a more direct connection between the Crown and each State, and to continue the individual existence of six self-governing communities.

These self-governing Colonies did not receive a delegation of their powers of legislation and administration from the central authority but they themselves, on entering the Commonwealth delegated clearly defined and strictly limited functions to the Federal Government.

A strong and combined determination has been evinced of late, on the part of the self-governing

States, not to transfer to the Commonwealth any more of their rights and duties, even indirectly and the Tasmanian Government is determined to promptly oppose any step tending to detract from State rights.

The States still have undoubted control of by far the larger share of the functions of Australian administration, from the point of view of the development of the country and the material and personal interests of the people. The group of functions delegated to the Commonwealth has a comprehensive aspect, but its connection with the everyday life of the majority of Australians is, in times of peace and of normal colonial development, comparatively remote, side by side with the direct bearing of State administration on the fortunes and aspirations of individuals.

From a State point of view, a refusal of the representation at the Colonial Conference of 1907 would embitter the aversion to federation, and give some strength to a feeling that the Imperial authorities are disposed to expand the prerogatives of the Commonwealth Executive in a manner that the self-governing Colonies did not stipulate for when they joined the Australian Federation.[17]

19. To all State representations the Secretary of State returned the same unaccommodating reply. The Conference would be constituted like its predecessor and would itself decide any changes in its composition. Invitations would not be extended to the States. Premier Carruthers expressed disappointment and protest, in which he said that he spoke on behalf of all States. He complained that the States, solely

represented by the Prime Minister, Alfred Deakin, would not "have their voice constitutionally or authoritatively expressed upon many of the subjects which will find a place upon the agenda paper". He also denied the propriety of State representation being determined by any Conference at which State attitudes could not be separately propounded.[18]

20. The Government of Tasmania independently confirmed its protest, and the Government of South Australia added its representations in sympathy with the other States.[19] The principal submission by South Australia, a memorandum of 12 December 1906, made up in detailed and analytical argument what it lost by dilatoriness. So persuasive was it that Lord Elgin, though adhering to his decision not to invite State attendance, felt constrained to send a long explanatory despatch in reply - a marked contrast to his previous perfunctory refusals.[20] While admitting the Imperial Government's "deep regret" at apparently having given unwitting, but legitimate, cause for dissatisfaction amongst State Ministers, he emphasized that there had been no earlier agitation of State grievances concerning the composition of the 1902 Conference. In effect, the States were regarded as having slept on any rights they may have had. There was no proper analogy, he said, between the Australian States, which had surrendered some of their powers, and Natal and Newfoundland, which had not. In the Imperial view, the Commonwealth and the States "both alike represent the people of Australia, but for different purposes". The deciding factor was that "the great majority of the subjects, and those the most important ones, to be discussed at the Conference are matters which are now in effect the business of the Commonwealth alone; and even in the case of the very few of these subjects

which may be regarded, in whole or in part, as still the business of the States, the Commonwealth possesses or may acquire paramount power". Overall, the Imperial Government could find no alternative without "disregarding the scheme of Commonwealth legislation, or the fundamental principles on which the idea of the Colonial Conference is based".[21]

21. That was practically the end of the matter. The presence of the States at Conferences would have been embarrassing as, at the urging of Canada, Dominion Ministers were permitted to attend, if required to support their Prime Ministers.[22] In the result the gatherings even of those representatives became inconveniently large, as witnessed by the outspokenness of Sir William Lyne, Australian Treasurer, who had been given a back seat, could not hear, nor confer with his Prime Minister, and felt that, if his function was merely to sit and listen, he "might as well be somewhere else".[23]

22. The poorly reasoned and authoritarian refusals of the Colonial Office to accede to State requests contrasted with two very closely argued, lengthy, and telling memoranda by Deakin. In the first, of 31 October 1906, he strongly resisted the claims of the States. Their internal concerns could, he asserted, be canvassed directly with the Imperial Government through their Agents General.

> But the Imperial Council /Colonial Conference/ is to deal with matters of wider range, and it is difficult, if not impossible, to conceive cases in which uniform action on its part would be necessary or desirable with respect to subjects over which the States have exclusive control. In

> fact the principal object of the creation of the Commonwealth was to transfer to its jurisdiction all subjects in respect of which the Australian Colonies had interests in common, and regarding which uniform action was possible. One of the leading ideas was that, as regards other parts of the Empire and foreign countries, Australia should be regarded as a single entity. To approve of the participation of the States in a Conference whose work must consist in the discussion of topics with an external bearing would be to admit that the existence of the Commonwealth was altogether unnecessary, and that the Constitution has merely added a seventh Government to those already existing, leaving the States the full jurisdiction outside Australia, whatever it was, which they had before its institution.[24]

He discerned no popular Australian feeling in support of the views of the Premiers. The agitation, he maintained, was a personal one by certain State politicians resentful of the limitation of their former powers.

23. The South Australian submissions of 12 December 1906 drew from Deakin a further powerful replication ten days later. In it he rejected State views as to Commonwealth legislative incapacity. Many federal powers of law-making had then not yet been exercised, but that did not restrict nor diminish the availability of those powers. On all major matters of national importance the Commonwealth exercised control, or had authority to exercise it, and was the only legislature to speak on the nation's behalf. Through it the people of the States were represented on all issues of common

national concern. If there were separate representation of Australian States at Colonial Conferences then Australia could no longer speak with one voice; the views of the States would be disunited on many topics and, consequently, the Commonwealth's real representation would be destroyed. Most of the matters for discussion were of a kind over which the States had no power and it would be unreasonable that their voices should be heard as mere expressions of opinion when they had no executive power to carry Conference resolutions into effect. Such a practice would render "practically abortive" the whole purpose of such Conferences.[25]

24. There was a further, and greater, local issue. The relationship between the Commonwealth and the States must be firmly understood if Federation were to succeed:

> If [the State arguments] were accepted it would appear that the federation of Australia was a mere departmental arrangement for the purpose of placing under one control the management of three important departments which affect the internal intercourse, intercommunication and the general defence of Australia. But that view is altogether impossible of acceptance. Federation did much more than merely establish a central administrative body. It created an entirely new Government provided with legislative and judicial as well as executive powers. The nature of these latter has been the subject of much discussion, but it is now settled that they include the right to act on behalf of Australia as a whole in all matters that relate to the interests of Australians as a united community. Indeed, one of the principal reasons that induced Australians to federate was that as

> regards all places outside the continent they should speak with one voice, that as the interests of Australians in relation to external affairs were common to all, it was desirable to have one spokesman with one set of views instead of, as formerly, six spokesmen with six possibly divergent sets of views. That principle has been stated over and over again, but as it is frequently ignored by State authorities desiring to preserve to themselves every possible vestige of power and jealous of the supremacy of the Commonwealth Government, it demands repetition.[26]

25. Many of Deakin's arguments were sound;[27] in political terms they were expedient. The State Premiers had not presented their case with sufficient care or uniformity. Only the South Australian submissions gave even the appearance of substance. The upshot was, in the area of Imperial relations, a permanent lowering of the status of the States and the elevation of the Commonwealth to a position which, constitutionally speaking, it was not intended to hold. As Professor /later Sir/ William Harrison Moore remarked in 1910:

> Of the present Constitution the essential feature is that the functions of government are divided: it is that which makes it federal. The Commonwealth Government and Parliament are distinguished from the States by the fact that they are charged with powers and functions which are limited by enumeration, while the residuary powers of government are reserved to the States. These powers, save where they are subject to the paramount federal power in the case of the enumerated powers, are independent and not subject to federal supervision

> and control. There is nothing which casts on the States any responsibility to the Commonwealth, the whole scheme of federal government is opposed to the existence of any supervisory authority over the States. This is undoubtedly the case within the Commonwealth itself, and it is submitted that there is nothing in the Constitution which either directly or by inference justifies the view that, while within Australia the Constitution is to be treated as a federal union, conferring limited powers merely upon the Commonwealth Government, it is to be treated by the Imperial Government as a unitary constitution with a single responsible government.[28]

26. At the 1907 Conference, Deakin, in what, externally at least, seemed a gesture of conciliation to the States, proposed that suggested subsidiary conferences be held not simply "between representatives of the Governments concerned", but between "any Governments concerned" to allow specifically for purely Provincial or State matters in Canada and Australia respectively to be debated on behalf of those Governments.[29] The Canadian Prime Minister rejected the idea as possibly accentuating differences between the various governments in federal systems. Any such subordinate conferences should be ad hoc meetings unconnected with the regular Conferences of principal Imperial Governments. Deakin did not press his proposal: the suggestion that the Australian States might take a place at the regular Conferences was not aired.

27. Almost simultaneously at their own Australian Conference, the State Premiers admitted that their hope for

eparate voice in the affairs of Empire was a lost cause. ir last word was spoken by the Premier of Tasmania. "I nk," he said, "we have done all we can in the matter".[30] Premiers did, however, agree to maintain a united front inst the Commonwealth to preserve State rights, to ensure t a direct channel of communication between the State ernors and the Colonial Office was maintained without the monwealth Governor-General as intermediary, and also to oint a constitutional expert to scrutinize Federal islation, reporting on any enactment which might prejudice States.

The States received no invitation to the Imperial ference of 1911, nor to any such Conferences thereafter. y made no further public attempts to secure representation any of the meetings. It followed that the Australian tes were not consulted when the Imperial Conference of 5 set up, under the chairmanship of Lord Balfour, a nittee of Prime Ministers and Heads of Delegations to nine questions of Inter-Imperial Relations (the Balfour nittee).[31]

Imperial Conference, 1926, and its Consequences

Old colonial ties had undergone scrutiny during the -1918 War. The British Empire had been largely transformed t. So far as legislative and executive authority was erned signs arose of a new attitude in Australia.

In 1916, Andrew Fisher, Australia's Scottish-born Labour Prime Minister, said bluntly that, though there was no sense in crying over spilt milk, it was intolerable that a Dominion Prime Minister should have less control over his country's fate in peace and war than had the humblest citizen of

the United Kingdom. In the future the Dominions would insist on having their say, not only in work-a-day matters like tariffs and social policy, but in the conduct of foreign affairs.[32]

30. With such views in mind, the Balfour Committee in 1926 endeavoured to put into words the enigmatic status, as between themselves, of Great Britain and her Dominions. Its celebrated definition was: "They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations".[33] With its other analyses, the Committee's report has been described by a distinguished historian as memorable for descriptive ability and political shrewdness: "It was, first and foremost, finely accurate description. With admirable economy of words it cut through the thickets of legalism and skirted the marshes of vague moralizing, and revealed the British Commonwealth as it was in the year 1926. It revealed also the direction of the road along which the British Commonwealth had passed, and the immediate end which that road was nowapproaching".[34]

31. The reduction of the Balfour formula to a draft Bill was assigned to a special Conference on the Operation of Dominion Legislation in 1929. Australia was represented by Sir William Harrison Moore and Major R.G. Casey. The Report of the Conference was published in 1930,[35] and a special report for the Australian Government was made by Harrison Moore.[36] They are considered in greater detail below.

The Imperial Conference of 1930 endorsed the draft
itted to it and recommended that an Act "which it was
ght might conveniently be called the Statute of
minster" be passed and become operative from 1 December
.[37] There was one caveat. Although the Canadian House
ommons had approved the 1929 Report, "it appeared that
esentations had been received from certain of the
inces of Canada ... protesting against action on the
rt until an opportunity had been given to the Provinces
etermine whether their rights would be adversely affected
uch action".[38] The Canadian Provinces pressed their
so effectively at home that the Prime Minister called a
erence between the Federal Government and all provincial
rnments early in the following year: it was agreed that
Dominion should adopt the Statute of Westminster and that
terms should apply to the Provinces.[39]

That precedent was not pursued by the States when
nilar review of the proposed Statute was made in
ralia. Once again they were preoccupied with rivalries
g themselves and their powers and status as between
selves and the Commonwealth. And, moreover, the Dominions
been given a limited timetable within which to ratify the
ute. That encouraged the concentrating of attention only
hose matters which then seemed most fundamental. It was,
instance, well stated by one complainant to the Western
ralian Government that:

> It is, I feel, a matter for regret that the question of removing the subjection of State legislation to the Colonial Laws Validity Act etc. has not been included in the proposed Act of Westminster. However, the resolutions must be passed by the 1st August

> 1931; the great question of the moment thus becomes not the granting of greater legislative freedom to the States; but the prevention of the unintentional diminution of their existing rights and privileges through the susceptibility of the proposed Act of Westminster to more than one construction.[40]

34. As the reports of the Imperial Conference made their way to the Governments of the Australian States, the response was varied. At one end of the scale, the New South Wales Government wanted the whole matter deferred so that it could concentrate on rescuing its legislation to abolish the Legislative Council, then recently upset by the Supreme Court's decision in Trethowan v. Peden.[41] At the other end of the scale, the Tasmanian Attorney-General successfully moved his Government to canvass State rights directly with the Imperial Government. "It appears to me", he said,

> that the point of view of the States in a Federal Union such as ours should have due consideration, and there is always the possibility that the States will be overlooked since they have not been represented at any of the Conferences ... The decisions of the Imperial Conference, 1930, will be submitted to the Imperial Parliament in the form of amending legislation and as the views of the States may be overlooked when such proposed legislation is being considered I would recommend that representations be made to the Imperial Government ... that this State and other States of the Commonwealth be given ample opportunity of considering such proposed legislation before it is passed into law.[42]

Queensland gave its support to the Tasmanian representations, while South Australia and Western Australia made independent

proaches to the Dominions Office. Only Victoria seemed
ntent with the proposed ratification, though its Agent
neral in London was anxious that "concerted action" might
taken by all States.[43]

On 3 July 1931 Federal Attorney-General Brennan
roduced in the House of Representatives a resolution to
ify the proposed terms of the Statute of Westminster
l.[44] Historically, the most interesting and most pertinent
ech on the resolution was that of J.G. Latham, then Deputy
der of the Opposition.[45] He was principally responsible
initiating amendments which were adopted by Parliament
written into the Statute of Westminster itself to resolve
most serious of the constitutional doubts entertained by
States. In effect the amendments prescribed that
tralian Commonwealth requests for Imperial legislation
uld be made, and consented to, by the Parliament as well
the Government of the Commonwealth; and they ensured that
Commonwealth could not solicit imperial legislation on
ters falling solely within State power. Latham emphasized
t the relationship between Commonwealth and States was not
lly the object of the legislation.

> It must be remembered that we are living under a federal constitution, and that the States each has a place in a federal system which depends upon a division of legislative power between the States. This resolution does not affect, is not intended to affect, and certainly should not affect, the position of the States in relation to the Commonwealth or to the United Kingdom. The States have not been represented at any of the conferences from which this resolution has ultimately emerged,

> and they cannot be compromised or affected in any way by this legislation ... They are entitled to preserve such relations as they like with the British Parliament. We do not control the relations between the States and the rest of the Empire. They have independent relations.[46]

36. As amended, the resolution was debated after the manner of legislation and passed by both Houses. Its solving of some of the States' problems went almost as far as was then desired but, viewed objectively, it did not go far enough.

37. A Premiers' Conference was held meanwhile in Melbourne during August and September 1931.[47] The Prime Minister, who presided, referred to the Statute of Westminster and "said he had received a number of protests regarding this subject from different States". He issued what was intended to be a placatory memorandum[48] reassuring the Premiers that the Statute would not substantially affect the States at all, and he requested that any further representations be made directly to him.

38. Tasmania persevered with determined opposition on the grounds that the Statute might enable the Commonwealth to destroy the shield of paramount imperial legislation for the States and even to annihilate them. The Federal Government offered to propose that the Statute be further amended by adding a clause to the effect that: "Nothing in this Act shall be deemed to require the concurrence of the Parliament and Government of the Commonwealth of Australia to any law made by Parliament in respect of any matter which when the law

made is within the authority of the States of Australia being a matter within the authority of the Parliament or ernment of the Commonwealth of Australia in any case where would have been in accordance with the constitutional ition before the commencement of this Act that Parliament uld make such law".[49] The Commonwealth also offered not adopt the Statute until all State objections had been olved, but Tasmania remained obdurate. Western Australia, n brooding over the possibility of secession, was likewise no humour to withdraw its objections.[50] South Australia o pressed its separate complaints upon the Dominions Office urged postponement of reading the Statute of Westminster l.[51]

In London, a final gesture to the Australian States made on the eve of the debate on the Statute of Westminster the House of Commons. A useful account by the Tasmanian nt General is preserved in that State's Archives:

> The second reading of the Bill in the House of Commons was taken on the /20th November/ and that morning all the State representatives met at the House of Commons at the request of Mr. Leslie Boyce, the Member for Gloucester, Mr. Boyce, who is an Australian, had been asked by the Solicitor General to meet the Agents General to discuss the provisions of the Bill so far as it relates to the Australian States. He dealt fully with the Bill and pointed out that in the view of the Imperial Government, the rights of the States had been adequately protected and they could not see that any alterations were necessary.
>
> The Agents General, however, were unanimously of the opinion that clause 10(2) was not sufficiently

clear inasmuch as the Federal Parliament might give a wide interpretation thereto, and pass some legislation which the State Governments would consider detrimental to their constitutional rights, and in order to place the clause beyond any doubt it was urged that the following words should be inserted "referred to in sub-section (1) of this section". The Solicitor General on behalf of the Government accepted the amendment.[52]

The Statute of Westminster Enacted

40. The Statute of Westminster Bill passed the United Kingdom Parliament at the close of its 1931 session[53] in a mingled mood of restrained patriotism and unrestrained apathy. Only the Irish question aroused sustained interest. The general feeling of English politicians was that, if the Dominions wanted the measure, they could have it on the terms they had stipulated. According to Dominions Secretary Thomas there was no possible alternative for wise statesmanship but "freely and ungrudgingly to accede" to the Dominions' request - "to have done anything else was to run counter to the whole course of our policy in relation to Imperial development, a policy which believes liberty to be the only true keynote of that development."[54] The Bill was to be looked upon, in his view, as the beginning of a new system of equality, the cutting away of dead wood to render possible new growth.[55]

41. However, to Winston Churchill the need to codify constitutional fundamentals was objectionable: "When all the generous sentiments in which all parties have bathed themselves during recent years have to be reduced to the language of Acts of Parliament, the result is not only pedantic, it is painful, and, to some at any rate, it will almost be

pellent".[56] Of those members in the House of Commons
did find it repellent, a few, notably Hopkin Morris
Marjoribanks, sought to have debate on the Bill postponed,
the majority favoured immediate action. Another effort
made by Mander to secure postponement in order that the
ections of Tasmania and South Australia might be further
died. His proposal was decisively rejected, the Dominions
retary saying:

> Every member who had followed Australian politics during the last two years knows perfectly well the differences existing with regard to the Federal Parliament and the States for reasons disconnected entirely with this Statute. We know the agitation that has taken place in some cases for separation. It would be a profound mistake for this Parliament, which is itself responsible for the Australian Constitution, to take sides. Nothing would be more dangerous to Imperial unity than that.[57]

In the House of Lords some desultory reference was
e to the Australian position. Lord Lloyd championed the
se of the States and urged caution in passing the Bill.[58]
passed it was, though with such indifference that it
med to be enacted under sufferance.[59] The attitudes of the
tralian States had been too parochial and too disunited in
ir representations to warrant serious attention at
tminster. The Bill became law in Great Britain on 11
ember 1931. Its more formal provisions applied instantly
the Dominions, but its important operative sections (2 to
would only take effect in Australia, New Zealand and
foundland when adopted by those respective Dominions.

Reactions to the Statute

43. Amongst lawyers and politicians the new enactment was viewed somewhat warily in most British countries, with the notable exceptions of Eire and South Africa. An American legal commentator observed "a surprising lack of enthusiasm for the enactment of the Statute even on the part of its supporters". In his view a study of its terms suggested that "some of the acclaim given to it /was/ not altogether moderate".[60] His ideas were echoed by Sir Robert Garran who assessed the Australian reaction as follows:

> A marked want of enthusiasm for the Statute was shown by many who, while admitting that Australia was practically committed to it by the Imperial Conference resolutions of 1926 and 1930, were not satisfied that the statutory implementing of the Balfour memorandum was either necessary or free from danger.[61]

Another lawyer thought that the Statute had brought "a purely negative contribution in law".[62] More recently, Sir Kenneth Roberts-Wray has suggested that "as a matter of political relationships it amounted to no more than a statutory confirmation of established fact".[63]

44. In Australia some concern was voiced, though little heeded, about the constitutional disadvantage in which the States had allowed themselves to be placed. Professor K.H. Bailey, stressing that the States' legislative powers in Federation were co-ordinate, not subordinate, concluded that:

> It is to be regretted that the problems created by the Statute for a federal Dominion have not been discussed in conference between the Commonwealth

> and the States, as they were in Canada ... In their endeavour to provide safeguards against Commonwealth aggrandisement, the States have in the writer's opinion, overlooked a point of some substance.[64]

. Mr. Justice Dixon sounded a similar caution at the stralian Legal Convention of 1936 when he said:

> In order to give legal autonomy to a community which enjoys or endures a federal system of government, it is not enough to free federal legislation upon the matters confided to the Federal Parliament from the overriding force of such Imperial statutes as may extend to it, if at the same time those statutes remain paramount over State legislation on the same matters and on all matters within the exclusive power of the States. To adopt this illogical course is to treat the State and Federal Legislatures as if they operated in different countries. It does not treat them as branches of one system of government among whom the total legislative power of the autonomous Dominion is divided.[65]

. The Victorian Government had meanwhile retained ofessor Bailey to advise it on the consequences of the atute and as to the desirability, even at such a late age, of seeking its extension to the States. That advice, ich is referred to in greater detail below,[66] was nerally in favour of having applied to the States some of e major provisions of the Statute. At a Constitutional nference held in Melbourne in 1934 the Federal Attorney-

General, R.G. Menzies, made it clear that his Government was considering Bailey's opinion before taking any steps to adopt the Statute.[67]

47. In March 1936 the Prime Minister, J.A. Lyons, circulated to the State Premiers a draft Bill for the adoption in Australia of the Statute's relevant sections.[68] In compliance with a request initiated by the Victorian Premier, the Commonwealth deferred action to permit of discussion of the measure at a Premiers' Conference to be held in Adelaide later in that year. In an advice as to the view which New South Wales might take, its Crown Solicitor, C.E. Weigall, observed:

> This Bill proposes a straight out adoption of sections 2,3,4,5 and 6 in the Statute in their present form. Such a course is of no advantage to the States as these sections only extend to the laws of the Commonwealth. It is noticed that the Canadian Provinces have the provisions of section 2 of the Statute applying to them, but the Government no doubt will not overlook the effect of the Colonial Laws Validity Act on the position of the Legislative Council.[69]

48. At the 1936 Conference Attorney-General Menzies explained that his Government was submitting the draft Bill for criticism in accordance with the promises made to the States by the Scullin administration in 1931.[70] On behalf of New South Wales it was stipulated, as a condition precedent of support, that the Bill should incorporate a preamble to the effect that "whereas it would be against constitutional usage to enact any law affecting the laws of

State/s/ without consultation with the States, and whereas, order that that should be done, it is desired and recognized constitutionally proper and necessary that the States uld be informed of the nature of the contemplated legis- ion and asked for their opinions thereon".[71] Victoria ssed strongly for the extension of the terms of the Statute the States. In that it was opposed by New South Wales ch wished to retain the Colonial Laws Validity Act for the e of its Legislative Council.[72] The other States were ecisive but promised to give any considered criticisms hin one month. No concerted action was in fact taken.

In June 1937 the Commonwealth proceeded to the ality of a first reading of the adoption Bill. Tasmania's ernment, in a reversal of attitude, supported the measure regarded "any risks to State rights involved in the sage of the adoption bill ... as vague, and possibly eal".[73] Victoria continued to press for a preamble to be erted in the Bill for the safeguarding of the position of States. Its anxiety was that "the Statute of Westminster ts present form might enable the Commonwealth to make and Parliament of the United Kingdom to accede to, a request legislation by that Parliament which might seriously ct the position of the States".[74] South Australia and nsland associated themselves with that view.[75] New South s offered the text of a "recital" and "declaratory clause" similar end.[76] Western Australia remained totally opposed doption of the Statute, expressing its preference for the inuance of flexible constitutional understandings.[77]

In a defensive speech in the House of Representatives 5 August 1937 the Attorney-General, R.G. Menzies, moved second reading of an unaltered adoption Bill. While

criticizing the 1926 Balfour proposals as a "misguided attempt to reduce to written terms something which was a matter of the spirit and not of the letter", he felt that the Statute of Westminster had to be accepted as a fact.[78] "Deferring it", he later maintained, "may mean that some day, in the heat of some intra-Imperial dispute, the Commonwealth Parliament might be invited to adopt the Statute as a gesture either of independence or of defiance. I believe we should act while the rational mood is on us".[79] There seemed to be general, if subdued, approval of that view, but the Bill did not secure attention before the Parliamentary session closed.

Australian Adoption of the Statute

51. There had been much agitation throughout Australia by a number of patriotic associations against adopting the Statute. It was seen as a move to "cut the painter" in respect of British ties.[80] Although the protests were generally thought to be ill-founded, and to have been more suited to 1926 or 1931 than to 1937, they may have had a cooling influence on the Government. Certainly no attempt was made to give the Bill any priority and, although it was introduced on two occasions, other business took precedence and it expired at the close of each session. Its revival awaited the exigencies of the second World War and a change of Federal Government. The new Attorney-General, Dr. H.V. Evatt, announced to the press in September 1942 his intention to introduce an adopting measure because of "many difficulties and anomalies" arising for want of the Statute's full application, especially in wartime.[81] At the end of that month he circulated a monograph to federal parliamentarians in explanation of his proposed Statute of Westminster Adoption

Bill.[82]

52. The benefits of the Statute, he argued, were no longer merely desirable, they were urgently essential. Because the Statute had not been adopted, there had been serious uncertainty as to the validity of Commonwealth laws or regulations, and delay because of the need to reserve certain legislation for royal approval. The result was not only inconvenience and restriction upon parliament's legislative powers, but "urgent vital war legislation or regulations may be invalidated or delayed in their operation through requirements which are out-of-date and admittedly serve no useful purpose".[83]

53. On the second reading of the Bill in the House of Representatives, it received general support.[84] The only reference to the position of the States was an assurance by the Attorney-General that the adoption of the Statute would not "alter the constitutional distribution of powers between this Parliament and the State Parliaments, /nor/ affect constitutional practice between the States and the Imperial authorities".[85] W.M. Hughes, in a strenuous address, sought postponement of the issue by referring it to an all-party committee, but that was defeated.[86] The Bill passed in the Senate and became law on 9 October 1942. The adoption of the Statute was made retrospective to 3 September 1939, the date of the outbreak of war with Germany.

54. The then Crown Solicitor for New South Wales, A.H. O'Connor, advised his Government that "except in so far as section 6 of the Statute /relating to Colonial Courts of Admiralty/ may apply to the laws of a State, the Australian

States as States in my opinion derive no benefit from the adoption by the Commonwealth of the Statute". But he foreshadowed that some detriment might be suffered from the States' continued exclusion from the terms of the Statute.[87]

55. The position of the States has meanwhile remained stationary. But, although no very weighty practical consequences flow from the anomalous standing of Commonwealth and States under the Statute of Westminster, the position is untidily inconvenient and illogical. It is a potential source of misunderstanding and embarrassment, and it needs to be set in order. As Professor Sawer has well pointed out, on the passing of the Statute of Westminster "the grotesque constitutional situation was created that the Australian federal government could enjoy the fullest degree of national autonomy, while the States of the federation remained in a legal status of dependent colonialism".[88] At a time when British Commonwealth relationships have changed even further towards autonomy and independence in the government of former territories of Empire, the anachronistic status of the Australian States should no longer be left to the accidental movements of history. On the contrary, it lends itself to revision and reform.

II SECTIONS 2 TO 6 OF THE STATUTE OF WESTMINSTER

The Statute of Westminster, 1931, consists of a ngthy preamble, reciting the constitutional relationships isting by convention between the Imperial Government and e British Dominions, and twelve sections largely directed reducing those conventions to legislative form. Sections o 6 inclusive were not to apply to Australia until the mmonwealth had adopted the Statute. Section 7 was ncerned solely with Canada. The remaining sections took fect in Australia forthwith.

Section 1 defined "Dominion" for the purpose of Statute, while section 11 excepted all such Dominions d any States or Provinces therein) from the expression lony" used in any imperial legislation passed "after the mencement of this Act". Section 12 specified a short title.

Of greatest significance to the Australian States, that time, were sections 8, 9 and 10 which provided stitutional safeguards then insisted upon by the States. tion 8 preserved all existing machinery for the repeal or eration of the Commonwealth Constitution Act. Section 9 vented the Commonwealth Parliament from legislating on ters within the exclusive authority of the States, and m being obliged to concur in imperial legislation made for States "where it would have been in accordance with the stitutional practice existing before the commencement of s Act that the Parliament of the United Kingdom should e that law without such concurrence". Section 10 pres- bed that sections 2 to 6 should not apply to certain minions", Australia being one of them, until locally pted. In that regard, the States were given an assurance

by the Commonwealth Government that they would be consulted before such adoption in Australia.

59. When the 1942 adopting Act was passed by the Commonwealth Parliament, the Australian States did not become bound or otherwise affected by sections 2 to 5 inclusive, but the position was different with regard to section 6. That section was in the following terms:

> Without prejudice to the generality of the foregoing provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

60. The width of the phrase "in any Dominion" prompted Professor Bailey's opinion in 1932 that "the section appears as it stands to apply to the States as well as to the Commonwealth".[89] Section 6, on its proper construction, meant that the requirements of section 4 of the Colonial Courts of Admiralty Act should cease to have effect "in Australia".[90] Accordingly, on its adoption, section 6 applied throughout Australia and now needs no special extension to the States. Judicial confirmation of that view is to be found in Swift & Co. Ltd. v. The Ship S.S. "Hermanger" where Macfarlan, J., held that section 6 "operates to amend the operation of section 7 of the Colonial Courts of Admiralty Act, 1890, in Australia and that such reservation is therefore

ot necessary any longer".[91]

1. We propose to regard section 6 of the Statute of estminster as being already in effect in the Australian tates and to require no further examination here. We turn ow to an examination of sections 2 to 4 inclusive, and o a brief comment on section 5.

A. Section 2 of the Statute of Westminster (Application of the Colonial Laws Validity Act 1865)

2. The section is in the following terms:

(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. For present purposes the effect of this section, f extended to the Australian States, would be of appreciable ignificance. It would, in the legislative sense, remove rom the States the last restrictions of their colonial past, nd would take away a potentially inconvenient obstacle to

their law-making powers.

64. Like the Statute of Westminster, the Colonial Laws Validity Act must be viewed in the perspective of history. Only then can it be properly appreciated how, on the one hand, [Sir] John Latham could say of it that "the Act was really an enabling Act",[92] and, on the other hand, [Sir] Robert Menzies could propose that it "might just as well be called the Colonial Laws 'Invalidity' Act".[93] In truth the nature and effect of the Act in the middle of the nineteenth century were very different from its nature and effect in the mid-twentieth century. Originally the Act was liberal and broad: today it has become repressive and narrow.

65. Since Dicey's celebrated assessment in 1885 of the Colonial Laws Validity Act as "the charter of colonial legislative independence",[94] it has been eulogized by many commentators. In 1920 Lord Birkenhead declared it to be "in Imperial history clarum et venerabile nomen".[95] Higgins, J., in 1925 said that:

> The object of the Act of 1865 was not so much to preserve the rights of the British Parliament against encroaching colonial legislatures, as to make it clear that a colonial legislature, acting for the colony in pursuance of the powers of legislation conferred, might act freely and without constraint from London, excepting only so far as a British Act, applying or extending to the Colony, definitely contradicted the colonial legislation ... The colonial Act is to be valid except to the extent of any actual repugnancy or

> direct collision between the two sets of provisions. Such a concession on the part of the supreme Parliament marks a very high level of liberality, foresight, statesmanship.[96]

recently Sir Kenneth Roberts-Wray has written that stitutional lawyers (and others) owe a debt of gratitude ... t Parliament was "provoked"] into enacting a charter of dom for colonial legislatures ... which ... in fact red up a fog of uncertainty".[97]

Roberts-Wray, however, goes on to point out that real source of liberality in the Colonial Laws Validity was section 3 which provided that:

> No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of [certain Acts, orders, or regulations referred to in the preceding section].

section, according to Roberts-Wray, did not merely ve doubts, "it changed existing law and conferred upon nial legislatures freedom in place of restrictions of xtent which defied precise definition".[98]

But we are here rather concerned, not with the rality of that portion of the Colonial Laws Validity but with its section 2, quoted below, which avoids onial" laws when repugnant to "imperial" laws. In that ext it is desirable to put aside the view of the Act charter of freedom and to examine the reasons for its g passed. It was an Act designed principally to remove rticular problem and to relieve the pressure of work of

the Colonial Office in attempting to resolve constitutional problems which arose in the colonies. It was not volunteered as a grant of legislative independence: it was thrust upon the Imperial Government by the consequences of the pedantic and hypercritical behaviour of Mr. Justice Benjamin Boothby, a Puisne Judge of the Supreme Court of the Province of South Australia.[99]

Background to the Colonial Laws Validity Act

68. Dr. D.B. Swinfen of the University of Dundee has made carefully documented and scholarly analyses of the background to the Act and of the considerations motivating the Colonial Office to procure it, and Parliament to pass it.[100] Of the negative attitude of the former he observes:

> On the question of repugnancy there was very little likelihood in the eighteen-fifties that the Colonial Office would go out of its way to have a Bill put through Parliament, defining the state of the law. To the officials, the law was already clear, and where difficulties arose, they could be dealt with by the existing machinery - either by disallowance, or by the colonial courts, with final appeal to the Privy Council. It is worth pointing out in this connexion that, in the forty years before 1865, not a single case involving repugnancy was brought before the Judicial Committee. So far from seeing any need for the passing of a Colonial Laws Validity Act, the Colonial Office would probably, all things being equal, have resisted any such proposal.[101]

69. But all things were not equal, due to the efforts of South Australia's "uncompromising dogmatist",[102] Boothby, J.

From his appointment to the bench in 1853, he regarded himself as a lone custodian of the imperial law against defilement by colonial legislators. In his court a startling number of local laws and institutions were held invalid for repugnancy to the laws of England, and for similar reasons. The Constitution Act, the pioneering Real Property Acts, two Electoral Acts, the legislation setting up the Court of Appeal, and the appointment of Chief Justice Hanson were all in Boothby's assessment void.[103]

70. So obstructive to the government of the Colony, and so inflammatory, were Boothby's judgements, that both Houses of the South Australian Parliament sent addresses to the Queen complaining of his actions and seeking intervention. It was, however, precisely such acrimony which the Colonial Office was determined to avoid. That the colonies should resolve those difficulties for themselves, was clearly the view of Sir Frederick Rogers, Under-Secretary at the Colonial Office, when he wrote an important minute on the Boothby affair:

> I think these powers [of the Colonial Assemblies] should, if possible, be so large and clear as to cut the ground from under such objectors as Mr. Boothby, and to enable Parliament to throw back on the Colonial Legislature the task of curing mistakes and removing doubts.[104]

71. Boothby continued in his strange course until the South Australian Government proceeded under Burke's Act[105] to "amove" him from his office. The details cannot be gone into here, but so much confusion had befallen the ambits of the Colony's legislative powers, that the Colonial Office was obliged to obtain an Imperial Act of Parliament to set

doubts at rest. It seems that the enlargement of the following Colonial Laws Validity Bill to cover all colonies, rather than South Australia alone, was a decision taken by Sir Frederick Rogers who "had, for some time, been preparing a Bill to settle several important colonial questions" of lesser stature than the issue of repugnancy.[106] Even that legislation probably would not have been realized, but for Boothby. "All the evidence", Dr. Swinfen suggests, "tends towards the conclusion that no such Act would have been passed without him, while a clear correlation can be established between the legal points raised by him, and the provisions of the Act" many of which answered Boothby point by point.[107]

72. In the result, with the passing of the Colonial Laws Validity Act, the colonies did acquire a much larger and more independent control of their own affairs than had previously been possible. The test always was conformity to the laws of England. A colonial law which was repugnant to those laws would be invalid. Section 2 of the Act provided that:

> Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

73. This portion of the Act preserved the operation by

paramount force of Imperial law when extended to the Colonies.[108] To such paramount legislation, the Colonies could not pass repugnant laws. But the meaning and extent of "repugnancy" are complex questions which warrant special analysis.

Repugnancy

74. The elusiveness of the meaning of this term was widely acknowledged long before it was incorporated into the Colonial Laws Validity Act. It was intended to be elusive, as Evatt, J., emphasized in his important judgement on the subject in Ffrost v. Stevenson,[109] where he gave his account of the historical position:

> Prior to the passing of the Colonial Laws Validity Act, the word "repugnant" was frequently used so as to impose a restriction upon colonial legislatures, assemblies or councils and the phrase "repugnant to the laws of England" plagued several generations of colonial courts and lawyers. That "repugnance" in such a context was established rather by dissimilarity than similarity of object, purpose or effect, is suggested by the observations contained in a letter of Sir James Stephen, Under-Secretary of the Colonies, who said:-
>
> > "Why bother yourself with that everlasting phrase 'not repugnant to the laws of England'? What does it mean? Has it any meaning? Then why did you, Mr. Counsel to the Colonial Department (you will say) 'bring it into the first New South Wales Act, and keep it in the second'? Why, in the first place, that it might serve as a pons asinorum over which no

> colonial Crown lawyer should pass without giving proof of more than asinine sagacity. Secondly, because it sounds highly constitutional and decorous. Thirdly, because it may every now and then prevent some egregious absurdity. This is indeed the correct interpretation of the phrase. Whatever is tyrannical or very foolish you may safely call "repugnant", etc., but whatever is necessary for the comfort and good government of the colony you may very safely assume to be in perfect harmony with English law".[110]

75. The matter was thus settled and understood within the Colonial Office and interpreted with just such flexibility. In many respects, the passing of the Colonial Laws Validity Act produced no obvious change. The concept of repugnancy was rarely invoked or considered.[111] Until the first World War there was very little call on the Australian Courts to adjudicate upon it. Indeed, for many years the only case of any consequence on the matter was R. v. Whelan,[112] a decision of the Victorian Supreme Court. There an unsuccessful attempt was made to upset a local statute by invoking section 2 of the Colonial Laws Validity Act. Although the judgements turned mainly on aspects of the adjectival law, a significant pronouncement on repugnancy was made by Stawell, C.J.:

> It appears to me that the meaning of the words "repugnant to the law of England", has been misapprehended during the argument. There are no judicial decisions on the point, but there are numerous cases in which Acts have been passed by

this Legislature in direct opposition to the law of England, or what was supposed to be the law of England - the law relating to primogeniture, for example, the punishment of rape, the mode of carrying out executions, and others - are all violations of the law of England. Even before responsible government was given, it was never intended to limit the colonies to the same practice as that of England; it was only intended that the grand principles of the common law of England should be observed in the legislation of the colonies.[113]

Major interpretations of the concept of repugnancy
re made in the High Court by Isaacs, J., in the course of
ree decisions given between 1915 and 1926. In Attorney-
neral for Queensland v. Attorney-General for the Common-
lth[114] he made an analysis of the Colonial Laws Validity
. Applying R. v. Marais,[115] he held that section 2
eclares the supremacy of the Imperial Parliament whenever
chooses to legislate for any portion of the Empire,
withstanding any local enactment on the same subject.
s is a doctrine inherent in the legal and constitutional
ations of the constituent portions of the Empire, and one
ch a Court of law must recognize, whatever political
ections might be urged to the Imperial exercise of power".
er reviewing some historical aspects of the use of the
d "repugnant" in relation to statutes, he went on to
pt the long-standing opinions of the Imperial law officers
t "inconsistency", "repugnancy" and "contrariety" were
erchangeable terms in this connexion.[116]

In The Union Steamship Co. of New Zealand Limited

v. The Commonwealth,[117] Isaacs, J., confirmed and elaborated upon his original view. For the purpose of detecting repugnancy, he held that "the attention of the Court is not to be concentrated on mere minute verbal expressions or individual differences of requirements".[118] A repugnancy to a "central and commanding intention" of Imperial legislation would be necessary in order to bring the Colonial Laws Validity Act into operation. He went on to cite, with approval, the following passage from Hearn's Government of England:[119]

> Originally the rule ran, much in the same form in which power is usually given to corporations to make by-laws, that a colonial Act must not be repugnant to the law of England. Such a restriction, if it were construed literally, would have proved too severe; and accordingly repugnancy was defined to imply, not diversity, but conflict; that is, if there were an Imperial law and a colonial law on the same subject, but with different enactments, the Imperial law must prevail.

78. The last step in this series of interpretations by Isaacs, J., came in The Commonwealth v. Kreglinger & Fernau Limited.[120] There he made a further account of his previously expressed views and concluded:

> The opinion of Sir Roundell Palmer and Sir Robert Collier [in 1864][121] ... was that the effect of repugnancy at common law was that "the subject matter of the invalid part of the legislation is wholly ultra vires". Unless separable, that would bring to naught the whole of the legislation containing the invalid part. To save this total invalidity sec.2 of the Colonial Laws Validity

Act was passed. The section is, to my mind, rather a saving than a destructive provision. The effect of sec.3 in this respect has, perhaps, not been fully recognized, and the two sections must be read together. If the result of comparing two Imperial enactments, whichever is first, is that one cuts down the other, then, whatever legislation is passed under the assumed authority of that other, but transgresses the limits to which it is reduced, is necessarily ultra vires. It does not need sec.2 of the Colonial Laws Validity Act to destroy it. That section really says that so far as Imperial Law is concerned the local Act (apart from the repugnant portions) may remain valid. Whether after excluding the repugnant portions the local Act operates as the will of the local legislature is another question.[122]

The general tendency, thus followed, of interpreting te narrowly the concept of repugnancy, has been further ne out by the limited number of cases of the invalidation "colonial" legislation on that ground.[123] Most litigation ting repugnancy in issue has been concerned with the con- uences of a repealing or amending measure which conflicts n some Imperial Act. This aspect may conveniently be nined in isolation.

eals and Repugnancy

It has long been accepted that a colonial or te legislature has power to repeal or amend some Imperial s.[124] These Imperial Acts are those in force in the colony State as part of the inherited law of England.[125] Imperial

Acts extending to the colony (or State) within the meaning of the Colonial Laws Validity Act, that is, Imperial Acts made applicable to the colony (or State) by the express words or necessary intendment of any Imperial Act, are not susceptible of repeal or amendment by the colonial or State legislature.[126]

Repugnancy and the Statute of Westminster

81. Section 2 of the Statute of Westminster, in ending the application to 'Dominions' of the Colonial Laws Validity Act, and the concept of repugnancy, at once created a disparity between the Commonwealth and States of Australia. It was the more pronounced, in that the Statute specifically applied section 2 to the Canadian Provinces.[127] The Australian States were thus left in a demonstrably subordinate and unsatisfactory position. As Professor Castles has put it:

> The possibility that a statute of an Australian State may be void ab initio, as being repugnant to the laws of England within the terms of the Colonial Laws Validity Act, is an anachronism, particularly as those laws to which Australian legislation would be repugnant were passed in an era when the present-day concept of the British Commonwealth was unknown.[128]

82. Curiously enough, the continuance of the Colonial Laws Validity Act had been aired as a grievance by the delegates from the Australian Colonies who went to England to negotiate the passing of the Commonwealth Constitution Act. According to Professor Keith, writing in 1916, those delegates:

> Clearly intimated that in their opinion the application of that Act to the laws of great

> self-governing communities was out of date, and in some degree open to objection. This view was not in any degree persisted in, and the application of the Colonial Laws Validity Act to the Commonwealth has never been doubted by the Courts.[129]

eith went on to propose that the continued application f the Act to self-governing Dominions[130] could no longer e justified.

3. The Imperial Conference of 1926 acknowledged that he means to the end of uniformity provided for by the Act ould be better secured "by the enactment of reciprocal tatutes based upon consultation and agreement".[131] In urn the 1929 Conference concluded that the Act should be epealed in its operation to the laws of Dominions:

> The Act, at the time when it was passed, without doubt extended the then existing powers of Colonial legislatures. This has always been recognized, but it is no less true that definite restrictions of a far-reaching character upon the effective exercise of those powers were maintained and given statutory effect. In important fields of legislation actually covered by statutes extending to the Dominions the restrictions upon legislative power have caused and continue to cause practical inconvenience by preventing the enactment of legislation adapted to their special needs. The restrictions in the past served a useful purpose in securing uniformity of law and co-operation on various matters of importance: but ... this method of securing uniformity, based as it was upon the supremacy of

> the Parliament of the United Kingdom, is no longer constitutionally appropriate in the case of the Dominions.[132]

Thence the matter was translated into draft legislation which was duly enacted as section 2 of the Statute of Westminster.

84. There was some academic controversy whether the doctrine of repugnancy could be effectively disposed of in such a way while the Parliament at Westminster could continue to legislate by paramount force. Keith had foreshadowed that, despite other benefits, repeal of the Colonial Laws Validity Act would leave the position "vague and difficult".[133] The result, as regards such matters as the monarchy, has borne out his view.[134] But it may be postulated that the removal of the Act in the 'Dominions' has revived old conventions. Latham likewise had proposed that, notwithstanding its effective repeal, the principle of the Colonial Laws Validity Act must stand, so long as the legal sovereignty of the British Parliament stood, that "in the event of manifest inconsistency or repugnancy between an Imperial statute and a Dominion statute the Imperial statute must prevail".[135]

85. The exclusion of the Australian States from the virtual repeal of the Colonial Laws Validity Act has been widely criticized. Professor Wheare, for example, contended that:

> it is difficult to accept arguments put forward to demonstrate that the States of Australia or the Provinces of Canada are, or ought to be, placed upon a status of constitutional inequality in relation to the United Kingdom. A Dominion is

not a government or a parliament; it is a territorial community. It has been declared that these territorial communities are equal in status to the territorial community of the United Kingdom. The people of Australia or Canada, that is to say, are in no way subordinate in constitutional status to the people of the United Kingdom, and that proposition is unaffected by the fact that the people of Australia or Canada are for some purposes governed from Canberra or Ottawa and for other purposes from the State or provincial capitals.[136]

6. Professor Bailey, writing in 1932, hoped that some teps might be taken to overcome the impression that Commonealth and States were, in this respect, unequal. He felt hat the matter could be rectified on the adoption of the tatute in Australia.

So far as the Colonial Laws Validity Act is concerned, the case for following the Canadian example is very strong. It would be a great anomaly to have Commonwealth and State legislation on the same subject matter (shipping for example) the latter bound, and the former not bound, by the Merchant Shipping Acts. Both in theory and in practice, there is much to be said for treating Dominion powers of self-government as a whole, irrespective of the particular authority by which, in a federal Dominion, they may come to be exercised.[137]

7. The conclusion seemed inescapable that there was o point in retaining Imperial control over Australian State

legislatures, while freeing the Commonwealth Parliament. However, for the reasons already specified, the States were preoccupied with other priorities in considering the Statute of Westminster, and the attempt was not made to obtain the benefits of its section 2. With hindsight, that omission can be seen to have been a mistake.

"Manner and Form"

88. It is necessary that we invite special attention to the significance of section 5 of the Colonial Laws Validity Act. That section reads:

> Every colonial legislature [as defined by section 1] shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature [as defined by section 1] shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

89. This is not the place to make a minute examination of the application of that section to section 7A of the Constitution Act, 1902, of New South Wales. Suffice it to say that section 7A was added to the Constitution Act by an

ıdment in 1929 prescribing that the Legislative Council ıld not be abolished without, in effect, taking a referam and observing other procedures.

An attempt to abolish the Legislative Council in) without following all those procedures was declared ılid by the Privy Council in the celebrated case Attorney-eral for New South Wales v. Trethowan.[138] The Board held ; section 5 of the Colonial Laws Validity Act was the ster section" to be considered:

> It will be observed that the second sentence of the section contains an enacting part with a proviso, and it was vehemently contended by the appellants that the effect of the proviso was not to cut down the operative part of the sentence, and that any construction of the words "manner and form", which are contained in the proviso, which cut down the powers previously granted was repugnant to the power so granted. In their Lordships' opinion it is impossible to read the section as if it were contained in watertight compartments. It must be read as a whole, and read as a whole the effect of the proviso is to qualify the words which immediately precede it. The powers are granted sub modo. Reading this section as a whole, it gives to the legislature of New South Wales certain powers, subject to this, that in respect of certain laws they can only become effectual provided they have been passed in such manner and form as may from time to time be required by any Act still on the statute book. Beyond that, the words "manner and form" are amply wide enough to cover an enactment providing that a Bill is to be submitted to the

electors and that unless and until a majority of the electors voting approve the Bill it shall not be presented to the Governor for His Majesty's assent.[139]

91. Further, section 7A had been itself rendered incapable of repeal without the authority of a referendum, and section 5 of the Colonial Laws Validity Act applied so as to render the constitution "rigid" to that extent. There have been proposals from time to time as to other ways in which such rigidity might be achieved without the overriding authority of the Colonial Laws Validity Act.[140] We take those proposals to be irrelevant to our present terms of reference. We will accordingly suggest the retention of the substance of sections 1 and 5 of the Colonial Laws Validity Act and their re-enactment.[141]

A Note on Sections 4 and 6 of the Colonial Laws Validity Act 1865

92. These sections appear to be anachronistic and no longer needed by the Australian States.

Section 4 is in the following terms:

No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though

such instructions may be referred to in such letters patent or last-mentioned instrument.

. In brief, this section validates an Act to which Governor has assented through inadvertent disregard of s instructions to reserve the relative Bill for the vereign's consideration. It does not, however, operate cure such an oversight when the instructions have been nveyed by letters patent or instrument generally authorizing e Governor to assent to Bills.

. The categories of Bills of the Australian States quiring to be so reserved are very restricted. The Royal structions of 29 October 1900 (which are identical in all ates)[142] enumerate them. As those Instructions are not ntained in letters patent and do not themselves generally thorize the Governor to assent to Bills, section 4 could erate in respect of them. By clause VIII of those structions the Governor, unless otherwise expressly thorized, is not to assent to Bills of the following asses:

1. Any Bill for the divorce of persons joined together in holy matrimony.
2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.
3. Any Bill affecting the currency of the State.
4. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
5. Any Bill of an extraordinary nature and importance whereby Our prerogative, or the rights and property of Our subjects not residing in the State, or the

trade and shipping of the United Kingdom and its Dependencies may be prejudiced.

6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

95. Items 1 and 3, and probably item 4, relate to matters now beyond the legislative competence of the States. The only remaining item of substance is item 5. Simply because of the "extraordinary nature and importance" of the measures to which it refers, it is inconceivable that assent would be given to them by a Governor acting inadvertently.

96. The likelihood of the Governor's being given other instructions relating to specific topics of State legislation is so improbable and so contrary to modern convention as to be merely theoretical. It follows that, for the purposes of the States in the twentieth century, section 4 of the Colonial Laws Validity Act has no obviously practical application of benefit to them. Its continuance as part of their laws can no longer be justified.

97. Examination of this section has brought under our attention the unsatisfactory and inappropriate position of the law concerning the mandatory reservation of certain State Bills and the possible disallowance of State Acts. We think that the opportunity should be taken to place these matters in better order, and we make further proposals concerning them in Part III below.[143]

98. Section 6 is in these terms:

The certificate of the Clerk or other proper officer of a legislative body in any colony to

the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any Bill reserved for the signification of Her Majesty's pleasure by the said governor, shall be prima facie evidence that the document so certified is a true copy of such law or Bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or Bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved Bill as aforesaid, shall be prima facie evidence of such disallowance or assent.

9. There are, in effect, three elements of proof ontemplated by the section: of the assent to Bills; of ıc disallowance of Acts; and of the allowance of a Bill ıich has been reserved by the Governor for the signification f the Sovereign's pleasure. The section, as Sir Kenneth oberts-Wray has said, "is only a matter of evidence".[144]

00. So far as New South Wales is concerned, the proof f assent to Bills, whether by the Governor or after eservation, is sufficiently covered by sections 3 and 4 f the Interpretation Act of 1897. Proof of disallowance is o longer a practical consideration: Roberts-Wray describes ıe doctrine of disallowance, in independent British ountries, as "merely a museum piece".[145]

101. The 1929 Conference on the Operation of Dominion Legislation, after pointing out that the doctrine had fallen into desuetude, reported that:

> The present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation. Accordingly, those Dominions who possess the power to amend their Constitutions in this respect can, by following the prescribed procedure, abolish the legal power of disallowance if they so desire. In the case of those Dominions who do not possess this power, it would be in accordance with constitutional practice, that, if so requested by the Dominion concerned, the Government of the United Kingdom should ask Parliament to pass the necessary legislation.[146]

102. There is no reason why the Australian States should be in any different position from the Australian Commonwealth in this connexion. It may safely be concluded that, for all practical purposes, no power of disallowance remains, and proof of disallowance of Acts will not be required.

103. As to the proof of Bills reserved - now confined under the Governor's instructions of 1900 and the Australian States Constitution Act 1907 to a narrow compass - there can be no practical justification for retaining section 6 of the Colonial Laws Validity Act. Commonly, litigation concerning Bills has been determined on demurrer (e.g., Trethowan v. Peden[147] Clayton v. Heffron[148]). If proof is necessary, there are means for doing so under the common law.[149] If legislative facilitation is needed, the State's

own legislation would suffice.

104. Section 6 of the Colonial Laws Validity Act was passed under such different constitutional circumstances from those of today and under such limited conditions of world communication, that it must be regarded as outmoded. Its functions are now either unnecessary or are sufficiently covered by existing State legislation. The section should not be retained as part of the law of the Australian States.

B. Section 3 of the Statute of Westminster (Extra-territorial Legislative Power)

105. The section provides that:

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

106. In Australia, section 3 applies solely to the Commonwealth, not to the States. The matter was investigated by the 1929 Conference on the Operation of Dominion Legislation which recognized that the States had good grounds to secure similar power, but that was "a matter primarily for consideration by the proper authorities in Australia".[150] The authorities did nothing to assert State interests, so that it remains true that the States have no power based on statute to pass any extra-territorial legislation. But their position has been ameliorated by the course of judicial

interpretation over the intervening years.

107. Well before 1931 it had been demonstrated that careful drafting of statutes could defeat most practical restrictions on extra-territorial power.[151] By 1916 Professor Keith regarded it as "extremely doubtful whether the retention of the territorial limitation of Dominion legislation serves any useful purpose".[152] It rather served, he thought, to promote the discussion of difficult points of law without any public advantage.

Definition

108. The power to make laws of extra-territorial force is a characteristic of a fully sovereign, independent state. Professor Wheare, relying partly on the Commons debate on the Statute of Westminster Bill, offered the following definition and observation:

> Extra-territorial legislation simply means legislation which attaches significance for courts within the jurisdiction to facts and events occurring outside the jurisdiction. This does not imply that one state can pass laws for another State, or that several systems of law will be in operation regulating a particular sphere within any given state. It means only "that each nation has the capacity to legislate outside ... its own territory, in respect of its own subjects, in such a way as to make them amenable to the law, as administered in its own courts, when they come within its jurisdiction".[153]

109. The emphasized word "nation" was, in its context, synonymous with "Dominion" as then understood within the

ritish Empire. Hence the Australian Commonwealth, as a ominion for the purposes of the Statute of Westminster, has lenary extra-territorial legislative power.[154] But the ustralian States are not Dominions, do not enjoy such power n the same comprehensive sense, and the doctrine of extra- erritorial incompetence has been described as remaining a clog on their sovereignty".[155]

10. The imposition of extra-territorial incompetence as long been criticized. As early as 1917 Salmond main- ained that:

> No colonial legislature can make laws for a place outside the limits of the colony ... But this rule is not a peculiarity of colonial constitutional law. It applies equally to the legislation of the Imperial Parliament, which has no more power to make laws which will operate in France than the Victorian Legislature has power to make laws which will be in force in Canada. The only difference is that the territorium of the Imperial Parliament is the whole Empire and not merely the United Kingdom, whereas the territorium of a colonial legislature is limited by the boundaries of the Colony. But although the Imperial Parliament cannot make laws for France, it can make laws for the United Kingdom (or indeed for any part of the Empire) with respect to France and to persons, things, and acts being done in France. It can make murder or treason done in Paris a criminal offence punishable in London, and the maxim extra territorium ius dicenti impune non paretur would be pleaded in vain in a prosecution for any such offence. Since, therefore, this maxim is powerless

> to restrict such legislation on the part of the Imperial Parliament in respect of offences committed outside the British Empire, how can it operate to invalidate similar legislation by a colonial parliament in respect of offences committed beyond the limits of the colony?[156]

111. The practical answer to Salmond's rhetorical question is to be found in the enduring vitality of nineteenth century colonial constitutional practice. By about the middle of that century the opinions of the law advisers to the Colonial Office had led to the making of an inflexible rule that British Colonies were legislatively incompetent in the extra-territorial sense. Professor D.P. O'Connell has correctly summed up the historical reasoning behind this approach - "its basis [was] clearly one of policy: relationships with foreign nationals outside the colonial boundaries raised questions of international law affecting the Imperial Government and the latter could not be compromised by possibly irresponsible colonial legislation".[157]

Judicial Decisions

112. The policy received its most severe application in Macleod's Case[158] where the Privy Council, in effect, held that a Colony could not legislate in respect of anything occurring outside its boundaries. There were several intervening related judgements of importance until the Board decided to relax that severity in the case of Croft v. Dunphy in 1933.[159] In this it took its cue from the Statute of Westminster which, in this connexion, as Professor Bailey has pointed out, was negative rather than positive, aiming "to sweep away a body of restrictive case law rather than to confer a substantive power".160

13. That case has been said to have disposed of the octrine of colonial extra-territorial incompetence, though he opinion is held, that the case had "implications only or the Dominions and had no direct relevance to the colonies nd doubtful relevance to the Australian States".[161] Despite hat analysis, the trend of judicial decision in New South ales has tended latterly to strengthen the view taken by vatt, J., in Trustees Executors & Agency Co. v. Federal ommissioner of Taxation[162] that Croft v. Dunphy "should esult in confining to a very small compass indeed the pposed territorial restrictions upon the legislative powers the seven Parliaments of Australia".[163]

14. So far as the Privy Council was concerned, any rmer severity in approaching the problem may be taken to ve been abandoned following the judgement in Wallace rothers v. Commissioner of Income Tax, Bombay[164] where it s held that: "There is no rule of law that the territorial limits of a subordinate legislature define the possible ope of its legislative enactments or mark the field open its vision ... Concern by a subordinate legislature with ffairs or persons outside its own territory may therefore ggest a query whether the legislature is in truth minding s own business. It does not compel the conclusion that is not".[165]

15. In Ex parte Iskra[166] a notable instance occurred a New South Wales court's favourably accepting an element extra-territoriality in a State enactment relating to the iminal law.[167] There, Brereton, J., after analysing glish and Australian authorities, concluded that:

> The effect of the decisions is that a legislature may give a statute extra-territorial operation if

> that statute is for the peace, order and good government of the State, and it is necessary for its more effective operation to that end so to do; and it may even, for that purpose, enact that an act done outside the State is a punishable offence, provided there is in the prohibited act an element sufficiently connected with the State. The problem of punishing the offender, if outside the State, is as irrelevant as that of enforcing the judgement in Ashbury v. Ellis. The canon of construction establishing a presumption against extra-territoriality, no less than s.17 of the Interpretation Act of 1897 in the case of New South Wales, still applies, but Macleod's Case is no longer authority for any absolute and arbitrary rule that a subordinate legislature cannot make punishable by its courts an act done outside the territory it governs, if it ever was.[168]

116. As early as 1929 J.G. Latham had expressed the opinion that the restrictions on extra-territorial law-making powers were not tied to the element of extra-territoriality alone. In his view a law made for the peace, order and good government of a colony (as then understood) was an exception to the ordinary rule and would be valid even though it had some operation beyond the territory of that colony.[169] It was on the very point of that exception that the 1929 Conference on the Operation of Dominion Legislation widened the powers conferred on "Dominions" under the Statute of Westminster. In this, according to Professor W.P.M. Kennedy of the University of Toronto, the Conference exceeded its power:

> The Imperial Conference of 1926 suggested that the Conference of 1929 should discuss "the practicability

and most convenient method" of giving extra-territorial effect to the laws of a Dominion "where such operation is ancillary to provision for the peace, order and good government of the Dominion". The Imperial Conference of 1929, lightly and with no disclosed catena of reasons, brushed aside the limitation ... and, boldly exceeding their reference, agreed on the general terms accepted in 1930 and incorporated in the Statute of Westminster.[170]

7. In the result, although it may be that the stralian States have a capacity to legislate extra-rritorially, they are restricted in such legislation to rthering the peace, welfare[171] and good government of the eas under their respective control. The Commonwealth rliament, on the other hand, has a completely unqualified wer to legislate with extra-territorial effect.

venue Laws

8. In this area the tendency has been for judicial cisions to confirm that the States have powers of extra-rritorial legislation. Once again, these powers are not limited, but must comply with the peace, order and ood vernment formula, and hence the object of the legislation st have some reasonable connexion with the legislating ate.

9. A celebrated enunciation of the principles involved s made by Dixon, J., in Broken Hill South Ltd. v. mmissioner of Taxation:

The power to make laws for the peace, order and

> good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicile, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicile, carrying on business there, or even remoter connexions. If a connexion exists, it is for the legislature to decide how far it should go in the exercise of its powers.[172]

120. The Privy Council, in Johnson v. Commissioner of Stamp Duties thought that such statement of the law "proceeded on right principle".[173] It also approved of a determination of the New South Wales Supreme Court in Attorney-General v. Australian Agricultural Co. that "the legislature of New South Wales is a subordinate legislature ... Legislation on any subject-matter which has no relevant territorial connexion whatever with New South Wales falls outside the power of the legislature of New South Wales".[174] In the view of the Privy Council then, and of local Courts subsequently, slight territorial connexions would suffice to save State legislation from failing for extra-territorial incompetence.

21. Thus in Myer Emporium Ltd. v. Commissioner of tamp Duties[175] it was held by the New South Wales Court f Appeal that the fact of incorporation of a company in ew South Wales was a sufficient territorial connexion to ender transfers of shares in its capital liable to local tamp duty, irrespective of their "location" and place of egistration. Walsh, J.A., observed:

> In my opinion, the incorporation of the Company in New South Wales does constitute a sufficient connexion, in relation to a charge imposed upon the transfer of a share in that Company. The whole value of the share and its very existence rest upon and are capable of being affected by the laws of this State. It does not answer this to say that, when the share is on a foreign register, it must be regarded, for purposes for which it is necessary to give to the share a local habitation, as being situated in that place, or that the holder of it may be able under the laws and in the courts of that place to enforce rights in relation to it. The important thing is that the existence of the share depends upon the laws of New South Wales. So does its presence on the branch register in Canberra ... It would be within competence if the New South Wales Parliament decided (however unlikely it may be that it would do so) to enact that shares in companies incorporated under its laws were to be held only by local residents and not by "foreigners" or that no transfer to a foreigner should be valid. A fortiori, it can enact that transfers, including transfers to foreigners, are to be subject to such

> conditions as it may stipulate, including the payment of some charge. If the foreigner chooses to invest in shares in a New South Wales company, he must submit to the conditions attaching to his exercise of that choice.[176]

122. The same judge pursued that rationale in Thompson v. Commissioner of Stamp Duties,[177] a similar case arising shortly afterwards. The Privy Council, on appeal, substantially affirmed the view, while pointing out the difficulty of laying down a general rule. According to the Board "it appears from decided cases that there is no "relevant territorial connexion" if the connexion with the territory of [the State] is too slight. There is an element of degree involved".[178]

123. It follows that where there is no territorial nexus whatever to be found in support of the application of extra-territorial legislation, it will fail.[179] Of that a recent reminder is the High Court decision in Welker v. Hewett,[180] where Kitto, J., whose judgement was generally agreed to by four members of the bench, observed:

> The question that arises is whether the Parliament of New South Wales has power to deal [under a particular Act] with a person who is not within its territory. It has the power, of course, if it so limits the application of the law as to base its operation upon some connexion that the absent [person] has with New South Wales, provided that the connexion is such as to make the enactment of the law relevant to the peace, welfare and good government of New South Wales; but otherwise it

has not, for the Parliament has no general power to make strangers to its territory liable in its courts to judgements or sentences by way of enforcing contributions to the revenue of the State.[181]

. We note the observations of Professor O'Connell, e in 1968, that:

The doctrine of extra-territorial legislative incompetence is a necessary factor in the distribution of power within a British-type federation. It is sometimes proposed that the Australian States should seek the abolition of the doctrine. If they succeeded in achieving this, the constitutional structure, notably in the tax field, would be weakened.[182]

. In the light of the development of the authorities, t interpretation must be viewed with great doubt. In view, in the fiscal field, the Commonwealth would be ther strengthened nor weakened by a statutory grant of ra-territorial legislative power to the States and the tes would be somewhat strengthened. They already enjoy ge powers, the line of judicial decisions showing the ent and manner of their territorial limitations.[183]

ritorial Waters

. The subject of extra-territorial legislative petence has received recent and special emphasis by the nbration of conflict between Commonwealth and State ernments concerning control of the marine waters surrounding continent, of the bed of the continental shelf, and of eral deposits therein. The likelihood of such a

controversy was foreshadowed by Professor D.P. O'Connell (then Reader in Law at Adelaide University) in a paper "Problems of Australian Coastal Jurisdiction" published in 1959.[184] After elaborating upon the areas of difficulty he concluded that "the problem is one of collision between two incompatible doctrines, the sovereignty of the constituent elements in a federal system, and their lack of responsibility in international relations. The way a court will approach the problem of maritime boundary will in the last resort depend upon its attitude to federalism as a theory and system of government".[185]

127. The perceptiveness of O'Connell's thesis was not fully appreciated nor widely supported at the time as it "flew in the face of Australian constitutional tradition".[186] However, the acceptance of material portions of it, substantially verbatim, by the Canadian Supreme Court in 1967 encouraged reconsideration. O'Connell re-stated his position, with particular reference to maritime boundaries and the continental shelf, in his article "Problems of Australian Coastal Jurisdiction"[187] and in commentary on the paper "Sovereignty and Jurisdiction over Australian Coastal Waters" by Dr. R.D. Lumb.[188]

128. Then followed a material pronouncement by the High Court in Bonser v. La Macchia,[189] in which the extent of the Commonwealth Parliament's constitutional powers in respect of marine and submarine domain was considered. The defendant, prosecuted for breach in ocean waters, some six miles from the coast of New South Wales, of a Commonwealth prohibition against trawling with nets of smaller mesh than that regulated, appealed to the High Court. It was there argued that the prohibition was beyond constitutional com-

etence. In assessing that question Barwick, C.J., and indeyer, J., although urged by counsel not to do so, made n analysis of the respective positions of the Commonwealth nd the States concerning maritime boundaries and control ver marine waters and submerged lands beyond low-water mark.

29. They both concluded that State territorial limits nd at low-water mark, the Australian Colonies never having cquired from the Imperial Parliament territorial jurisdiction eyond that point.[190] On or after Federation, the Common-ealth, in their determination, acquired the former imperial ontrol of "territorial waters" (those within one marine eague of the coast and over which the Admiral's authority istorically extended); and subsequently beyond that limit. ndeyer, J., considered that the Commonwealth's "sovereignty" xtended to "all forms of ownership, rule, dominion, and ower known to our law, which are capable of existing in the pen sea and sea-bed". Barwick, C.J., was "not as ready as ndeyer, J., to upset the status quo respecting fisheries", t he did not "disguise his preference for a centralist olution to what is essentially a problem of federalism. e view he takes that the sea-bed is intrinsically Common-alth derives in his judgement not only from a legalistic alysis of the cases ... but also from his views on feder-ism as a system designed to resolve the international sues which an evolving society projects".[191] The reasons r the judgements are intricate and interesting, but do t call for further analysis here.

0. Encouraged by these pronouncements the Commonwealth vernment introduced a Territorial Sea and Continental elf Bill in April, 1970.[192] The preamble to the Bill

declared that the territorial sea "is within the sovereignty of Her Majesty" and that Australia "as a coastal state has sovereign rights in respect of certain submarine areas, known as the continental shelf, adjacent to its coast but beyond the limits of the territorial sea, for the purpose of exploring those submarine areas and exploiting their natural resources". Clause 5 proceeded to the conclusion that "the sovereignty in respect of the territorial sea, and in respect of the airspace above the territorial sea and in respect of the bed and subsoil of the territorial sea, is vested in and exercisable by the Crown in right of the Commonwealth". Consideration of the Bill, after early vicissitudes, appears at the time of writing this paper, to have been postponed indefinitely.

131. A confirmatory grant of extra-territorial legislative power to the several States will not give them constitutional powers over territory to which they have no title. The determination of that title is an independent matter and the claims of none of the parties involved would be affected if State extra-territorial powers were confirmed by statute. It could be that their express enunciation would be some use if, in due course, off-shore mineral deposits were worked under an arrangement - of a kind not uncommon in America and Canada - for the sharing of royalties between Federal and State Governments.

132. In his advice to the Victorian Government soon after the passing of the Statute of Westminster, Professor Bailey concluded, of the extra-territoriality question, that there would be "no substantial legal reason for or against the extension of section 3 to the States. The decision

would turn largely on political questions of status and prestige".[193] That is still true: the States have, as far as we know, suffered no material detriment by exclusion from the section, the advantages flowing from adopting it would be relatively limited. However, it is worth noting that a power of extra-territorial legislation has been generally conferred by the Imperial Parliament on British countries acquiring responsible or independent government since the second World War.[194]

133. Of greater importance is the possibility of there being some unusual areas of the law in which a statutory grant of extra-territorial competence may be of potential use.[195] State jurisdictions over piracy iure gentium and by statute depend substantially on power derived from the United Kingdom. Should State legislation on that subject be desired, its area of operation may be limited if the doctrine of extra-territoriality remains. Piracy of, and similar offences relating to, aircraft present novel areas where such wide authority may also be of value.[196]

C. Section 4 of the Statute of Westminster (Requests for Imperial Legislation)

134. The section reads:

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

135. It is necessary to consider jointly with section 4 the provisions of section 9 of the Statute, which are:

> (1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.
>
> (2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom shall make that law without such concurrence.
>
> (3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

136. The sections are unsatisfactory, not only in their obscure drafting (of which more is said below), but also in their substance.[197] The material portions of them are, in theory at least, houses of cards, for they rest on

he impossible foundations of seeking to diminish the egislative competence of the United Kingdom Parliament n British countries.[198] Professor Wheare had little doubt hat section 4 was "ineffective in law to restrict the nited Kingdom Parliament to the sphere of legislating for Dominion only with the request and consent of that ominion".[199] Mr. Justice Dixon said that the drafting of hese sections:

> brought the promoters of the Statute face to face with the only limitation there is upon the omni-competence of the Imperial Parliament. The limitation necessarily arises from that Parliament's supremacy over the law. No law it makes can deprive it of supremacy over that law. The last expression of its legislative will repeals all prior inconsistent laws. So long, therefore, as the Dominions remained under the jurisdiction of the British Crown, the theoretical power of the Parliament at Westminster to make laws extending to them could not be extinguished.[200]

37. More recently Sir Kenneth Roberts-Wray has isposed of section 4 by saying that "the convention that he United Kingdom Parliament did not legislate for Dominions ithout their consent was accepted and would have continued o be observed even if section 4 had not given it statutory orm".[201] He might well have added that the matter would ave been better left to convention rather than forced into legislative formula especially unsuited to a federal system. owever, it has been enacted and must now be taken as it is ound. From a practical viewpoint the section is best egarded in the terms once applied to it by Sir Owen Dixon. he preamble and section 4, he said, "will be completely

effectual in fact to insure that the power of the British Parliament in reference to a Dominion will lie dormant unless and until the Dominion requests that it should be exerted in a specified manner. But they do not operate in law to diminish the power of that Parliament".[202]

138. There is no doubt that sections 4 and 9(2) taken together ensure that the Commonwealth Parliament or Government may not solicit from the Imperial Parliament any legislation "with respect to any matter within the authority of the States", subject only to the "constitutional practice" existing before the passing of the Act.[203] Sir Kenneth Bailey took the view that section 4 by itself did not place that restriction on the Commonwealth. Without section 9(2), he said, section 4 must depend on the ordinary grammatical significance of the word "Dominion" as denoting "the whole Australian territorial community - i.e., the Commonwealth, <u>including</u> the States".[204] Hence section 4, standing alone, would have curtailed imperial legislation for the States on all subjects unless the Commonwealth had requested and consented to the enactment thereof. In his conclusion, the States were fully justified in securing the insertion of section 9(2). They were not justified, however, in their fears that either section might permit the Commonwealth to secure imperial legislation as of right, without regard to State wishes, and without the exercise of any discretion or deliberative judgement by the Imperial Parliament.[205]

139. Dr. Wynes, on the other hand, considers that section 4 could never have applied to the States, nor was section 9(2) really needed to clarify the point. In his view section 4 is to be construed, in effect, by substituting, as section 10(3) allows, the expression "the Commonwealth

f Australia" for "a Dominion" where therein appearing. he result is that Imperial Acts would not apply to the ommonwealth as part of the law of the Commonwealth without equest and consent. Moreover, "the 'law of the Commonwealth' eans the statute law and common law which applies throughout he Commonwealth of Australia considered as a single indi- isible political unit and not as an aggregation of several tates".[206] Hence the section could have no application to mperial laws on subjects outside Commonwealth legislative ower.

0. As to section 9(2), it is Dr. Wynes' opinion at it is little more than a historical curiosity symptomatic the sensitivities of the States in 1931. The effect of e sub-section, he says:

> is simply to preserve the constitutional right of the States to approach the Imperial authorities with a request for legislation upon a matter within their exclusive powers. Where the concurrence of the Commonwealth was in "constitutional practice" previously required, it will still be necessary; but where this was not the case sec. 9(2) simply preserves the rights of the States in this respect. It is true that in this view the subsection is superfluous, but it was inserted at the request of four of the States in order to clear up ... doubts.[207]

1. It is an open question where the Australian States end in respect to concurrence in imperial legislation for tters on which the authority of Commonwealth and States erlap - the laws relating to shipping, for example. No feguard exists to ensure to the States any right of

requesting or consenting to such legislation. Conventions may exist that the States should be invited to concur, but, if that is so, they were little in evidence when it came to passing such fundamental constitutional measures as the Statute of Westminster itself, His Majesty's Declaration of Abdication Act 1936 and the Royal Titles Act 1953 - even though the States were materially affected by all of them.

142. In Part III of this working paper,[208] we suggest the adoption of the greater part of section 4 of the Statute of Westminster. We have proceeded on the assumption that any necessary request will be by the appropriate legislature, without further confirmation by the Government concerned. The expression "Parliament and Government" was inserted in section 9(3) of the Statute of Westminster to meet an Australian objection. The Bill had previously referred to the request and consent of a "Dominion", and it was not then clear whether that contemplated action by the Government, Parliament, or the electorate, or some combination of them.[209]

143. Those problems do not now arise, it being clearly settled that the customary vehicle for request is an Act of the Parliament concerned.[210] There is no occasion for a Government to express itself independently of Parliament in this respect. On the contrary, since the Crown is part of the legislature, such an intervention by a Government would be redundant.

D. Section 5 of the Statute of Westminster (Merchant Shipping)

144. Section 5 is as follows:

> Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

45. This section was inserted, as a measure of clarification only, on the recommendation of the 1929 Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation. Paragraph 121 of the Conference's Report[211] states that:

> The Merchant Shipping Act, 1894, by section 735, now confers upon the Parliament of a Dominion a limited power of repeal. The power of repeal with regard to Merchant Shipping Acts under the new position will, however, be covered by the wider power of repeal contained in the general clause which we have recommended.

46. Our reference does not extend to considering the substance of Merchant Shipping legislation and no proposals for dealing with it are appropriate to our work on statute law revision. We believe that independent attention is being given to the formidable problems of rationalizing Imperial, Federal and State legislation on the subject.

47. For present purposes we might, however, draw attention to the area of merchant shipping as illustrating particularly well the way in which a State Parliament may not be master of its own statute book. The Merchant Shipping

Act, 1894, (Imperial) has been frequently amended and was revised considerably as recently as 1970.[212] These amendments, we apprehend, whatever their position may be in relation to the Commonwealth of Australia, continue to bind the States by paramount force.

III PROPOSAL FOR UNITED KINGDOM LEGISLATION

48. We think that the time has come when it is no longer appropriate, save in special cases to which we shall come, that the United Kingdom Parliament should be in a position to legislate so as to change the law in force in the State. We further think that the time has come when the legislative powers of the State should be freed from the limitations formerly appropriate to its position as a Colony in the British Empire. The limitations to which we refer are those arising out of the doctrine of extra-territorial legislative incompetence and of repugnancy to the laws of England, those arising out of control from England of the discretion of the Governor as regards assent to State Bills, and those arising out of provisions for reservation of State Bills and disallowance of State Acts. There are several reasons.

49. In the first place, the course of history has taken away the reason for the limitations. The content of the law of the State is no longer a concern of the United Kingdom Government.

50. In the second place, we think it appropriate to the present position of Australia as a nation that it should be possible to find amongst the legislatures in Australia complete sovereign law-making powers. Except where the Commonwealth Constitution otherwise provides, there should be no subject of possible legislation which is beyond the sum of the powers of the legislatures of the Commonwealth and the States.[213] If, taken together, the constitutions of Australian legislatures fail to give such legislative powers,

Australia remains to that extent subordinate and not autonomous as becomes a nation.

151. In the third place, there are fields, some of every day importance, the laws governing which are defined for Australia by United Kingdom legislation, unalterable by any Australian legislature or by any combination of Australian legislatures.[214] These fields include important parts of the laws relating to shipping and navigation.

152. In the fourth place, laws which Australians may be properly concerned to make are liable to attack in the Courts for the reasons we have mentioned. For example, difficulties confront any Australian legislature which seeks to penalize the hijacking of aircraft in cases where the facts show no connexion with Australia.[215] It is grotesque that a person charged with such an offence in an Australian court should have an opportunity of escaping punishment by reference to limits of legislative power surviving from colonial days.

153. In the fifth place, limits on legislative power may prompt the adoption of stratagems for the purpose of securing constitutional validity. We instance the suggestion that a State legislature might penalize, not bigamy anywhere in the world, but entry into the State of a person who had committed bigamy anywhere in the world.

154. We put forward for consideration a draft of a Bill[216] for an Act of the United Kingdom Parliament to deal with the position of New South Wales. In doing so we do not pretend to usurp the function of Parliamentary Counsel, either

in England or elsewhere. Rather, we put forward the draft as an embodiment in something like legislative language of the proposals we make in the light of the foregoing review.

155. The draft Bill is confined to meeting the position of New South Wales. The needs of New South Wales are special to the extent that maintenance of the present state of affairs calls for the enactment in a United Kingdom Act of something to preserve the effect of the latter part of section 5 of the Colonial Laws Validity Act 1865.[217] Other States may have the same or other special needs. We hope, however, that the draft Bill will serve as a basis for discussion. Consideration may show that the States should seek the passing of a Bill along generally similar lines for each State, or should seek the passing of a single Bill for all the States.

156. The question arises whether the Statute of Westminster requires that a Bill along the lines of our proposal should be passed by the United Kingdom Parliament only at the request and with the consent of the Parliament and Government of the Commonwealth.[218] It is our view that an Act founded on the draft Bill would not extend to the Commonwealth as part of the law of the Commonwealth within the meaning of section 4 of the Statute of Westminster[219] and that the question should be given a negative answer.

157. We go on to comment on the sections of the draft Bill.

158. Section 1 is concerned with the laws affecting the Sovereign. Although the section is placed first in the Bill,

it deals with points which have arisen incidentally in the course of our consideration of questions of repugnancy and the operation as regards the States and the Commonwealth of United Kingdom legislation. Section 2 of the draft Bill would be inconvenient if it applied to United Kingdom Acts touching the succession to the throne or matters of regency. Although the draft section 1 really operates as an exception to the draft section 2 and to some extent as an exception to the draft section 6, it seems appropriate to put draft section 1 at the beginning of the Bill because of the constitutional importance of its subject matter.

159. The Queen has a basic part in the government of the States and the Commonwealth. The Commonwealth Constitution and the Constitution Act, 1902 (N.S.W.), assume that the Sovereign for the purposes of those constitutions will be the Sovereign of the United Kingdom.[220] A different idea could not have been entertained at the time those constitutions were framed and a different idea could hardly be entertained today.

160. However, the identification of the Sovereign depends on the law of the United Kingdom. The law in question is largely, perhaps altogether, embodied in United Kingdom Acts[221] passed before the adoption by the Commonwealth Parliament of section 4 of the Statute of Westminster became effective. These United Kingdom Acts extend to the Commonwealth as part of the law of the Commonwealth and extend to the State as part of the law of the State. The Acts so extend by necessary intendment if not by express words. Further, the provisions of the Commonwealth of Australia Constitution Act referring to the Queen (that is, Queen Victoria) extend to that Queen's heirs and successors in the

sovereignty of the United Kingdom.[222]

161. An alternative and perhaps better view is that the constitutions of the Commonwealth and of the State take as the Sovereign for their own purposes the Sovereign for the time being of the United Kingdom. On this view, it is not a matter of the law of the United Kingdom extending to the Commonwealth or the State in the sense that, for example, the Merchant Shipping Acts so extend, but rather a matter of ascertaining, by reference to the whole state of affairs in the United Kingdom, including the relevant facts and law (whether that law extends to places outside the United Kingdom or not), who is for the time being the Sovereign of that Kingdom.

162. As regards the Commonwealth, the constitutional conventions noticed in the preamble to the Statute of Westminster, and section 4 of the Statute, are appropriate to meet the problems which may arise. The law touching the succession to the throne ought not to be changed without the assent of the Parliament of the Commonwealth,[223] and if it is necessary that a United Kingdom Act on the subject should extend to the Commonwealth as part of the law of the Commonwealth, the Act would need to have the request and consent of the Parliament and Government of the Commonwealth.[224]

163. The arrangements mentioned in paragraph 162 appear to us to afford a sufficient measure of consultation of Australians in matters touching succession to the throne. It would unduly complicate relationships within the Commonwealth of Nations, if consultation of the Government or legislature of the State were also required.

164. If, however, the view expressed in paragraph 160 is the right one, section 2 of the draft Bill might, if unqualified, involve that a United Kingdom Act touching the succession to the throne would be ineffective as regards the State unless passed at the request of the Legislature of the State. It seems best, in order to escape this inconvenience, that the laws for the time being of the United Kingdom touching the succession to the throne should continue to extend to the State, as they have in the past, without the need of any request by the Legislature of the State.

165. If occasion should arise for the law relating to the succession to the throne to diverge as between the Commonwealth and the States on the one hand and the United Kingdom on the other hand, basic constitutional changes would be required, either by further United Kingdom legislation or by some action authorized by the Commonwealth Constitution. It is not useful now to attempt to foresee and leave room for such changes.

166. Similar considerations apply to the delegated performance of the royal functions. Here we speak of such matters as regency and the powers of counsellors of state under the Regency Acts of the United Kingdom,[225] not of the settled constitutional arrangements for the Governor-General of the Commonwealth, the Governor or Lieutenant Governor of the State, and administrators of government. Occasions would be rare for the performance of royal functions in respect of the Commonwealth or a State by a regent or other delegate, but might arise, for example, if the appointment of a Governor-General or a Governor were required.

167. The Regency Act 1937 (U.K.) appears to extend to the Commonwealth and to the States as part of their laws respectively.[226] The Regency Act 1943 and the Regency Act 1953 presumably extend to the States as part of their laws but do not have the declaration required by section 4 of the Statute of Westminster and hence do not extend to the Commonwealth as part of its law. There is thus a divergence in the regency laws as between the United Kingdom and the States on the one hand and the Commonwealth on the other hand.

168. As in matters of succession to the throne, it seems right to us that matters of regency should be for United Kingdom legislation, without any need for request or consent by the legislature of the State.

169. Section 1(2) of the draft Bill would deny to the Bill any effect on the law respecting the royal style and titles. It seems that changes in the royal style and titles were, before 1931, made from time to time by proclamation under authority of an Act of the United Kingdom Parliament, but constitutional practice did not require the assent of any other Parliament.[227] The present position is that the Queen may, with the assent of the Parliament of the Commonwealth of Australia or other Member of the Commonwealth of Nations, adopt by proclamation a style and titles for use in relation to that Member.[228]

170. Neither the Government nor the Legislature of the State has, so far as we are aware, ever been consulted on questions relating to the royal style and titles. It seems to us inappropriate to propose any change in this position.

The matter is best left to arrangements made by representatives of the United Kingdom, the Commonwealth of Australia and other Members of the Commonwealth of Nations.[229]

171. The draft section 2 adopts the substance of section 4 of the Statute of Westminster. The draft Bill being a draft of a Bill for the United Kingdom Parliament, "Act" means an Act of that Parliament.

172. Section 4 of the Statute of Westminster calls for not only a request for, but also consent to the enactment of the United Kingdom Act in question. The requirement of consent does not seem useful and does not occur in the draft section 2. We recognize, however, that other considerations, such as the convenience of uniformity, may show that the draft section 2 should follow section 4 of the Statute of Westminster by requiring consent in addition to request.

173. The draft section 3 deals with extra-territoriality. It is based on section 3 of the Statute of Westminster but omits the declaratory words. The effect of a declaration that the Legislature has the power in question might be inconvenient. It might retrospectively validate State legislation which is now invalid. To do so would be to legislate in the dark and might occasion injustice. Under the draft section 3 the Legislature could itself make laws to deal with problems arising out of the invalidity of earlier State legislation.

174. So much for the wording of the draft section 3. What would be achieved by its enactment? Since 1933, when Croft v. Dunphy[230] was decided, the doctrine of extra-territorial legislative incompetence has come to have little,

erhaps no, operation. There remains, however, some room or argument that the reasoning in Croft v. Dunphy, oncerned as it was with legislation of the Dominion of anada, is not necessarily applicable in full to the egislation of the State.

75. Territorial considerations may indeed still be elevant to the validity of State legislation: the want of sufficient territorial connexion may show that the legis- ation is not for the peace, welfare and good government f the State.[231] But the question is generally considered oday as one of construction of the Constitution Act, rather han of a ground of invalidity extraneous to the Constitution ct.

76. It may be that the draft section 3 would directly verride the territorial limitation ascribed today to the xpression "for the peace, welfare and good government of ew South Wales".[232] If the draft section did not have that peration, it would at least, when read with the draft ection 4, authorize an amendment to the Constitution Act, 902, so as to eliminate the requirement that laws must be or the peace, welfare and good government of the State.

77. The removal of these territorial limitations is a orth-while objective. The limitations still occasionally rustrate the intentions of State legislatures, either by iscouraging attempts at legislation, or by constraining he Courts to hold legislation invalid.[233]

78. The draft section 3 would not infringe the egislative powers of the Commonwealth. To whatever extent

the powers of the State may be enlarged by the draft section 3, State legislation must always yield to Commonwealth legislation by force of section 109 of the Commonwealth Constitution.

179. The taking away of territorial limitations on the legislative powers of the State would have its main effect by taking away one ground on which a court administering the laws of the State must treat a State Act as invalid. It would not affect the rules of the conflict of laws (supplemented in Australia by section 118 of the Commonwealth Constitution) whereby a court of one country will determine how far effect ought to be given in that country to the laws of another country.

180. The draft section 4 takes the place of so much of section 5 of the Colonial Laws Validity Act 1865 as is necessary to preserve the position whereby laws respecting the Legislature may be put beyond repeal or amendment by ordinary legislative procedures.

181. The draft section 4 drops the first limb of section 5 of the 1865 Act (down to "therein"). This limb deals with laws respecting courts of judicature. It is unnecessary in the presence of the general power which the Legislature has under section 5 of the Constitution Act.

182. The draft section 4 also drops the references in section 5 of the 1865 Act to United Kingdom Acts, letters patent and Orders in Council as possible means whereby requirements as to manner and form may be made. These means

are inappropriate to the present independence of the State as regards the government in the United Kingdom.

183. We turn to the draft section 5. Subsection (1) would enact in a general form a provision similar in effect to the first limb of section 2(2) of the Statute of Westminster (down to "under any such Act"). Since the principle embodied in the subsection is an important constitutional principle, it seems to us fitting to express it in a short, general and positive form. The draft section (2) supplements subsection (1) so that, read together, the subsections are equivalent to the first limb of section 2(2) of the Statute of Westminster.

184. The draft section 5(3) is equivalent to the second limb ("and the powers" and so on) of section 2(2) of the Statute of Westminster.

185. The draft section 6 would have a double operation. First it would maintain the predominance of the laws mentioned in the subsection (1) and thus prevent legislation interfering with the federal system in Australia. Second, by specifying the Commonwealth Constitution and those United Kingdom Acts which alone are to prevail over State Acts, it would emphasize the otherwise unlimited legislative powers which could be given to the State.

186. The draft section 6(2) abandons the doctrine of repugnancy, both as that doctrine existed before the passing of the Colonial Laws Validity Act and in the form which the doctrine took under that Act. Instead, the draft section (2) adopts a test of inconsistency along the lines of section

109 of the Commonwealth Constitution. The latter section has received much judicial and other learned exposition and its effect is well understood. It is convenient to do so because in this way there would be introduced a common test for determining the validity of State legislation in cases of alleged conflict with United Kingdom or Commonwealth legislation. It is doubtful whether there is any substantial difference between the tests of repugnancy under the Colonial Laws Validity Act and inconsistency under section 109 of the Commonwealth Constitution.[234]

187. The draft section 7 would abolish requirements for the reservation of Bills of the Legislature for the signification of Her Majesty's pleasure thereon. The requirements which still survive[235] are inappropriate to the present independence of the State as regards the United Kingdom. We believe that there is no case in living memory of assent to a reserved Bill being withheld.

188. The draft section 7 is not enough to put an end to the requirements of clause VIII of the Instructions to the Governor of 29 October 1900.[236] That clause provides that the Governor shall not, except in specified cases, assent to Bills of specified classes. It is clear enough that the clause contemplates that the Bills concerned will be reserved, but the clause does not say so in terms. If something like the draft section 7 is adopted, steps should be taken to have clause VIII revoked.

189. The draft section 8 is to an effect similar to that of section 2 of the Australian States Constitution Act 1907. As a matter of good order, State Acts passed before the commencement of the United Kingdom Act which we now propose ought to have this measure of confirmation. The draft

ction is large enough in its terms to allow the repeal by
y of statute law revision of previous confirmatory United
ngdom Acts.

0. The draft section 9 would take away Her Majesty's
wer to disallow a State Act. As in the case of the
servation of Bills, we believe that there is no case in
ving memory of a State Act being disallowed. The power
s become inappropriate. In 1929 it was agreed at an
perial conference that the current constitutional position
s that the power of disallowance could no longer be
ercised in relation to Dominion legislation.[237] We believe
at the position is the same today in relation to State
gislation.

1. The power of disallowance is, it seems, a
erogative power, regulated by statute.[238] It therefore
ms best to enact an affirmative abolition of the power,
ther than merely repeal the existing regulatory
actments.[239]

2. The draft section 10 defines words used in the
11. It does not call for further comment.

3. The draft section 11 deals with repeals. We go on
comment on each of the enactments proposed for repeal.

4. The provisions proposed for repeal in the Australian
stitutions Act 1842, and in section 3 of the New South
les Constitution Act 1855, relate to instructions to the
vernor concerning assent to colonial Bills, to the

reservation of colonial Bills and to the disallowance of colonial Acts. The proposal for repeal rests partly on the view that instructions from England to the Governor on the exercise of his powers of assent to State Bills are an anachronism. Otherwise, the proposals are consequential on sections 6 and 8 of the draft Bill.

195. We propose that section 4 of the New South Wales Constitution Act 1855 be repealed. That section gave to the colonial legislature power to alter or repeal the Act 17 Vic. No.41, the Constitution Act of 1855. The latter Act was wholly repealed by the Constitution Act, 1902. It may be that the power in section 4 of the United Kingdom Act of 1855 was thus exhausted in 1902. Whether it is exhausted or not, the section is unnecessary in the presence of section 5 of the Constitution Act, 1902, and either section 5 of the Colonial Laws Validity Act 1865 or section 4 of the draft Bill.[240]

196. We propose the repeal of section 1 of the Australian Constitutions Act 1862, so far as the section relates to the State. The place of the section would be taken by section 8 of the draft Bill.

197. We propose the repeal of the Colonial Laws Validity Act 1865, so far as the Act relates to the State. Section 1 deals with interpretation and stands or falls with the remainder of the Act. Sections 2 and 3 deal with repugnancy: their place would be taken by sections 5 and 6 of the draft Bill. Section 4 saves Acts assented to by the Governor in disobedience to Her Majesty's instructions: its place would be taken, as to the past, by section 8 of the

draft Bill and, as to the future, by section 7 of the draft Bill.[241] Section 5 has been discussed above: its place would be taken by section 4 of the draft Bill. Section 6 is largely unnecessary: the courts of the State take judicial notice of the Acts of the State. So far as evidentiary provisions may be necessary, they can be enacted by the State Legislatures. We therefore propose the repeal of section 6 without the enactment of United Kingdom legislation in its place. Section 7 is not concerned with New South Wales.

198. We propose the repeal of the reference to New South Wales in section 2 of the Colonial Acts Confirmation Act 1894. The section would then not apply to Acts of the colony of New South Wales. Its place would be taken by section 8 of the draft Bill.

199. We propose the repeal of the Australian States Constitution Act 1907. The proposal for the repeal of section 1 of that Act is consequential on the proposal to adopt section 7 of the draft Bill. Section 8 of the draft Bill would do the work of section 2 of the Act of 1907.[242]

200. The draft section 11 (short title) does not call for comment.

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NEW SOUTH WALES BILL 1972

ARRANGEMENT

Section

1. The Sovereign.
2. Extension of Acts to the State.
3. Extra-territoriality.
4. Laws respecting the Legislature.
5. Repugnancy.
6. Inconsistency with dominant laws.
7. Requirement for reservation of State Bills abolished.
8. Confirmation of State and colonial Acts.
9. No more disallowance of State Acts.
10. Interpretation.
11. Repeal.
12. Short title.

A B I L L

To make provision respecting the Sovereign in relation to the State of New South Wales, concerning the application of the laws of England in relation to the State and concerning the powers of the legislature of the State; to abolish requirements for the reservation of Bills of the legislature of the State for the signification of Her Majesty's pleasure thereon; to confirm certain Acts of the State and Acts of the colony of New South Wales; to abolish powers of disallowance of Acts of the State; and for purposes connected with the matters aforesaid.

BE IT ENACTED etc.

1. - (1) The laws of England respecting the succession to the throne and the performance of the royal functions by regent, counsellors of state or other persons shall extend to the State as part of the law of the State. The Sovereign.

(2) This Act does not affect the law respecting the royal style and titles.

2. - (1) An Act passed after the commencement of this Act shall not extend to the State as part of the law of the State unless it is expressly declared in the Act that the legislature has requested the enactment of the Act. Extension of Acts to the State. 22 & 23 Geo.5 c.4 s.4.

(2) This section does not affect the operation of subsection (1) of section 1 above.

3. - (1) The Legislature shall have all power to make laws having extra-territorial operation. Extra-territoriality. 22 & 23 Geo.5 c.4 s.3.

(2) This section has effect subject to section 6 below.

4. - (1) The Legislature shall have all power to make laws respecting its institution, powers and procedure: Laws respecting the Legislature. 28 & 29 Vict. c.63 s.5.

provided that such laws must be passed in such manner and form as may from time to time be required by any law for the time being in force in the State.

(2) This section has effect subject to section 6 below.

Repugnancy. 22 & 23 Geo.5 c.4 s.2(2).

5. - (1) A law made by the Legislature after the commencement of this Act shall not be void or inoperative on the ground that it is repugnant to the law of England.

22 & 23 Geo.5 c.4 s.2(2).

(2) For the purposes of subsection (1) above, the law of England includes any existing or future Act and any order, rule or regulation made under any existing or future Act.

22 &23 Geo.5 c.4 s.2(2).

(3) The Legislature may repeal or amend any existing or future Act, or any order, rule or regulation made under any existing or future Act, in so far as it is part of the law of the State.

(4) This section has effect subject to section 6 below.

Inconsistency with dominant law.

6. - (1) For the purposes of this section, each of the following, but no other law, is a dominant law -

(a) the Commonwealth of Australia Constitution Act;

(b) the Constitution of the Commonwealth of Australia;

(c) the Statute of Westminster 1931;

(d) this Act.

Commonwealth of Australia Constitution, s.109.

(2) Where a law made by the Legislature is inconsistent with a dominant law, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Requirement for reservation of, State Bills abolished.

7. The Governor shall not be required by any existing or future Act, Order in Council, letters patent, instructions or other instrument, or by any other means, to

reserve for the signification of Her Majesty's pleasure thereon, any Bill passed by the Legislature after the commencement of this Act.

Confirmation of State and colonial Acts. 7 Edw.7 c.7 s.2(1).

8. - (1) Where an Act of the Legislature has been assented to by the Governor in the name of Her Majesty before the commencement of this Act, the Act of the Legislature is not and never was invalid for want of -

(a) reservation of the Bill for the Act for the signification of Her Majesty's pleasure thereon; or

(b) laying of the Bill before both Houses of Parliament.

(2) This section does not apply to an Act of the Legislature which has been disallowed by Her Majesty before the commencement of this Act.

(3) In this section -

"Governor" includes the Governor for the time being of the colony of New South Wales and the person for the time being lawfully administering the government of the colony.

"Legislature" includes the Legislature from time to time of the colony.

"State" includes the colony.

No more disallowance of State Acts.

9. An Act of the Legislature which has been assented to by the Governor on behalf of Her Majesty shall not, after the commencement of this Act, be subject to disallowance by Her Majesty.

10. In this Act, unless the contrary intention appears - Interpretation.

"Governor" means the Governor for the time being of the State and includes the person for the time being lawfully administering the government of the State;

"Legislature" means the Legislature from time to time of the State; and

"State" means the State of New South Wales.

11. The enactments mentioned in columns 1 and 2 of the Schedule to this Act are repealed to the extent specified in column 3 of the Schedule. Repeal.

12. This Act may be cited as the New South Wales Act 1972. Short title.

SCHEDULE Section 11

REPEALS

Chapter	Short Title	Extent of Repeal
& 6 Vict. .76.	The Australian Constitutions Act 1842.	In section 31, the words "but subject nevertheless to the Provisions contained in this Act, and to such Instructions as may from Time to Time be given in that Behalf by Her Majesty," and the words ", or that he reserves such Bill for the Signification of Her Majesty's Pleasure thereon". Sections 32, 33 and 40.
& 19 Vict. .54.	The New South Wales Constitution Act 1855.	In section 3, the words "and the Instructions to be conveyed to Governors for their Guidance in relation to the Matters aforesaid, and the Disallowance of Bills by Her Majesty,". Section 4.
& 26 Vict. .11.	The Australian Constitutions Act 1862.	Section 1, so far as the section relates to the State.
& 29 Vict. .63.	The Colonial Laws Validity Act 1865.	The whole Act, so far as the Act relates to the State.
& 57 Vict. .72.	The Colonial Acts Confirmation Act 1894.	In section 2, the words "New South Wales".
Edw.7 .7.	The Australian States Constitution Act 1907.	The whole Act, so far as the Act relates to the State.

APPENDIX A

THE COLONIAL LAWS VALIDITY ACT 1865

(28 & 29 Vict., c.63) [June 29, 1865]

AN Act to remove Doubts as to the Validity of Colonial Laws.

Whereas Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

1. Interpretation

The term "colony" shall in this Act include all of Her Majesty's possessions abroad in which there shall exist a legislature, as herein-after defined, except the Channel Islands, the Isle of Man [British India...].

The terms "legislature" and "colonial legislature" shall severally signify the authority, other than the Imperial Parliament of Her Majesty in Council, competent to make laws for any colony:

The term "representative legislature" shall signify any colonial legislature which shall comprise a legislative body of which one half are elected by inhabitants of the colony:

The term "colonial law" shall include laws made for any colony either by such legislature as aforesaid or by Her Majesty in Council:

An Act of Parliament, or any provision thereof, shall, in construing this Act, be said to extend to any colony when it is made applicable to such colony by the express words or necessary intendment of any Act of Parliament:

The term "governor" shall mean the officer lawfully administering the government of any colony:

The term "letters patent" shall mean letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland.

2. Colonial laws, when void for repugnancy

Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.

3. Colonial laws, when not void for repugnancy

No colonial law shall be or be deemed to have been void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.

4. Colonial laws not void for inconsistency with instructions to governors

No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions

with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument.

5. Colonial legislatures may establish, etc., courts of law - Representative legislatures may alter their constitutions

Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein; and every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.

6. Evidence of passing, disallowance, and assent

The certificate of the clerk or other proper officer of a legislative body in any colony to the effect that the document to which it is attached is a true copy of any colonial law assented to by the governor of such colony, or of any Bill reserved for the signification of Her

Majesty's pleasure by the said governor, shall be prima facie evidence that the document so certified is a true copy of such law or Bill, and, as the case may be, that such law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the governor; and any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or Bill shall relate, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved Bill as aforesaid, shall be prima facie evidence of such disallowance or assent.

And whereas doubts are entertained respecting the validity of certain Acts enacted or reputed to be enacted by the legislature of South Australia: Be it further enacted as follows:

7. Certain Acts enacted by legislature of South Australia to be valid

All laws or reputed laws enacted or purporting to have been enacted by the said legislature, or by persons or bodies of persons for the time being acting as such legislature, which have received the assent of Her Majesty in Council, or which have received the assent of the governor of the said colony in the name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the date of such assent for all purposes whatever: Provided, that nothing herein contained shall be deemed to give effect to any law or reputed law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the law disallowance or repeal of any law.

APPENDIX B

THE STATUTE OF WESTMINSTER 1931

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930

(22 Geo.5, c.4) [11 Dec. 1931]

Whereas the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1. Meaning of "Dominion" in this Act

In this Act the expression "Dominion" means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, ... the Irish Free State and Newfoundland.

2. Validity of laws made by Parliament of a Dominion

(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the

provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. Power of Parliament of Dominion to legislate extra-territorially

It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. Parliament of United Kingdom not to legislate for Dominion except by consent

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. Powers of Dominion Parliaments in relation to merchant shipping

Without prejudice to the generality of the foregoing provisions of this Act, sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

6. Powers of Dominion Parliaments in relation to Courts of Admiralty

Without prejudice to the generality of the foregoing

provisions of this Act, section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7. Saving for British North America Acts and application of the Act to Canada

(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Saving for Constitution Acts of Australia and New Zealand

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9. Saving with respect to States of Australia

(1) Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10. Certain sections of Act not to apply to Australia, New Zealand or Newfoundland unless adopted

(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Domion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Meaning of "Colony" in future Acts

Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. Short title

This Act may be cited as the Statute of Westminster, 1931.

Notes

1. 9 Geo.IV c.83, "An Act to provide for the administration of Justice in New South Wales and Van Diemen's Land, and for the more effectual Government thereof, and for other Purposes relating thereto".

2. 22 & 23 Geo.V c.4, "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930".

3. 63 & 64 Vict. c.12, "An Act to constitute the Commonwealth of Australia".

4. 25 November 1886 in Command Paper C. 5091, vii (published in Accounts and Papers 8, Vol.56, 1887). A general historical analysis of the early Conferences is contained in "Correspondence Relating to the Future Organization of Colonial Conferences", Command Paper Cd. 2785 (published in Accounts and Papers 13, Vol.77, 1906) at 57ff. The papers of all Conferences held between 1887 and 1937 are collected in M. Ollivier, The Colonial and Imperial Conferences, Vols.I-III, (1954). A detailed commentary on the whole series of Conferences may be found in A.B. Keith, Responsible Government in the Dominions, (2 ed., 1928), Vol.II, 1176 ff; and a brief review in an anonymous article "Imperial Conferences and the Statute of Westminster", (1932) Law Times, 53.

5. This action was seen by Professor Keith, loc. cit., as an outcome of the Imperial Federation movement in the period after 1883.

6. J.C. Anderson, "Dominion Status", (1930) 8 Canadian Bar Review, 32 at 38.

7. Command Paper C. 8596 (published in Accounts and Papers 8, Vol.59, 1897), 631.

8. Command Paper C. 7553 (published in Accounts and Papers 6, Vol.56, 1894), 337.

9. Papers Relating to the Conference, Command Paper Cd. 1299 (published in Accounts and Papers 12, Vol.66, 1902), 451 at 464.

10. Op. cit., 615.

11. Votes and Proceedings of the Parliament of N.S.W. 1903 (1), 571.

12. The circumstances of the case are succinctly summarized in G. Sawer, Australian Federal Politics and Law 1901-1929 (1956), 31:

> "/The Vondel/ was a Dutch ship whose crew deserted in Adelaide in 1901. The Dutch government complained to the government in the United Kingdom that the South Australian authorities had not assisted the Dutch Consul to arrest the men as required by a Convention of 1856 applying to the colonies. The Secretary of State for Foreign Affairs sent an inquiry on the matter through the Secretary of State for the Colonies (Joseph Chamberlain) to the Governor-General of the Commonwealth, and Deakin as Minister for External Affairs then asked the South Australian government for a report. The South

Australian government objected to this inquiry being made through the Commonwealth, claiming that it should have been made by Chamberlain direct to South Australia through its Governor".

13. Votes and Proceedings, supra note 11, 696.

14. Ibid., 697.

15. Ibid., 632.

16. Correspondence Relating to the Colonial Conference 1907, Command Paper Cd. 3340 (published in Accounts and Papers 8, Vol.54, 1907), 743.

17. Ibid., 749-50.

18. Ibid., 755.

19. Ibid., 760 and 763-4. For a continuation of the correspondence see Command Paper Cd. 3524 (published in Accounts and Papers 8, Vol.55, 1907), 711.

20. See Secretary of State's despatches of 31 August 1906 and 5 December 1906, Command Paper Cd. 3340, 752 and 759.

21. Command Paper Cd. 3340, 772-4.

22. Ibid., 754-5.

23. Minutes of Proceedings, Command Paper Cd. 3523 (published in Accounts and Papers 9, Vol.55, 1907), 118.

24. Command Paper Cd. 3340, 757.

25. Ibid., 769-71.

26. Ibid., 769.

27. Even Professor Keith, who was generally hostile to the manner in which the States had been treated, acknowledged this, op. cit., 615.

28. Constitution of the Commonwealth of Australia (2 ed., 1910), 348-9 and cf. 352-3.

29. Command Paper Cd. 3523, 92 and 93.

30. Votes and Proceedings of the Victorian Legislative Assembly, 1907 (2), 1185.

31. Summary of Proceedings of Imperial Conference, 1926, Command Paper Cmd. 2768, 13.

32. F.L.W. Wood, in J.C. Beaglehole (ed.), New Zealand and the Statute of Westminster (1944), 108.

33. Command Paper Cmd. 2768, 14.

34. Sir Keith Hancock, Survey of British Commonwealth Affairs, Vol.1, (1937), 263. A notable verbal summary was also made by W.M. Hughes in the debates on the Statute of Westminster Adoption Bill, 1942, Commonwealth Parliamentary Debates, Vol.172, 1425: "Considered as a whole, the report was indeed a wonderful document. Almost metaphysical in

some of its references to Imperial relations, it was, nevertheless, intensely realistic. Above all its purpose was political. It took stock of everything. Nothing escaped it. It noted the presence of the representatives of Canada, South Africa and the Irish Free State; it knew very well what each wanted, and gave it to them. It was all things to all men. Every Prime Minister went away perfectly satisfied - Mr. Bruce because it altered nothing that affected Australia, Mr. Mackenzie King because it taught Lord Byng where he got off, and General Hertzog because he was able to assure the burghers that the King of England was no longer the King of South Africa, although it was true that the King of South Africa was also King of England. As for the representatives of the Irish Free State, they, too - or some of them - were for the time being satisfied".

35. Command Paper Cmd. 3479.

36. Commonwealth Parliamentary Papers, General Session 1929-30-31, Vol.II, No.102, containing also the full text of the Conference Report.

37. Summary of Proceedings, Command Paper Cmd. 3717, 17.

38. Ibid.

39. A discussion is contained in W.P.M. Kennedy, "The Imperial Conferences 1926-1930. The Statute of Westminster", (1932) 48 Law Quarterly Review, 191. Cf. John S. Ewart, "The Statute of Westminster, 1931, as a Climax in its Relation to Canada", (1932) 10 Canadian Bar Review, 111; H.S. Nicholas,

"The Statute of Westminster and the Constitution of Canada", (1950) 24 Australian Law Journal, 147.

40. Hon. Secretary, The Dominion League of Western Australia to the Premier, Western Australia, 9 July 1931, copy in Victorian Crown Law Office file P31/2382.

41. (1931) 31 S.R. (N.S.W.), 183.

42. Letter to the Premier, Tasmania, 2 March 1931, Tasmanian State Archives PD1/484. On 17 March 1931 the Lieutenant-Governor of Tasmania sent a secret telegram to the Secretary of State for the Dominions which, in part, said: "An Act passed by Imperial Parliament ... should contain reservations to Australian States of their constitution/s/ which by Commonwealth Constitution (existing only as it does by the provisions of Commonwealth of Australia Constitution Act which is an Imperial Act) are to remain as they were when Commonwealth Constitution Act was passed. An enactment which could possibly be construed as giving Commonwealth Parliament power to abolish State Constitutions would probably immediately be used by Commonwealth Parliament to abolish the States. The consequences might be of gravest possible character. The States have not been heard and my ministers claim and I think rightly that the States must be heard before legislation passed which might end in their abolition". Tasmanian Archives, loc. cit. The special apprehensions of Tasmanian politicians were apparent in a letter written on behalf of the Government on 7 August 1931 where it was contended that "the proposed Statute is not really called for; that the people of Australia or of Tasmania, in particular, have expressed no desire that

the basis of the Empire should be fundamentally altered in this manner; that the right to appeal to the Imperial Parliament to protect Tasmania, a small State, from domination by the other States of Australia should be preserved, and that if the proposed Statute becomes law, it involves a departure from an important feature of Imperial relations which existed when the State entered into Federation", ibid.

43. Undated memorandum "Statute of Westminster" in Victorian Crown Law Office file. Cf. Agent General for Victoria to Premier, Victoria, 28 May 1931, Appendix E in K.H. Bailey, The Statute of Westminster, 1931 (1935), 58.

44. Commonwealth Parliamentary Debates, Vol.130, 3415.

45. Ibid., Vol.131, 4065.

46. Ibid.

47. Commonwealth Parliamentary Papers, General Session 1929-30-31, Vol.II, No.269, 391.

48. Reproduced as Appendix C in Bailey, op. cit., 56.

49. Telegram Prime Minister to Premier Tasmania 13 October 1931, Tasmanian Archives loc. cit. (No.211). The Premier replied, 19 October 1931: "Statute of Westminster appreciate greatly your evident desire to meet States point of view but feel that the present is the time for this State to place on record its protest against certain portions of Statute stop Cannot understand how passage of Statute should

be a matter of great urgency stop Government feels that as resolution of protest is now pending we should take opinion of House on matter", ibid. An informative summary of the reasons for Tasmanian uneasiness about the Statute is contained in The Mercury (Hobart), 1 October 1931, 7.

50. Commonwealth Parliamentary Debates, Vol.154, 1152. Western Australian Parliamentary Debates, Vol.86 (New Series), 4038, 4060, 4188, 4207; ibid., Vol.87, 5240, 17 November 1931, where, in answer to questions, the Premier stated that the recently passed Commonwealth resolution did not meet Western Australia's protest, and that he had cabled his Government's disapproval; West Australian (Perth) 29 July 1931, 14, 30 July 1931, 13. The first step towards secession was taken by the introduction of a Bill on 18 November 1931, Western Australian Parliamentary Debates, Vol.87 (New Series), 5415.

51. Telegram Premier South Australia to Premier Tasmania, 19 November 1931, Tasmanian Archives loc. cit. Advertiser (Adelaide), 13 November 1931, 18, and 17 November 1931, 8.

52. Acting Agent General for Tasmania to Premier, Tasmania, 26 November 1931, Despatch 541, Tasmanian Archives loc. cit. Cf. Agent General for South Australia to Agent General for Victoria, 2 December 1931, reproduced as Appendix F, Bailey, op. cit., 59; and Agent General for Victoria to Premier, Victoria, 24 November 1931, Victorian Crown Law Office file P/31/4304.

53. The stages of the Bill were the King's Speech, Parliamentary Debates (Commons), Vol.259, c.45; first reading, ibid., c.273; second reading, ibid., c.1173 ff; committee, ibid., Vol.260, c.245 ff; third reading, ibid., c.368; Parliamentary Debates (Lords), Vol.83, c.176 ff.

54. Parliamentary Debates (Commons), Vol.259, c.1182.

55. Ibid., c.1183.

56. Ibid., c.1189.

57. Ibid., Vol.260, c.294.

58. Parliamentary Debates (Lords), Vol.83, c.199.

59. An assessment confirmed by Professor Keith in "Notes on Imperial Constitutional Law", (1932) 14 Journal of Comparative Legislation and International Law, 3rd series, 101.

60. Manley O. Hudson, "Notes on the Statute of Westminster, 1931", (1932-3) 46 Harvard Law Review, 261 at 262.

61. "R.R.G.", "The Statute /of Westminster/ in Australia", (1932) 13 British Year Book of International Law, 116.

62. R.T.E. Latham, in Hancock, Survey of British Commonwealth Affairs, Vol.1, (1937), 513.

63. Commonwealth and Colonial Law (1966), 256.

64. The Australian Quarterly, 14 December 1931, 24 at 40. Cf. the views of H.V. Evatt, The King and His Dominion Governors (1936), 212: "In the Commonwealth of Australia action was not taken to include the States within the scope of the Statute of Westminster. This was due in part to the sudden dissolution of the Federal Parliament towards the end of the year 1931, in part to the absence of unanimity amongst the States, and in part to the undoubted fact that several of the State Governments were not sufficiently seized of the importance of protecting their relative status in the polity of the Commonwealth".

65. 10 Australian Law Journal Supplement, 96 at 100.

66. Particularly in paragraphs 60, 132 and 139 and notes 193, 197 and 203. The advice seems to have been prompted by a Crown Law Office Memorandum to the Attorney-General in 1932: "... The question arises whether the whole matter should not, even at this late stage, be referred to suitable counsel for consideration from the State point of view, and enable the Premier to make a suitable and considered reply to the Imperial Government and, if necessary, to the Commonwealth Government, on a subject of such grave importance. For instance, it might be considered expedient to suggest that the Statute of Westminster should be amended so as to make provisions like those of s.7(2) and (3) relating to the Provinces of Canada, apply also to the Australian States". Victorian Crown Law Office files 32/67 and 32/993.

67. Ibid., file 33/2655.

68. Letter of 19 March 1936, New South Wales Premier's Dept. file, 44/2808; copy letter Premier, Victoria, to Prime Minister, 9 April 1936, ibid.

69. 23 June 1936, ibid.

70. "Proceedings and Decisions of Conference of Commonwealth and State Ministers held in Adelaide, 26th to 28th August 1936", (South Australian Government Printer, 1936),

75. Cf. Commonwealth Parliamentary Debates, Vol.132, 1207.

71. "Proceedings and Decisions", supra, 76.

72. See below, paragraphs 88-91.

73. Sydney Morning Herald, 10 August 1937, 12. Tasmania was "very anxious to see the Statute of Westminster adopted", Acting Premier, Tasmania, to Premier, Victoria, 26 August 1937, Victorian Crown Law Office file.

74. Attorney-General, Victoria, to Attorney-General, Commonwealth, 1 July 1937, Victorian Crown Law Office file.

75. Attorney-General, South Australia, to Premier, Victoria, 26 August 1937, Victorian Crown Law Office file; Commonwealth Parliamentary Debates, Vol.154, 1152.

76. Attorney General, New South Wales, to Attorney-General, Victoria, 11 August 1937, New South Wales Premier's Dept. file 44/2808. Cf. Commonwealth Parliamentary Debates, loc. cit.

77. Commonwealth Parliamentary Debates, ibid. Premier, Western Australia, to Premier, Victoria, 31 August 1937, Victorian Crown Law Office file:- "The Government of Western Australia after legal advice and careful consideration is of the opinion that even the suggested preamble and the proposed assurances by the Commonwealth Government will be inadequate to protect fully the constituent States of the Commonwealth against legislation which the Commonwealth Parliament will be able to pass if the Statute of Westminster is adopted and which may be prejudicial to their status as self-governing colonies... For these reasons the Government of Western Australia prefers to protest against the adoption of the Statute of Westminster rather than to give a qualified approval to such adoption by suggesting the inadequate protection sought by the suggested special preamble and Government assurances".

78. Commonwealth Parliamentary Debates, Vol.154, 92.

79. Sydney Morning Herald, 28 January 1938 and (1938) 11 Australian Law Journal, 368.

80. For example, The British Empire Union in Australia expressed its "grave concern" and resolved to organize public meetings of protest. In The Practical Patriot, 12 February 1938, offers of help and money were solicited, the object being: "Australians must be made aware of their danger... Ask your Federal Member to demand a Referendum - 'Are You in favour of Separation from Great Britain?'." For criticisms of such views see David Maughan, letter to Editor, Sydney Morning Herald, 1 October 1942, 4; and Dr. Frank Louat, ibid., 29 September 1942, 4.

81. Sydney Morning Herald, 10, 23 and 30 September 1942, pages 4, 5 and 6, and 6 respectively.

82. "Statute of Westminster Adoption Bill" (from a copy in the National Library, Canberra).

83. Ibid., 15.

84. Commonwealth Parliamentary Debates, Vol.172, 1387.

85. Ibid., 1476. The fact was, that it did alter the latter practice. As David Maughan pointed out, "The Statute of Westminster", (1939) 13 Australian Law Journal, 152 at 160: "We seem to have arrived at the result that the Imperial Parliament would have no power to pass laws affecting us as citizens of the Commonwealth of Australia without the request of the Parliament and Government of the Commonwealth but that the Imperial Parliament would still retain the fullest power to legislate for us as citizens of the State of Queensland or of any other State on those subjects which are exclusively within the legislative powers of the States".

86. Commonwealth Parliamentary Debates, op. cit., 1424. "Obviously", said the leader-writer in The Argus (Melbourne), 2 October 1942, 2, "there cannot be any strong public objection to a bill which only ratifies decisions long since unanimously assented to by all the contracting parties, which has been accepted in principle by both Houses of the Australian Parliament, and which has been sponsored in turn by both of the great political parties". Cf. Sydney Morning Herald, 1 October 1942, 7.

87. Advice of 20 November 1942, New South Wales Premier's Department file, 44/2808.

88. Australian Federal Politics and Law, 1929-1949 (1963), 33.

89. The Statute of Westminster, 1931, (1935), 29 and 37-41. Compare B.J. McGrath, "Admiralty Jurisdiction and the Statute of Westminster", (1933) 6 Australian Law Journal, 160 and 215.

90. That interpretation was also made by A.H. O'Connor, Crown Solicitor of New South Wales, in his advice of 20 November 1942, cited supra note 87.

91. (1965) 82 W.N. (N.S.W.), Part 1, 540 at 543.

92. J.G. Latham, Australia and the British Commonwealth (1929), 87.

93. Commonwealth Parliamentary Debates, Vol.154, 86.

94. Introduction to the Study of the Law of the Constitution, (9th ed., 1948), 105.

95. McCawley v. The King [1920] A.C., 691 at 709.

96. Union Steamship Co. of New Zealand Ltd. v. The Commonwealth (1925) 36 C.L.R., 130 at 155-6.

97. Commonwealth and Colonial Law (1966), 396.

98. Ibid., 400.

99. From 1853 to 1867. A concise account of his extraordinary career appears in Australian Dictionary of Biography, Vol.3, (1969), 194.

100. "The Genesis of the Colonial Laws Validity Act", (1967) The Juridical Review, 28; Imperial Control of Colonial Legislation 1813-1865 (1970), especially Part IV.

101. (1967) The Juridical Review, 28 at 32, and cf. 57; and Imperial Control of Colonial Legislation, 167.

102. D.H. Pike, "Introduction of the Real Property Act in South Australia", (1960-62) 1 Adelaide Law Review, 169 at 185.

103. The best researched account of Boothby's idiosyncrasies on the bench is R.M. Hague, "History of the Law in South Australia", (unpublished typescript, South Australian Archives - and microfilm National Library), chapter V.

104. 13 May 1863, Colonial Office Law Officers' Reports (C.O. 13/113) quoted by Swinfen, (1967) The Juridical Review, 29.

105. 22 Geo.III c.75, the Colonial Leave of Absence Act, 1782, section 2 of which provided that a colonial Governor and Council might lawfully "amove" the holder of certain offices under the Crown for wilful absence, his neglect of the duties of such office, or if he should "otherwise

misbehave therein".

106. Swinfen, op. cit., 42. In this connexion, the advice of Sir Roundell Palmer and Sir R.P. Collier that "the balance of reason and practical convenience is in favour of extending such provisions to all Her Majesty's colonial possessions" probably influenced the Colonial Office; Report of 28 September 1864, quoted in E.G. Blackmore, The Law of the Constitution of South Australia (1894), 67.

107. Swinfen, op. cit., 56 and 59.

108. In re The Queen v. Marais [1902] A.C., 51, especially at 54, but note the reservations of Roberts-Wray, Commonwealth and Colonial Law (1966), 399. Nadan v. The King [1926] A.C., 482.

109. (1937) 58 C.L.R., 528 at 602.

110. Quoted from Sir Roger Therry, Reminiscences of Thirty Years' Residence in New South Wales and Victoria (1863). Cf. the view of Sir Francis Forbes, first Chief Justice of New South Wales, in his "Remarks on opinion expressed by W.W. Burton" (1834) Historical Records of Australia, Series I, Vol.XVII, 533 at 534: "Forming my opinion on what appears to have been the usual interpretation of the word repugnant, as put upon it by the Legislatures and Courts of the elder Colonies, and the Crown Lawyers to whom their enactments have been submitted, and applying my own mind to discover what the Imperial Parliament must have intended by the use of it in the Act which creates a legislative power to meet and provide for the unforeseen

exigencies and wants of this remote Colony, I conceive that the word was intended to convey a meaning to this effect; that, in making laws 'for the peace, welfare, and good Government of the Colony', the Governor and Council shall take into their consideration the circumstances of the particular matter which requires legislative provision, and make such a law as may remedy any particular mischief, consistently with the general principles of the laws of England".

111. "It is true that /the Colonial Laws Validity Act/ had expressed in statutory form the principle that any colonial law repugnant to any Act of the British Parliament extending to the Colony, or to any order or regulation made under such an Act, should, to the extent of the repugnancy, be void. But the British Parliament so sparingly exercised its residual authority that, in practice, the restraint thus stated was seldom encountered in the Dominions", Dixon, J., "The Statute of Westminster 1931", (1936) 10 Australian Law Journal Supplement, 96 at 97. Enid Campbell, "Colonial Legislation and the Laws of England", (1965) 2 University of Tasmania Law Review, 148.

112. (1868) 5 W.W. & a'B. (L), 7.

113. At 18.

114. (1915) 20 C.L.R., 148 at 166; cf. his joint judgement with Rich, J., in McCawley v. The King (1919) 26 C.L.R., 9 at 48.

115. Supra, note 108.

116. At 168. For a general discussion see Keith, Responsible Government in the Dominions, (2nd ed., 1928), 339 ff. Also Campbell, supra note 111, especially at 154-5, 158-9, 174-5.

117. (1925) 36 C.L.R., 130 at 147.

118. At 148: contrast the views of Evatt, J., expressed in Ffrost v. Stevenson (1937) 58 C.L.R., 528 at 604.

119. At 148 (from 2nd ed., (1886), 596).

120. (1926) 37 C.L.R., 393.

121. Cited supra, note 106.

122. At 410-11.

123. For instance, Re Scully (1937) 32 Tas.L.R., 3. For a comment see A.C. Castles, "Limitations on the Autonomy of the Australian States", (1962) Public Law, 175 at 184-5. See also, Castles "The Paramount Force of Commonwealth Legislation Since the Statute of Westminster", (1962) 35 Australian Law Journal, 402.

124. The Queen v. McCarthy (1873) 4 Australian Jurist Reports, 155; Harris v. Davies (1885) 10 App. Cas., 279; The Attorney-General of the State of Victoria v. Moses [1907] V.L.R., 130; Cobb & Co. Limited v. Kropp [1965] Qd. R., 285. See also Aarons v. Rees (1898) 15 W.N. (N.S.W.), 88; Mitchell v. Scales (1907) 5 C.L.R., 405; Hazlewood v. Webber

(1934) 52 C.L.R., 268; Bridie v. Messina (1965) 66 S.R. (N.S.W.), 446. Cf. Keith, Responsible Government in the Dominions, (2nd ed., 1928), Vol.I, 339; Report of the Conference on the Operation of Dominion Legislation, 1929, Command Paper Cmd. 3479, 17, para.46; Roberts-Wray, Commonwealth and Colonial Law (1966), 400-1; Enid Campbell, "Colonial Legislation and the Laws of England", (1965) 2 University of Tasmania Law Review, 148 at 154 and 174-5.

125. So far as New South Wales is concerned, those laws of England required to be applied in the administration of justice by section 24 of the Australian Courts Act 1828. The cases cited in the preceding footnote do not deal with the problem posed by the words "made applicable ... by the express words ... of any Act of Parliament" (our emphasis) in section 1 of the Colonial Laws Validity Act 1865 and the words "shall be applied" in section 24 of the Australian Courts Act 1828, but we think that the course of authority and of practice is too strong to allow the questioning today of the proposition in the text.

126. Colonial Laws Validity Act 1865, sections 1, 2, 3.

127. By section 7(2).

128. "Limitations on the Autonomy of the Australian States", (1962) Public Law, 175 at 183.

129. Imperial Unity and the Dominions (1916), 140.

130. In the sense in which that phrase was then understood. As Keith remarked, op. cit., 9, " 'Self-governing

Dominions' or more shortly 'Dominions' is the technical term, first invented at the Colonial Conference of 1907, for the aggregate of the five colonies possessing responsible government - Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, and Newfoundland".

131. Command Paper Cmd.2768, 17, item (d).

132. Command Paper Cmd.3479, 18, para.49.

133. Imperial Unity and the Dominions (1916), 142.

134. See below, paragraphs 158-170.

135. J.G. Latham, Australia and the British Commonwealth (1929), 91.

136. The Statute of Westminster and Dominion Status (4th ed., 1949), 22.

137. "The Statute of Westminster", Part II, (1932) 5 Australian Law Journal, 398 at 401-2.

138. [1932] A.C., 526.

139. At 539-40.

140. E.g., H.V. Evatt, The King and His Dominion Governors (1936), 214-5; (1936) 10 Australian Law Journal Supplement, 107; (1938) 11 Australian Law Journal, 377. W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change", (1950) 24 Australian Law

Journal, 103. Cf. A.C. Castles, "Limitations on the Autonomy of the Australian States", (1962) Public Law, 175 at 191.

141. See paragraphs 180-182.

142. New South Wales - Parliamentary Handbook (18th ed., 1965) Part III, 12; Western Australia - Acts etc. Relating to Parliament (1968), 176; Victoria - Votes and Proceedings of the Legislative Assembly (1901), I, unpaged; Tasmania - Journals of the Parliament of Tasmania (1901), Vol.45, No.21; Queensland - Votes and Proceedings of the Legislative Assembly (1901), I, 975; South Australia - Proceedings of the Parliament of South Australia ("Blue Book") (1901), 11, No.116. Further requirements for reservation are made by the Australian States Constitution Act 1907, but those requirements are outside the ambit of section 4 of the Colonial Laws Validity Act.

143. See paragraphs 187-191.

144. Commonwealth and Colonial Law (1966), 405.

145. Ibid., 254.

146. Command Paper Cmd. 3479, 12, para.23.

147. (1931) 31 S.R. (N.S.W.), 183.

148. (1961) 61 S.R. (N.S.W.), 768.

149. Phipson on Evidence (11th ed., 1970), 1720.

150. Command Paper Cmd. 3479, 24. According to F.A. Trindade, "The Australian States and the Doctrine of Extra-territorial Legislative Incompetence" (1971) 45 Australian Law Journal, 233 at 240, the States could readily amend their constitutions to declare their extra-territorial power. Cf. Evatt, (1936) 10 Australian Law Journal Supplement, 107.

151. For example, Peninsular and Oriental Steam Navigation Company v. Kingston /1903/ A.C., 471.

152. Imperial Unity and the Dominions (1916), 138.

153. The Constitutional Structure of the Commonwealth (1960), 43. Compare the view of Evatt, "The British Dominions as Mandatories", (1935) 1 Proceedings of the Australian and New Zealand Society of International Law, 27 at 51: "The limits of extra-territorial jurisdiction permitted by international law cannot be stated with precision. But, certainly, no State attempts to exercise such a jurisdiction in matters with which it has absolutely no concern whatever. Consequently, in actual practice, it would be no hardship upon a Dominion so to restrict its extra-territorial legislation that no foreign State should have a right to complain of, and prove, a breach of international law on the Dominion's part".

154. Subject to any limitations of the kind contemplated by Dixon, C.J., in The Queen v. Foster (1958-1959) 103 C.L.R., 256 at 267 - "Since the adoption of the Statute of Westminster

by Act No.56 of 1942 it can be no objection to the validity of a law of the Commonwealth that it purports to operate outside Australia. The result may be an enlargement of federal power, but it is not an enlargement against which s.9(1) of the Statute of Westminster can have anything to say. That sub-section provides that nothing in the Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia. Section 9(1) cannot have anything to say against it because it is obvious that before the Statute, if and where on the ground of extra-territoriality the Commonwealth lacked power, there also the States lacked power on the same ground". As to the contemporary meaning of "Dominion", see note 130.

155. D.P. O'Connell, "The Doctrine of Colonial Extra-territorial Legislative Incompetence", (1959) 75 Law Quarterly Review, 318. Contrast the view of Evatt, J., that "constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself. Sovereignty is not attributable to one authority more than to the others, it is divided between them in accordance with the demarcation of functions set out in the Commonwealth Constitution. Within the limits so prescribed, the legislative authority of the States is of precisely equivalent quality and potency to that of the Commonwealth". Broken Hill South Limited v. Commissioner of Taxation (1936-1937) 56 C.L.R., 337 at 378. Trindade, op. cit., note 150, (241), takes the view that "the extra-territorial limitation as such does not exist and is therefore no longer a clog on

the sovereignty of the Australian States". For an earlier criticism of O'Connell's assertion see Castles, "Limitations on the Autonomy of the Australian States", (1962) Public Law, 175 at 196-7.

156. "The Limitations of Colonial Legislative Power", (1917) 33 Law Quarterly Review, 117 at 120.

157. The British Year Book of International Law 1958, (1959), 248-9.

158. Macleod v. Attorney-General for New South Wales [1891] A.C., 455.

159. [1933] A.C., 156.

160. "The Statute of Westminster", (1932) 5 Australian Law Journal, 362 at 363.

161. O'Connell, op. cit., supra note 157, at 251.

162. (1933) 49 C.L.R., 220.

163. At 235.

164. (1948) 75 Indian Appeals, 86.

165. At 98. Cf. British Columbia Electric Railway Co. Ltd. v. The King [1946] A.C., 527 at 542: "A legislature which passes a law having extra-territorial operation may find that what it has enacted cannot be directly enforced, but the Act is not invalid on that account, and the courts

of its country must enforce the law with the machinery available to them".

166. (1963) 63 S.R. (N.S.W.), 538.

167. Cf. Munro v. Lombardo [1964] W.A.R., 63 at 67 per Wolff, C.J.: "In my opinion, the State is competent to pass penal legislation to punish a person who is within the jurisdiction but whose transgression is an act outside the jurisdiction which the law of the State declares to be punishable. This proposition would probably have been rejected for a long time after [Macleod's Case - wrongly cited in the report], but later consideration of the jurisdictional element in modern taxing statutes would, it seems, cast doubt on the entire validity of Macleod's Case". Contrast In re Caruchet (1899) 9 Q.L.J., 122, adopted in Reg. v. Hildebrandt [1964] Qd.R., 43.

168. At 552.

169. Australia and the British Commonwealth (1929), 80.

170. "The Imperial Conferences, 1926-1930. The Statute of Westminster", (1932) 48 Law Quarterly Review, 191 at 209.

171. The phrases "peace, order and good good government" and "peace, welfare and good government" appear to be used interchangeably, though the connotations of "welfare" are semasiologically wider than those of "order". According to Roberts-Wray, Commonwealth and Colonial Law (1966), 369, "though 'order' and 'welfare' are far from synonymous, the use of the phrase 'peace, welfare and good government' makes

no difference". That phrase was applied to Australiaas early as 1823 under s.XXIV of the New South Wales Act (4 Geo.IV c.96). Under the Commonwealth Constitution (s.51) the phrase "peace, order and good government" is used. The history and application of those words were reviewed by Windeyer, J., in The Queen v. Foster (1958-1959) 103 C.L.R., 256 at 306-8. In summary, as Dr. Wynes has put it - Legislative, Executive and Judicial Powers in Australia (4th ed. 1970), 118 - "The words 'for the peace, order and good government of the Commonwealth' do no more than authorize the utmost discretion in the enactment of legislation and do not invest the Parliament with any general power/s/ outside those enumerated in the Constitution". Roberts-Wray (loc. cit.) takes the same view: "It is well established that whether a law is good, wise, bad or foolish is not a justiciable issue. Whether a particular enactment is calculated as a matter of fact or policy to secure peace, order and good government is not a question into which the Courts will inquire. In short, it is apparent that the Courts have attached little value to the actual words but have concerned themselves with the general doctrine of legislative competence". A further comment appears in J.B. Thomas, "The Off-Shore Mineral Resources Legislation", (1965) 38 Australian Law Journal, 408 at 409.

172. (1936-1937) 56 C.L.R., 337 at 375.

173. /1956/ A.C., 331 at 353.

174. (1934) 34 S.R. (N.S.W.), 571 at 574.

175. (1967) 2 N.S.W.R., 230.

176. At 245.

177. (1967) 86 W.N. (N.S.W.), Part 2, 247.

178. [1969] 1 A.C., 320 at 335-6.

179. Roberts-Wray, Commonwealth and Colonial Law (1966), 388.

180. (1969) 120 C.L.R., 503.

181. At 512. For a complementary view as to extra-territorial property see Permanent Trustee Co. (Canberra) Limited v. Finlayson (1968) 43 A.L.J.R., 42 and O'Sullivan v. Dejneko (1963-1964) 110 C.L.R., 498.

182. "Problems of Australian Coastal Jurisdiction", (1968) 42 Australian Law Journal, 39 at 44.

183. See also paragraphs 173-179.

184. The British Year Book of International Law 1958, (1959), 199.

185. At 259. He further expounded his views in an article "The Doctrine of Colonial Extra-territorial Legislative Incompetence", (1959) 75 Law Quarterly Review, 318.

186. "Offshore Sovereignty Asserted" (1970) 44 Australian Law Journal, 189. See also J.B. Thomas, "The Offshore Mineral Resources Legislation" (1965) 38 Australian Law Journal, 408.

187. (1968) 42 Australian Law Journal, 39. See also "Australian Coastal Jurisdiction" in O'Connell (ed.) International Law in Australia (1965), 246.

188. (1969) 43 Australian Law Journal, 421 and 441.

189. (1969) 43 A.L.J.R., 275.

190. In that connexion, the following note in Forsyth, Cases and Opinions on Constitutional Law (1869), 24, is of interest: "The jurisdiction of colonial legislatures extends to three miles from the shore. In an opinion given by the Law Officers of the Crown - Sir J. Harding, Queen's Advocate; Sir A.E. Cockburn, Attorney General; and Sir R. Bethell, Solicitor General - with reference to British Guiana, Feb. 1855, they said: 'We conceive that the colonial legislature cannot legally exercise its jurisdiction beyond its territorial limits - three miles from the shore - or, at the utmost, can only do this over persons domiciled in the colony who may offend against its ordinances even beyond those limits, but not over other persons'. In an opinion given by Sir J. Harding, Queen's Advocate, in Aug. 1854, on the question within what distance of the coasts of the Falkland Islands foreigners might be legally prevented from whale and seal fishing, he said: 'Her Majesty's Government will be legally justified in preventing foreigners from whale and seal fishing within three marine miles (or a marine league)

from the coasts, such being the distance to which, according to the modern interpretation and usage of nations, a cannon-shot is supposed to reach'."

191. O'Connell, "The Australian Maritime Domain", (1970) 44 Australian Law Journal, 192 at 206.

192. Commonwealth Parliamentary Debates (1970), 1276, 1897, 2242.

193. The Statute of Westminster, 1931 (1935), 37.

194. For example, Ceylon Independence Act 1947, Ghana Independence Act 1957, Sierra Leone Independence Act 1961, Tanganyika Independence Act 1961, Jamaica Independence Act 1962, Trinidad and Tobago Independence Act 1962, Gambia Independence Act 1964, Malawi Independence Act 1964, Malta Independence Act 1964, Guyana Independence Act 1966, Mauritius Independence Act 1968, Fiji Independence Act 1970. It might be mentioned that the ordinary practice has been to grant extra-territorial legislative power in wide terms identical to section 3 of the Statute of Westminster 1931. However, in a few cases, for instance the Independence Acts of Nigeria (1960), Uganda (1962) and Kenya (1963), the following qualified grant has been made: "Any legislature established for [country] or any part thereof shall have full power to make laws having extra-territorial operation, so far as those laws relate to matters within the legislative powers of that legislature".

195. For a short comment, see A.C. Castles, "Limitations on the Autonomy of the Australian States", (1962) Public Law, 175 at 200.

196. See, for example, Reg. v. Hildebrandt [1964] Qd.R., 43; also paragraph 152 below.

197. W.A. Wynes, Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), 74. Bailey, The Statute of Westminster, 1931 (1935), 14, attempted to rationalize the sections and came to the conclusion that "s.9 (2) does operate to defeat pro tanto, in the interests of the States, the intention with which s.4 must be regarded as having been originally drafted - viz., that in future no Imperial law should apply in any part of Australia unless the Commonwealth has concurred in it"; and, at 17, "s.4 and s.9(2) still leave a considerable field open to conventional understandings". Dixon, J., in "The Statute of Westminster 1931" (1936) 10 Australian Law Journal, 96 at 100, said of section 9(2) that "This provision is very obscure. If the subject matter is already within the exclusive authority of the States, why should they need an Act?".

198. Dixon, J., op. cit. P.J. Hanks, "Re-Defining the Sovereign: Current Attitudes to Section 4 of the Statute of Westminster", (1968) 42 Australian Law Journal, 286.

199. The Statute of Westminster and Dominion Status (4th ed., 1949), 153. Cf. Wynes, loc. cit., - "In point of law, so far as this section purports to limit the powers of the Imperial Parliament, it is of no effect".

200. 10 Australian Law Journal Supplement, 96 at 98. Cf. "The Law and the Constitution", (1935) 51 Law Quarterly Review, 590 at 595-6 and 611.

201. Commonwealth and Colonial Law (1966), 257.

202. Op. cit., 99-100.

203. A note on the significance of the words "constitutional practice existing" appears in Halsbury's Statutes of England (3rd ed. 1968), 23. Bailey, The Statute of Westminster, 1931 (1935), 17-18, observed that: "This phrase clearly implies that there are some matters, even within the exclusive jurisdiction of the States, in relation to which the Imperial Parliament did not feel itself free to make laws, even before the enactment of the Statute of Westminster, unless the Commonwealth had concurred in the proposed legislation. ... I have, however, found it difficult to imagine Imperial legislation of the kind in question. I refer to the phrase in the Statute not so much for its intrinsic importance as because it appears to demonstrate conclusively that in laying down the conditions on which it will henceforward legislate for British communities overseas, the Imperial Parliament retains certain discretionary powers, and has not altogether excluded constitutional understandings, underlying and explaining the rules of strict law. In the concluding phrase of s.9(2), it is as though the Imperial Parliament had said: 'If you seek Imperial legislation with reference to matters within your own exclusive authority, you need not necessarily get the Commonwealth's consent; but in some cases we give you fair warning that we will not act unless the Commonwealth does concur'." Cf. W.N. Harrison, "The Statute of Westminster and Dominion Sovereignty", (1944) 17 Australian Law Journal, 282 and 314, especially at 317. Cf. also G. Marshall, Parliamentary Sovereignty and the Commonwealth (1957), 83-4.

204. Bailey, op. cit., 12.

205. Ibid., 10-11.

206. Op. cit., 74.

207. Ibid., 75.

208. See paragraphs 171-172.

209. Wheare, op. cit., 209.

210. For example, Cocos (Keeling) Islands (Request and Consent) Act 1954 (Commonwealth); Christmas Island (Request and Consent) Act 1957 (Commonwealth); New Zealand Constitution (Request and Consent) Act, 1947.

211. Command Paper Cmd. 3479.

212. Merchant Shipping Act 1970 (No.36).

213. Constitutional protections in the Commonwealth Constitution, for example the protection by section 92 of trade, commerce and intercourse amongst the States, are alterable by constitutional means within Australia, that is, by referendum and associated steps under section 128 of the Constitution. The problems raised by this paper concern limitations of legislative power more properly within the cognisance of the United Kingdom Parliament. Further, we are not here concerned with the enlargement of the legislative powers of the Commonwealth: again the Commonwealth Constitution makes its own provision in that respect (especially ss.51 (xxxvii), (xxxviii), 128).

214. We note paragraph (xxxviii) of section 51 of the Commonwealth Constitution. The paragraph runs -

> "The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia".

It is perhaps unlikely that the necessary request or concurrence will ever be given. On questions of extra-territorial legislative competence, the utility of the paragraph is much diminished by the words "within the Commonwealth". See Wynes, Legislative, Executive and Judicial Powers in Australia, (4th ed., 1970), 162.

215. Thus sections 32B, 154B, 204A, 204B, 204C of the Crimes Act, 1900 (N.S.W.) are not expressed to apply to acts done outside New South Wales and would be construed as not applying to such acts: Interpretation Act, 1897-1969, s.17; Ex parte Iskra (1963) 63 S.R. (N.S.W.), 538, 548, 549. And the Crimes (Aircraft) Act 1963 (Cth.) has detailed expressions of a variety of connexions with Australia (see sections 6 and 10), some with doubtful relevance to any of the enumerated subject matters of Commonwealth legislative power (see section 6(1)(c), (d)).

216. Commencing on page 111 below.

217. See the Constitution Act, 1902, s.7A, and Attorney-General for New South Wales v. Trethowan [1932] A.C., 526.

218. Statute of Westminster 1931, ss.4, 9(3).

219. See Wynes, op. cit., 74, 75.

220. Commonwealth of Australia Constitution Act, preamble and section 2; Commonwealth Constitution, ss.1, 61; Constitution Act, 1902 (N.S.W.), s.3. And see Taylor v. Attorney-General of Queensland (1917) 23 C.L.R., 457, 474, Isaacs, J.

221. The Act of Settlement (1700), ss.1,2; His Majesty's Declaration of Abdication Act 1936.

222. Commonwealth of Australia Constitution Act, s.2. And the federal agreement of the peoples of the Australian Colonies was for a union 'under the Crown of the United Kingdom of Great Britain and Ireland": Commonwealth of Australia Constitution Act, preamble.

223. Statute of Westminster 1931, second recital in the preamble.

224. Statute of Westminster 1931, s.4.

225. Regency Acts 1937 to 1953.

226. See the Regency Act 1937, s.2(2), whereby declarations of incapacity or recovery under the section are to be communicated to the Dominion Governments: this provision seems to negate the ordinary presumption that United Kingdom legislation does not extend to British countries outside the United Kingdom. The presumption is discussed in Halsbury's Laws of England, Vol.36, (3rd ed., 1961) at 428, 429. See also Wade & Phillips' Constitutional Law (7th ed., 1965), 170; Ridges' Constitutional Law (8th ed., 1950), 135;

Scott, The New Zealand Constitution (1962), 69.

227. See Ridge, op. cit., 131; Halsbury's Laws of England, Vol.7, (3rd ed., 1954), 212.

228. See the second recital in the preamble to the Statute of Westminster 1931, the Royal Style and Titles Act 1953 (Cth.) and the Royal Titles Act 1953 (U.K.). It may be that a proclamation of the royal style and titles for one Member of the Commonwealth of Nations ought to have the assent of all Members: see the Royal Style and Titles Act 1953 (Cth.), s.5.

229. There seems to be a case for a review of the wording of the proclamations of 28 May 1953 which govern the present royal style and titles. One proclamation is of a style and titles for use in relation to the United Kingdom and all other the territories for whose foreign relations the United Kingdom Government is responsible (11th supplement to the London Gazette, 26 May 1953): this proclamation clearly does not embrace use in relation to New South Wales. Another proclamation is of a style and titles for use in relation to the Commonwealth of Australia and its Territories (Commonwealth Gazette, 29 May 1953, 1547; Commonwealth Statutory Rules 1901-1956, Vol.5, 5322): there is room for doubt whether this proclamation embraces use in relation to New South Wales.

230. [1933] A.C.,156.

231. For example, Welker v. Hewett (1969) 120 C.L.R., 503.

232. See Windeyer, J., in The Queen v. Foster (1959) 103 C.L.R., 256, 306-308. Compare Menzies, J., in the same

case at pages 300, 301.

233. For example, Welker v. Hewett, note 231 above.

234. Ffrost v. Stevenson (1937) 58 C.L.R., 528, 572, Dixon, J.

235. Australian States Constitution Act 1907, s.1, and, indirectly, clause VIII of the Instructions to the Governor of 29 October 1900. Clause VIII is as follows -

"VIII. The Governor shall not, except in the cases hereunder mentioned, assent in Our name to any Bill of any of the following classes:-

1. Any Bill for the divorce of persons joined together in holy matrimony.
2. Any Bill whereby any grant of land or money, or other donation or gratuity, may be made to himself.
3. Any Bill affecting the currency of the State.
4. Any Bill the provisions of which shall appear inconsistent with obligations imposed upon Us by Treaty.
5. Any Bill of an extraordinary nature and importance whereby Our prerogative, or the rights and property of Our subjects not residing in the State, or the trade and shipping of the United Kingdom and its Dependencies may be prejudiced.
6. Any Bill containing provisions to which Our assent has been once refused, or which have been disallowed by Us.

Unless he shall have previously obtained Our instructions upon such Bill through one of our Principal

Secretaries of State, or unless such Bill shall contain a clause suspending the operation of such Bill until the signification in the State of Our pleasure thereupon, or unless the Governor shall have satisfied himself that an urgent necessity exists requiring that such Bill be brought into immediate operation, in which case he is authorised to assent in Our name to such Bill, unless the same shall be repugnant to the law of England, or inconsistent with any obligations imposed upon Us by Treaty. But he is to transmit to Us by the earliest opportunity the Bill so assented to, together with his reasons for assenting thereto."

236. See note 235 above.

237. Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929, Command Paper Cmd. 3479, 12. The relevant provision in the Commonwealth Constitution is section 59, which is susceptible of removal by alteration of the Constitution by referendum and so on under section 128. There was an exception in relation to the Colonial Stock Act 1900, but the exception has been made obsolete by the Trustee Investments Act 1961 (U.K.). See Halsbury's Laws of England, 3rd ed., Cumulative Supplement 1971 note to Vol.5, para.1012; compare Roberts-Wray, Commonwealth and Colonial Law (1966), 230.

238. Roberts-Wray, ibid., 227. The statutory regulation by United Kingdom Act for the State comprises the Australian Constitutions Act 1842 s.32 and the New South Wales Constitution Act 1855 s.3.

239. It has been suggested that mere repeal would be

enough to achieve abolition: Roberts-Wray, op. cit., 228.

240. See Attorney-General for New South Wales v. Trethowan [1932] A.C., 526.

241. Section 4 of the Colonial Laws Validity Act is not limited to instructions relating to the reservation of Bills. The only relevant instructions, however, at present and for upwards of seventy years past, are those in clause VIII of the Instructions of 29 October 1900. We have proposed that the clause should be revoked if something like the draft section 7 is adopted.

242. Provisions of United Kingdom Acts requiring the laying before Parliament of colonial Bills include -

The Australian Courts Act 1828, s.29 (repealed by the Statute Law Revision Act 1874).

The Australian Constitutions Act 1850, s.32 proviso (repealed by the Australian States Constitution Act 1907).

V. C. N. Blight, Government Printer, New South Wales - 1972