SIR OWEN DIXON'S THEORY OF FEDERALISM

By LESLIE ZINES*

The *Engineers' Case*[1] was regarded by many at the time as establishing a standard of interpretation for the Constitution that did not involve a resort to implications—or at any rate made it less likely that the Court would resort to implications. The 'implications' with which the judgments in the *Engineers' Case* were concerned involved two distinct but connected doctrines—

(a) the reserved powers of the States.

(b) the immunity of instrumentalities (Commonwealth and State).

The first of these required that, in construing the specific powers granted to the Commonwealth, regard should be had to the powers that were reserved to the States under sections 106 and 107 of the Constitution. The second doctrine rested on the idea that it was in the nature of federalism that the central government could not fetter, control or interfere with the free exercise by the State governments of their functions and vice versa.[2] Although the *Engineers' Case* was directly concerned only with the problem of the immunity of instrumentalities, it is difficult to confine the ratio of the case to an attack on that problem alone. The whole approach of the majority involved an overruling of both doctrines and it would be hard to ascribe given reasons in the judgments as applying only to one or other of the implications.

The immediate effect of the *Engineers' Case* was to strengthen the powers of the Commonwealth. *Prima facie*, at any rate, they were to be interpreted without regard to the powers of the States. Similarly the rejection of the doctrine that one government could not interfere with another in the exercise of its governmental functions was also a step towards centralisation. The supremacy of Commonwealth legislation (by virtue of the operation of section 109) made the overthrow of that doctrine of more benefit to the Commonwealth than the States. For example, in *Pirrie v. McFarlane*[3] the High Court held (Isaacs and Rich JJ.

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[1] *Amalgamated Society of Engineers v. Adelaide Steamship Company Limited* (1920) 28 C.L.R. 129.

[2] '. . . when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative'. (*D'Emden v. Pedder* (1904) 1 C.L.R. 91, 111). In the *Railway Servants' Case* (1906) 4 C.L.R. 488 this doctrine was held to be reciprocal and applicable to attempted interference by the Commonwealth with State instrumentalities.

[3] (1925) 36 C.L.R. 170.

dissenting) that the Motor Car Act 1915 (Vic.) bound a member of the defence forces who was driving a motor car in the execution of his duties and under the orders of his superiors. The Court declared that there was nothing in the Constitution that expressly or by implication exempted members of the defence forces from State motor car legislation. While it appears that that decision gave greater scope to State legislation than would have been the case before the *Engineers' Case* the Commonwealth always had it in its power to nullify the extension by passing a law exempting members of the defence forces from compliance with State law.[4]

Clearly, however, where a Commonwealth law such as the Conciliation and Arbitration Act binds a State the State cannot exempt itself from its provisions. Paramountcy belongs to the Commonwealth.

The *Engineers' Case* was treated by many as a constitutional revolution. Political scientists noted the trend towards centralisation and this trend was correlated with the political and social context.[5] The refusal to look at implications was treated by many lawyers as establishing a simpler and more certain method of interpretation and one more consistent with traditional judicial method. While political scientists, therefore, considered the decision to be a partial result of the changing political and economic conditions a number of lawyers welcomed the decision as exploding a theory which had required judges to depart from their role and take extra-legal factors into account.[6]

There were some, however, who realised that ' implications ' were not so easily removed. Sir Robert Garran in an address delivered at the University of London on 12 December 1923 said—

> On the face of it, then, it may seem that, after twenty years, the principles of interpretation to be applied to questions of constitutional power arising under the Constitution have been suddenly and fundamentally changed. . . . But I think that time will show that the change is not so great, and the discontinuity not so marked, as might at first sight appear. After all, each doctrine is a general formula to aid in finding out, in its application to particular cases, what the

[4] *Ibid.* 183 *per* Knox C.J.—' The Commonwealth Parliament has, in my opinion, undoubted power, by legislation with respect to a subject which is within the ambit of its legislative powers, to override the provisions of any State law, but in the absence of any such enactment the State law must be given its full effect '.

[5] L. F. Crisp in *The Parliamentary Government of the Commonwealth of Australia*, (2nd ed. 1954) states at p. 269—' Time, as it happened, was on the side of Isaacs and Higgins. By 1920 both Griffith and Barton had passed from the Bench. But it had, perhaps, become clear even earlier that the " philosophical current in the minds of the people " was running against the narrower interpretations. The Commonwealth was becoming closer knit. The First World War speeded the process and enormously increased the prestige and practical importance of the National Parliament.'

[6] Wynes, *Legislative, Executive and Judicial Powers in Australia*, (1st ed. 1936) 22-24; (3rd ed. 1962) 17—' . . . the present writer has always subscribed to the view that the *Engineers' Case* was rightly decided and that the principles there established are the only principles upon which a written Constitution can properly and with any certainty be interpreted.'

> meaning of the Constitution is. The formula itself is of less importance than its application. And the terms in which the new rule is stated by the Court tend, naturally, to emphasize the difference between the two, rather than their similarities. A certain implied term, which had been added as a gloss to the Constitution, is expunged, and references are made to the 'express words of the Constitution' in a way which might suggest that all implications are rejected. That, of course, is not the intention. No rule of construction can ignore the truth that what is necessarily implied is as much part of the Constitution as that which is expressed; the only question is, whether the implication is necessary.[7]

State power to affect Commonwealth agents and instrumentalities was upheld in *Pirrie v. McFarlane* and *West v. Commissioner of Taxation (N.S.W.)*.[8] In the latter case the High Court unanimously held that federal superannuation pensions were taxable under State law. Ten years later in *Uther v. Federal Commissioner of Taxation*[9] the power of the State to take away the priority of the Commonwealth to payment of debts in the winding up of a company was upheld. Dixon J. dissented.[10]

Similarly, of course, the *Engineers' Case* had itself upheld the power of the Commonwealth to affect instrumentalities of the States. In *Stuart-Robertson v. Lloyd*[11] it was held that Commonwealth legislative power with respect to bankruptcy extended to authorise a provision permitting the Bankruptcy Court to order a bankrupt member of a State Parliament to contribute periodic amounts out of his parliamentary salary.

The seeming simplicity of the approach of the *Engineers' Case* in respect of immunity of governmental functions was disturbed from an early date by various judgments of Sir Owen Dixon. As is the case in many branches of constitutional law Sir Owen's theory eventually became the orthodox doctrine of the Court. This article is, therefore, largely an outline and examination of his views in that field. Perhaps, it would be more appropriate to talk of the *development* of the views of Dixon J. One gets the feeling that in respect of section 92, for example, Sir Owen had for a long time a consistent idea in his own mind of the proper interpretation of that provision. In the field of inter-governmental immunities, however, we see first of all a nibbling away at the doctrine of the *Engineers' Case* in the form of finding exceptions to it, then the emergence of an underlying rationale for those exceptions and, finally, a more full blown theory of inter-governmental relations in Australia.

From the time that Dixon J. first went on to the High Court bench he consistently reiterated that the *Engineers' Case* did not prevent a

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[7] (1924) 40 *Law Quarterly Review* 202, 216.

[8] (1936-1937) 56 C.L.R. 657.

[9] (1947) 74 C.L.R. 508.

[10] In *Commonwealth v. Cigamatic Pty Limited* (1962) 108 C.L.R. 372 the High Court overruled *Uther's Case* and so, the dissent of Dixon J. became the law.

[11] (1932) 47 C.L.R. 482.

resort to implications in interpreting the Constitution. He seems to have accepted the view of the *Engineers' Case* that the legislative powers of the Commonwealth Parliament should not be interpreted by having regard to the so called reserved powers of the States; however, he saw, in the joint judgment in the *Engineers' Case* itself, exceptions to the overthrow of the doctrine of the immunity of instrumentalities.

In 1930 he interpreted the *Engineers' Case* rule as follows—

> ... unless, and save in so far as, the contrary appears from some other provision of the Constitution or from the nature or the subject matter of the power or from the terms in which it is conferred, every grant of legislative power to the Commonwealth should be interpreted as authorizing the Parliament to make laws affecting the operations of the States and their agencies, at any rate if the State is not acting in the exercise of the Crown's prerogative and if the Parliament confines itself to laws which do not discriminate against the States or their agencies.[12]

These views were repeated in *West v. Commissioner of Taxation (N.S.W.)*.[13]

It might be said with respect that His Honour gave greater emphasis to the ' exceptions ' in the *Engineers' Case* than would be expected from the context in which they appeared in the judgment. Some years ago Professor Sawer[14] examined the *Engineers' Case* in relation to Dixon's ' exceptions ', and found that the *Engineers' Case* made no clear ' reservations ' in the sense of excepting from its general condemnation of implied prohibitions some topics on which implications of that type might operate. It is enough to say that I agree with the substance of what Professor Sawer has to say. The question is now largely academic, since there is no movement among any members of the present High Court toward a rallying cry of ' Back to the *Engineers' Case* '.

One illustration of Sir Owen's approach may suffice. The joint judgment in the *Engineers' Case* did not give as an exception to the general rule that laws which discriminated against another government were invalid. In the above quotation from the *Australian Railways Union Case*, His Honour seems to state that the High Court in the *Engineers' Case* regarded discrimination as an exception to the basic rule they expounded. He later said (in *West's Case*) that the Engineers' Case left the question open. However, in the *Engineers' Case* the matter was discussed in relation to the cases of *D'Emden v. Pedder*[15] and *Deakin v. Webb*[16] where it was held that a State Income Tax Act did not validly extend to tax moneys which had been received as Commonwealth salary.

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[12] *Australian Railways Union v. Victorian Railways Commissioners* (1930) 44 C.L.R. 319, 390.

[13] (1936-1937) 56 C.L.R. 657, 682-683.

[14] (1948-1949) 4 *Res Judicatae* 15, 85.

[15] (1904) 1 C.L.R. 91.

[16] (1904) 1 C.L.R. 585.

Their Honours declared that those cases could only be upheld as correct on the basis that the State Act was inconsistent with the Commonwealth Act fixing the officer's salary. On the question of discrimination the joint judgment said—' An act of the State Legislature discriminating against Commonwealth officers might well be held to have the necessary effect of conflicting with the provision made by the Commonwealth law for its officers relatively to the rest of the community '.[17] The problem of discrimination was, therefore, treated as a question involving the operation of section 109. In view of this fairly extensive treatment of discrimination it would not have been unreasonable to conclude that the majority of the High Court were not of the opinion that a law discriminating against another government was, for that reason, invalid.

The impression one gets is that Sir Owen Dixon disagreed in fundamental respects with the general theory underlying the majority judgment in the *Engineers' Case*. He has undermined that theory not by pointing out its errors or by express disagreement, but rather by interpreting it in the light of his own theory. This has led him to emphasise and give prominence to features of the judgment which would appear to others to be ancillary.

To the two exceptions mentioned expressly in *West's Case*, His Honour added a third in *Essendon Corporation v. Criterion Theatres Limited.*[18] That third reservation related to the taxation powers of the governments. These three ' exceptions '—the prerogative, discriminatory laws and taxation—formed the basis of Sir Owen's attack. In my opinion, these exceptions are now of less importance in view of the development of more sweeping principles. However, they are still of relevance in particular cases and they also serve as illustrations of the general theory. It is proposed to examine each of them.

The prerogative

The joint judgment in the *Engineers' Case* made vague references to the prerogative. Their Honours pointed out that that case did not involve any prerogative ' in the sense of the use in which it signifies the power of the Crown apart from statutory authority.'

In *Uther's Case*, Dixon J. noted that the priority claimed by the Commonwealth sprang from one of the prerogatives of the Crown and that this was ' an added reason, a reason perhaps sufficient in itself, for saying that it is a matter lying completely outside State power '.[19]

This argument did not appeal to Latham C.J. For him the prerogative was part of the common law and ' the Commonwealth of Australia was not born into a vacuum '. There were matters relating to the Commonwealth prerogative that the State could not affect—for example, the

[17] (1920) 28 C.L.R. 129, 157.
[18] (1947) 74 C.L.R. 1.
[19] (1947) 74 C.L.R. 508, 528.

functions of the Governor-General in summoning and dissolving Parliament—but this was because the law would not be ' the peace order and good government ' of the State concerned.[20] However, the priority of debts was a normal feature of a companies law and had a clear relation to the State of New South Wales. Although Dixon J. was inclined to think that the fact that the prerogative was involved was enough to invalidate the State provision, he looked, in *Uther's Case*, behind the prerogative to the particular relationship with which the prerogative was concerned. The prerogative involved in that case regulated the relationship of the Commonwealth with its subjects. From this field the States were barred. At common law, for example, the Crown in the right of the Commonwealth could assign, or receive an assignment of, a legal chose in action and no notice to the debtor was required. As this was a prerogative right affecting the relationship of the Crown with its subjects, State laws such as section 12 of the Conveyancing Act (N.S.W.) providing for legal assignments of choses in action could not apply to the Commonwealth so as to require notice to be given. Dixon J., of course, dissented in *Uther's Case*, but his views were repeated and followed by the majority of the Court in *Commonwealth v. Cigamatic Pty Limited*.[21] The Judges agreeing with Dixon C.J. were Kitto, Menzies, Windeyer and Owen JJ. The result was the overruling of *Uther's Case*.

In *Cigamatic*, Dixon C.J. seems to have further played down the fact that it was the prerogative that was involved. He said—

> If you express the priority belonging to the Commonwealth as a prerogative of the Crown in right of the Commonwealth, the question is whether the legislative powers of the States could extend over one of the prerogatives of the Crown in right of the Commonwealth. If, as in modern times I think it is more correct to do, you describe it as a fiscal right belonging to the Commonwealth as a government and affecting its Treasury, it is a question of State legislative power affecting to control or abolish a federal fiscal right.[22]

One may perhaps see signs, here, of what some people would refer to as a ' functional ' rather than a ' conceptual ' approach. In other words, what may be important is not merely the prerogative but the function or relationship that the prerogative protects or deals with.

In my view, however, the remarks of Dixon C.J. were not intended to cut down this exception to the doctrine in the *Engineers' Case* but rather to extend it. If the general principles formulated in *Bogle's Case*[23] (which will be dealt with later) are correct, the Commonwealth's area

[20] *Ibid.* 521.
[21] (1962) 108 C.L.R. 372.
[22] *Ibid.* 377-378
[23] *Commonwealth v. Bogle* (1952-1953) 89 C.L.R. 229.

of immunity from State law is greater than that involved in the 'exceptions' to the *Engineers' Case*. The prerogative becomes significant only in the limited field where the State can otherwise affect the Commonwealth.

Taxation

General

The joint judgment in the *Engineers' Case* pointed out[24] that the Court was concerned primarily with placitum xxxv. Their Honours stated that in respect of other heads of power it might be necessary to consider the nature of the power and take that into account in determining its effect in relation to the legislative authority of the States. They mentioned taxation by way of example. Sir Owen Dixon has posed the question why some Commonwealth powers should be singled out for special treatment. His answer is that under some powers it is easier under a general law to burden the States than it is under others. A general code relating to say cheques or weights and measures could not be said (according to this view) to be controlling the States in the exercise of their functions. 'But to attempt to burden the exercise of State functions by means of the power to tax needs no ingenuity . . . '.[25]

Section 114 of the Constitution deals expressly with governmental immunity from taxation. It provides that '[a] State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State'.

It could be argued that as the Constitution makes express the immunity of property of a government from tax by another government no other tax immunity is contemplated by the Constitution : *expressio unius est exclusio alterius*. This approach was rejected by Dixon J. He maintained, in effect, that section 114 extended rather than narrowed the tax immunity that the Constitution would have otherwise granted. The 'implied' immunity is immunity from being taxed in respect of any function. The immunity granted by section 114 is based merely on ownership and does not depend on the nature or purpose of the use or on who is using it : *Essendon Corporation Case*.[26]

That the States could not directly tax the Commonwealth, in the exercise of any of its functions, was emphasised in the *State Banking Case*,[27] and the *Essendon Corporation Case*. In the latter case Dixon J. said—'To describe the establishment of the Commonwealth as the

[24] (1920) 28 C.L.R. 129, 143.
[25] *Melbourne Corporation v. Commonwealth* (1947) 74 C.L.R. 31, 80.
[26] (1947) 74 C.L.R. 1, 18.
[27] (1947) 74 C.L.R. 31.

birth of the nation has become a commonplace. It was anything but the birth of a taxpayer'.[28]

It is clear from other references in the *Essendon Corporation Case*[29] and in the *State Banking Case*[30] that Dixon J. considered that this immunity from taxation was a mutual one, that is, that the immunity resided also in the State. Yet even in the hey-day of the doctrine of the immunity of instrumentalities, before 1920, the States were held to be subject to the payment of customs duty under Commonwealth law. Today, the States are made subject by legislation to pay-roll tax, but the validity of that tax has not been determined by the Court.

Customs duty

In the *Steel Rails Case*[31] an attempt was made to exempt the State from payment of customs duty by arguing the doctrine of the immunity of instrumentalities.[32] The Court held that the doctrine had no application in the case of Commonwealth exclusive powers. The doctrine was based upon necessity and the necessity in this case was over-ridden by virtue of the fact that the nature of the Commonwealth power was such that its exercise involved control of State functions. No suggestion has been made by any High Court Judge since the *Engineers' Case*, so far as I am aware, that the *Steel Rails Case* was wrongly decided. As the special treatment of the taxation power is said to arise from the nature of that power it may be that the customs power could be said to justify a law imposing duties on the States because of the special 'nature' of the customs power. The power to impose duties of customs, however, is conferred by section 51 (ii) as part of the power to make laws with respect to taxation.[33]

If the decision in the *Steel Rails Case* is correct it cannot easily be fitted into Dixon's general views regarding immunity of governmental functions from taxation by another government. The joint judgment in the *Engineers' Case* rejected the view that the decision in the *Steel Rails Case* could be justified on the basis that an exclusive power of the Commonwealth was involved. If taxation is to be regarded as an exception from the general doctrine of the *Engineers' Case* then customs duties can only be explained as an exception from the taxation exception on the basis of the consequences that would flow from deciding otherwise.[34]

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[28] (1947) 74 C.L.R. 1, 22.

[29] *Ibid.* 19.

[30] (1947) 74 C.L.R. 31, 78.

[31] *Attorney-General of N.S.W. v. Collector of Customs for N.S.W.* (1908) 5 C.L.R. 818.

[32] The Court held that the levying of customs was not the imposition of a tax upon property within the meaning of s. 114 of the Constitution.

[33] *Vacuum Oil Co. Pty Ltd v. Queensland* (1934) 51 C.L.R. 108, 125.

[34] It has been suggested to me that His Honour would not rely on a distinction which was based on social or economic consequences and that he would seek a more formal

Crown instrumentalities

Clearly the revenue of a State Government Department cannot be subject to Commonwealth income tax. Conversely, the income received by a State public servant from the State is taxable by the Commonwealth because the State itself is not being taxed nor is the income received by the public servant for or on behalf of the State. But what of an independent statutory corporation whose capital comes from the Government and whose income finds its way ultimately into Consolidated Revenue, but which does not come within ' the shield of the Crown ' ? There would seem to be no reason in principle why such a body should not be subject to Commonwealth taxation nor why a similar Commonwealth corporation should not be subject to State taxation. In the latter case, however, it seems that the Commonwealth can (despite the argument of Evatt J. in *West's Case*) protect the corporation from State taxation: *Australian Coastal Shipping Commission v. O'Reilly*.[35]

Difficult problems arise as to what is an agent of the Crown for purposes of immunity granted by the Constitution as distinct from immunity conferred by Commonwealth legislation.

In *Commonwealth v. Bogle*[36] it was argued, *inter alia*, that the Prices Regulation Act 1948-1951 (Vic.) did not as a matter of construction bind the Crown and that Commonwealth Hostels Ltd was an agent of the Crown and entitled to its ' shield '. This argument was rejected by the majority of the High Court. The question involved ordinary

criterion. One possible criterion would be that in the case of customs an *exclusive* power is involved. This basis for distinction was rejected in the *Engineers' Case*. It seems to me, however, that it is quite consistent with Sir Owen's approach to say that, as the customs power would be ineffectual if Commonwealth laws did not bind the States, the ' nature ' of that power requires that the States can be bound by Commonwealth customs laws. In *O'Sullivan v. Noarlunga Meat Limited* (1954) 92 C.L.R. 565, 597 Fullagar J. quoted with approval the following statement of the Court in *D'Emden v. Pedder* (1904) 1 C.L.R. 91, 110 (approving of Marshall C.J. in *M'Culloch v. Maryland* 4 Wheat. 316)—' where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor and without special mention, every power and every control the denial of which would render the grant itself ineffective.' Dixon C.J. concurred with Fullagar J. The same statement has been approved by Dixon C.J. on other occasions. The reasoning in the above statement would, it is submitted, be applicable to the customs power where a denial of the right to bind the States ' would render the grant itself ineffective '.

In any case, as is shown below, Sir Owen's view that the taxation power, the prerogative and discriminatory laws are ' exceptions ' to the general principle in the *Engineers' Case* is itself based on the possible consequences to the federal system of holding otherwise.

[35] (1961-1962) 107 C.L.R. 46. Dixon C.J. in *O'Reilly's Case* referred to the Australian Coastal Shipping Commission as ' a corporate agency of the Crown in the right of the Commonwealth ' and said that ' The fact that a corporation is established to carry on the line makes it no less a function carried on in the interests of the Crown in the right of the Commonwealth.' (p. 54). It would appear, however, that His Honour was concerned with the fact that ' No private interests are involved.' (p. 55) rather than with the question whether the corporation was entitled to the privileges and immunities of the Commonwealth. It is made clear in the judgments of Menzies and Windeyer JJ. that the case was argued on the basis that the Commission was not itself a servant of the Crown so as to be entitled to the Commonwealth's privileges and immunities.

[36] (1952-1953) 89 C.L.R. 229.

rules of administrative law as to when a corporate body was entitled to Crown immunity. These principles are difficult enough, but they do not involve issues of federalism. They may, however, be relevant to the Dixonian view of intergovernmental immunity. If the Commonwealth is immune from State legislation, not as a matter of construction but because of implications in the Constitution, does that immunity extend to an ' agent ' of the Commonwealth which is otherwise entitled to the shield of the Crown?

On the face of it there would seem to be no reason why the test should not be the same in both cases, and Fullagar J. in *Bogle's Case* seems to treat it as the same question for the most part. He refers, for example, to the *Grain Elevators Board (Victoria) v. Dunmunkle Corporation*[37] and *Victorian Railways Commissioners v. Herbert.*[38]

A difficulty arises, however, because of his reference to *Roberts v. Ahern.*[39] That case concerned section 5 of the Police Offences Act 1890 (Vic.) which made it an offence for a person, *inter alia*, to cart garbage or night soil without a licence. The Act was held as a matter of construction not to bind the Commonwealth. The defendant was a person who had contracted with the Post Office. He pleaded Crown immunity. The Court held that the contract between the Commonwealth and the defendant was one of agency and therefore he was entitled to the shield of the Commonwealth.

One might of course dispute whether the rule applied by the Court was correct, but it clearly had nothing to do with the immunity of instrumentalities. In *Bogle's Case*,[40] however, Fullagar J. stated that he regarded *Roberts v. Ahern* ' as representing an extreme application of that overthrown doctrine '. He referred to Evatt J. in *West's Case* [41] who mentioned *Roberts v. Ahern* as illustrating the ' numerous and startling applications ' of the general doctrine of immunity of instrumentalities before it was overthrown. Evatt J. in turn referred back to Higgins J. in *Pirrie v. McFarlane*[42] who mentioned *Roberts v. Ahern* and other cases as raising questions that ' will have to be considered now in the light of the *Engineers' Case* '.

All this is very puzzling. It may be that if a State Act does not purport to bind the Commonwealth the ordinary rules as to the shield of the Crown apply, but if the Commonwealth is forced to rely on its constitutional immunity, the range of bodies who are entitled to this constitutional ' shield ' is narrower.[43]

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[37] (1946) 73 C.L.R. 70.

[38] [1949] V.L.R. 211.

[39] (1904) 1 C.L.R. 406.

[40] (1952-1953) 89 C.L.R. 229, 268.

[41] (1936-1937) 56 C.L.R. 657, 696-697.

[42] (1925) 36 C.L.R. 170, 213.

[43] Williams J. in *Bogle's Case* relied on *Roberts v. Ahern* to give Commonwealth Hostels Limited Crown immunity.

Discrimination

This is perhaps the least controversial of ' exceptions '. It was one of the main reasons given by Dixon J. for invalidating the relevant provision of the Banking Act in the *State Banking Case*. The existence of the rule that one government may not discriminate against another makes absurd the policy behind such cases as *Deakin v. Webb* and *D'Emden v. Pedder* that one government should not be able to tax the servants of another because ' the power to tax is the power to destroy '. Clearly, if the Commonwealth wished to destroy the States by financially ruining State servants it could only achieve this by similarly ruining all its residents who were not State servants.

The problem of what is discrimination can, however, be a difficult one. In the *State Banking Case* section 48 of the Banking Act 1945 operated to prohibit trading banks (except with the consent of the Treasurer) from handling the accounts of the States and their agencies. The provision was held invalid. The main ground taken by Dixon J. was that it discriminated against, and imposed special burdens upon, the States.

The concept of ' discrimination ' usually denotes that a person or group of persons has been singled out for no good and relevant reason.

In his argument in the *State Banking Case* G. E. Barwick was careful to say that—' It is not suggested that a law ceases to be a law with respect to banking merely because it discriminates against a particular class of persons or entities: The nature of the class may disclose a *discrimen* which is related to banking '.[44] The Commonwealth submitted that there was a relevant nexus between the proper objects of banking control and section 48. The Banking Act had established the Commonwealth Bank as a central bank and references were made to general works on banking to show that it was a recognised function of a central bank to act as a government banker. Sections 96 and 105A of the Constitution were referred to as establishing the proposition that the ' Commonwealth and States may now be regarded as one government for monetary and public credit purposes '.[45]

Dixon J., however, relied on formal discrimination. The law was not a general law which governed all alike but placed ' a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers '.[46]

The problem remains, however, whether a Commonwealth law discriminating against a State or a State law discriminating against the Commonwealth can ever be valid if it can in some sense be said to be a ' justifiable ' discrimination.

[44] (1947) 74 C.L.R. 31, 36.
[45] *Ibid.* 40.
[46] *Ibid.* 79.

In the *Second Uniform Tax Case*[47] the High Court by a majority held section 221 (1) (a) of the Income Tax and Social Services Contribution Assessment Act 1936-1956 to be invalid. That provision made it an offence for a taxpayer to pay any State income tax before he had paid his Commonwealth income tax. Dixon C.J. and the other majority judges considered that the provision was not incidental to the power to make laws with respect to taxation. They did not, therefore, express any views on the bearing of the decision in the *State Banking Case* on the matter.[48]

Williams J. adverted to the problem. He faced the fact that the provision ' discriminated ' against the State in that it left the taxpayer free to pay all his debts, other than State income tax, before paying his Commonwealth tax. He considered, however, that there was good reason for the discrimination—' It is apparent that the debt most likely to compete with the debt to the Commonwealth for income tax would be a debt to a State or States for a similar tax '. He concluded—' Discrimination against a State, where it can be seen to be justified, is not a ground for invalidating a Commonwealth law.'[49]

On this reasoning discrimination would only be a *prima facie* ground for invalidity which could be displaced by showing that the discrimination was justified from the point of view of the effectuation of Commonwealth power. Sir Owen Dixon, however, has given no indication that he would be prepared to adopt that line of argument. It is suggested that he would not uphold a statute which singled out a State even though the ' discrimination ' might, from the point of view of Williams J., be a relevant and not an arbitrary one.

Sometimes, of course, a Commonwealth power may itself indicate that special treatment of the States is contemplated, for example, section 96. It was on this basis that Dixon C.J. distinguished the *State Banking Case* in the *Second Uniform Tax Case*.[50]

A rationale of the exceptions

Commonwealth power

In the *State Banking Case* Dixon J. set out general principles which he felt were behind the exceptions he saw to the *Engineers' Case* doctrine.

[47] *Victoria v. Commonwealth* (1957) 99 C.L.R. 575. Dixon C.J., McTiernan, Kitto and Taylor JJ.; Williams, Webb and Fullagar JJ. dissenting.

[48] It seems clear, in any case, that he would not have regarded the ' discrimination ' in s. 221 (1) (a) as a justifiable one. In the course of arguing that the provision was not incidental to the taxation power, His Honour said—' . . . if the rationale of s. 221 (1) (a) were merely to insure that federal taxes were paid, it might be asked why should a debt for State income tax be picked out as the indebtedness the discharge of which would lessen the taxpayer's ability to pay. Why should not other debts be postponed too? ': *Ibid.* 615.

[49] *Ibid.* 638.

[50] (1957) 99 C.L.R. 575, 609. A further distinction mentioned by Dixon C.J. at p. 610 was that s. 96 did not enable the making of a ' coercive ' law.

This theory was further elaborated in *Uther's Case.* It rests on the basis that the Constitution recognises and preserves the existence and independence of the political units involved in our federation. It is not expected or contemplated by the Constitution that powers granted would be used primarily against another government. The system of federalism provided for by the Constitution 'logically demands' that, unless there is an indication to the contrary, the powers granted to the Commonwealth should not be understood as authorizing the Commonwealth to make a law aimed at 'the restriction or control of the State in the exercise of its executive authority'. The reverse argument, namely that the State cannot hinder the Commonwealth, applies and (as we shall see) applies *a fortiori.* Sir Owen would, therefore, agree with the general idea behind the old doctrine of the immunity of instrumentalities, namely the protection of the one government from the exercise of power by another. His Honour seems to commence his reasoning with the very same notion. Where he disagrees with the pre-*Engineers' Case* judgments is that he regards them as going too far. The old doctrine gave rise to many extravagances and resulted in the invalidation of laws which had at best only an indirect effect on the functions of Government. One example would be the taxation of the salaries of government servants under a general law. Further, the earlier courts did not see that in many instances the Constitution itself indicated that powers might be used so as to affect another government.[51]

Sir Owen's reasoning would seem to be along the following lines—

There is a basic assumption that in the discharge of their respective functions the State is free from federal control and the Commonwealth is free from State control. So far as the Commonwealth is concerned, however, this assumption is usually displaced by the fact that the Constitution expressly confers on it enumerated and affirmative powers. This principle follows from the decision in the *Engineers' Case* which is to the effect that whenever the Constitution confers a power to make laws in respect of a specific subject matter, *prima facie* it enables the Commonwealth to affect the operations of the States.

Nevertheless, the principle in the *Engineers' Case* does not fully displace the basic assumption of inter-governmental immunity. Most of the Commonwealth's powers contemplate the making of general laws. The grant of express powers to the Commonwealth, together with Commonwealth supremacy, means that the State must accept the *general* legal system and legal machinery established by Commonwealth law.

Commonwealth power, however, cannot be used with the aim or purpose of controlling a State in the exercise of its functions. So far as

[51] It should be added that Sir Owen has said that between his view and that of the earlier doctrine 'there is a world of difference' (*Essendon Corporation Case* (1947) 74 C.L.R. 1, 19). It is submitted, however, that the differences are as stated in the text.

most of the Commonwealth's powers are concerned—for example, weights and measures, bills of exchange, meteorology, lighthouses *etcetera*—it would be hard to see how general laws made under them could have the illicit aim or purpose.

Looked at in this light, however, discriminatory laws can be seen as one aspect of the general doctrine that one government in a federation cannot use its legislative power ' in order directly to deprive another government of powers or authority committed to it or restrict that government in their exercise '.[52]

The above argument assumes that the Commonwealth law would otherwise be within power. It may be that the ' discrimination ' will show that the purported law is not a law with respect to the particular subject matter concerned. This was the view of Dixon C.J. and of other majority judges in the *Second Uniform Tax Case* with respect to section 221 (1) (a) of the Income Tax and Social Services Contribution Assessment Act. However, the mere fact of discrimination may not be sufficient in itself to take a provision outside the subject matter of the power unless regard is had to the implications involved in the federal system.

Thus, in the *State Banking Case* Dixon J. did not deny the validity of section 48 on the ground of irrelevance to the banking power or because any connexion it had with banking was too remote or tenuous. It was invalid because the provision disclosed a purpose contrary to federal assumptions.

It will be noted that this reasoning is contrary to Sir Owen's usual approach to problems of categorisation. His Honour has often drawn a distinction between the operation of a law within a field of power and the purpose or policy of the law. Thus a federal provision that only trade-unionists may engage in interstate or overseas trade would be a valid exercise of the commerce power ' in spite of the industrial aspect which the provision undeniably presents '.[53] The Commonwealth may, therefore, by a valid law achieve a purpose or pursue a policy which would normally lie within State legislative authority. This principle, however, does not apply where the purpose or policy disclosed is to burden a State in the exercise of its constitutional power.[54] The placing of special burdens upon a State is indicative of the wrongful purpose.

The absence of an indicated purpose of controlling the States in the exercise of their functions is not, however, the only consideration going to validity. The basic assumptions of federalism are relevant in another respect. Not only does the Constitution envisage that, as a general rule, one government will not attempt directly to burden another in the exercise

[52] (1947) 74 C.L.R. 31, 81.
[53] *Huddart Parker Limited v. Commonwealth* (1931) 44 C.L.R. 492, 516.
[54] *State Banking Case* (1947) 74 C.L.R. 31, 79-80.

of its functions; it also ' predicates their continued existence as independent entities '.[55]

Most of the Commonwealth powers are such that general laws made under them will neither have the unconstitutional purpose nor will they in any real sense threaten the continued and independent existence of the States. Where the taxation power or the prerogative is concerned, however, special considerations need to apply because, in these spheres, even a general law may interfere with the independent functioning of the other government.

It is submitted, however, that the fact that a State prerogative is involved or that a Commonwealth law is an exercise of the taxation power will not be conclusive against validity. Even in these circumstances the primary consideration may be the effective exercise of the specific power granted to the Commonwealth. It has been suggested above that this is the case in respect of the imposition of customs duties on State importations. Similarly, it seems to be Sir Owen Dixon's view that the ' postponement of the State's priority to payment of debts in insolvency proceedings under the Commonwealth Bankruptcy Act ' or by virtue of other Commonwealth legislation is valid.[56] On the other hand it would be difficult under Sir Owen's theory, to justify the imposition of payroll tax on the States.

State power

It is in respect of State power to affect the Commonwealth that Sir Owen Dixon chiefly departs from the line of reasoning used by the High Court in the *Engineers' Case*. The Commonwealth has certain advantages over the States and is in a stronger position. The advantages arise from (a) the supremacy of the Commonwealth under section 109, and (b) the fact that the Commonwealth is given affirmative express and enumerated powers.

It is difficult to see why either of the above reasons should lead to the result that the Commonwealth may affect the State in circumstances where the State cannot affect the Commonwealth. For example, if the State cannot affect the Commonwealth's prerogative it is because of the nature of the federal system. That is, it is an ' implication ' from the Constitution. Dixon J. himself says in *Uther's Case*[57] that the federal

[55] *Ibid.* 82.

[56] In *Uther's Case* (1947) 74 C.L.R. 508, 529 Dixon J. said—' The affirmative grant of legislative power to the Parliament over the subjects of bankruptcy and insolvency may authorize the enactment of laws excluding or reducing the priority of the Crown in right of the States in bankruptcy . . . '. In the *Second Uniform Tax Case* (1957) 99 C.L.R. 575, 611-612 he referred to s. 221 (1) (b) (i) which was concerned with the order of priority in which federal income tax was to be paid by a trustee in bankruptcy and said—' I would unhesitatingly uphold the validity of this provision as a law made in the exercise of the power conferred by s. 51 (xvii.) of the Constitution to make laws with respect to bankruptcy and insolvency '.

[57] (1947) 74 C.L.R. 508, 529.

system ' is necessarily a dual system '. Further, to uphold prerogative immunity on a reciprocal basis it is not necessary to resort to interpreting the powers of the Commonwealth in relation to any reserved powers of the States supposedly conferred by section 107. If there is any reason for exempting the Commonwealth prerogative from State interference, it is that the Commonwealth is not to be treated as a mere subject of the Crown in the right of the State. The reverse argument could also be maintained. In other words the main purpose of the doctrine is not the preservation of legislative power but rather preservation of the executive power and protection of the functions of the Crown. To use the language of pre-*Engineers*' *Case* days the doctrine involved is that of the ' immunity of instrumentalities ' rather than ' reserved powers '.

The result of the *Second Uniform Tax Case* and *Commonwealth v. Cigamatic Pty Limited*, however, is that the Commonwealth may control or abolish a State's ' fiscal right as a government ' to priority in payment of debts in bankruptcy proceedings, but a State may not similarly affect the Commonwealth in company winding-up proceedings. What makes this position particularly incongruous is that it is clearly established that the Commonwealth can protect itself and its agencies against the State interference, but the States cannot take the same action against Commonwealth legislation. If any implications are to be drawn from section 109, therefore, it could well be that the States have a stronger claim to immunity than the Commonwealth.

This point was in fact made by Latham C.J. in *Uther's Case*. He said—

> The principle enunciated and applied in the [*State*] *Banking Case* cannot, in my opinion, be applied in favour of the Commonwealth in the same way as it may properly be applied in favour of a State. A State has no means of protecting itself against Commonwealth legislation if that legislation is valid. The position in the case of the Commonwealth, however, is very different . . . the Commonwealth Parliament is in a position to protect the Commonwealth against State legislation which, in the opinion of the Parliament, impairs or interferes with the performance of Commonwealth functions or the exercise of Commonwealth rights.[58]

Whatever validity this line of reasoning has, it clearly has not found favour with Sir Owen Dixon nor with the majority of the present Court. Indeed, the tendency is to restrict the power of the States to affect the Commonwealth even beyond that involved in the broad principle enunciated above.

The States cannot point to any affirmative grants of power. This puts them, according to the above reasoning, in a weaker position. The leading judgment on the position of the States is that of Fullagar J. in *Bogle's Case*. Dixon C.J. stated that he agreed with that judgment ' both in

[58] *Ibid.* 520.

the conclusions and in the reasons they express'. For the purposes of this paper therefore I have treated the views expressed by Fullagar J. as those of Sir Owen Dixon.[59] The judgment of Fullagar J. was also concurred in by Webb and Kitto JJ. He said—

> To say that a State can enact legislation which is binding upon the Commonwealth in the same sense in which it is binding upon a subject of the State appears to me to give effect to a fundamental misconception. The question whether a particular State Act binds the Crown in rights of a State is a pure question of construction. The Crown in right of the State has assented to the statute, and no constitutional question arises. If we ask whether the same statute binds the Crown in right of the Commonwealth, a question of construction may arise on the threshold. In considering that question we are, or should be, assisted by a presumption that references to the Crown are references to the Crown in right of the State only. If the answer to the question of construction be that the statute in question does purport to bind the Crown in right of the Commonwealth, then a constitutional question arises. The Crown in right of the State has assented to the statute, but the Crown in right of the Commonwealth has not, and the constitutional question, to my mind, is susceptible of only one answer, and that is that the State Parliament has no power over the Commonwealth. The Commonwealth—or the Crown in right of the Commonwealth, or whatever you choose to call it—is, to all intents and purposes, a juristic person, but it is not a juristic person which is subjected either by any State Constitution or by the Commonwealth Constitution to the legislative power of any State Parliament. If, for instance, the Commonwealth Parliament had never enacted s. 56 of the *Judiciary Act* 1903-1950, it is surely unthinkable that the Victorian Parliament could have made a law rendering the Commonwealth liable for torts committed in Victoria. The Commonwealth may, of course, become affected by State laws. If, for example, it makes a contract in Victoria, the terms and effect of that contract may have to be sought in the *Goods Act* 1928 (*Vict.*).[60]

It is to be noted that in this passage there is no reference to the 'exceptions' to the *Engineers' Case*. Indeed, the occasions on which State law may bind the Commonwealth are treated as exceptions to a general rule that the Commonwealth is immune from such laws.

The distinction drawn between State Acts which purport to 'bind' the Commonwealth and those which 'affect' the Commonwealth,

[59] Wynes, (3rd ed. 1962) 535, suggests we are not justified in assuming that the other judges of the Court agreed with the broad language used by Fullagar J. In my opinion, however, when Dixon C.J. said he agreed with both the decision and the reasoning of Fullagar J. he was expressing agreement with the whole tenor of the judgment. On other occasions when Dixon C.J. may not have agreed with everything said, he has generally been more cautious in the terms he used. For example, in *Norman v. Commissioner of Taxation* [1964] A.L.R. 131, 139 Dixon C.J. referred to a part of a judgment of Windeyer J. and said 'I do not know that there is anything contained in it with which I am disposed to disagree'.

[60] (1952-1953) 89 C.L.R. 229, 259-260.

such as the law of contract, is a difficult one. In this regard, consideration might be given to an analysis by H. A. L. Hart of laws of various types.[61]

Professor Hart sets out to consider whether the Austinian notion of orders backed by threats is an illuminating description of law. He points out that criminal law and the law of torts come closest to this general idea '[b]ut there are important classes of law where this analogy with orders backed by threats altogether fails, since they perform a quite different social function '.[62] These laws he refers to as providing ' facilities ' and include such branches of law as contracts, wills, trusts and marriage. To consider these branches of law as representing orders backed by threats is, according to Hart, to obscure their function in, and contribution to, social life. A person who makes a promise without a deed or without consideration has not ' broken ' the law of contract in the same sense as a person who steals commits a breach of the criminal law. In the case of the unenforceable promise Hart would say that the person concerned has simply not complied with the rules that enable a legal facility to be used.

For the purposes of the present problem however, it is necessary to take account of another aspect which Hart tends to ignore or, rather, to underplay. It is possible, of course, to look at the law of contract, trusts, wills *etcetera*, as examples both of facilities and of orders backed by threats. Once the rules of contract, for example, are complied with the party can commit a breach of law in the same sense for present purposes as he can be said to have broken the law of crime or of tort. Action can be brought against him for damages and the armed might of the ' sovereign ' will be placed behind enforcement of the judgment.[63]

It is clear that a State could not by statute have made the Commonwealth liable in contract or tort. From the point of view of Sir Owen Dixon's earlier analysis the basis for this position could be said to be that the prerogative is involved.[64] From the standpoint of the judgment of Fullagar J. in *Bogle's Case* the answer would be that the State Parliament has no power over the Commonwealth, the Commonwealth not being a juristic person which is subject to the legislative power of any State Parliament.

The position could be put this way: the State cannot ' command ' the Commonwealth in the sense of making the Commonwealth legally

[61] *The Concept of Law* (1961).

[62] *Ibid.* 27.

[63] Kelsen, for example, regards the rules relating to contract, trusts, marriage, *etc.* as a means by which private individuals create norms which are backed up by state sanction. Hart attacks this type of categorisation as obscuring the ' facility ' aspect of these rules. It might be added that Hart's analysis tends to obscure the ' command ' or ' coercion ' side of the question which, it is submitted, is important for purposes of the present problem.

[64] *Federal Commissioner of Taxation v. E. O. Farley Limited* (1940) 63 C.L.R. 278, 308.

liable for anything it does. If, however, the Commonwealth chooses to use any facility of State law for its purposes it must abide by the rules. If the Commonwealth was not otherwise liable in contract it could not have been sued in contract, but if the Commonwealth wanted to sue a party with which it contracted for a breach of contract, the State law relating to form, consideration, mistake, *etcetera*, would come into play. Even this, however, is subject to qualification: First, the State cannot make it more burdensome for the Commonwealth to sue than for other individuals to do so. This would be a discriminatory law. Secondly, if the Crown has procedural or other advantages in bringing a suit by virtue of the prerogative the State cannot take those advantages away from the Commonwealth. This is illustrated by Dixon J. in *Uther's Case*[65] with reference to Crown privileges at common law relating to assignments of choses in action. So that when the common law does not provide a general facility but grants a special facility to the Crown the State cannot destroy or modify that facility in so far as it benefits the Commonwealth.

If the prerogative is not involved, however, there would seem to be no reason why the Commonwealth should not be bound by changes in the rules as much as anyone else. If a State provided in a general Act, purporting to bind the Commonwealth, that a contract involving two pounds or more was void unless the contract was in writing, the Commonwealth, it is submitted, could not successfully sue on a contract that did not comply with the statute, in the absence of Commonwealth legislation to the contrary.

Contracts, trusts, gifts and other transactions may be avoided on grounds of lack of due form or for reasons going to the substance of the transaction. On the above analysis, a distinction between 'form' and 'substance' would be irrelevant. The distinction may, however, be pertinent to an understanding of the views expressed in *Bogle's Case*.

Fullagar J. said—'... I should think it impossible to hold that the Parliament of Victoria could lawfully prescribe the uses which might be made by the Commonwealth of its own property, the terms upon which that property might be let to tenants, or the terms upon which the Commonwealth might provide accommodation for immigrants introduced into Australia'.[66] His Honour went on to say that—'... a State has no power to bind the Commonwealth by such legislation as that which is contained in the *Prices Regulation Act*'.[67]

The Prices Regulation Act purported to control prices by, *inter alia*, making it an offence to sell or offer for sale declared goods or services

[65] (1947) 74 C.L.R. 508, 528.
[66] (1952-1953) 89 C.L.R. 229, 260.
[67] *Ibid.* 266.

at a price above the maximum price determined by the Commissioner. In addition to the prescription of penalties a court was empowered to order a refund of any amount paid in excess of the fixed maximum price. The aim of the Act was, therefore, to control prices by making certain transactions illegal. On the above analysis it is clear, therefore, that such provisions could not apply to the Commonwealth. The Act was one which prohibited transactions. The State cannot prohibit the Commonwealth from doing anything.

It is possible, however, to look at the case from another angle, namely a denial of legal facilities. Neither the Commonwealth nor the company was being prosecuted for an offence nor being sued for damages. They were suing for breach of contract. There was no Commonwealth law relating to enforceability of the contract in question. It could be argued that the Commonwealth had not complied with State rules relating to the enforceability of contracts and therefore could not make use of the facilities supplied by State law.

Insofar as the particular Act in *Bogle's Case* was concerned, the denial of the right to sue for breach of contract was merely incidental to, and was a consequence of, the general prohibition and declared illegality of the acts in question. It might be said, however, that an Act, which provided that a contract of sale of goods was void where the price was over a certain amount, could in the absence of Commonwealth legislation be applicable to sales by the Commonwealth.

However, the examples that have been given of State laws that may affect the Commonwealth are all of a formal, procedural or interpretative nature.

Thus Dixon J. in *Farley's Case* said that—'. . . the general law of contract may regulate the formation, performance and discharge of the contracts which the Commonwealth finds it necessary to make in the course of the ordinary administration of government'.[68] (It is clear from the context that he was not merely referring to the operation of sections 79 and 80 of the Judiciary Act 1903-1939.)

In *Uther's Case* His Honour said—'. . . if the Commonwealth contracts with a company the form of the contract will be governed by s. 348 of the [N.S.W.] *Companies Act*'.[69] That provision related to the form of contracts with companies. In *Bogle's Case*, itself, as we have seen above, the example given was of a contract made by the Commonwealth being interpreted in accordance with the provisions of the Goods Act of Victoria. Thus a distinction may have to be made between, for example, a law altering the requirements as to consideration or writing and one which refused enforcement to a contract of loan which specified an

[68] (1940) 63 C.L.R. 278, 308.
[69] (1947) 74 C.L.R. 508, 528.

interest rate greater than a fixed percentage. If this is so, then the distinction between adjectival laws which apply to Commonwealth transactions and other rules which do not will prove as difficult of application as the distinction between 'prohibition' and 'regulation' in the application of section 92.

Conclusion

It is submitted that Sir Owen Dixon's theory of intergovernmental relations in Australia may be summed up as follows—

The notion of federalism involves two basic assumptions:

(a) that one government will not restrain, hinder, burden or control another in the exercise of its functions;

(b) that the Commonwealth and the States will continue to exist as independent entities.

The conferring of express, affirmative and enumerated powers on the Commonwealth involves a further assumption that to some extent conflicts with the 'federal assumptions'. This is a result of the decision in the *Engineers' Case* which decided that Commonwealth powers, *prima facie*, authorise the making of laws affecting the operations of the States.

The 'federal assumptions' operate, however, to invalidate a Commonwealth law which has as its purpose the control of a State. A law discriminating against a State is an example of such a law.

In certain cases even a general Commonwealth law may be invalid if it threatens asssumption (b). This will normally occur where the State's prerogative is involved or where the law is an exercise of the taxation power. These factors will not, however, be conclusive where it can be shown that the effectuation of the power (as in the case of the customs power) requires that the State be controlled.

As the States do not have affirmative powers the 'federal assumptions' operate to their full extent. The Commonwealth, therefore, cannot be controlled by State law. The Commonwealth may, however, in the course of administration, use legal powers or facilities granted by State law. If it does, the rules of State law will be relevant. The State cannot, however, discriminate against the Commonwealth or affect its prerogative rights. It is a matter of doubt whether a general State law *denying* validity to an act or transaction for reasons other than lack of due form or proper procedure can affect the Commonwealth.