

A HISTORICAL SURVEY OF THE VICTORIAN CONSTITUTION, 1856 TO 1956

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I

The first Victorian Parliament elected under the provisions of the Constitution Act 1855 met on 21 November 1856. It was celebrated as a great event and the day was proclaimed a holiday. A future Premier of the Colony recorded his impressions of the day's events. 'The Corporation headed by the Mayor, the Judges in their robes, the Town Councillors in their uniforms, the Foreign Consuls looking as like Ambassadors as they could contrive to do, and the Governor accompanied by a staff and escorted by volunteer cavalry arrived at a Chamber crowded with ladies.'¹ The occasion was noteworthy in more ways than one. Not only was this the first Victorian Parliament to be elected under the regime of responsible government, but Victoria blazed a trail by conducting the election by secret ballot. The legislation enacting the secret ballot had been adopted in 1856 by the Legislative Council established in 1850, though not without vehement opposition and expressions of foreboding.² This new-fangled method of voting proved a great success, and the conduct of the election was applauded by contemporary observers.³ Under the Constitution Act, thirty members were elected to the Legislative Council⁴ and sixty to the Assembly.⁵ No person was eligible for election to the Legislative Council unless he was thirty years of age and owned freehold property to the value of £5,000 or the annual value of £500.⁶ The qualification for election to the Assembly was the attainment of the age of twenty-one and the ownership of freehold land to the value of £2,000, or the annual value of £200.⁷

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¹ Sir C. G. Duffy; *My Life in Two Hemispheres*, ii, 160, cited Mills: 'The Composition of the Victorian Parliament 1856-1881', (1942) 2 *Historical Studies (Australia and New Zealand)*, 25.

² The secret ballot was enacted by Act 19 Vict. no. 12, 1856. For an account of the events leading to the passing of this Act, see Scott: 'The History of the Victorian Ballot' (1920-1) 8 *Victorian Historical Magazine* 1, 49.

³ William Westgarth, one of the returning officers in Melbourne, reported that 'like everyone else in the colony, he watched with interest the effect produced. The effect was quite extraordinary, the elections having passed off without the least confusion or disturbance, although there was a manifestation of great interest in the election'. H. C. E. Childers, who was Commissioner of Trade and Customs in the first responsible government, and who later returned to England stated in the course of a speech in the House of Commons in 1860 that the Victorian elections of 1856 'were conducted with a regularity and quiet unknown before, and that in a population far more excitable, and during an agitation of questions far more exciting than you have in this country'. Cited, Scott *op. cit.*, 58.

⁴ S. 3.

⁵ S. 10.

⁶ S. 4.

⁷ S. 11.

The franchise was also restricted: to qualify as a voter for the Legislative Council, a man had to be twenty-one years of age and either possess freehold property to the value of £1,000 or the annual value of £100, or have a leasehold estate of prescribed value and duration or satisfy specified educational or professional qualifications.⁸ A voter for the Assembly had to be twenty-one years of age and possess freehold to the value of £50 or the annual value of £5, or occupy a leasehold worth £10 per annum, or be a householder of the annual value of £10, or be in legal occupation of Crown lands for a period of twelve months in consideration of any payment to the public revenue or be in receipt of an annual salary of £100.⁹ Eligibility for election and for the franchise was confined to males. The first elections under the Constitution Act took place in August 1856 for the Legislative Council and in the following month for the Assembly. More popular interest was shown in the Assembly elections, and only about one half the number of qualified electors voted in the Council's election.¹⁰ Following the proclamation of the Constitution by the Governor, Sir Charles Hotham on 23 November 1855, a government comprising Mr W. C. Haines (Chief Secretary), Mr W. F. Stawell (Attorney-General), Mr C. Sladen (Treasurer), Mr C. Pasley (Commissioner of Public Works), Mr H. C. E. Childers (Commissioner of Trade and Customs), Mr A. Clarke (Surveyor-General), Mr R. Molesworth (Solicitor-General), and Mr W. H. F. Mitchell (without portfolio) assumed office. After the elections, the Haines ministry resumed office, and retained it until March 1857.

II

The events leading up to the enactment of the Constitution Act 1855 may be briefly recounted. Regular government of the district of Port Phillip had been established in 1836, when it was proclaimed open for settlement, and Captain William Lonsdale was appointed resident police magistrate of the district. In 1839 Charles Joseph La Trobe was appointed superintendent of the district. Though subject to the authority of the Governor of New South Wales, he effectively exercised the powers of a Lieutenant-Governor, and was formally appointed to that office in 1851. In 1842, a Legislative Council was established in New South Wales, consisting of thirty-six members, twenty-four elected by colonists on a restricted property franchise and twelve nominated by the Governor. Six members were to be elected for the Port Phillip District, one of whom was to represent Melbourne. The Act which constituted the

⁸ S. 5.

⁹ S. 12.

¹⁰ See Mills, *op. cit.*, *supra* n.1 for an account of this election.

Legislative Council redefined the Port Phillip District and substituted the River Murray for the Murrumbidgee as its northern boundary.

During the remaining years of the decade, growing dissatisfaction with their status was expressed by the colonists of the Port Phillip District and this was recognized by the Imperial Parliament which in August 1850 passed an Act intituled 'an Act for the better Government of Her Majesty's Australian colonies'.¹¹ This provided that 'the territories now comprised within the said District of Port Phillip, including the town of Melbourne, and bounded on the north and north-east by a straight line drawn from Cape Howe to the nearest source of the River Murray, and thence by the course of that river to the eastern boundary of the colony of South Australia, shall be separated from the Colony of New South Wales, and shall cease to return members to the Legislative Council of such colony, and shall be erected into and thenceforth form a separate colony, to be known and designated as the colony of Victoria'.

The Imperial Act of 1850 also extended the form of government by partly elected, partly nominated Legislative Councils which had been granted to New South Wales in 1842 to Van Diemen's Land, South Australia and Victoria. The Victorian Electoral Act 1851, which was a consequential Act passed by the Governor and Legislative Council of New South Wales, provided for the establishment of a Victorian Legislative Council of thirty members, two-thirds elected on a restricted franchise, and one-third nominated. The powers of the Legislative Councils were not significantly extended beyond the limits of 1842, except that they were now permitted to levy non-differential customs duties and were given the power of constitutional amendment within certain limits. The Act of 1850 was regarded by Earl Grey, Secretary of State for the Colonies, as a foundation 'upon which might gradually be raised a system of government founded on the same principles as those under which the British Empire had risen to greatness and power'.¹² At the same time it was made very clear that the Home government proposed to maintain control over Crown lands and the colonial revenues. This called forth forceful colonial protests particularly in the Legislative Council of New South Wales. Earl Grey was unmoved, but a change of heart and policy came with a change of government and the new Colonial Secretary, Sir John Pakington, signified in 1852 that the Imperial government was prepared to cede control of these matters to the colonial legislatures. His decision was endorsed and its scope extended by his successor, the Duke of New-

¹¹ 13 & 14 Vic. c. 59.

¹² Despatch of Earl Grey to Sir Charles Fitzroy dated 30 August 1850, cited by Higinbotham C.J. in *Toy v. Musgrove* (1888) 14 V.L.R. 349, 389.

castle, and the Australian colonial Legislative Councils were authorized to prepare constitutional instruments accordingly. Sections 54 and 55 of the Victorian Constitution Act bore evidence of the outcome of the dispute between the Home government and the colonial Legislative Councils, which had been resolved by the subsequent concessions by Pakington and Newcastle. Section 54 authorized the Victorian legislature to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown within the Colony, while section 55 gave the legislature effective control over colonial revenues. The original enactment of these provisions by the Victorian Legislative Council was beyond power, but this was cured by Imperial legislation.¹³

In one important respect, the Imperial government declined to accept the constitution bills as submitted by the colonial Legislative Councils. The New South Wales, South Australian and Victorian Councils had attempted to restrict the prerogatives of reservation and disallowance of colonial bills, and purported to abolish these powers in respect of bills of 'merely local or municipal concernment'. Only Imperial bills, which were enumerated in classes in the New South Wales and Victorian bills, might be disallowed, or reserved, or form the subject of Instructions to the Governor. The Imperial authorities found difficulty in accepting the distinction as drawn between these classes of bills, and these clauses were struck out of the bills before then. Accordingly, in Victoria, as in the other Australian colonies, the Crown retained the right to disallow any colonial Act within two years, while the Governor might reserve any bill and was obliged either by the Constitution¹⁴ or his instructions to reserve certain classes of bills for the Royal assent. As things developed, this seeming defeat of colonial aspirations towards self-government proved to be nothing of the sort. The point has been well made by Bailey that

The absence of a hard-and-fast distinction between local and imperial affairs, both in the Constitution Acts and in the Governor's Instructions really facilitated the growth of self government. Since there was no recognised boundary, it was *pro tanto* easier for colonies to claim and obtain freedom of action with regard to matters which, as they grew, became vital for their welfare. No constitutional alteration was necessary . . . Only five Acts from the Australian colonies were disallowed between 1856 and 1900. Reservation indeed was not infrequent, but assent was often withheld only temporarily, pending amendments. Only some forty bills during these years definitely failed to receive the royal assent, and of these four-fifths subsequently passed into

¹³ See *Toy v. Musgrove* (1888) 14 V.L.R. 349, 390 *per* Higinbotham C.J.

¹⁴ By s. 60 power was given to the legislature to amend the Constitution, subject to specified conditions. The section imposed an obligation to reserve certain bills for the signification of the Crown's pleasure.

law with perhaps some modification. Purely local bills were vetoed only in the earlier years, and two-thirds of the whole forty fell within the first half of the period. The veto became little more than a means of securing consultation and delay.¹⁵

The Constitution Act was assented to by Her Majesty in Council on 21 July 1855, pursuant to the provisions of the Imperial statute 18 and 19 Vict. c. 55, s. 1. It is generally referred to as Schedule (1) of the Imperial Act and has been regarded as having the force of law by virtue of that Act. As already noted, it was proclaimed by the Governor, Sir Charles Hotham, on 23 November 1855.¹⁶

III

This paper is concerned with constitutional law and developments in Victoria, but a word must be said about the remarkable developments which took place in the Colony during the decade in which responsible government was established. In 1850 the population of Victoria was approximately 70,000, of whom 23,000 were settled in Melbourne. Within a few days of separation from New South Wales in July 1851, gold was discovered in Victoria. A great wave of immigration followed and by 1855 the population of the Colony was in the vicinity of 300,000. By 1861 there were more than 540,000 people in the Colony, of whom nearly 140,000 were in Melbourne. Victoria had far outstripped New South Wales which at this date had a population of 358,000, and it was not until the 1890's that New South Wales overtook Victoria.

The constitutional developments of the 1850's in Victoria cannot be explained simply by reference to the rush of population to the Colony following the discovery of gold. Similar constitutional developments took place in other colonies which were not comparably affected. An examination of the provisions of the Victorian Constitution Act, notably its electoral qualification requirements and the provisions with respect to the Legislative Council, shows that there was a disproportionate influence accorded to landed interests. It appears that the goldfields showed little interest in constitution-making, and that the troubles which developed on the goldfields, and culminated in the Ballarat riots and at the Eureka Stockade at the end of 1854, arose out of local grievances. These involved licence fees, reform of the administration of the goldfields and access to

¹⁵ Bailey: 'Self Government in Australia 1860-1900' 7 *Cambridge History of British Empire*, Part 1, 411; see also McNaughtan: *Australia: A Social and Political History* (1955), 134.

¹⁶ Captain Sir Charles Hotham R.N., K.C.B. had been appointed Lieutenant-Governor in June 1854. In May 1855 he was appointed Governor of the Colony and held office until his death in December 1855. He died only 38 days after signing the proclamation giving effect to the Constitution Act.

Crown lands near the goldfields. At the same time, the demands which were addressed by the diggers to La Trobe in 1854 included a claim for the franchise. It has been suggested that while the discovery of gold *accelerated* the movement towards political democracy, the path was determined without the great pressures and events which changed the face of Victoria in the fifties.¹⁷ At the same time, as has been aptly observed, the 'mere presence of a quarter of a million unrepresented diggers underlined the absurdity of a system in which political rights ended abruptly with the £10 lodger'.¹⁸ Within a year of the meeting of the first Victorian Parliament under responsible government, the property qualification for members of the Legislative Assembly had been abolished¹⁹ and universal manhood suffrage for electors of the Assembly had become law.²⁰ In 1858, the first of a line of Acts changing the composition and structure of the legislature was passed.²¹ This increased the number of members of the Assembly from sixty to seventy-eight, and the number of electoral districts to forty-nine.

IV

Section 1 of the Constitution Act 1855 authorized the newly constituted Victorian legislature to make laws 'in and for Victoria in all cases whatsoever'. The actual form of words differed from that used in the New South Wales Constitution Act which authorized the making of laws for the peace, welfare and good government of the colony in all cases whatsoever. There is no substantial difference in these two formulas. Three decisions of the Judicial Committee of the Privy Council affirmed the proposition that within the limits of the powers granted by their Constitutions, the colonial legislatures were not in any sense agents or delegates of the Imperial Parliament, but had and were intended to have plenary powers of legislation as large, and of the same nature, as those of the Imperial Parliament itself.²² In *Powell v. Apollo Candle Co. Ltd.*,²³ a question arose as to the power of the New South Wales legislature to authorize the Governor-in-Council to prescribe and impose customs duties in defined cases. The New South Wales legislature had been specifically authorized to

¹⁷ 'Even without gold, the Australian colonies, with no traditional conservative class and without established institutions, would hardly have left the broad road from Benthamite liberalism through political democracy towards "state socialism", though they might well have travelled it more slowly'. McNaughtan, *op. cit.*, 99.

¹⁸ *Ibid.*, 107.

¹⁹ Act 21 Vict. no. 12 (August 1857).

²⁰ Act 21 Vict. no. 33 (November 1857).

²¹ Act 22 Vict. no. 64.

²² *Reg. v. Burah* (1878) 3 App. Cas. 889; *Hodge v. The Queen* (1883) 9 App. Cas. 117; *Powell v. Apollo Candle Co. Ltd.* (1885) 10 App. Cas. 282. For a modern affirmation of the rule, see *The Commonwealth v. New South Wales* [1929] A.C. 431.

²³ (1885) 10 App. Cas. 282.

impose non-differential customs duties.²⁴ The Supreme Court of New South Wales had held that Parliament must itself fix the duties and could not entrust this power wholly or partly to the Governor or any other person or body. This view proceeded from the principle that the colonial legislature was a delegate of the Imperial Parliament, and that the maxim *delegatus non potest delegare* applied to deny power in the delegate to delegate further. This decision was reversed by the Privy Council which pointed to its earlier decisions and said that those cases had:

put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature. It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent or delegate.²⁵

Although limited in their legislative powers, the colonial Parliaments mirrored the mother Parliament in this respect.

There are provisions in the Victorian Constitution Act which referred specifically to the rules and usages of the Imperial Parliament. Section 34 which dealt with the making and adoption of standing orders governing various aspects of the business and relations of the Legislative Council and Assembly provided that until such standing rules and orders should be adopted, resort should be had to the rules, forms and usages of the Imperial Parliament which should be followed so far as they might be applicable to the proceedings of the Council and Assembly. In the course of the clashes between the two Victorian Houses, frequent reference was made to this provision in aid of the argument that the Legislative Council should model its action and conduct upon that of the House of Lords. This matter will be considered in the course of examination of the relations between the Houses. Section 35 of the Constitution Act authorized the Victorian Parliament to legislate to define the privileges, immunities and powers of the Council and Assembly and their members, subject to the proviso that such privileges, powers and immunities should not exceed 'those now held enjoyed and exercised by the Commons House of Parliament or the members thereof'. This power was exercised in 1857²⁶ and it was provided that the privileges powers and immunities of the Council and Assembly and of their committees and members should be those of the House of Commons as at the date of the passing of the Constitution Act, so far as they were not inconsistent with that Act or with any Act of the Victorian Parliament. It was further provided that the Journals

²⁴ As had the Victorian Parliament. Constitution Act 1855, s. 43.

²⁵ (1885) 10 App. Cas. 282, 290.

²⁶ 20 Vict. no. 1. Now re-enacted as ss. 12 and 13 of the Constitution Act Amendment Act 1928.

of the House of Commons should be *prima facie* evidence in any inquiry touching questions of privilege.

The validity of these provisions was sustained by the Supreme Court in *In re Dill*.²⁷ Dill was the printer and publisher of *The Argus* and had published an article relating to a committee of the Assembly, with particular reference to an individual member. The Assembly resolved that this was a scandalous breach of privilege and commanded Dill to attend the House. He disregarded the summons and was committed for contempt. In holding that the power given by section 35 of the Constitution Act had been well exercised by the legislation of 1857, the Supreme Court found that the publication outside the House of material which the Assembly adjudged to be a libel on it, or on a committee or member, was a contempt for which the House had authority to commit. Dill's application for *habeas corpus* was refused accordingly. Dill subsequently brought an action for false imprisonment against the Speaker of the Assembly. This time, in *Dill v. Murphy*,²⁸ it was argued that under the terms of section 35 of the Constitution Act the Victorian legislature was required to enumerate the several privileges of the House of Commons to which it laid claim, and that as it had claimed the privileges of the House of Commons in general terms, it had failed to comply with the requirements of the Constitution. This argument was summarily rejected in the Privy Council as 'absurd and plainly untenable . . . The Colonial Parliament have clearly defined the privileges claimed and could not have done so in any way more convenient'.²⁹

In *Stevenson v. The Queen*³⁰ in the course of a dispute between the Assembly and the Legislative Council, it was claimed that the Assembly, having passed resolutions imposing customs duties, had the privilege of authorizing customs officers to collect the duties until the end of the session in which the resolutions had been passed. The Supreme Court of Victoria, in rejecting the claim, stated that questions of the existence and the limits of privilege were matters of law to be decided by the courts.³¹

The scope of the power to commit for contempt of the House was considered by the Privy Council in *Speaker of the Legislative Assembly v. Glass*.³² The Assembly declared Glass to be guilty of contempt and breach of privilege and he was committed to gaol under

²⁷ (1862) 1 W. & W. (L) 171, 342.

²⁸ (1864) 1 Moo. N.S. 487.

²⁹ *Ibid.*, 514. The word 'define' in s. 35 was interpreted as meaning 'declare'.

³⁰ (1865) 2 W.W. & a'B. (L) 143.

³¹ The court went on to say that 20 Vict. no. 1, s. 2, which made the Journals of the House of Commons *prima facie* evidence of privilege, did not convert the question of privilege into an issue of fact.

³² (1871) 3 P.C. 560. See *Reg. v. Richards, Ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157, 162-163. See also Quick & Garran: *The Annotated Constitution of the Commonwealth of Australia* (1901), 503 ff.

the Speaker's warrant which was in general terms and did not specify any specific offence. On an application for *habeas corpus*, Glass was discharged from custody by Stawell C.J. on the ground that the Victorian Constitution Act and the Act of 1857 did not confer this power on the Legislative Assembly, although it was clear that the House of Commons had power to commit in this manner.³³ This decision was reversed by the Privy Council which affirmed the proposition that section 35 of the Constitution Act and the Act of 1857 gave the Legislative Assembly the *same* powers and privileges as belonged to the House of Commons as at the date of the passing of the Constitution. Since the House of Commons had the privilege of adjudging without appeal whether a contempt had been committed and also possessed the power of committing by general warrant without specifying the nature of the contempt, it followed that the Victorian Legislative Assembly also possessed these powers.

Arguments involving the scope of parliamentary privilege were addressed to the Supreme Court in *McDonald v. Cain*.³⁴ In that case, the question was whether the Electoral Districts Act 1953 was valid, not having been passed by an absolute majority in the Legislative Council, as required by section 60 of the Constitution Act. On the substantive point, the plaintiffs failed, but it had been argued by the Solicitor-General for the defendants that the action was not competent, since to grant the relief would involve a violation of the privileges of Parliament. Section 60 of the Constitution Act provided that 'it shall not be lawful to present to the Governor of the said Colony for Her Majesty's assent' bills effecting certain constitutional amendments passed by absolute majorities in each House. Declarations were sought against the Clerk of the House that it was unlawful to present the bill to the Governor, and against Cain and other responsible ministers that it was unlawful to advise the Governor to give the Royal assent. Similar arguments had been unsuccessfully addressed to the Supreme Court of New South Wales in the earlier case of *Trethowan v. Peden*.³⁵ Two members of the Supreme Court in *McDonald v. Cain*, Martin and O'Bryan JJ. held that no breach of privilege arose in granting the relief sought, while the third member of the Court, Gavan Duffy J., expressed some doubt, but declined to give a concluded answer on the point.

The Solicitor-General had stated his argument on privilege in the following terms: that by the joint standing orders of the two Houses, the clerk was required to present duly authenticated copies of bills

³³ *Sheriff of Middlesex Case* (1840) 11 A. & E. 273.

³⁴ [1953] V.L.R. 411.

³⁵ (1930) 31 S.R. (N.S.W.) 183. See Sawyer: 'Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence' (1944) 60 *Law Quarterly Review*, 83; Cowen: 'The Injunction and Parliamentary Process' (1955) 71 *Law Quarterly Review*, 336.

passed by the two Houses to the Governor. As such he was a servant of Parliament, and the grant of a declaration would involve an interference with the internal affairs of Parliament, and consequently a breach of privilege. As against the ministers, the grant of relief would be an interference with the constitutional right of the Governor to seek and obtain the advice of responsible ministers.

In dealing with these submissions, the Court pointed out that it had jurisdiction to determine the scope and limits of parliamentary privilege as a matter of law. It was noted further that in exercising the power conferred by section 35 of the Constitution Act, the Victorian Parliament had adopted the privileges of the House of Commons so far as they were not inconsistent with the Constitution Act or with any Act of the Victorian Parliament. In this case section 60 of the Constitution Act, assuming it to be applicable, provided in terms that it should be unlawful to present certain bills for the Royal assent. From this it followed that it must be open to the court to determine whether the offence of 'presenting' had been committed. Conceding the proposition that parliamentary privilege protected the internal proceedings of the two Houses,³⁶ there was no invasion of privilege here, since Parliament had done all that it could do with the bill, apart from presentation. So far as relief was sought against the ministers, there was no interference with their right to advise the Governor, or with the Governor's right to seek advice; the declaration merely stated what the law was so that the ministers might know what advice they might lawfully give. O'Bryan J. thought that as a matter of discretion an injunction might have been refused against the minister-defendants if it had been asked, but he noted that the Supreme Court of New South Wales had granted an injunction in similar circumstances in *Trethowan v. Peden*.

Whether an English court would take the same view of the scope of the internal affairs and procedures of Parliament is far from certain. But so far as Victoria is concerned, it is to be noted that the legislative implementation of section 35 of the Constitution Act limits the adoption of the privileges of the House of Commons by reference to the provisions of the Constitution Act and Acts of the Victorian Parliament. Section 60 of the Constitution specifically prohibits presentation. It seems clear from this that the privileges of the Victorian Houses and the House of Commons are not necessarily or invariably co-extensive.

It is to be noted further that Dixon C.J. has recently cast doubt on the propriety of the grant of an injunction in *Trethowan v. Peden*,³⁷ although this view was not necessarily shared by all the members of

³⁶ *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271.

³⁷ *Hughes & Vale Pty. Ltd. v. Gair* [1954] Argus L.R. 1093, 1094.

the court,³⁸ and O'Bryan J. in *McDonald v. Cain* had some doubts about the matter, at least so far as the minister-defendants were concerned. It is extremely unlikely that an injunction would ever be granted in the United Kingdom in comparable circumstances.³⁹

V

The Constitution Act 1855 has been regarded as the legislative source of responsible government in Victoria. That design was not very clearly apparent on the face of the instrument. Higinbotham, who as a minister of the Crown and as Chief Justice dogmatically asserted that the Act was a complete charter of responsible government, nevertheless admitted that 'that design has found . . . obscure legal expression in that Act'.⁴⁰ Jenks, who wrote the first systematic study of the government of Victoria in the early 1890's, spoke of the 'strange lack of allusion to the impending change' to responsible government in the constitutional documents of the period,⁴¹ and a later writer noted the 'surprising absence'⁴² of reference to ministerial responsibility in the Constitution Act.

In the Constitution Act, the word 'responsible' appears only three times: in marginal notes to sections 18 and 51, and in part 7 of Schedule D. For the rest the principles of responsible government have to be spelled out of the substantive provisions of the Act. Section 17 provided that on acceptance of an office of profit under the Crown by a member of either House, his seat should become vacant, 'but such person shall if duly qualified be capable of being re-elected'. Section 18 (to which was attached the marginal note 'who are responsible officers') named a group of officers of government, of whom four at least should be members of either House. Section 37 drew a distinction between appointments to public offices under the government: in general, appointments were in the hands of the Governor with the advice of the Executive Council, but the appointment of 'officers liable to retire from office on political grounds' was vested in the Governor alone. Section 50 provided for the payment of pensions to existing incumbents of offices, 'who on political grounds may retire or be released', while section 51 (with a marginal note 'pensions to responsible officers') provided for the payment of pensions for future holders of office. On the executive side, a new Commission and Instructions were

³⁸ McTiernan J. said that he did not 'consider that a determination of this application prejudices the question whether the judgments of the Justices of the Supreme Court in *Trethowan's Case* are right or wrong', *ibid.*

³⁹ See Holdsworth (1943) 59 *Law Quarterly Review*, 2.

⁴⁰ *Toy v. Musgrove* (1888) 14 V.L.R. 349, 396.

⁴¹ *The Government of Victoria* (1891), 206-207.

⁴² Melbourne: 'The Establishment of Responsible Government' 7 *Cambridge History of the British Empire*, 295.

issued to the Governor. The new Commission departed from the old in authorizing the Governor to appoint the Executive Council, and simply required him to transmit the names to the Colonial Office. Under the earlier Commission, his authority was limited to making temporary appointments until the pleasure of the Imperial government was known. Appointments still ran in the Queen's name and during her pleasure. The disposition of Crown lands was placed in the hands of the Governor with the advice of the Executive Council in accordance with colonial legislation. Provision was also made for the Senior Military Officer of the Colony to act if both the Governor and Lieutenant-Governor were incapacitated. The only material change in the Instructions which accompanied the Commission was the power given to the Governor to appoint a member of the Executive Council to preside during his absence. Under the old rule, the senior member presided as of course.⁴³

Of these provisions in the Constitution Act, section 18, which required a minimum of four named officers to be members of either House, was designed to insure against any attempt to carry on the government by a ministry independent of the legislature. In 1903, a further constitutional amendment was enacted (now section 16 of the Constitution Act Amendment Act 1928) providing that no responsible minister should hold office for more than three months without becoming a member of either House.

Scanty as were the references to the system of responsible government in the Constitution Act, there is no mention of Cabinet government. The Executive Council referred to in the Constitution Act⁴⁴ was in law a body consisting of *all* who had ever been appointed to it, unless they chose to retire from membership.⁴⁵ This meant that former ministers continued to be members of the Council. In this respect, the Executive Council was patterned on the Privy Council. As a working body, it comprised members of the ministry in office. In its working aspect, as Jenks observed, 'the Executive Council has two shapes, the formal and the informal. The latter, which is usually spoken of as the "Cabinet" is the real core and essence of the Government . . . The former is the "Executive Council" proper, presided over by the Governor . . . Here the decisions of the Cabinet are put into official form, appointments confirmed, resignations accepted, proceedings ordered, and notices published. It is the formal organ of the executive of the colony'.⁴⁶ The actual

⁴³ Jenks: *op. cit.*, 207-208.

⁴⁴ See s. 37.

⁴⁵ In 1886, Higinbotham C.J. on behalf of the judges of the Supreme Court proposed that they should be made members of the Executive Council. This came to nothing. See Cowen and Derham: 'The Constitutional Position of the Judges' (1956) 29 *Australian Law Journal*, 705, 710.

⁴⁶ *Op. cit.*, 275.

framework of Cabinet government was fashioned, as in the United Kingdom, by constitutional convention.

It is not too surprising that the references to responsible government in the Constitution Act 1855 were meagre and that the matter was left so largely to inference. The principal concern was to secure self-government in local matters and to take over responsibility for those matters which between 1851 and 1855 had been under the control of the United Kingdom government. Having achieved local control in these matters, it was not found necessary to spell out the principles of ministerial responsibility in any detail, since these were already assumed to be a normal feature of constitutional government.⁴⁷

But the great debate was not over the issue of ministerial responsibility, nor over the establishment of some measure of responsible government. It turned on the *extent* to which responsible government had been established by the Constitution Act 1855. The question first arose in the course of the disputes between the Legislative Assembly and Legislative Council in the 1860's when questions were raised as to the position and conduct of the Governor and the propriety of the conduct of the Home government in the course of the dispute. Higinbotham, as Attorney-General in the McCulloch ministry, dogmatically asserted that the Act of 1855 had made a plenary grant of self-government, and his views were embodied in a series of resolutions moved by him and carried in the Legislative Assembly in 1869, after he had ceased to hold office.⁴⁸

These views were restated by Higinbotham as Chief Justice of Victoria in the great case of *Toy v. Musgrove*.⁴⁹ That case provided him with a unique opportunity to expound his political philosophy, although he failed to persuade the court. The case, on any reckoning must be almost unique in the law reports, so far as it provides an elaborate examination of the scope and nature of responsible government by majority and dissenters alike. Toy was a Chinese who brought an action for damages against Musgrove, Collector of Customs, who had refused to allow him entry to Victoria. Musgrove had acted on the instructions of a responsible minister. The defence of Act of State was rejected on the ground that the Governor had no power to perform such an act and that the action taken against Toy had not been ratified by the Crown. It was also argued that the Crown had the power to exclude aliens, that in Victoria this power was vested in the Governor and was properly exercisable on

⁴⁷ See Melbourne, *op. cit.*, n. 42, 295. 'Of ministerial responsibility they said but little, because they thought it a normal feature of constitutional government.'

⁴⁸ Vic. Parl. Deb. 1869, IX, 2123. See Morris: *George Higinbotham, a Memoir* (1895), 160-189; Eggleston: 'Australia and the Empire 1855-1921', 7 *Cambridge History of the British Empire*, 521, 522-523.

⁴⁹ (1888) 14 V.L.R. 349.

his behalf by a responsible minister. This argument was adopted by Higinbotham C.J. and was expounded by him in a series of propositions.

I am of opinion, *First*, that 'The Constitution Act' as amended and limited by 'The Constitution Statute' is the only source and origin of the constitutional rights of self-government of the people of Victoria. *Secondly*, that a constitution or complete system of government by responsible advisers, as well as a constitution of the Houses of Legislature, was the design present to the minds of the framers of 'The Constitution Act', and that that design has found adequate, though obscure legal expression in that Act. *Thirdly*, that the two bodies created by 'The Constitution Act', the Government and the Parliament of Victoria, have been invested with co-ordinate and inter-related but distinct functions, and are designed, on the model of the Government and the Parliament of Great Britain, to aid each other in establishing and maintaining plenary rights of self-government in internal affairs for the people of Victoria. *Fourthly*, that the Executive Government of Victoria, consisting of Ministers of the Crown, are responsible to the Parliament of Victoria for the exercise of all the powers vested by 'The Constitution Act' in the Governor as the representative of the Crown in Victoria; and that they, and they alone, have the right to influence, guide, and control him in the exercise of his constitutional powers created by 'The Constitution Act'. *Fifthly*, that the Executive Government of Victoria possesses and exercises necessary functions under and by virtue of 'The Constitution Act' similar to, and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the internal affairs of Great Britain. *Sixthly*, that the Executive Government of Victoria in the execution of the statutory powers of the Governor, express and implied, and in the exercise of its own functions, has a legal right and duty, subject to the approval of Parliament, and so far as may be consistent with the Statute law and the provisions of treaties binding the Crown, the Government, and the Legislature of Victoria, to do all acts and to make all provisions that can be necessary and that are in its opinion necessary or expedient for the reasonable and proper administration of law and the conduct of public affairs, and for the security, safety or welfare of the people of Victoria.⁵⁰

Applying these principles to the present case, the plaintiff's claim failed. The right to exclude aliens was inherent in the constitutional government of any independent state or any quasi-independent State like Victoria. No treaty right was violated by the exclusion of the plaintiff, and it followed therefore that the power of exclusion could be exercised by a responsible minister, since the exercise of the power to exclude aliens was an act which was properly performable for the security, safety, peace and welfare of Victoria.

This view persuaded only one other member of the Court, Kerferd J. The majority were of the opinion that as no such power

⁵⁰ *Ibid.*, 396-397.

to exclude aliens had been expressly conferred by the Constitution Act, it followed that there was no executive power to exclude. The propositions stated by Higinbotham C.J. were all sharply challenged and rejected. Holroyd J. warned against being misled by abstract terms:

No such thing as responsible government has been bestowed upon the colony by name; and it could not be so bestowed. There is no cut-and-dried institution called responsible government, identical in all countries where it exists. Whatever measure of self-government has been imparted to the colony, we must search for it in the Statute law, and collect and consolidate it as best we may. Nobody can have studied the development of self-government in the Australian colonies without having observed the tentative and cautious manner in which the British statesmen have proceeded in their arduous task. The impulse which has warmed them into action has always been supplied from the colonies themselves.⁵¹

Williams J. lamented the conclusion which he found himself obliged to reach:

I have been for years, in common with, I believe, very many others, under the delusion (as I must term it) that we enjoyed in this colony responsible government in the proper sense of the term. I awake to find, so far as my opinion goes, that we have merely an instalment of responsible government.⁵²

Such an authority as the minister claimed had to be supported by the terms of the Constitution Act, and that Act did not establish the defendant's case.

The decision of the Supreme Court was reversed on appeal by the Privy Council.⁵³ Though counsel for the appellant pressed Higinbotham C.J.'s arguments, the Privy Council expressly declined the invitation to pass upon the large constitutional issues. The Board rested its decision upon the construction of Victorian statute law and on a common law principle that an alien does not have a right enforceable by action to enter British territory.⁵⁴

Higinbotham's views of the character of the responsible government granted in 1855 did not postulate that *all* matters touching Victoria were within the control of Victorian responsible ministers. There were certain Imperial matters which lay outside the control of responsible ministers, and in respect of these, and of matters which had been specifically reserved for Imperial decision by the Constitution Act, the Governor was an Imperial agent subject to Imperial direction. These qualifications and limitations on the scope of full responsible government, which prevented the Victorian gov-

⁵¹ *Ibid.*, 428.

⁵² *Ibid.*, 416.

⁵³ *Musgrove v. Toy* [1891] A.C. 274.

⁵⁴ See Harrison Moore: *Act of State in English Law*, 95-99.

ernment from being a perfect mirror of the government of the United Kingdom, were stated by Higinbotham C.J. in *Toy v. Musgrove*.⁵⁵

Since 'The Constitution Statute' the Governor retains for many purposes the same legal character of an Imperial agent or officer, and is subject to similar orders . . . his services can be lawfully commanded by the Crown in matters affecting Imperial interests. The relations during peace or in time of war of foreign independent States to Great Britain, so far as they may be affected by the indirect relations of such States to this dependency of Great Britain, the treatment of belligerent and neutral ships in Victorian waters in time of war, the control of Her Majesty's military and naval forces within Victoria, the reservation of or assent to Bills passed by the Legislature of Victoria (a subject expressly excepted by 'The Constitution Statute' from the operation of Victorian constitutional law), these and a variety of other questions by which Imperial interests may be affected and with regard to which Victorian constitutional law does not prohibit interference by the Imperial Government, still form subjects upon which commands may be lawfully issued to the Governor by the Imperial authorities. With reference to all such questions, the Governor is to fulfil his instructions without being controlled and without a legal right to be assisted by the advice of Her Majesty's Ministers for Victoria.

Apart from such matters, the Governor exercised his powers under the Constitution Act as the head of the executive government in Victoria and in respect of these functions he was in no sense an agent of the Crown or of the Imperial government; he was 'the local sovereign of Victoria'⁵⁶ advised by Victorian responsible ministers. Higinbotham C.J. pointed to provisions in the Royal Commission and Instructions and in the Letters Patent constituting the office of Governor which in his view failed to recognize this distinction between the two aspects of the Governor's position. So far as these instructions purported to authorize the Governor to do what he was already authorized to do by the Constitution Act, the Chief Justice stigmatized them as 'void',⁵⁷ while certain Imperial directions to the Governor to act in a particular manner were 'illegal'.⁵⁸ Examples of 'illegal' instructions were: authority to act in opposition to the advice given to the Governor by the Executive Council if in any case the Governor deemed it right to do so, and the regulation of the power of pardon in capital cases.⁵⁹

Higinbotham's views had been reflected in the draft Constitution bills which had been submitted to the Imperial Parliament in 1854. These, it will be recalled, had drawn a distinction between matters of Imperial and local concern and had sought to reserve control of

⁵⁵ (1888) 14 V.L.R. 349, 380.

⁵⁶ *Ibid.*, 381.

⁵⁷ *Ibid.*, 382.

⁵⁸ *Ibid.*, 383.

⁵⁹ *Ibid.*, 382-384.

the latter to the local government. This line of division had been rejected by the Imperial government which had insisted upon maintaining a *general* power of reservation and disallowance in all cases.⁶⁰ Higinbotham adhered to his views quite uncompromisingly and inflexibly. When, in the course of his differences as Attorney-General in the McCulloch ministry with the Judges of the Supreme Court in 1866, his views were supported by an opinion of the Imperial law officers, he characteristically prepared a memorandum objecting to this uninvited interference by Imperial ministers.⁶¹ As his biographer expressed it 'he was . . . resolute against the interference of Downing Street'.⁶² His insistence that in Imperial matters the Governor acted on the instructions of the Imperial government and not on the advice of the Victorian ministers called for special explanation of the Shenandoah incident. When the Shenandoah, an armed vessel of the Confederate forces, sailed into the port of Melbourne during the American civil war, a number of urgent problems of international law and diplomacy were raised, and Governor Darling consulted his Victorian ministers. Higinbotham, who was Attorney-General at the time, insisted that such advice as was given to the Governor by ministers was not given by them in that capacity, but as individual executive councillors. It has been observed however that the records do not suggest that the ministers were not acting in the ordinary way, and that the Governor's act in turning to his local ministers for advice on this occasion shows rather that the distinction between Imperial and local matters tended to break down in practice.⁶³

Higinbotham's views on the Governor's office affected him personally. As Chief Justice, he was not designated Lieutenant- or Acting-Governor. He had made it clear that he would not correspond with the Colonial Office on matters of domestic policy.⁶⁴

It has been aptly said that 'statesman rather than lawyer, Higinbotham had the future with him'.⁶⁵ As a member of the legislature, as a minister of the Crown, and a judge, he found himself opposed to the views of the Imperial government and, on occasion, to the views of his colleagues. His conception of the Governor's position,

⁶⁰ *Supra*.

⁶¹ Morris: *George Higinbotham, a Memoir* (1895), 116.

⁶² *Ibid.*, 159.

⁶³ See Bailey: 7 *Cambridge History of the British Empire*, 409-410. Bailey notes that 'the Ministers' would, as Higinbotham would have said, have felt bound to resign if their advice had been rejected; but they could scarcely have escaped responsibility to Parliament for the advice they gave . . . Higinbotham's attempt to show that in imperial affairs colonial ministers did not act as such was the counterpart of his rigid exclusion from domestic affairs of the Secretary of State. In practice, both tended to break down in illogical compromise.'

⁶⁴ His biographer observes 'George Higinbotham had not the slightest desire to be Governor of the Colony; but he resented the insult to his office of Chief Justice in being put aside, solely because he was resolute to uphold his view of the constitutional law.' Morris *op. cit.*, 203.

⁶⁵ Bailey, *op. cit.*, 397.

separating Imperial from local matters, has been characterized as 'startling'⁶⁶ in his own day. It has been noted that Higinbotham regarded certain Imperial instructions to the Governor as illegal. It was very clear that the Imperial government, though willing to make a very substantial grant of local autonomy and responsibility to the Colonial governments, still believed that Imperial interests called for some measure of control and supervision in remote and sometimes disorderly colonies which showed little evidence of political stability. Between 1856 and 1900, Victoria had twenty-eight ministries and in New South Wales and South Australia there were even more.⁶⁷ The desire to retain a measure of supervision over colonial activity had led the Imperial government to insist on a general power of reservation and disallowance in the Constitution Act 1855. It also led the Imperial government to regard the Governor as an agency by whom Imperial interests were protected and proper supervision of governmental activities was maintained. When a Governor's conduct fell short of the appropriate standard, the Imperial government did not hesitate to rebuke him, at least in earlier days. In the constitutional crisis of the sixties, Governor Darling had yielded to ministerial pressure and had sanctioned the levy of duties on a mere resolution of the Legislative Assembly. He had also permitted his ministers to contract a bank loan to obtain money for public purposes, and approved of the payment of official salaries without parliamentary approval. In justification of his action, Sir Charles Darling pleaded the usage of the Imperial Parliament and the extreme necessity of the case. He was corrected and sharply rebuked by Cardwell, the Colonial Secretary, in a despatch of November 1865. In this despatch, the Colonial Secretary observed that 'the Queen's representative is justified in deferring very largely to his constitutional advisers in matters of policy and even of equity; but he is imperatively bound to withhold the Queen's authority from all or any of those manifestly unlawful proceedings by which one political party, or one member of the body-politic, is occasionally tempted to endeavour to establish its preponderance over another'.⁶⁸ In recalling Darling, in a despatch of February 1866, the Colonial Secretary once again stated the principles upon which the Governor should act.⁶⁹ Later when the two Houses were locked in dispute over a proposed grant of money to Lady Darling, the Colonial Secretary in a despatch to the new Governor, Manners-Sutton, expressed the opinion that the Governor should only recommend the vote again to the legislature on specified terms.⁷⁰ This

⁶⁶ Eggleston: 7 *Cambridge History of the British Empire*, 524.

⁶⁷ New South Wales 29, South Australia 42. See Bailey, *op. cit.*, 499.

⁶⁸ Com. Pap. 1866, 1, 695, cited Todd: *Parliamentary Government in the Colonies* (1894), 137.

⁶⁹ Com. Pap. 1886, 1, 701, cited Todd, *op. cit.*, 138.

⁷⁰ Com. Pap. 1867-68, 1, 677 cited Todd, *op. cit.*, 147.

provoked bitter protest from the ministry which resented the attempt on the part of the Imperial government to limit the discretion of the Legislative Assembly as to the form of its legislative proposals. In the Imperial Parliament, there were strong expressions of opinion in the Commons and in the House of Lords that the Imperial government had not acted with firmness, and that the Victorian Governor should have been directed not to put the vote on the Darling grant to the legislature.⁷¹

In the later conflict between the two Houses in the seventies, the Governor, Sir George Bowen, had reluctantly agreed, after strong resistance, to the Berry ministry's decision to dismiss substantial numbers of civil servants. In a despatch of August 1878, the Colonial Secretary, Hicks-Beach, while making it quite clear that he did not intend to censure the Governor who had made the most strenuous efforts to settle the dispute between the Houses, expressed his disapproval of Bowen's conduct in allowing the removal of the civil servants. While affirming the general principle that the Governor should be advised by his local ministers, the Colonial Secretary stated that the maintenance of a permanent civil service removable only for specified misconduct or under a scheme of reductions duly authorized by Parliament was a constitutional principle of great importance. In such a case the Governor would have done better both from the standpoint of the Colony and from the maintenance of principles of parliamentary government to refuse to sign the documents dismissing the civil servants.

The conflicts between the two Houses in the sixties and seventies will be examined more closely at a later stage, but the particular episodes discussed show plainly that the Imperial government—and for that matter the Imperial Parliament—did not accept Higinbotham's view of the Governor's function and position. The Imperial view was reflected also in the Instructions to Governors. In the exercise of the prerogative of mercy, the Governor was required to act according to his own deliberate judgment whether or not the members of the Executive Council concurred. This was an instruction which Higinbotham stigmatized as illegal, and as Chief Justice he carried on a vigorous correspondence about it with Lord Knutsford. Ultimately the principle of ministerial responsibility triumphed and the Instruction was revised in 1892.⁷²

Other instructions directed the Governor to act on occasion on his own discretion and even against the advice of the Executive Council. The scope of this instruction was expounded in despatches by Colonial Secretaries, who were reluctant to spell out precisely the

⁷¹ See Todd *op. cit.*, 149-150.

⁷² See Bailey, *op. cit.*, 400-401.

circumstances in which a Governor might refuse to follow the advice of his local ministers on local matters, but stressed that they should be exceptional. These instructions were of obvious importance in the Victorian constitutional crises of the sixties and seventies. Advice to a Governor who had sought it from the Colonial Office sometimes brought cold comfort. In the dispute of the seventies, Sir George Bowen was told by the Colonial Secretary to 'take his stand on the law'.⁷³ But this left the Governor in a very difficult position in seeking illuminating advice on the law. If he turned to the local law officers, he was turning to ministers who were partisans; if he turned to the Imperial law officers, he provoked protest from the local ministry. Sir George Bowen drew attention to these very real difficulties, but received little assistance from the Home Government in coping with them.

The Governor's instructions were significantly modified in the nineties. By this time, Higinbotham's legal doctrine had come into its own. The reason has been well stated by a recent writer:

The governor's function did, in fact, move in this direction, mainly because at successive points, the original position was found to be untenable if the party system were to operate. The governor's powers were of little consequence except at a time of crisis produced by party conflict, but when such a conflict arose it proved impossible for him to tread a tight-rope between the antagonists. To reject the advice of a ministry was normally to support the opposition. To remain above party politics, it was, paradoxically, necessary to accept the advice of the ministry of the day. Moreover, the governor, if he suspected that his ministers were advising a course of action which was illegal, or subversive of the constitution, was dependent on the Crown law officers through the attorney-general in the ministry itself for legal advice. If, a layman and unsupported by organized local opinion, he had the temerity to reject their advice, then he alone was responsible for the consequence. The essentials of Higinbotham's conception of responsible government were reached in the end, because the system of divided responsibility proved, piece by piece, unworkable.⁷⁴

This did not mean however that in *every* case the Governor acted upon the advice of his Colonial government. The striking exception was, and is, the exercise of the prerogative of dissolution, for right up to the present day the Governor has on occasion declined to accept ministerial advice to dissolve. In 1872, Lord Canterbury refused a dissolution to C. G. Duffy, when another ministry could be formed, even though Duffy would have won an election.⁷⁵ In 1908, Sir Thomas Carmichael granted a dissolution to Sir Thomas Bent, and embodied his reasons in a memorandum. It is quite clear from this that the Governor did not simply act upon ministerial advice,

⁷³ *Ibid.*, 406.

⁷⁴ McNaughtan *Australia: A Social and Political History* (1955), 133.

⁷⁵ Bailey *op. cit.*, 408.

but exercised what he regarded as a clear discretion having regard to a number of factors which he set out in the memorandum.⁷⁶ More recently, in 1950, Sir Dallas Brooks refused a dissolution to Mr Hollway. In 1952, in the course of political manoeuvres designed to secure the passage of electoral reform, Sir Dallas Brooks refused a dissolution first to Mr McDonald, leader of the Country Party, then to Mr Hollway. He subsequently granted a dissolution to Mr McDonald.

No attempt has been made to examine all the cases of the exercise of the prerogative of dissolution in Victoria. The cases cited show, clearly enough, that right up to the present day the Governor exercises an independent discretion in deciding whether or not to grant a dissolution. It may be, of course, that the prerogative of dissolution is a special case, and that there is no significant difference between the position of an Australian Governor and of the Crown in the United Kingdom. It is true that there is no modern instance of a refusal to grant a dissolution in the United Kingdom, and the dissolution granted to Ramsay MacDonald in 1924 has been regarded by some as authority for the proposition that the Crown will *always* act on the advice of the ministry in granting a dissolution. If this is so, there is a significant difference of practice in the United Kingdom and Australia, but there is some doubt whether this reading of the 1924 English precedent is justified.⁷⁷ It has been argued that it is desirable in the interests of the Crown and its Dominion representatives that there should be more precise rules governing the circumstances and conditions in which a dissolution should be granted or refused.⁷⁸ It is implicit in this suggestion that both the Crown in England and the Governors in the Dominions retain a discretion, however ill-defined, in deciding whether to grant a dissolution on ministerial advice.

The Constitution Act 1855 had preserved Imperial control through the reservation and disallowance of colonial bills. Higinbotham conceded – as, on the law, he was bound to concede – that ‘the reservation of or assent to Bills passed by the Legislature of Victoria’ were matters ‘with regard to which Victorian constitutional law does not prohibit interference by the Imperial government’.⁷⁹ The Governor was instructed to reserve certain classes of bills and might reserve any bill for the Royal pleasure, and any colonial bill which had received the Governors’ assent might still be disallowed by the Crown within two years. But from the earliest days of responsible government the Imperial government exercised its powers very sparingly. As Bailey has noted, only five Australian colonial Acts were disallowed between

⁷⁶ Evatt: *The King and His Dominion Governors* (1936), 229-233.

⁷⁷ Evatt *op. cit.*, 65-69.

⁷⁸ *Ibid.*, 69.

⁷⁹ *Toy v. Musgrove* (1888) 14 V.L.R. 349, 380.

1856 and 1900. While reservation was not uncommon, it was often temporary, pending amendment of the bill. Only about forty bills during this period failed initially to receive the Royal assent, and about four-fifths of these subsequently became law with perhaps some modification. Purely local bills were vetoed only in the earlier years, and the veto became little more than a means of securing consultation and delay.⁸⁰ These figures covered all the Australian colonies and not merely Victoria.

There was some uncertainty about the precise scope of the requirement of reservation of colonial bills, and some difference of opinion between Imperial and colonial law officers. In 1907, the Imperial Parliament passed the Australian States Constitution Act.⁸¹ This imposed an obligation to reserve bills which (a) altered the constitution of the State legislature or either House (b) affected the Governor's salary (c) were required by any state Act passed after this Act or under the bill itself to be reserved. Subject to the further qualification that nothing in the Act should affect the reservation of bills in accordance with Royal Instructions to State Governors, the Act provided that it should not be necessary to reserve any other class of bill. In the debate on this Act in the Imperial Parliament, it was pointed out that the legislation was designed to clarify the position with regard to reservation, that it had the approval of the six Australian State governments, and that it had been approved by the local as well as by the Imperial law officers.⁸²

During the first half century of responsible government in Victoria and in all the Australian colonies, Imperial control over local legislation was progressively relaxed. Though the Imperial government might lament the impact of Australian colonial immigration laws on the fabric of Imperial foreign relations, the colonies were allowed to go their own way. The colonies were also allowed to work out their own fiscal and tariff policies. The Australian Colonies Government Act 1850 had authorized the imposition of uniform and non-differential customs duties. The Victorian use of this power to introduce a protective tariff was, from the Imperial point of view, the pouring of new, unexpected and unpalatable wine into differently devised bottles. Nonetheless, protection in Victoria was 'regretfully but immediately'⁸³ accepted. At first, and for some time, the Imperial government set its face against the grant of additional power to impose differential duties. But this power was conceded in two stages; first as between the Australian colonies themselves (including New Zealand) by the Australian Colonies Duties Act 1873,⁸⁴ which still

⁸⁰ Bailey *op. cit.*, 411.

⁸¹ 7 Edw. VII c. 7.

⁸² H.C. Debs. 4th ser., clxxvii, 242 ff. H.L. Debs. 4th ser., clxix, 1394-1395.

⁸³ Bailey *op. cit.*, 413.

⁸⁴ 36 & 37 Vict. c. 22.

forbade the imposition of differential duties outside this area, and then by the Australian Colonies Duties Act 1895,⁸⁵ which gave general power. Legislation on marriage and divorce, which was required by Instructions to be reserved, was at first controlled, but no veto was interposed after 1890.⁸⁶ On the other hand control of merchant shipping, which was regarded as a matter of distinctively Imperial concern, was exercised for a longer period.

There were occasions on which the intervention of the Imperial Parliament was invited by the colonies. The power of the Victorian legislature under the Constitution Act was limited to the making of laws in and for Victoria. To augment these powers, and to assist the colonies over the hurdle of extra-territorial limitations of power, the Imperial Parliament passed such legislation as the Extradition Acts, Naturalization Acts and the International Copyright Act. Again the United Kingdom Parliament with colonial consent was willing to pass such measures as the Australian States Constitution Act 1907, which resolved doubts relating to the reservations of State bills. There were, however, cases in which Imperial assistance was sought by a colonial ministry for quite different purposes. In the course of the deadlock between the Victorian Houses in the seventies, the premier, Graham Berry, urged the need for constitutional reform to ensure the supremacy of the Assembly. Constitutional amendment along these lines could not be achieved within the existing local constitutional framework as the Legislative Council would not concur, and an approach was made to the Imperial government by a ministerial delegation of two (the premier and Mr C. H. Pearson) who went to England in 1879 expressly for this purpose. The delegation asked for an amendment to section 60 of the Constitution Act to allow the *Assembly* to enact a constitutional amendment in two consecutive sessions with a general election intervening.

The United Kingdom government declined to comply, and the reasons for its refusal were stated in an elaborate despatch by the Colonial Secretary, Sir Michael Hicks-Beach, to the Governor of Victoria.⁸⁷ It was observed that 'the circumstances do not yet justify any Imperial legislation for the amendment of that constitution act by which self-government in the form which Victoria desired was conceded to her, and by which the power of amending the constitution was expressly, and as an essential incident of self-government,

⁸⁵ 58 Vict. c. 3.

⁸⁶ A Victorian divorce bill of 1860 was not assented to, but was allowed to stand in 1864. In 1889, the Victorian Parliament enacted a comprehensive divorce Act including a number of new grounds. The Act was assented to after representations had been made by the Australian Agents General. See Keith: *Responsible Government in the Dominions* (2nd ed., 1927). ii, 961.

⁸⁷ Comp. Pap. 1878-9, ii, 566; Todd: *Parliamentary Government in the Colonies*, 744-748. The Governor was the Marquess of Normanby.

vested in the colonial legislature with the consent of the Crown. The intervention of the Imperial Parliament would not, in my opinion, be justifiable, except in an extreme emergency, and in compliance with the urgent desire of the people of the colony when all available efforts on their part have been exhausted'.⁸⁸ The two Houses were counselled to observe the practices of the two Houses of the Imperial Parliament (advice which fell on unresponsive ears!) and other suggestions were offered to smooth the rough path of bicameral government in Victoria. The nub of the matter was stated at the end of the despatch: The Colonial Secretary wrote that the Imperial Parliament would not be prepared to disturb the settlement embodied in the Constitution Act at the request of one House of the legislature unless it was clear that the Council had refused to concur with the Assembly in a reasonable proposal for regulating the relations between the two Houses in financial matters in accordance with English practice, as embodied in the relations between Commons and Lords, and persisted in that refusal after the Assembly's proposals had been endorsed by an appeal to the electorate and had again been rejected by the Council.

This episode shows, quite plainly, that little more than twenty years after the establishment of responsible government it was the view of the Imperial government that internal colonial constitutional disputes should be resolved at home, and that the Imperial government should not make use of its legislative machinery to resolve them at the request of one of the warring elements. It is true that the despatch acknowledged that in an 'extreme emergency' Imperial legislative action might appropriately be taken, and indicated what might be regarded as appropriate circumstances. But in view of constitutional developments since that time, it seems clear that at the present day, no emergency, however extreme, would induce the Imperial Parliament to intervene in an internal State dispute at the request of a State ministry. The question is, no doubt, a theoretical one at the present day, but the 1879 episode is of great interest as indicating how early in the evolution of responsible government the Imperial authorities had set their faces against intervention in internal colonial constitutional disputes and crises.

In reviewing the scope of Imperial control of colonial activity, it remains to consider the scope and operation of the Colonial Laws Validity Act, 1865. The passing of this Act had been made necessary by the actions of Mr Justice Boothby of the Supreme Court of South Australia, who, in the course of his judicial activities in the early sixties had invalidated a series of South Australian Acts. Parts of the South Australian Constitution Act were declared invalid on the

⁸⁸ Todd: *op. cit.*, 745.

ground that colonial laws which were repugnant to the law of England were invalid to the extent of the repugnancy. Other Acts were struck down on the ground that they fell within a class of legislation which the Governor was required by his instructions to reserve, and that the Governor had given his assent without reserving them. Mr Justice Boothby's activity, not unnaturally, gave rise to great concern and irritation, and the Imperial law officers were called upon to advise. Their advice still left an area of doubt, particularly with reference to the competence of colonial legislatures to amend their constitutions.⁸⁹ In order to quiet these doubts, the Imperial Parliament enacted the Colonial Laws Validity Act. Sections 2 and 3 dealt with the doctrine of repugnancy and provided that a colonial Act should be void and inoperative *only* to the extent to which it was repugnant to the provisions of any United Kingdom Act of Parliament or any order or regulation made under such an Act extending to the particular colony. Section 4 dealt with the matter of neglect of instructions to reserve bills, and provided that this should not be a ground for invalidating an Act which had received the Governor's assent. Section 5 was concerned with the power to amend a colonial constitution. It was provided that every representative colonial legislature (defined as one in which at least one half of the legislative body was elected) should have full power to make laws respecting the constitution, powers and procedure of the legislature, provided that these laws should be passed in such manner and form as might from time to time be required by any Act of Parliament or Colonial Law for the time being in force in the colony.

The Colonial Laws Validity Act was conceived as 'an enabling Act, not a restrictive or disabling Act.'⁹⁰ It is entitled an Act to remove doubts as to the validity of colonial laws, and so far from being regarded as a curtailment of legislative power, was looked upon as one of the charters of colonial independence. But as the status of the self-governing colonies, and notably that of the self-governing Dominions evolved, the Act came to operate and to be regarded as a fetter.⁹¹ Section 2 of the Statute of Westminster 1931 prospectively excluded its operation in respect of the Dominions to which the Statute applied, and section 7 (2) made similar provision for the Canadian Provinces. Since the adoption of the Statute of Westminster in

⁸⁹ For an account of the events see Wheare: *The Statute of Westminster and Dominion Status* (5th ed.) 74 ff. Boothby incurred the wrath of the South Australian legislature which took steps to remove him. The interesting story of these proceedings is told by Todd *op. cit.*, 846-856.

⁹⁰ Quick and Garran: *The Annotated Constitution of the Australian Commonwealth* (1901), 348.

⁹¹ Thus in *Nadan v. The King* [1926] A.C. 482, Canadian Dominion legislation purporting to abolish appeals in criminal matters to the Privy Council was held invalid. One of the grounds of the decision was repugnancy under the Colonial Laws Validity Act, s. 2.

Australia,⁹² the Colonial Laws Validity Act no longer has any operation as regards the Commonwealth, but it still operates in respect of the Australian States, for which, unlike the Canadian Provinces, no special provision was made in the Statute. In *Attorney-General for New South Wales v. Trethowan*,⁹³ it was held that legislation enacted by the New South Wales Parliament was invalid insofar as it had failed to comply with the 'manner and form' requirements of section 5 of the Colonial Laws Validity Act. In *McDonald v. Cain*,⁹⁴ the Victorian Supreme Court made reference to section 5 in considering whether a Victorian Act was invalid, as not having been passed by the majorities required by section 60 of the Victorian Constitution Act. In this case, it was held that section 60 did not apply to the Act in question, but it was clear that had it done so, section 5 of the Colonial Laws Validity Act would have rendered the Act invalid.

VI

Throughout the century of responsible government in Victoria, there have been frequent conflicts between the two Houses of the legislature. An English observer described the Victorian Legislative Council as a conservative bastion without parallel in the British Empire.⁹⁵ In 1873, Higinbotham, who had been a minister during the constitutional crises of the sixties described the frustrations of members of the Assembly. 'We suffer shame and humiliation in the feeling that we are called night after night to sit and discuss public measures when we know that the whole of our discussion is fruitless and that our talk is idle, aimless and purposeless'.⁹⁶ His lament was echoed more than half a century later.⁹⁷ Frustrations sometimes drove Victorian politicians to extreme language in speaking of the Council; in 1888 Sir Henry Wrixon said: 'I have always firmly held that that class institution . . . has been hitherto the great curse of our politics'.⁹⁸ A ministerial memorandum submitted to the Secretary of State for the Colonies during the crisis of the seventies pointed to the fact that since the establishment of the Council more than eighty bills had been rejected by it and more than twenty others had been

⁹² Statute of Westminster Adoption Act 1942.

⁹³ [1932] A.C. 526.

⁹⁴ [1953] V.L.R. 411, especially 434.

⁹⁵ Sir Charles Dilke: cited Ingham: 'Political Parties in the Victorian Legislative Assembly' (1949) 4 *Historical Studies (Australia and New Zealand)*, at p. 242.

⁹⁶ Victorian Parliamentary Debates, xvii. 1271. Cited Serle: 'The Victorian Legislative Council 1856-1950, (1954) 6 *Historical Studies (Australia and New Zealand)*, 186, 201.

⁹⁷ See Mr A. A. Dunstan, Victorian Parl. Deb., cci, 50. Cited Serle *op. cit.*, 200.

⁹⁸ Vic. Parl. Deb. (2nd series) xxxix, 169. Cited Ingham: 'Political Parties in the Victorian Legislative Assembly' (1949) 4 *Historical Studies (Australia and New Zealand)*, 243. Graham Berry outdid this with his description in 1878 of 'a chamber which robs the people of the gold in the soil, and the land God gave them, and hounds Governor after Governor to his death, or the disgrace that is almost worse than death' Vic. Parl. Deb., xxviii, 115. Serle *op. cit.*, 194 speaks of this as a 'hysterical exaggeration'.

amended to such an extent that they had been abandoned by the Assembly.⁹⁹

Land legislation suffered badly at the hands of the Council during the nineteenth and early twentieth century; proposals for the enlargement of the Assembly were rejected in 1873 and again in 1885; bills to provide payment to members were rejected four times in the sixties, the abolition of plural voting came up six times between 1888 and 1899, when the Council finally allowed it to pass. The Council rigidly opposed proposals to grant the vote to women, and bills for this purpose were rejected on many occasions until 1908 when it was allowed to pass. This was seven years after women had been given the vote in Commonwealth elections, and Victoria was the last Australian State to come into line. There was also a long record of Council opposition to Assembly bills on social and industrial matters.¹ In 1947 the Council refused supply to the government to force an election, and did so again in 1952—after its reconstitution of 1950—in the course of political manoeuvres designed to achieve electoral redistribution.

As originally devised, the Council was an elective House with a high property qualification for members and electors.² The Council was intended to be a strong conservative body, representing the settled interests of the Colony. Victoria chose an elective upper chamber while New South Wales preferred a nominated Council. The Victorian draftsmen perceived that there was greater strength and durability in an elective chamber, which was not at the mercy of a 'vicious ministry'³ which could swamp it. Wentworth, the architect of the New South Wales nominated upper House, lived to rue the day. 'I never contemplated when I lent my hand to the framing of the Constitution that any ministry in this country would . . . sweep the streets of Sydney in order to swamp the House.'⁴ Under the Constitution Act, members and electors of the Legislative Assembly also had to satisfy a property qualification,⁵ but this disappeared in 1857 when the property qualification for membership was abolished⁶ and universal manhood suffrage was introduced.⁷ From this early date the structure and character of the two legislative chambers was very difficult.

⁹⁹ Todd *op. cit.*, 742.

¹ For an account of the Council's influence on legislation between 1856 and 1950, see Serle *op. cit.*, 191-200.

² Constitution Act 1855, ss. 4, 5.

³ 'We create an Upper House not to be swamped or coerced, and to be the creature of the ministry of the day, but to have the power to contend with a vicious ministry if such should exist, and a power seriously to withstand any rash legislation on the part of the Lower House.' J. V. F. Foster, Colonial Secretary in G. H. F. Webb Debate in the Legislative Council of the Colony of Victoria on the Second Reading of the New Constitution Bill 69-70, cited *op. cit.*, 187.

⁴ 'Sydney Morning Herald,' 26 July 1861, cited Serle *op. cit.*, 187.

⁵ Ss. 11, 12.

⁶ 21 Vict. no. 12.

⁷ 21 Vict. no. 33.

The authors of the Constitution Act designed the Legislative Council as a strong house. There was no provision in the Constitution Act for resolving deadlocks between the two Houses, and section 60 further safeguarded the position of the Council by requiring that constitutional amendments, including alterations in the constitution of either House, must be passed by an absolute majority of the membership of *both* Houses. Section 56 made special provision for appropriation legislation. It provided that bills for appropriating any part of the revenue of Victoria and for imposing taxation should originate in the Assembly and might be rejected, but not altered, by the Council. As a matter of law, this was the position of the House of Lords, as established by long constitutional usage, and the Lords had been so sparing in the exercise of the power to reject that it was possible to argue as a matter of constitutional practice that there was no real power to reject an Appropriation Bill. From this it was argued that the Council should model its action upon the practice of the House of Lords, and this was reinforced by reference to section 34 of the Constitution Act which authorized the two Houses to prepare and adopt standing rules and orders, but until such rules were adopted 'resort shall be had to the rules forms and usages of the Imperial Parliament of Great Britain and Ireland which shall be followed so far as the same may be applicable to the proceedings of the said Council and Assembly respectively.'

During the crises and deadlocks between the Houses in the sixties and seventies, Governors and Colonial Secretaries urged upon the Council the desirability of following English practice. In a despatch of 1879,⁸ the Colonial Secretary, Sir Michael Hicks-Beach, referred to a statement of the Victorian Premier, Graham Berry that the actions of the Legislative Council made it perennially uncertain whether supply would be forthcoming. The Colonial Secretary observed that 'this difficulty would not arise if the two Houses of Victoria were guided in this matter, as in others, by the practice of the Imperial Parliament, the Council following the practice of the House of Lords, and the Assembly that of the House of Commons'.⁹ The Council, for its part, rejected the advice to look to the Lords as a model: the Council was an *elective* chamber, whose privileges, immunities and powers were declared, equally with those of the Assembly, to be 'those of the Commons House of Parliament of Great Britain,' and it was constitutionally empowered to deal with all questions of legislation on an equal footing with the Assembly, subject only to section 56 of the Constitution Act which specifically authorized it to reject an Appropriation Bill. The argument did not

⁸ *Supra*, p. 31.

⁹ Todd *op. cit.*, 746.

lose force with the passage of time; for it was said that the change in the status of the House of Lords following the passing of the Parliament Act 1911 made the analogy to the Lords even less compelling and the Council presumably acted on its reading of the Constitution as late as 1952 in refusing supply to the government.

The crises and deadlocks of the sixties and seventies have been dealt with by a number of writers¹⁰ and only a short summary will be attempted here. In 1865, the Assembly included a Tariff Bill and a Gold Duties Repeal Bill in the Appropriation Bill, together with a new form of preamble which, in effect, asserted an exclusive right in the Assembly to grant supply. The Council protested that the inclusion of foreign matter in an Appropriation Bill was a violation of long established constitutional practice, and laid aside the Bill until the various matters were dealt with separately. The McCulloch ministry had tacked the Tariff Bill to the appropriate measure, fearing that if the Tariff Bill were sent up separately it would be rejected as a protectionist measure by the Council. In November 1865, the Tariff Bill was sent up separately, and this time the Council rejected the Bill, taking the high ground that it had power to do so under section 56 of the Constitution Act. One of its stated reasons for rejecting the Bill was that the issue of protection had never been submitted to the country. The ministry was granted a dissolution, and was returned with greater strength. The Council now stated that it would accept protection, but would insist on a strict adherence to United Kingdom practice with respect to the contents of bills. The Assembly then sent up a new Tariff Bill which included the Gold Duties Bill and retained the offensive preamble and thus was again rejected by the Council. The ministry resigned, and the Council stated that it would accept the two bills if sent up separately with the customary preamble. An alternative ministry could not be found and the McCulloch ministry resumed office. A conference between the Houses arranged a compromise as a result of which the Bill was passed by the Council with an amended preamble and with an assurance from the ministry that there was no suggestion of tacking in the form in which the measure was sent to the Council.

When the Tariff Bill was first passed by the Assembly early in 1865, immediate collection of the duties which it imposed was authorized. When the Council rejected the composite bill, the collection of the duties was challenged. In *Stevenson v. The Queen*¹¹ the Supreme Court rejected the Assembly's claim of privilege to levy

¹⁰ See Crowley: *Aspects of the Constitutional Conflicts Between the Two Houses of the Victorian Legislature 1864-8* (M.A. thesis, University of Melbourne); Parnaby: *The Economic and Political Development of Victoria 1877-80* (Ph.D. thesis, University of Melbourne); Bailey *op. cit.*, 421 ff.

¹¹ (1865) 2 W.W. & a'B. (L) 143, *Supra*.

duties by resolution until the end of the session. Notwithstanding the decision, the practice was not abandoned until some time later. There was therefore money in the Treasury, but no Appropriation Act had been passed authorizing its disbursement. The ministry then resorted to the device of borrowing from a bank which made advances equal to the amount of the credit of the Colony. The ministry used this loan money to carry on the work of government. By arrangement, the bank brought actions under the Crown Remedies Act for repayment of its advances and the Attorney-General (Higinbotham) confessed judgment, whereupon warrants were duly countersigned for payment. This procedure was successfully challenged in *Alcock v. Fergie*.¹² The Crown Remedies Act provided that on receipt of a certificate that judgment had been obtained, it should be lawful for the Governor to cause to be paid out of the consolidated revenue such damages as were assessed under the authority of the Act. It was argued on behalf of the ministry that the Crown, by confessing judgment, made moneys legally available for the satisfaction of the judgment. The Supreme Court held that in order to render any part of the consolidated revenue legally applicable and available, Parliament must have voted and actually appropriated money for the purpose. 'Whatever may be the validity of the judgment it cannot be legally satisfied until the will of Parliament on the question has been expressed, and no expression of that will has, in our opinion, been conveyed by the Crown Remedies Act.'¹³

Dispute between the two Houses arose again in 1867. Governor Sir Charles Darling had been recalled for his part in the earlier dispute. His crowning offence had been a statement which he attached to a petition to the Crown forwarded at the request of a number of Victorian executive councillors, a petition which challenged the Governor's action in the course of the constitutional dispute. In his statement, Darling charged the petitioners with treacherous conspiracy against him, and expressed the hope that they would never again hold office. He was sharply rebuked by the Secretary of State, Mr Cardwell, for lowering himself into the arena of party and factional politics, and was recalled. This action provoked bitter protest from the McCulloch ministry, and the Assembly in its Appropriation Bill for 1867 included a vote of £20,000 to Lady Darling. The Council rejected the Bill on the ground that the grant was a breach of the Colonial Regulations affecting public servants, and ought not to have been dealt with in this way by the Victorian Parliament, and on the wider ground that to tack the grant to an Appropriation Bill was an unconstitutional attempt to deprive the Council of its

¹² (1867) 4 W.W. & a'B. 285.

¹³ *Ibid.*, 319.

constitutional powers. The Assembly was dissolved and an election followed, in which the ministry was returned with a strong majority. The ministry signified its intention of sending up the Darling grant with the Appropriation Bill. At this stage, the Governor received instructions from the Colonial Secretary not to permit the Bill to go up in this form, and in view of this, the ministry resigned. After protracted negotiations, a new administration under Sladen was formed, but it was defeated by McCulloch's supporters in the Assembly and resigned in June 1868, and the McCulloch ministry returned to office. At this stage, the conflict came to an end through the action of Sir Charles Darling who was reinstated in the colonial service on condition that he advise the Victorian Government that he was unable to accept the proposed grant either for his wife or for himself. The correspondence was laid before the Parliament and the dispute evaporated.¹⁴

Almost a decade later the conflict was reopened by the Berry ministry which, in 1877, included a vote for payment of members in an Appropriation Bill. The Council had rejected separate bills for the payment of members in 1860, 1865, 1867 and 1869, and had agreed to a three year trial in 1870. The Council laid aside the Appropriation Bill, and the government, to highlight the consequences, advised the dismissal of large numbers of civil servants and judges of inferior jurisdictions. The Governor, Sir George Bowen, had grave doubts about the legality and propriety of this action, but finally acceded to the demands of the ministry. His compliance was regretted by the Home government in a despatch to the Governor. Ultimately a *separate* bill for the payment of members was accepted by the Council, and payment of members was made permanent in 1886.

The Legislative Council emerged from the conflicts of the sixties and seventies with its powers intact; and it had maintained its view of the propriety of exercising its powers under section 56 of the Constitution Act by laying aside objectionable measures. Following the conflicts of the sixties, the McCulloch ministry took no steps to initiate constitutional reform, but the Council moved to strengthen its own position by broadening its base. An Act of 1869 reduced the property qualification for membership by half—from freehold to the value of £5,000 to £2,500, with a corresponding reduction in annual value, while the elector's qualification was reduced to a holding of an annual value of £50.¹⁵ This halving of qualifications

¹⁴ Darling was afterwards allowed an annual pension of £1,000 dating from October 1866. He died in January 1870, and the Victorian Parliament, on a message from the Governor, passed an Act (1870, no. 362) conferring an annual pension of £1,000 on Lady Darling and making provision for his children.

¹⁵ 32 Vict. no. 334.

increased the Council electorate from 12,000 to 20,000. During the crisis of the seventies, the Berry administration made strong demands for constitutional reform to secure the predominance of the Assembly. These met with no success at home, and the application for Imperial legislation was also rejected.¹⁶ In 1881, however, local legislation was enacted which modified the structure, membership and tenure of the Council, but in no wise affected its powers. This Act which was passed after some negotiation between the Houses reduced the property qualification for members to freehold of the annual rateable value of £100. The property qualification for electors was reduced to possession of freehold of the annual value of £10, or a leasehold originally created for not less than five years or an occupying tenancy of an annual value of £25. The membership of the Council was increased from thirty to forty-two and the number of provinces from six to fourteen, while the tenure of members was reduced from ten to six years.

The broadening of the Council's membership and electorate served, obviously, to strengthen its position and its resolve not to be governed by English precedent, which in its opinion were inapplicable to an elected and representative upper chamber. It had suffered no diminution of power as a result of the conflicts of the sixties and seventies, and Berry's proposals for resolving deadlocks had failed to pass. In the remaining years of the nineteenth century, the Council rejected a number of important bills sent up by the Assembly, and in 1893-4 a parliamentary Royal Commission recommended the referendum as the solution for deadlocks. In 1903 the Irvine government secured the passage of a deadlock provision. This provided that if the Assembly passed a bill which was then rejected or returned with unacceptable amendments by the Council, and if the Assembly, not later than six months before the date of its normal expiry by effluxion of time, was dissolved specifically because of the disagreement between the two Houses, and if then the Assembly passed the bill once again, and it was again rejected or amended in unacceptable manner by the Council, the Governor might dissolve both Houses simultaneously not less than nine months nor more than twelve months after the first dissolution. It is to be observed that this extraordinarily cumbersome procedure made no provision for a joint sitting, took a great deal of time and in any event did not apply to bills altering the constitution of either House.¹⁷ The Irvine Bill also modified section 56 of the Constitution Act by providing that a bill should not be construed as one appropriating any part of the revenue or for imposing any duty rate tax rent return or import simply by reason of its containing provisions for

¹⁶ *Supra*.

¹⁷ Constitution Act 1903, (no. 1864), s. 31.

the imposition of fines or other pecuniary penalties or payments for services or license fees. It was also provided that the Council might make suggestions for the amendment of money bills at certain specified stages, subject only to the qualification that it might not suggest amendments which would impose increased charges or burdens on the people.¹⁸ The Act also reduced the membership of the Council which had been increased to forty-eight in 1888,¹⁹ to thirty-five,²⁰ and decreased the property qualification for membership to freehold of an annual value of £50,²¹ and of electors qualifying as owners lessees or occupying tenants to an annual value of £15.²²

These constitutional amendments, so far from weakening the position of the Council once again served to strengthen its position. The deadlock provisions were so slow and cumbersome as to be inoperative, while the Council was specifically given additional powers over money bills. An informed commentator observed that the net result was to make the Council probably the most unsailable second chamber in the world.²³

Payment for members of the Council was introduced in 1922,²⁴ while for both Houses women were placed in a position of equality with men as electors in 1908,²⁵ and as candidates and members in 1923.²⁶ Preferential voting for the Assembly was introduced in 1911²⁷ and for the Council in 1921,²⁸ while compulsory voting was introduced in Assembly elections in 1926²⁹ and for the Council in 1935.³⁰

Between 1935 and 1937, further moves were made to provide a more effective deadlock procedure. Mr Dunstan's Country Party administration, with Labour support, unsuccessfully attempted to secure the passage of a bill providing for the automatic passing of legislation (excluding bills to abolish the Council) without the consent of the Council, provided that the Assembly had been dissolved after rejection of the bill by the Council and had then again passed the bill. In 1937 agreement was reached on a new deadlock pro-

¹⁸ *Ibid.*, s. 30.

¹⁹ Act no. 995.

²⁰ Constitution Act 1903, s. 10. This reduction was effected following the enactment of the Commonwealth of Australia Constitution Act 1900. S. 10 provided for 34 ordinarily elected members and one representative elected by public and railway servants. The number was reduced to 34 (omitting the public servant representative) in 1906.

²¹ *Ibid.*, s. 18.

²² s. 19.

²³ Eggleston: *George Swinburne* (1931), 106. Cited Serle *op. cit.*, 189.

²⁴ Constitution Act Amendment Act 1922 (no. 3218). It was fixed at £200 *per annum*.

²⁵ Adult Suffrage Act 1908 (no. 2185).

²⁶ Parliamentary Elections (Women Candidates) Act 1923.

²⁷ Act no. 2321.

²⁸ Act no. 3139.

²⁹ Compulsory Voting (Assembly Election) Act 1926.

³⁰ Legislative Council Elections Act 1933.

cedure. It was provided that if the Council rejected a bill, and the Assembly was dissolved in consequence of the rejection not later than six months before its normal expiry of effluxion of time, and the bill was again passed by the Assembly not less than nine months after the date of the second reading of the bill when *first* passed, and was again rejected by the Council, the Governor might then dissolve the Council. If, after the dissolution, the Council again rejected the bill, the Governor might convene a joint sitting of both Houses at which the bill might be carried by an absolute majority. Certain bills, including bills for the abolition of the Council, were excluded from the operation of the provision.³¹ The Act also expressly prohibited tacking, by providing that an annual Appropriation Bill should deal only with appropriation.³² The property qualification for membership of the Council was reduced to £25,³³ and the age qualification from thirty to twenty-one years.³⁴

The Legislative Council Reform Act 1950³⁵ abolished the property qualification for membership of the Council³⁶ and introduced adult suffrage in Council elections.³⁷ Thereafter the structural differences between the two Houses were confined to tenure, and to some extent, to the character of the electorates. The Council tenure was six years, subject only to dissolution under the 1937 deadlock provisions, while members of the Assembly held office for three years, unless, as not infrequently happened, the House was dissolved before that time. Particularly after the Assembly redistribution effected by the Electoral Districts Acts 1953, the weighting of rural votes was more pronounced in the Council. But apart from this, the Council, like the Assembly, was a popularly based House. Before 1950, though to a diminishing extent, the Council membership and electorate had been restricted, and in this sense the Act of 1950 worked a reform of a fundamental character. As between two popularly elected Houses there was little persuasion in any argument which sought to pattern their relations *inter se* on British practice and this argument, as has been noted, was rejected by the Council from the early days of responsible government. The present position is that the Council regards itself as a chamber of co-ordinate jurisdiction with the Assembly controlled only by the terms of section 56 of the Constitution Act 1855, as modified by section 30 of the Constitution

³¹ Constitution (Reform) Act 1937, s. 2.

³² *Ibid.*, s. 3.

³³ *Ibid.*, s. 5 (2) (a).

³⁴ *Ibid.*, s. 5 (1) (a).

³⁵ Serle *op. cit.*, 191, describes the circumstances in which it passed into law. 'In its eagerness for office, the Country Party was willing to accept Council reform as one of the conditions of support laid down by the Labour Party. Success was only made possible by the unexpected conversion of two Liberal Councillors.'

³⁶ S. 2.

³⁷ S. 3.

Act 1903 which purported to define money bills and to authorize the Council to suggest amendments to money bills at prescribed stages in the legislative process. Since 1950 the Council has exercised its powers under section 56 to reject a supply bill; it did so in 1952 to force an election on the issue of electoral reform of the Assembly and it has rejected other measures sent up by the Assembly. The procedure of 1937 is available to resolve protracted deadlocks, but it cannot be doubted that after a century marked by constant conflict between the two Houses, the Council has emerged with its powers intact, and to some extent increased, though it has been profoundly changed in the character of its membership and electorate. No doubt as a revising chamber, the Council can and does perform useful functions, but some may question the purpose of preserving a bicameral structure when the two Houses are so largely identical in structure.

VII

The Constitution Act 1855, made provision for a Legislative Assembly of sixty members elected for five years on a restricted franchise, while members were required to possess a substantial property qualification. The property qualification was abolished in 1857, and universal manhood suffrage was introduced in the same year. Women did not become eligible to vote in Assembly elections until 1908, or eligible for membership of the Assembly until 1923. The tenure of membership was reduced to three years in 1858, and the number of members was increased to seventy-eight in that year. There was a further increase in membership to eighty-six in 1878, and to ninety-five in 1888. In 1903, following the inauguration of the Commonwealth in 1901, the Assembly was reduced to sixty-eight members, and three years later to sixty-five. These numbers remained unchanged until 1953, when the Electoral Districts Act 1953 was passed. This provided that Assembly electoral districts should be based on Commonwealth Electoral divisions, on the footing of two State districts for every one Commonwealth division. This is subject to the qualification that any such redivision of State districts must not reduce the total membership of the Assembly. At the present time, there are thirty-three Commonwealth electoral divisions in Victoria, and the consequent Victorian redistribution has brought the Assembly membership to sixty-six.

In the course of the last century, a number of Acts has been passed which bear upon the constitution and working of the Assembly. Payment of members was first established upon a regular and permanent basis in 1886, when it was fixed at £300 per annum. Since that time, the amount has been increased on a number of

occasions, and special provision has been made for payment to the Speaker, the Chairman of Committees, the Leader of the Opposition, and to leaders of any recognized party which has at least ten members in the Assembly, of which party no member is a responsible minister. Provision has also been made for special payments to the Deputy Premier and to the Deputy Leader of the Opposition, and for Government and party whips. Plural voting was abolished for Assembly elections in 1899, after a protracted battle with the Legislative Council. Voting by post was first introduced for a trial period in 1900, and was made permanent in 1910. Preferential voting for Assembly elections was enacted in 1911, and compulsory voting in 1926. Provision was made for absentee voting at elections for the Assembly in 1927. In 1935 civil servants and railway employees were permitted to contest any parliamentary election without having first to resign from the service. Under the Parliamentary Elections (State Servants) Act 1953, members of these services were entitled to reinstatement after they had ceased to be members of the Victorian Parliament, and this privilege was extended in 1955 to cover election to and retirement from the Commonwealth Parliament.

The Constitution Act 1855, sections 17 and 18, excluded seven named officers of government from the blanket prohibition against the holding of offices of profit under the Crown by members of the legislature. The seven named offices were those which might be held by responsible ministers. On appointment as a responsible minister, a member of the legislature vacated his seat, but was eligible for re-election. The obligation to vacate and submit for re-election was first modified by the Officials in Parliament Act 1883. This provided that where a minister had been elected to Parliament he could change his portfolio without vacating his seat. The requirement to seek re-election on appointment disappeared with the enactment of the Officials in Parliament Act 1914. This was substantially re-enacted by the Constitution Act Amendment Act 1928, section 20, which provides that when a member of either House is appointed as a responsible minister, his acceptance of the appointment will not vacate his seat.

Of the seven named holders of office set out in section 18 of the Constitution Act, at least four were required to be members of either House of Parliament. An Act of 1859 increased the number of ministers to nine, preserving the minimum requirement of four members of Parliament. The Officials in Parliament Act 1883 again increased the number of ministers who might be members of either House to ten; and it was again provided that not less than four should be members, and that not more than eight should be members of the Assembly. The number of responsible ministers was

reduced to eight by the Constitution Act 1903; of whom no more than two might be members of the Council and six of the Assembly. The number of ministers was increased from eight to nine in 1936. The Constitution Act Amendment Act 1944 made provision for three additional responsible ministers who were to be paid £250 a year in addition to their parliamentary salaries. In 1947, the number of ministers (excluding the three in this special category) was raised from nine to ten, and it was raised again to twelve in 1950. This Act provided that four ministers might be members of the Council (formerly two), and reduced the maximum number of ministers in the special category from three to two. This allowed for a ministry of fourteen. The Parliamentary Salaries and Allowances Act 1954 placed the two additional ministers on the same plane as other responsible ministers, subject only to a salary differentiation between ministers. The Act provided specific salaries for the Premier and Deputy-Premier, then provided salaries of a specified amount for 'ten other responsible Ministers of the Crown' and at a lower rate for 'each of not more than two other responsible Ministers of the Crown.'

VIII

Some important questions have arisen with respect to the position of the judiciary in Victoria. The Constitution Act, section 38, substantially following the Act of Settlement 1701, provided that the commissions of judges of the Supreme Court should continue and remain in full force during their good behaviour notwithstanding the demise of the Crown, provided always that it should be lawful for the Governor to remove any such judge on the address of both Houses of the legislature. There is a good statement of the conditions which might work a forfeiture of the judge's office for misbehaviour in an opinion by Higinbotham, as Attorney-General, in 1864.³⁸

While it is clear that in the United Kingdom, a superior judge may be removed only for misbehaviour or by address, there were, and still are some doubts about the position in Victoria. So far as removal is concerned, these doubts arise from the provisions of an Imperial Act, known as Burke's Act, passed in 1785.³⁹ This, so far as material, provided that if any person holding office by letters patent should be wilfully absent from the Colony wherein the same

³⁸ 'Misbehaviour includes firstly, the improper exercise of judicial functions; secondly, wilful neglect of duty or non-attendance; and thirdly, a conviction for any infamous offence, by which, although it is not connected with the duties of his office, the offender is rendered unfit to exercise any office or public franchise' *Votes and Proceedings of the Legislative Assembly, Victoria 1864-65*, ii, ch. 2, 11.

³⁹ 22 Geo. III c. 75. Confirmed and amended by 54 Geo. III c. 61.

is or ought to be exercised, without a reasonable cause being allowed by the Governor and Council of the Colony, or should neglect the duty of such office, or otherwise misbehave therein, it should be lawful for the Governor-in-Council to amove such person from the office. An appeal against amotion lay to the King-in-Council.

Burke's Act, which has been held to apply to judges holding office by letters patent,⁴⁰ was enacted to compel holders of offices to perform their duties in person and to strike at the practice by which office holders remained in the United Kingdom and paid a substitute to discharge their duties in the colony. It is apparent that the mischief which the Act was designed to remedy has had no conceivable application to Victoria during the century of responsible government. If, however, it is law in Victoria, it confers power on the Governor-in-Council to amove a judge in circumstances in which the King-in-Council would have no comparable power in respect of a High Court judge in England.

This Act gave power to *amove* a judge. Another local Act, 15 Vict., no. 10, section 5, passed not long before responsible government was introduced in Victoria, authorized the Governor-in-Council to *suspend* judges in prescribed circumstances,⁴¹ which included incapacity, neglect of duty and wilful absence from the Colony. This power to suspend survived in Victoria as late as 1915, when it was re-enacted as section 10 of the Supreme Court Act. It was subsequently repealed and did not appear in the Supreme Court Act 1928.

In the course of a dispute between the Victorian Supreme Court and Higinbotham, as Attorney-General, between 1864 and 1866, the question was raised whether the power of amotion conferred by Burke's Act and the power of suspension conferred by the local Act survived the passing of the Constitution Act 1855. The controversy began with the question whether Sir Redmond Barry, a justice of the Supreme Court, must ask and be granted permission to leave Victoria. Higinbotham's view was that Burke's Act and the local Act applied notwithstanding the passing of the Constitution Act, and that a judge must seek and be granted leave, as he might otherwise be regarded as wilfully absent within the terms of the two Acts referred to. The view of the judges was that Burke's Act and

⁴⁰ *Willis v. Gipps* (1846) 5 Moo. P.C. 379.

⁴¹ It shall be lawful for the Lieutenant-Governor of the said colony with the advice of the Executive Council thereof to suspend from his office until the pleasure of Her Majesty be known any judge of the said court who shall be wilfully absent from the said Colony without a reasonable cause to be allowed by the said Lieutenant-Governor and Executive Council. And also any Judge who shall become incapable, or who shall neglect to perform the duties of his office, or who shall otherwise misbehave himself.

the local Act were impliedly repealed by section 38 of the Constitution Act which spoke with the authority of an Imperial statute, and that section 38 provided the only means of removing a Supreme Court judge. Higinbotham prepared an elaborate opinion in which he argued that there was no inconsistency between the Constitution Act and Burke's Act, and that both were law in Victoria. As the power of removal under Burke's Act survived, it followed, in Higinbotham's view, that the lesser power to suspend authorized by 15 Vict., no. 10, section 5, also survived.

The judges asked that the question be referred to the Privy Council, and their petition was transmitted by Governor Darling to the Colonial Secretary, together with a statement of Higinbotham's views. The Colonial Secretary, Mr Cardwell, considered that the questions raised by the judges were 'as yet entirely of an abstract and theoretical character' and declined to submit them to the Privy Council, but referred the matter to the Imperial law officers, Sir Roundell Palmer, Attorney-General, (later Lord Selborne), and Sir Robert Collier, Solicitor-General, whose opinion supported Higinbotham. The conclusion they reached was that there was no inconsistency between section 38 of the Constitution Act and Burke's Act, so that the Governor-in-Council might still remove a judge under the terms of that Act. On the question of suspension, they stated: 'We also think it is the better opinion that they (the Governor-in-Council) can still suspend judges under the Local Act, 15 Vict., no. 10, section 5, the power of suspension, for the causes therein mentioned being not inconsistent with the tenure of the office during good behaviour, especially if the office is (as we consider it to be) held subject to the power of removal, for the like causes, given by the 27 Geo. III c. 75.'⁴² In an earlier opinion in 1862 on a case arising in Queensland, the Imperial law officers, Sir William Atherton, Attorney-General, and Sir Roundell Palmer, Solicitor-General, had expressed the view that Burke's Act continued to apply. In the Queensland case, however, there was no local Act expressly authorizing suspension of a judge and the law officers were of opinion that in the absence of express authority, there was no power to suspend.

At this point, the controversy came to an end with an expression of regret from the Victorian judges that the matter had not been allowed to go to the Privy Council,⁴³ and it seems clear that they were not persuaded of the soundness of the views of Higinbotham and the Imperial law officers. It is at best uncertain whether Burke's Act continues to apply in Victoria. The Act is included in the

⁴² Cited Todd: *Parliamentary Government in England*, ii 75.

⁴³ There is a detailed account of the dispute: *ibid.*, 754-760.

Second Schedule to the Imperial Acts Application Act 1928, and is not specifically repealed by that Act. The inclusion is not conclusive evidence that the Act is still operative in Victoria, but it does indicate that it was not thought definitely inoperative in 1928. Todd writing shortly after the dispute between the judges and Higinbotham had no doubt that Burke's Act applied.⁴⁴ The principal modern support for the view that Burke's Act was repealed by the Constitution Act is provided by Keith, but there are aspects of his argument which are unsatisfactory.⁴⁵ The only safe course is to treat Burke's Act as still technically in force and to move for its formal repeal since there is no conceivable justification for its survival in Victoria. Provision was made by the Supreme Court (Judges Retirement) Act 1936 for the compulsory retirement of Supreme Court judges appointed after the commencement of the Act, at the age of seventy-two.

County Court judges held office under the County Courts Statute 1869, at the pleasure of the Governor-in-Council and were liable to arbitrary dismissal.⁴⁶ Section 9 of the County Court Act 1928 now provides for the tenure of office during good behaviour, subject to removal by the Governor-in-Council for wilful absence from Victoria 'without reasonable cause to be allowed by the Governor-in-Council', or for neglect of duty or on address by both Houses of the legislature.

A matter of some constitutional importance arose in 1952, when a chairman of General Sessions made some remarks from the Bench which were critical of government housing policy. These remarks displeased the government which, it appears, authorized the Premier to write a letter to the judge admonishing him for what he had said. It is to be noted that the position of a chairman of General Sessions is quite divorced from his office as a County Court judge. The appointment of chairmen of General Sessions is made under section 182 of the Justices Act 1928, and no specific provision is made for their removal. It may be that, a chairman of General Sessions is, in this capacity, in the same position as a justice of the peace who may be prohibited by the Governor-in-Council from acting as a justice, and the publication of the prohibition has the effect of rendering any such person incapable of acting as a justice until such time as he is newly appointed.⁴⁷ The facts of the 1952 case are not altogether clear from the newspaper reports, but on the assumption that the judge said something that might not be

⁴⁴ *Ibid.*, 752-753.

⁴⁵ *Responsible Government in the Dominions* ii, 1068-1070. See Cowen and Derham: 'The Independence of the Judges' (1953) 26 *Australian Law Journal*, 462, 464.

⁴⁶ *Reg. v. Rogers* (1878) 4 V.L.R. (L) 334.

⁴⁷ Justices Act 1928, s. 15.

thought proper, and even on the more extreme assumption that his remarks might have been construed as a substantial refusal to perform his duties as a chairman of General Sessions, it is submitted that the action of the government in admonishing him was improper. The preservation of the independence of the judiciary is a matter of fundamental constitutional importance. There are prescribed procedures for the removal of a judge, and unless it is thought proper in a particular case to take steps to remove a judge, no action should be taken against him. If a judge may be admonished without being removed—and admonition will necessarily carry with it the threat of removal on repetition of the alleged offence—there is a very real danger that the principle of judicial independence will be impaired.⁴⁸

A further matter of constitutional interest arises in connection with communications between the judiciary and other officers and branches of the government. In the course of the dispute between the judges and the government in the sixties, a sharp correspondence took place between Mr Justice Barry, the Attorney-General Higinbotham, and the Governor over the right of the judges to communicate directly with the Governor. Higinbotham stated quite definitely that such communications should go through him as Attorney-General, and Barry J. was informed by the Governor-in-Council that this was the course which he must follow. The judges then asked the Governor to submit the question to the Colonial Secretary for final decision. Mr Cardwell avoided the question. He said that the judges, together with all other inhabitants, were entitled to address the Governor on matters connected with their *personal* rights, but declined to answer the question so far as it related to *official* communications. This he left for the Governor to decide after consultation with his advisers, adding, with some piety, that whatever arrangements should be decided upon, should be such as to assure the judges that their communications would reach the Governor and be given appropriate attention by him. Thereupon Governor Darling advised the judges that they should address him through the Attorney-General and assured them that all communications would receive from him the attention they merited.⁴⁹

There is a specific provision in Victorian statute law for communication by the judges of the Supreme Court to the Governor. This first appeared as section 54 of the Judicature Act 1883, and is now enacted as section 28 of the Supreme Court Act 1928. It pro-

⁴⁸ This case is discussed at length by Cowen and Derham: 'The Independence of Judges' (1953) 26 *Australian Law Journal*, 462. But see Beasley and Brett: 'The Independence of Judges' *ibid.*, 582.

⁴⁹ See Todd *op. cit.*, 754 ff.

vides that 'A Council of the Judges of the Court, of which due notice shall be given to all the said Judges, shall assemble once at least in every year on such day or days as are fixed by the Chief Justice for the purpose of considering the operation of this Act and of the Rules of Court for the time being in force, and also the working of the several offices and the arrangements relative to the duties of the officers of the Court, and of inquiring and examining into any defects which appear to exist in the system of procedure or the administration of the law in the Court or in any Court from which any appeal lies to the Supreme Court or any Judge thereof: and they shall report annually to the Governor what (if any) amendments or alterations it would in their judgment be expedient to make in this Act or in any law relating to the administration of justice and what other provisions (if any) which cannot be carried into effect without the authority of Parliament it would be expedient to make for the better administration of justice. An Extraordinary Council of the said Judges may also at any time be convened by the Chief Justice.'

This Act came into operation in 1884, and it appears that the Council of Judges reported annually to the Governor under the section from 1886-1919. The report was transmitted to the Governor through the Attorney-General and was ordered by the Governor to be presented to both Houses of Parliament. Over this period it dealt with various matters, including proposals for law reform, but in its latter years, it tended to be more and more perfunctory and statistical.⁵⁰ From 1920-54 it appears that no report was made under section 28, but that in 1955 the judges did report under the section and sent their report direct to the Governor.⁵¹ On a number of occasions, the judges appear to have ignored the report as a channel of communication with the government and conducted important official business with the government (not the Governor) through the Attorney-General. This was done in 1930 and 1931 over the question whether the judges should be included in legislation reducing salaries.

An important constitutional issue arose at the end of 1954 in the course of correspondence and negotiations relating to the salaries of the judges. The judges had been advised of proposed legislation raising their salaries. They had then agreed to a resolution addressed by the Chief Justice to the Premier recording a protest against the inadequacy of the salary rises and requesting that the resolution be brought to the attention of Parliament. There was further correspondence between the Premier and the Chief Justice,

⁵⁰ See Cowen and Derham: 'The Constitutional Position of the Judges' (1956) 29 *Australian Law Journal*, 705, 710-711.

⁵¹ *Ibid.*, 711.

and the government declined to bring the judge's resolution before Parliament. The government's bill for the increase of judicial salaries came before the Assembly on 7 December, and on the following day, the Chief Justice speaking from the Bench made a strong protest on constitutional grounds against the action of the government. While acknowledging that the fixing of judicial salaries was a matter for Parliament, the judges protested that the refusal by the Premier to bring their resolution before Parliament was a serious departure from accepted constitutional standards. The resolution proceeded:

This is the accepted constitutional channel for the judiciary, as one of the three organs of Government, to bring its views before the legislative organ, viz., the Parliament of the State . . . The Judges feel that the denial of the right of communication from themselves to the Legislature is a serious departure from accepted constitutional standards. As the Judges were entitled to expect the Hon. the Premier would make the communication requested, they sought no other means of making their views known to Parliament until today, when it became clear that their right of communicating with the Legislature had been ignored.⁵²

The Chief Justice also made public the earlier correspondence between him and the Premier.

It is not easy to discover any clear constitutional warrant for the view stated by the judges that they possessed the right as one arm of government to communicate with another arm, and that the Premier had acted unconstitutionally in denying this. There is little assistance in English practice, for the Lord Chancellor is a member of all three branches of government, and through him the requirements and interests of the judiciary may find expression both in the Cabinet and in Parliament. The judges of the House of Lords, and such other judges as are peers are also members of the House of Lords, and may, and on occasions do, sit and vote. The situation in Victoria is in no way comparable, and the judges are divorced from the other branches of government. The Chief Justice tends, as a matter of practice to be appointed as Lieutenant-Governor, and on occasion the senior puisne judge has been appointed as Administrator of the Government. But these judges assume this executive capacity only in exceptional circumstances.

In the dispute between the judges and Higinbotham in the sixties, the arguments of the judges implied that they were a co-ordinate arm of government, entitled to communicate directly with the Governor, and that they were not subject to motion or suspension by the executive. Higinbotham denied this: in his view the judges

⁵² This resolution together with the other correspondence referred to is set out *ibid.*, 705-707.

were a special class of public servants.⁵³ He insisted that this in no way affected their independence. 'The judicial independence of the judges of the Supreme Court is not in any degree affected by this question. The assertion of a power to see that certain judicial functions are not neglected is completely distinct from the assertion of a right to interfere with the performance of these functions.'⁵⁴ The English judges published a memorandum in 1931, in which they protested against a reduction of judicial salaries, and insisted that they were not civil servants, but a special and independent arm of government.⁵⁵ In the original resolution transmitted to the Premier for submission to Parliament, the Chief Justice of Victoria expressed similar views. 'The Supreme Court is also an organ of Government under the Constitution, and whilst we are servants of the public, we are not members of the public service. It is proper that, like the members of the other two organs of Government, we should receive allowances in respect of the expenditure incurred by reason of our office.'⁵⁶

Constitutional authorities are divided in their views on this matter,⁵⁷ and it is certainly not easy to find a clear constitutional warrant for the position taken up by the Victorian judges in December 1954. But it is clear that however difficult it may be to give precise definition to the position of the judges within the constitutional framework of the State, their position is special, and the preservation of their independence is of vital constitutional importance. The most appropriate conclusion appears to be that if the judges desire collectively to have certain matters which, in their view, affect the administration of the law in the community laid before Parliament, and request the Premier to communicate their views to the legislature, it is proper that he should do so. This does not require the Premier or the government to endorse the views of the judges. The particular episode in 1954 was an unfortunate one, because the judges' own salaries were in issue, and in the popular press this had rather an unfortunate effect on the judges' case which had intended

⁵³ He spoke of 'all judicial and other officers in the public service of Victoria'. *Votes and Proceedings of the Legislative Assembly of Victoria 1864-65*, no. 34, C. no. 2.

⁵⁴ *Votes and Proceedings of the Legislative Assembly 1866*, C. no. 8.

⁵⁵ 'It is, we think, beyond question that the Judges are not in the position occupied by civil servants. They are appointed to hold particular offices of dignity and exceptional importance. They occupy a vital place in the constitution of this country. They stand equally between the Crown and the executive and between the executive and the subject. They have to discharge the gravest and most responsible duties. It has for over two centuries been considered essential that their security and independence should be maintained inviolate' (1933) 174 *Law Times* 103.

⁵⁶ Cowen and Derham *op. cit.*, (n. 50), 705.

⁵⁷ Holdsworth: 'The Constitutional Position of the Judges' (1932) 48 *Law Quarterly Review*, 25; (1932) 173 *Law Times*, 336 supported the views of the English judges as quoted above, while Wade (1932), 173 *Law Times*, 246 expressed doubts about the validity of their position.

to raise the matter as a high constitutional issue. At the same time, it is clear that the level of judicial salaries may obviously affect the administration of justice.

It is rather odd that the judges in 1954 ignored the channel of communication to the Governor under section 28 of the Supreme Court Act. The section calls for an annual report on the operation of the Supreme Court Act itself, in which judicial salaries are fixed, so that the section in terms contemplates reports on judicial salaries. Moreover, the Chief Justice may call an extraordinary Council which may report at any time. If the judges had reported under this section, with a request that the report be laid before Parliament, it appears very likely that the request would have been complied with. It is submitted that section 28 provided the judges with an appropriate channel, and it is not known whether they deliberately rejected it or whether it had fallen into such disuse that it was altogether overlooked. In choosing a channel through the Premier, the judges were driven to rely on general principles relating to communications between the arms of government, for which, as already noted, the constitutional warrant is not clear. It appears, as already noted, that the judges reported in July 1955 under the terms of section 28 of the Supreme Court Act.

IX

The establishment of the Commonwealth in 1901 significantly affected the position of the States. In the last quarter of the nineteenth century, Victoria and Victorians played an important role in the events which led to federation. A speech by the Victorian Premier, James Service, in 1883 on the occasion of the completion of the Melbourne-Sydney rail link at Albury, gave impetus to the assembly of a convention which met at Sydney in that year. As a result of that meeting, and due largely to the initiative of Samuel Griffith, Premier of Queensland (later principal draftsman of the Constitution Bill of 1891, then Chief Justice of Queensland and then first Chief Justice of the High Court) a draft bill for a Federal Council of Australasia was prepared, and this was enacted by the United Kingdom Parliament as the Federal Council of Australasia Act 1885. Victoria was a member of this Council, which enacted some measures, but was greatly hampered by the non-participation of New South Wales and by the inherent weakness of its constitutional structure as it entirely lacked executive authority. It met until 1899, and the Act which constituted the Federal Council was repealed by the Commonwealth of Australia Constitution Act, section 7.

Victorians played a prominent part in the two federal conventions

which met at Sydney in 1891, and at Adelaide, Sydney and Melbourne in 1897-8.⁵⁸ Alfred Deakin was a member of the delegation which went to England to assist the passage of the Constitutional Bill through the United Kingdom Parliament and he has left a chronicle of the events of those years.⁵⁹ He became the second Prime Minister of the Commonwealth. Isaac Isaacs was an articulate, vigorous and learned member of the 1897-8 convention. He subsequently became Attorney-General of the Commonwealth, then a Justice and subsequently Chief Justice of the High Court and the first Australian-born Governor-General of the Commonwealth. H. B. Higgins, later a Justice of the High Court also played an important part in the work of the second convention, though he was a convinced unificationist, and not a federalist. W. A. Trenwith, generally regarded as the father of the Victorian Parliamentary Labour Party was also a member of the second convention. Before submission to the United Kingdom Parliament, the Constitution Bill was twice submitted to referendum in Victoria⁶⁰ and was carried on both occasions.

The provisions of the Commonwealth Constitution fall to be considered here so far as they affect the powers and position of the States. The Constitution conferred specific powers on the Commonwealth and left the residue of power not expressly conferred with the States. This broadly followed United States precedent, which was most apt to the Australian situation at the time. Section 106 provided that the Constitution of each State should, subject to the Commonwealth Constitution, continue as at the establishment of the Commonwealth, until altered in accordance with the Constitution of the State. Section 107 provided that every power of a State Parliament should continue to be exercisable by it unless it had been exclusively vested in the Commonwealth Parliament or had been withdrawn from the State Parliament. Commonwealth powers were in some cases exclusive, in other cases concurrent. Within the area of concurrent power, the Commonwealth and States might both legislate, subject to a supremacy clause, section 109, which rendered State laws invalid⁶¹ to the extent of their inconsistency with Commonwealth laws. Among the powers exclusively vested in the Commonwealth are the imposition of customs and excise duties, and, subject to limited qualifications set out in section 91, the grant of bounties.⁶² The interpretation of duties of excise by

⁵⁸ See Hall: *Victoria's Part in the Australian Federation Movement 1849-1900* (1931).

⁵⁹ *The Federal Story* (First published in 1944).

⁶⁰ Twice because of the failure of New South Wales to pass it by the required majority the first time.

⁶¹ 'Inoperative' would have been a better usage. See Latham C.J. in *Carter v. Egg and Egg Pulp Marketing Board* (Vict.) (1942) 66 C.L.R. 557, 573.

⁶² S. 90.

the High Court has been extremely wide,⁶³ and the result has been to make it practically impossible for the States to impose sales taxes, and this has derived them a fruitful source of revenue. Powers over coinage and legal tender are effectively within the exclusive control of the Commonwealth.⁶⁴ The States are prohibited from raising or maintaining armed forces without the consent of the Commonwealth Parliament,⁶⁵ and it appears that the Royal prerogative of declaring war and making peace may only be exercised on the advice of the Commonwealth government.⁶⁶ In the first decade of the Commonwealth, it was settled, not without some protest, that the States have no *locus standi* in international relations, and that the Commonwealth speaks for Australia in this area.⁶⁷ There are areas of power in which the Commonwealth has effectively pre-empted the field—for example, in bankruptcy and negotiable instruments.⁶⁸ There are other areas in which the Commonwealth has been extremely coy in the exercise of its powers: the great fabric of legislation on divorce and matrimonial causes is State law,⁶⁹ and though the Commonwealth has full power to enact a uniform law on these matters,⁷⁰ its intervention has been extremely limited, and principally, though not exclusively, concerned with matters of jurisdiction.⁷¹

The Commonwealth Constitution imposes certain specific limitations on State powers. Section 114 denies power to a State, without the consent of the Commonwealth Parliament, to raise or maintain armed forces or to impose any tax on Commonwealth property, while section 115 enjoins a State from coining money or from making anything legal tender except gold or silver coin. The notorious section, 92, imposes a limitation on Commonwealth and States alike, in its peremptory demand that trade commerce and intercourse among the States shall be absolutely free. Section 92 was recently invoked to strike down Victorian road transport legislation.⁷² Specific duties may be imposed upon States; for example, the requirement in section 120 that States must make prison accommodation available for persons convicted of offences against Commonwealth laws.

The Constitution also includes a number of provisions expressly

⁶³ *Matthews v. Chicory Marketing Board* (1938) 60 C.L.R. 263. *Parton v. Milk Board* (1949) 80 C.L.R. 229. See Arndt: 'Judicial Review under sec. 90 of the Constitution. An Economist's View' (1952) 25 *Australian Law Journal*, 667.

⁶⁴ Ss. 51 (xii), 115.

⁶⁵ S. 114.

⁶⁶ *Joseph v. Colonial Treasurer of N.S.W.* (1918) 25 C.L.R. 32.

⁶⁷ See Moore: 'The Constitution and Its Working'; 7 *Cambridge History of British Empire* 655-656; Keith: *Responsible Government in the Dominions*, ii, 612 ff.

⁶⁸ Under ss. 51 (xvii) and (xvi). Here the Commonwealth legislation covers the field to the exclusion of the states under s. 10.

⁶⁹ Marriage Act 1928. (Vic.)

⁷⁰ S. 51 (xxii).

⁷¹ Matrimonial Causes Act 1945-55 (Cth.)

⁷² *Armstrong v. State of Victoria* (1955) 93 C.L.R. 264.

designed to protect State interests. The provisions of chapter 1 prescribing that an equal number of senators, now ten, should be elected from each State, were conceived with the prime purpose of allowing a voice for State interests, as such, in the Federal Parliament. The success of the plan has not been particularly obvious.⁷³ Again, certain Commonwealth powers are controlled in State interests. The Commonwealth taxing power conferred by section 51 (ii) is controlled by a prohibition against discrimination between States or parts of States, and the power to grant bounties on the production and export of goods under section 51 (iii) is made subject to a requirement that such bounties shall be uniform throughout the Commonwealth. Section 99 provides that the Commonwealth shall not by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or part of a State, while section 100 limits the Commonwealth legislative power in respect of trade and commerce by requiring that any such law shall not abridge the right of a State or its residents to the reasonable use of river waters for conservation or irrigation. Section 114 denies power to the Commonwealth to impose any tax on property belonging to a State.

Apart from these specific protections for State interests which appear on the face of the Commonwealth Constitution, there are further restrictions on Commonwealth powers which have been worked out by the courts. A doctrine of inter-governmental immunities, which operated to deny power to either major element to the federal compact to legislate so as to affect the governmental interests of the other was elaborated in the first two decades of the Commonwealth's existence. After 1920 the doctrine passed into eclipse, but in recent years it has had a modified revival. It was held in the *State Banking* case⁷⁴ that the Commonwealth could not validly legislate to prohibit private trading banks from accepting the deposits of State governments and their instrumentalities. It seems clear that the revived doctrine of inter-governmental immunities is of rather limited operation.⁷⁵ Again, it has been held that though the Commonwealth Parliament may make laws conferring rights to proceed against a State (or the Commonwealth), satisfaction of a judgment against a State in such circumstances depends upon the appropriation of the necessary funds by the State Parliament,⁷⁶ but this safeguard

⁷³ 'The Senate was to be the States' house. This anticipation has been almost completely falsified by results. The Senate is as much a party house as the lower house. The candidates for the Senate are presented to the voters in teams selected by the political parties. The personality of the candidates is of minor importance'. Latham: 'Changing the Constitution' (1953) 1 *Sydney Law Review*, 14, 22.

⁷⁴ *Melbourne Corporation v. The Commonwealth* (1947) 74 C.L.R. 31.

⁷⁵ See *The Commonwealth of Australia*, ed. Paton, (1952), 61-69.

⁷⁶ *Australian Railways Union v. Victorian Railway Commissioners* (1930) 44 C.L.R. 319.

does not operate in a case in which the State is in default of its obligations under the Financial Agreement.⁷⁷

Finally, in this context, it is to be noted that the provision for amendment of the Commonwealth Constitution, section 128, requires that the amendment proposal shall be submitted to a referendum, at which it must be carried by a majority of all electors voting and also by a majority of the electors in a majority of the States. It is further provided that no alteration diminishing the proportionate representation of any State in either House, or the minimum number of representatives of a State in the House of Representatives, or in any way altering the limits of a State, or in any manner affecting the provisions of the constitution in relation to a State, shall become law unless carried by a majority of electors in that State.

Over the half-century of the Commonwealth's existence, Commonwealth power has grown very considerably. Two world wars and a major depression have called for substantial measures of uniform direction and control of the country's affairs and resources, and two main agencies of Commonwealth extended power have been the defence and the conciliation and arbitration powers under sections 51 (vi) and (xxxv). The odd shape of the arbitration power has made the arbitration court the agency of uniform prescription, and has produced an odd divorce between a wide general power in the court and a very limited regulatory power over industrial matters in the Commonwealth Parliament.⁷⁸ But the most powerful element operating in favour of extended Commonwealth power has been the factor of financial predominance. The original plan was to give Commonwealth and States direct taxing power. But the power to impose customs and excise duties was wholly transferred to the Commonwealth. This immediately threatened the States with the disappearance of a major source of revenue, and provision was made in section 87 for a retransfer of three quarters of the customs and excise revenue to the States. Section 94 also contemplates the return of all surplus revenue from the Commonwealth to the States but the surplus magically disappeared during the first decade of the Commonwealth. In 1910, the provisions of section 87 ceased to operate with the enactment of the Surplus Revenue Act which provided for annual payments at the rate of 25s. per head of population to the States. This in turn came to an end in 1927 with the Financial Agreement under which the Commonwealth undertook to contribute sums towards the discharge of interest payments on State debts. A sinking fund was also established to which both the Commonwealth and the States contributed. The Financial Agreement

⁷⁷ *New South Wales v. The Commonwealth* (1932) 46 C.L.R. 155.

⁷⁸ See Latham (1953) 1 *Sydney Law Review*, 14, 36.

also set up the Loan Council on which there is Commonwealth and State representation. This Council controls public borrowing (excluding Commonwealth defence borrowing) by Commonwealth and States, and was set up because it was thought desirable to co-ordinate borrowing so as to avoid competition between governments in the loan market. The Loan Council is a remarkable institution, not least because it takes borrowing policy and power out of the hands of individual governments and vests it in a special supra-Commonwealth and State body.⁷⁹ The Financial Agreement of 1927 was written into the Commonwealth Constitution as an amendment and now appears as section 105A. It is one of the very few constitutional amendments of substantial importance which has been successfully submitted to the electorate and it has been observed that it was carried only because the proposed amendment had the unanimous support of both political parties; it was certainly not understood by the majority of electors.⁸⁰ It assumed major constitutional importance within a short time after its enactment. New South Wales defaulted in payments owing under an agreement between that State and the Commonwealth. The Commonwealth acted promptly and in effect impounded tax and other obligations owing to New South Wales. The High Court by a majority upheld this legislation on the ground, *inter alia*, that this was a measure for the performance of a financial agreement by the parties thereto.⁸¹

Under section 96 of the Constitution, the Commonwealth Parliament may grant financial assistance to States on such terms and conditions as it thinks fit. As Commonwealth financial resources have increased and those of the States have diminished, this power has assumed increasing importance. Special grants under this power were first made to Western Australia in 1910-11. Grants were originally determined by the Commonwealth Treasurer and government, but since 1933, a permanent Commonwealth Grants Commission has been in existence, and regular grants have been made to the 'claimant' States, Western Australia, South Australia and Tasmania.⁸² Special grants have also been made to States for particular purposes and particularly since 1945, the Commonwealth has used its powers under section 96 to make grants for such purposes as housing, land settlement, roads and public works.

By far the most significant development in the field of public finance is the fact that the Commonwealth for practical purposes

⁷⁹ See Davis: 'A Unique Federal Institution' (1953) 2 *University of Western Australia Annual Law Review*, 350.

⁸⁰ Beasley: (1951) 25 *Australian Law Journal*, 341.

⁸¹ *New South Wales v. The Commonwealth* (1932) 46 C.L.R. 155. See Davis *op. cit.*, 385 ff.

⁸² See Davis: 'A Vital Constitutional Compromise' (1948) 1 *University of Western Australia Annual Law Review*, 21.

has swallowed up the major fields of taxation to the exclusion of the States. Before the second world war, the Commonwealth and States both levied income taxes. The Commonwealth tax was uniform throughout the country, as required by the Constitution, but State taxes varied. This meant that the aggregate of Commonwealth *plus* State tax varied from State to State. Early in the war, the Commonwealth imposed a uniform high rate of income tax. Further Acts provided for (1) priority in payment for Commonwealth over State tax and (2) grants to States of amounts broadly equivalent to the income tax they had previously imposed *on condition* that the abstained from imposing their own income taxes. The scheme was unsuccessfully challenged. The imposition of the Commonwealth tax was held valid under section 51 (ii), the priority provision under the supremacy clause, section 109, and as incidental to the tax power, and the conditional grants to the States were upheld under section 96.⁸³ By this ingenious legislative scheme, the Commonwealth was able to drive the States out of the main taxing fields. The implication of this holding was recognized by the court. As the Chief Justice, Sir John Latham, observed in the course of his judgment:

The scheme which the Commonwealth has applied to income tax . . . could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth. If the Commonwealth Parliament, in a Grants Act, simply provided for the payment of moneys to the States without attaching any condition whatever, none of the legislation could be challenged . . . The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with policies, legislative or other, of the respective States, no reference being made to such matters in any Commonwealth statute. Thus if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision. The determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.⁸⁴

It should be noted that this decision did not depend for its validity on the defence power, which has a varying content depending upon the situation which calls forth defence measures. As the law stands, Commonwealth primacy and State subordination in tax matters depends on powers whose content does not vary in this way. It is significant that the majority in the court was not persuaded by arguments drawn from the federal character of the Constitution.⁸⁵

⁸³ *South Australia v. The Commonwealth* (1942) 65 C.L.R. 373. ⁸⁴ *Ibid.*, 429.

⁸⁵ 'It is not for the layman to say whether these judgments on the meaning of the Australian constitution are good law or not. What the student of federal government

The decision in the *Uniform Tax Case* remains law at the time of writing, though it is to be challenged by the Victorian government. While it operates, it gives effect to the prophetic words of Alfred Deakin in 1902 who spoke of the scheme of taxing powers in the constitution as leaving the States 'legally free but financially bound to the chariot wheels of the central government'.⁸⁶

Under the original scheme of reimbursement to the States under uniform taxation, Victoria fared badly. The reimbursement formula has since been modified, and the Victorian situation has improved to some extent. But the present situation in which considerable constitutional powers remain with the States, while they remain in a large measure financially dependent on the Commonwealth, is disturbing. If the States are to continue to enjoy and exercise the powers which the Constitution confers on them, it is obvious that they must have adequate financial resources, and must not have to depend for them on the other partner to the federal compact. The lack of balance between the constitutional and financial powers of the States poses a problem of the greatest importance in Australia.⁸⁷

X

The establishment of the Australian Commonwealth has affected the States in other ways. The States were not invited to the colonial conference of 1902 and raised an objection to their exclusion from the 1907 conference. The Colonial Secretary refused to accept their submission that they should be invited to attend along with the Commonwealth, and there has been no State representation at subsequent Imperial or British Commonwealth conferences. The States have, however, been invited to certain specialist conferences since the establishment of the Commonwealth; for example, they were directly invited to send representatives to the Surveyors' Conference of 1911. The State Premiers declined to attend the coronation of Edward VII in 1902, when the invitation was sent through the Governor-General, and the procedure was rectified in 1910 when invitations to the coronation of King George V were sent through the State Governors.⁸⁸

can say, however, is that if they are good law, then federal principle does not appear to find a place in [the constitution] so far as the taxing power is concerned . . . If the power of the Commonwealth . . . to tax includes a power to nullify the powers of the states . . . to collect their taxes then it is a power to destroy the independence of these regional governments. In my opinion, this was not the intention of the constitution.' Wheare: *Federal Government* (1946) 112, 113.

⁸⁶ Murdoch: *Alfred Deakin*, 234.

⁸⁷ See Giblin: 'Financial Aspects of the Constitution' in *Federalism in Australia* (1949); Brown: 'Some Aspects of Federal-State Financial Relations (Australia)' in *Federalism, An Australian Jubilee Study* (1952); Hannan: 'Finance and Taxation' in *Essays on the Australian Constitution* (1952); Latham: 'Changing the Constitution' (1953) 1 *Sydney Law Review*, 14, 30-33.

⁸⁸ See Keith: *Responsible Government in the Dominions*, ii, 615-621.

The absence of State representation at the Imperial conferences and meetings after the first world war, and particularly in 1926 and 1930, had very important consequences in the formulation of the conventions governing the relations between the United Kingdom and the self-governing Dominions and in the shaping of the Statute of Westminster 1931. The conference on the Operation of Dominion Legislation of 1929 made no proposals for the removal of the inequalities to which the Canadian Provinces and the Australian States were subject. This was left to be dealt with by the competent authorities in the Dominions, and action was taken in Canada to remove the fetter of the Colonial Laws Validity Act from the Canadian Provinces as the result of agreement between Dominion and Provincial authorities only.⁸⁹ The adoption of the Statute of Westminster by the Commonwealth Parliament in 1942 (retrospectively to 1939)⁹⁰ has produced some anomalous results, and casts doubt on the validity of the judicial statement that 'constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself.'⁹¹ Thus, while section 2 of the Statute removed the fetter of the Colonial Laws Validity Act from the Commonwealth, it remains operative so far as the Australian States are concerned.⁹² Section 3 of the Statute which was cast in the form both of a declaration and of an enactment, was inserted to clear up uncertainty as to the power of a Dominion Parliament to enact laws having extra-territorial operation. But the extra-territorial operation of Australian State laws remains a matter of common law. Here the position has been lucidly, and it is submitted, soundly stated by Evatt J. in *Trustees Executors & Agency Co. Ltd. v. Federal Commissioner of Taxation*.⁹³

The correct general principle, is, I have always considered . . . whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned . . . in this view, the fact of the Legislature's dealing with circumstances, persons or things without the Dominion is always a relevant, but never a conclusive, element in the determination by its own courts of questions of legislative power.

Only section 6 of the Statute which speaks of certain provisions of the Colonial Courts of Admiralty Act 1890 ceasing to have effect *in a Dominion* as from the commencement of the Act appears to have

⁸⁹ See Wheare: *The Statute of Westminster and Dominion Status* (5th ed. 1953), 184-185.

⁹⁰ Statute of Westminster Adoption Act 1942.

⁹¹ *Broken Hill South Ltd. v. Commissioner of Taxation (New South Wales)* (1937) 56 C.L.R. 337, 378 per Evatt J.

⁹² *Attorney-General for N.S.W. v. Trethowan* [1932] A.C. 526; *McDonald v. Cain* [1953] V.L.R. 411.

⁹³ (1933) 49 C.L.R. 220, 234-235.

a *geographical* application which would extend to the area of the States as well as to the Commonwealth of Australia.

When the draft bill for the Statute of Westminster came before the Commonwealth Parliament for consideration in 1931, there was some expression of disquiet by the States. This was reflected in proposed amendments to the bill which were subsequently incorporated in the Statute. Section 9 (1) provides that nothing in the Act shall be deemed to authorize the Parliament of the Commonwealth to make laws on any matter within the authority of the States, not being a matter within the authority of the Parliament or Government of the Commonwealth. This was inserted, as a matter of caution, to make sure that the removal of the control imposed by the Colonial Laws Validity Act did not authorize the Commonwealth to burst and overflow the banks marked out in the Commonwealth Constitution Act. Section 9 (2) provides further that nothing in the Act required the concurrence of the Commonwealth in any law made by the United Kingdom Parliament with respect to any matter within State competence, which was not a matter within Commonwealth competence, in any case where previous constitutional practice did not require Commonwealth concurrence. The States unsuccessfully pressed for another safeguard to prevent the Commonwealth requesting and consenting to legislation by the United Kingdom Parliament on matters within State competence. The refusal by the United Kingdom government to entertain this proposal in 1931 possibly suggested that it did not fully grasp the point at issue⁹⁴ and when the point was raised again in 1942 when the Statute was adopted by the Commonwealth Parliament, it was answered that the contingency was too remote and that in any event the United Kingdom Parliament was not bound automatically to comply with a Commonwealth request for the enactment of legislation. In 1931, the Commonwealth Government had given an undertaking to the States that no action would be taken towards adopting the Statute of Westminster without prior consultation with the States. It appears however that no such consultation took place when the Statute was adopted in 1942.⁹⁵

It is not only in the field covered by the Statute of Westminster that inequalities between the States and the Commonwealth survive, for they extend also into the field of conventions. Take, for example, the comparative position of the Governor-General and the Governors of the States. The Governor-General is in no respect an agent of the United Kingdom Government; he is the *personal* representative of the Crown; recommendations for the appointment of a

⁹⁴ See Wheare *op. cit.*, n. 89, 210-211; see also 216j-216k.

⁹⁵ *Ibid.*, 216k. Wheare adds: 'On the other hand, it would seem that adoption was generally favoured throughout the Commonwealth although where opposition and misgiving were expressed they were expressed keenly and sometimes violently.'

Governor-General are made by the Commonwealth Government directly to Her Majesty; and the Governor-General corresponds directly with the Crown. The position of a State Governor is different; his official correspondence is with the Secretary of State for Commonwealth Relations, a minister in the United Kingdom Government, who also advises the Crown on matters of appointment of State Governors, no doubt after consultation with the State administration.

The differences of status between Commonwealth and States in the field of statute and of convention hardly makes sense. This has been well stated by the leading contemporary writer on the Statute of Westminster:

It is difficult to accept arguments put forward to demonstrate that the States of Australia . . . 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 . . . 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 . . . are for some purposes governed from Canberra . . . and for other purposes from the State . . . capitals.⁹⁶

That seems to be plain good sense, but as things stand it is not the law.

⁹⁶ *Ibid.*, 223. See also Bailey: 'The Statute of Westminster' (1932) 5 *Australian Law Journal*, 362, 398. Professor Bailey also prepared an *opinion* on the application of the Statute to the States of Australia which was printed by the Government Printer, Melbourne, but not published. Wheare *op. cit.*, 201 rightly speaks of this *Opinion* as 'the most authoritative study of the Statute in relation to any one Dominion yet printed.'