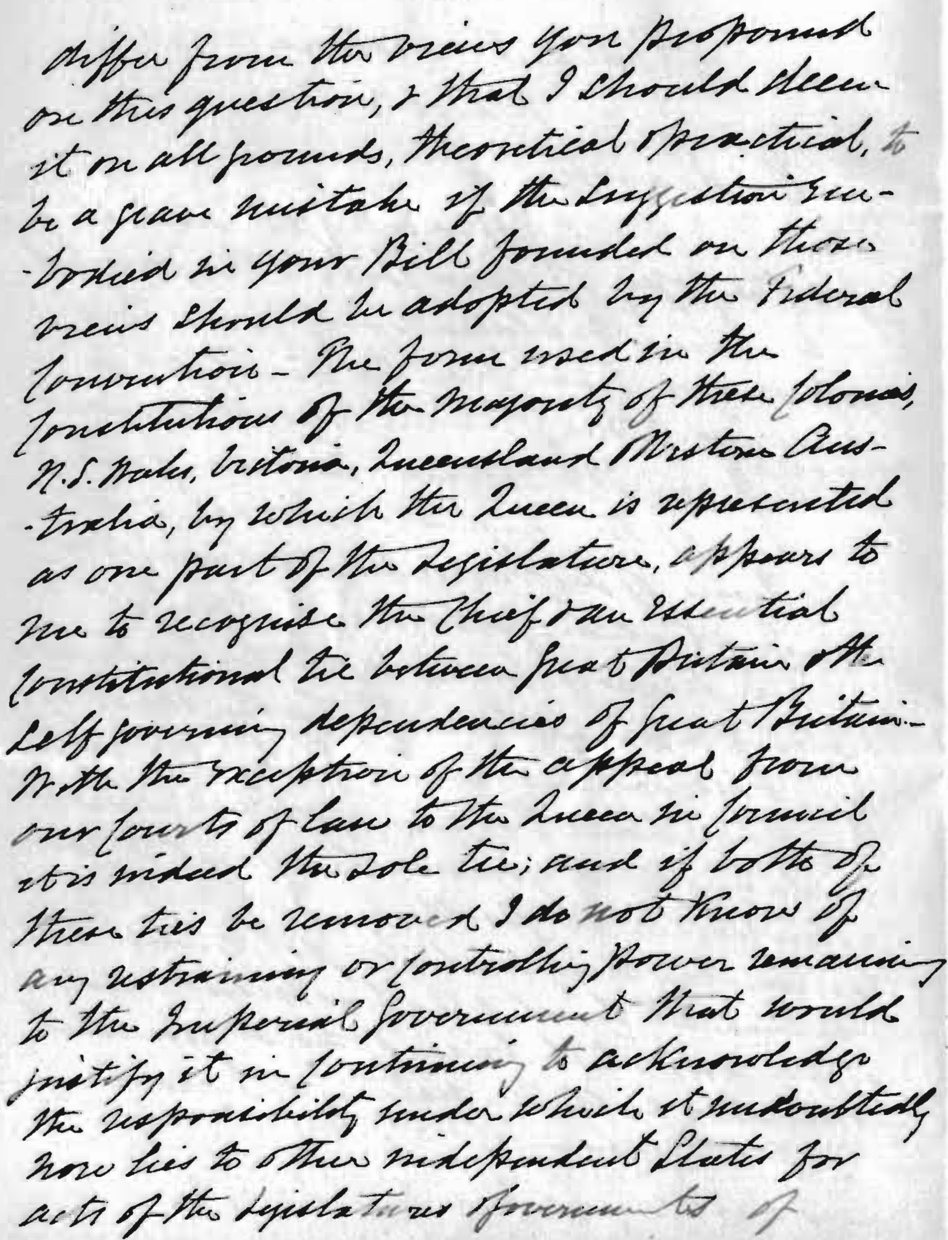
C4/C 206

Portland - Victoria
March 8 - 1891

My dear Sir

I thank you much for the copy of your Bill & the printed observations explanatory of your Bill which you have been so kind as to forward to me, & which have been sent to me from Melbourne. They are full of matter of the highest interest & at this time of supreme importance for all Australian politicians. I must confine myself, however, to the particular subject referred to in the latter part of your observations to which you direct my attention. I believe you are correct in saying that you are the first to call attention to it publicly. I do not remember any writer or politician in Victoria at least who has mentioned it & made it the basis of an argument connected with the nature & character of our Constitution.

I will say at once that I venture to


differ from the views you propound
on this question, & that I should deem
it on all grounds, theoretical & practical, to
be a grave mistake if the suggestion em-
-bodied in your Bill founded on those
views should be adopted by the Federal
Convention – The form used in the
Constitutions of the majority of these Colonies,
N.S. Wales, Victoria, Queensland & Western Aus-
-tralia, by which the Queen is represented
as one part of the Legislature, appears to
me to recognise the chief & an essential
Constitutional tie between Great Britain & the
self governing dependencies of Great Britain –
With the exception of the appeal from
our Courts of law to the Queen in Council
it is indeed the sole tie; and if both of
these ties be removed I do not know of
any restraining or controlling power remaining
to the Imperial Government that would
justify it in continuing to acknowledge
the responsibility under which it undoubtedly
now lies to other independent States for
acts of the Legislatures & Governments of

dependencies which would in law & in fact have then ceased to be dependencies. The form adopted by the majority of the Australian Constitutions distinctly & accurately expresses the essential fundamental fact of our legal relation of dependence on the British Crown & of the limitation of our rights of legislation springing from that relation. This is an all-sufficient reason for retaining that form so long as we are not prepared to assume the burdens of independence.

I do not understand you, however, to wish that the power of disallowance of Australian Acts of Parliament should be taken away from the Crown, but you would represent that power as an Executive function of the Imperial Government, & not as a power exercised by the Crown as one branch of the Federal & Provincial Legislatures. But this view if it were adopted in legislation & acted upon would appear to justify & might lead to very dangerous interference by the Imperial Government with our legislation from its initial stage down to the time of reservation of Bills for the Royal Assent. We have had experience of such interference

in Victoria - When protection legislation was first introduced in the Victorian Legislature, Mr Cardwell, the Secretary of State for the Colonies, wrote a series of despatches, threatening to the Governor & insulting to his Ministers to whom the Governor was instructed to show them, with the view of preventing the introduction of such measures - The action of the Secretary of State was illegal & unconstitutional, but it had a powerful effect at the time - If your suggestion were adopted, it might be argued with some force that as the act of the Crown in assenting to & dissenting from Bills was only an executive act, the Imperial advisers of the Crown would be justified in instructing their agent, the Governor, to try to prevent the passing of Bills which they might be induced by secret influence to condemn. The bare possibility of such influence being exercised would have the worst effects.

The legal character of this part of the Constitution of Victoria is easily understood. The ground of it is obvious to everyone who admits that Victoria is a dependency of the British Crown - Its operation has been, except at the period of our history I have referred to,

C4/C206

free from fictitious controversy - Under it the Governor as the Representative of the Crown not as the agent of the Imperial Ministers of the Crown, assents to certain Bills - He reserves others in accordance with the published general Instructions authorised by the Imperial Constitution Statute to be given to him by Imperial Ministers, & the Crown is advised by its Imperial Advisers in respect of Bills so reserved to assent to or dissent from them on grounds of Imperial policy only which do not come under consideration until the Colonial stage of legislation has been passed, & which, in the event of the Royal assent being withheld, have to be publicly assigned & justified -

Your suggestion, if adopted, would establish a difference between the form of Federal legislation & the prevailing form of Provincial legislation, & this difference would undoubtedly give rise sooner or later to controversy & speculation with the

regard to the legal status & powers of both the Federal & the Provincial Legislatures - Our experience in Victoria has made our politicians acquainted with the enormous waste of time & of political energy occasioned by controversy of this kind which is perpetual because the matter in dispute can never be determined by recognised authority - It were better, in my opinion, that there should be no federation for the present than that we should institute a Federal Constitution that would create new doubts & lead to new & bitter & resoluless controversy - I am prepared to go further & to hazard the prediction that the Federal Convention will result in a grievous & lasting failure if it does not use the grand opportunity it possesses of removing the ignorance & doubts that now prevail respecting the constitutional rights & powers (including the limits of those rights & powers) of the several

Australian Provinces. If the preponderance of opinion be in favor of retaining in the proposed Federal Constitution the English system of responsible Government, notwithstanding its acknowledged defects & disadvantages, why should not that system be adopted by express words in its entirety? And can any valid reason be urged against the expediency of explaining & interpreting in an identical sense by means of express declaratory provision the true legal meaning of the Constitution Acts of all the Provinces of Australia included in the Federation? If this were done, the peoples of these Colonies would soon come to understand the real nature not only of the Federal Constitution but of their own. The Federal Constitution & the Provincial Constitutions would explain & support one another. The subject matter of each would be distinct, & the distinction would be well defined if, as happily seems probable, the Convention should determine on giving to the Federal Government only such enumerated powers as the various Provinces may be willing to concede to it. There would

there be small danger of conflict of jurisdictions or diversity of practice - Both the Dominion & the Provinces would be founded on the same constitutional principles, namely, responsibility to Parliament, as regards Ministers or the Executive Government, and the exclusive control by the representative body of the Legislature of taxation & finance, as regards legislation -

I write in haste & cannot do more than indicate generally the grounds on which my answer to your question rests.

Allow me in conclusion to say that you & all your colleagues in the Convention have my warm sympathy & my best wishes for your success in the noble & very difficult work on which you are engaged. I will add that enduring success will intimately depend, in my opinion, upon the degree in which you shall be able to enact in clear words & apply to the Dominion & to the several Provinces of Australia the principles which determine the relations of the two Houses of the Legislature & the legal position & action of the Executive Government of England.

I am, my dear Sir,
Yours faithfully,
Geo. Higinbotham

The Honorable
A. Inglis Clark

Uni.Tas.Archives A.I. Clark Papers C4/C206
G. Higinbotham

Supreme Court
Portland, Victoria

March 8 1891

My dear Sir

I thank you much for the copy of your bill and the printed observations explanatory of your Bill which you have been so kind as to forward to me and which have been sent to me from Melbourne. They are full of matters of the highest interest and at this time of supreme importance for all Australian politicians. I must confine myself however, to the particular subject referred to in the latter part of your observations to which you direct my attention. I believe you are correct in saying that you are the first to call attention to it publicly - I do not remember any writer or politician in Victoria at least who has mentioned it made it the basis of an argument connected with the nature and character of our Constitution.

I will say at once that I venture to differ from the views you propound on this question, and that I should deem it on all grounds, theoretical & practical, to be a grave mistake if the suggestion embodied in your Bill founded on those views should be adopted by the Federal Convention - The form used in the Constitution of the majority of these colonies, NS Wales, Victoria, Queensland and Western Australia by which the Queen is represented as one part of the Legislature, appears to me to recognise the Chief and an essential Constitutional tie between Great Britain and the self governing dependencies of Great Britain. With the exception of the appeal from our courts of law to the Queen in Council it is indeed the sole tie, and if both of these ties be removed I do not know of any restraining or controlling power remaining to the Imperial Government that would justify it in continuing to acknowledge the responsibility under which it undoubtedly now lies to other independent States for acts of the legislatures of governments of dependencies which would in law and in fact have then ceased to be dependencies. The form adopted by the majority of the Australian Constitutions distinctly and accurately expressed the essential fundamental fact of our legal retention of dependence on the British Crown and of the limitation of our rights of legislation springing from that relation. This is an all sufficient reason for retaining this form so long as we are not prepared to assume the burden of independence.

I do not understand you, however, to wish that the power of disallowance of Australian Acts of Parliaments should be taken away from the Crown,

but you would represent the power as an executive function of the Imperial Government, and not as a power exercised by the Crown as one branch of the Federal and Provincial legislatures. But this view if it were adopted in legislation and acted upon would appear to justify and might lead to very dangerous interference by the Imperial Government with our legislation from its initial stage down to the time of reservation of Bills for the Royal assent.

We have had experience of such interference in Victoria - when protection legislation was first introduced in the Victorian legislation, Mr Cardwell, the Secretary of State for the colonies, wrote a series of despatches, threatening to the Governor and insulting to his ministers, to whom the Governor was instructed to show them, with the view of preventing the introduction of such measures. The action of the Secretary of State was illegal and unconstitutional, but it had a powerful effect at the time. If your suggestion was adopted, it might be argued with some force that as the act of the Crown in assenting to or dissenting from Bills was only an executive act, the imperial advisers of the Crown would be justified in instructing their agent the Governor to try to prevent the passing of bills which they might be induced by secret influence to condemn. The bare possibility of such influence being exercised would have the worst effects.

The legal character of this part of the Constitution of Victoria is easily understood. The ground of it is obvious to everyone who admits that Victoria is a dependency of the British Crown. Its operation has been, except at the period of our history I have refered to, free from friction and controversy. Under it the Governor as the Representative of the Crown and not as the agent of the Imperial Ministers of the Crown, assents to certain Bills. He reserves others in accordance with established general instructions authorised by the Imperial Constitution Statute to be given to him by the Imperial Ministers, and the Crown is advised by its Imperial Advisers in respect of Bills so reserved to assent to or dissent from them on grounds of imperial policy only which do not come under consideration until the colonial stage of legislation has been passed, and which, in the event of the Royal assent being withheld have to be publicly assigned and justified.

Your suggestion, if adopted would establish a difference between the form of Federal legislation and the prevailing form of Provincial legislation, and this difference would undoubtedly give rise sooner or later to controversy and speculation with regard to the legal status and powers of both the Federal and Provincial legislatures. Our experience in Victoria has made our politicians acquainted with the enormous waste of time and of political energy occasioned by controversy of this kind which is perpetual because the matter in dispute can never be

determined by recognised authority. It were better, in my opinion that there should be no federation for the present than that we should institute a Federal Constitution that would create new doubts and lead to new and better and ceaseless controversy. I am prepared to go further and to hazard the prediction that the Federal Convention will result in a grievous and lasting failure if it does not use the grand opportunity it possesses of removing the ignorance and doubts that now prevail respecting the Constitutional rights and powers (including the limits of those rights and powers) of the several Australian Provinces. If the preponderance of opinion be in favour of retaining in the proposed Federal Constitution the English system of responsible government, not withstanding its acknowledged defects and disadvantages, why should not that system be adopted by express words in its entirety? And would any valid reason be urged against the expediency of explaining and interpreting in an identical sense and by means of express declaratory provision the true legal meaning of other Constitution Acts of all the Provinces of Australia included in the Federation? If this were done the peoples of these Colonies would soon come to understand the real nature not only of the Federal Constitution but of their own. The Federal Constitution and the Provincial Constitutions would explain and support one another. The subject matter of each would be well defined if, as happily seems probable, the Convention should determine on giving to the Federal Government only such enumerated powers as the various Provinces may be willing to concede to it. There would then be small danger of conflict of jurisdictions or diversity of practice. Both the Dominion and the Provinces would be founded on the same constitutional principles, namely responsibility to Parliament, as regards Ministers or the Executive Government and the exclusive control by the representative body of the Legislature of taxation and finance as regards legislation.

I write in haste and cannot do more than indicate generally the grounds on which my answer to your question rests.

Allow me in conclusion to say that you and all your colleagues in the Convention have my warm sympathy and my best wishes for your success in the noble and very difficult work on which you are engaged. I will add that enduring success will entirely depend, in my opinion, upon the degree in which you shall be able to enact in clear words and apply to the Dominion and to the several Provinces of Australia the principles which determine the relations of the two Houses of the Legislature and the legal position and action of the Executive Government of England.

I am my dear Sir
Yours faithfully
Geo [George] Higinbotham

The Honourable A. Inglis Clark

Portland - Victoria
March 8 - 1891

My dear Sir

I thank you much for the copy of your Bill & the printed observations explanatory of your Bill which you have been so kind as to forward to me, which have been sent to me from Melbourne. They are full of matter of the highest interest & at this time of supreme importance for all Australian politicians - I must confine myself, however, to the particular subject referred to in the latter part of your observations to which you direct my attention - I believe you are correct in saying that you are the first to call attention to it publicly - I do not remember any writer or politician in Victoria at least who has mentioned it made it the basis of an argument connected with the nature & character of our Constitution -

I will say at once that I venture to

differ from the views you propound on this question, & that I should deem it on all grounds, theoretical & practical, to be a grave mistake if the suggestion em-bodied in your Bill founded on those views should be adopted by the Federal Convention. The form used in the Constitutions of the majority of these Colonies, N.S. Wales, Victoria, Queensland & Western Aus-tralia, by which the Queen is represented as one part of the Legislature, appears to me to recognise the chief & an essential Constitutional tie between Great Britain & the self governing dependencies of Great Britain. With the exception of the appeal from our Courts of law to the Queen in Council it is indeed the sole tie; and if both of these ties be removed I do not know of any restraining or controlling power remaining to the Imperial Government that would justify it in continuing to acknowledge the responsibility under which it undoubtedly now lies to other independent States for acts of the Legislatures & Governments

dependencies which would in law & in fact have then ceased to be dependencies. The form adopted by the majority of the Australian Constitutions distinctly & accurately expresses the essential fundamental fact of our legal relation of dependence on the British Crown & of the limitation of our rights of legislation springing from that relation. This is an all-sufficient reason for retaining this form so long as we are not prepared to assume the burdens of independence.

I do not understand you, however, to wish that the power of disallowance of Australian Acts of Parliament should be taken away from the Crown, but you would represent that power as an Executive function of the Imperial Government, & not as a power exercised by the Crown as one branch of the Federal & Provincial Legislatures. But this view if it were adopted in legislation & acted upon would appear to justify & might lead to very dangerous interference by the Imperial Government with our legislation from its initial stage down to the time of reservation of Bills for the Royal Assent. We have had experience of such interference

in Victoria – When protection legislation was first introduced in the Victorian Legislature, Mr. Cardwell, the Secretary of State for the Colonies, wrote a series of despatches, threatening to the Governor & insulting to his Ministers to whom the Governor was instructed to show them, with the view of preventing the introduction of such measures – The action of the Secretary of State was illegal & unconstitutional, but it had a powerful effect at the time – If your suggestion were adopted, it might be argued with some force that as the act of the Crown in assenting to & dissenting from Bills was only an executive act, the Imperial advisers of the Crown would be justified in instructing their agent, the Governor, to try to prevent the passing of Bills which they might be induced by secret influences to condemn. The bare possibility of such influence being exercised would have the worst effects.

The legal character of this part of the Constitution of Victoria is easily understood – the ground of it is obvious to everyone who admits that Victoria is a dependency of the British Crown – Its operation has been, except at the period of our history I have referred to,

free from fictitious controversy — Under
it the Governor as the Representative of
the Crown not as the agent of the
Imperial Ministers of the Crown, assents
to certain Bills — He reserves others in
accordance with the published general
Instructions authorised by the Imperial
Constitution Statute to be given to him by
Imperial Ministers, the Crown is
advised by its Imperial Advisers in
respect of Bills so reserved to assent to or
dissent from them on grounds of Imperial
policy only which do not come under
consideration until the Colonial stage of
legislation has been passed, & which, in
the event of the Royal assent being withheld,
have to be publicly assigned & justified —

Your suggestion, if adopted, would
establish a difference between the course
of Federal legislation & the prevailing course
of Provincial legislation, & this difference
would undoubtedly give rise sooner or
later to controversy & speculation with

regard to the legal status & powers of both the Federal & the Provincial Legislatures - Our experience in Victoria has made our politicians acquainted with the enormous waste of time & of political energy occasioned by controversy of this kind which is perpetual because the matter in dispute can never be determined by recognised authority - It were better, in my opinion, that there should be no federation for the present than that we should institute a Federal Constitution that would create new doubts & lead to new & bitter & insoluble controversy - I am prepared to go further & to hazard the prediction that the Federal Convention will result in a grievous & lasting failure if it does not use the grand opportunity it possesses of removing the ignorance & doubts that now prevail respecting the constitutional rights & powers (including the limits of those rights & powers) of the several

Australian Provinces. If the preponderance of opinion be in favor of retaining in the proposed Federal Constitution the English system of responsible government, notwithstanding its acknowledged defects & disadvantages, why should not that system be adopted by express words in its entirety? And can any valid reason be urged against the expediency of explaining & interpreting in an identical sense by means of express declaratory provision the true legal meaning of the Constitution Acts of all the Provinces of Australia included in the Federation? If this were done, the peoples of these Colonies would soon come to understand the real nature not only of the Federal Constitution but of their own. The Federal Constitution & the Provincial Constitutions would explain & support one another. The subject matter of each would be distinct, & the distinction would be well defined if, as happily seems probable, the Convention should determine on giving to the Federal Government only such enumerated powers as the various Provinces may be willing to concede to it. There would

there be small danger of conflict of jurisdictions or diversity of practice – Both the Dominion & the Provinces would be founded on the same constitutional principles, namely, responsibility to Parliament, as regards Ministers or the Executive Government, and the exclusive control by the representative body of the Legislature of taxation & finance, as regards legislation –

I write in haste & cannot do more than indicate generally the grounds on which my answer to your question rests.

Allow me in conclusion to say that you & all your colleagues in the Convention have my warm sympathy & my best wishes for your success in the noble & very difficult work on which you are engaged. I will add that enduring success will entirely depend, in my opinion, upon the degree in which you shall be able to enact in clear words & apply to the Dominion & to the several Provinces of Australia the principles which determine the relations of the two Houses of the Legislature & the legal position & action of the Executive Government of England.

Believe me, My dear Sir,
Yours faithfully,
Thring

The Honourable
A. Inglis Clark