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W. P. M. Kennedy

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SOME ASPECTS OF CANADIAN AND AUSTRALIAN FEDERAL CONSTITUTIONAL LAW

W. P. M. KENNEDY*

Students of American constitutional law are thoroughly familiar with the various issues which have arisen over the taxing powers of the federal and state governments, and principles have been established which are practically fundamental. Of these, one, for my purposes, may be categorically stated: There exists a mutual respect for the agencies or instrnmentalities (*in stricto sensu*) of the national and state governments, the idea behind this rule being that if the taxing power were fully conceded to one government it might hurt, cripple, or indeed defeat the activities of the other. The rule is thus reciprocal. There is an "implied limitation" on the powers of the various governments, "necessity" requiring this, lest the independence of any government within the union should be rendered liable to hurt by the taxation or statutory regulation of any other. I need hardly elaborate further this principle. It is sufficient for my purpose, thus, in general terms, to refer to it, as some such reference is a necessary introduction to our subject.

Within the British Empire are two federations—that of the Dominion of Canada and that of tlie Commonwealth of Australia. The former was created in 1867, the latter in 1900—both by statutes of the United Kingdom.[1] Within these two federations problems have arisen analogous to those just referred to in the constitutional law of the United States, and for many years there was a distinct difference in judicial opinions in the solution of them. For Canada, the interpretation differed until quite recently from that of Australia. It would take us too far afield to enter into the causes which lay behind these judicial differences. Certain facts, however, must be pointed out. First, in the statutory constitution of neither federation does there exist any explicit protection for the agencies, activities, or instrumentalities (*in stricto sensu*) of either national, state, or provincial governments. The taxing powers of all governments are

*Professor of Law in the University of Toronto.

[1]30 and 31 VIC. c. 3 (The British North America Act, 1867); 63 and 64 VIC. c. 12 (The Commonwealth of Australia Constitution Act, 1900).

defined, and whatever the difficulties in law connected with these definitions, we must at least note that they contain no such prohibitions, explicit or implicit, as have become rules in the United States. It would seem, then, that the divergencies referred to need not have arisen, as we should have expected that statutory interpretation would have been uniform, either—it does not matter for the moment which expectation we might look for—as refusing to recognize such prohibitions since none were laid down in the statutes concerned, or as recognizing them as implied and necessary for the protection of the federal principle basic in the legal structure of each nation.

We are thus led to a second point. The final interpretation of the British North America Act lies with the Judicial Committee of the Privy Council under a statute of the United Kingdom, which Canada cannot alter or repeal.[2] In Australia, however, the Commonwealth of Australia Constitution Act made modifications, forbidding any appeal to the Judicial Committee "from a decision of the High Court [of Australia] upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by [His] Majesty in Council."[3] On the other hand, the Act exempted from statutory regulation by the Australian federal legislature the control of appeals to the Judicial Committee from the Supreme Courts of the States "in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court[s] to the [King] in Council".[4]

It is obvious that a clash of interpretation was possible; and, as a matter of fact, as we shall see, it became very grave. For example, a case might go from a State court to the High Court and be decided there finally, as the High Court might not consider it one for determination by the Judicial Committee. Another case of an exactly similar nature might go on appeal direct from the Supreme Court of a State to the Judicial Committee, which might hand down a decision diametrically opposed to that of the High Court. This is, as will appear later, exactly what happened. Fortunately or unfortunately, there were clauses in the Commonwealth of Australia Constitution

[2]The Judicial Committee Act, 1844, protected by 28 and 29 Vic. c. 63 (The Colonial Laws Validity Act, 1865).

[3]63 and 64 Vic. c. 12, § 74 (1900).

[4]*Ibid.* § 73 (iii).

Act which enabled Australia to settle the clashes in interpretation.[5] That Act gave the legislature of Australia power to confer original jurisdiction on the High Court of Australia "in any matter arising under this Constitution", and to define "the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the Courts of the States." Acting under these clear legal powers the legislature of Australia in 1907 passed a law excluding the Supreme Court of any State from deciding any question as to "the limits of the constitutional powers *inter se* of the Commonwealth and those of any State or States, or as to the limit *inter se* of the constitutional powers of any two or more States", whether on first instance or appeal. When any such point arises for judicial decision in a State court, the case is *ipso facto* removed to the High Court of Australia.[6] As a consequence, no appeal, where any such issues are concerned, can reach the Judicial Committee direct from a State court.[7] It may seem to the astute lawyer that there remained the question as to whether the issue concerned was in fact and in law one which came within the definitions of the Act of 1907, and that the Judicial Committee might be called on to settle such a point. It is true that such a power still remains; but the Judicial Committee, in this connexion, has shown no desire whatever to make fine and subtle distinctions, and efforts by the States along these lines have been totally unsuccessful before the Judicial Committee.[8] Thus it has happened that the interpretation of the constitutional issues (among others the taxing power) has finally fallen in Australia to the Australian High Court, whose interpretation has differed, until quite recently, from that of the Judicial Committee in interpreting analogous powers in the British North America Act.

With this introduction we can now consider some problems in the constitutional law of these two nations. Obviously no article of this nature could be anything like comprehensive. However, it is possible to give American lawyers such a view as will illustrate certain constitutional issues in the two other great federal legal systems. In order to avoid confusion I shall treat each federation separately, beginning with the Dominion of Canada.

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[5]*Ibid.* §§ 76 (i), 77 (ii).

[6]Federal Act, No. 8 (Australia, 1907).

[7]Commonwealth v. The Limerick S.S. Co. Ltd., (1924) 35 C. L. R. 69.

[8]Minister of Trading Concerns v. Amalgamated Society of Engineers, [1923] A. C. 170; *cf.* Commonwealth v. The Limerick S. S. Co. Ltd., *supra* note 7; Commonwealth v. Krelinger and Fernau, Ltd., (1926) 37 C. L. R. 393; (1902) 5 J. Soc. Comp. Leg. (N. s.) 278.

I.

(a) *Interference by the Provinces with Canadian agencies, instrumentalities, or legal creations:* One of the earliest cases resembles *McCulloch v. Maryland.*[9] In 1882 the legislature of the Province of Quebec imposed taxation on each and every bank doing business in that Province, varying with its paid up capital and the number of its branches, no allowance or exception being made even if the principal place of such a bank's business were not in the Province, or if such a bank were incorporated outside the Province. The Bank of Toronto had its head office in Toronto in the Province of Ontario and was legally incorporated outside Quebec, where, however, it had an agency in the city of Montreal. The Bank of Toronto challenged the tax as beyond the capacity of the Quebec legislature. *Inter alia*, it was claimed by counsel for the Bank that there was a possibility that the tax might become so discriminatory in its incidents as to defeat the federal exclusive control over "banking and incorporation of banks";[10] and that the power to tax involves the power to destroy.[11] The Judicial Committee, however, decided that the tax was fully legal under the exclusive power of the Province to raise "direct taxation within the Province in order to the raising of a revenue for provincial purposes",[12] that it was not discriminatory, and that the whole argument set up by deductions or otherwise from *McCulloch v. Maryland* was not in accordance with British constitutional law. The provincial legislatures were "sovereign within their ambit",[13] and to limit that ambit by ethical considerations, or by a theory of the potential abuse of undoubtedly legal powers would be contrary to the whole scheme of the British North America Act of 1867, whose judicial interpretation must be guided by the decision of the question whether or not the federal legislature or the provincial legislature has power to legislate over the subject matter concerned. If a subject matter is found to fall clearly within the powers of the Province, it would be quite an invalid rule of interpretation "to deny its existence, because by some possibility it may be abused, or may limit the range which otherwise would be open to the Dominion Parliament."[14] In other words, the Judicial Committee refused to read any doctrine of

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[9]4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819).

[10]30 and 31 Vic. c. 3, § 91 (15) (1867).

[11]Marshall, C. J., in McCulloch v. Maryland, *supra* note 9.

[12]30 and 31 Vic. c. 3, § 92 (2) (1867).

[13]Laid down by the Judicial Committee in Hodge v. The Queen, 9 App. Cas. 117 (1883).

[14]Bank of Toronto v. Lambe, 12 App. Cas. 575 (1887).

"necessary prohibition" into the British North America Act of 1867, and applied the well known principles of parliamentary sovereignty to the provincial legislature, namely, that, given the legal power to legislate, the manner of exercise of that power is beyond judicial review.

Another taxing case, *Abbott v. City of Saint John*,[15] will illustrate an interesting point. A customs officer of the federal government appealed against an assessment of his income imposed by the City of Saint John, New Brunswick, acting under powers derived from the legislature of that Province under its exclusive power over "municipal institutions in the Province."[16] The Supreme Court of Canada upheld the tax, following a decision of the Judicial Committee in a similar case.[17] The tax was not discriminatory as it fell on every person assessable under the classes of persons defined in regulations of undoubted legal validity.

Two interesting company cases will serve to throw light on other aspects of the taxing power. In 1915, there came before the Judicial Committee the case of *John Deere Plow Co. v. Wharton*.[18] The appellant company was a federal incorporation under the federal Companies Act. The Companies Act of the Province of British Columbia laid it down that federal companies should be licensed or registered under the provincial Act if they wished to carry on business in British Columbia or to be parties to judicial proceedings in the courts of the Province. The Judicial Committee held that the effects of the Provincial Companies Act were such as to exclude from the courts a federal incorporation unless it obtained a license from the Province, and secondly that it differentially penalized such a company and its agents if, without such a license, it or they attempted to carry on business in British Columbia. In other words, the Companies Act of British Columbia struck at and nullified capacities which were natural, logical, and consequential derivations from the very incorporation itself of the company. In so far as the legislation of British Columbia did this last, it was an illegal interference with capacities legally conferred on the company by valid federal legislation, and to this extent it was *ultra vires* of the Province.

In 1921 a somewhat analogous problem came before the Judicial Committee in *Great West Saddlery Co. v. The King*.[19] The appellant company was likewise a federal incorporation with trading powers

[15](1908) 40 S. C. R. 597.
[16]30 and 31 VIC. c. 3, § 92 (8) (1867).
[17]Webb v. Outrim, [1907] A. C. 81.
[18][1915] A. C. 330.
[19][1921] 2 A. C. 91.

granted to do business in any Province. Certain Provinces passed acts to exclude such business, unless the company or companies in question was or were licensed and registered under the said acts. The licenses could not be withheld as in the case of the Companies Act of British Columbia, and counsel for the Provinces argued that the licenses were merely receipts showing that the company or companies had complied with provincial legislative demands. The Judicial Committee refused to accept the argument and held that such legislation, in its generality, would render inoperative the capacity or capacities of the company or companies derived from undoubted federal authority. Certain sections of the provincial acts were held *intra vires;* but, for our purpose, we need only note that it is now clear that a Province cannot narrow the capacity of a Dominion company, if that company is created to do business throughout Canada under a federal law which is in itself a valid exercise of federal legislative powers.

It will thus be seen that the general trend of judicial decisions is to protect federally created capacities lest they should be handicapped by discriminatory provincial laws. On the other hand, it would seem that legislative action by the Provinces will be upheld if it is a clear exercise of provincial powers applied indiscriminately; and in such a case the courts will not consider the possibilities of abuse.

(b) *Interference by the Dominion of Canada with provincial agencies, instrumentalities, or legal creations:* In discussing this question I must confine myself to a narrow field of illustration, and I shall omit, as in the last section, the entire problem of insurance companies for the simple reason that as to them the law is so highly confused that even a separate monograph might fail to make it clear, especially to foreign lawyers. The cases which follow are, however, of some interest; and they will, in addition, as will appear later, afford points of contrast with Australian decisions.

Section 125 of the British North America Act of 1867 lays down the following principle: "No lands or property belonging to Canada or any Province shall be liable to taxation."[20] Up to 1923 we had arrived at a reasonable construction of that provision.[21] In that year, however, a new and interesting problem arose, which must be kept in mind in the light of somewhat similar issues in Australia. A cargo of whiskey was shipped for the use of certain public insti-

[20]30 and 31 VIC. c. 3, § 125 (1867).

[21]See, *inter alia*, Smith v. Council of the Rural Municipality of Vermillion, [1916] 2 A. C. 569; Hudson's Bay Co. v. Bratt's Lake Rural Municipality, [1919] A. C. 1006; *In re* Town of Cochrane v. Cowan, (1921) 50 O. L. R. 169, 173.

tutions in British Columbia, a Province then under exclusive "government liquor control", and the whiskey in question was imported by the government of that Province. The federal customs officer refused to release the whiskey for delivery until the federal duties had been paid. The government of British Columbia relied on the protection of the section of the British North America Act just quoted, and claimed that, as the whiskey in question was undoubtedly the property of the Province, any tax on it would be illegal. The Judicial Committee, however, decided that this section could not be construed as an absolute prohibition, but must be read in the light of the exclusive powers granted to the federal legislature over "the regulation of trade and commerce" and over "the raising of money by any mode or system of taxation."[22] They accordingly decided that assessing the duty on the whiskey, even though it was the property of the Province, was a perfectly valid exercise of federal powers.[23] It may be that, in the light of this decision, we shall have to abandon some of the rulings interpreting section 125 of the British North America Act. Be that as it may, the decision of the Judicial Committee is interesting in that it preserves the exclusive, enumerated powers of the Dominion, which are granted "notwithstanding anything in the Act,"[24] and also, because it affords an interesting illustration of arriving at a similar conclusion by different methods from those used by the High Court of Australia—a point to which I shall refer later.

The counterpart of *Abbott v. The City of Saint John*[24a] is found in *Caron v. The King*.[25] The Minister of Agriculture in the cabinet of the Province of Quebec claimed that his income as a provincial officer should be free from federal income tax—a general system of taxation imposed under the federal power to raise money "by any mode or system" of taxation. The Judicial Committee applied the principles of the *Abbott* case and laid it down that, while the federal legislature might not so exercise its taxing powers as to destroy the capacities of provincial officers, yet, in the case in question, the tax was not of the nature of such a discriminatory exercise of power and was imposed on all persons within the classifications of the federal income tax acts,[26] without any regard to the sources of the incomes of such persons. For these reasons the provincial Minister

[22]30 and 31 Vic. c. 3, § 91 (2, 3), (1867).
[23]Att'y Gen. for British Columbia v. Att'y Gen. for Canada, [1924] A. C. 222.
[24]30 and 31 Vic. c. 3, § 91 (1867).
[24a]*Supra* note 15.
[25][1924] A. C. 999.
[26]Income Tax Act of 1917, and amending Act of 1919.

of Agriculture was legally taxed by Canada on his income as a provincial officer.

In concluding this division of our subject, we may point out that there are rules of interpreting the British North America Act of fairly general acceptance. The courts will treat it as an ordinary British statute and will, accordingly, try to give to its every section its natural meaning, reading it in the light of the rest of the statute and without in the least allowing historical reasons, or reasons based on any conception of the federal principle of government, to influence them. Their duty, as they have conceived it to be, is to interpret the whole scheme of the Act without reading into it anything not necessarily implicit, to interpret a delicate and difficult distribution of powers in such a way as not to nullify or destroy the federation. On the whole, there has been success crowning these efforts, although within recent years the tendency of the Judicial Committee has been to accentuate provincial powers.[27]

II.

The interpretation of the Commonwealth of Australia Constitution Act of 1900 for many years followed quite different lines, laid down in no uncertain terms by Sir Samuel Griffith, the first chief justice of the Commonwealth, who imported into the canons of construction entire principles and rules drawn from American constitutional law. In addition, he went out of his way to emphasize methods for interpreting the Act totally at variance from those which have been relied on in construing the British North America Act. For example, he said: "We think it right to emphasize what we conceive to be a fundamental principle applicable to the construction of instruments which purport to call into existence a new state with independent powers of legislation and government... Such instruments are not and never have been drawn on the same lines as for instance the Merchant Shipping Acts, which prescribe in every detail the powers and authorities to be exercised by every person dealt with by the statute."[28]

Following this idea, a principle emerged that the intent of the whole scheme of the Australian federation was the establishment of

[27]See Att'y Gen. for Canada v. Att'y Gen. for Alberta, [1916] 1 A. C. 588; *In re* Board of Commerce Act of 1919, [1922] 1 A. C. 191; Toronto Electric Commissioners v. Snyder, [1925] A. C. 396; W. P. M. Kennedy, *Law and Custom in the Canadian Constitution* (Dec. 1929) ROUND TABLE 143, *ff.*

[28]Baxter v. Commissioner of Taxes, (1907) 4 C. L. R. 1087. Griffith, C. J., cites in this connexion Story, J., in Martin v. Hunter's Lessee, 1 Wheat. 304. 4 L. Ed. 97 (U. S. 1816).

separate quasi-sovereign governments, and that necessity demanded that every power of each government must be construed as limited and restricted so as not to hurt, injure, or impair the independence of the other. This principle was applied to all control, whether of a taxing or regulative nature, by any one government in Australia over the operations of any other. It is obvious that behind these rules lie contractual conceptions as between the parties to the federal union. Indeed in 1906 Griffith, C. J., elaborated this canon of interpretation. The Commonwealth of Australia Constitution Act is, he said, not merely an Act of the legislature of the United Kingdom; it is a compact entered into between the six Australian colonies which formed the Commonwealth. "The rules, therefore," he added, "that in construing the statute regard must be had to the existing laws which are modified by it, and that in construing a contract regard must be had to the facts and circumstances existing at the date of the contract are applicable in a special degree to the construction of such a constitution."[29] As a consequence, the High Court of Australia purported to give effect to a rule laid down by Bowen, L. J., in *The Moorcock*:[30] "[T]he implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction." Indeed, Griffith, C. J., expressly declared that his rules of construction were drawn from the principle enunciated in *The Moorcock*.[31]

To follow in detail the case law governed by these principles and canons would in truth almost amount to a treatise on Australian constitutional law. My purpose will be served if I trace the law in Australia connected with the doctrine of the immunity of instrumentalities, showing its early history and its establishment. The matter will be of special interest to American lawyers in disclosing the influence of American constitutional law in Australia; while the final abandonment of the doctrine will be of value to legal students, who study with care comparative jurisprudence.

The doctrine first came up in Australian constitutional law in what is known as *Wollaston's Case*.[32] This was a case stated by the Commissioner of Taxes for the State of Victoria as to whether one

[29]Federated Amalgamated Government Railway and Tramway Service Ass'n v. New South Wales Railway and Traffic Employees Ass'n, (1906) 4 C. L. R. 488, 534.

[30]14 P. D. 64, 68 (1889).

[31]In Att'y Gen. for Queensland v. Att'y Gen. for the Commonwealth, (1915) 20 C. L. R. 148, 162–3.

[32](1902) 28 V. L. R. 357.

Wollaston, a federal officer, should be assessed for State income tax in Victoria, where he resided and carried out most of his federal duties. The Supreme Court of Victoria rejected the principles laid down in *McCulloch v. Maryland*, refused to accept any pleas based on a "doctrine of necessity", and followed the lines of the rulings already discussed in analogous Canadian cases. Two years later, *D'Emden v. Pedder*,[33] the first important constitutional case with which the High Court of Australia dealt, was connected with the same point. The question at issue was whether a State could compel a federal officer to use a State stamp on a receipt for his salary. The High Court explained, amplified, and established the doctrine of the immunity of instrumentalities. Griffith, C. J., in deciding in favor of the federal officer against Tasmania, the State in question, said: "It must...be taken to be of the essence of the Constitution that the Commonwealth is entitled within the ambit of its authority, to exercise its legislative and executive functions in absolute freedom, and without any interference or control whatever except that prescribed by the Constitution itself... It follows that when a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative."[33a] The rule was applied two years later to state instruments in the strictest sense,[34] and thus the doctrine was made reciprocal.

Matters did not rest here. When in *Deakin v. Webb*[35] a problem almost similar to that in *Wollaston's Case* came on appeal before the High Court of Australia, that court reversed the unanimous decision of the Supreme Court of Victoria, and applied the principle laid down in *D'Emden v. Pedder*, supporting their decision with the United States Supreme Court case of *Dobbins v. Commissioners of Erie County*.[36] They also laid it down that the question of the liability of a federal officer's salary to State taxation came within the question as to the limits, *inter se*, of the constitutional powers of the Commonwealth and those of the States, within the meaning of the Constitution, that therefore the decision of the High Court

[33](1904) 1 C. L. R. 92.

[33a]*Ibid.*, per Griffith, C. J., at 109–11.

[34]Federated Amalgamated Government Railway and Tramway Service Ass'n v. New South Wales Traffic Employees Ass'n, *supra* note 29.

[35](1904) 1 C. L. R. 585. See Higgins, *McCulloch v. Maryland in Australia* 905) 18 HARV. L. REV. 559.

[36]16 Pet. 435, 10 L. Ed. 1022 (U. S. 1842).

was final, unless that Court should certify the case as one for the determination of the Judicial Committee, which certificate the Court refused.[37]

The States, however, were not to be outdone. Outtrim, a federal officer in Victoria, objected to the assessment of his federal salary by the income tax law of that State. The Commissioner of Taxes referred the matter to the Supreme Court of Victoria, which, feeling itself bound to follow *Deakin v. Webb*, decided against him.[38] The Commissioner, however, obtained leave to appeal directly to the Judicial Committee under the provisions of the Commonwealth of Australia Constitution Act,[39] and the case came before that body under the title, *Webb v. Outtrim*.[40] The government of the Commonwealth obtained leave to intervene and was represented by counsel. The Judicial Committee refused to follow *Deakin v. Webb* and reversed the judgment of the Court of Victoria. There was thus a pretty situation. The Judicial Committee held one doctrine, and the High Court of Australia held another. A way out of the difficulty was found. The Commonwealth, first of all, allowed the States, by federal legislation, to tax the salaries of federal officers;[41] and, in order to settle the conflict in law, the federal legislature in 1907 passed the Judiciary Act, under which, as we have already seen, the Supreme Court of any State was excluded from dealing with cases of this nature, which, when they arose, were automatically removed to the High Court of Australia. This settled matters for thirteen years, and constitutional lawyers believed that the doctrine of the reciprocal immunity of instrumentalities was an integral part of Australian constitutional law. *Dis aliter visum.*

In 1920, a case of vast importance arose before the High Court.[42] The respondents were carrying on trade under legislation of Western Australia, and their operations were likely to give rise to "industrial disputes"[43] within the meaning of the Commonwealth of Australia Act if the respondents had been private individuals. They were, however, operating steamships on behalf of the government of Western Australia. The question was whether such a governmental activity was immune from federal legislation in relation to "in-

[37]63 and 64 VIC. c. 12, § 74 (1900).

[38]Outtrim's Case, [1905] V. L. R. 463.

[39]63 and 64 VIC. c. 12, § 74 (iii) (1900).

[40]*Supra* note 17.

[41]Commonwealth Salaries Act, 1907.

[42]Amalgamated Society of Engineers v. Adelaide S. S. Co. Ltd., (1920) 28 C. L. R. 129.

[43]63 and 64 VIC. c. 12, § 51 (xxxv) (1900).

dustrial disputes", a subject matter on which the federal legislature had legally legislated. The result of the case, which was against the State, is immaterial; but it is interesting to note that the issues could have been decided quite apart from any reference to the doctrine of the immunity of instrumentalities, since that doctrine had not been held to apply, either in Australia or in the United States, to the trading activities of a government, but only to governmental agencies *in stricto sensu*.[44]

The High Court, however, reviewed the doctrine and laid down a rule now known as "the rule in the *Engineers Case*": The Constitution of Australia is to be interpreted and given effect to according to its own terms, finding the intention from the words, and upholding the Constitution precisely as framed. It is to speak with its own voice, "clear of any qualifications which the people of the Commonwealth, or, at their request, the Imperial Parliament, have not thought fit to express, and clear of any questions of expediency or political exigency."[45] As a result, the High Court rejected the doctrine of the immunity of instrumentalities based upon the principle of necessity or implied prohibition. In other words, that court has now come into line with the Judicial Committee. The Australian Constitution is therefore to be interpreted quite apart from the contractual ideas of Griffith, C. J., and in accordance with the well known rules of statutory construction; and in conformity with the views which govern in the Dominion of Canada.

In so far as federal agencies are to be immune from State taxation or regulation, this immunity will in the future be governed, not by the doctrine of necessity, but by the fact that they are created in relation to subject matters belonging in law to the federal legislature, and protected by the rule of the Constitution: "When a law of a State is inconsistent with a law of the Commonwealth the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."[46] Under this position it is clear that anything like the American doctrine of the immunity of instrumentalities is gone; and that such protection as exists is based explicitly on the Constitution, which gives, however, nothing like a reciprocity of "immunity" for the States.[47]

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[44]*Cf.* South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110 (1905); Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342 (1911); Federated Engineers Ass'n v. Broken Still Proprietary Co., (1911) 12 C. L. R. 398; Australian Workers Union v. Adelaide Milling Co., (1919) 26 C. L. R. 460.

[45]Engineers Case, *supra* note 42, at 142.

[46]*Cf. ibid.* 111; and see 63 and 64 VIC. c. 12, § 109 (1900).

[47]*Cf.* Commonwealth v. State of Queensland, (1920) 29 C. L. R. 1; Davoren v. Commonwealth Commissioner of Taxation, (1923) 29 Argus L. R. 129. See

I may note, before leaving this case, that it laid down some rules as to the use in Australia of the decisions of the Supreme Court of the United States. They cannot in the future be recognized as standards whereby to measure the respective rights of the Commonwealth and the States; but they can be used for guidance in cases of ambiguity.[48]

Before concluding, I wish to refer to one other type of Australian case for purposes of comparison with Canadian constitutional law. We have seen how the difficulties were solved in Canada in relation to federal taxation of provincial property, when it in reality was provincial property for purposes of trade. In Canadian law, the lines followed were that provincial governmental trading must not be allowed to interfere with the legal taxing powers of the federation; and that is true in spite of the guarantee of protection already quoted from the British North America Act. In Australia similar situations have arisen, and the High Court has arrived at similar conclusions; but, in spite of a rule of the Constitution that "the Commonwealth shall not impose any tax on property of any kind belonging to a State",[49] and in spite of clear federal taxing powers, the process of reasoning has differed from that in Canada. For example, a government cannot import, free from federal duties, steel rails required for a State's railways; much less can it import, free from federal duties, wire-netting for general use in the State.[50] The High Court did not consider the federal taxing power and balance it, as in Canadian law, against the section just quoted from the Constitution Act. They preferred to say that the taxes were importation taxes and not taxes on property. The year of these decisions is 1908. Would such a fine point be made today in the light of the *Engineers Case?*

Sir R. Garren, *The Development of the Australian Constitution* (1924) 40 L. Q. REV. 202, *ff.*

[48]Engineers Case, *supra* note 42, at 146.

[49]63 and 64 VIC. c. 12, § 114 (1900).

[50]Att'y Gen. of New South Wales v. Collector of Customs, (1908) 5 C. L. R. 818; The King v. Sutton, (1908) 5 C. L. R. 789.