ALSATIAS FOR JACK SHEPPARDS? : THE LAW IN FEDERAL ENCLAVES IN AUSTRALIA

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I

The existence of Commonwealth lands within the geographical boundaries of the States gives rise to interesting problems of federal law. There are, or may be, problems of jurisdiction (using that term in the broad sense to cover the exercise of legislative, executive and judicial power) as between Commonwealth and State authority. In a paper on 'The Need for Co-operation in State and Commonwealth Laws' presented to the Sixth Legal Convention of the Law Council of Australia in 1949, Professors Beasley and Baker made reference to the problem:

> Although State laws with respect to places acquired by the Commonwealth continue in force, there is some uncertainty as to whether or not the Commonwealth Parliament could not by apt legislation exclude State penal provisions with respect to offences committed on acquired property and in some cases as to whether, in fact, by virtue of s. 109 this has not already occurred. The whole topic is shrouded in uncertainty. . . . It seems that as matters stand at the present, Commonwealth acquired places could become "Alsatias for Jack Sheppards" or "Commonwealth *enclaves,* in which New South Wales writs cannot operate or New South Wales police perform their functions".[1]

The reference to 'Alsatias for Jack Sheppards' is from a judgment of Higgins J. in one of the few cases in which the matter has been discussed, and in which divergent views were expressed in the High Court.[2] The reference to Alsatia is of respectable antiquity in this context. In 1901, the first year of the Commonwealth's existence, in *R. v. Bamford*[3] the question was whether a person might be convicted under the Postage Act of New South Wales of stealing a letter in a Commonwealth post office in New South Wales. In March 1901, the Postal Department of that State had been transferred to the Commonwealth and the property in the post offices was vested in the Commonwealth by operation of section 85 of the Constitution. No Commonwealth legislation had then been enacted with respect to postal offences, and the question was whether the State law still applied. It was held by a majority in the Supreme Court of New South Wales that it did apply, and the two majority judges were

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[1] (1949) 23 *Australian Law Journal* 188, 191.

[2] *Commonwealth v. New South Wales* (1923) 33 C.L.R. 1, 59.

[3] (1901) 1 S.R. (N.S.W.) 337.

attracted by the reference to Alsatia in the arguments of the Attorney-General, Mr Wise. Owen J. spoke of the danger that 'there would be scattered throughout the State little Alsatias where no law prevailed and where crime could be committed with impunity'[4] and G. B. Simpson J. referred to 'little Alsatias—[where]—everybody and everything will be entirely at the mercy of criminals enterprising enough to take advantage of a condition of lawlessness alleged to have been brought about by the combined effect of Imperial legislation, and neglect on the part of the Parliament of the Australian Commonwealth'.[5] Higgins J. later coupled Alsatia with Jack Sheppard, and as a piece of history the association is interesting. Alsatia was in the Whitefriars' district of London and was a sanctuary for debtors and lawbreakers until 1697; Jack Sheppard was a notorious highwayman born in 1702 and executed at Tyburn in 1724. But Alsatia passed into the language in the eighteenth and nineteenth century as a general description of a low quarter to which criminals resorted.

The Constitution contains various provisions for the acquisition and government of land by the Commonwealth. Section 111 authorizes the surrender of any part of a State to the Commonwealth by the Parliament of the State, and on surrender and acceptance by the Commonwealth such part of the State becomes subject to the exclusive jurisdiction of the Commonwealth. Section 125 makes provision for the grant and acquisition of land for the establishment of the seat of government and the Australian Capital Territory.[6] Section 122 authorizes the making of laws by the Parliament for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth. Section 52 (i) confers exclusive power on the Parliament to make laws for the peace order and good government of the Commonwealth with respect to the seat of government of the Commonwealth and all places acquired by the Commonwealth for public purposes.

Putting aside for the present consideration of the meaning of the words 'all places acquired by the Commonwealth for public purposes' in section 52 (i), it is to be observed that this group of provisions relates to Commonwealth territories in the *political* as well as the

[4] *Ibid.* 350. [5] *Ibid.* 358.

[6] 'The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales and be distant not less than one hundred miles from Sydney.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.'

proprietary sense. Such territories may be enclaves within State boundaries, and in the case of the Australian Capital Territory must necessarily be so; or they may lie outside State limits and indeed may be external to the boundaries of the Commonwealth. In the case of the Australian Capital Territory there is also a question as to the source of Commonwealth legislative authority, which is whether section 52 (i) is aptly drawn to confer power on the Parliament to legislate for the Territory.[7]

There are other provisions for the acquisition of land by the Commonwealth. Section 51 (xxxi) authorizes the making of laws by the Parliament for the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws. Section 85 provides that when any department of the public service of a State is transferred to the Commonwealth all property of the State used exclusively in connection with the department shall be vested in the Commonwealth. Any property of the State used, though not exclusively, in connection with the department may be acquired by the Commonwealth subject, in either case, to an obligation to pay compensation. Section 85 is linked with section 69 which provides for the transfer of certain departments from the States to the Commonwealth. The expression 'property of the State' in section 85 is, as was pointed out in *Commonwealth v. New South Wales*,[8]

> . . . popular rather than legal. It has always been recognized that the waste lands of Australia and royal metals wherever found in Australia are vested in the King . . . ; the management and control of waste lands and royal metals have, however, by various Imperial Acts been conferred upon the legislative organs of the several States of Australia. In addition, the States have often acquired lands from private owners for public purposes. All these lands (including royal metals) may not inaptly be described as the property of the State and consequently potentially within the operation of section 85.

For purposes of jurisdiction, nothing apparently depends on whether an acquisition is effected under section 51 (xxxi) or section 85.[9] There is however a significant distinction between acquisitions effected under these powers, and those effected by authority of section 111 and section 125. The power to legislate conferred by section 122 operates on land acquired under section 111 (and it may be under

[7] See *Federal Capital Commission v. Laristan Building and Investment Co. Pty Ltd* (1929) 42 C.L.R. 582; *Australian National Airways Pty Ltd v. Commonwealth* (1955) 71 C.L.R. 29, 83; Ewens, 'Where is the Seat of Government' (1951) 25 *Australian Law Journal* 532; Wynes, *Legislative, Executive and Judicial Powers in Australia* (2nd ed. 1956) 160; Cowen, *Federal Jurisdiction in Australia* (1959) 144-148; Else-Mitchell (ed.), *Essays on the Australian Constitution*, 73, 78 (Sawer).

[8] (1923) 33 C.L.R. 1, 19 *per* Knox C.J. and Starke J.

[9] *Kingsford Smith Air Services Ltd v. Garrisson* (1938) 55 W.N. (N.S.W.) 122, 124.

section 125), but not on land acquired under section 51 (xxxi) or section 85. This is because sections 111, 122 and 125 are concerned with territories of the Commonwealth in the political sense, whereas section 51 (xxxi) and section 85 appear to contemplate the acquisition of land for less general and more distinctively proprietary purposes.

This paper is concerned with the sources of governmental authority over land acquired by authority of section 51 (xxxi) and section 85. Such acquisitions are likely to be made within the geographical boundaries of the States and section 52 (i) confers exclusive legislative power on the Commonwealth Parliament to legislate for the peace order and good government of the Commonwealth with respect to all places acquired by the Commonwealth for public purposes. It is a question, not yet certainly settled, whether this confers a power to legislate generally for the government and administration of land within State boundaries acquired under section 51 (xxxi) or section 85 by the Commonwealth.

Whatever the ambit of section 52 (i), it is clear that there are other sources of power to legislate for lands so acquired. There will often be discovered a specific Commonwealth legislative power which, in combination with the incidental power, section 51 (xxxix), can be relied on as a source of legislative authority. For example: section 76 of the Quarantine Act, relating to trespass on quarantine stations, is supported by the quarantine power, section 51 (ix), and the incidental power. Section 114 of the Post and Telegraph Act which constitutes the offence of stealing a postal article rests on the postal power, section 51 (v) and section 51 (xxxix). Section 89 of the Commonwealth Crimes Act imposing penalties for trespass on land belonging to or in the possession of the Commonwealth and used for military purposes is supported by the defence power, section 51 (vi) and section 51 (xxxix). A Commonwealth law applying to such lands may *expressly* exclude the operation of State law. Thus the Australian Army (Canteens Service) Regulations 1957 specifically exclude the operation of State liquor laws in army canteens and clubs. This draws support from section 51 (vi), the defence power, section 51 (xxxix), and section 109.

But there are cases where the source of authority is not so clearly apparent, at least in section 51 of the Constitution. The Airports (Business Concessions) Act 1959 authorizes the grant of leases, licences and trading rights by Commonwealth authority in airports owned or held under lease by the Commonwealth and operated in pursuance of the Air Navigation Act. It may be that section 51 (i), the interstate commerce power, together with the incidental power furnish constitutional support for this, but it is not clear, and it may be necessary to turn to section 52 (i). The Airports (Surface Traffic) Act

1960 likewise makes provision with respect to the control of surface traffic at airports.[10] Sections 51-54 of the Lands Acquisition Act 1955 authorize various dealings in land which are vested in the Commonwealth: *inter alia,* these sections provide that the Governor-General may authorize the grant of a lease or licence to a person to mine for metals or minerals on land situate in a State which is vested in the Commonwealth. It is difficult to discover constitutional authority for such a provision in section 51 of the Constitution; and if this is so, it is necessary to turn to section 52 (i) as a source of support.

II

The problem of jurisdiction over federal enclaves within State boundaries has, of course, arisen in the United States, and reference has been made to American authority in Australian cases.[11] Article 1, section 8 § 17 of the United States Constitution provides that the Congress shall have power to exercise exclusive legislation 'in all Cases whatsoever over such District (not exceeding ten Miles square) as may, by Cession of Particular States and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings'. The comparison with section 52 (i) of the Commonwealth Constitution is interesting. The American clause has been examined by American courts on many occasions and in *Fort Leavenworth Railroad Co. v. Lowe,*[12] the Supreme Court of the United States said that

> When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have "like authority" over such places as it has over the district which is the seat of government; that is, the power of "exclusive legislation in all cases whatsoever". Broader or clearer language could not be used to exclude all other authority than that of Congress.

It is well settled that the legislative power over such places is general and extends to the making of laws for their internal govern-

[10] S. 18 provides:
'This Act shall not be construed as intended to exclude the operation of any law of a State or Territory of the Commonwealth in which an airport is situated that can operate without prejudice to the express provisions of this Act or the regulations and, in particular, of any law of a State or Territory of the Commonwealth relating to the registration and equipment of vehicles, the licensing of drivers of motor vehicles and the rules to be observed by persons driving or in charge of vehicles or animals, or by pedestrians, on roads.'

[11] *R. v. Bamford* (1901) 1 S.R. (N.S.W.) 337; *Commonwealth v. New South Wales* (1923) 33 C.L.R. 1.

[12] (1885) 114 U.S. 525, 532.

ment. The original emphasis was on military installations,[13] but the construction of the words 'other needful buildings' has been broad; it covers post offices[14] and embraces 'whatever structures are found to be necessary in the performance of the functions of the Federal Government'.[15] It extends therefore to such structures as locks and dams for the improvement of navigation; it would doubtless embrace lands acquired for a wide variety of governmental purposes, though it has been held not to apply to lands acquired for forests and national parks.[16] Once land is acquired in accordance with Article 1, section 8 § 17, State jurisdiction is wholly ousted,[17] unless on a transfer with consent the State makes a particular reservation of jurisdiction.[18] The United States may however decline to accept exclusive jurisdiction,[19] and, in any event, on an acquisition which entitles the United States to assume exclusive jurisdiction, State laws which were in force at the date of cession and which are intended for the protection of private rights, continue in force until they are abrogated or changed by Congress.[20] But only such State laws as were in force at the date of cession continue to apply; subsequent repeals or amendments by the State legislature will not be effective.[21] This gives rise to anomalous situations.[22]

The United States may also exercise the power of eminent domain to take land without the consent of the State in which it is situated,[23] and Article 1, section 8 § 17 does not apply to such a case, so that over such land the State retains jurisdiction which is not inconsistent with its governmental uses.[24] Nor is there exclusive jurisdiction over lands ceded to the United States which are held or acquired for purposes not within the definition of 'other needful buildings',[25] though in such a case a State may cede and the United States may accept exclusive jurisdiction.

The existence of federal enclaves within State boundaries, subject to the exclusive jurisdiction of the United States and therefore withdrawn from the jurisdiction of the State, has raised a variety of prob-

[13] Patterson, 'The Relation of the Federal Government to the Territories and the States in Landholding' (1949) 28 *Texas Law Review* 43, 57-62.
[14] *Battle v. U.S.* (1908) 209 U.S. 36.
[15] *James v. Dravo Contracting Co.* (1937) 302 U.S. 134, 143.
[16] *Collins v. Yosemite Park Co.* (1938) 304 U.S. 518, 530.
[17] See as to criminal jurisdiction *Johnson v. Yellow Cab Transit Co.* (1944) 321 U.S. 383.
[18] *James v. Dravo Contracting Co.* (1937) 302 U.S. 134.
[19] *Mason Co. v. Tax Commissioner of Washington* (1937) 302 U.S. 186; *Atkinson v. State Tax Commission of Oregon* (1938) 303 U.S. 20.
[20] *Chicago, Rock Island and Pacific Railroad Co. v. McGlinn* (1883) 114 U.S. 542.
[21] *Arlington Hotel v. Fant* (1929) 278 U.S. 439.
[22] See 'Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy' (1952) 101 *University of Pennsylvania Law Review* 124.
[23] *Kohl v. U.S.* (1875) 91 U.S. 367.
[24] *James v. Dravo Contracting Co.* (1937) 302 U.S. 134.
[25] *Collins v. Yosemite Park Co.* (1938) 304 U.S. 518.

lems.[26] The withdrawal of State legislative or judicial jurisdiction and the want of federal action may produce a jurisdictional void. Such a legal vacuum cannot be tolerated and various expedients have been devised. In 1928 Congress provided for the application of the law of the State in which the federal enclave was situated in respect of wrongful death or injury occurring within a national park or other area under the exclusive jurisdiction of the United States. Similar provision was subsequently made with respect to workers' compensation legislation. Such provisions are designed primarily to provide for compensation for employees of contractors working on federal buildings and lands. In 1940, Congress gave specified taxing authority within federal enclaves to the States, and by another Act of the same year provided that acceptance by the federal government of a cession of jurisdiction would not be presumed by an acceptance of a transfer of property with the consent of a State, but that such an acceptance of jurisdiction must be demonstrated by affirmative acts.

For more than a hundred years, Congress has also enacted Assimilative Acts, applying to the federal land the law of the State as it stood as at the date of the Act. To this there was no constitutional objection, though it suffered from the obvious defect that it did not make provision for subsequent amendment or repeal of State laws.[27] The Assimilative Act in this form produced 'static conformity';[28] and during the nineteenth and twentieth centuries a succession of criminal law acts was passed to bring the assimilation up to date. This course of conduct was dictated by the understandable disinclination of Congress to enact detailed and comprehensive criminal codes for all the federal enclaves, and by doubt of the validity of general prospective enactments which produced 'complete current conformity'[29] with State law. The fear was that this might be an unconstitutional delegation of power to the States. In 1948, Congress faced the issue by enacting such an Assimilative Crimes Act designed to produce current conformity and this was upheld by the Supreme Court of the United States, by a majority decision in *United States v. Sharpnack*.[30]

This eases the problem, though it does not entirely dispose of it, and there is an active current discussion of jurisdictional problems in federal enclaves. But it is clear that Article 1, section 8 § 17 vests in Congress an exclusive jurisdiction over federal enclaves, and that

[26] See 'Land Under Exclusive Federal Jurisdiction: An Island Within a State' (1949) 58 *Yale Law Journal* 1402; 'Federal Areas: The Confusion of a Jurisdictional-Geographical Dichotomy' (1952) 101 *University of Pennsylvania Law Review* 124; 'The Federal Assimilative Crimes Act' (1957) 70 *Harvard Law Review* 685.

[27] *U.S. v. Paul* (1832) 6 Pet. 141; *Franklin v. U.S.* (1909) 216 U.S. 559.

[28] *United States v. Sharpnack* (1958) 355 U.S. 286, 291.

[29] *Ibid.* 293. [30] (1958) 355 U.S. 286.

where exclusive jurisdiction is assumed by Congress, State jurisdiction subject to specific reservations and the saving of existing State laws which protect individual rights, is wholly withdrawn.

III

In the sixty years of Australian federation there have been only two reported cases in which the decision depended entirely on the resolution of the problem of jurisdiction in federal enclaves. In *R. v. Bamford*[31] in 1901, there was some reluctance on the part of the New South Wales Full Supreme Court to take up the matter in view of the way in which the case came to it, but the Attorney-General urged the 'pressing importance to have it decided. Cases will frequently arise, and in fact are now pending, in which the same question will arise.' The prisoner had been charged at the Armidale Assizes with stealing a letter in a post office which had been transferred to the Commonwealth by section 85 of the Constitution. He pleaded guilty, but at the trial the Solicitor-General raised the question of the jurisdiction of the court to try the matter and Cohen J. referred the matter to the Full Supreme Court which by a majority held that the prisoner was properly convicted.

There were two jurisdictional questions. One was legislative, and raised the issue whether New South Wales law ran within the post office which was federal land; the other was judicial: whether New South Wales courts were competent to try indictments in respect of acts committed on federal land. The determination of these issues involved examination of the operation of sections 85, 52 (i) and 108 of the Constitution. Section 108 provides that

> Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal of any such law as the Parliament of the Colony had until the Colony became a State.

All three members of the Court agreed that section 52 (i) conferred general and exclusive power on the Commonwealth Parliament to legislate for the government of all places acquired by the Commonwealth for public purposes. But the Court was divided on the effect of an acquisition under section 85 and the consequent operation of section 108. The majority view was that land acquired under section 85 did not cease to be part of the State, so that section 108 operated, and the prisoner was properly convicted under the State Act which

[31] (1901) 1 S.R. (N.S.W.) 337.

continued to apply. The New South Wales law in question was one which was within the powers of the Commonwealth Parliament to enact by virtue of section 52 (i), and it continued in force in the State which included within its area the Armidale post office. A contrary holding would involve the consequence that land acquired by authority of section 85 ceased to be within the State, so that section 108 could not operate as it only continued the force of laws in the State. If New South Wales law did not apply, and as the Commonwealth had not exercised its legislative power, the Armidale post office and all like places would become Alsatias, no man's lands.[32] The dissenting judge, Stephen J., was prepared to face this prospect. In his view section 85 operated to excise land from the *political* area of a State, and it was in this sense that the words 'shall . . . continue in force in the State' in section 108 should be read. If the consequence was that crimes could be committed with impunity in such places, the Commonwealth had abundant power under section 52 (i) to fill the horrid void.

The reasoning of the Court with respect to legislative power led to a similar conclusion in the case of judicial jurisdiction. In the view of the majority, there was nothing in the Constitution which withdrew the jurisdiction of State courts in respect of such matters; it followed therefore that the courts of New South Wales retained jurisdiction to try such offences.

In *Kingsford Smith Air Services Ltd v. Garrisson,*[33] there was a challenge to the jurisdiction of the Metropolitan District Court of New South Wales. An action for damages was brought in that court based on the negligence of the defendant in the management and control of an aeroplane on the Kingsford Smith Aerodrome at Mascot, New South Wales. The aerodrome had been acquired by the Commonwealth under the Lands Acquisition Act 1906-1934, pursuant to the authority of section 51 (xxxi) of the Constitution, and was within the geographical boundaries of the area in which the Metropolitan District Court had jurisdiction. The defendant argued that the acquisition of the land by the Commonwealth removed it from the jurisdiction of the New South Wales court. This was in effect a restatement of the dissenting view of Stephen J. in *R. v. Bamford.* Betts D.C.J. held that no distinction could be based upon the constitutional source of acquisition being section 51 (xxxi) rather than section 85, and concluded that *Bamford's* case was binding authority for the proposition that the Metropolitan District Court was a court of competent jurisdiction. He also stated a general proposition with respect to jurisdiction in such federal lands.

[32] *Ibid.* 350, 358.
[33] (1938) 55 W.N. (N.S.W.) 122.

> It was pressed upon me that the land embraced by the aerodrome had ceased to be in New South Wales and has been taken out of the boundaries of the jurisdiction of the Metropolitan District Court. In my opinion this is not so. It is true that section 52 of the Commonwealth of Australia Constitution Act provides that "The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to the seat of Government of the Commonwealth and all places acquired by the Commonwealth for public purposes"; but it seems to me that the mere granting of exclusive jurisdiction to make laws for the peace, order and good government of the Commonwealth does not have the effect of abrogating any laws duly made and already in force and operating for the peace, order and good government of the area in question whether it be regarded as Commonwealth property or not.
>
> In my opinion, quite apart from ss. 108 and 109 of the Constitution, existing laws of the State for the peace, order and good government of the area would continue to apply until the Parliament of the Commonwealth had exercised the exclusive power granted to it by section 52 of the Constitution.[34]

In face of *R. v. Bamford,* it was hardly possible for a New South Wales District Court judge to reach any other conclusion, and a subsequent application to the High Court by the defendant in *Garrisson* for an order *nisi* for prohibition was refused.[35] These two cases support the view that on an acquisition under sections 51 (xxxi) or 85, land thereby passing to the Commonwealth is not withdrawn by that very fact from the operation of existing State laws, and from the jurisdiction of State courts. In the context of judicial jurisdiction, there is therefore a significant difference between the Australian case and an acquisition under Article 1, section 8 § 17 of the United States Constitution where jurisdiction over lands so acquired is wholly withdrawn from State courts.[36]

Section 108 of the Constitution also has no American counterpart. It is set in a group of sections saving State constitutions (section 106), vesting residual powers in the States (section 107), while section 109 provides for the supremacy of federal law in cases of inconsistency between federal and State law. In discussing this group of sections, and with particular reference to section 108, Owen J. said in *R. v. Bamford*[37]

> These sections seem to me to enact that the existing laws of the State are to continue in force, even though they relate to matters within the exclusive powers of the Parliament of the Commonwealth, until that Parliament enacts laws relating to such matters; provided that such State laws are not inconsistent with a law of the Commonwealth. But that the power of a State Parliament to make future laws shall cease, where the power is exclusively vested in the Parliament of the Com-

[34] *Ibid.* 124. [35] *Ibid.*

[36] See *R. v. Bamford* (1901) 1 S.R. (N.S.W.) 337, 353, 355. Stephen J. at 345 expressed a contrary view. [37] (1901) 1 S.R. (N.S.W.) 337, 352.

monwealth, except for the purpose of altering or repealing existing laws. If that is so, then although the legislative jurisdiction of the State—i.e. the power to make future laws—has ceased (with the exception abovementioned), nevertheless the existing State laws continue in force, unless and until the Parliament of the Commonwealth makes laws superseding them.

Section 108 is not specifically directed to State laws which relate to matters within the *exclusive* powers of the Commonwealth Parliament; it relates to matters within the powers of the Parliament which may or may not be exclusive. Owen J. made specific reference to exclusive powers because he was discussing section 108 in the context of section 52 (i) which is a grant of exclusive power. Section 108 was obviously designed to fill a possible vacuum; as O'Connor J. put it in *McKelvey v. Meagher*[38] 'the object of that section was to prevent any gap in the administration of State laws', and it may well be that in the case of non-exclusive powers it was inserted *ex abundanti cautela*. The continuance of State laws in any event is subject to the Constitution; so that where subjects are expressly withdrawn from State competence as in the case of the prohibition against raising or maintaining armed forces (section 114) or coining money (section 115) or in the case of the imposition of customs or excise duties (section 90) there is no continuance of State laws on such matters.[39] The section does not only preserve the operation of State laws, it continues laws in force in the State, which may be Imperial statutes.[40]

But there is a difficulty in the case of laws which relate to matters within the exclusive powers of the Commonwealth Parliament. In such a case, section 108 may preserve the State law which was in effect at the date at which the Constitution came into operation. But section 108 provides that the State Parliament shall have 'such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State'. It is not easy to see how a power to alter and repeal can be reconciled with a grant of exclusive federal power. The conclusion drawn by constitutional writers has been that this part of section 108 has no application to the case of exclusive Commonwealth powers. As Moore said:

> This enactment creates some difficulty in respect to the exclusive powers of the Commonwealth. Until the colony became a State, the power to "repeal or alter" existing laws included the power to supplement them and to substitute others for them, a fullness of power which is contradictory of the exclusive power of the Commonwealth Parliament. The difficulty must be met by holding that matters within the exclusive power are exempted from the latter part of sec. 108.[41]

[38] (1906) 4 C.L.R. 265, 295.
[39] *R. v. Bamford* (1901) 1 S.R. (N.S.W.) 337, 356; Wynes, *op. cit.* 125.
[40] *McKelvey v. Meagher* (1906) 4 C.L.R. 265, but see *McArthur v. Williams* (1936) 55 C.L.R. 324; Wynes, *op. cit.* 126.
[41] *The Constitution of the Commonwealth of Australia* (2nd ed. 1910) 411-412.

Quick and Garran[42] and Inglis Clark[43] had earlier expressed the same opinion. This carries conviction, though in *R. v. Bamford* Owen J. in the passage already cited appeared to suggest that a power to alter and repeal survived even in such a case. But it is submitted that this is error and that the view of the writers is correct.

It still remains to consider section 52 (i); 'the Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order and good government of the Commonwealth with respect to . . . all places acquired by the Commonwealth for public purposes'. Article 1, section 8 § 17 of the United States Constitution, as we have seen, confers exclusive power of the widest governmental character on Congress in legislating for places covered by that clause. So, too, in *R. v. Bamford,* the whole Court was of opinion that the power conferred by section 52 (i) in respect of places acquired by authority of section 51 (xxxi) or section 85 was of a similar character. Quick and Garran, writing before *R. v. Bamford* was decided, took the same view; they did not apparently distinguish for this purpose between the scope and extent of Commonwealth power with respect to property acquired by authority of section 51 (xxxi) and section 85 on the one hand, and with respect to property contemplated by section 122 on the other.[44] Moore put the alternative possibilities that section 52 (i) constituted the Parliament the sole authority competent to exercise legislative power for such places, subject to section 108 or that it was 'merely a power to enact such special legislation in respect to such places as their particular circumstances may appear to the Commonwealth Parliament to require, leaving them otherwise under the general legislation and jurisdiction of the State'.[45] He answered the question by stating without criticism that *R. v. Bamford* had assumed the former to be the true meaning of the section.[46] Quick subsequently modified the earlier opinion expressed in Quick and Garran. In 1919 he wrote of *R. v. Bamford* that

> the ground of this decision cannot be supported; and . . . land acquired by the Commonwealth either under section 85 of the Constitution or under the power conferred by sec. 51 (xxxi) to acquire property for public purposes, does not become Federal territory like the Seat of Government, and it does not cease to be territory of the State.[47]

This accepts as correct Moore's alternative construction, that section 52 (i) confers exclusive power to enact such special legislation as the peculiar circumstances of federal land, not acquired as a political territory, may dictate. Beyond this point, general governmental power

[42] *The Annotated Constitution of the Australian Commonwealth* (1900) 938.
[43] *Australian Constitutional Law* (2nd ed. 1905) 95-96.
[44] *Op. cit.* 659-660. [45] *Op. cit.* 289. [46] *Ibid.*
[47] *Legislative Powers of the Commonwealth and the States of Australia* (1919) 621-622.

remains with the State, not by reference to section 108, but by reference to section 107 since the power given by section 52 (i) is so limited. Wynes adopts this later view of Quick that *R. v. Bamford* was wrongly decided. He argues that land acquired by authority of section 51 (xxxi) or section 85 is not acquired as territory in the political sense, but as land *ager publicus;* that the power conferred by section 52 (i) must be to legislate on the subject of places as places, and concludes that

> land passing under section 85 or section 51 (xxxi) to the Commonwealth does not become federal, or cease to be State, territory.[48]

Apart from *R. v. Bamford* and *Garrisson,* the judicial discussion of the problem has been meagre. In *Commonwealth v. New South Wales*[49] lands had been acquired by the Commonwealth in New South Wales by authority of sections 85 and 51 (xxxi) and it was held by the High Court that subject to the payment of compensation all these lands, including the royal metals (Higgins J. dissenting as to the royal metals) and other minerals therein, were vested in the Commonwealth freed and discharged from all reservations, rights, royalties, conditions and obligations of any kind whatsoever to the State of New South Wales. On the broader question of the scope of the power conferred by section 52 (i) with respect to land acquired by authority of sections 85 and 51 (xxxi), Isaacs and Higgins JJ. stated differing views. With reference to a transfer by authority of section 85, Isaacs J. said

> The Constitution, having determined on the transfer from State to Commonwealth of certain Government Departments, recognized that the physical apparatus, so to speak, in the form of property entirely belonging to the State and used in connection with the transferred Departments, should pass, together with the governmental functions to the Commonwealth. . . . The title transferred by sec. 85 is taken from the State, as I have already said, adversely to State law and by a law superior, and by that superior law is vested in the Commonwealth; and, as that superior law is the sole source of title, it follows that nothing henceforth can depend on State registration laws or State laws of any kind.
>
> But as the land—not being in Commonwealth "territory" properly so called, that is, outside a State—remains in the State boundaries, it was necessary to provide that the governmental powers of the Commonwealth—exclusive in themselves—should for the purposes for which the land was transferred, be entirely free from State jurisdiction. To this end sec. 52 (i) was shaped in the form that the Commonwealth Parliament shall have exclusive power to legislate for "the seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes" . . . The grant of exclusive power carries an in-

[48] *Op. cit.* 163. [49] (1923) 33 C.L.R. 1.

evitable inference with it. It shows that the proprietorship and the sovereignty were intended to go together in this respect.[50]

Higgins J. disagreed:

> After all, the land acquired still remains part of New South Wales, politically, and subject to New South Wales laws; though not to New South Wales taxation of property (sec. 114 of the Constitution). The numerous lands acquired from New South Wales by the Commonwealth as property do not constitute a series of Commonwealth *enclaves,* in which New South Wales writs cannot operate or New South Wales police perform their functions. It is only the *property* in the lands (at most) that passes to the Commonwealth; the pieces of land acquired are not Alsatias for Jack Sheppards.
>
> . . . In my opinion, the words "places" acquired by the Commonwealth in sec. 52 do not apply to lands acquired as property under the Lands Acquisition Act; they refer to "places" acquired in the sense of sec. 122, any territories acquired in a political sense. Sec. 122 actually refers to the parliamentary representation of the place acquired. The section of the Constitution relating to the seat of government confirms this opinion (sec. 125); for in that section not only is the territory to be granted to or acquired by the Commonwealth, but the property in the soil is to be vested also.[51]

This is a very definite difference of viewpoint. On the one side it is said that section 52 (i) does not apply at all to lands acquired by authority of section 51 (xxxi) or section 85; on the other that it operates on such lands and confers governmental power with respect to them. Isaacs J. did not explore in any detail the ambit of such govermental power, and was content with the formulation that 'the governmental powers of the Commonwealth—exclusive in themselves—should for the purposes for which the land was transferred, be entirely free from State jurisdiction'.[52] Jurisdiction is, presumably, used in the legislative context; and Isaacs J. did not consider the operation of section 108. Neither Isaacs J. nor Higgins J. referred to *R. v. Bamford,* though the views of Higgins J. are plainly at variance with those of the New South Wales Supreme Court in that case.

The operation of State law in federal lands arose for consideration in a rather special context in *in re The Income Tax Acts (No. 4), Wollaston's Case.*[53] This was the earliest case raising the issue of liability of the salaries of federal officers to payment of State tax, and was decided by the Supreme Court of Victoria before the constitution of the High Court. Wollaston was the Comptroller-General of Customs, and it was argued that his salary was not subject to federal income tax on various grounds, one of which was that he earned his

[50] *Ibid.* 44, 46. [51] *Ibid.* 59-60. [52] *Ibid.* 46.
[53] (1902) 28 V.L.R. 357.

salary in the Customs House which, on the transfer of the Customs Department, was acquired by the Commonwealth by operation of section 85 of the Constitution, so that it ceased to be State territory, and the income earned in the Customs House was therefore not earned 'in Victoria'. The argument failed to persuade. a'Beckett J., in whose judgment Williams J. concurred, referred to *R. v. Bamford* as authority for the proposition that 'the geographical limit is that which is to be regarded, and that the mere vesting of the Customs House in the Commonwealth does not take the land out of Victoria for the purposes of the section'.[54] Madden C.J., without reference to *R. v. Bamford,* propounded a narrow view of the effect of an acquisition under section 51 (xxxi) or section 85; he doubted whether land acquired in this way as a post office, a customs house or a lighthouse became part of Commonwealth territory 'in the same full sense, so as to become in all respects its exclusive subject of Government to all intents and purposes'[55] as land acquired by section 125, the section relating to the seat of government. In his view, land acquired by authority of section 51 (xxxi) or section 85 'will be conveyed to the Commonwealth as parcels of land within the several States, which, like any other land conveyed by Crown grant to an individual, remains at all events in great measure part of the territory of the States, although exclusive proprietary right to control and enjoyment is given to the grantee'.[56]

IV

In *R. v. Bamford,* the Attorney-General of New South Wales urged on the Court the pressing need to decide a question which could and would have great practical significance. The particular question which arose in that case is not likely to arise again because it has been dealt with by Commonwealth legislation which is plainly valid. But the general question of the power and the scope of the power of the Commonwealth to legislate for lands acquired by it under sections 51 (xxxi) and 85, which is not land acquired as territory in the sense of sections 111, 122 and 125, is uncertain, as is the operation of State legislation in such lands within State boundaries. That uncertainty is revealed by the judicial and juristic discussion, and it is not difficult to formulate practical problems touching the operation of Commonwealth or State law within such enclaves to which no certain answer can be given.

There are various possible solutions. First there is the dissenting view of Stephen J. in *R. v. Bamford* that on an acquisition pursuant to section 51 (xxxi) or section 85, land is to be regarded as excised

[54] *Ibid.* 391. [55] *Ibid.* 376. [56] *Ibid.* 377.

from a State, so that the sole source of authority is federal. For want of federal action, Alsatias may arise, since on this view section 108 does not save existing State laws. Then there is the majority view stated in *R. v. Bamford,* that section 52 (i) furnishes a broad source of federal power to legislate for such lands; that such an acquisition does not excise land from a State, so that the jurisdiction of State courts continues, as does the authority of State law so far as it is preserved by section 108. On the Court's reading of section 52 (i) it must be that section 108, *pace* Owen J., only preserves the operation of existing State law; it does not support the operation of subsequent amendments or alterations, as this must be inconsistent with the exclusive character of the general legislative power conferred by section 52 (i) as exclusiveness was defined in that case.

The third view is that section 52 (i) does not confer general governmental authority; that at most it authorizes legislation with respect to such land as *ager publicus;* or, as Wynes puts it, that it authorizes legislation with respect to places as places. This view is also suggested by Madden C.J. in *Wollaston's Case* and by Quick and Wynes. This reading of section 52 (i) would presumably authorize such legislation as sections 51 to 54 of the Lands Acquisition Act 1955, which provide for specific dealings with the land, as such, such as the grant of leases, easements, authority to mine *et cetera.* It would be more difficult to justify under this view such legislation as the Airports (Business Concessions) Act 1959 because the authority to grant trading rights is more aptly characterized as an exercise of governmental power than as a dealing with the land as land. It may be that this Act derived constitutional support from section 51, but we are concerned here with the problem of defining the scope of section 52 (i).[57] If this third view is correct, it follows that *R. v. Bamford* was wrongly decided; that State laws continue to operate generally within federal enclaves, subject only to the operation of section 109 of the Constitution. The fourth view is narrower still; it is, as put by Higgins J. in *Commonwealth v. New South Wales,* that such lands are not places for the purpose of section 52 (i); and that places within the meaning of that section are Commonwealth territories in the political sense. The source of power to legislate for land acquired by authority of section 51 (xxxi) or section 85 must be discovered outside section 52 (i), and normally within the paragraphs of section 51. On this view, the States retain a general jurisdiction over such lands, subject to the operation of section 109. There is still another view which does not emerge clearly from the cases or the books, which is that section 52 (i) confers general power on the Commonwealth to legislate with respect to places acquired for public purposes, but

[57] Pp. 461-463, 465-467, *supra.*

that the general operation of State law is not thereby excluded. The basis of this view is that State laws only infringe the exclusive Commonwealth powers under section 52 (i) if they are laws with respect to places acquired by the Commonwealth for public purposes. A State law of general application throughout the State *including* the federal enclave is not a law with respect to places acquired by the Commonwealth for public purposes merely because it extends to such places. It will intrude upon the exclusive Commonwealth power only if it is shown that the State law is directed *specifically* to places acquired by the Commonwealth.

Of these five views, it is submitted that two may be discarded with reasonable confidence. These are the polaric views; those of Stephen J. in *R. v. Bamford* and of Higgins J. in *Commonwealth v. New South Wales*. There seems to be no good sense, and certainly no obvious constitutional warrant, for treating as excised from State territory lands acquired by authority of section 51 (xxxi) or section 85 for the purposes contemplated by those sections. The Constitution makes other provision for territory acquired in the political sense, and there are obvious inconveniences in the conclusion that such lands are wholly withdrawn from State jurisdiction. Stephen J.'s optimistic comment that federal authority could fill the void is very doubtful, and it is also doubtful whether in any event this federal source of authority furnishes an appropriate legal régime for the various federal enclaves within the several States. What policy makes it desirable to reach a conclusion that they should be subject to a separate, exclusive federal régime? The difficulty in Higgins J.'s view that such lands are not places within section 52 (i) is that it seems to deprive this part of the section of meaning. If the power to legislate for places acquired by the Commonwealth for public purposes applies only to political territories, it gives in more restricted form, since it is subject to the Constitution, the power more broadly conferred by section 122. Moreover, though this cannot be conclusive, the comparable form of Article 1, section 8 § 17 of the United States Constitution argues in favour of 'places' in section 52 (i) being construed to cover lands acquired by authority of section 51 (xxxi) and section 85.

The argument by reference to the form and interpretation of Article 1, section 8 § 17 also has relevance in considering the views of Quick and Wynes. In this context, it is to be remembered that section 52 (i) also confers power to legislate with respect to the seat of government, and there is judicial support for the view that this authorizes legislation for the internal government of that seat, and, it may be, for the Australian Capital Territory.[58] It is true that this

[58] P. 463 *supra*.

view has been questioned, but it is submitted that it is correct, and if it is correct then it is difficult to argue that the *ambit* of the power to legislate for places acquired by the Commonwealth for public purposes is differently or more narrowly construed.

It is believed that the appropriate choice lies as between the views of the majority in *R. v. Bamford* and the fifth view set out above. Both agree that section 52 (i) confers a general legislative power on the Commonwealth; but disagree as to the character of State power over such places. On the *Bamford* argument, the exclusiveness of Commonwealth power allows State legislation to operate only within the limits of section 108 and, of course, section 109. This produces obvious practical inconveniences; it only saves State laws operating at the date of the acquisition. The other view depends upon a sophisticated characterization; it argues that the exclusiveness of Commonwealth power under section 52 (i) depends upon the classification of the law as one with respect to the place. It would follow that any State law directed specifically to the area of land comprehended by the federal enclave would be bad for intrusion into an exclusive Commonwealth legislative area, but this analysis does not operate to deny validity to a State law operating *generally* throughout the geographical area of the State which is not bad for inconsistency under section 109. The practical merits of such a solution are plain; it does not give rise to the anomalies which result from the operation of existing but not future State laws in the *R. v. Bamford* view; it provides for a conformity of law throughout the area of the State, subject always to the power of the Commonwealth to make special and separate provision for its own land and places which will necessarily prevail over State law by operation of section 109.

It may be objected that this view gives little scope for the operation of section 108, but that is hardly serious; for the section was obviously designed to insure against any possibility of a void, and may have been written into the Constitution out of excess of caution. *R. v. Bamford* stands as an almost isolated landmark in this area of the law, and it should not be held to foreclose a different and more convenient solution by other State Supreme Courts and *a fortiori* by the High Court itself.