CHOICE OF LAW IN FEDERAL JURISDICTION

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The selection of law to be applied in courts exercising federal jurisdiction has not appeared to provide many difficulties in actual practice. Nevertheless this matter raises certain important questions of a fundamental character not without interest and presents some puzzling features of statutory construction. Some of the obvious pitfalls have attracted the feet of the unwary. A short survey of the issues and a comparison with the law on the same subject in the United States even if involving no more than a lowly compilation of practical rules will collect together matters not otherwise available.

At the outset we should have clear in our minds which of the courts operating in the Commonwealth come within the scope of this enquiry. The list includes both classes of Federal courts, that is courts created either by the Constitution or by Commonwealth legislation on the one hand and State courts, that is created by State statutes on the other. In the first group for the purpose of this note we exclude generally the courts of the Territories. These are not Federal courts in the same sense as the other courts mentioned. It is possible that there may be exceptions in this last group,[1] but an examination of the intricate distinctions which have been drawn both with regard to different classes of Territories and different constitutional provisions relating to them would take us too far from the main theme with which we are primarily concerned.

Practical questions as to the law to be selected by Federal courts in the narrowest sense arise in the High Court, the Commonwealth Bankruptcy Court and the Commonwealth Industrial Court. In the case of the High Court, different questions may arise in relation to the original and appellate jurisdiction. Here we may note that these courts, like all other courts in Australia, may in any particular case be called upon to determine a matter which, so far as the substantive rights of the parties are concerned demands the application or consideration of provisions of State law or of the common law as applied in one or more States. So far however as the Bankruptcy Court or the Industrial Court are concerned these substantive matters of State law will always occur as appendages to some more inclusive right created by Federal law. Thus the Bankruptcy Court may be called upon to decide as to the existence of a debt of the bankrupt. The legal issues which engage the actual attention of the Court may themselves be

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[1] *E.g. Federal Capital Commission v. Laristan Building and Investment Company Proprietary Limited* (1929) 42 C.L.R. 582.

confined to questions of State law. Yet the Court will have no concern with deciding such questions except in relation to some right, duty, privilege, immunity *etc.* created by or arising out of the Commonwealth Bankruptcy Statute. In this sense it is broadly true that a court of this category when exercising Federal jurisdiction is in every case ultimately concerned to enforce or protect rights *etc.* created by Federal law.

This particular situation does not, however, apply in so simple a manner to the High Court. It may here be desirable to distinguish between the appellate and the original jurisdiction of that Court. Since the power to exercise each of these jurisdictions is conferred by the Constitution[2] each of them falls within the 'judicial power of the Commonwealth.'[3] Moreover so far as the appellate jurisdiction is concerned, it is directly created by the Constitution, though it may be and has been regulated by the Commonwealth Parliament. In this one sense therefore it is clear that the High Court is always exercising 'Federal jurisdiction'.

However when the High Court sits on appeal from a State court in a cause or matter which is regulated in its entirety by the law of the State, it may be described in a general way as sitting as yet another, though superior, court of that State.

In cases of this kind it is in one sense misleading to describe the Court as exercising Federal jurisdiction, notwithstanding that its function is to exercise the 'judicial power of the Commonwealth'. It may be sufficient for our purpose to say that it applies State law and, further, that no statute of the Commonwealth Parliament can direct otherwise.

The whole of the law which the Court applies is derived from the fact of the grant of appellate jurisdiction in the Constitution and from this grant itself the nature and extent of the function is to be deduced. We may ask two questions relating to this function. Firstly may the Commonwealth Parliament, by virtue of section 51 (xxxix), legislate so as to affect the function in regard to the Court's selection of the law? Secondly may a State Parliament legislate so as thus to affect the function? For example might either of these Parliaments provide by effective enactment that any such appeal shall be considered as a rehearing so that the applicable law shall be that prevailing at the date of hearing the appeal? Again to suppose an example of a different kind, may either Parliament provide that, in any appeal from a judgment or order based upon a finding of adultery by one of the parties, an appeal should be allowed if upon the hearing of the appeal it appears that the party found guilty of the adultery was not shown beyond all reasonable doubt so to have been guilty, notwith-

[2] Ss. 73, 75 and 76.

[3] Commonwealth Constitution, s. 71.

standing that the law of the State wherein the matter was determined did not so require?

As to the powers of the Commonwealth Parliament to enact such legislation, it is more convenient to consider this matter in connection with the more general question of this Parliament's powers to affect the exercise of Federal jurisdiction in its various aspects. As to the powers of the State Parliament however, though no doubt, the lack of power is clear enough, certain interesting features emerge. It is of course also clear that if the State concerned wished to make such a provision, it would normally do so with regard to the primary finding and not in relation to the appeal.

If the two hypothetical State statutes referred to are considered they are seen to be essentially contrasting in character. The first would be a law substituting a rehearing for an appeal. It would in short take away by replacing appellate power and, in consequence, directly conflict with the Constitution. In consequence no further consideration need be given as to its validity; it is obviously enough invalid. The second suggested statute, however, may be thought merely to control or affect the exercise of the appellate power without taking it away. Under such a statute the Court would still exercise the power but subject to overriding directions. It is true that such qualifications of appellate jurisdiction are not customary in our legal practice. Nevertheless a law of this character 'protecting' jury verdicts from correction on appeal may easily enough be imagined. But could it be said that such a statute deals with the (State) law of adultery as that law is to be applied in the High Court in the exercise of Federal jurisdiction but without infringing upon the grant of power which, coming from the Constitution, cannot be curtailed by State legislation?

Notwithstanding the suggestion that such a statute would merely prescribe the (State) law to be applied by a court applying State substantive law upon the appeal it appears clear that the State Parliament may not lay down any prescription to control the High Court in the exercise of judicial power under the Constitution. It will be seen hereafter, that the Commonwealth Parliament may 'regulate' the hearing and determination of appeals by the High Court.[4] Hence there arises the question whether it can affect the law to be applied by the High Court in such matters. It may well be that no prescription or qualification of any Australian legislature may be directed to the High Court in such matters. This may be the consequence of creating a 'Federal' court and then empowering it to exercise *inter alia* purely 'State' jurisdiction. It is to be noted that the Judicial Committee of the Privy Council is no doubt in a comparable position, that is to say, that the State Parliament is equally impotent to prescribe any law

[4] *Ibid.* s. 73.

to be applied by it on the hearing of any appeal. Since the Constitution substituted an alternative appellate tribunal to the Judicial Committee above the State Supreme Courts there was nothing novel in the resulting impotence of the State legislatures in relation to that Court.

Let us consider the other aspect of the appellate jurisdiction of the High Court, namely its function as a court of appeal from Federal courts, that is to say all courts exercising Federal jurisdiction. Here appeals may be heard from either State courts invested with Federal jurisdiction or from other Federal courts (as for example the Bankruptcy Court). Moreover in this connection a State court invested with Federal jurisdiction may nevertheless have been dealing with and deciding a case entirely controlled by State law. For example a case in a State Supreme Court between residents of different States may be solely concerned with rights created by the laws of one State though it is obviously a case involving the exercise of Federal jurisdiction.

May the Commonwealth Parliament prescribe in any way the law to be applied by the High Court in hearing appeals, including appeals in Federal jurisdiction or any class of them, apart from 'regulating the hearing and determination' of such appeals?[5] And does this power of regulation include the power of prescribing the law to be applied in the hearing and determination of an appeal?

In the first place it would seem that a power of regulating the determination of an appeal would upon the literal meaning of the words authorize any rule which conditioned the exercise of the appellate power provided that it did not destroy that power itself. An example for examination arises by assuming a law providing that, in any appeal from a judgment upon a verdict of a jury awarding damages for personal injuries resulting from the use of a motor car on a public highway, the judgment should not be set aside or otherwise affected on appeal upon the ground only that there was not sufficient evidence upon which reasonable men could find that the person in control of the motor car had been negligent.

Such a law would affect amongst other claims a claim made against the Commonwealth arising out of an allegation of negligence by the driver as a servant of the Commonwealth. There might therefore be nothing strange in Commonwealth legislation endeavouring to affect the substantive rights, or at any rate the practical outcome of litigation in relation to this subject matter. It seems clear that no other Parliament may deal with this matter in the High Court if the Commonwealth Parliament may not do so. But such a law would also affect a case involving a claim made by a pedestrian injured in the State of his residence by a motorist visiting that State though normally and regularly resident in some other State.

[5] *Ibid.*

It may be convenient here to recall that when for example a State Supreme Court entertains such a case it is exercising 'Federal jurisdiction' even though every step in the case including service outside the jurisdiction is (apparently) taken under its own State law and even though the substantive rights of the parties are determined exclusively by State law, including the common law. This result arises through the operation of the provisions of the Commonwealth Judiciary Act 1903-1959 section 39 'applied' to the provision contained in the Constitution section 75 (iii).[6]

To revert to the example cited of the contemplated Commonwealth law applied to the appeal in an action between residents of different States. If the proposed Commonwealth law be valid, in truth the Commonwealth Parliament would be exercising a legislative power over State-created substantive rights with reference to a subject matter which, at first sight, seems very far removed from any specific subject matter allotted to the Commonwealth by the constitutional division of powers. No doubt this result would itself provide a reason for reading the grant of power to the Commonwealth Parliament to 'regulate the determination' of appeals by the High Court[7] in a very much narrower sense. The power of Parliament is to prescribe regulations for the 'hearing and determination' of appeals. It may be considered that the expression is to be taken as limited to the form of the process of appellate adjudication and not the substantive issues involved. Thus Parliament may provide that no appeal shall be heard except by leave of the Court itself.[8] This conclusion may be derived from or reinforced by the reflection that section 73 of the Constitution is itself concerned with creating three different classes of appellate power operating upon wide and disparate classes of original jurisdiction. The substantive rules adjudicated upon in these classes of original jurisdictions in many respects have nothing in common so that a power to affect all or any of these substantive rules arising merely from a provision contained in the creating of appellate power in relation to them would be a result surprising, to say the least, in its consequences. This is a particular and narrow ground upon which such 'Federal' interference may be resisted. There remains however the wider question as to how far generally the judicature provisions may result, in combination with section 51 (xxxix) of the Constitution in authorizing the Commonwealth Parliament to legislate upon substantive legal topics not normally within its legislative scope. Is it possible to deduce from the judicature provisions together with section 51 (xxxix) any power in the Commonwealth Parliament to

[6] *John Sanderson & Co. v. Crawford* [1915] V.L.R. 568. *Cf. Alba Petroleum Co. of Australia Pty Ltd v. Griffiths* [1951] Argus L.R. 438.
[7] Commonwealth Constitution, s. 73.
[8] Matrimonial Causes Act 1959, s. 93 (Cth).

legislate so as to affect the law regulating the substantive rights of litigants involved either in the original or appellate jurisdictions created by the Constitution except with regard to substantive rights embraced within those particular subject matters specifically entrusted to the Commonwealth Parliament?

I. The Extent of Commonwealth Power

To envisage the extent which such a legislative power would have, it is convenient to repeat the description of the classes of controversies which may fall to be determined in the exercise of original Federal jurisdiction. Thus the case may belong to a class in which the whole of the substantive rights are determined by Federal law alone, as for example a prosecution for a breach of the Customs Act. Such a class of case could in fact arise only in a State court. Similarly a case involving the question of whether to order compliance with an award made by the Commonwealth Conciliation and Arbitration Commission and proved to have been broken could arise only in the Commonwealth Industrial Court and would involve 'Federal' law only. The cases which, when they arise in a State Supreme Court, can be determined only by the High Court are well known.[9] It is obvious of course that Federal legislative competence would justify the modification of every substantive right arising in any such litigation.

On the other hand in each of the three categories of courts exercising original Federal jurisdiction questions may arise for determination which involve as well as issues depending upon Federal law as above mentioned other issues depending upon the ascertainment and application of State law. Finally in the first and third categories (invested State courts and the High Court) cases may arise for determination which involve exclusively the determination and application of State law or the common law. Can the Federal Parliament affect the substantive rules of State law involved in such litigation?

The application exclusively of State law may occur in many cases arising between residents of different States. In many cases in which the Commonwealth is a party, though the basic liability may be Federal, that is, created by the Constitution and/or other Federal law, the whole content of the substantive rights in issue will be embraced within State law. And this will be so whether the case is initiated in the High Court or in a State court. To take the example of a claim for damages in a running down case it is clear enough that, in either the High Court or a State court the whole controversy may well involve no legal issue except some State statute law or the common law, both in the case when the parties are residents of different States and when the plaintiff or defendant happens to be the Commonwealth. It

[9] Judiciary Act 1903-1959, s. 40A (Cth).

is useful to remember also that a case upon appeal in the High Court may be exclusively concerned with State-created rights and duties. It has been submitted that this particular State law may not be altered by Federal legislation 'regulating' the appellate jurisdiction. But may the State law which falls to be applied in Federal jurisdiction ever be altered by Federal legislation?

The Commonwealth Parliament has attempted to deal with the whole situation relating to the selection of law in courts exercising Federal jurisdiction in two statutory provisions of engagingly simple appearance. The Judiciary Act under the heading of 'Application of Laws' provides as follows:

> 79. The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State in all cases to which they are applicable.
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> 80. So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law of England as modified by the Constitution and by the statute law in force in the State in which the Court in which the jurisdiction is exercised shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

II. The American Experience

It is useful to approach these two matters by a short historical and comparative survey. There is a certain general similarity together with contrasting differences between the sections of the Judiciary Act and the Act of the American Congress known as the Federal Judiciary Act of 1789, section 34. That section provided:

> That the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

Clearly the similarity of this section to section 79 is sufficient to indicate that the former was the model to which recourse was had. One or two of the dissimilarities may be shortly disposed of. The United States provision appears to be confined to common law trials but in practice no distinction was ever observed in this connection in the case of equity suits. When in due course this law came to be restated in the United States Code[10] this distinction was abandoned in the re-drafting. The reference to the 'courts of the United States' by contrast with 'all Courts exercising federal jurisdiction' in the Aus-

[10] 28 U.S.C. 1652.

tralian legislation[11] was a natural way of accepting the existence of courts with 'invested jurisdiction'. The exclusion of any reference to rules of procedure, evidence and competency of witnesses from the Act of Congress was a matter of greater importance as will be seen. The contrast between providing that the indicated laws were, in one case, to be regarded as 'rules of decision' and in the other case were 'to be binding' has in actual development covered very significant differences in both outlook and development.

For half a century after the establishment of the United States no very serious issue appears to have arisen as to the binding authority of decisions of State courts upon the Federal tribunals. This fact is the more significant when it is remembered that, upon questions other than those involving Federal law, any decision of the highest court in the system of courts in the State was itself final and conclusive. The Supreme Court at Washington was not in any sense a final court of appeal upon 'State questions' (for example, questions involving only State law) as is the High Court in Australia. On the other hand original jurisdiction had been exercised by separate Federal courts from the earliest stage of the Union notwithstanding that the whole case being litigated, viewed as one of substantive rights, fell to be determined by State law. From this exercise of original Federal jurisdiction an appeal did lie to the Supreme Court though the only issue arising involved a question of State law. Thus the theoretical possibility existed that a rule might be enunciated or evolved in the highest court of the State which would continue to bind the courts of that State whilst a different view might be announced by the Supreme Court (on a matter of 'State law'), which would bind the citizens of the same State when they came to litigate (as for instance against residents of other States) in the Federal courts of first instance in that State. Undoubtedly it was against the possibility of any such variance that the Judiciary Act section 34 had been designed. It may be noted in passing that the danger of any such continuing disconformity was, in the long run and indeed in practice in the short run also, avoided in Australia by the fact that the final authority for determining the 'true rule' on the same matter was the High Court, whether the question originated in and was determined by a State court and was definitively determined by the highest court of the State or in a Federal court. Moreover the immediate tendency to uniformity of result was reinforced by the fact that the primary determination of any such 'State legal question' even arising in Federal jurisdiction would in most cases fall to be made by a State judge sitting in a State court—except in the case of the somewhat infrequent recourse to the original jurisdiction of the High Court for a determination of this kind.

[11] Judiciary Act 1903-1959, s. 80 (Cth).

The absence of diversity in judicial doctrine between State and Federal Courts in the U.S.A. appears to have been secured for about the first half century of the United States, notwithstanding the complete independence of State courts determining exclusively State questions partly by a strong sense of comity and partly by the express terms of the Judiciary Act section 34. It is interesting to note that, in the earliest stages of Australian federal history, the dominance of the High Court even upon matters of State law and the State courts was not altogether anticipated. Thus Griffith C.J. said in *Bond v. The Commonwealth of Australia*[12]:

> But it has been decided by Madden C.J., and by the Supreme Court of Victoria . . . that the allegation is true in law as well as in fact. . . . This Court would, I think, in any case, be reluctant, as a general rule, to put a different construction upon the Statutes of a State from that which the Supreme Court of the State itself has declared to be their true construction. . . .

Whilst the result thus indicated might be reached by the High Court today, it would arise not because of any authority which a State court was recognized as having upon 'State matters', but because of the normal respect displayed by an appellate tribunal for those courts over whom it exercises appellate jurisdiction, and for whose decisions experience as well as the practical exigencies of the situation has engendered respect. In short, the form of expression of Griffith C.J. was more appropriate to a situation closer to that in the United States than was in fact true of Australia.

In 1842 the United States Supreme Court much influenced if not dominated by Story J. handed down its decision in *Swift v. Tyson.*[13] This was a case tried on the facts in a Federal Circuit Court in the State of New York. The plaintiff was a resident of the State of Maine who sued Tyson, a citizen of New York on a bill of exchange of which Tyson was acceptor. Swift had taken as endorsee for value and the defendant sought to vitiate his claim by raising defences which might have prevailed against the original drawer but without attempting to show that the plaintiff had notice of the deficiencies. Such a proceeding would have been of course a direct attack upon the negotiability of the bill. Yet it was said that this doctrine was part of the law of New York and therefore, under the provisions of the Judiciary Act section 34, compelling in the Federal Court including the Supreme Court in an appeal in such a case. If the doctrine prevailed the possibility of a common rule regulating negotiable paper throughout the Union was substantially undermined. For a judge like Story J.—'a man of great learning and of reputation for learning even greater than the learning itself' the situation was critical. It was solved with boldness. The words

[12] (1903) 1 C.L.R. 13, 22-23.

[13] (1842) 16 Peters 1; 10 Law Ed. 865.

'laws of the several states' in the Judiciary Act section 34 were held not to include the rules laid down in the judicial decisions of State judges. In consequence the Supreme Court was free to determine the characteristic of negotiability unhampered by the vagaries of New York's judges. The Judiciary Act section was limited to State laws strictly local, that is to say,

> to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate and other matters immovable and extra territorial in their nature and character.[14]

One aspect of this construction of the section which need not surprise any student of jurisprudence was that the determination of the denotation of the expression 'the laws of the several States' which was expounded in the construction proved singularly elusive in practice.

During a period of ninety-six years the doctrine of *Swift v. Tyson*[15] flourished and expanded. In its application in 1864 the Supreme Court declined to 'immolate truth, justice and the law because a State tribunal had erected the altar and decreed the sacrifice'.[16] If it was hoped that uniformity of general legal principles would result once the Supreme Court was rendered free to disregard the local errors of particular State courts and display the single and undeniable truth for all judges to perceive, then Mr Justice Story from his *post-mortem* scrutiny must have been disappointed. Judges may not suffer from every human weakness but they do incline to prefer their own wisdom to that of other men and even other judges. In the absence of any compulsion to accept the views of others they inevitably differ from them sooner or later. In consequence, far from unity of judicial doctrine being encouraged, diversity emerged. In fact two similar cases arising in the one State might be decided independently and differently in a State and Federal court. From the field of general commercial law the doctrine of *Swift v. Tyson*[17] expanded to the general field of contract and tort. In consequence a careful litigant (or his advisers) realized that his success might depend upon whether he sued in a Federal or a State court in his State (or some other). He might, if corporate, contemplate re-incorporation in a new State if he was assisted by the doctrine applied on a particular matter by Federal courts adjudicating in a diverse citizenship action rather than by the doctrines applied in any particular State court.[18]

At this stage in the development there were powerful and learned

[14] (1842) 16 Peters 1, 18; 10 Law Ed. 865, 871. [15] *Ibid.*
[16] *Gelpcke v. City of Dubuque* (1863) 1 Wall. 175, 206, 207; 17 Law Ed. 526.
[17] (1842) 16 Peters 1; 10 Law Ed. 865.
[18] *Black and White Taxicab & Transfer Company v. Brown and Yellow Taxicab Co. Transfer Company* (1927) 276 U.S. 518.

critics including Mr Justice Holmes, Mr Justice Brandeis and Mr Justice Stone. The first named even referred to 'an unconstitutional assumption of powers which no lapse of time should make us hesitate to correct'.[19] Now it is clear that the general situation which seemed to call for relief could not be duplicated in Australia since the process of investing State courts instead of creating separate Federal trial tribunals and the general unifying effect of High Court appellate control strongly tended to uniformity. Nevertheless the raising of the constitutional issue promotes a question which itself might well have a direct bearing upon problems in Australia. It is useful at this stage to note one passage from Holmes J. in the *Taxicab* case[20] because of its general jurisprudential flavour. For its application to the situation in this country we must delay in order to complete the evolution of the American doctrine. In referring to the consequence of the decision in *Swift v. Tyson*[21] in permitting, if not encouraging the Federal courts to base judgments upon their independent ascertainment of matters of 'general law' this very learned authority said:

> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any court concerned. If there were such a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute, the courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a state, whether called common law or not, is not the common law generally but the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else.[22]

In a more striking phrase, Holmes J. described this condemned conception of the common law as a 'brooding omnipresence in the sky'. This seems a somewhat uncomfortable form even for a celestial cover. It will be necessary to consider hereafter whether it does not in truth overshadow the courts of Australia.

The gathering volume of disapproval of *Swift v. Tyson*[23] found unequivocal expression in the judgment in *Erie Railroad Company v. Tompkins*[24] in which Brandeis J. wrote the majority opinion in which four other members of the Court joined. In this decision the doctrine of *Swift v. Tyson*[25] was swept away and, in place thereof, Federal courts were directed to apply that rule of law which would be applied in the State courts in the State wherein the Federal court was sitting.

[19] *Ibid.* [20] *Ibid.* [21] (1842) 16 Peters 1; 10 Law Ed. 865.
[22] (1927) 276 U.S. 518, 533-534. [23] (1842) 16 Peters 1; 10 Law Ed. 865.
[24] (1937) 304 U.S. 64. [25] 16 Peters 1; 10 Law Ed. 865.

In short the 'laws of the several States' in the Judiciary Act were declared to include the whole of the law of each State including its 'judge made law' not excluding the conflict of law rules in that *corpus* of law. Rules of procedure were not, as they never had been, included in this adopted *corpus* of law. This reversal of doctrine might be no more than an interesting sample of comparative legal history were it not for a conspicuous reason announced by Brandeis J. as a justification for overturning a conception which had provided the basis for nearly a century of the operation of the national courts. An epitome of this reason may be found in the passage which states that,

> except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general", be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the Federal Courts.[26]

For the present it may be sufficient to ask whether the denials of these two powers are equally true in Australia, and upon the same or what other course of reasoning. If the denial of the Federal legislative power is well founded, what practical consequences follow in Australia?

It is to be noted that neither the result reached by Brandeis J. nor the reason for it commanded universal assent in the Supreme Court itself. At least three judges specifically disclaimed the doctrine in its constitutional aspect. In the generation which has elapsed since this pronouncement the Court has upon numerous occasions considered, qualified and in some cases extended the doctrine of *Erie Railroad Company v. Tompkins*.[27] It is broadly true to say that from that day to this the Court and all its members have avoided any clear reiteration of the constitutional compulsion which led to the reversal of a precedent which had been basal in Federal jurisdiction and jurisprudence for almost a century.

The *Erie Railroad Case*[28] was itself one which involved the recourse by the Federal court to that part of the law of the State where the Federal court was sitting (the 'forum State') which embraced its conflict of law rules including its rules for choosing the appropriate law for determining the rights of a plaintiff claiming damages for personal injuries received outside the boundaries of the forum State itself. This particular aspect of the new doctrine was not made explicit in the opinion of Brandeis J. though it may have been implicit therein.

[26] *Erie Railroad Company v. Tompkins* (1937) 304 U.S. 74, 78. [27] *Ibid.* [28] *Ibid.*

At all events, the extension of the doctrine in this way was made quite unmistakable by the Supreme Court's decision in *Klaxon Company v. Stentor Electric Manufacturing Company*.[29] This particular extension is not without its interest when the Australian system is under consideration.

In this particular aspect one of the difficult tasks resulting to the Federal court is to be noted. Whilst it is directed to ascertain the choice of law rule of the State courts of the State in which it is sitting in any case in which the relevant facts occur in more than one State, it is bound also to consider whether the State rule of choice involves any failure to give full faith and credit to the law of any other State of the Union by reason of the constitutional provision contained in Article IV section I. A similar provision is to be found of course in section 118 of the Australian Constitution. In fact the Federal court may find that the courts of the State in which it is sitting habitually apply a rule of their own *lex fori* in a case involving a pattern of local and extra-State facts corresponding to the case for trial in the Federal court. In this situation the Federal court must determine at its peril whether the selection of the *lex fori* under the rule of choice of State law involves no more than a proper consideration of the overriding but legitimate demands of the governmental interest or public policy of the 'forum State' or whether this acceptance by the State judge of his own law (including, it may be, the statute law of his own State expressed in terms which leave no doubt of its applicability) is not indeed unconstitutional as denying full faith and credit to the law of some other State of the Union.

Thus the tender regard for the interest of the 'outlander' which the Federal diversity jurisdiction may be thought to ensure in a Federal system having been, to a minor extent, bowed out of court by *Erie Railroad Company v. Tompkins*,[30] may find itself restored by reason of the faith and credit required by the Constitution itself.

Australian judges are not yet completely familiar with this nice addition to their existing difficulties, though it may be hazarded that the failure of counsel to demand that it should be undertaken arises from less excusable explanations than sympathy for the judicial lot.

The constitutional complications do not end at this stage in American Federal courts for two reasons which are not applicable in Australia. Into the profundities of 'due process' we need not pursue the American judge in his 'Erie and Tompkinated' way of life, except to note that American decisions may be affected by influences which are from the Australian point of view peculiarly exotic.[31]

[29] (1940) 313 U.S. 487. [30] (1937) 304 U.S. 64.

[31] *Harris v. Harris* [1947] V.L.R. 44, 57-58, *per* Fullagar J.; Z. Cowen, 'Full Faith and Credit—The Australian Experience' (1952) 6 *Res Judicatae* 27.

The other complication has, to the Australian observer, some illustrative and practical value from the comparative point of view. Deriving from the constitutional compulsions which underlie the formulation of *Erie Railroad Company v. Tompkins*[32] was the view that a case in a Federal court should be decided in the same way, as if it had fallen to be determined by a State court of the 'forum State'. Whilst in actual fact the rules of procedure for Federal courts are not to be found in the State law of the forum State under the *Erie Railroad Company v. Tompkins* rule, but in Federal statutes and rules of court made thereunder, no rule can be thus adopted as a procedural guide for a Federal court, when adjudicating upon a case involving substantive rights defined by State law, if that rule would qualify or destroy the right this State created. If this principle were not to be observed, Federal law would prove to be intruding into a sphere of substantive rights exclusively allocated by the Constitution to the States. The severity with which this principle has been enunciated and applied by the Supreme Court seems to be one reason for concluding that, despite the absence of clear statement, the Court now believes that the basis of *Erie Railroad Company v. Tompkins*[33] as currently understood does derive from the Constitution itself. Hence the possibility that procedural rules ostensibly applying to Federal courts, may either be invalid or, upon construction, inapplicable when adjudicating upon a case exclusively based on 'State law'. Further, the same general view of the problem has resulted in rules apparently of an unmistakably 'procedural' character being treated as not procedural but substantive for the purpose in hand and in consequence not applicable by a Federal court. Thus the court avoids a 'different result' from that to be anticipated in a hypothetical hearing of the same action before a State court in the forum State. The lengths to which the characterization by the Supreme Court of provisions of Federal statutes as 'substantive' rather than 'procedural' may be extended, because of a desire to ensure that Federal trial courts will reach the same result as State courts would do, is very strikingly disclosed in three decisions handed down in the same term by the Supreme Court.[34]

III. The Australian Solution

It is obvious of course that the provisions of the Australian Judiciary Act section 79 avoid many of these difficulties which have arisen in this aspect of the problem in the United States since the section provides for the selection of State rules of procedure by each court

[32] (1937) 304 U.S. 64. [33] *Ibid.*

[34] *Ragan v. Merchants Transfer and Warehouse Company, Inc.* (1948) 337 U.S. 530. *Woods v. Interstate Realty Company* (1948) 337 U.S. 535. *Cohen v. Beneficial Industrial Loan Corporation* (1948) 337 U.S. 541.

exercising Federal jurisdiction as well as certain State rules of substantive law of the 'forum State'. To the extent, however, that Federal procedural rules having statutory force may appear to command and condition the exercise by the High Court of its original jurisdiction in cases otherwise entirely regulated by substantive State law, this particular kind of problem may yet raise its head in Australia.

The discussion in this summary form of the evolution of the United States law has been taken far enough to permit of various comparative conclusions being drawn, and certain difficulties and possible excesses of power being disclosed in the Australian law which otherwise might not readily come to view. In the light of this survey, attention may be directed to the two sections of the Judiciary Act which have been quoted.[35]

The first questions to be determined are matters of construction. What is the meaning of 'the laws of each State' in section 79? Is this properly to be confined to the statutes of each State? If this is so of course, the section, except in one respect, has no genuine operative effect. Valid State statutes operate by constitutional force in all courts in Australia, that is to say by the continuance *sub modo* of the constitutional authority of the States and also by the requirement of full faith and credit. They do not need the authorization of Commonwealth statute. On the other hand the power of the Commonwealth Parliament certainly extends to providing for the procedure of courts exercising Federal jurisdiction.[36] From this point of view section 79 would become no more than a roundabout form of enacting a procedural code for Federal courts. Even so viewed it is a curious example of the exercise of legislative power, since it would on this view enact as law, all provisions with regard to procedure which may be enacted by virtue of State power in the future and without independent consideration by the Commonwealth Parliament itself of the desirability of such future enacted rules. Perhaps this is not a more extensive delegation of rule making than the grant to the justices of the High Court of the rule making power contained in Judiciary Act section 86 (b): 'Regulating procedure pleading and practice in the High Court in civil and criminal matters in the exercise of both its original and of its appellate jurisdiction'.

The section under review is, of course, not legislation by reference to and adoption of State enacted law but by delegation to State constituted authorities, including possibly authorities to be constituted in the future. Perhaps the special nature of the subject matter and the character of the State authorities so far authorized should be taken into account in passing upon this matter. The obvious practical con-

[35] *Supra*, ss. 79, 80. [36] Commonwealth Constitution, s. 51 (xxxix).

venience of the provision itself makes any critical attack upon it unattractive. It is to be noted that one of the early decisions upon the power to delegate legislative capacity by a legislature in a constitution with prescribed division of powers occurred in connection with just this subject matter.[37] But this upholding by Chief Justice Marshall of delegation of rule making to the judges was for 'a general provision [which] may be made, and power given to those who are to act under such general provisions to fill up the details'. Whether indeed this description fairly applies to the delegation of procedural rule making in section 79 may be questioned. In this case, however, if the theory does not cover all the facts, so much the worse for the theory.

If, however, the theory is to be left thus stricken on the battlefield, we should at least give recognition to its logical character which would lead to a denial of the validity of such delegation. This is best done in the words of Chief Justice Marshall. 'The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation'. It would of course be much more difficult to formulate any theory which would justify the delegation of legislative power so as to give the authority of Federal legislative enactment to the 'unwritten' rules of practice ('procedure') followed in State courts if indeed these rules are part of the 'laws relating to procedure' mentioned in section 79. It is possible, however, that no such rules are in fact made applicable in courts exercising Federal jurisdiction by section 79 of the Judiciary Act.

It is submitted that in section 79 the expression 'the laws of each State' means the statute law (and rules made thereunder) and means no more than this. It is useful, though as a reminder merely, to consider the situation in which Sir Robert Garran found himself when he began to draft this section some time, one may suppose, in 1902. It is difficult to resist the conclusion that he had open on his desk the Judiciary Act of the American Congress of 1789. Moreover it is safe to conclude that he was entirely familiar with the magisterial contribution of Story J. to the meaning and operation of section 34. *Swift v. Tyson*[38] may have had its critics, but in 1902 it was the established law of the Union. 'The laws of the several States' in the section of the American statute did not include the general *corpus* of judge-made law according to the interpretation of the Supreme Court then current. Realizing that Federal courts might need to have recourse to some *corpus* of law to complete what statute law left incomplete, Sir Robert proceeded to draft section 80. But, as will be seen, this exercise of legislative power involved a very modest claim.

[37] *Wayman v. Southard* (1825) 10 Wheat 1; 6 Law Ed. 253.
[38] (1842) 16 Peters 1; 10 Law Ed. 865.

It would not be sufficient reason to support the suggested construction of the expression 'the law of the States' to say that it was copied from a similar expression in an Act of Congress which had obtained a certain construction. It is more to the point to say that neither Story J. nor his critics had ever supposed that a Federal legislature of limited powers could claim a power to prescribe all the legal rules to be applied in Federal courts upon a vast and undefined series of subject matters not otherwise committed to its charge. This is the primary reason for giving to the statutory phrase the meaning which it is submitted it has.

This conclusion is reinforced by considering the form of the next following section. Section 80 commences with a reference to 'the laws of the Commonwealth'. An examination of the scope and purpose of this section makes it clear that what is here referred to is the statutes of the Commonwealth. It seems inherently unlikely that the expression 'the laws of the States' was not intended to have a similar significance. There is moreover another reason in the last resort for reaching this conclusion. The ascertainment and application of the 'common law rules' by the judges of the State Supreme Courts were in fact demanded by the statutes of the States.[39] These courts were the creatures of statutes and the whole of the law to be applied in them was itself defined, though somewhat indirectly, by the terms of the statute. This is not to deny the existence of the doctrine of *Campbell v. Hall*[40] or the characterization of the Australian Colonies as 'settlement' colonies but merely to indicate that, by 1903, the existence of the body of the common law as operative in the State courts had been embodied in State statutes so as to be part of the statutory law of the States. It is true that the courts in the Colonies sometimes applied a set of legal rules not derived from the English courts. Some particular statutory jurisdiction in the colonial courts, such for example as the jurisdiction to dissolve a marriage is upon examination revealed to be regulated not by the rules understood and applied by and borrowed from some court of common law or equity in England. In a particular case of this character there is no statutory grant of 'law finding power' conferred upon the State court conditioned by reference to the practice of English judges. The situation is so unusual as to make it indeed a precise example of the exception which proves the rule. Indeed for a State court judge to refuse to recognize and apply an indubitable rule of the common law would, in 1903, always have been, at bottom, contrary to a State statute except where the jurisdiction was created by some other State statute which otherwise permitted or directed.

[39] *E.g.* Supreme Court Act 1958, ss. 15-17, 21, 61 (Vic.).
[40] (1774) 1 Cowp. 204, 208; 98 E.R. 1045, 1047, *per* Lord Mansfield.

Indeed if section 79 were interpreted as referring to anything more than the Statute laws of the States, and so referring were held to be valid, then it must be that the Commonwealth Parliament may prescribe the whole of the substantive law to be applied in all litigation to be determined by courts exercising Federal jurisdiction. It is, of course, not to the point, to insist that the particular prescription which has been enacted makes no practical alteration in the law which would have been applied in the absence of the provision. If the provision were to have genuine constitutional force when prescribing the law to be selected, then so too would an amendment commencing 'except so far as hereinafter set out' followed by a series of specific provisions. It is interesting to consider one or two forms which such provisions might exhibit.

We may consider a provision asserting that contributory negligence should in all cases be a defence to any claim and that the onus of disproving it should rest upon the plaintiff. This provision, it may be remembered, would apply to a running down claim in the Supreme Court of Victoria if the plaintiff lived in Albury and was injured by a motorist living in Wodonga. Such a law would, if valid, be inconsistent with and would prevail against State statutes dealing with this subject matter, a subject matter apparently remote from Federal power and consequently a matter for State law. Indeed we may come closer still to 'constitutional dynamite' with a more limited example. Let us imagine one of these exceptions providing that

> in any action by a resident of a State of the Commonwealth against any one of the States of the Commonwealth other than that of his residence for the repayment to him of money exacted by the defendant State without lawful justification, it shall not be relevant to show that such money was paid by the plaintiff voluntarily and without protest.

The multiplication of examples is unnecessary. The conclusion seems inescapable. There is no general power in the Commonwealth Parliament to prescribe the law to be applied by courts exercising Federal jurisdiction to be derived alone from the fact that the court is exercising Federal jurisdiction. The very limited grant of power in section 78 of the Constitution reinforces this conclusion rather than denies it. 'Federal jurisdiction' is not as such a subject matter for Commonwealth substantive legislative power in disregard of the fundamental division of legislative powers contained in the Constitution.

It must be noted, of course, that the Commonwealth Parliament may well have power derived from other sources to prescribe the law to be applied by a court exercising Federal jurisdiction. It is obvious, for example, that in respect of the jurisdiction exercised in any matter 'arising under any laws made by the Parliament' from the very

nature of the situation, there is power in the Parliament to prescribe the law to be applied in its exercise. Indeed there is a necessity that Parliament should do so, however hesitant it may seem to be.[41] It may not appear quite so obvious that there is such legislative competence in relation to the jurisdiction in matters 'in which the Commonwealth . . . is a party'. It seems clear, however that, for a variety of reasons, there is a power to make laws on the subject of this jurisdiction derived, not from the creation of the jurisdiction, but from other constitutional provisions or underlying constitutional principles. Thus 'the right of the subject to recover from the Crown in right of the Commonwealth, whether in contract or in tort, is the creature of the law which the Federal Parliament controls'.[42] Indeed in relation to this topic it has been suggested that, far from the creation of the jurisdiction in the Constitution being a source for the derivation of legislative competence, *per contra* the creation of this jurisdiction by mention in the Constitution, has been thought to provide implied limitations upon the existence of a legislative power over this subject which Parliament might otherwise be thought to have derived from other sources![43]

Statutes passed by reason of these powers of the Commonwealth Parliament to make laws on enumerated subject matters will frequently provide the terms of the substantive rights adjudicated upon in Federal jurisdiction. In this situation, it may well happen that the Commonwealth statute may not be sufficiently complete to operate without the addition of rules or principles not themselves set out in the statute. Indeed this must be true in the vast majority of situations in which a court is called upon to apply some provision of a Federal statute. A Commonwealth statute which authorizes a subject to sue for damages in respect of a contract entered into between himself and the Crown in right of the Commonwealth will be unlikely to contain any complete definition of the legal definition of either 'contract' or 'breach' nor of the rules of evidence prescribing the mode of proof for the establishment of either of them. It is to this situation that section 80 is in part directed.

Parliament has contemplated that its own statutes made upon specific subject matters committed to it will in themselves be insufficient. It might be said that it is within the power to make laws on such subject matters, to go on and prescribe that the 'common law of England' shall provide the rules necessary to make statutory provisions on any such subject matter workable, that is, so far as these provisions are insufficient to carry them into effect.

[41] *Barrett v. Opitz* (1945) 70 C.L.R. 141.
[42] *Werren v. The Commonwealth* (1938) 59 C.L.R. 150, 167, *per* Dixon J.
[43] *The Commonwealth of Australia v. The State of New South Wales* (1923) 32 C.L.R. 200, 216.

Even so viewed, this is a very wide reaching example of legislation by reference. No doubt the course adopted by Parliament may be justified by the actual nature of the subject matter incorporated by reference by the legislation. The common law may well exist, as a 'brooding omnipresence in the sky' in Federal courts in a somewhat different sense from that intended by Holmes J. because the colonies which constituted the Federation were and are 'settlement colonies'. Section 80 of the Judiciary Act might be a more questionable exercise of the legislative process if, for example, the reference had been to 'the common law as understood and applied by the Courts of New York' and even more so if the reference had been to some other *corpus juris* altogether. But this is not a matter of practical significance and concerns rather the conceptions of 'legislating' current in our constitutional systems.

It is more to the point to consider the further modification of the 'incorporated *corpus juris*' to be found in section 80. It is the common law 'as modified by the statute law in force in the State in which the court in which the jurisdiction is exercised is held' which is made, as it were, part of Commonwealth statute law. It may be noted in passing that this 'modified common law' is incorporated 'so far as it is applicable'. To this provision, possibly of great significance, we shall return. Meanwhile consider the example of legislation by reference which is now presented. The Commonwealth Parliament would appear, on one view, to be legislating on the subject, let it be supposed, of bankruptcy by providing that in applying the law the common law conception of contract shall be treated as part of the Commonwealth bankruptcy law. Thus this conception becomes applicable because Parliament so declares. If in the future, however, a State Parliament were to abolish the doctrine of consideration, then the Commonwealth law of bankruptcy would incorporate this new conception of contract whenever a case arises in the Bankruptcy Court sitting in that State. Thus the terms of the Federal law would differ as the State Parliaments legislated from time to time and moreover would differ as the court moved from State to State and would differ by reason of the policy of the State legislatures. It is submitted that this cannot be a valid example of the exercise of Federal legislative power. Of course this submission has no reference to any question as to the force which any statute of a State may have by reason of its own constitutional vigour and when the State law is the appropriate law to apply under some rule of choice. It is concerned to consider merely the nature of the purported exercise of Federal legislative capacity provided by section 80. In form, the section is not a rule of choice (even if quite irrational) but a rule of substantive law operating by reference.

IV. The 'Adoption' of Common Law

The problems arising in this connection are made even more puzzling if an attempt is made to attach significance to the qualification that the common law of England shall govern 'so far as it is applicable'. The hypothesis under consideration upon which the section is taken to be operating is that provisions of some Commonwealth statutes are insufficient and some other or further legal rule, norm, standard *etc.,* is required. If there is such a rule to be found in the common law then it will *ex hypothesi* be 'applicable'. If there is no available rule of the common law (if this is theoretically possible) then of course it cannot be 'applicable'. Thus if a rule be found, it is not conceivable that it could or would be applied further than that point beyond which it would not be applicable!

Nor can it be supposed that this puzzling phrase can be given any meaning by reference to conflict of laws problems. If the case before the court contains contacts with more than one country (or more than one State in the Commonwealth) then the common law itself will contain rules choosing the law to be applied (so far as the Federal statute depends upon these common law rules so as to be made effective). It may well be that the final rule selected is not part of the common law at all, but this will be so, not because the common law is not applicable but because it has been applied and has produced the result in question. If then the phrase 'so far as it is applicable' indicates the inclusion of relevant choice of law rules among the other rules of the common law which are included by the statutory reference, it is of course superfluous. If this is the meaning of the phrase it does not help to render any more comprehensible the rest of the section.

If, on the other hand, it is said that it is the modification of the common law by the law of the forum State which is to be applied when it is applicable, the section proves singularly barren of effect for two reasons. If, by the choice of law rules applied by courts exercising Federal jurisdiction (whatever rules these may be) the law of the forum State would be the proper law to apply, then the statutes of that State will upon such choice apply *proprio vigora* by reason of the force of the State Constitution preserved by the Federal Constitution. Section 80 would in consequence have achieved nothing. If upon the same basis, the law of another State of the Commonwealth other than the forum State would be selected by the proper conflict rule, then the law of this State and, in consequence, the common law as modified by the law of this State would apply. Thus the reference in section 80 to the law of the forum State, that is, the State in which the (Federal) court is held, would seem to be meaningless if the

phrase 'so far as it is applicable' be taken to refer to State statutory modification of the common law, and to make that statutory modification operative on the court when 'applicable'.

At this stage, it would appear that section 80 may be viewed as an effective exercise of each of the Commonwealth legislative powers entrusted to the Parliament by the Constitution, the exercise taking the form of adding the common law rules to each statutory exercise of these specific powers so as to complete the same. The section, in somewhat circuitous fashion, also recognizes the constitutional force of valid State legislation which may be applicable. But in making no provision for the operation of State statutes modifying the common law when enacted by a State other than the forum State, it produces a result which taxes the credulity of the interpreter of the section.

But an even more puzzling or less defensible provision is to be found in section 80. Thus it provides: 'So far as the laws of the Commonwealth are not applicable . . . the common law of England shall so far as it is applicable . . . govern all Courts exercising federal jurisdiction'.

If this is construed to mean that when any matter arises in a Federal court which is not covered by Federal statute then it shall be decided (governed) by the common law, it goes much too far. It is true that there is accommodation given to State statutes modifying the common law though there is a limitation to the statutes of the forum State. Clearly any relevant and valid State statute will have inescapable binding force. This provision construed in the sense indicated would amount to a claim by the Commonwealth Parliament to lay down the substantive governing law over the whole field of Federal jurisdiction, including those parts in which the substantive rights are to be determined by State law. It is submitted that such a claim, for reasons previously indicated, cannot be supported.

If, it is suggested that the aspect of section 80 which deals with the cases to which 'the laws of the Commonwealth are not applicable', should by implication be limited to cases arising upon those subject matters which are themselves made specifically the subject matter of Commonwealth legislative power (such as lighthouses, marriage, or foreign trade), then this section would, it may be contended, be legislation upon each of these subjects to the extent that no other Commonwealth statute had been enacted upon the aspect of the subject matter relevant to the litigation. The content of the legislation thus enacted would be the relevant common law rules so far as not modified by any relevant State statute of the forum State. Whether such a fantastic mode of exercising the law making power could be upheld seems highly unlikely. In any case, since relevant State statutes modifying the common law *not* emanating from the forum State would also have force and effect, it is submitted that no genuine

or independent definable effect can be given to this facet of section 80.

In the light of this examination of the two sections of the Judiciary Act it is now possible to draw certain conclusions as to their operation in various of the classes of courts exercising Federal jurisdiction.

As to State courts invested with Federal jurisdiction it is submitted that the sections have operative effect in two directions and no more. By section 79 these courts shall apply their own relevant State law of procedure evidence and the competency of witnesses. This is a valid exercise of Commonwealth legislative power relating to the investing of State courts with Federal jurisdiction. Further, when such courts in dealing with a matter before them are carrying into effect an existing Commonwealth statute, then, if necessary, to achieve this end they shall have recourse to the common law of England. It is submitted that subject to Commonwealth statute (but not subject to the common law) in this jurisdiction, they must apply valid State statutes *proprio vigora*. Further, it is submitted that in such courts no particular significance can be attached to the law of any one State as, for example, the forum State, and the particular reference in section 80 to this law may easily prove misleading, and cannot be given any practical significance.

It may be useful before proceeding to outline the application of these sections to the other courts exercising Federal jurisdiction to attempt a concrete illustration of these particular operations of the two sections. A useful opportunity arises from the investing of the Supreme Courts of the States with Federal jurisdiction under the Federal Matrimonial Causes Act 1959.

Section 25 of that Act is illuminated by the side-note 'Law to be Applied'. Sub-section (2) of this section indicates that 'in proceedings for a decree of nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage', the applicable law is to be found in the principles and rules applied in the ecclesiastical courts in England immediately prior to 1857. It may be noted that so far as these rules and principles are 'insufficient' to enable these jurisdictions to be exercised, then the court should be governed by the common law of England. Or should section 25 (2) be read so as to exclude the operation of section 80? It is submitted there is no good reason for adopting any such qualification upon section 80 or section 25.

With regard to the jurisdiction in divorce under this Act, it is more difficult to be clear about the operation of section 80. Certain it is that section 25 (3) directs that the common law rules of private international law shall apply to, *inter alia*, proceedings for dissolution of marriage. But what of other provisions of the Statute which are insufficient without some further rule to be fully effective? It would

appear that section 80 would here find a normal field for its operation, and indeed a fairly substantial area the filling of which would be of great practical importance. It may well be, for example, that to carry into effect the jurisdiction to decree dissolution of marriage on the ground that the other party to the marriage has committed adultery, it is essential for the court to determine upon whom is the onus of proof and what is the 'standard' of proof required. It may be that the Statute itself upon its true construction discloses upon whom the onus lies. In this case the provisions of the law of the Commonwealth are not insufficient. If however there is no indication of the standard of proof and it is thought necessary for effective exercise of the jurisdiction by a court to define this standard, it would appear that the court should be governed by the common law of England. What precisely this expression should be taken to mean may be a matter of some difficulty. For present purposes it is sufficient to point out that this common law becomes applicable by operation of a statutory direction to the court. It may well be that, in this situation, it would no longer be true to say as did Coppel A-J. in *Hobson v. Hobson*[44] that 'it is still technically correct that neither the High Court of Australia nor the Supreme Courts of the various States are bound by decisions of the House of Lords'. As a matter of construction it would appear reasonable to conclude that when Parliament referred to the common law of England it did not intend to exclude a rule of that law as enunciated by the House of Lords. Equally it can hardly be true to describe a Federal court, in view of the duty stated in section 80, when following a decision of the House of Lords as doing no more than obeying 'a wise general rule of practice'.[45]

It is useful to apply the course of this reasoning to the selection of the appropriate rule of law by the High Court when sitting as a court of appeal from a State court exercising Federal jurisdiction. As has been seen, this appellate function is created by the Constitution. In certain respects it may be regulated by statute, but the jurisdiction may not be taken away nor its appellate character changed. The court of first instance may, in deciding a case have been compelled to have recourse to the common law of England in the necessary 'filling out' of the operation of a Federal statute. If, at the time this were done there were definite decisions of the Court of Appeal in England upon the issue arising in the case laying down the appropriate rule, the court of first instance would surely have no alternative in the performance of its statutory duty but to adopt and apply the rule in question. It might think the rule inappropriate for Australian conditions, as for example might prove to be the case in regard to liability

[44] [1953] V.L.R. 186, 188.
[45] *Piro v. W. Foster & Co. Ltd* (1943) 68 C.L.R. 313, 320, *per* Latham C.J.

for cattle escaping on to the highway and causing injury to the plaintiff in conditions prevailing in the Australian countryside. Suppose the result to be damage to valuable Commonwealth government property, as for instance a military aeroplane. No doubt an action would lie in a State court at the suit of the Commonwealth and would arise in Federal jurisdiction. It might in part be covered by Federal statute but otherwise would involve 'the common law of England'. Would not the statutory duty imposed upon the trial court by section 80 make the application of the English common law rule laid down by the Court of Appeal inescapable, however unsuitable? Would not any contrary decision be one requiring inevitably to be reversed by the High Court on appeal, however much that Court might regard the rule as undesirable in the circumstances of this country? For, the question to be decided on appeal should surely be not whether the trial court decided the matter wisely and well, but whether it performed its statutory duty and permitted itself to be governed by the common law of England.

It may then be said that the reference in section 80 to the 'common law' is to something much more elastic than a reference to a rule enunciated by some particular court or courts in England. It would be said then that the statute uses the expression 'the common law of England' to describe a body of law which is precisely that 'brooding omnipresence in the sky' of which Holmes J. wrote with such vigorous scepticism. The passage previously quoted will be found to have very apt application to the situation now under scrutiny. In the true view, it would be contended the statutory expression does not contemplate a concrete set of rules existing and ascertainable but a *corpus* of law to be deduced by a traditional and organized method of judicial procedure. The activity may be well or ill performed and the resulting discovery may or may not in truth reveal the 'common law' upon the particular topic involved. But, upon this view of the common law, no binding force need necessarily be given to any rule as enunciated at any point of time by any English court. It would be a matter of judgment, no doubt hedged around by strong dictates of discretion, as to whether any such rule did or did not constitute part of the common law which was to regulate the rights of Australians. In particular it may be said that any other conception would compel Australian courts to accept or adopt rules as applicable in Australia however much the developing conditions of this country, or its climate or geography, may indicate the unsuitability of the rule in question. It is true that these contentions all point to the desirability of construing the expression 'the common law of England' from a certain jurisprudential point of view, however unacceptable to the theorist of the common law in the United States. Even so, it is difficult to see how

the statutory duty, if it be binding, could ever permit an Australian court which was subject to it to 'find' a common law rule which conflicted with a rule on the same subject clearly established in the courts of England.

In fact an examination of the judicial methods of reasoning of the High Court in the decision of a case involving a doubtful 'rule' of the common law, discloses an intellectual process which is not capable of being adjusted to the statutory duty contained in section 80 even if defined with the degree of elasticity indicated. The normal and legitimate process of many of the justices faced with such a problem is to search for their own solution of the problem in the light of history and logic, their own formulation of the appropriate rule and then to frame their justification for its adoption in accordance with the jurisprudential requirements evolved by common lawyers. Having done so much they will consider and perhaps draw comfort from the fact that a series of English decisions, perhaps of single judges coincide with or do not markedly depart from the rule which, in the justices' view should be held to apply. In its essential intellectual character, this process cannot by any theoretical conception be defined as the performance of a statutory duty to apply the law of another country, whatever the constitutional and legal significance of that country may be.

But if in truth an attempt is made to read the statutory phrase ('the common law of England') in such a way as to make it possible to recognize the existing judicial processes followed by the High Court as conforming to the statutory direction, it would become obvious that the section itself was not a valid exercise of any existing legislative power. If the 'common law' which is supposed to be directed to be applied is asserted to be the law which a judge concludes on the whole to be logically deducible from the nature of existing rules as he perceives this nature to be and as qualified in his view by the current conditions to which it is to be applied, surely then the section is not a parliamentary prescription of the law to be applied in courts exercising Federal jurisdiction. Such a section so construed would not be valid delegated legislation in any sense, however wide which could be given to that expression. Nor would it be legislation by reference, however inclusive. Indeed, it would appear to have the character of a purported exercise of the judicial function by the legislature. The conclusion would be that given such a wide sense the section would be invalid.

The description of the effect of the two sections of the Judiciary Act upon the judicial procedures and methods of State courts invested with Federal jurisdiction serves equally well to explain the situation of 'Federal courts' *stricto sensu,* though it is convenient to leave aside for some particular consideration the High Court in the exercise of its

original jurisdiction. Though the position of the Federal courts above mentioned proves in practice to be similar to that of the invested State courts, two matters demand notice.

In the first place the Federal courts in this limited class may not have access to the general reservoir of legal rules to which the State courts have become accustomed to resort in the exercise of their State jurisdiction. The thesis has already been indicated, that the State courts in the exercise of their jurisdiction are under a statutory duty, as for example, to be found in the provisions of the Supreme Court Act in Victoria,[46] to apply in the absence of any relevant statute, the same law as the courts in England would do to the matters which come before them.

In the second place, however, the State courts have a function in the exercise of Federal jurisdiction to decide cases in which the substantive law is not, and, it is submitted in some cases, cannot ever be prescribed by the Commonwealth Parliament. This is certainly the case with respect to the jurisdiction relating to diversity of residence.

In the absence of valid statutory provisions, which must necessarily in such cases be contained in State statutes, no doubt the source of this substantive law is to be found in the 'common law'. The duty to ascertain and apply this law, however, either derives from the fundamental sources from which the courts draw their strength or from statutory directions couched in very different terms from those to be found in section 80. Moreover both this duty itself and the content of it may be changed by the State Parliaments and by them alone. In this respect the State courts exercising Federal jurisdiction over controversies of this class are in a different position from Federal courts which have no competence over such classes of cases.

[46] Ss. 15-17, 21, 61.

(To be concluded)