# THE LAW APPLICABLE IN FEDERAL JURISDICTION

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*In this article Mr O'Brien discusses questions relating to the competence of the Federal Parliament to prescribe the law applicable in federal jurisdiction, and the power of State legislatures to bind courts exercising federal jurisdiction. Much of the discussion concerning the Federal Parliament relates to the interpretation and constitutional validity of sections 79 and 80 of the Judiciary Act 1903-1973 (Cth): do those provisions have a substantive operation (that is, create rights and liabilities), or are they procedural provisions (define the juridical nature of federal jurisdiction)? After posing hypothetical fact situations raising issues relating to federal jurisdiction, the author concludes that the sections are procedural provisions. The application of the common law to federal jurisdiction is the subject of Part Two of this article to be published in this Journal next year.*

## INTRODUCTION

In the seventy-two years of the High Court's existence and in over seven hundred cases on constitutional law, little light has been shed on what is the applicable law in federal jurisdiction. It is a question, one can truthfully say, that does not greatly excite the curiosity of either judges, practitioners or scholars. The fact that this area of learning presents few practical difficulties would account for its relegation to the sphere of abstract theorism. Nevertheless, despite the eccentric appearance an analysis of this question assumes, this writer believes that utilitarian reasons are not the only ones that justify enquiry.

The orthodox learning on the choice of law in federal jurisdiction is to be found in sections 79 and 80 of the Judiciary Act 1903-1973 (Cth). Those sections have a sweeping and all-embracing operation.

> 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 is held 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.

These sections are roughly equivalent to section 34 of the Judiciary Act 1789 enacted by the United States Congress:

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> 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.[1]

If it is assumed that sections 79 and 80 have a substantive operation, (that is, create rights and liabilities) as it was assumed by Sir Phillip Phillips,[2] then one would question from where the Commonwealth derives its power to enact such comprehensive provisions. If the Commonwealth does possess power sufficient to authorize the enactment of sections 79 and 80, it may also possess the power to enact any rule of decision as the governing law in federal jurisdiction. In other words, federal legislative competence would include a substantive power with respect to the nine descriptions of "matters" that are found in sections 75 and 76 of the Constitution. Those sections define the ambit of federal jurisdiction by enumerating the classes of cases that are or may be brought within it. No doubt the possession of such a power would be of advantage to the federal government, since cases involving the Commonwealth, as a litigant, are cases that arise within federal jurisdiction. The Commonwealth would possess power to legislate with respect to itself, thus enabling it to confer upon itself any set of rights or powers it wishes. For instance, the Commonwealth could be given rights to seek an injunction against an intrastate trader who raises his prices above that fixed by the Prices Justification Tribunal. Similarly, wages could be controlled, as could in fact any commercial or fiscal practice. With respect to crime, the Commonwealth would have a *carte blanche* power to do as it chooses. Admittedly, it would be a curious place to find such an extensive power tucked away in the language of chapter III of the Constitution.

While such speculations may appear alarming, it ought to be noted that nothing more is involved than an acceptance of the view that the legislative, executive and judicial powers of the Commonwealth are equal and co-extensive. Be that as it may, it nevertheless too radically re-adjusts the line dividing the powers inter se of the federal and State governments to be accepted with equanimity. While Phillips attributed to sections 79 and 80 a substantive operation, he nevertheless confined it within the perimeters of the section 51 powers.

> 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.[3]

While such a statement makes eminent good sense, it does so because of the way in which we visualize the constitutional division of powers.

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[1] Now to be found in 28 U.S.C. s. 1652.

[2] "Choice of Law in Federal Jurisdiction" (1961) 3 M.U.L.R. 170, 188, 189.

[3] *Id.*, 187.

However, assumptions that spring from our political context so as to become a part of our conditioned way of life are nothing more than biases unless they can be established by logic—in this case the logic of the Constitution, which is the only means of accurately comprehending the extent of federal power. So, then, what does logic say as to the validity and operation of sections 79 and 80? It may be that section 51 (xxxix), the incidental power to the powers of the federal judicature, is sufficient authority for sections 79 and 80.[4] Pryles and Hanks have suggested that section 51(xxv), the full faith and credit implementing provision, supports those sections.[5] On the other hand, the sections may be beyond power but in circumstances which would make it irrelevant. Assuming that those sections merely declare the position to be that which would have existed in any event, then those sections introduce no change to the pre-existing law. Consequently, the presumption of validity that attaches to all legislation[6] would not be rebutted in the case of sections 79 and 80 since no advantage could be gained in doing so. In the United States it has been held that section 34 of the Judiciary Act is merely declarative.[7]

Alternatively, sections 79 and 80 may not have a substantive operation at all. They may only be procedural provisions, or to put it more comprehensively, they may only enact rules that operate in the field of jurisdictional law. If that is their effect, then it is suggested that they are provisions which define what may be called the juridical nature of federal jurisdiction. That expression will be defined in far greater depth later. At this point it is sufficient to say that a provision which defines the juridical nature of federal jurisdiction is one which selects the "matter" over which a federal jurisdiction is to be established by reference only to the legal system from which that matter emanates. These remarks are made only by way of introductory comment and are not intended to be explanatory.

In this article the writer intends to investigate the following points.

1. The extent of federal legislative competence with respect to the prescription of the law to be applied in federal jurisdiction.
2. Does State law bind courts exercising federal jurisdiction in the absence of inconsistent Commonwealth law?
3. Finally, the writer will look at the role of common law in federal jurisdiction.

In looking at the first question the writer intends initially to examine what is meant by federal jurisdiction.

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[4] See P. H. Lane, *The Australian Federal System, with United States Analogues* (1972) 397.

[5] M. C. Pryles and P. J. Hanks, *Federal Conflict of Laws* (1974) 173.

[6] *Boilermakers* case (1956) 94 C.L.R. 254, 293, 295.

[7] See *Mason* v. *United States* (1923) 260 U.S. 545, 559; see also *Erie Railroad Company* v. *Harry J. Tompkins* (1938) 304 U.S. 64, 72; and *First National Bank* v. *United Air Lines* (1951) 342 U.S. 396 *per* Jackson J.

## WHAT IS FEDERAL JURISDICTION?

### 1. *The Separation of Powers Doctrine*

The structure of the Commonwealth Constitution followed the model upon which it was based, namely the Constitution of the United States. Article I of the U.S. Constitution, concerned with the powers of Congress, has its equivalent in Chapter I of the Australian federal Constitution which deals with the powers of the Commonwealth Parliament. Chapter II and Article II both deal with the powers of the Executive, and Chapter III and Article III both are concerned with the powers of the federal judiciary. Not only were the founding fathers of our Constitution content to imitate the structure of the American Constitution, but went further and copiously borrowed the language and ideas embodied in it. Chapter III is a striking example of this plagiarism. The only significant contribution our own founding fathers made to the nature of federal jurisdiction was section 77(iii), the autochthonous expedient providing for the investment of State courts with federal jurisdiction.

From the very outset it was expected that the High Court would follow the separation of powers doctrine which had been formulated by the U.S. Supreme Court.[8] In 1915, in *New South Wales* v. *The Commonwealth*,[9] the High Court took the opportunity of implementing this doctrine. The majority held that the interstate commission set up under sections 101-103 of the Constitution, which was obviously not a Chapter III court, could not exercise any part of the judicial power of the Commonwealth. Section 71 of the Constitution states:

> The judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. . .

The expression "shall be vested" was interpreted as "shall be exclusively vested".[10]

As anticipated in 1901 by Quick and Garran, the separation of powers doctrine would involve a further refinement. The learned authors stated:

> The Constitution vests the legislative, executive and judicial powers respectively in distinct organs; and, although no specific definition of these powers is attempted, it is conceived that the distinction is peremptory, and that any clear invasion of judicial functions by the executive or by the legislature, or any allotment to the judiciary of executive or legislative functions, would be equally unconstitutional.[11]

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[8] See J. Quick and R. R. Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 720.

[9] (1915) 20 C.L.R. 54.

[10] See also J. M. Finnis, "Separation of Powers in the Australian Constitution" (1968) 3 Adel. L. Rev. 159

[11] Quick and Garran, note 8 *supra*, at 720.

In 1956 in the *Boilermakers* case[12] the High Court held by a majority of four to three that, subject to one exception, a Chapter III court could not exercise non-judicial powers. The basis of the decision rested on the view that just as the Commonwealth's legislative powers with respect to the creation or conferral of judicial power were to be found exclusively in Chapter III, so also were its legislative powers with respect to the federal judicature as an institution. The text of the Constitution admits of one obvious exception to this, and that is to be found in section 51(xxxix).

> The Parliament shall, subject to this Constitution, have powers to make laws, etc. with respect to: (xxxix) matters incidental to the execution of any power vested . . . in the federal judicature.

Consequently, the majority reasoned that this authorized the Commonwealth to confer on the federal judiciary non-judicial powers which are incidental to the execution of judicial power. The section 51 powers do not otherwise contain within their scope the authority to either create or confer judicial power. Similarly they do not confer the power to legislate with respect to the federal judicature. How long this second limb of the separation of powers doctrine is likely to remain good law is open to speculation in the light of dicta of Barwick C.J. in *Re Joske; ex parte Australian Building Construction Employees*.[13] However, until the High Court should overturn the *Boilermakers* case, the Commonwealth's legislative powers with respect to the federal judicature must be considered as reposing exclusively in Chapter III and section 51(xxxix).

2. *What is Judicial Power?*

The problem of defining judicial power has two aspects to it. The first involves determining its meaning as an abstract concept. The second is the practical problem of ascertaining whether any given function is judicial or non-judicial. Professor Howard states:

> In any given case the question whether a tribunal is exercising, or is intended to exercise, part of the judicial power of the Commonwealth is determined not by the mechanical application of an analytical definition but by a comparison of the constitution and powers of the tribunal with one or more of those characteristics of the judicial function which have come to be regarded in common law countries as particularly distinctive.[14]

In this passage it is suggested that the learned writer is concerned with the practical application of the meaning of judicial power. No attempt will be made here to deal with this second aspect of the problem of defining judicial power.

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[12] *R.* v. *Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254; see also the Privy Council decision in *A-G for the Commonwealth* v. *The Queen* [1957] A.C. 288.

[13] (1974) 48 A.L.J.R. 42, 43.

[14] C. Howard, *Australian Federal Constitutional Law* (2nd ed., 1972) 154-155.

Holmes J. of the United States Supreme Court provided a definition of judicial power that has been adhered to consistently by the High Court. "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist."[15] Issacs and Rich JJ. in *Waterside Workers' Federation of Australia* v. *J.W. Alexander Ltd*[16] expressed and elaborated upon the same view. In that case their Honours were discussing the difference between a judicial order and an arbitral order:

> Both of them rest for their ultimate validity and efficacy on the legislative power. Both presuppose a dispute, and a hearing or investigation, and a decision. But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and the liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other.[17]

However, to say that judicial power is simply the ascertainment, declaration and enforcement of existing rights and liabilities under law would not complete the picture. Further elaborations were made in the judgment of Dixon C.J. and McTiernan J. in *R.* v. *Davison*:[18]

> The truth is that the ascertainment of existing rights by judicial determination of issues of fact or law falls exclusively within judicial power so that the Parliament cannot confide the function to any person or body but a court constituted under ss 71 and 72 of the Constitution and this may be true also of some duties or powers hitherto invariably discharged by courts under our system of jurisprudence but not exactly of the foregoing description. But there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental to the exercise of judicial power or because they are proper subjects of its exercise.[19]

Their Honours appear to be suggesting that there are two other classes of functions that can be said to belong to the judicial power of the Commonwealth. The first is those functions that do not involve an ascertainment, declaration and enforcement of existing rights and liabilities under law, but have been traditionally exercised by courts under the common law system of jurisprudence. Their Honours cite examples of these. The administration of assets or of trusts by the Court of Chancery, orders relating to maintenance and guardianship of infants and the granting of consent to the marriage of a ward of the court[20] do not involve strictly the

[15] *Prentis* v. *Atlantic Coast Line Co.* (1908) 211 U.S. 210, 226.
[16] (1918) 25 C.L.R. 434.
[17] *Id.*, 463.
[18] (1954) 90 C.L.R. 353.
[19] *Id.*, 369-370.
[20] *Id.*, 368.

performance of a judicial function. However, they are "proper subjects of its exercise", because historically they have always been performed by the repositories of judicial power. The second class of functions which are non-judicial according to the precise interpretation of that term, but may nevertheless be exercised by Chapter III courts, are those functions conferred on Chapter III courts under the authority of section 51(xxxix), namely those non-judicial functions that are incidental to the exercise of judicial power.

Both the classes of functions referred to are, however, peripheral to the primary role of Chapter III courts. That role according to the nature of federal jurisdiction involves the ascertainment and enforcement of existing rights and liabilities under law. As will be shown shortly, the definition of "matters", a prerequisite to federal jurisdiction, necessarily assumes that the judicial power exercised within federal jurisdiction primarily concerns the function of ascertaining and enforcing rights and liabilities.

### 3. *The Conceptual Relationship Between Judicial Power and Federal Jurisdiction*

The judicial power of the Commonwealth is only exercisable within federal jurisdiction. The parameters of federal jurisdiction are detailed in sections 75 and 76 of the Constitution. Those sections make provision for federal jurisdiction in respect of nine classes of cases.

> 75. In all matters—
> (i) Arising under any treaty:
> (ii) Affecting consuls or other representatives of other countries:
> (iii) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
> (iv) Between States, or between residents of different States, or between a State and a resident, of another State:
> (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
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> the High Court shall have original jurisdiction.
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> 76. The Parliament may make laws conferring original jurisdiction on the High Court in any matter—
> (i) Arising under this Constitution, or involving its interpretation:
> (ii) Arising under any laws made by the Parliament:
> (iii) Of Admiralty and maritime jurisdiction:
> (iv) Relating to the same subject-matter claimed under the laws of different States.

By virtue of Part VI of the Judiciary Act, together with section 30 of the same Act, the Commonwealth Parliament has exercised in full its power to confer federal jurisdiction over every description of "matters" that is permissible under the Constitution. Further, under section 39(1) of the Judiciary Act, the Commonwealth Parliament has invested State courts with federal jurisdiction and has rendered federal jurisdiction, to a large extent, exclusive of the inherent jurisdiction of the courts of the State (pursuant to its powers under section 77 of the Constitution). Windeyer J.

in *Felton* v. *Mulligan*[21] recently held that the inherent jurisdiction is in fact inoperative, on the basis that this inherent jurisdiction is inconsistent with the existence of federal jurisdiction, and so section 109 invalidates that jurisdiction, thus rendering the remainder of federal jurisdiction also exclusive.

Federal jurisdiction may be exercised by three classes of courts—the High Court, other federal courts created by Parliament, and State courts invested with federal jurisdiction. Before federal jurisdiction can be exercised *there must exist a "matter"*. That expression has been defined by the High Court on two occasions. In *South Australia* v. *Victoria*[22] the Chief Justice, Sir Samuel Griffiths, stated:

> [A] matter between States, in order to be justiciable, must be such that a controversy of a like nature could arise between individual persons, and must be such that it can be determined upon principles of law.[23]

Isaacs J. elaborated upon the same theme with possibly more precision:

> In my opinion that expression, used in reference to the judicature, and applying equally to individuals and States, includes and is confined to claims resting upon an alleged violation of some positive law to which the parties are alike subject, and which therefore governs their relations, and constitutes the measure of their respective rights and duties.[24]

Higgins J. expressed a similar view as to the meaning of that term:

> Under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise.[25]

In *Re Judiciary and Navigation Acts*[26] the Court (Higgins J. dissenting) stated:

> In our opinion there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.[27]

Their Honours (Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ.), having quoted from the opinions of the members of the Court in *South Australia* v. *Victoria*, stated:

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[21] See *Felton* v. *Mulligan* (1971) 124 C.L.R. 367. However, query whether the jurisdiction that is not federal which is exercised by State courts with respect to those matters coming under s. 76(ii) and (iii) is State jurisdiction? The jurisdiction coming within s. 76(ii), it is submitted, is derived from C.Cl. 5 of the *Commonwealth of Australia Constitution Act*, 1900, 63 and 64 Vict., c. 12. Similarly the jurisdiction conforming with s. 76(iii) is derived from the *Colonial Courts of Admiralty Act*, 1890, 53 and 54 Vict., c. 27. Since these are not "a law of a State" how is s. 109 relevant in that case?

[22] (1911) 12 C.L.R. 667.

[23] *Id.*, 675.

[24] *Id.*, 715.

[25] *Id.*, 742.

[26] (1921) 29 C.L.R. 257.

[27] *Id.*, 265.

> All these opinions indicate that a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law.[28]

It is submitted that a correct synthesis of these views amounts to this: A matter is a dispute between persons as to the alleged existence of rights and liabilities existing under law that are vested in or imposed on such persons. If the dispute as to rights and liabilities bears any one of the nine descriptions set out in sections 75 and 76 of the Constitution, then a federal jurisdiction can be created with respect to that dispute. That jurisdiction is exercised and can only be exercised by resolving that dispute through an ascertainment, declaration and enforcement of the rights and liabilities found to be vested in or imposed on the parties to the dispute. The process is accomplished through a determination of questions both of law and of fact. Thus to exercise federal jurisdiction is to exercise the judicial power of the Commonwealth.

## THE FEDERAL LEGISLATIVE COMPETENCE WITH RESPECT TO THE PRESCRIPTION OF THE LAW APPLICABLE IN FEDERAL JURISDICTION

### 1. *Do Sections 79 and 80 of the Judiciary Act have a Substantive Operation?*

If sections 79 and 80 are to be interpreted as having a substantive operation, then, it is submitted, they are invalid. Their invalidity would follow from the principles just stated. To say that sections 79 and 80 have a substantive operation means that those provisions create rights and liabilities. If that is so, then what is the contingency or factum upon which the creation of such rights and liabilities depends? In part at least the answer must be the existence of a federal jurisdiction because the operation of those two provisions is predicated, as is stated in them, on there being a court which exercises federal jurisdiction. This brings us to the conundrum. For there to be a federal jurisdiction there must be a matter that is not only a dispute as to the alleged existence of rights and liabilities, but also, so as to enable the court to exercise the judicial power of the Commonwealth, the actual existence within that dispute of rights and liabilities. Thus a matter, being a prerequisite to a federal jurisdiction, requires that rights and liabilities pre-exist the federal jurisdiction. Further, it is those rights and liabilities that are to be ascertained, declared and enforced in the exercise of that jurisdiction.

If it is supposed that sections 79 and 80 create even a necessary portion of the rights and liabilities to be ascertained and enforced in the jurisdiction, then the existence of those rights and liabilities does not precede the jurisdiction. Consequently, the prerequisite matter is either non-existent or

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[28] *Id.*, 266.

incomplete. In the first case, clearly, there can be no federal jurisdiction and hence sections 79 and 80 cannot create rights and liabilities since the contingency necessary for their creation has not occurred. The provisions would be pointless in a substantive sense. In the second case, where the matter would be supposedly incomplete without being supplemented by the substantive operation of sections 79 and 80, the end result, it is submitted, is nevertheless the same. First, it should be pointed out that the writer has doubts as to whether there can exist an incomplete matter. The concept is self-contradictory. Therefore the writer will not hazard a speculation as to a fact situation which illustrates the point.

An incomplete matter in this context involves a law, other than sections 79 and 80, which has a substantive operation in creating rights, liabilities, powers, privileges or immunities, but one which fails to create for a particular fact situation sufficient rights and liabilities to authorize the granting of a judicial remedy by a court. In short, the plaintiff would be without a cause of action unless sections 79 and 80 filled the gap. If there is no cause of action, there can be no matter. From the dictum quoted by Higgins J. in *South Australia* v. *Victoria,* the view stated by the majority in *Re Judiciary and Navigation Acts* and the definition of judicial power, it is clear that a matter must be able to call forth a remedy. In short, an incomplete matter is no matter at all. Therefore, if sections 79 and 80 are in any way necessary to the obtaining of a remedy from a court exercising federal jurisdiction, then there can be no pre-existing matter. Hence there can be no federal jurisdiction and sections 79 and 80 will not have a substantive operation, since their operation is predicated on the existence of a federal jurisdiction.

This analysis answers some of the questions raised in the introduction to this article. First, federal legislative competence with respect to the prescription of the law to be applied in federal jurisdiction cannot involve a capacity to enact substantive law. Second, sections 79 and 80 cannot be validated or supported by section 51(xxv). If that head of power gives to sections 79 and 80 a substantive operation, then the exercise is futile. If, on the other hand, those sections in some way define *an aspect of the nature of federal jurisdiction,* as will be shown later, and if their authority is section 51(xxv), then it would be in violation of the separation of powers doctrine. It is essential to the nature of that doctrine that the law making power of the Commonwealth with respect to federal jurisdiction be confined to the provisions of Chapter III. Hence section 51(xxv) cannot be a mandate for any law that deals with the structure or fabric of federal jurisdiction.

If there is no substantive federal legislative power with respect to the prescription of law in federal jurisdiction, is there any competence at all? If there is, is it to be found in section 51(xxxix), or the provisions of Chapter III? To these questions the writer now turns.

2. *The Power to Define the Juridical Nature of Federal Jurisdiction*

The answer to the question of whether the Commonwealth possesses legislative competence with respect to the prescription of the applicable law in federal jurisdiction, it is submitted, is yes. The power, as mentioned earlier, is not a substantive power; it is a power to define what may be called the *juridical nature of federal jurisdiction*. The explanation of that expression will require returning to matters already covered.

As noted earlier, matters and the judicial power of the Commonwealth are related concepts. The former refers to a dispute as to the existence of rights and liabilities; the latter refers to the resolution of that dispute by the ascertainment and enforcement of those rights and liabilities found to exist. In both definitions it is assumed that with respect to one transaction or factual dispute there emerges only one set of rights and liabilities. That assumption, it is suggested, in some cases is wrong. There may emerge out of one transaction two or more sets of rights and liabilities. In explaining this peculiarity of jurisprudence, the writer will first confine himself to examples drawn from a unitary system.

Take for example, A who lends his car to B. B fails to return the car within the agreed time, so A requests B unequivocally to return his property and B refuses. A could sue B in either detinue or conversion. Each cause of action will confer a distinct right on A and impose a different liability on B. Thus out of one transaction emerge two sets of rights and liabilities, which may be called parallel sets of rights and liabilities. If the loan of the car was made pursuant to a contract which contained a clause stipulating a reasonable sum of money as liquidated damages for any pecuniary loss that A incurred through late delivery by B, then an action in contract for that amount would lie. An action in conversion would enable A to recover a similar amount, as possibly would an action in detinue. Consequently, under those circumstances three parallel sets of rights and liabilities would emerge from the same transaction. Once the conversion is complete, equity would enter the picture and impose a constructive trust on B to hold the property for the benefit of A.[29] Thus a fourth set of rights and liabilities would emerge from that one transaction. In this example each set of rights and liabilities is consistent with the others. However, important differences may nevertheless arise depending on which set of rights and liabilities is being enforced. In the case of *Re Brumm*[30] the defendant had sold the converted property for an amount in excess of the market value of the property at the time of the conversion. The plaintiff was able to recover the additional amount being a beneficiary under a constructive trust.

In the thesis being advanced, it is important to note that each set of

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[29] The property in this case would be a possessory interest which B holds in the car and that possessory interest would constitute the subject matter of the trust.
[30] [1942] St.R.Q. 52.

rights and liabilities co-exists, so that one set in no way cancels or impairs the operation of any of the others. If differences in result turn on which set of rights and liabilities are enforced, then the determination of which result is ultimately to prevail is not ascertained by regarding one set of rights and liabilities as negating any or all of the others. Rather, it is discovered by looking to the jurisdiction of the court which hears the case.[31] That court, in the example given, will only be able to enforce one set of rights and liabilities at any one time. Which set it enforces will, it is submitted, depend on its juridical nature. Some courts possess equitable jurisdiction, other courts do not. Yet in this example both types of courts could hear the case. However, they could not both enforce the same set of rights and liabilities. The difference in their jurisdictions does not turn on a question of fact, since the facts are identical, but rather on the jurisdictional capacity of the courts to enforce different branches of jurisprudence. This distinction in jurisdiction is what is meant by the reference to its juridical nature.

There are not only differences between the juridical nature of courts exercising legal or equitable jurisdiction but also between courts that exercise only legal jurisdiction. If the example had occurred in the eighteenth century, the plaintiff would have been put on the same set of facts to making a choice between an action on a writ of detinue, or an action in case for conversion or an action in assumpsit. The choice was compulsory and final and the choice determined the juridical nature of the common law court that heard the case. Thus from the outset one set of rights and liabilities out of a possible set of three was selected.

As Professor Maitland observes:

> But further to a very considerable degree the substantive law administered in a given form of action has grown up independently of the law administered in other forms. Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a

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[31] Legal scholars such as Professors F. W. Maitland and W. N. Hohfeld have suggested that the apparent conflict between law and equity can be resolved on a substantive law basis. Maitland states: "No, we ought to think of the relation between common law and equity not as that between two conflicting systems, but as that between code and supplement, that between text and gloss." See F. W. Maitland, *Equity* (1936) 153. Hohfeld suggests that the conflict can be resolved by regarding equity as repealing those inconsistent portions of the common law just as a later statute repeals those inconsistent provisions of an earlier one. See "Supplemental Note on the Conflict of Equity and Law" (1917) 26 Yale L. J. 767. Professor J. Stone, it is suggested, correctly described the means of reconciliation in a section entitled "Equitable and Legal Rights Analytically Distinguishable only by the Court of Enforcement"; see *Legal Systems and Lawyers' Reasonings* (1964) 155. It is submitted that a case like *Moore* v. *Dimond* (1929) 43 C.L.R. 105 envisages a situation where law and equity may impose on the same parties two contradictory landlord and tenant relationships. Thus the outcome of litigation between such parties would depend on the jurisdiction in which the action was brought. These types of conflict are therefore not resolved on a substantive law basis but on a jurisdictional basis.

litigant will find that his case will fit some two or three of these pigeon-holes.[32]

Of course, under our modern procedure the plaintiff is given far greater flexibility, he can plead each cause of action in the same writ. If the court possesses both legal and equitable jurisdiction, the juridical nature of that court is enlarged to the point that it can enforce any one of the four sets of rights and liabilities. However, since the remedy that flows from an enforcement of each of the four sets of rights and liabilities may, in some circumstances, be different, a choice will ultimately have to be made in such cases as to which set of rights and liabilities is to be enforced. Such a choice of remedies when made will reduce the ambit of the juridical nature of the jurisdiction. However, under modern procedure the juridical nature of the jurisdiction becomes fixed only at the end of the case rather than being determined from the outset. In other words, the set or sets of rights and liabilities that are to be enforced will only be determined when the ultimate choice as to remedy or remedies has been made.

In a federal system the multiplicity of parallel sets of rights and liabilities increases dramatically as compared to the situation in a unitary system. If one takes the example previously given and embellishes it slightly, the point is clearly illustrated. In the hiring agreement between A and B, suppose that it was a condition of the contract that B, the hirer, road test the vehicle by driving it through every State in Australia. The contract is made in Victoria and re-delivery is to be effected in Victoria. B drives the car around Australia but fails to properly road test the vehicle and fails also to deliver, even after a request to do so by A. Under Victorian law there emerge four parallel sets of rights and liabilities, but in addition five other sets of rights and liabilities also arise. Since the contract was breached in every State by B's failure to adequately road test the car in any State, the courts of every State have jurisdiction to hear the dispute *in contract only*.[33] If the jurisdiction of the courts of a State extends to a factual dispute, then the law administered by those courts would also extend to that dispute. This statement is equally true irrespective of whether reference is made to that branch of the law of a State known as conflict of laws or its municipal law. The result therefore is that the laws of the remaining five States would also prescribe five separate sets of rights and liabilities, thus leaving a total of nine parallel sets of rights and liabilities.

Suppose A and B were residents of different States. Under those circumstances the case is one that would come within federal jurisdiction under section 75(iv) of the Constitution and section 39(2) of the Judiciary Act. Given that, out of the one factual dispute there has emerged a possible nine sets of rights and liabilities all independent of each other. Is there

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[32] F. W. Maitland, *The Forms of Action at Common Law* (1968) 3.
[33] See ss 4 and 11 of Service and Execution of Process Act 1901-1968 (Cth).

*one matter* over which a federal jurisdiction may be created or, rather, are *there nine matters*? The dispute as between A and B is potentially with respect to the alleged existence of each and every one of those nine parallel sets of rights and liabilities, or, in other words, there are nine potential causes of action. It is submitted that where there are multiple causes of action there are multiple matters. That multiplicity of matters may occur within the legal system of any one State or may result from an overlap between the systems of law of two or more States.

An examination of the High Court's original jurisdiction under section 76(i), concerning matters "arising under the Constitution or involving its interpretation", further supports the view that where there are multiple causes of action there are a multiplicity of matters even though each cause of action stems from the same factual transaction, and the rights and liabilities concerned relate to the same parties. Suppose in a modification of the example previously given that A and B were not residents of different States, but otherwise the facts are identical with one exception. The hiring contract between them requiring B to drive the vehicle through every State in Australia was tainted with illegality by virtue of a Commonwealth regulation enacted under a law, the validity of which was suspect. Suppose also that it was questionable whether the regulation was intra vires the Commonwealth law. A sues B in the original jurisdiction of the High Court on the clause stipulating a liquidated sum for breaches of the contract committed by B. In the same action A also sues B in detinue and conversion for the value of the motor vehicle. If it is assumed that the illegality is such that while it would affect the action in contract, it would not affect the two actions in tort, a question then arises whether A can bring all claims into the original jurisdiction of the High Court under section 76(i). Inasmuch as the action in contract involves a question of illegality which, in turn, involves a constitutional question, there is no doubt that the cause based on contract may be heard in the original jurisdiction of the High Court. But since the constitutional question is limited to the issue of illegality which, in turn, is confined to the action in contract, the collateral actions, it is submitted, fall outside the ambit of the original jurisdiction of the High Court.

In *Carter* v. *Egg and Egg Pulp Marketing Board (Vic.)*[34] the plaintiffs sought declarations that certain provisions of Victorian statutes, together with regulations made thereunder, were invalid. The alleged invalidity involved questions arising under the Constitution. Further, the plaintiffs claimed an account of the defendants' dealings with large quantities of eggs delivered to the defendants by the plaintiffs and payment of any amount found due upon the taking of such account. This additional claim against the defendants did not involve any constitutional question but concerned only a question of statutory construction of a Victorian Act.

[34] (1942) 66 C.L.R. 557.

The High Court held that it could not entertain jurisdiction on this cause of action which was regarded as severable from the claims for declarations. The Chief Justice commented:

> If 'matter' were interpreted in this instance to mean 'a legal proceeding' including all claims made in that legal proceeding, this provision would become absurd. A claim involving the interpretation of the Constitution may be joined with all kinds of other claims against the same defendant which has nothing to do with the Constitution—*e.g.* with claims based upon breach of contract or upon tort. The provision cannot be interpreted to mean that the Commonwealth Parliament may, for this reason, not only invest State Courts with jurisdiction in cases of contract or tort (a jurisdiction which they possess quite independently of and prior to the Constitution), but also may confer such jurisdiction as 'federal jurisdiction'—which would be an absurd provision.[35]

Starke J., in putting the same view, stated:

> But there must be a matter, a cause of action, in the sense indicated, and not merely a legal proceeding in which the interpretation of the Constitution arises in respect of some matters or causes of action. The jurisdiction of this Court is not attracted to matters or causes of action arising in a legal proceeding which cannot involve the interpretation of the Constitution.[36]

His Honour makes it quite plain that for every cause of action or set of rights and liabilities, there is a separate matter. Furthermore, the same conclusion follows from the actual decision in the case; that if two or more causes of action emerge from transactions between the parties with only one bearing a description capable of bringing the case within federal jurisdiction, then that cause of action can be the only one litigated in federal jurisdiction.

At this point it may be necessary to clarify what is meant by factual transaction. That expression within this context refers to all events and circumstances occurring in relation to the parties which have some legal significance. The expression does not refer to all those facts necessary to establish any one cause of action but rather to all those facts that are necessary to establish every cause of action that could conceivably arise out of the transaction. It should be noted that the facts necessary to establish one cause of action will as a totality differ from the facts necessary to establish the remaining causes of action. The only occasion when the facts necessary to establish one cause of action will be identical in every respect to the facts necessary to establish another cause of action is when each cause of action derives authority from different systems of law, that is, when the legal systems of two or more States overlap and the precepts or norms of each system on that particular question are identical.

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[35] *Id.*, 579-580.
[36] *Id.*, 587.

To return to the example given earlier, it is clear in the light of the decision in *Carter* v. *Egg and Egg Pulp Marketing Board* that the actions in detinue and/or conversion not being affected by the question of illegality, and therefore not concerning a constitutional question, cannot be described as being in conformity with section 76(i). Hence they must be severed from the action in contract and litigated in a State jurisdiction. That nevertheless still leaves a remaining question. What of the issue that the Commonwealth regulation is invalid not because it lacks constitutional authority, but rather because it is not intra vires its parent statute? That issue cannot be brought under section 76(i) because no constitutional question is involved and further it cannot be brought within section 76(ii). The reason is that the matter does not arise under a law of the Parliament. The matter in this case is an action in contract which arises under the common law. The fact that a defence to that cause of action is based on a federal law is not sufficient to bring it within section 76(ii).[37] Nevertheless the issue as to the intra vires operation of the regulation could be raised in federal jurisdiction in this particular case. That specific issue relates to the existence of a cause of action in contract, which already bears a description consistent with section 76(i) because of the issue concerning the interpretation of the Constitution. Once a matter or cause of action bears a requisite description so as to bring it within federal jurisdiction, the whole cause and every issue concerned within it is brought within the federal jurisdiction.[38] Therefore, the cause of action in contract and all issues related to it are within federal jurisdiction, in this case the original jurisdiction of the High Court.

However, it is necessary to know whether there is one cause of action or whether there are six. The contract, being one that was breached in every State, attracts the jurisdiction of the courts of every State which, in turn, renders the laws administered in those six separate curial jurisdictions applicable to the issues in contract. The legal systems of each of the States, either through their municipal law of contract or through their private international law rules, prescribe six separate sets of rights and liabilities and thereby give rise to six separate causes of action. This will be true even though the precepts of each of the six systems of law on this question of contract are identical. Where each set of precepts in each of the different systems of law derive their authority from different sources, the causes of action that stem from each set of precepts will, in turn, be different despite the identity of meaning of every precept. Thus, it is submitted, with respect to the issues in contract as between A and B, there is a potential of six causes of action, six sets of rights and liabilities and six matters.[39] Given

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[37] See *Collins* v. *Charles Marshall Pty Ltd* (1955) 92 C.L.R. 529.

[38] See *Parton* v. *Milk Board (Victoria)* (1949) 80 C.L.R. 229; *R.* v. *Carter; ex parte Kirsch* (1934) 52 C.L.R. 221; *Hopper* v. *Egg and Egg Pulp Marketing Board (Victoria)* (1939) 61 C.L.R. 665.

[39] Professor W. W. Cook has expressed the same view "Shall we, must we, say that there are as many 'rights' all growing out of the one group of facts under consider-

that the constitutional question, through the issue of illegality, relates to each of the six causes of action, all six matters therefore bear a description in conformity with section 76(i). However, a federal jurisdiction cannot be created with respect to every matter in view of their concurrent nature. Therefore, the Commonwealth must choose between the matters when creating a federal jurisdiction which one of the six is to constitute the subject of the jurisdiction. It possesses a power to make such a choice through the expression "matters" as used in sections 76 and 77 of the Constitution. This power of choice has been exercised through sections 79 and 80 of the Judiciary Act by choosing the matter constituted under the law of the State in which the federal jurisdiction is exercised. Those sections therefore do not have a substantive operation. Rather, they define the juridical nature of federal jurisdiction by choosing which branch of the substantive law is applicable by creating a federal jurisdiction over that matter which stems from the branch of the substantive law which has been chosen.

It is true that sections 79 and 80 are choice of law rules. However, they are not choice of law rules in the sense that the normal rules of conflict of laws are. The difference is that conflicts' rules belong to the substantive law whereas sections 79 and 80 are rules going to jurisdiction, that is, curial jurisdiction. A conflicts' rule is a rule that directs recognition to a rule of foreign law so as to incorporate that rule of foreign law into the *lex fori*. As Lord Mansfield put it in *Holman* v. *Johnson*:

> There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England, says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.[40]

The foreign rule which is incorporated into the *lex fori* creates, given the existence of the facts upon which the rule is predicated, a cause of action or set of rights and liabilities which are in turn made the subject of a curial jurisdiction. Sections 79 and 80 do not choose rules which create causes of action but rather choose only the cause of action or matter, assuming it bears the appropriate description within sections 75 and 76 of the Constitution, over which a federal jurisdiction is to be established. The distinction admittedly is a fine one and made even more so given that sections 79 and 80 choose the cause of action or matter by making reference to the branch of substantive law that creates the cause of action or matter. While the distinction is a fine one, it nevertheless is important, since if sections 79 and 80 were to possess the same character as do ordinary rules of conflicts, they would incorporate into federal law certain areas of State substantive law and would, in turn, be substantive law rules

ation, as there are jurisdictions which will give the plaintiff relief?": "The Logical and Legal Bases of the Conflicts of Laws" (1924) 33 Yale L.J. 457, 478.

40 (1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121.

that lead to the creation of rights and liabilities. For the reasons given earlier their operation in that case would be nugatory.

It has been held by the High Court in a series of cases[41] that when a court is exercising federal jurisdiction and is directed by section 79 to apply the law of the State in which it sits, included in that State law are its rules of private international law. Accordingly, if a tort is committed in Queensland and the action is heard in the original jurisdiction of the High Court sitting in New South Wales, the court will apply the rule in *Phillips* v. *Eyre*[42] and thereby look to the tort law of Queensland rather than simply applying the municipal law of New South Wales. Prima facie this may appear odd, since all the events and factual circumstances relevant to the case occurred within the jurisdiction, that is, within the original jurisdiction of the High Court which extends throughout the Commonwealth. Where is the foreign element[43] that draws attention to the conflicts' rules of New South Wales law? If sections 79 and 80 were to be given a substantive operation so that they were like ordinary choice of law rules that selected the rules of State law to be incorporated into federal law, then, it is submitted, the above interpretation of section 79 by the High Court would be wrong. In the example given, if the tort was committed within the jurisdiction of the High Court, then the relevant branch of New South Wales law would be its municipal law of torts.[44] If, however, sections 79 and 80 are laws that merely go to jurisdiction by defining the juridical nature of federal jurisdiction through the process of choosing the matter over which the jurisdiction is to be established, then this interpretation of section 79 by the High Court would be correct. If a tort is committed in Queensland, and if the laws of New South Wales apply to that tort, the cause of action or matter created by New South Wales law is not ascertained by reference to its municipal law of torts but rather by looking to its rules of private international law.

3. *Problems with Respect to the Original Jurisdiction of the High Court*

In analysing the term "matters" so that several matters may arise out of the same factual dispute between the same parties, certain problems occur in relation to the original jurisdiction of the High Court under section 75 of the Constitution. Under section 75 of the Constitution the Commonwealth Parliament has been given no direct power as it has in sections 76 and 77 to define the juridical nature of federal jurisdiction. The difficulty can be seen in returning to an example given earlier. A and B, being residents of different States, enter into a hiring agreement containing a condition that B road test the vehicle by driving it through every State in Australia. The contract is breached by B, leaving a cause of action in A.

[41] *Musgrave* v. *Commonwealth* (1936) 57 C.L.R. 514; *R.* v. *Langdon; ex parte Langdon* (1953) 88 C.L.R. 158; *Deputy Commissioner of Taxation* v. *Brown* (1958) 100 C.L.R. 32; *Pedersen* v. *Young* (1964) 110 C.L.R. 162; see also Cook, note 39 *supra* at 478.

[42] (1869) L.R. 4 Q.B. 225; (1870) L.R. 6 Q.B. 1.

[43] See A. V. Dicey and J. H. C. Morris, *The Conflict of Laws* (9th ed., 1973) 3.

[44] See Cook, note 39 *supra* at 471-473.

Since the courts of each State could exercise jurisdiction over the dispute, the law of each State applies to the dispute conferring separate sets of rights and liabilities on the parties. Consequently, according to the view advanced earlier, six matters emerge from that one factual transaction. Therefore, if the cause was litigated in the original jurisdiction of the High Court under section 75(iv), any one of those six matters could form the subject of the jurisdiction. If the sets of rights and liabilities constituted under the laws of the different States led to inconsistent results, the High Court would be placed in a dilemma.

The original jurisdiction of the High Court under section 75 of the Constitution is conferred by the Constitution. Accordingly, the Commonwealth Parliament is incapable of limiting, reducing or in any way impairing the ambit of that jurisdiction.[45] It follows, therefore, that if sections 79 and 80 purport to limit the matters over which the High Court can exercise its diversity jurisdiction by a selection of one matter to the exclusion of the remaining five, then those provisions to that extent would be invalid. At least, that is certainly arguable. Conversely, it may be argued that under the circumstances the High Court would only be able to ascertain, declare and enforce one set of rights and liabilities at any one time, and must invariably leave the remainder to wither for want of enforcement. Thus its jurisdiction is in no way being limited, reduced or impaired by being confined to a single matter since its jurisdiction must inevitably be confined to a single matter. All that sections 79 and 80 do is identify that matter over which the jurisdiction is to be exercised.

In accepting that proposition, however, it does not automatically follow that the Commonwealth Parliament possesses the power to identify and select the matter over which a jurisdiction, conferred by the Constitution, is to be exercised. If it is accepted that the Commonwealth Parliament does not possess such a power, then it is submitted that, where there lies a potential of two or more matters arising out of the same factual dispute, it is the parties who make the choice as to the matter which is to form the subject of a jurisdiction conferred under the Constitution. To be more specific, it is the plaintiff who exercises the power of choice. This conclusion, it is suggested, is supported by analogy with the case of multiple causes of action arising within a unitary system out of one factual dispute. Under those circumstances the choice of the cause of action which is to be the subject of the litigation, where the law permits the enforcement of only one of those causes of action, is left to the plaintiff. He exercises his choice by adopting the mode of procedure designed for the enforcement of that cause of action. The mode of procedure may be either an adoption of a certain form of pleadings or alternatively issuing process out of a certain jurisdiction. It follows that if the Constitution creates a jurisdiction

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[45] See *R.* v. *Murray; ex parte Procter* (1949) 77 C.L.R. 387; *Commonwealth* v. *New South Wales* (1923) 32 C.L.R. 200, 216.

and in no way defines its juridical nature, then the means of definition is that which ordinarily applies. The means of defining the juridical nature of curial jurisdictions is ordinarily through the vehicle of procedure.

Yet, having said that much, it does not follow that the plaintiff is necessarily free to choose any one of the six matters that potentially arise from the factual dispute. While he may have an option of six causes of action, he may not have an option as to six different modes of procedure to enforce those six potential matters or causes of action. If all that is open to him is one procedural vehicle for the enforcement of only one cause of action or matter, then either he pursues that procedure or he does not have recourse to law. While there may exist another five potential causes of action, they exist *in abstracto* where the law fails to provide an appropriate procedure for their initiation in a jurisdiction.

It is the view of the writer that this is in fact the situation with respect to the original jurisdiction of the High Court under section 75. The procedural vehicle provided allows for the enforcement of only that matter that is consistent with the selection made by sections 79 and 80 of the Judiciary Act. The power to make rules of practice and procedure with respect to the original jurisdiction of the High Court generally is given under section 86 of the Judiciary Act which provides:

> The Justices of the High Court or a majority of them may make Rules of Court necessary or convenient to be made for carrying into effect the provisions of this Act or so much of the provisions of any other Act as confers jurisdiction on the High Court or relates to the practice or procedure of the High Court, and in particular for the following matters, that is to say—
>
> (a) . . .
>
> (b) Regulating procedure pleading and practice in the High Court in civil or criminal matters in the exercise both of its original and of its appellate jurisdiction;[46]

That provision, it is submitted, is to be read in conjunction with the other provisions of the Act, especially since the section specifically states that the rules are to be made "for carrying into effect the provisions of this Act".

The role of procedure and the nature of procedural rule making power were discussed by the Victorian Full Court in *White* v. *White*.[47] In the joint judgment of Herring C.J., Gavan Duffy and Barry JJ., it was stated:

> In the appropriate context, it comprehends all steps necessary to be taken in litigation for the establishment of a right in order that the right may be judicially recognised and declared in such manner as will enable the party asserting the right to legally enjoy it.[48]

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[46] The question of whether procedural rule making power is within the competence of the Commonwealth Parliament or within the exclusive competence of the High Court justices was raised in *R.* v. *Davison* (1954) 90 C.L.R. 353, 369, *per* Dixon C.J. and McTiernan J. It is assumed that s. 86 is valid.

[47] [1947] V.L.R. 434.

[48] *Id.*, 440.

Where these exists a multiplicity of rights with their corresponding liabilities in circumstances where only one set of rights and liabilities may be enforced, the power of the High Court judges to make procedural rules must be exercised to facilitate the enforcement of only one of those sets of rights and liabilities. It is submitted that the power given under section 86 is to be exercised subject to sections 79 and 80 so that the procedural vehicle fashioned through an exercise of this rule making power is with respect to the enforcement of that matter selected by those sections.

In conclusion, it is emphasized that while the mode of procedure that emerges through an exercise of the power under section 86 is confined to the enforcement of that matter chosen by sections 79 and 80, it does not of itself exclude the enforcement of the remaining matters that potentially arise from the factual dispute. They exist and are in no way destroyed or impaired by sections 79 and 80 or by section 86. However, as stated earlier, they exist *in abstracto* for want of an appropriate procedure designed for their specific enforcement.

## DOES STATE LAW BIND COURTS EXERCISING FEDERAL JURISDICTION?

The power of the Commonwealth Parliament through either Chapter III or section 51(xxxix) to define the juridical nature of federal jurisdiction by choosing one matter to form the subject of a federal jurisdiction out of a potential of two or more matters existing under the laws of different States, is of course subject to the Constitution. If the Constitution or constitutional principles select one matter out of a potential of two or more matters over which a federal jurisdiction is to be exercised, then the Commonwealth Parliament could have no power to affect such a choice. There are a number of possible ways in which the Constitution might define the juridical nature of federal jurisdiction. The first possibility to be considered is whether the prescription of the applicable law in federal jurisdiction constitutionally follows this format: the Constitution, the laws of the Commonwealth and, to the extent to which those two are insufficient, the law of the State in which the federal jurisdiction is exercised. If this format was constitutionally entrenched, it would mean that, in the absence of the Constitution and the laws of the Commonwealth, State law binds courts exercising federal jurisdiction.

On the question of whether State law binds courts exercising federal jurisdiction in the absence of the Constitution and the laws of the Commonwealth, Sir Phillip Phillips stated:

> 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.[49]

[49] (1961) 3 M.U.L.R. 170, 184.

It is submitted that this statement is wrong in both respects. Neither the constitutional authority supporting State statutes nor the requirement of full faith and credit under section 118 of the Constitution compels courts exercising federal jurisdiction to be bound by State statutes. Similarly courts of one State are not bound by the statutes of another State. In coming to this conclusion a re-examination of issues already canvassed will need to be undertaken.

*The Constitutional Authority of State Statutes*

The first question is whether the constitutional authority of a State is such as to render binding on courts exercising federal jurisdiction within that State the statute law of the State. While there is no doubt that the State legislatures have power to create substantive rules of law that lead to the creation of rights and liabilities, it is a further step to say that a certain jurisdiction must recognize and enforce those rights and liabilities. The fact that there exists a power to enact new rules and principles into the formal body of law does not imply that curial jurisdictions existing independently of that power must take cognisance of the consequential rights and liabilities that flow from an exercise of the power. In the first section of this article the writer has endeavoured to show that the process of law is divided into two quite distinct stages. The first is the formulation of rules and principles of law whose operation is predicated on there occurring a certain prescribed combination of facts or events which, when occurring, give rise to the conferral and imposition of rights and liabilities on specific persons associated with that combination of facts or events. The second stage is to resolve any disputes between such persons as to the alleged existence of rights and liabilities with respect to that factual situation by ascertaining, declaring and enforcing those rights and liabilities found to exist under law. The first stage concerns the role of the substantive law. The second stage concerns the role of jurisdictional law, namely, those rules and principles of law which relate to curial jurisdictions and govern the process of ascertainment, declaration and enforcement of rights and liabilities. Such branches of the law as procedure and evidence are clear examples of jurisdictional law quite independent of the substantive law.

If the rules and principles of the jurisdictional law owe their authority to one source and the rules of the substantive law owe their authority to another source, there is no necessary reason why the substantive law should formulate the subject matter of the jurisdiction. However, that is what is being suggested when it is claimed that State law binds, in the absence of the Constitution and Commonwealth law, courts exercising federal jurisdiction. In rejecting the assertion as to the binding effect of State law on federal jurisdiction, it is essential to point to the independence of jurisdictional law from substantive law. An occasion in actual practice, when the autonomous nature of these two parts of the legal system is emphasized, is where the substantive law throws up two or more causes of action or, as

has been described, two or more parallel sets of rights and liabilities. Possibly a classical example of this can be seen from the following fact situation.

Suppose A and B enter into an oral lease which is required to be in writing and yet is sufficiently performed, by the tenant entering possession and paying rent, to enable equity to avoid the Statute of Frauds. If the rent is paid with respect to an aliquot part of a year at common law, there will be presumed to arise by operation of law a yearly tenancy.[50] This will be so even if the agreement is in fact for a fixed term. Suppose the oral agreement allowed the landlord to forfeit the lease for the breach of a special covenant taking effect under that agreement. If that covenant was breached and the landlord exercised his right of forfeiture, two contradictory sets of rights and liabilities would arise. At law the tenant would be entitled to remain in possession since he would not be required to quit the premises without being given six months' notice. However, at equity the lease would be forfeited thereby obliging the tenant to quit the premises. The outcome of an action for eviction between A and B in that fact situation can only be determined by looking to the jurisdiction in which the action is brought. If the court can exercise equitable jurisdiction, then the landlord would win. If, however, the court can only exercise legal jurisdiction, the tenant would win. The substantive law throws up the dilemma without in any way resolving it. Its solution can only be found by looking to the jurisdictional law concerning the rules as to the juridical nature of curial jurisdictions.

If the system of jurisprudence produces only one set of rights and liabilities, the jurisdictional law may still be independent of the substantive law in the sense that it will not enforce that set of rights and liabilities. For example, if a *limitation of actions Act* imposes only a procedural bar on the commencement of actions, the rights and liabilities survive after the limitation period but exist only *in abstracto*. Another example is the rule that the King cannot be sued in his own courts. That is a rule which goes to jurisdictional law with the result that the Crown may commit a tort giving rise to rights and liabilities which exist but are nevertheless beyond the jurisdiction of any court to enforce. Once the jurisdictional impediment is removed, those pre-existing rights and liabilities can then be enjoyed by way of judicial enforcement.[51]

Both these examples illustrate the point that where there exists under the substantive law rights and liabilities, it does not necessarily follow from that fact alone that they will form the subject of a curial jurisdiction and so be judicially enforced. In other words, the mere existence of rights and liabilities does not establish an automatic process of enforcement by a court of law. As mentioned earlier, the legal process

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[50] See *Moore* v. *Dimond* (1929) 43 C.L.R. 105.

[51] See *Farnell* v. *Bowman* (1887) 12 App. Cas. 643; see also *Werrin* v. *Commonwealth* (1937) 59 C.L.R. 150, 168 *per* Dixon J.

falls into two parts—the first concerns the creation of rights and liabilities; the second step concerns their enforcement. Each stage in this process is governed by an independent set of rules and principles so that the rules of substantive law are limited to the establishment of rights and liabilities; those rules cannot further establish a curial jurisdiction for the enforcement of those rights and liabilities and still assume only a substantive character. That is not to say, of course, that a rule may not in fact perfom both functions at once, for instance, a rule which both creates the right and also creates the jurisdiction to enforce the right. However, such a rule performs two quite distinct operations, the one substantive, the other jurisdictional. This can be seen from the case of *R.* v. *Commonwealth Court of Conciliation and Arbitration; ex parte Barrett.*[52] That case concerned an attack made on section 58E of the Commonwealth Conciliation and Arbitration Act sub-section 1 of which provided:

> The Court may upon complaint by any member of an organization . . . make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.

The argument against the validity of the section was that it attempted to create a federal jurisdiction with respect to a matter which did not conform to any one of the nine descriptions set out in sections 75 and 76 of the Constitution. The only head of federal jurisdiction that could possibly meet the case was section 76(ii) "a matter arising under a law of the Parliament". It was argued that this was not a matter arising under a federal law in that it concerned a dispute as to rights and liabilities arising under the rules of an organization. Those rules obtained their force only in accordance with the principles of common law. The argument was rejected on the basis that section 58E not only created a jurisdiction but also incorporated by reference into federal law the rules and principles of common law with respect to the nature of the obligations arising under rules of an organization. Dixon J. commented on the dual operation of the provisions:

> Legislation in the form under discussion must, of course, fall within one of the subjects of the legislative power of Federal Parliament in s. 51 or s. 52. But, assuming the law is one with respect to one other of the enumerated powers and that it also defines the jurisdiction of a Federal court with respect to a justiciable subject matter, why should not an application to obtain the benefit of the provision be a matter arising under that very law? *Ex hypothesi*, the justiciable subject matter is not only specified or indicated by the law defining the jurisdiction, but falls within one of the enumerated legislative powers. That is to say that, apart from the special requirements of Chapter III, it would be an exercise of legislative power upon an assigned subject.[53]

According to the view of his Honour, the section performed two func-

[52] (1945) 70 C.L.R. 141.
[53] *Id.*, 168.

tions. First, it created the substantive right, and secondly, it established a jurisdiction for the enforcement of that right. The fact that the provision achieved both ends simultaneously did not in the least militate against the proposition that both functions were quite separate and had to be authorized under distinct sources within the Constitution. Furthermore, it should be observed that section 58E operates initially to establish the right where there is a violation of a rule of an organization by a person obliged to observe the rule. The right having been established, the section then goes on and creates a federal jurisdiction with resepct to that right and its corresponding liability.

Given that the jurisdictional law is quite separate from the substantive law, it is within the power of the legislature that governs the jurisdictional law, rather than the legislature that controls the substantive law, to determine whether a set of rights and liabilities existing under substantive law is to be ascertained and enforced within the jurisdiction. It follows from the reasoning of Dixon J. in *ex parte Barrett* that if the powers under Chapter III were to be given to one legislature and the powers under section 51 were to be given to another legislature, then the substantive effect of section 58E would have to be enacted by the latter legislature and the jurisdictional operation of the provision would have to be enacted by the former legislature. Consequently, it is submitted that, since the State Parliaments have no control over the jurisdictional law pertaining to federal jurisdiction, they have no power to determine whether rights and liabilities created in the exercise of their substantive legislative power are to form the subject of a federal jurisdiction. In short, they have no power to bind courts exercising federal jurisdiction.

Once this division is made between substantive and jurisdictional law, then it is clear that it falls to the Commonwealth to determine what rights and liabilities are to be enforced in federal jurisdiction. This follows from the separation of powers doctrine. That doctrine, as stated earlier, amounts to this: the legislative competence of the Commonwealth to confer federal judicial power and to legislate with respect to federal judicial institutions is confined to Chapter III and section 51(xxxix) of the Constitution. Accordingly, neither of these two legislative functions may be performed under the rubric of the other powers contained in section 51. It would be absurd under those circumstances to find that the legislative power of the States was such that the nature of federal jurisdiction and the power exercised therein were subjects within the scope of that power. It would seem very strange that while such subjects are not within the ordinary powers of the Commonwealth under section 51, they are nevertheless within the ordinary powers of the States under their own Constitutions. This axiomatic assumption was in part made by Webb J. in *R.* v. *Oregan; ex parte Oregan.*[54]

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[54] (1957) 97 C.L.R. 323, 330.

It should also be noted that the Commonwealth cannot legislate with respect to the judicial institutions of the States other than through the express grants of power under section 77(iii) and section 79.[55] As was stated in the joint judgment of Knox C.J., Rich and Dixon JJ. in *Le Mesurier* v. *Connor*:

> But the provisions of sec. 77 and sec. 79, which explicitly give legislative power to the Commonwealth in respect of State Courts, make it plain that the general powers of the Parliament to legislate with respect to the subjects confided to it, like similar powers of Congress, must not be interpreted as authorising legislation giving jurisdiction to State Courts.[56]

Not only are the general powers of the Commonwealth Parliament such as not to allow the conferral of judicial power on State courts, but equally they do not authorize the conferral of non-judicial powers on those courts. The principle was stated in the joint judgment of the High Court in *Queen Victoria Memorial Hospital* v. *Thornton*:

> It would be strange indeed if the Constitution contained a grant of legislative power which would enable the Parliament to require or to authorise State courts as such to execute duties, functions or powers which were not judicial.[57]

This limitation imposed on the general powers of the Commonwealth appears to be a partial resurrection of the old implied immunities doctrine. However, it should be remembered that what is being referred to as the general powers of the Commonwealth means its substantive law making powers under section 51. Hence those powers cannot justify rules that enter the area of jurisdictional law under the control of State Parliaments. Similarly, it is beyond the power of State Parliaments to enter the field of federal jurisdictional law. This has been held on two occasions, both in *Pedersen* v. *Young*[58] and *John Robertson and Co.* v. *Ferguson Transformers*.[59] Those cases were concerned with the effect of a State Limitations Act constituting a procedural bar with respect to actions brought in the original jurisdiction of the High Court. On both occasions the High Court held that State statutes of limitations could not govern the commencement of actions in the original jurisdiction of the High Court.[60] As pointed out earlier, a limitation of actions Act that operates as a procedural bar to the commencement of actions does not obliterate the right and corresponding liability but rather destroys the capacity of curial jurisdictions to enforce those rights and liabilities. Thus they are properly described as laws with respect to jurisdiction.

To further emphasize the point, it should be recalled that it is an estab-

[55] See *Le Mesurier* v. *Connor* (1929) 42 C.L.R. 481, 496; *British Medical Association* v. *Commonwealth* (1949) 79 C.L.R. 201, 236; *Queen Victoria Memorial Hospital* v. *Thornton* (1953) 87 C.L.R. 144, 152.
[56] (1929) 42 C.L.R. 481, 496.
[57] (1953) 87 C.L.R. 144, 152.
[58] (1964) 110 C.L.R. 162.
[59] (1973) 47 A.L.J.R. 381.
[60] See (1964) 110 C.L.R. 162, 167, 169; (1973) 47 A.L.J.R. 381, 386, 389.

lished rule that the courts of one State are not bound by the statutes of another State even if both States derive their ultimate constitutional authority from the same source. This is the case with respect to the Commonwealth and the Australian States. This rule was laid down in *Phillips* v. *Eyre*[61] when it was decided that legislation enacted in the Crown Colony of Jamaica did not bind courts sitting in England. Such legislation was as much a piece of foreign law as the legislation of France. This rule was followed in the Australian context in *Ray* v. *M'Mackin*[62] when it was held by the Victorian Full Court that Victorian courts were not bound by New South Wales legislation even with respect to events occurring in New South Wales.[63] The rule has been affirmed more recently in *Anderson* v. *Eric Anderson*.[64] So if the laws of one State do not bind the courts of another State, then why should they bind courts exercising federal jurisdiction?

It should be noted that the basis of this rule does not rest on a view as to the territorial limitations of the substantive law making power of the States. (The law of Victoria, which is valid and binding on the courts of Victoria, will not bind the courts of South Australia. It may, however, be incorporated into the law of South Australia through the conflicts' rules of that State.) The rationale behind the rule, it is submitted, is that the juridical nature of the curial jurisdictions of a State is such that it will only look to and enforce rights and liabilities emanating from the statute law of that State. In other words, the jurisdiction of a State court is not sufficiently broad to allow actions under statutes enacted by another State.[65] One would assume that federal jurisdiction is subject to the same limitations, unless, of course, the Constitution of the Commonwealth otherwise provides. As has already been shown, the Commonwealth Parliament has the power to render rights and liabilities created under State statutes actionable in federal jurisdiction. Whether section 118 enlarges federal jurisdiction to render causes of action arising under State statutes enforceable in that jurisdiction has been considered elsewhere.[66] However, in the absence of these two considerations, it is submitted that federal jurisdiction is in no way different in this respect from State curial jurisdictions and in no way bound by laws enacted by a legislature other than the Commonwealth Parliament and the Imperial Parliament.

In conclusion, it is submitted that the constitutional authority of a State

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[61] (1870) L.R. 6 Q.B. 1.

[62] (1875) 1 V.L.R. 274.

[63] *Id.*, 280.

[64] (1965) 114 C.L.R. 20, 33, 40 *per* Kitto and Windeyer JJ.

[65] While a sister-State statute may not apply by virtue of its own force, it may create a debt which the conflicts' rules of the forum may render actionable in the forum. The foreign statutory debt is therefore enforceable by force of the common law rules governing choice of law. See *The Nominal Defendant* v. *Bagots' Executor and Trustees Company Limited* [1971] S.A.S.R. 346; *Hall* v. *National and General Insurance Co. Ltd* [1967] V.R. 355, 361.

[66] The writer has dealt with this issue in an article entitled: "The Role of Full Faith and Credit in Federal Jurisdiction" (1976) 7 F.L. Rev. 169.

Parliament is not such that enables it to compel courts of other States and those exercising federal jurisdiction to enforce rights and liabilities created under the substantive law of that State. The power to do so falls within the realm of jurisdictional law which, in the case of State courts, is exclusive to the legislature of the State and, in the case of courts exercising federal jurisdiction, is exclusive to the Commonwealth Parliament.