THE LAW APPLICABLE IN FEDERAL JURISDICTION

PART 2: THE APPLICATION OF COMMON LAW TO FEDERAL JURISDICTION

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In the first part of Mr O'Brien's article on the law applicable in federal jurisdiction, published in this Journal last year, the author discussed questions relating to the competence of the Federal Parliament to prescribe the law applicable in federal jurisdiction and the power of the State legislatures to bind courts exercising federal jurisdiction. In this, the second part of the article, Mr O'Brien discusses the application of common law to federal jurisdiction, as well as an alternative interpretation of sections 79 and 80 of the Judiciary Act 1903 (Cth) and limitations on the application of those sections. The author compares the approach of courts considering similar issues in the United States with those found in Australia, pointing out however that the decision as to which law to apply is in the United States governed more by Constitutional principle than by Congressional legislation; a point to be contrasted with the position in Australia. The author concludes that the practical effect of his views is to allow the Federal Parliament to choose between competing systems of law within federal jurisdiction.

I INTRODUCTION

In considering the law applicable in federal jurisdiction, one of the most difficult issues is ascertaining the role of common law. In the United States a formidable body of case law has evolved concerning this very question; but in Australia the courts have made only scant reference to it. The learning on this area of constitutional law has been developed in Australia mainly in the context of articles and textbooks.[1] Given the fact that the courts have so far failed to clearly articulate the basic principles concerning this issue, once again one is forced to speculate as to what is the best line of reasoning to adopt.

The first question that arises is whether there is any basis for thinking that the common law has an operation independent of its application within each of the State legal systems. In relation to that,

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[1] Phillips, "Choice of Law in Federal Jurisdiction" (1961) 3 *M.U.L.R.* 170; Campbell, "Federal Contract Law" (1970) 44 *A.L.J.* 520; Renard, "Australian Inter-state Common Law" (1970) 4 *Fed. L. Rev.* 87; Pryles and Hanks, *Federal Conflicts of Laws* (1974) 147-183; Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 785-788; Clarke, *Studies in Australian Constitutional Law* (1905) 192; Quick and Groom, *The Judicial Power of the Commonwealth* (1904) 206-207.

there is also the question of what is the source of the application of common law within each of the State legal systems. Does the common law operate as one system of jurisprudence throughout Australia, or does it alternatively divide itself up into several distinct systems of jurisprudence? If the latter alternative is the correct one, a further question arises as to whether there is, in turn, a seventh system of common law operating within the context of federal jurisdiction which could be appropriately described as federal common law. If, on the other hand, there is only one system of common law which applies in each of the State political systems, does it also apply within the federal system as well? Finally, if it is established that the common law applies within federal jurisdiction either as a unitary system or as federal common law, is it subject to the Commonwealth's power to define the juridical nature of federal jurisdiction? In other words, is the application of common law dependent on whether the Commonwealth creates a federal jurisdiction over a matter which is the creature of common law? Or alternatively, does common law have an automatic application to federal jurisdiction, so that its application can only be limited substantively by the Commonwealth through the use of the section 51 powers? In considering this point, attention shall be directed to section 80 of the Judiciary Act 1903 (Cth).

Before embarking on a study of the Australian position, it will be useful to make reference to the American experience.

II THE AMERICAN ANALOGY

The United States Congress provided little guidance or direction for the Supreme Court and other federal courts when administering law in federal jurisdiction. Congress simply enacted section 34 of the Judiciary Act 1789 which provided:

> 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.[2]

The provision did little more than enunciate a general policy, the implementation of which was to be left to the independent decision of the judicial tribunals of the United States. It is therefore not surprising to find that the courts have placed little emphasis on the section, which is highlighted by comparison with the High Court's adherence to the language of sections 79 and 80.[3] However, while the Supreme Court for a time truly ignored the language of section 34, it never ignored its

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

[3] *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514; *Huddart Parker Ltd* v. *The Ship "Mill Hill"* (1950) 81 C.L.R. 502; *R. v. Oregan; ex parte Oregan* (1957) 97 C.L.R. 323.

spirit. In matters coming under the general governance of State law, the Supreme Court has always maintained the view that federal courts which entertain jurisdiction with respect to such matters should apply State law. The primary source of difficulty and confusion has been the question of what is State law. And how is it to be determined? It has never been the view of the Supreme Court that there exists a body of jurisprudence which incorporates the overall principles of the common law separate and distinct from the different State systems of common law. In other words, the Supreme Court has never adhered to the view that there exists a federal common law as a general body of jurisprudence.

In 1834 this basic proposition was established. In *Wheaton* v. *Peters*[4] an action was brought both at common law and under an Act of Congress for breach of copyright. Coincidentally, the copyright was claimed over reports of the decisions of the United States Supreme Court. McClean J., in delivering the opinion of the Supreme Court, acceded to the plaintiff's claim that according to the common law of England, as at that date, there existed in authors a copyright with respect to their writings. The next question was: Did this copyright exist at common law in the United States? In dealing with this point, a preliminary issue arose as to whether there existed a common law of the United States. With respect to this issue, His Honour stated:

> It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.[5] When, therefore, a common law right is asserted, we must look to the State in which the controversy originated.[6]

It was held that the appropriate State law was that of Pennsylvania and that the common law of Pennsylvania did not contain any principle that would support the plaintiff's claim to copyright.

Eight years later, in *Swift* v. *Tyson*[7] the seeds of confusion were sown. The plaintiff invoked the diversity jurisdiction of a federal circuit court sitting in New York in an action on a negotiable instrument. The defendant raised the defence that since the plaintiff was not a *bona fide* holder for value without notice, the defendant could plead

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[4] (1834) 8 Pet. 591. See also earlier authorities: *United States* v. *Worrall* (1798) 2 Dall. 384; *United States* v. *Hudson* (1812) 7 Cranch 32.

[5] Presumably only if a head or heads of power can be found in Article I of the Constitution which would support such an adoption. See *Erie* v. *Tompkins* (1938) 304 U.S. 64, 78.

[6] (1834) 8 Pet. 591, 658.

[7] (1842) 16 Pet. 1.

that his initial acceptance of the instrument was induced by fraud. The only question was whether the plaintiff was a *bona fide* holder for value without notice if the consideration given for the instrument was the payment of a pre-existing debt. The courts of New York had previously held that the payment of a pre-existing debt was not good consideration for the purposes of constituting the payer as a *bona fide* holder for value without notice. The Supreme Court had to determine whether it was bound by the New York rulings or whether it had a right of independent decision on this question. For the defendant it was argued that the "laws of the several States" as appearing in section 34 included the decisional law of the courts of the several States so that, by virtue of the section, the federal court was bound by the New York decisions. In answer to this argument, Story J., in giving the opinion of the Court, stated:

> In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws.[8]

A little further on His Honour stated:

> In all the various cases which have hitherto come before us for decision, this Court have [sic] uniformly supposed, that the true interpretation of the thirty-fourth section limited its application 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 title to real estate, and other matters immovable and intraterritorial in their nature and character.[9]

It is submitted that it would be quite erroneous to think that the Supreme Court was reversing its previous ruling in *Wheaton* v. *Peters* in a matter of eight years. Furthermore, it appears from the report that Story J. was a member of the majority in *Wheaton* v. *Peters*. The ruling of the Court seems perfectly consistent with the view that the Court was applying the law of New York, maintaining, however, that the law of New York involves an adoption and application of the general principles of commercial jurisprudence whose rules and principles are not authoritatively determined by simply looking to the decisions of New York courts, even if they are those of the highest court of appeal of New York. Rather, the rules and principles of this adopted system of jurisprudence are "ascertained upon general reasoning and legal analogies" which may involve a close study of State court decisions with due deference given to their determinations.[10] Yet, in

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[8] *Id.*, 18.
[9] *Ibid.*
[10] *Id.*, 19.

the final analysis, it is for the federal courts to come to an independent decision on such matters, just as the Supreme Court did in this case, by holding that the plaintiff was a *bona fide* holder for value without notice.

In 1887 in *Smith* v. *Alabama*[11] the Supreme Court clearly illustrated that its two previous decisions of *Wheaton* v. *Peters* and *Swift* v. *Tyson* were compatible and could be reconciled in the same framework of principle. Matthews J., in delivering the opinion of the Court, stated:

> There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes: *Wheaton* v. *Peters*. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular State. This arises from the circumstances that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the State in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment.[12]

The judgment then went on to cite *Swift* v. *Tyson* as an example of an exercise of independent judgment. The right and duty of the courts of the United States to exercise an independent judgment existed not only because it was a concurrent jurisdiction with that of State tribunals, rather than being subordinate, but also because in cases coming within the diversity jurisdiction, it was an implementation of the policy behind the creation of that jurisdiction. The point was stated in *Burgess* v. *Seligman*[13] in the majority opinion of Bradley J.:

> As, however, the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication.[14]

In the field of interstate trade and commerce, the Supreme Court by 1900 felt that it had previously been too dogmatic in denying entirely the existence of a federal common law. In *Western Union Telegraph Co.* v. *Call Publishing Co.*[15] the Supreme Court began to

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[11] (1887) 124 U.S. 465.
[12] *Id.*, 478.
[13] (1882) 107 U.S. 20; see also *Kuhn* v. *Fairmont Coal Company* (1909) 215 U.S. 349.
[14] (1882) 107 U.S. 20, 34.
[15] (1900) 181 U.S. 92.

resile from its position as stated in *Wheaton* v. *Peters* and *Smith* v. *Alabama* by raising the spectre of a federal common law limited to the governance of interstate commercial transactions. Naturally enough this would require a certain amount of intellectual gymnastics in order to undo some of the knots. This task was performed by Brewer J. in delivering the opinion of the Court:

> There is no body of federal common law separate and distinct from the common law existing in the several States, in the sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several States. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress.[16]

The emergence of a limited federal common law finally became established with the overall re-analysis performed in *Erie* v. *Tompkins*.[17] However, before moving on to that case, it may be instructive to trace the dissentient steps of Holmes J. whose view was ultimately approved in the decision of *Erie* v. *Tompkins* in 1938.

To Story J., the law was an abstract collection of rules and principles woven together to form a coherent body of wisdom that existed independently of the minds that conceived and declared it. To Holmes J., the law had no independent existence from the minds that created and applied it. To him the law as an abstraction was primarily a set of predictions as to what a judge may do in any given case. Consequently, in dealing with the question of what was the law of a State, the answer must be what the courts of that State say the law is. In 1909, in *Kuhn* v. *Fairmont*,[18] His Honour stated:

> The law of a State does not become something outside of the State court and independent of it, by being called the common law. Whatever it is called it is the law as declared by the State judges and nothing else.[19]

It followed from this jurisprudential analysis that if federal courts claimed an independent right to declare what the law of a State was and did so, in opposition to the ruling of a State court, they were in turn developing a different body of doctrine and a different system of

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[16] *Id.*, 101. Eight years earlier His Honour in *Baltimore & Ohio Railroad Co.* v. *Baugh* (1892) 149 U.S. 368, 378-379 also expressed the view that there existed a common law governing inter-state commercial transactions. The *dictum* in that case is also difficult to reconcile with the accepted conceptual framework of that period.

[17] (1938) 304 U.S. 64.

[18] (1909) 215 U.S. 349.

[19] *Id.*, 372.

jurisprudence. In other words, through the decisions of federal courts and of the Supreme Court, a general body of federal common law was evolving despite the repeated insistence of the Supreme Court that no such thing existed.[20] Furthermore, the thesis of Story J. assumed that there was a system of jurisprudence whose content was ascertained deductively from precedent and analogy, which existed beyond the confines of any one State but was applicable within each State. Thus the rules and principles of the common law systems of each State were to be discovered by ascertaining the doctrines of this system of jurisprudence which permeated the federation. In the days of *Swift* v. *Tyson* this *corpus* of legal reasoning was regarded as jurisprudential wisdom rather than as actual law. However, one can see that towards the turn of the century, in judgments like those of Brewer J. in *Western Union Telegraph Co.* v. *Call Publishing Co.*[21] and *Baltimore & Ohio Railroad Co.* v. *Baugh*,[22] what was once regarded as mere wisdom was assuming the more definite and concrete form of law. This conversion was no doubt partly prompted by the supposed need to regulate interstate commercial transactions by a uniform body of decisional law.

In 1927, in *Black and White T. & T. Co.* v. *Brown and Yellow T. & T. Co.*[23] this august body of jurisprudence assumed a more sinister appearance when it allowed a Kentuckian taxi-cab company to avoid the prohibitions under the common law of Kentucky with respect to restraint of trade contracts by re-incorporating in Louisiana and thereby creating a diversity of citizenship as between itself and a rival taxi-cab company. This device enabled the company to enforce in a federal court a restraint of trade contract which could not be enforced in a Kentuckian court. In his dissent Holmes J., with simple and pragmatic reasoning, set about to expose the fallacy that started with the decision of *Swift* v. *Tyson*:

> 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

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[20] *Baltimore & Ohio Railroad Co.* v. *Baugh* (1892) 149 U.S. 368, 404 *per* Field J.

[21] (1900) 181 U.S. 92.

[22] (1892) 149 U.S. 368, 374-378.

[23] (1927) 276 U.S. 518.

> that State without regard to what it may have been in England or anywhere else.[24]

Eleven years later Holmes J. was finally vindicated when the Supreme Court handed down its famous decision in *Erie* v. *Tompkins*.[25] Historical research undertaken by Charles Warren had clearly shown that the draftsman of section 34 in an initial draft had intended that the decisional law of a State was to be incorporated in the expression "the laws of the several States".[26] The Court in *Erie* v. *Tompkins* gave effect to the original intention of the draftsman and overruled *Swift* v. *Tyson* interpreting "the laws of the several States" to include the decisional law of the State so that federal courts, when dealing with State matters, were bound by the decisions of the court of last resort of the appropriate State. Brandeis J., in delivering the opinion of the Court, stated the principle that would govern federal courts in the application of law to federal jurisdiction:

> *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 the 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.[27]

As a matter of strict theory, the decision did more to assert the existence of a federal common law, albeit a *limited* system of jurisprudence "in matters governed by the federal Constitution or by Acts of Congress", than to deny it an existence. Since *Wheaton* v. *Peters*[28] it had always been the case that there was no federal general common law and that, in the absence of the Constitution or Acts of Congress, federal courts were bound to apply State law. The only change the decision of *Erie* v. *Tompkins* had brought was as to the process of ascertaining what was State law. In short, the Supreme Court and other federal courts were not only bound to apply State law but also to interpret State law in the same manner as it had been interpreted by the courts of the relevant State.

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[24] *Id.*, 533, 534 (emphasis added).

[25] 304 U.S. 64, 79.

[26] Warren, "New Light on the History of the Federal Judiciary Act 1789" (1923) 37 *Harv. L. Rev.* 49, 86-88.

[27] 304 U.S. 64, 78 (emphasis added). It is interesting to note that in almost every respect Field J. in *Baltimore & Ohio Railroad Co.* v. *Baugh* (1892) 149 U.S. 368, had anticipated the judgment of Brandeis J.

[28] (1834) 8 Pet. 591.

The Supreme Court, in adopting the analysis of Holmes J., established a basis for the existence of a federal common law. In referring to law as only those rules and principles which have a "definite authority" behind them, His Honour was referring to the various Constitutions of the States and the federal Constitution. Therefore common law as operating within the United States consisted of several distinct systems of decisional law, each of which was logically and authoritatively derived from one or other of those constitutional instruments. If the general common law of a State could be erected upon its Constitution, why could not a *limited* body of common law find an authoritative basis in the federal Constitution? This analytical potential which the *Erie* decision offered was soon realised. In 1943, in *Clearfield Trust Company* v. *United States*[29] the Supreme Court held that the liability of the United States on cheques that it issues is governed by federal common law. Douglas J., who delivered the opinion of the Court, stated:

> The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935. The authority to issue the check had its origins in the Constitution and the statutes of the United States and was in no way dependent on the laws of Pennsylvania or of any other State.[30]

A little further on His Honour made it clear that the case was governed by a rule of federal common law rather than by the interpretation of a federal statute:

> In absence of an applicable Act of Congress, it is for the federal courts to fashion the governing rule of law according to their own standards . . . And while the federal law merchant developed for about a century under the regime of *Swift* v. *Tyson* represented general commercial law rather than a choice of a federal rule designed to protect a federal right, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.[31]

In *United States* v. *Standard Oil Company of California*[32] the United States brought a tort action against Standard Oil to recover the cost of hospitalisation and pay of a U.S. soldier injured by the defendant company. It was held by the Supreme Court that such actions came within federal common law and were governed by the decisions of

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[29] (1943) 318 U.S. 363.
[30] *Id.*, 366.
[31] *Id.*, 367.
[32] (1947) 332 U.S. 301.

federal courts and the Supreme Court. In both these decisions the Court emphasised the inconvenience of leaving such questions as to the rights and liabilities of the United States to the individual decision of the various State courts. To allocate such matters to the area of State common law would create unnecessary confusion and would prevent the development of a uniform body of principles to determine the fiscal and governmental rights and liabilities of the United States. This prevailing policy consideration illustrates the necessity of maintaining at least a limited federal common law.

More recently federal common law has been expanded to cover such matters as interstate pollution and the general questions of interstate ecology. In *Illinois* v. *City of Milwaukee*[33] it was held by the Supreme Court that an action brought by the State of Illinois against the City of Milwaukee to prevent the latter from discharging raw or inadequately treated sewerage into Lake Michigan came under the rubric of federal common law. This decision, to some degree, must support the view of Brewer J.[34] that interstate commercial transactions are governed by the common law as operating throughout the United States. In other words, to put it into post-*Erie* terminology, such transactions are governed by federal common law.

While the parameters of federal common law are limited, the scope of this body of jurisprudence is quite extensive, and is of growing importance. As was pointed out earlier, this body of common law is separate and distinct from the common law systems of the States which are, in turn, separate and distinct from each other. Consequently, the operation of the common law within the United States is multilateral, having a separate existence within each political entity within the federation. The multilateral character of the common law must, in part, be due to the historical origins of the present legal systems of the United States. The war of independence accomplished for the American colonists both a legal and political revolution. The legal systems that were established subsequent to the revolution were not a continuation of the pre-existing systems that operated before the revolution. Therefore both the federal and State legal systems have their historical and logical origins in the Constitutions drafted and implemented upon the success of the American revolution, with each Constitution forming the basis of a sovereign State.[35] For that reason the common law system of any political entity within the federation must be distinct since it forms part of a legal system which is independent and sovereign.

In Australia, on the other hand, the position is quite the reverse. The federal and State legal systems all trace their origins to the same

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[33] (1972) 406 U.S. 91.

[34] See *Western Union Telegraph Co.* v. *Call Publishing Co.* (1900) 181 U.S. 92, 101.

[35] *Wheaton* v. *Peters* (1834) 8 Pet. 591, 658. See also Dixon, *Jesting Pilate* (1965) 205.

authoritative source, the Imperial Parliament. Furthermore, due to the absence of any successful revolution which would have interrupted the continuous development of Australia's political and legal institutions, English law has continued from the first settlement in an uninterrupted development to the present day. It is this crucial historical difference between the Australian and American positions which renders the American experience more interesting and relevant by way of contrast than by analogy. There is also one other critical difference. In the United States, on questions of general law the highest Court of Appeal of a State is the court of last resort. Unless the case comes within federal jurisdiction or involves a federal question, the case cannot go to the Supreme Court. On the other hand, in Australia, under section 73 of the Constitution, the High Court is given a general appellate jurisdiction so that the various judicial systems of the States and the Commonwealth all merge at that same point.

III THE AUSTRALIAN EXPERIENCE

1. *The Reception of English Law into Australia*

Colonial constitutional law is divided into two major divisions. The applicable law of a colony depends upon whether the colony is classified as a conquered or ceded colony, or as a settled colony. In the case of a conquered or ceded colony, the local laws operative at the time of conquest or secession remain in force unless altered by the Crown in the exercise of its prerogative powers to make peace or to make treaties.[36] Also, of course, they may be altered by the Imperial Parliament. In the case of a settled colony, the principle was stated by Blackstone:

> For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant Colony; such, for instance, as the general rules of inheritance and of protection from personal injuries.[37]

A little further on he also said:

> . . . the whole of their constitution being also liable to be new-modelled and reformed, by the general superintending power of the legislature in the mother country.

The Privy Council in *Cooper* v. *Stuart*[38] quoted this passage with approval. Their Lordships also added:

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[36] *Campbell* v. *Hall* (1774) 1 Cowp. 204, 209-210; 98 E.R. 1045, 1047.
[37] *Commentaries* (4th ed., 1771) I, 107.
[38] (1889) 14 App. Cas. 286, 291-292.

> If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial legislature.[39]

This principle was expressed in legislative form in section 24 of the Australian Courts Act 1828 (Imp.).

It is important to note that by virtue of this principle governing the applicable law in a settled colony, not only is the common law of England applicable but also statutory law enacted prior to the date of settlement insofar as such enactments suit the condition of the colony.[40] Presumably the principles of equity would also apply in the same way. However, there exists one difficulty in this respect, that a colonial court could only exercise an equitable jurisdiction if it was granted by an Act of Parliament. The Crown possessed no power to confer an equitable jurisdiction on colonial courts in a settled colony.[41]

All the Australian colonies came within the classification of settled colonies.[42] Consequently, the common law took seed in this country upon the first settlement in 1788. The common law, either by virtue of the first settlement or by virtue of the first settlement together with the subsequent colonial settlements (in South Australia and Western Australia) enveloped the Australian continent. By 1860 the Australian continent together with Tasmania had been divided into six colonial entities. There then existed six independent legal systems all having a common law element derived from the same basic principle that governed the applicable law in settled colonies. This gives rise to the question of whether the common law divided into six different systems of law or whether it remained a unitary system applicable in six different and independent political entities. The fact that the respective legal systems of the Australian colonies need to be differentiated one from the other does not lead to the conclusion that the common law element of each system is, in turn, distinct. Each colonial-come-State legal system is separate and independent because the statutory element within each may be and often is unique. However, it does not follow that the common law element in each system is also unique; in fact the position is quite the reverse.

Before discussing this question any further, it would be of advantage to first define the basic issue. Did the common law have a unitary or

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[39] *Id.*, 292.

[40] *Fitzgerald* v. *Luck* (1839) 1 Legge 118; *Ex Parte Nicholls* (1839) 1 Legge 123; *Cannon* v. *Keighran* (1843) 1 Legge 170. Castles, "Reception and Status of English Law in Australia" (1963-1966) 2 *Adelaide L. Rev.* 1, 14-16.

[41] Campbell, "The Royal Prerogative to Create Colonial Courts" (1964) 4 *Syd. L. Rev.* 343. See also *Sammut* v. *Strickland* [1938] A.C. 678, 701.

[42] *Cooper* v. *Stuart* (1889) 14 App. Cas. 286.

multiple operation before federation under the colonial structure of government? In other words, was there one system that applied within each colony or did each colony have its own separate system of common law? The ultimate question must be: What is meant by a system of law? Quite simply, a system of law is a coherent body of rules and principles of law. Whether there are one or two systems of law operating in two governmental jurisdictions turns on whether the rules and principles of law that apply to the two jurisdictions are or could be different from each other. If the total content of rules and principles could be different, then it is suggested that the system of law that applies to one must be different from that which applies to the other. For the rules and principles of law that apply in two different jurisdictions to be the same, they must have been derived from the same conceptual and authoritative source and the interpretation, development and accretion of new rules and principles must be governed and administered by the same agency. While the legislative powers of the various colonial governments within Australia came from the same source, namely the Imperial Parliament, the exercise of that power, and therefore the formulation of new rules of law, was to be exercised by different agencies. Consequently, the legal systems of the colonies by containing the variable element of enacted law must be considered as separate and distinct. But, as was pointed out above, such characteristics do not apply to the position of the common law.

The common law, as operating within Australia, not only was derived from exactly the same source, namely the principle governing the application of law to settled colonies, but has always been under the same superintending governance of an appellate court. Prior to federation it was the Privy Council; subsequently, it has been the High Court as well as the Privy Council with the High Court ever gradually moving towards a complete monopoly.[43] In both these respects the Australian position contrasts with the American situation. This point was made by Sir Owen Dixon in an address given to the American Bar Association in 1943, entitled "Sources of Legal Authority".[44] His Honour stated in somewhat ambiguous terms:

> You will see that, under the Australian conception, while on the one hand there is neither need nor room for the doctrine of *Swift* v. *Tyson*, on the other hand the basal principle of *Erie Railroad Co.* v. *Tompkins* is contradicted.[45]

In saying that there is neither need nor room for the doctrine of *Swift* v. *Tyson*, His Honour was pointing out that the issue whether federal courts should exercise an independent judgment as to the

[43] S. 74 of the Constitution; s. 39(2) Judiciary Act 1903 (Cth); Privy Council (Limitations of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth).

[44] Dixon, note 35 *supra*, 198.

[45] *Id.*, 202. See also *id.*, 203-213.

content of State law is irrelevant in the Australian context, given the general appellate jurisdiction of the High Court. The common law of a State is determined ultimately by the decisions of the High Court and also the Privy Council. Whether the Court is exercising State or federal jurisdiction, it will always look to the same body of binding precedents, and that would be so irrespective of whether one was to allow or not to allow federal courts and courts exercising federal jurisdiction the right of independent interpretation of State common law. In short, *Swift* v. *Tyson* raises a non-issue in the Australian context.

Professor Ely, in describing the *Erie* decision, said: "Nor would it do it justice to call it a rule or even a principle, for it implicates, indeed perhaps it is, the very essence of our federalism."[46] The decision, in affirming and stating, presumably for all time, that the American federalism consisted of co-existing yet self-contained components, expounded the one conception that is fundamental to the American Union. That is the basal principle behind *Erie* v. *Tompkins*. In saying that that principle was contradicted with respect to Australian federalism, Sir Owen Dixon must have been referring to the fact that, unlike the position in the United States, every rule of law, whether statutory or decisional, that operates within the Australian federation both historically and logically finds its authority in the rule at common law that renders English law applicable to a settled colony.[47] Upon that rule is erected both the authority of the rules and principles of English decisional law and the supremacy of the Imperial Parliament over the law. Accordingly, both in source and content the common law that applies to a colony-come-State is the same that applies to every other colony-come-State. Therefore, there is no logical basis for dividing the common law up into separate systems either before or after federation.[48]

The authorities on this question are meagre, but insofar as they establish anything, they do support the point which has been advanced. Only on one occasion has the High Court been called upon to consider this issue. In *The King* v. *Kidman*[49] the defendant was charged with conspiracy to defraud the Commonwealth. The case involved two questions. First, was a Commonwealth enactment valid which operated retrospectively rendering the defendant criminally liable for a conspiracy to defraud the Commonwealth? Secondly, was such conduct an offence at common law? Only two of the six justices who sat on the case considered the latter question. In considering this question, both Griffith C.J. and Isaacs J. raised the broader question of whether there was a common law of the Commonwealth and whether the common

[46] Ely, "The Irrepressible Myth of Erie" (1974) 87 *Harv. L. Rev.* 693, 695.
[47] Earlier on in the address His Honour makes specific reference to the rule. Note 35 *supra*, 199.
[48] For a contrary view, see Cowen, "Diversity Jurisdiction: The Australian Experience" (1955) 7 *Res Judicatae* 1, 29.
[49] (1915) 20 C.L.R. 425.

law had a unitary or multiple operation. With respect to this latter issue, the Chief Justice said:

> The laws so brought to Australia undoubtedly included all the common law relating to the rights and prerogatives of the Sovereign in his capacity of head of the Realm and the protection of his officers in enforcing them, including so much of the common law as imposed loss of life or liberty for infraction of it. When the several Australian Colonies were erected, this law was not abrogated, but continued in force as law of the respective Colonies applicable to the Sovereign as their head. It did not, however, become disintegrated into six separate codes of law, although it became part of an identical law applicable to six separate political entities.[50]

Isaacs J. on the same point stated:

> So here, there is a peace of the Commonwealth, not because there is a special common law of the Commonwealth, but because the common law of Australia recognises the peace of the King in relation to his Commonwealth, by virtue of the Constitution, just as it recognises the peace of the King in relation to each separate State.[51]

It is therefore suggested that both according to reason and authority there is a sound basis for supporting the view that the common law is a unitary system. If the common law is a unitary system, then a number of important consequences would seem to flow from that fact. Certainly some of these consequences will be seen within the context of a federal arrangement. But there is at least one significant consequence which arises quite outside the federal system. This consequence concerns the effect that a unitary system of common law has on the legislative authority of the colonial-come-State Parliaments. While the issue is one which, to a large extent, is of only academic interest, it is nevertheless important.

2. *The Supremacy of State Parliaments over the Common Law System*

Blackstone, in describing the power of Parliament, said: "It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing and expounding of laws . . ."[52]

The fourth edition of *Halsbury's Laws of England*, in reference to the authority of Parliament, reads:

> Moreover there is no doubt that a statute can alter or abrogate rules of common law or equity, and if there is repugnancy between one statute and another, the one that is later in date prevails.[53]

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[50] *Id.*, 435-436.
[51] *Id.*, 445.
[52] Note 37 *supra*, 160.
[53] Vol. 8, 531.

Neither of these authorities cite one case in support of the proposition that Parliament can abrogate rules at common law or equity. Possibly the reason for this lies in the fact that it is both fundamental and axiomatic that Parliament can abrogate rules and principles of common law and equity. It is one of those principles that needs no authority. If it is assumed that that is correct and if, as was stated in *Powell* v. *Apollo Candle Co.*,[54] the Australian colonial legislatures within their defined limits enjoy "plenary powers of legislation as large, and of the same nature, as those of Parliament itself",[55] then those legislatures would also possess the power to abrogate or extinguish rules and principles of common law and equity. Consequently, if in a contract action both a New South Wales court and a Victorian court would apply the same rule at common law to the same set of facts, then it would be competent for either the Victorian or New South Wales legislature to extinguish that rule from the body of common law.[56] This raises another rather difficult problem. If only the legislature of New South Wales had abrogated the rule of common law by replacing the law intended by the parties with the *lex loci contractus* in determining the proper law of the contract, then only the courts of New South Wales would be bound by that enactment. But if the rule of common law that the intention of parties determines the proper law of the contract is extinguished as a rule of common law, then that rule has been expunged from that system of jurisprudence which both jurisdictions share in common. Thus while the Victorian court may not be bound by the New South Wales enactment, it would be bound to recognise that a rule of common law which it seeks to rely on no longer exists by virtue of the New South Wales law.

A Victorian court under full faith and credit must take judicial notice of sister-State statutes.[57] True, its jurisdiction is not such that it can enforce rights and liabilities which are the product of sister-State legislation. However, it must take notice of the fact that by the operation of a New South Wales statute, what would otherwise have been a rule at common law, giving rise to rights and liabilities which are within its jurisdiction to enforce, no longer exists. It is not a case of enforcing the statute; it is rather a case of not enforcing a rule which, because of the statute, no longer exists.

This argument has not been developed in order to convince the reader that it is in fact correct, but rather to illustrate the problem

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[54] (1885) 10 App. Cas. 282.

[55] *Id.*, 289; see also *R.* v. *Burah* (1878) 3 App. Cas. 889, 904; *Hodge* v. *R.* (1883) 9 App. Cas. 117, 132.

[56] Assuming, of course, that such legislation would not be invalidated under full faith and credit. See O'Brien, "The Role of Full Faith and Credit in Federal Jurisdiction" (1976) 7 *Fed. L. Rev.* 169.

[57] *Livingston* v. *Commissioner of Stamp Duties (S.A.)* (1960) 107 C.L.R. 411, 421 *per* Dixon C.J.

that arises when it is accepted that there is one and only one system of common law operating throughout Australia, and when it is also accepted that the State legislatures have the power to abrogate or extinguish rules of common law and equity. If both these propositions are accepted, then as a matter of logic, considerable difficulties arise in avoiding the problems posed above. It is submitted that in order to avoid these difficulties the second proposition be abandoned, and that while State legislatures are quite capable of enacting rules repugnant to the rules and principles of common law and equity, the State enactment could not operate to extinguish those rules and principles. Those rules and principles continue in force; however, in the case of conflict with a statutory rule, the statutory rule prevails for the courts of the State in which the statute was enacted. In other words, the courts of the legislating State enforce those rights and liabilities stemming from the statute and refuse to enforce those rights and liabilities stemming from an inconsistent rule at common law. In short, the position is analogous to the situation of an inconsistency between Commonwealth and State legislation. The State statute is inoperative for the period of the inconsistency, but once the Commonwealth Act is repealed, the State Act is immediately revived and becomes enforceable.[58] It should be noted also that at common law when a statute is repealed, unless the contrary intention appears, those rules at common law which were inconsistent and repugnant to the statute are automatically revived and operate as if the statute had never been passed.[59]

Having attempted to identify the role of the common law in Australia without taking into account the federal arrangement, it is now necessary to examine the operation of common law in federal jurisdiction. The foregoing discussion has emphasised the major distinction between the Australian and American positions. In the United States the common law is inextricably bound up in the context of the political entities which are brought together in a federation. For the common law to apply within a State, it must exist under the constitutional authority of that State, and therefore it is the common law of that State as a separate and independent system of law.[60] Similarly, if it operates within the federal context, it does so under the authority of the federal Constitution and again it exists as a separate body of law.[61] In Australia, on the other hand, the common law is antecedent to the formation of the different political entities which are formed into a federation. It is the common law which is the authority for those

[58] *Butler* v. *Attorney-General for Victoria* (1961) 106 C.L.R. 268.

[59] *Surtees* v. *Ellison* (1829) 9 B. & C. 750; 109 E.R. 278 *per* Lord Tenterden; *Churchill* v. *Crease* (1828) 5 Bing. 177; 130 E.R. 1028; *Simpson* v. *Ready* (1844) 11 M. & W. 344; 152 E.R. 836 *per* Parke B.

[60] *Black and White T. & T. Co.* v. *Brown and Yellow T. & T. Co.* (1927) 276 U.S. 518, 533-534 *per* Holmes J.

[61] *Clearfield Trust Co.* v. *U.S.* (1943) 318 U.S. 363, 366.

political entities rather than the converse. The common law, therefore, is a separate and independent system of law distinct from the State and federal legal systems, although applicable in each. In the United States there is, for instance, the common law of New York, whereas in Australia there is the common law of Australia as it applies in the State of New South Wales.[62]

IV THE COMMON LAW IN THE AUSTRALIAN FEDERAL SYSTEM

There are two aspects to the role of the common law in Australia's federal system. First, the federal Constitution is enacted against the background of a unitary system of common law, and as a result there must be necessarily an interaction between the two.[63] The consequence of this interaction between the Constitution and the common law is the creation of a series of rights and liabilities which, while they exist as the product of common law rules, are nevertheless dependent on the existence of the federal Constitution. Secondly, the common law as an independent body of law applies to every justiciable dispute prescribing rights and liabilities consequential upon the operation of its rules and principles. Those rights and liabilities or matters are the product of the common law; they may also be the product of State law. Whether they fit this latter description will depend on two things. First, whether the justiciable dispute is one over which the courts of a State could exercise jurisdiction; and secondly, whether the legislature of that State has enacted a statutory rule applying to that dispute prescribing inconsistent rights and liabilities. If there are statutory rights and liabilities incompatible with those arising from the common law, then they will be enforced in the courts of the enacting State in preference to those inconsistent rights and liabilities existing at common law. Only those rights and liabilities of common law compatible with the statute will be enforced by such a court. However, whilst those inconsistent rights and liabilities arising under the authority of common law do not exist under that State legal system, they nevertheless do exist. They may be enforced by the courts of another State or by courts exercising federal jurisdiction.

In short, the question is not whether those rights and liabilities exist but rather whether the court in which the action is brought has jurisdiction to enforce them. If, as was argued earlier, courts exercising federal jurisdiction are not bound by State statutes, they are then not bound to enforce rights and liabilities which are produced from the

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[62] This point was clearly expounded by Sir Owen Dixon in an address entitled "The Common Law as an Ultimate Constitutional Foundation", note 35 *supra*, 203.

[63] *Uther* v. *Federal Commissioner of Taxation* (1947) 74 C.L.R. 508, 521 *per* Latham C.J.

operation of such statutes. It was submitted earlier that the application of State statutes to federal jurisdiction depended upon how the Commonwealth defined the juridical nature of federal jurisdiction. If the Commonwealth is therefore free to render inapplicable any State statutory law, it is also free to render the statutory law of all the States inapplicable and to create a federal jurisdiction over those rights and liabilities arising under the common law insofar as such rights and liabilities are compatible with those created by the Constitution and the laws of the Commonwealth. In short, it is possible to place the common law solely in the context of the Constitution and to see Commonwealth law as the only source of the substantive rights and liabilities to be enforced in federal jurisdiction. Such an arrangement of sources of substantive law can best be described as the federal legal system.

The writer will now consider in detail the two aspects of the role of common law in federal jurisdiction.

1. *The Interaction between the Constitution and the Common Law*

The federal Constitution not only enacted rules of law, it also created a number of abstract facts such as the Commonwealth as a juristic entity, the federal Parliament, federal elections, federal jurisdiction, a federal consolidated revenue fund, and so on. These facts come within the description of those predicated facts upon which some of the rules of the common law operate. For instance, the Commonwealth, being a manifestation of the Crown, is a fact to which a number of special rules of the common law respond by conferring on the Commonwealth prerogative rights, immunities and powers.[64] The rules of the common law which respond to the juridical fact created by section 61 are the same rules which apply to the States in conferring on them prerogative rights. Thus two sets of prerogative rights are produced,[65] not because there are two rules of common law, but rather because there are two sets of facts to which the same rule applies. Isaacs J., in *R.* v. *Kidman*, in quoting Parke B., expressed the point quite succinctly: "The rules of the common law have the incalculable advantage of being capable of application to new combinations of circumstances . . ."[66]

His Honour cited two examples. The rule that it is an offence to conspire to defraud the Crown imposes a criminal liability on any person who conspires to defraud the Commonwealth.[67] If there is a king's peace in right of a State, there is also a king's peace in right of

[64] *Commissioner of Taxation* v. *Official Liquidator of E.O. Farley Ltd* (1940) 63 C.L.R. 278.
[65] *Ibid.*
[66] (1915) 20 C.L.R. 425, 445-446.
[67] *Ibid.* See also Griffith C.J. in the same case, *id.*, 435-436.

the Commonwealth, both concepts being derived from the same principle of common law.[68]

The Constitution, in setting up a federal Parliament as an elective institution, established a fact to which quite a number of rules of common law apply. For instance, the common law, in the absence of comprehensive federal legislation, governs the conduct of federal elections.[69] Section 81, in establishing a consolidated revenue fund, rendered applicable those special rules of common law which give rights of action to recover money wrongfully appropriated from Crown revenues.[70]

In other words, this fusion between the Constitution and the common law produces a number of rights and liabilities which exist under the authority of the common law, yet come within the contemplation of the Constitution. Such rights and liabilities are to be distinguished from those which are the creature of the Constitution, such as the privileges of both Houses of Parliament under section 49. Those rights, powers and privileges exist by the authority of that provision as compared with those limited privileges which attach to a colonial legislature under the common law when the Constitution of the legislature does not expressly create such privileges.[71] Privileges of the latter kind are the result of the operation of rules of the common law which respond to the fact of a legislature, as are the privileges of the House of Commons.[72]

This special category of rights and liabilities existing under the common law as a result of the interaction between the Constitution and the common law has been described as "the common law of the Constitution"[73] and in that capacity appears to enjoy a special position in constitutional law. Dixon J. in *Uther* v. *Federal Commissioner of Taxation* held that the prerogative rights of the Commonwealth could not be limited or destroyed by State legislation.[74] There is nothing unusual in that proposition if it is accepted, as it was suggested earlier, that State legislatures are unable to extinguish any of the rights and liabilities created at common law. Their legislative power extends only to the enactment of rules creating rights and liabilities inconsistent with those arising from the operation of the common law, with the statutory rights and liabilities taking priority in the courts of the enacting State.

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[68] *Id.*, 445.
[69] *Chanter* v. *Blackwood* (1904) 1 C.L.R. 39, 56-59, 63-64, 75-77.
[70] *Auckland Harbour Board* v. *R.* [1924] A.C. 318; *Commonwealth* v. *Burns* (1971) V.R. 825.
[71] *Kielley* v. *Carson* (1842) 4 Moo. P.C. 63; 13 E.R. 225.
[72] *Stockdale* v. *Hansard* (1839) 9 Ad. & E. 1; 112 E.R. 1112.
[73] *Uther* (1947) 74 C.L.R. 508, 531 *per* Dixon J.
[74] *Id.*, 528, 532.

The real issue raised in *Uther* and in *The Commonwealth* v. *Cigamatic*[75] was whether State legislatures can enact rules creating rights and liabilities inconsistent with those arising from an interaction between the Constitution and the common law. It would appear on the authority of *Cigamatic* and *The Commonwealth* v. *Bogle*[76] that serious limitations exist on the power of State legislatures to enact such inconsistent rights and liabilities.[77] This constitutional limitation on the powers of State legislatures could be based on the view that an interference with an exercise of those rights arising from the common law through the operation of the Constitution in such provisions as section 61 is enacting laws inconsistent with the paramount law of the Constitution. The argument was put in *West* v. *Commissioner of Taxation (New South Wales)*[78] by Dixon J. who said:

> Surely it is implicit in the power given to the Executive Government of the Commonwealth that the incidences and consequences of its exercise shall not be made the subject of special liabilities or burdens under State law. The principles which have been adopted for determining for the purposes of sec. 109 whether a State law is inconsistent with a Federal statute are no less applicable when the question is whether the State law is consistent with the Federal Constitution.[79]

An alternative or additional reason why these rights and liabilities arising at common law through its interaction with the Constitution cannot be opposed by rights and liabilities created under State legislation has been suggested by Mr Evans.[80] These special common law rights and liabilities are beyond the territorial legislative power of State Parliaments. Where all the predicated facts upon which the rule of common law operates are the product of the federal Constitution either directly or indirectly, then those facts cannot be placed within the territorial jurisdiction of any of the States; hence they cannot form the subject of the legislative power of the States. A classic example of this is seen from the facts of *Cigamatic* where the Commonwealth was seeking to assert its prerogative right to priority in the payment of debts with respect to debts created by federal statutes and regulations.

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[75] (1962) 108 C.L.R. 372.

[76] (1953) 89 C.L.R. 229, 259 *per* Fullagar J.

[77] As to the limits of this constitutional doctrine, see Howard, "Some Problems of Commonwealth Immunity and Exclusive Legislative Powers" (1972) 5 *Fed. L. Rev.* 31. See also Evans, "Rethinking Commonwealth Immunity" (1972) 8 *M.U.L.R.* 521.

[78] (1937) 56 C.L.R. 657.

[79] *Id.*, 681. See also *Essendon Corporation* v. *Criterion Theatres Ltd* (1947) 74 C.L.R. 1, 23 *per* Dixon J. See also the discussion and criticism of the *Cigamatic* doctrine in Sawer, "State Statutes and the Commonwealth" (1961) *U. Tas. L. Rev.* 580; Sackville, "The Doctrine of Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis" (1969) 7 *M.U.L.R.* 15; Evans, note 77 *supra*, 521.

[80] Note 77 *supra*, 552-553.

The prerogative right is the result of a rule of common law that looks to the existence of a debt in the Crown. The debt is the product of a federal statute, the Crown is the product of the Constitution; neither fact can be located within the territory of any State, hence they do not come within State legislative power.

> Surely it is for the peace, order and good government of the Commonwealth, not for the peace, welfare and good government of New South Wales, to say what shall be the relative situation of private rights and of the public rights of the Crown representing the Commonwealth, where they come into conflict. It is a question of the fiscal and governmental rights of the Commonwealth and, as such, is one over which the State has no power.[81]

In *Re Usines de Melles' Patent*,[82] Fullagar J. held that a patent created under federal law was property situate in Australia, but was not situate in any State or territory of the Commonwealth.[83] If such property should vest in the Crown as *bona vacantia*, then by virtue of its locality it vests in the Commonwealth rather than in the Crown in right of a State. Similarly the legislatures of the States would be incapable of affecting such a devolution of property. His Honour regarded the application of this rule of the common law with respect to patents, trade marks and copyrights as forming "part of the common law of the Commonwealth".[84]

This expression no doubt covers much the same ground as the expression of Dixon J. in *Uther*; "the common law of the Constitution". Possibly the former is more extensive in meaning than is the latter, in that the former comprehends those rights resulting from the application of rules of the common law not only to facts created by the Constitution, but also those created by Commonwealth legislation. However, it should be made clear with respect to both expressions that they do not describe a set of rules or principles of law but rather those consequential rights and liabilities that accrue from the application of the rules and principles of the common law to federal facts. Therefore, while there is no federal common law, there is a body of federal common law rights and liabilities.

In *Uther*,[85] Dixon J. quoted the following passage from *Clearfield Trust Co.* v. *United States*:

> The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent

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[81] *Uther* (1947) 74 C.L.R. 508, 530-531 *per* Dixon J. However, this line of reasoning does not explain the decision in *Commonwealth* v. *Bogle*. Possibly the decision of Fullagar J. in that case is, in fact, wrong. See Evans, note 77 *supra*, 536-537.

[82] (1954) 91 C.L.R. 42.

[83] *Id.*, 49.

[84] *Ibid.* The same expression was used by Griffith C.J. and Isaacs J. in *Kidman* (1915) 20 C.L.R. 425.

[85] (1947) 74 C.L.R. 508, 529.

> on the laws of Pennsylvania or of any other State . . . The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources.[86]

Suppose, in the absence of the Bills of Exchange Act 1909 (Cth), the Commonwealth had issued a cheque which had been, as in the *Clearfield Trust* case, fraudulently endorsed. If a *bona fide* holder in due course was seeking to recover on the cheque against the Commonwealth, the matter would be governed by the common law. In the *Clearfield Trust* case, federal common law was held to be the appropriate law. Since there is no such body of law in Australian federalism, the common law, as a unitary system, would simply apply. However, when the common law does apply, it applies to an abstract fact created by the Constitution and a federal statute. If this distinction were to be expressed in the light of the passage just quoted, instead of saying that the "authority to issue the check had its origin in the Constitution and the statutes of the United States . . .", in Australia it would be said that the "cheque had its origin in the Constitution and the statutes of the Commonwealth".

In the United States the federal Constitution is not only the source of facts to which the rules of common law apply; it is also the source of those rules of common law which apply to those facts created by the Constitution and the laws of the United States. It would appear from the decision of the High Court in *Cigamatic* that the principles of the *Clearfield Trust* case also apply within Australia; namely that the rights and liabilities of the federal government on a cheque are not to be determined nor affected by State law. In Australia, State law really means State statutory law, since the decisional law element within a State legal system, unlike in the United States, is not peculiar to that legal system.

Further, it should not be supposed that this body of federal common law rights and liabilities is confined to federal questions alone. Federal jurisdiction may itself be the source of special sets of facts to which the common law rules would apply, prescribing unique sets of rights and liabilities. These special sets of facts may have nothing to do with the federal government and could in fact relate to simple tort matters. This situation arises because certain rules of the common law contain predicated facts which distinguish between foreign and domestic events. These rules have the potential, when applied within a curial jurisdiction, of creating facts. This point can best be illustrated by way of example within the context of both federal and State curial jurisdictions.

Suppose A committed a felony in New South Wales in the presence of a New South Wales policeman. The policeman seeks to arrest A, however A escapes and crosses the border into Victoria. The policeman

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[86] (1943) 318 U.S. 363, 366.

pursues him and effects an arrest in Victoria. On returning to New South Wales A promptly brings an action in a New South Wales court for false imprisonment and assault.

Since the case involves the alleged commission of torts committed outside the forum, it would come initially within the rule in *Phillips* v. *Eyre*;[87] hence the tort must be actionable according to the *lex fori* and not justified under the *lex loci delicti*. In *Phillips* v. *Eyre*, Willes J., in explaining the first limb of the rule, stated that "the wrong must be of such a character that it would have been actionable if committed in England".[88]

Arguably, the defendant could defeat the action on the basis of this requirement. If the arrest had been made in New South Wales, it would have been lawful and therefore not actionable according to the *lex fori*. In *Potter* v. *Broken Hill Proprietary Company Ltd*[89] the Victorian Supreme Court read the statement of Willes J., quoted above, strictly, holding that the very act and not just an act of the same character or class must be actionable according to the *lex fori* if committed in the forum. It would therefore appear on the strength of these two authorities that the policeman could successfully defend the action.[90]

If the action, on those same set of facts, was brought in Victoria, the plaintiff would succeed. In Victoria the alleged wrong occurred in the forum; consequently, no conflicts question arises with respect to the enforcement of foreign torts. There was an imprisonment and an assault, neither of which were lawful according to Victorian law, since it will not enforce a foreign penal law, nor allow any person, in the absence of statutory authority, to enforce such a law within the jurisdiction. In this case there was no such authority.

The case in both Victoria and New South Wales is governed entirely by the rules of common law, and yet it appears on the same set of facts that the courts of two different jurisdictions would come to different results. When it is said that the facts are the same, what is meant is that the physical events are the same. However, for juristic purposes the facts are different. In Victoria the felony was foreign while the tort was local. In New South Wales the felony was local but the tort was foreign. The different juridical complexions the events assume is due to the fact that the total transaction is being viewed from two different perspectives, with the result that two different sets of facts emerge. To each set of facts the appropriate rule of common law

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[87] (1870) L.R. 6 Q.B. 1.

[88] *Id.*, 28-29.

[89] [1905] V.L.R. 612, 630 *per* Hood J.

[90] It is assumed that on the facts of the case the proper law of the tort is New South Wales, so therefore the result would not be any different in the light of the House of Lords decision in *Chaplin* v. *Boys* [1971] A.C. 356.

applies, creating a set of rights and liabilities. Since there are two sets of facts, two rules of common law are called into operation, creating two sets of rights and liabilities—one being the product of Victorian law, the other being the product of New South Wales law, and both being the product of the common law as it applies in the legal systems of the two States.

If the parties were residents of different States, then to establish a federal jurisdiction over either of those two sets of rights and liabilities must involve creating a federal jurisdiction over a matter constituted under State law. However, there is an additional matter over which a federal jurisdiction may be established with reference to this transaction. Just as there are State perspectives from which the events may be viewed, there is also a federal perspective. If this transaction were to be examined by the High Court, then it would have to be conceded that both the felony and the tort were committed within its jurisdiction. At the same time one could not ignore the fact that the felony and tort were committed in State jurisdictions as well. Therefore, looking at those two events from a federal perspective, one would have to conclude that both the tort and the felony were committed in two jurisdictions simultaneously. Consequently, it would be inappropriate to describe either the tort or the felony as being foreign. Equally, it would be inappropriate to ignore the fact that both the tort and the felony were committed in State jurisdictions.

Both the rule in *Phillips* v. *Eyre* and the ordinary municipal rule of tort law look to a wrong committed in only one jurisdiction, either the forum or a foreign jurisdiction. However, when viewing the transaction involved here, from a federal perspective, the tortious wrong has been committed in two jurisdictions simultaneously; a fact which is comprehended by neither the rule in *Phillips* v. *Eyre* nor the municipal rule of tort law. Consequently, both rules are thereby rendered inapplicable and a new rule must be found which would properly take account of the fact that the wrong occurred concurrently in two jurisdictions. In other words, there is a need to apply a rule suited to this three dimensional situation rather than applying what are essentially two dimensional rules.

A similar problem has arisen in the context of section 56 of the Judiciary Act which renders the Commonwealth liable in tort and contract. It has been held that that provision has incorporated the delictual liability of the Commonwealth as well as abolishing the prerogative immunity enjoyed by the Commonwealth.[91] However, since

[91] *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514, 550 *per* Evatt and McTiernan JJ.; *Suehle* v. *Commonwealth* (1967) 116 C.L.R. 353; *Washington* v. *Commonwealth* (1939) 39 S.R. (N.S.W.) 133. This interpretation of s. 56 and the choice of law rule attributed to that provision has been severely criticised by Pryles and Hanks, note 1 *supra*, 196-199.

the delictual liability is created only by implication, its content must be determined by State law, hence a choice of law problem arises. The choice of law rule in section 56 is the enforcement of the *lex loci delicti*. In the problem posed above, the same rule may be thought to apply. However, given the recent criticisms of that approach in *Chaplin* v. *Boys*[92] the preferable approach would be to adopt the proper law of the tort in cases where either the rule in *Phillips* v. *Eyre* is inappropriate,[93] or as in this case, is inapplicable. Therefore, it is tentatively assumed that to this third set of facts seen from a federal perspective, the proper law of the tort applies establishing a third set of rights and liabilities which need not be the same as either of the two preceding sets of rights and liabilities.

A federal jurisdiction could equally be established over this third matter as it could over the other two matters. However, this third matter could not be characterised as arising under State law. While it is a product of the common law as a unitary system, it is so from a federal perspective and hence must be regarded as a matter constituted under the federal legal system.

This rather unusual example illustrates that while the common law is a unitary system, it may operate differently in different jurisdictions because each jurisdiction may, when looking at the same set of events, see a unique fact situation which will call into operation a rule of the common law different from the rule that would be applied by other jurisdictions. It follows that each jurisdiction or legal system may be responsible for the creation of a distinct set of rights and liabilities although the one system of common law governs the case entirely. Consequently, as seen in the example given, each legal system is responsible for producing a matter over which a jurisdiction may be created. If those matters created by the State legal systems can be the subject of a federal jurisdiction, why cannot that matter constituted under the federal legal system also form the subject of a federal jurisdiction?

In the example given the relevant rules contained predicated facts which involved making distinctions between wrongs committed within the forum and others committed within a foreign jurisdiction. As has been pointed out elsewhere, if the rules of the common law which make such distinctions are removed, then differences in result as indicated above would not arise.[94] In most cases where the events are the same, then the facts as seen from different jurisdictional perspectives will also be the same. If the case is one of contract in which the

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[92] [1971] A.C. 356.

[93] *E.g.*, *Warren* v. *Warren* [1972] Qd. R. 386; *Kemp* v. *Piper* [1971] S.A.S.R. 25.

[94] O'Brien, note 56 *supra*. Rules whose predicated facts involve making distinctions between foreign and domestic events have been described as rules which make reference to the *lex fori*.

courts of two States possess jurisdiction, then they will see the facts in exactly the same way. Whether the contract was made in the jurisdiction, or whether it was to be performed in two or more jurisdictions, are relevant only with respect to the question of whether a court can hear the case. Once that is established, then such questions are irrelevant to the substantive issues. Each court will apply the same rule of common law by determining what is the proper law of the contract.

2. *The Federal Legal System*

In examining the role of the common law in federalism, it has been shown that the Constitution and the laws of the Commonwealth are responsible for the creation, either directly or indirectly, of a wide range of facts to which the rules of the common law respond by prescribing what may be called federal common law rights and liabilities. The decision of the High Court in *Cigamatic* suggests that these rights and liabilities enjoy an immunity from State legislative interference. It is not within the scope of this article to discuss the many ramifications of that decision, nor to determine the precise area of application of that immunity.[95] Whether these federal common law rights and liabilities enjoy a priority of enforcement is a question which is subsumed under the "immunity" issue. If those rights and liabilities enjoy a complete immunity, then no priority question will arise since they are the only rights and liabilities existing with respect to those subject matters to which they relate. Finally, it ought not to be forgotten that these rights and liabilities exist within an overall structure which is best described as the federal legal system. That system consists of the Constitution, the laws of the Commonwealth and the common law; hence these federal common law rights and liabilities must, at least, be subject to the operation of section 51 of the Constitution, and therefore cannot be regarded as immutable. Their authoritative source is the common law, and although they can be regarded as coming within the operation of the Constitution and the laws of the Commonwealth, they are nevertheless subject to rights and liabilities created by Commonwealth legislation in pursuance of its section 51 powers.[96]

However, to say that the federal legal system prescribes only those rights and liabilities which owe their authoritative origins to the Constitution, the laws of the Commonwealth and the interaction between those two sources of law and the common law, would be misleading. It is suggested that the common law component in the federal legal system is in no way limited; it exists within that system

[95] These questions are extensively canvassed in the Howard/Evans debate, note 77 *supra*.

[96] *Uther* (1947) 74 C.L.R. 508, 531 *per* Dixon J.

in its entirety. While the common law may prescribe a special category of rights and liabilities which come within the description of federal common law rights and liabilities, there is no reason to suggest that the remaining rights and liabilities consequent upon the operation of that body of law cannot also be enforced within a federal jurisdiction. In other words, the common law may apply in its entirety within federal jurisdiction unaffected by State legislation and subject only to the Constitution and the laws of the Commonwealth. If it is assumed that the Commonwealth possesses a full power to define the juridical nature of federal jurisdiction, then it would be capable of establishing a federal jurisdiction only over those matters constituted under that arrangement of the sources of substantive law.

The only practical differences which follow from establishing a federal jurisdiction over matters constituted under the federal legal system, as opposed to those existing under a State legal system, are that State statutes affecting common law conflicts rules will not be enforced where the federal legal system governs. Also, as has already been illustrated, certain rules of the common law, which make reference to the *lex fori* or, in other words, distinguish between foreign and domestic events, may create within each legal system unique sets of rights and liabilities. This second point assumes that such rules of the common law continue to operate under full faith and credit. Otherwise State statutes will operate whether the federal legal system or a State legal system is the governing law in federal jurisdiction.

If a "common law garden" type of case comes within the federal legal system, it will be governed by the choice of law rules of common law. If it is a contract case, then the first question the court will ask is: What is the proper law of the contract? The answer in the normal course of events will be the law of one of the six States which will include all relevant State statutory law. If it is a case concerning the devolution of movable property on death, then the case will be determined by an examination of the *lex domicilii* which, on most occasions, will be State law, thus including State statutes. One could go on listing endless examples. The important point is that where the choice of law rule looks to "the proper law of the matter",[97] in the usual case that will be State law and included in that State law will be all State statutes which govern internal matters. However, State statutes which create or govern choice of law rules will not usually be picked up because, in order to avoid *renvoi* problems, choice of law rules do not look to the choice of law rules in another jurisdiction; rather they look to the domestic rules.[98] In other words, the question

[97] *Re E. & B. Chemicals and Wool Treatment Pty Ltd* (1939) S.A.S.R. 441, 443-444.

[98] Cook, "The Logical and Legal Bases of the Conflict of Laws" (1924) 33 *Yale L.J.* 457, 469.

asked is what would the foreign court do if the facts of the case had all occurred within that foreign jurisdiction. Thus rights and liabilities stemming from a State statute which replaces a common law choice of law rule with one of its own making can only be enforced in federal jurisdiction, when the law of that State has been specifically nominated as the governing law.[99]

Apart from these two practical consequences which go to differences in result on substantive issues, the federal legal system also has practical relevance on a jurisdictional basis. The first jurisdictional problem that arises concerns the original jurisdiction of the High Court under section 75 of the Constitution. As noted earlier, this jurisdiction gives rise to unusual problems. It is a jurisdiction granted by the Constitution itself and therefore cannot be affected or impaired by Commonwealth legislation.[100] Consequently, the Commonwealth has no direct power to define its juridical nature. It was suggested earlier that the Commonwealth could do this indirectly by providing a procedural vehicle for only a certain class of matters that bore any one of the five descriptions under section 75, leaving the remaining matters that come within that provision without a procedural mode of enforcement. This view is sound only so long as the jurisdiction granted under section 75 is not juridically defined by the Constitution. In other words, so long as the expression "matters", as used in section 75, refers to every matter bearing an appropriate description which arises under any body of law having force and effect within the federation. But where the expression "matters" is to be limited to only those matters, for instance, which arise under the federal legal system, then the jurisdiction is juridically defined.

In a line of cases beginning with *The Commonwealth* v. *New South Wales*[101] it was held that the liability enforced within the jurisdiction granted by section 75 automatically arose, and that the provision in some way imposed the liability on defendants in actions in that jurisdiction. Exactly how section 75 operates to impose a substantive liability has yet to be clearly explained by the High Court. However, in *Werrin* v. *The Commonwealth*[102] at least one possibility was rejected, namely, that section 75 incorporates by implication the substantive rights and liabilities to be enforced under that provision.[103]

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[99] Dixon, note 35 *supra*, 204; *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514, 547 *per* Dixon J.; Phillips, note 1 *supra*, 190, 394.

[100] O'Brien, "The Law Applicable in Federal Jurisdiction (Part One) (1976) 1 *U.N.S.W.L.J.* 327, 345.

[101] (1923) 32 C.L.R. 200. *New South Wales* v. *Bardolph* (1934) 52 C.L.R. 455; *Heimann* v. *Commonwealth* (1933) 54 C.L.R. 126; *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514; *Asiatic Steam Navigation Co. Ltd* v. *Commonwealth* (1955-1956) 96 C.L.R. 397, 416-417.

[102] (1937) 59 C.L.R. 150.

[103] *Id.*, 161 *per* Rich J., 167-168 *per* Dixon J. See also Professor Campbell's discussion of this question, note 1 *supra*, 582-588.

The problem which the combined effect of *Werrin* v. *The Commonwealth* and *The Commonwealth* v. *New South Wales* gives rise to is that if the liability enforced under section 75 is not a creature of that provision and yet automatically arises, then from whence does it come? The answer given by Dixon J. in *Werrin* v. *The Commonwealth* was that the liability exists at common law, but in the case of the Crown it exists as an imperfect obligation unless a jurisdiction is created which will enforce the liability of the Crown in right of a State or the Commonwealth.[104] Such a jurisdiction was established by section 75. However, there is still an additional question, and that is, does the liability arise under the common law as it applies within a State legal system, or within the federal legal system? As seen before, the critical difference between the two types of systems is that within the federal legal system the choice of law rules of common law will govern the operation of State statutes, whereas within a State legal system State statutes may ultimately govern the operation of the choice of law rules of common law. Keeping in mind this difference, it appears that the liability enforced under section 75 is one arising under the federal legal system. This suggests that the jurisdiction granted by that provision is juridically defined so that only matters arising under that system can form the subject of that jurisdiction. Sir Owen Dixon, in an address in 1957 to a Convention of the Law Council of Australia, stated:

> When a judge of the High Court of Australia sits exercising the original jurisdiction of this court in a matter between residents of different States, his attitude to the substantive law and, indeed, to the law of evidence, is very different from that of the judge of a District Court of the United States exercising the jurisdiction based on diversity of citizenship.
>
> The Australian judge knows that he must give effect to the relevant statutory law of the appropriate State. If he is in doubt which is the appropriate State he turns, for the purpose of resolving his doubts, to that part of the common law called private international law. But, if there be no statutory law in the case, or subject to such statutory provisions as are material, he proceeds to administer the common law as an entire system.[105]

This quotation[106] indicates in two ways that the federal legal system is the governing law with respect to section 75. First, because the choice of law rules govern the operation of State statutes rather than it being the other way around. Secondly, in alluding to a difference between American and Australian positions His Honour, it is sub-

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[104] *Id.*, 167-168.

[105] Dixon, note 35 *supra*, 204.

[106] The same view as to the controlling effect of conflict rules was expressed by His Honour in *Musgrave* v. *Commonwealth* (1937) 57 C.L.R. 514, 547.

mitted, is suggesting that whereas in diversity cases in the United States State law governs, in Australia the federal legal system governs.

Consequently, there appears to be some authority which would suggest that the expression in section 75 "[i]n all matters" really means in all matters arising under the federal legal system. But no case has clearly so held. Furthermore, there are numbers of authorities which have applied section 79 of the Judiciary Act when determining the applicable law in the original jurisdiction of the High Court under section 75.[107] Section 79 renders State law as the governing law in cases arising in federal jurisdiction.

If the term "matters" as used in section 75 is to be interpreted in the narrow sense, so that the expression refers only to those causes of action or sets of rights and liabilities which are constituted under the federal legal system, then that interpretation will seriously limit the power given in section 77 of the Constitution. That section provides:

> With respect to any of the matters mentioned in the last two sections the Parliament may make laws—
>
> (i) Defining the jurisdiction of any federal court other than the High Court;
>
> (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
>
> (iii) Investing any court of a State with federal jurisdiction.

If the Commonwealth wished to confer a jurisdiction on a federal court with respect to any of those classes of cases mentioned in section 75, then in defining that jurisdiction it must limit its juridical nature to matters constituted under the federal legal system. Similarly, it could only invest a State court with federal jurisdiction under sections 75 and 77(iii) with respect to those matters constituted under the federal legal system. But worst of all, section 77(ii) would be seriously limited in meaning and effect.

The State jurisdiction of State courts is always with respect to matters arising under a State legal system. Whereas federal courts would possess a jurisdiction in relation to matters referred to in section 75 with respect to only those matters constituted under the federal legal system. As a result the two types of jurisdiction would, without any exercise of power under section 77(ii), be mutually exclusive, so that to render the federal matter exclusive to federal jurisdiction under section 77(ii) in meaningless, since it would in any event be exclusive to federal jurisdiction. Furthermore, State courts in the exercise of State jurisdiction could not be deprived of their

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[107] *Id.*, 531 *per* Latham C.J.; *R.* v. *Oregan; ex parte Oregan* (1957) 97 C.L.R. 323; *Parker* v. *Commonwealth* (1965) 112 C.L.R. 295; *Pedersen* v. *Young* (1964) 110 C.L.R. 162.

jurisdiction in those classes of cases mentioned in section 75 by an exercise of the power given in section 77(ii), since the matter forming the subject of State jurisdiction would be different to the matter forming the subject of the jurisdiction under section 75.

If section 77(ii) is to be read in accordance with the interpretation so far assumed,[108] then the term "matters" as used in section 75 cannot be given such a restrictive meaning. The term would have to include not only those matters prescribed by the federal legal system, but also those matters constituted under a State legal system assuming that either type of matter bears one of the five descriptions set out in section 75. In this way, the Commonwealth would, in exercise of the power given in section 77(ii), be able to divest State courts of State jurisdiction in those classes of cases. Furthermore, the High Court has favoured a broad interpretation of the expression "matters". In *South Australia* v. *Victoria*[109] Sir Samuel Griffith observed: "The word 'matters' was in 1900 in common use as the widest term to denote controversies which might come before a court of justice."[110]

In the light of the limitations which would exist with respect to the powers given in section 77, the interpretation of Griffith C.J. should be preferred, it is submitted, to a narrow reading of the phrase "[i]n all matters" as used in section 75. Problems of defining the juridical nature of the original jurisdiction of the High Court under section 75 can be solved by the indirect method, noted earlier, of providing a procedural vehicle only for those matters constituted under the legal system which the Commonwealth wishes to operate as the governing law.

3. *The Dual Operation of Judiciary Act Sections 79 and 80*

The second aspect in which the federal legal system has relevance in the field of jurisdiction can be seen in the dual operation of sections 79 and 80 of the Judiciary Act. Those provisions, as indicated earlier, establish a federal jurisdiction over a matter constituted under the State legal system in which the jurisdiction is exercised. However, if that was the full extent of the operation of sections 79 and 80, then considerable difficulties may arise with respect to establishing a jurisdiction for federal courts. These problems can best be seen by example.

Suppose the Commonwealth were to set up a Superior Court to exercise the original jurisdiction of the High Court. The Court is to sit only in Melbourne, Sydney and Adelaide. Imagine an action brought in

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[108] Howard, *Australian Federal Constitutional Law* (2nd ed., 1972) 232-236; Cowen, *Federal Jurisdiction in Australia* (1959) 168-170; *Minister of Army* v. *Parbury Henty & Co.* (1945) 70 C.L.R. 459, 504-505 *per* Dixon J.

[109] (1911) 12 C.L.R. 667.

[110] *Id.*, 675. See also *Re Judiciary and Navigation Acts* (1921) 29 C.L.R. 257, 266.

such a Court between a resident of Tasmania against a resident of Western Australia on a contract made in Tasmania and to be performed entirely in Tasmania. The defendant throughout remains resident in Western Australia. No matter in what capital the action is heard by the Superior Court, without section 80 of the Judiciary Act, the Court could not possess jurisdiction. It should be observed that only the courts of two States could entertain jurisdiction in this case. The first, of course, is Tasmania being the *lex loci contractus* and also the place where the contract was to be performed. The second is Western Australia, since it possesses *in personam* jurisdiction over the defendant. The legal systems of the remaining four States do not apply to the factual dispute since the courts of those States could not entertain jurisdiction over that dispute. If the laws of those States do not apply to the dispute, then they cannot prescribe rights and liabilities with respect to the parties to that dispute. Hence those four legal systems do not give rise to a matter in the context of the particular facts of this case. Consequently, it would be futile to attempt to establish a federal jurisdiction over a matter constituted under one of those four State legal systems with reference to the facts of this case, since no such matter exists. However, that is precisely what section 79 purports to do.

If the jurisdiction of the Superior Court was simply confined to matters arising under the laws of the State in which it sits, then in this case it would not possess jurisdiction no matter in which of the three State capitals it was to sit. However, in circumstances such as these, section 80 would take over and establish a jurisdiction over a matter constituted under the federal legal system. That provision selects a matter constituted under federal law, but if federal law is inapplicable, then it selects a matter constituted under "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". In other words, it selects a matter constituted under the common law as modified by the Constitution and the statute law in force in the State in which the courts sit. The statute law referred to naturally includes State statutes of the forum State. In short, section 80 *prima facie* performs the same role as does section 79 by selecting a matter constituted under the State legal system of the forum State.

But if, as in this case, the State legal system does not apply to the factual dispute, then it will not give rise to a matter over which a jurisdiction can be established. Also, the State statutes of the forum State will not modify the common law as it applies to the factual dispute. The factual dispute is one which would be beyond the territorial legislative power of the legislature of the forum State; hence the statutes of that State would be incapable of modifying the common law with respect to its specific application to the facts of the particular

case. Therefore, the operation of section 80 must be different when section 79 purports to create a jurisdiction over a matter which does not exist. Section 80 under those circumstances will simply select a matter constituted under the common law as modified only by the Constitution and the laws of the Commonwealth. In other words, it will select a matter constituted under the federal legal system. What that section is looking for in cases where the operation of section 79 has proved futile are sources of substantive law that operate throughout Australia and there are only three—the Constitution, the laws of the Commonwealth, and the common law as a unitary system.

Choosing the common law as modified only by the Constitution and the laws of the Commonwealth does not mean that State statutory law is irrelevant. It will be relevant and applicable, as shown earlier, through the operation of the choice of law rules of the common law. In this particular case the first issue arising from the application of the common law would be what is the proper law of the contract. In this case it would be Tasmanian and therefore Tasmanian statutes dealing with contract would be rendered applicable. If the case concerned a tort with the contacts pointing to Tasmania, then given a federal perspective the common law as operating within the federal legal system would probably look to the proper law of the tort which again would be Tasmanian; hence its statutes again would be relevant.

Where, on the other hand, section 79 seeks to create a jurisdiction over a matter constituted under a State legal system which does exist because the State legal system applies to the factual dispute, then the State statutes of that legal system would also modify the common law as it applies to that factual dispute. As a result, where the operation of section 79 is effective, then section 80 will operate in harmony with section 79 by also establishing a federal jurisdiction over a matter constituted under the legal system of the forum State. Under those circumstances section 80 will choose a matter constituted under the common law as modified by the Constitution, the laws of the Commonwealth and the laws of the State. It would appear that the Constitution and the laws of the Commonwealth would form part of every State legal system just as they form a part of the federal legal system by virtue of covering clause five. That provision states: "This Act and all the laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State . . ."[111]

The construction of sections 79 and 80 advanced above is not one which so far has received the approval of the courts. Equally, there is no clear authority denying that such an operation can be attributed to those sections. The issue has only arisen once in the reported cases.

[111] *Butler* v. *Attorney-General for Victoria* (1961) 106 C.L.R. 268; Quick and Garran, note 1 *supra*, 353-354.

That case was *R.* v. *Oregan; ex parte Oregan*[112] which involved an application for a writ of *habeas corpus* brought by a wife against her husband seeking custody of their child. The action was brought in the original jurisdiction of the High Court on the basis of diversity of residence and was heard by Webb J., sitting in Melbourne. The child, who was in the custody of his father, was resident in Tasmania. Webb J. saw the difficulty of seeking to apply Victorian State statute law concerning the custody of infants to the facts of this case under section 79:

> Then the Victorian statute law relating to the custody of infants is binding on this court when sitting in Victoria; but only in cases in which the laws of Victoria are applicable. But I think these laws are not applicable to a person domiciled and residing in Tasmania who has the legal custody of the child in Tasmania.[113]

His Honour then went on to consider the operation of section 80:

> [S]o the common law, as modified by the statute law of Victoria, applies in custody cases in this Court while sitting in Victoria. This view is not inconsistent with that expressed above on the effect of s. 79. It is one thing to hold that the Victorian statute law is not applicable and quite another thing to hold that the common law as modified by the Victorian State law is applicable.[114]

The writer must disagree with the proposition expressed towards the end of this passage. In the opinion of the writer, where section 79 does not render a State statute applicable because the State statute could not apply to the facts of the case, then the common law cannot be modified by that State statute within the meaning of section 80. The view, as expressed earlier, must apply to a case like *R.* v. *Oregan; ex parte Oregan.* Where section 79 does not operate to render a forum State statute applicable because the statute could not apply of its own force to the facts of the case, then the State statute equally could not modify the common law as it applies to the facts of the case. The writer agrees with His Honour that section 80 alone governs this case, but it is only "the common law of England . . . so far as it is applicable . . ." that actually governs.

The common law would apply to the facts of *R.* v. *Oregan; ex parte Oregan* through its conflict of law rules. In *R.* v. *Langdon; ex parte Langdon,*[115] Taylor J. held, in a very similar case, that the choice of law rule determining the appropriate law governing custody cases was the law of the *situs* of the child.[116] Since the child was residing in

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[112] (1957) 97 C.L.R. 323.
[113] *Id.*, 330.
[114] *Id.*, 331.
[115] (1953) 88 C.L.R. 158.
[116] *Id.*, 160. See also Cowen, note 48 *supra*, 23-24; Pryles and Hanks, note 1 *supra*, 163-164.

Tasmania, the Guardianship and Custody of Infants Act 1934 (Tas.) would therefore have been the legislation determining the question of custody. Webb J. indicated that he would have preferred to apply the Tasmanian legislation rather than the Victorian equivalent; indeed His Honour suggested that had the Victorian legislation differed substantially from the Tasmanian Act, he would have removed the cause to Tasmania. It would appear from the report that Webb J. had overlooked the manner in which the common law, unmodified by statute, applied to the facts of that particular case. If this point had been brought to the attention of His Honour, the interpretation of section 80, as applied in *R.* v. *Oregan; ex parte Oregan*, may very well have been in conformity with the view that, if a forum State statute does not apply under section 79, then it does not modify the common law under section 80.

In conclusion, it is therefore submitted that sections 79 and 80 together create a federal jurisdiction over a matter constituted under the State legal system of the forum. If that should prove impossible because the State legal system of the forum does not apply to the facts of the case, and therefore, does not create a matter, then section 80 will take over and establish a jurisdiction over a collateral matter constituted under the federal legal system. It should also be observed that the ancillary operation of section 80, in establishing a jurisdiction over a matter constituted under the federal legal system, does not apply with respect to State courts invested with federal jurisdiction. The investment of State courts with federal jurisdiction under section 39(2) of the Judiciary Act is expressed as operating only "within the limits of their several jurisdictions". Consequently, a State court cannot exercise federal jurisdiction over a dispute if it could not exercise State jurisdiction with respect to the same factual dispute. If the court could exercise State jurisdiction with respect to that factual dispute, then the State legal system of the forum must apply to that dispute, creating a matter over which the joint operation of sections 79 and 80 would establish the invested federal jurisdiction. Therefore, it is only federal courts which are affected and assisted by this residual operation in section 80 of the Judiciary Act.

4. *An Alternative Interpretation of Judiciary Act Sections 79 and 80*

Sir Phillip Phillips has suggested that section 80 was designed to overcome the possible influence, in Australia, of the decision of *Swift* v. *Tyson*.[117] He suggested that the expression "the laws of each State", as used in section 79, was intended to include only the statute law of each State. He was of the view that the draftsman would have suspected that the High Court would take a similar approach to that taken in *Swift* v. *Tyson*, and thereby restrict the interpretation of that

[117] (1842) 16 Pet. 1.

expression. It was therefore necessary that, in applying the law of the forum State, it be made abundantly clear that the decisional law as well as statute law was to be applied by courts exercising federal jurisdiction.[118] The learned writer stated:

> 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, 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 familiar with the magisterial contribution of Story J. to the meaning and operation of section 34. *Swift* v. *Tyson* had its critics, but in 1902 it was 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. Realising 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.[119]

Fortunately one is not forced to rely exclusively on conjecture as to "the situation in which Sir Robert Garran found himself when he began to draft" those two provisions. Sir Robert Garran, together with Sir John Quick, published in January of 1901 *The Annotated Constitution of the Australian Commonwealth*[120] which contained what purported to be a comprehensive account of the American position as to the governing law in federal jurisdiction.[121] Neither in that section of the book, nor anywhere else, is contained any reference to the decision of *Swift* v. *Tyson*. While the authors were aware of the effect of the decision of *Wheaton* v. *Peters*,[122] they only make a slight reference to the principle applied in *Swift* v. *Tyson*. This reference is only made in a quotation from an American text. It is quite clear that the authors had no appreciation of that "magisterial contribution of Story J." for they say:

> In the United States the federal courts follow the decisions of the highest court of a State in questions concerning merely the laws of that State, and only claim a right of 'independent interpretation' where the law of the Union is involved.[123]

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[118] See also Nygh, *Conflict of Laws in Australia* (1968) 788. In the opinion of the writer, such an approach would involve a misunderstanding of the effect of the decision in *Swift* v. *Tyson*.

[119] Phillips, "Choice of Law in Federal Jurisdiction" (1961) 3 *M.U.L.R.* 170, 185.

[120] Quick and Garran, note 1 *supra*.

[121] *Id.*, 785-788.

[122] (1834) 8 Pet. 591.

[123] Quick and Garran, note 1 *supra*, 785.

A little further on they state:

> In the United States, the decisions of the courts of each State being final as to what the common law of the State is, the common law in one State may come in time to be widely different from the common law in another State.[124]

In all probability, Sir Robert Garran did draft sections 79 and 80, for he was at the time secretary to the Federal Attorney-General and Parliamentary Draftsman.[125] Phillips is probably right when he suggests that the drafting of those provisions was influenced by the American precedents. However, it was not *Swift* v. *Tyson* which Sir Robert Garran had in mind, but rather *Wheaton* v. *Peters, United States* v. *Worrall*[126] and *United States* v. *Hudson and Goodwin*.[127] In 1838, in *Wheaton* v. *Peters*, it was clearly established that there was no common law of the United States. Furthermore, and this was probably of more importance to Sir Robert Garran, the common law, according to these authorities and in particular *United States* v. *Hudson and Goodwin*, was not a source of jurisdiction for the courts of the United States. In criminal cases, for instance, not only must there exist, at common law, offences against the United States, but it was also necessary that the courts of the United States possess jurisdiction to deal with such offences. In *United States* v. *Hudson and Goodwin* it had been held that before the Federal District courts could exercise such a common law jurisdiction, it had to be expressly granted by Congressional legislation.[128] Quick and Garran indicated their awareness of this point:

> In both the above cases it was held, independently of whether a common-law offence could exist, that the courts had no jurisdiction over the case in question.[129]

With respect to the first question of whether there existed a common law of the United States, Quick and Garran felt that the American situation was inappropriate to the position under the Australian Federation. Having quoted from an American text, they state:

> This test of the existence of a federal common law is wholly inapplicable to the Commonwealth, because the High Court, as a national and not a federal court of appeal, has not only the right, but the duty of 'independent interpretation' of the common law in all cases that come before it. . . The decisions of the High Court will be binding on the courts of the States; and thus the rules of the common law will be—as they always have been—the same in all States. In this sense, that the common law in all the States is

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[124] *Ibid.*
[125] *Commonwealth Gazette*, 19 April 1906, 306.
[126] (1798) 2 Dall. 384.
[127] (1812) 7 Cranch 32.
[128] *Id.*, 33.
[129] Quick and Garran, note 1 *supra*, 786.

> the same, it may certainly be said that there is a common law of the Commonwealth.[130]

Although it is not entirely clear from this passage, it would seem that the authors were of the view that there was a common law of Australia, operating as a unitary system. They therefore properly anticipated, as can be seen from *R.* v. *Kidman*,[131] that there would exist, at common law, offences against the Commonwealth. What they were uncertain about was whether the common law could be enforced within federal jurisdiction. A. Inglis Clark, in writing *Australian Constitutional Law*,[132] published in 1901, expressed a similar view. In his opinion there would not exist a federal common law "except in relation to the executive powers of the Crown".[133] Without indicating what he meant by the expression "federal common law", he then went on to say that ". . . the federal courts of the Commonwealth will not possess any jurisdiction under the common law".[134]

Therefore, if one is to speculate on what Sir Robert Garran intended to be the effect of section 80, it would be safe to assume that having taken note of such American precedents as *United States* v. *Hudson and Goodwin*, he intended to confer on courts exercising federal jurisdiction, a jurisdiction sufficient to enforce rights and liabilities under the common law "in civil and criminal matters". It was necessary, if the American precedents were to be followed in Australia, to spell out clearly in the legislation conferring or investing federal jurisdiction that the court possessed a common law jurisdiction in both civil and criminal cases.[135]

This view is consistent with an interpretation of those provisions that they enact rules that relate only to questions of jurisdiction. They do not create, nor attempt to create, by incorporation, any part of the substantive common law. Rather, they merely define the juridical nature of federal jurisdiction. On the other hand, it is admitted that in all probability Sir Robert Garran did not intend, nor envisage, the dual operation of those provisions. Nevertheless, it is submitted that the dual operation, suggested earlier, is consistent with the general objectives Sir Robert was attempting to achieve.

In 1904, Sir John Quick, together with Littleton E. Groom, published the *Judicial Power of The Commonwealth*[136] in which they provided annotations to sections 79 and 80 of the Judiciary Act. In

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[130] *Id.*, 785.
[131] (1915) 20 C.L.R. 425, 436, 445.
[132] Clark, note 1 *supra.*
[133] *Id.*, 192.
[134] *Ibid.*
[135] It had been held that there was no distinction between civil and criminal common law jurisdiction. See *Re Barry* (1844) 42 F. 113. The decision was approved in *In Re Burrus* (1899) 136 U.S. 586, 594, 597.
[136] Quick and Groom, note 1 *supra.*

the preface to this publication they acknowledged the "valuable assistance", *inter alia*, of R. R. Garran. It is also worth noting that, at the time of this publication and at the time of the passing of the Judiciary Act, both authors were members of the House of Representatives. They were, therefore, likely to be informed as to the reasons and objectives of sections 79 and 80. Having said that much, it is somewhat disappointing to reveal that their annotations on sections 79 and 80 are largely unilluminating. The jurisdictional difficulties with respect to the enforcement of common law rights and liabilities are alluded to only vaguely. The authors state in reference to section 80:

> This section expressly declares the common law shall to the extent prescribed govern all courts exercising federal jurisdiction. Apart from this enactment it has been contended that there is no federal common law, "except in relation to the executive powers of the Crown it is submitted that there cannot be any federal common law in Australia, and that the Federal Courts of the Commonwealth will not possess any jurisdiction under the common law": A. Inglis Clark's Australian Constitutional Law, at p. 192.[137]

While the authors do suggest that section 80 has overcome the potential jurisdictional difficulties of courts exercising federal jurisdiction being unable to enforce common law rights and liabilities, they seem to be of the view that the provision has a substantive operation as well. For the reasons advanced earlier, considerable difficulties would arise if that was the case.

It is also worth noting that the authors refute, in advance, the restricted interpretation, advanced by Phillips, placed on the expression "the laws of each State", as used in section 79. In the annotations to section 80 the authors state:

> The common law of England forms part of the laws of each State of the Commonwealth, and as such, may be administered by the High Court under the preceding section.[138]

5. *Limitations on the Application of Judiciary Act Sections 79 and 80*

It is important to note that sections 79 and 80 do not exhaustively define the juridical nature of federal jurisdiction. Those provisions are only relevant where the factual dispute involved does or could throw up two or more sets of rights and liabilities constituted under different legal systems. Where the factual dispute could only produce one set of rights and liabilities, there will, therefore, emerge only one matter. In creating a federal jurisdiction with respect to such a factual dispute, the juridical nature of that jurisdiction will automatically be defined

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[137] *Id.*, 206.
[138] *Ibid.*

and hence such provisions as sections 79 and 80 would be redundant. An obvious example is where the Commonwealth Parliament seeks to create a federal jurisdiction with respect to a matter coming under section 76(ii) of the Constitution. Any fact situation which is involved in litigation brought under section 76(ii) would only produce one matter arising under a law of the Parliament. When the Commonwealth seeks to enforce a federal common law right, there would only be one matter involved. While there may arise, in such cases, collateral matters under the same legal systems, there would not arise two or more matters constituted under different legal systems since, in such cases, there would not be an overlap as between different systems of law.

It was stated earlier that the federal legal system would overlap one or other of the State legal systems with respect to any factual dispute occurring within Australia. Consequently, the only occasion when there would arise out of a transaction a single matter would be when that transaction was governed exclusively by the federal legal system. For instance, when the case concerned a matter arising under the law of the Parliament or involved the enforcement of federal common law rights and liabilities.

There are also related situations governed by the same principle. A factual dispute may be one which produces two or more matters constituted under different legal systems; however, only one bears a description in conformity with the heads of federal jurisdiction set out in sections 75 and 76 of the Constitution. To create a federal jurisdiction with respect to such a case must involve automatically defining the juridical nature of federal jurisdiction. *Anderson* v. *Eric Anderson*[139] is a case in point. In that case an action in tort, with respect to an accident occurring in the A.C.T., was brought in the District Court of New South Wales. It was argued that the Court was possessed of federal jurisdiction by virtue of section 76(ii) of the Constitution and section 39(2) of the Judiciary Act, in that it involved a matter arising under a law of the Parliament.[140] The factual dispute involved threw up two matters: one being a matter arising under A.C.T. law, the other being a matter arising under New South Wales law. Only the first matter possessed a description capable of coming within federal jurisdiction.

In the New South Wales Supreme Court, only Jacobs J. held the view that the action came within federal jurisdiction. Having reached that conclusion, he then went on to determine the law applicable by an examination of sections 79 and 80.[141] He held, not unsurprisingly,

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[139] (1965) 114 C.L.R. 20, on appeal from [1964-1965] N.S.W.R. 1867.

[140] Seat of Government Acceptance Act 1909 (Cth) s. 6; Seat of Government (Administration) Act 1910 (Cth); Law Reform (Miscellaneous Provisions) Ordinance 1955 (A.C.T.) s. 15.

[141] [1964-1965] N.S.W.R. 1867, 1877-1878.

that federal law governed. It is submitted that this additional step in His Honour's judgment was unnecessary. Despite the fact that there arose out of the factual dispute two matters, only one bore a description capable of forming the subject of a federal jurisdiction. Therefore, in order to create a federal jurisdiction with respect to that case, it would involve rendering the matter, arising under A.C.T. law, the subject of the jurisdiction. In such circumstances, sections 79 and 80 had no contribution to make. The law applicable in that particular case was determined automatically through the investment of federal jurisdiction by section 39(2) of the Judiciary Act. The adoption of this superfluous and more circuitous route created the potential for further confusion, as can be seen from the judgment of Kitto J. in the High Court:

> Let it be assumed that by reason of the provisions mentioned a court exercising federal jurisdiction in New South Wales in respect of a matter arising out of events which have occurred in the Capital Territory is required to treat as part of the Law of New South Wales, and therefore to apply to the case in obedience to ss. 79 and 80 of the *Judiciary Act*, the provisions of s. 15 of the Ordinance of the Territory.[142]

His Honour subsequently concluded by saying:

> If it be true that the section is to be treated by a New South Wales court, and in particular by such a court when exercising federal jurisdiction, as if it were transplanted into the law of New South Wales, it must stand in that law with the same meaning as it has in the Territory; and to say that in New South Wales there is in force a provision, the true meaning of which is that the law of torts in the Territory is to contain a particular rule, is to make a statement which gets the appellant nowhere.[143]

V CONCLUSION

In this article the writer has attempted to show that the Commonwealth Parliament has the power to define the juridical nature of federal jurisdiction, that is, the power to determine which branch or branches of Australian substantive law is to be applied by a court exercising federal jurisdiction. This determination is made by creating a federal jurisdiction over those consequential rights and liabilities that arise from the operation of that portion of the substantive law which has been chosen. The specific source of this power is the expression "matters" as it is used in sections 76 and 77 of the Constitution. With reference to the original jurisdiction of the High Court under section 75, the Commonwealth Parliament has been given no direct power, as it has in sections 76 and 77, to define the juridical nature of that

[142] (1965) 114 C.L.R. 20, 32.
[143] *Id.*, 33.

jurisdiction. However, through the incidental power it can enact the rules of procedure and practice that will govern the exercise of that jurisdiction. It therefore indirectly can define the juridical nature of that jurisdiction by providing a procedural vehicle for only those consequential rights and liabilities arising from the operation of that portion of the substantive law which the Commonwealth wishes to govern the exercise of that jurisdiction.

The writer has attempted further to show that the ability of the Commonwealth to define the juridical nature of federal jurisdiction through sections 51(xxix), 76 and 77 has not been limited by the existence of any constitutional principle which would require courts exercising federal jurisdiction to apply the State law of the forum where neither the Constitution nor Commonwealth law is applicable. It has been submitted that neither the constitutional force of State legislation nor the full faith and credit mandate under section 118 of the Constitution renders State law binding on courts exercising federal jurisdiction. Furthermore, full faith and credit does not operate to reconcile and resolve conflicts between the operation of the legal systems of two or more States on a substantive basis by confining the operation of State legal systems within the ambit of the conflictual rules at common law.[144]

If it is accepted that the Commonwealth has power to define the juridical nature of federal jurisdiction, then what is the practical effect of that power? In essence, it gives the Commonwealth a power of choice primarily as between competing systems of State law where the operation of such systems is with respect to the same factual dispute. Where two or more State legal systems overlap, that is, apply to the same factual transaction, and prescribe or could prescribe with respect to that transaction differing sets of rights and liabilities, the Commonwealth can choose which set is to be enforced in federal jurisdiction. The Commonwealth, of course, may be limited in its choice where some or all of those sets of rights and liabilities which emerge do not bear any one of those nine descriptions set out in sections 75 and 76 of the Constitution. It may be, however, that wherever the legal system of two or more States overlap in prescribing different sets of rights and liabilities, an issue will arise under section 118 of the Constitution, thus bringing all those sets of rights and liabilities potentially within federal jurisdiction through section 76(i) of the Constitution.

It has been shown earlier that the only occasions when such a competition will arise between the legal systems of two or more States are when the factual transaction invokes a conflicts rule of common law whose operation is predicated on subjective criteria by making

[144] The writer has dealt with these issues elsewhere, see O'Brien, note 56 *supra*.

reference to the forum or the *lex fori*, or where a State legislature has altered a conflicts rule of common law. It is suggested that unless one of those two situations arises, the power of choice through defining the juridical nature of federal jurisdiction is of no realistic value. It therefore follows that the potential limits of this power of choice correspond to the limits of the power of State legislatures to override the conflicts rules of common law, and those limits are primarily determined by the territorial ambit of their legislative power.

In the United States the Supreme Court appears to have frozen the choice as between competing systems of State law by holding in *Klaxon* v. *Stentor*[145] that it followed from the decision in *Erie* v. *Tompkins* that a federal court must apply the law of the State in which it sits, including the State's conflictual rules. In Australia, the High Court has held that the same choice is made by section 79 of the Judiciary Act. The major difference is that the decision in the United States is demanded more by constitutional principle[146] than by Congressional legislation; whereas in Australia, the High Court has attributed the choice solely to the operation of section 79.

Given the existence of the federal legal system being a system of law in addition to those of the States, with that system invariably overlapping one or more of the State legal systems, then the Commonwealth can also choose that system to prevail in federal jurisdiction through an exercise of its power of choice. Furthermore, it has exercised this power in section 80 of the Judiciary Act by providing an alternative choice of the federal legal system to that choice made by section 79 where the choice made under section 79 would fail. In the light of this dual operation, the existence of this power of choice becomes important in order to validate those provisions.

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[145] (1941) 313 U.S. 487.

[146] On a close reading of *Klaxon* v. *Stentor*, *id.*, 496, one can infer that the constitutional basis of the choice probably rests on an application of the Tenth Amendment. See also *Baltimore & Ohio Railroad Co.* v. *Baugh* (1892) 149 U.S. 368 *per* Field J. Its equivalent in Australia is the "reserved powers" doctrine which is not something upon which one can build constitutional principles. See *Engineer's* case (1920) 28 C.L.R. 129, 154.