# GOVERNMENT CORPORATIONS*

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## II

An English public service corporation, in order to secure the benefit of immunities of the Crown, must establish, in the absence of special legislation, that it performs a function which is prohibited to private enterprise. In pressing its claim, it receives no special assistance from the government, because it is accepted that when Parliament creates such a body the Crown is relieved of a responsibility.

In like circumstances such a body in the United States or Australia may anticipate receiving the active support of the government representing the legislative division which created it—the exercise of a constitutional power is in issue. There are, of course, material differences between the constitutions of the two countries. For the immediate purpose, reference need only be to the field of the Supreme Court of the United States and that of the High Court of Australia. The first is both guardian and interpreter of the powers delegated by the people; the other is a court of law which, in constitutional issues, has an Imperial act to apply. The Supreme Court takes into consideration the probable consequences of encroachment by one government on the field of another, lest the latter be fettered in the exercise of its constitutional functions, and, wherever necessary, reads into the constitution an implied prohibition against legislation being applied which may have such an effect. In the early days of the Commonwealth of Australia, its High Court imported a like prohibition into the Australian constitution. Affairs reached a state where there were comparable decisions of the High Court and of the Privy Council diametrically opposed to each other. To solve the impasse, a tailor-made case was presented to the High Court, and with gusto Chief Justice Griffith proceeded to demolish the position of the Privy Council, ending with:

> We are of opinion that the implication of a prohibition of mutual interference is as necessary in the case of the Australian Constitution as in that of the United States of America, and that the doctrine laid down in *D'Emden* v. *Pedder*, 1 C.L.R. 91 at p. 111, 'that when a state attempts to give to its legislative or executive authority an operation which, if valid, would fetter control or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and

* The first part of Mr. Sellar's article appeared in the May issue at pp. 393 *ff.*

> inoperative' should be once more affirmed by this Court notwithstanding the opinion of the Judicial Committee in *Webb* v. *Outrim*, [1907] A.C. 81. The rule, which was then laid down, is, in the words of Chief Justice Marshall, 'safe for the States and safe for the Commonwealth'. The contrary rule would be dangerous and ruinous for the States, and dangerous and ruinous for the Commonwealth, and would substitute chaos for order and set up an official in London subject to political accidents in place of the High Court as the guardians of the Constitution.[28]

Leave to appeal to the Privy Council was refused. To avoid further confusion, direct appeals from state courts being still permissive, the Commonwealth enacted that states might tax the salaries of its employees, section 114 of the Constitution reading:

> 114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.[29]

The conflict between the Privy Council and High Court was ended when the High Court adopted the Privy Council's view in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*[30] Lord Halsbury had said in *Webb* v. *Outrim:*

> It is, indeed, an expansion of the canon of interpretation in question to consider the knowledge of those who framed the Constitution and their supposed preferences for this or that model which might have been in their minds. Their Lordships are not able to acquiesce in any such principle of interpretation. The Legislature must have had in their minds the constitutions of the several States with respect to which the Act of Parliament which their Lordships are called upon to interpret was passed. The 114th section of the Constitution Act sufficiently shews that protection from interference on the part of the Federal power was not lost sight of. It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature.[31]

Chief Justice Griffith may have been unorthodox in his treatment of a Privy Council decision, but in the *Engineers*

[28] *Baxter* v. *Commissioner of Taxation* (1907), 4 C.L.R. 1087.

[29] State income taxes date from 1884; Commonwealth income taxes were first imposed in 1916. Thereupon, New South Wales enacted that "taxation by the Commonwealth of salaries earned by State Officials after July 1, 1918, shall not be an interference with the exercise of power by the State if the rate is not higher than the rate on other salaries within the Commonwealth". *Davoren* v. *Commonwealth Commissioner of Taxation*, 29 A.L.R. 129, noted this, but the court did not regard such legislation as a perquisite to taxing State employees by action of the Commonwealth Parliament.

[30] (1920), 28 C.L.R. 129.

[31] [1907] A.C. 81, at p. 90.

case, Mr. Justice Isaacs, for the court, was equally precedent-breaking when he included a direct quotation from a speech delivered by Lord Haldane in the British House of Commons on the motion to pass the bill creating the Commonwealth of Australia. On that occasion Lord Haldane had said:

> The difference between the Constitution which this Bill proposes to set up and the Constitution of the United States is enormous and fundamental. This Bill is permeated through and through with the spirit of the greatest institution which exists within the Empire—I mean the institution of responsible government, a government under which the Executive is directly responsible to—nay, is almost the creature of—the Legislature. This is not so in America, but it is so with all the Constitutions we have granted to our self-governing colonies. On this occasion we establish a Constitution modelled on our own model, pregnant with the same spirit, and permeated with the principle of responsible government. Therefore, what you have here is nothing akin to the Constitution of the United States except in its most superficial features.

The conclusion of the High Court in the *Engineers* case was that:

> the doctrine of 'implied prohibition' finds no place when the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their express or necessarily implied meaning. The principle we apply to the Commonwealth we apply also to the States, leaving their respective Acts of legislation full operation within their respective areas and subject matters, but in case of conflict, giving to valid Commonwealth legislation the supremacy according to the very words of section 109. . . .

*West* v. *Commissioner of Taxation*[32] is the most recent word on the subject of intergovernmental immunity from general taxes. In this case the High Court cited *Abbott* v. *City of St. John*[33] and *Caron* v. *The King*[34] as pertinent precedents. The conclusions were that:

> a general undiscriminatory State income tax is not inconsistent with Federal Acts fixing or providing means for fixing salaries and pensions.[35]

Conversely:

> if a State tax discriminated against pensions, salaries or other payments made by the Commonwealth, it could not be supported.[36]
>
> It is established, I think, by authority, and I assume that the Commonwealth might competently pass legislation protecting its officers, and exempting from State taxation salaries and pensions granted by it.[37]

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[32] (1936–37), 56 C.L.R. 657.
[33] (1908), 40 S.C.R. 597.
[34] [1924] A.C. 999.
[35] *Op. cit.*, Chief Justice Lathan at p. 670.
[36] *Op. cit.*, Mr. Justice Dixon at p. 681.
[37] *Op. cit.*, Mr. Justice Starke at p. 677.

*United States*

The division of powers under the Constitution brought to issue, in *M'Culloch* v. *The State of Maryland*,[38] the power to create corporate instrumentalities to perform public services. Chief Justice Marshall declared the power existed:

> The power of creating a corporation. . . is never the end for which other powers are exercised, but a means by which other objects are accomplished.[39]

Later he said:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.[40]

Since then many instrumentalities have been created by specific legislation, but also on various occasions State charters have been secured with departmental officials as petitioners. Sometimes the authority so to apply is drawn from the defence and welfare powers of the President and national government granted by the Constitution; in other cases, Congress gives a general authorization, an example being the National Industrial Recovery Act 1933, which provided that:

> To effectuate the policy of this title, the president is hereby authorized to establish such agencies . . . as he may find necessary.

Some State constitutions prohibit States from engaging in commercial enterprises by use of corporations; others have no such prohibition. The Port of New York Authority is a special case—a joint agency of the States of New Jersey and New York. In 1925 Mr. Charles Evans Hughes (then in private practice) advised the Authority that it

> is none the less a public instrumentality because it is the instrumentality of two States instead of one. Each State has the constitutional power to establish an instrumentality of this character and each State has the constitutional competency, with the consent of Congress, to enter into a compact with another State to establish a similar joint instrumentality. The Port of New York Authority must be regarded as validly constituted as the competent public agency of both States.

Chief Justice Marshall in *M'Culloch* v. *The State of Maryland* declared that there was an implied prohibition against governments taxing each other; but a few years later he qualified that:

[38] 4 Wheaton 316 (1819).
[39] *Ibid.*, at p. 411.
[40] *Ibid.*, at p. 421.

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen . . . it . . . takes the character which belongs to . . the business which is to be transacted.[41]

Passing by nineteenth century decisions, in *South Carolina* v. *U.S.*[42] the point before the Supreme Court was the power of the national government to impose an excise license tax on liquor dispensaries which were operated as a State monopoly. Mr. Justice Brewer, speaking for the court, observed that:

> There is a large and growing movement in the country in favour of the acquisition and management by the public of what are termed public utilities, including not merely therein the supply of gas and water, but also the entire railroad system.[43]

Hypothetically enlarging the field to all activities subject to taxes for the national treasury, he adduced that:

> if all the States should concur in exercising their powers to the full extent, it would be almost impossible for the Nation to collect any revenues. In other words, in this indirect way it would be within the competency of the States to practically destroy the efficiency of the National Government.[44]

And he decided that a proper constitutional safeguard was to hold that:

> whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.

Twenty-eight years later a like set of circumstances presented themselves in *Ohio* v. *Helvering, Commissioner of Internal Revenue.*[45] The litigation was to restrain the United States Government from levying an excise license on state-operated retail and wholesale liquor stores. The State sought to distinguish the *South Carolina* case by a novel argument, which was rejected by the court through Mr. Justice Sutherland:

> A distinction is sought in the fact that after that case [*South Carolina* v. *U.S.*] was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a state to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic; bu t certainly, it did not have the effect of converting what

[41] *The Bank of the United States* v. *Planters' Bank of Georgia,* 9 Wheaton 904 (U.S. 1824), at p. 907.
[42] 199 U.S. 437 (1905).
[43] *Ibid.*, at p. 454.
[44] *Ibid.*, at p. 455.
[45] 292 U.S. 360 (1933).

> had always been a private activity into a governmental function. The argument seems to be that the police power is elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on.[46]

He pointed out that it had repeatedly been held that:

> 'the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . exempt from taxation by the United States.'[47]

But, he added:

> by the very terms of the rule, the immunity of the states from federal taxation is limited to those agencies which are of a governmental character. Whenever a state engages in a business of a private nature it exercises non-governmental functions, and the business, though conducted by the state, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress.

and that:

> When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned.

Three cases were before the Supreme Court on the eve of legislation withdrawing the taxation immunity of public employees.[48] One[49] involved employees of the New York Port Authority seeking relief from national income tax. The second[50] concerned employees of the Home Owners' Loan Corporation (a national corporation) contesting liability to a New York State tax. The third[51] was a federal Circuit Court judge resisting federal income tax on his judicial salary. In each of these cases the reasoning of the court was that a tax which falls alike upon every citizen does not threaten the independence of national or state governments nor the independence of the judiciary. For example, Mr. Justice Stone, for the court, said in *Graves* v. *O'Keefe:*

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[46] *Ibid.*, at p. 369.

[47] *Ibid.*, at p. 368–369.

[48] *The Collector* v. *Day*, 11 Wall. 113 (1870) had established the rule that, to levy income tax on the salary of a state official was to impose an economic burden on the state, because it would necessitate that the state pay a larger salary for the services of its official. The decision was specifically overruled in *Graves* v. *O'Keefe*.

[49] *Helvering, Commissioner of Internal Revenue* v. *Gerhardt*, 304 U.S. 405 (1938).

[50] *Graves* v. *O'Keefe*, 306 U.S. 466 (1939).

[51] *O'Malley, Commissioner of Internal Revenue* v. *Woodrough*, 307 U.S. 277 (1939).

> The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the federal government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern . . . It follows that when exemption from state taxation is claimed on the ground that the federal government is burdened by the tax, and Congress has disclosed no intention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.[52]

The Supreme Court has moved a long way from the strict application of Marshall's "the power to tax involves the power to destroy". This fact was emphasized by Mr. Justice Frankfurter in his concurring opinion in *Graves* v. *O'Keefe*, where he dubbed the phrase a "seductive *cliché*" inserted in *M'Culloch* v. *Maryland*, "partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes". He added:

> In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity. Both the Supreme Court of Canada[53] and the High Court of Australia[54] on fuller consideration . . . have completely rejected the doctrine of intergovernmental immunity. In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.

*Graves* v. *O'Keefe* did not decide to what extent a legislative declaration of relief from state taxes could be upheld when the activity was not truly "governmental" in obligation. Mr. Justice Stone gave some consideration to the powers of Congress, but

> whether its power to grant tax exemption as an incident to the exercise of powers specially granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which courts have applied, is a question which need not now be determined.

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[52] *Op. cit.* at p. 480.

[53] *Abbott* v. *City of St. John*, 40 S.C.R. 597; and *Caron* v. *The King* [1924] A.C. 999.

[54] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, 28 C.L.R. 129; and *West* v. *Commissioner of Taxation*, 56 C.L.R. 657.

Shortly after the point was in issue. The Home Owners' Loan Corporation is a national agency created by Congress. Included in the legislation is the provision that, except as to municipal taxes on its real property, it shall be exempt

> from all taxation now or hereafter imposed by the United States, by any territory, dependency, or possession thereof or by any state, county, municipality, or local taxing authority.

The State of Maryland has a mortgage tax which it sought to impose on mortgages tendered by the corporation for registration. The corporation moved for an order to restrain the registrar from levying the tax. The Maryland court granted the order[55] and on appeal was upheld by the Supreme Court. Thus the question left open in *Graves* v. *O'Keefe* being answered in the affirmative, it would appear that the Supreme Court is leaning towards transforming the protection of the national government and its agencies from state taxation into a legislative, rather than a constitutional, question.

Two years later, the court demonstrated that unless a levy be directly on the national government, it was not disposed to treat a state's general tax as an economic burden on the government to the degree that it was prohibited by the constitution.[56] The case did not involve a government corporation, but, since it arose in connection with a defence contract and there could be no question but that the tax was certain to be a cost in the project, it is of interest, although decided on a narrow point of law. The State of Alabama has a sales tax of 2% to be paid by vendors and recovered from purchasers. The defendants sold lumber to a contractor, who, for cost plus a fee, was constructing an army camp for the United States Government. The tax statute being so framed that the legal incidence was on the contractor and not on the United States, and as the contract provided for reimbursement of all state and municipal taxes, the decision was that:

> No constitutional immunity of the United States from state taxation prevents a State from applying its sales tax to a purchase of building materials by one who buys them for use, and uses them, in performing a 'cost-plus' building contract for the Government, although the contract provides that the title to such materials shall vest in the United States upon their delivery, inspection, and acceptance by a Government officer, at the building site, and that the contractor shall be reimbursed by the Government for the cost of the materials, including the tax.

[55] *Pittman* v. *Home Owners' Loan Corporation*, 7 U.S. Law Week 503 (Nov. 6, 1939).

[56] *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

> The fact that the economic burden of the tax is passed on to the United States does not make it a tax upon the United States.

Instrumentalities organized as corporations under an act of Congress are specifically exempted from federal income taxes.[57] Montgomery's Federal Taxes on Corporations (1945-46) vol. 2, p. 60, states:

> The Reconstruction Finance Corporation and the Federal Reserve Banks are exempt. The exemption under section 101 (15) also applies to federal land banks, national farm loan associations, federal intermediate credit banks, as provided in the Federal Farm Loan Act as amended, the Federal Crop Insurance Corporation, federal home loan banks organized under the Federal Home Loan Bank Act, the Home Owners' Loan Corporation, the Commodity Credit Corporation and National Mortgage Associations organized under the National Housing Act.

The basis of the general constitutional immunity from state taxation was re-stated in *Helvering* v. *Gerhardt*:

> In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are levying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality.[58]

Consequently, it is the practice, when national corporations are created, to include a provision which frequently reads:

> real property of the corporation shall be subject to state, territorial, county, municipal or local taxation to the same extent according to its value as other real property is taxed.

But in the absence of such a provision, it is the practice of the national government to insist on immunity from local taxes on real property. An illustration is provided by the United States Spruce Production Corporation. It was created under the company laws of the State of Washington in 1918 to produce lumber

[57] It is administrative practice to extend like relief to state corporations, although in *Helvering* v. *Gerhardt* it was suggested, but not decided, that the Port Authority of New York might be taxable.

[58] *Op. cit.*, at p. 412.

for the manufacture of aeroplanes during the first Great War. Congress had not granted any special authority to seek incorporation, which was secured by United States officials being petitioners. All stock was held by the Treasury. A county sought to levy land taxes on its property. The Supreme Court, through Mr. Justice Holmes, decided that a levy could not be made whenever incorporation and formal erection of a new personality was only for the convenience of the government in carrying out its ends.[59] Nor will the United States tolerate, in litigation, a set-off of a sum due by one government corporation against the claim of another.[60] On the other hand, it has been held[61] that legal immunity from suit is not conferred on government corporations when a "to sue and be sued" clause is omitted.

*Australia*

Section 109 of the Constitution reads:

> **109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.**

The extensive use of state and municipal boards, corporations, etc., to carry on public undertakings has given rise to numerous cases involving the application of Commonwealth industrial laws. That is, whether such undertakings are governmental services and therefore entitled to the immunities of the Crown. The *Engineers* case[62] decided that the operation of railways was not an inalienable function of state government. It has also been held that a municipal corporation was not entitled to immunity whenever it engaged in a trading occupation (supplying electricity to the public).[63] The court was divided in *Federal Municipal Employees Union* v. *Melbourne*,[64] the majority holding that municipal corporations established under state laws are not, with regard to the making, maintenance, control or lighting of public streets, performing a governmental service. The point at issue was really the drawing of a dividing line between trading and non-trading activities. Mr. Justice Isaacs did so in these words:

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[59] *Clallam County* v. *U.S. and United States Spruce Production Corporation*, 263 U.S. 341 (1923).

[60] *North Dakota-Montana Wheat Growers' Association* v. *U.S.*, 66 F. (2d) 573 (C.C.A. 8th, 1933). Cert. denied, U.S. Sup. Ct., Feb. 19th, 1934.

[61] *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U.S. 381 (1939).

[62] (1920), 28 C.L.R. 129.

[63] *Federated Engine Drivers' and Firemen's Association* v. *Broken Hill Proprietary Co.* [No. 2] 16 C.L.R. 245.

[64] (1919), 26 C.L.R. 508.

> If a municipality either (1) is legally empowered to perform and does perform any function whatever for the Crown, or (2) is lawfully empowered to perform and does perform any function which constitutionally is inalienably a Crown function—as for instance, the administration of justice—the municipality is in law presumed to represent the Crown, and the exemption applies. Otherwise, it is outside the exemption, and, if impliedly exempted at all, some other principle must be reverted to. The making and maintenance of streets in the municipality is not within either proposition.

In the field of taxation, it was held in *Heiner* v. *Scott* that the Commonwealth Bank was not performing a governmental service.[65] But *Broken Hill Associated Smelters* v. *Collector of Taxes for Victoria* decided that acceptance by the Crown of war risk insurance on shipping was not a trading venture.[66] Similarly, when a state organizes a board to buy and sell grain as an incident in a joint governmental policy of organizing the distribution of food during a war, it is a governmental act.[67] *Commonwealth* v. *Queensland* involved the constitutionality of a provision in the State of Queensland's income tax act.[68] The Commonwealth Inscribed Stock Act directed that:

> The interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State unless the interest is declared to be so liable by the prospectus relating to the loan on which the interest is payable.

The state act took cognizance of this, but provided that the exempted income be taken into calculation to the extent of establishing total income of the taxpayer. The state argued that the Commonwealth's power went no further than to fix the legal relations between the lender and the Commonwealth. Counsel for the Commonwealth relied on the words of the Constitution:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—
>
> (iv) Borrowing money on the public credit of the Commonwealth.

and was upheld, Mr. Justice Isaacs saying of section 51:

> This is much more than a power in the Commonwealth to borrow. It is a power to make laws with respect to Commonwealth borrowing. It includes the power to fix the terms of the bargain between the Commonwealth and the lenders, and to ensure by appropriate and paramount legislation that the terms it provides shall be enforced. Representing

[65] (1914), 19 C.L.R. 381.
[66] (1918), 25 C.L.R. 61.
[67] *Australian Workers' Union* v. *Adelaide Milling Co.* (1919), 26 C.L.R. 460.
[68] (1920), 29 C.L.R. 1.

> the whole nation, it may guarantee that the lender shall have and may retain to the full so far as any authority in Australia is concerned, the remuneration promised him by the Commonwealth. The loan is a transaction outside the jurisdiction of the States; the interest is an income of the lender created by the Commonwealth. And, being created by the Commonwealth for its own purpose, it may be surrounded with such characteristics as to secure to the Commonwealth the full benefit it desires to obtain . . .

The doctrines of *M'Culloch* v. *Maryland* were fully respected and applied by the High Court in the period when corporate agencies were introduced in Australia. Therefore, Chief Justice Griffith, for the court, in *Heiner* v. *Scott*[69] experienced no difficulty in recognizing the creation of the Commonwealth Bank as constitutional:

> the Commonwealth Parliament may, for the more convenient exercise of any of the executive functions of government, set up a corporation for the purpose of acting as an agent or instrumentality of government.

But:

> it does not follow that it is the function of government to carry on a trade for the purpose of raising revenue. In my opinion the carrying on of ordinary banking business is not a function of the executive government of the Commonwealth conferred by the Constitution. It may be that the carrying on of such a business is not unlawful in the sense of being forbidden by law, but the liberty to do so cannot be regarded as anything more than a permissive faculty, permitted only in the sense of not being prohibited by positive law. Such tacit permission cannot confer any right to restrict the States in the exercise of their legislative powers over all persons who in like absence of prohibition engage in such enterprises. The faculty is, in truth, one which is common to all persons.

A few years later, the High Court threw some new aspects into the field of controversy. A corporate Shipping Board was created by Public Act in 1923 to take over and manage ships, docks, machine shops, etc., of the Commonwealth Government. It was vested with power to carry on the general business of shipowner, manufacturer, engineer, dockowner and repairer and any other business incidental thereto or to the works and establishments. It was the successful bidder for turbo-alternator sets for a municipal powerhouse. The price was £666,605. A manufacturers' association sought, through the Attorney General, a declaration that to contract in this manner was beyond its corporate powers. The arguments and general conclusions may be mirrored by references to the judgment of Chief Justice Knox:

[69] (1914), 19 C.L.R. 381.

To the argument that the section giving powers to the Board was related to the general executive power:

> The supply and delivery of these alternators is wholly unconnected with the shipping line or any activity carried on by the Commonwealth under legislative sanction.

and

> It is impossible to say that an activity unwarranted in express terms by the Constitution is nevertheless vested in the Executive, and can therefore be conferred as an executive function upon such a body as the Shipping Board.

To the argument that the statute vested in the Board a general commercial power:

> The Parliament has only such power as is expressly or by necessary implication vested in it by the Constitution. There is no power which enables the Parliament or the Executive Government to set up manufacturing or engineering businesses for general commercial purposes.

To the argument that the activity could be related to the trade and commerce power of the Commonwealth:

> The trade and commerce power . . . is a power to regulate trade and commerce . . .

To the argument that, in times of peace, such contracts were necessary to provide training of staffs for naval and military defence—a Commonwealth power:

> Extensive as is that power, still it does not authorize the establishment of businesses for the purpose of trade and wholly unconnected with any purposes of naval or military defence;

and

> Despite the practical difficulties facing the Commonwealth in the maintenance of its dockyards and works, the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war or in conditions arising out of or connected with war.

The outcome of the case is still regarded as controversial, but a Royal Commission on the Constitution (1929) summarizes it in this way:

> The High Court decided that authority to enter into this contract had not been conferred on the Shipping Board by the Commonwealth Parliament, and that a law conferring this authority would have been ultra vires the Commonwealth Parliament.

The decision was reviewed some years later by the High Court.[70] Again an association of manufacturers was opposing

[70] *Atty. General (Victoria)* v. *Commonwealth* (1933–34), 52 C.L.R. 533.

sale of goods by a government factory, but this time the power to operate was upheld under the defence power, the Defence Act having empowered the Governor General to

> establish and maintain factories for the manufacture of naval and military equipment and uniforms.

and

> do all matters and things deemed by him to be necessary or desirable for the efficient defence and protection of the Commonwealth or any State.

Mr. Justice Starke dissented, and gave judicial notice to a constitutional doubt of long standing: the power to accomplish, by use of the power to appropriate public moneys, ends which are not in the enumerated powers of the Commonwealth. The material part of his dissent is:

> The power to appropriate moneys 'for the purpose of the Commonwealth' does not, in my opinion, enable the Commonwealth to appropriate such moneys to any purpose it thinks fit, but restricts that power to the subjects assigned to, or departments, or matters placed under the control of the Federal Government by the Constitution. No constitutional warrant, therefore, for the extension of the operations of the clothing factory to general business purposes can be found in the appropriation power.

The history may be traced by reference to the efforts to create a Commonwealth Department of Agriculture. In 1901, 1904 and 1908 bills were introduced and dropped because no mover could quote a specific power in the constitution to create. On August 3rd, 1909, the Prime Minister, Sir Littleton Groom, moved the adoption of a bill to create a federal bureau of agriculture. He declared:

> Our power to deal with this subject, in the first place, rests entirely, as it does in the United States, upon the power of appropriation. It has been held by the United States authorities that under the power of appropriation, the Federal authority may appropriate money to carry out the various objects to which I have referred. Not only is there the power of appropriation, but there arise implied powers from the very nature of the Constitution.

Opposition by the states was sufficient to cause the bill to be withdrawn. The Royal Commission on the Constitution (1929), at page 180, reports:

> this proposal was not renewed, but in 1916 a temporary body was formed, and in 1920 the Institute of Science and Industry was established, which in 1926 was reorganized under the name of the Council for Scientific and Industrial Research. The Council received a grant of £250,000

> out of the surplus revenue of the year 1925-26 and a further grant of $250,000 in 1927-28. The money is to be expended in accordance with estimates of expenditure passed by both Houses of the Parliament from time to time.

Another Royal Commission sitting at the same time was examining the question of child endowment, including the capacity of the Commonwealth to legislate. Appearing before the Commission, Sir Robert Garran, Solicitor General, subscribed to the view that section 81 of the Constitution which provides:

> 81. All revenues . . . . of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

conferred:

> an absolute power of appropriation for general purposes.

In this he was supported by Maurice Blackburn, K.C. Mr. Owen Dixon, K.C., and Sir Edward Mitchell, K.C., took the opposite view. Sir Edward pointed out that some considered that the Commonwealth may dispose of its money as it pleased and accompany gifts with the imposition of conditions and penalties:

> I do not agree with this view—which would necessitate giving to the words 'the purposes of the Commonwealth' in section 81 of the Constitution—a much wider meaning than I think would be upheld, although no doubt, if the Commonwealth Parliament simply confined its legislation to distributing money, it may be impracticable to attack the legislation for the want of a competent Plaintiff who could show that he was injuriously affected by such legislation. But where any rule of conduct is imposed enforceable by some sanction like a penalty in respect of matters which the Commonwealth Parliament has no power to legislate about—I think that any person upon whom such penalty was imposed would be a competent Plaintiff to successfully challenge the constitutionality of such legislation.

The Royal Commission in its report advised that

> the existence of a power to legislate . . . . must be regarded as, at least doubtful,

whenever the subject matter is not clearly within a defined "purpose" of the Commonwealth. No legislative action was taken until 1941, when a measure was introduced and enacted.[71]

[71] The scheme is financed partly from Consolidated Revenue, partly from the abolition of exemption from taxation in respect of children, but mainly from a tax of 2½% on all payrolls in excess of £20 per week.

There was no concerted opposition to the bill, but various members voiced the fear that its legality might be challenged. On April 2nd, in closing the debate on second reading, Mr. Holt, Minister of Labour and National Service, answered by saying:

> The Government does not dispute the fact that differences of opinion have existed, but it claims that with the additional powers now conferred under the defence power, the Commonwealth has all of the legal authority necessary to keep this measure successfully in operation against any substantial threat of attack, for the duration of the war at least.

Thus the subject is still an open one, although *Victoria* v. *Commonwealth*[72] decided that the following words in section 96 of the Constitution:

> the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

vested the Commonwealth with adequate power to enact a Federal Aid Roads Act providing grants to states. Two states contended that the legislation simply made the states agents of the central government, and as the Commonwealth had no power to construct roads, the legislation was ultra vires. In the argument, counsel for the Commonwealth was stopped when he made the point that each state had first to sign an agreement before any moneys might be applied to road construction.

It is useful to compare the experience of the United States:

1795, President Washington recommended to Congress that assistance be given to agriculture. No action taken.

1817, a federal Bureau of Agriculture proposed, but defeated on ground that it was a state matter.

1836, a free seed distribution made a charge to an omnibus vote.

1837, a small appropriation made to collect agricultureal statistics.

1850, a vote of $1,000 made to provide for chemical analyses of vegetable substances.

1851, a specific vote made for distribution of seeds.

1859, a specific vote of $3,500 to publish information regarding cotton.

1862, Bureau of Agriculture authorized.

1863, a grant of $80,000 made for the expenses of the Bureau.

1889, the Bureau designated an Executive division to be headed by a Secretary of State.

[72] (1926), 38 C.L.R. 399.

The Supreme Court of the United States circumvented the issue until *United States* v. *Butler*, when Mr. Justice Roberts for the majority said that Congress had no power to appropriate for an object outside its jurisdiction:

> From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.
>
> It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.[73]

Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissented, through Mr. Justice Stone, who stated that:

> The spending power of Congress is in addition to the legislative power and not subordinate to it. The independent grant of the power of the purse, and its very nature, involving in its exercise the duty to insure expenditure within the granted power, presuppose freedom of selection among divers ends and aims, and the capacity to impose such conditions as will render the choice effective. It is a contradiction in terms to say that there is a power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure.[74]

and ended with:

> Courts are not the only agency of government that must be assumed to have capacity to govern. Congress and the courts both unhappily may falter or be mistaken in the performance of their constitutional duty. But interpretation of our great charter of government which proceeds on any assumption that the responsibility for the preservation of our institutions is the exclusive concern of any one of the three branches of government, or that it alone can save them from destruction is far more likely, in the long run, 'to obliterate the constituent members' of 'an indestructible union of indestructible states' than the frank recognition that language, even of a constitution, may mean what it says: that the power of tax and spend includes the power to relieve a nationwide economic maladjustment by conditional gifts of money.[75]

Although the *Butler* case was distinguished rather than overruled, the opinion of the dissenting judges became the opinion of the court in *Steward Machine Co.* v. *Davis*,[76] which

[73] 297 U.S. 1 (1936) at p. 68.
[74] *Ibid.*, at p. 85.
[75] *Ibid.*, at p. 87.
[76] 301 U.S. 548 (1937).

concerned the legality of the Unemployment Compensation Act of Alabama—the enacting of the legislation being a condition precedent to receiving grants from the national government.

*General Summarization*

From the foregoing it will be observed that the courts are increasingly taking notice of the type of service rendered. In England the test really is: Could the activity be performed by private enterprise? Whenever an affirmative answer can be given, the public corporation, in order to secure any special privilege of the Crown, has to establish that the privilege is conferred by some statute. The protection afforded by the Public Authorities Protection Act, 1893, is an example. In the United States, the flood of corporate activities released by "New Deal" legislation has afforded the Supreme Court opportunities to clear up many matters of controversy. The trend of judicial thought, especially as evidenced by the opinions of the late Chief Justice Stone, was towards eliminating from the test of "economic burden" all taxes which were not directly imposed on a government. Further, the court is veering away from judicial precedent founded on the implied prohibition doctrine enunciated by Chief Justice Marshall. A consequence may be that the powers of Congress will be regarded as materially extended in determining whether or not a national corporation is taxable by other governments, and, in turn, whether their corporate agencies shall be subject to national taxes, including income tax.

In Australia an issue is taking form the answer to which, from the Canadian viewpoint, may be of prime importance. That is, the capacity to use the corporate device to perform commercial and other activities which are not within the enumerated powers of the Commonwealth or of the States. There is a body of opinion which would be content if the English practice were applied. But the *Metropolitan Meat Industry Board* v. *Sheedy*[77] (a priority in bankruptcy case) illustrates that corporations will not forego claims to the Crown's privileges without a fight. There is also a section of the community which would restrict governmental activities to obligations of government —defined as strictly as the courts will tolerate. The Australians may amend their own constitution, and by section 74 of the Constitution:

[77] [1927] A.C. 899.

74. No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

Therefore, the subject is one which may be solved in Australia without reference to the Privy Council, but whatever the answer may be, it should be of interest to Canadians in more ways than one.

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IN THE COURT OF KING'S BENCH, TRINITY TERM, 1289

Gilbert Hydecok and Agnes his wife complained that John son of John de Leygistre, chaplain, John of Melton, chaplain, and John of Middleton, had broken into their house, wounded them and carried off goods and chattels to the value of ten pounds. Jurors made inquiry and said on their oath that the aforesaid John and others had come to the inn at Gilbert's house and after they had left, Robert the son of Gilbert went to his room and lit a candle. Thereupon John and the others threw snowballs at the candle and put it out and Robert swore at them. They dragged him out and beat him in the street, and he "raised the hue". Gilbert and Agnes, alarmed, came to the hue and John and the others beat them, took a hood and cap, the greater part of Agnes' peruke, her belt and purse, three shillings and a farthing". It was decreed that Gilbert and Agnes should recover their chattels and ten pounds damages. (Selden Society, Select Cases in the Court of King's Bench, Vol. I, p. 178)