

**THE CHAMBER OF PRINCES**

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**Government of India Act (1935)**

**and**

**Instruments of Accession**

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**OPINION**

**OF**

**MR. J. H. MORGAN, K. C.;**

**COUNSEL TO THE CHAMBER OF PRINCES.**

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## Section I.

### INTRODUCTORY

1. In this Opinion I propose to discuss the legal principles which will be applied by the Federal High Court and the Judicial Committee of the Privy Council in determining the scope and meaning of

- (1) the Government of India Act,
- (2) the Instruments of Accession, and
- (3) the "Items" in the Federal Legislative List contained in the Seventh Schedule to the Act.

In dealing with these questions I shall, of course, pay careful attention to the various proposals which have already been put forward by the various Committees and Conferences which have been discussing these three questions ever since July of last year. I refer, in particular, to the proceedings and reports of the Bombay Conference convened by the Chancellor, the Finance Committee of the Conference which met under the Chairmanship of H. H. the Nawab of Bhopal, the "Informal" Committee of Ministers which has sat under the chairmanship of Sir Akbar Hydari, the Drafting Committee of the Punjab States Council, the Standing Committee of Ministers of States of Division XII, the Central India Ministers Group, and to the correspondence arising out of these proceedings. The whole of this literature has now been laid before me. I have also carefully studied the "Hyderabad Memorandum", dated 15th-17th January of this year. I have had laid before me many "Notes" of the discussions held by the officers of the Political Department with the representatives of the various States on their visits to the individual States. In addition to this, I have had numerous consultations with Ministers who have called on me for that purpose. I shall also have occasion to refer to the Proceedings and Interim Report of the Constitution Committee which has been meeting under the chairmanship of His Highness the Maharaja of Patiala. Most of the meetings of the Constitution Committee I have attended in my capacity of Legal Adviser to the Chamber and many questions of law have been referred to me by the Committee. My answers to those questions will be found in the present Opinion. I have already pointed out at one of the meetings of the Committee that I cannot regard myself as necessarily bound by its conclusions and on some points I find myself in disagreement with them, as will duly appear.

2. Before proceeding to discuss the legal principles in question I think it may not be amiss if I explain what I conceive the duty of counsel to be. That

duty is, in the first place, to bring to bear upon the examination of the questions at issue the previous decisions of the Judicial Committee of the Privy Council in their interpretation of the two other Federal Constitutions of the Empire, the Commonwealth of Australia and the Dominion of Canada and, incidentally, the decisions of the House of Lords and the English Courts in the interpretation of statutes which the Privy Council itself constantly adopts and applies and will adopt and apply when it comes to interpret the Government of India Act. The general rule of construction has been aptly stated by the Privy Council in a leading Canadian case, known as *Parsons Case*, 7A. C. 96 in the following words: "in order to determine the meaning of the terms employed in describing any particular class (of legislative items) other parts of the British North America Act (the Canadian Constitution) and of other Imperial Acts *in pari materia* may be looked at". I have noticed with some surprise that in none of the reports of the committees, and the recommendations made in them, are to be found any references whatsoever to Privy Council cases. This is unfortunate inasmuch as the officers of the Political Department may very properly complain, and I understand that they have already complained, that proposals for amendment and limitation have been pressed upon them which are of a vague, speculative, and imaginary character and often based upon apprehensions which have no foundation in the realm of fact. I have read some observations to the same effect by one of the most distinguished representatives of the States on the Constitution Committee, namely Sir K. N. Haksar. Where, however, amendments and qualifications can be supported, as I propose to support them, by Privy Council cases authoritatively determining the scope and meaning of terms used in the Act, the Draft Instrument of Accession and the Legislative List, then such amendments and qualifications will demand, and I am sure will receive, the most careful and sympathetic attention from the Government of India and the Political Department. It will be observed that in this Opinion I have excluded all reference to the decisions of American Courts on the Federal Constitution of the United States. Those decisions are wholly irrelevant and, indeed, positively misleading. The Privy Council, in interpreting the Government of India Act, will most certainly exclude them, as it has always excluded them in its interpretation of the Federal Constitution Acts of Australia and Canada. American law is as out of place and as intrusive as would be the presence of an American lawyer at the hearing of an appeal before the Privy Council, before which, indeed, no foreign lawyer is ever allowed to appear. I think it as well to enter this caution, as I am informed that the Political officers have objected to the relevance of certain arguments addressed to them and supported by references to the

Federal Constitution of the United States. I am in entire agreement with the Political Officers on this point. The introduction of American Constitutional Law into such discussions is not merely ignorant; it is a sheer waste of time and can only result in confusing the issue.<sup>1</sup>

3. In the second place, my duty as counsel is to enlighten the Chamber to the best of my ability as to every conceivable consequence, prejudicial to the rights of the States, as the result of their accession to the Federation which my knowledge and experience as a constitutional lawyer may suggest to me. If I did not do this, I should be neglecting my duty and the States might well have reason to complain if, in years to come, such consequences occurred without my having foreseen, and expressed, the possibility of their occurrence. It is, however, no part of my duty to attempt to dissuade the States from entering the Federation even as it is no part of my duty to persuade them to enter it. It is for the States themselves, after due consideration of my Opinion on these questions, to decide whether or not they will accede. It may be recalled that, at one of the meetings of the Constitution Committee, on my pointing out, as it was my duty to do, some of the consequences, prejudicial to "State rights", which had occurred in the legal development of the Canadian and Australian Constitutions, I was violently criticized by a foreign lawyer imported for the occasion. The lawyer in question did not attempt to answer my legal arguments and, through no fault of his own, was, of course, incapable of answering them. A foreign lawyer must inevitably be hopelessly at a loss in a domain so unfamiliar to him as the Constitutional Law of the British Empire. The lawyer in question confined himself to rhetorical imputations of what he called "Defeatism". No such imputations could possibly be made by an English counsel, though they may, for all I know, be "common form" in the primitive procedure of the inferior courts of the United States where rhetoric often takes the place of law and loud vociferation does duty for argument. The line of approach to the subject which I have adopted at the meetings of the Constitution Committee and which I follow in this Opinion was that adopted by me and by three of the most eminent Counsel in England in the Opinions we wrote for the Chamber of Princes in the years 1934 and 1935. In those Opinions we consistently pointed out, as it was our duty to do, any "elements of danger", as we deliberately called them, in which the accession to the Federation might involve the States. No responsible person ventured to suggest

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(1). The attitude of the Privy Council towards attempts to import alien conceptions of American law has been adequately summarised by Mr. Justice Clement in his classical treatise on the Canadian Constitution (at page 400) in the words, "The Judicial Committee have always deprecated any attempt to draw analogies between the Canadian and American systems." They have equally repudiated American analogies in their interpretation of the Australian Constitution—see *Webb v. Outtrim* (1907) A. C. 81.

that, in so doing, we were indulging in "defeatism". The imputation is childish. It may well be that the advantages of entering the Federation outweigh the dangers, in other words the disadvantages, legally speaking, which are attendant on any contract so uncertain in its actual operation as a Federal contract has always and everywhere proved to be. That, however, is a political question on which I express no opinion. In pointing out "elements of danger" in this Opinion, my object is not to raise difficulties in the way of the entry of the Indian States into the Federation but to remove them, if removable they be. They can, I think, be removed if the Government of India is prepared, as I feel sure it is prepared, to consider sympathetically every proposal, by way of "safeguards", which can be shown to rest on apprehensions well-founded in law, in other words, on the judicial construction and the constitutional development of the two other Federal Constitutions enacted by Parliament.

4. Finally, it is my duty as Counsel to advise the Chamber, in the fateful decisions it is has to take, with complete impartiality and entire detachment from politics. This aspect of the duty of Counsel is so obvious, and the duty itself so imperative, that, were I advising English clients in England, it would be quite unnecessary for me to state it. But my attention has been drawn to certain Indian newspaper articles—articles "inspired", I am told, by a certain politician—which impute to me as Counsel and to the Standing Committee which has done me the honour to retain my services, a deliberate design on my part and on theirs to deter the States from entering the Federation and, indeed, to "wreck" its accomplishment. The imputation is false. My instructions are simply "to advise" the Chamber and no attempt whatsoever has been made, directly or indirectly, by the Standing Committee or any member of it to influence the advice which it is my duty to give. The fact, I have good reason to believe, is perfectly well understood by the Government of India whose cordial reception of me I take this opportunity of acknowledging. In England such reflections on the honesty of counsel would never be made in any newspaper and, if made, would be defamatory. In view of them, I think it as well to make clear what the rules of my profession in England are when counsel is engaged to advise in matters which have a "political" aspect. Those rules are that counsel, from the moment he is briefed, dismisses entirely from his mind any political views of his own which he may, at one time or another, have entertained upon the subject and that he confines himself with all the sincerity at his command to the purely legal aspect of the questions submitted to him. The position of counsel under such circumstances is exactly the same as that of the head of his

profession, namely the Attorney-General. The late Attorney-General, Sir Thomas Inskip, had expressed strong views, as a member of the Government which was responsible for it, in favour of the Government of India Bill. During its passage through the House of Commons, he was frequently called upon by members of all parties in the House to give a legal opinion on the meaning of the various clauses of the Bill and he gave it. No one ever ventured, or would ever venture, to question the honesty and the impartiality of the opinions which he accordingly gave or to suggest that those opinions were tainted by his views in favour of the Bill. My instructions from the solicitors to the Chamber are as follows:

“The Standing Committee of the Indian Chamber of Princes have instructed Messrs. Herbert Smith and Co. to request counsel to advise the Chamber in connection with the Government of India Act and the legal questions in connection with the accession of the Feudatory States who are members of the Chamber of Princes to the Indian Federation”.

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## Section II.

### THE “EXPLANATORY MEMORANDUM” ON “SAFEGUARDS” LAID BEFORE THE CONSTITUTION COMMITTEE.

5. I will first deal with certain questions referred to me for my opinion by His Highness the Maharaja of Patiala at the first day's proceedings of the Constitution Committee on 25th January. At that meeting there was circulated for discussion an “Explanatory Memorandum” of Agendum I purporting to be a “statement showing how far the original safeguards have been incorporated in the Government of India Act”. The statement proceeded to set out the “Essential Safeguards” which were originally submitted to me and my distinguished fellow Counsel Sir William Jowitt, K. C., Mr. D. N. Pritt, K. C., and, at a later stage, Mr. Wilfrid Greene, K. C., when we were instructed to advise the Chamber of Princes in 1934 and 1935. Our opinions are on record. In reply to the first “essential safeguard” and the most important of them all, namely that “the sovereignty and autonomy of the States shall be fully respected and guaranteed and there shall be no interference, direct or indirect, with the internal affairs of the States”, we wrote as follows:

“This condition is not to be found in the proposals. For the reasons given in Part. III of this Opinion the Federal Union contemplated, or indeed any Federal Union that could be practically devised, is fundamentally and in principle incompatible with the observance of this condition.”<sup>1</sup>

In the second Opinion which I and my fellow Counsel wrote for the Chamber of Princes on the Government of India Bill we repeated these words, adding:

“These words are just as much applicable now as they were then. They apply to the Bill even as they applied to the Proposals upon which the Bill is founded”.<sup>2</sup>

This was the considered opinion of four of His Majesty's Counsel. But in the Explanatory Memorandum circulated on 25th January last, the Constitution Committee was invited to accept the following opinion on the fulfilment or otherwise, of the Essential Safeguard in question:

“In the opinion of Counsel this (i.e., “the unimpaired sovereignty and autonomy of the States”) is *adequately safeguarded*”.

I do not quite know who is the “counsel” responsible for this highly original opinion but I find it impossible to believe that he was an English counsel. It is quite clear that either he has not read the two Opinions of the four English counsel referred to or that, if he had read them, he has completely failed to understand them. Immediately this “Opinion” of his was read at the Committee, I expressed my “total dissent” from it and my complete dissociation from all that followed it in the Explanatory Memorandum in which it appeared. The Memorandum is not, in my opinion, worth any further consideration but, in deference to the request of His Highness the Maharaja of Patiala, I proceed in this Opinion to deal with it.

6. In view of this Memorandum having been circulated and the misleading character of the opinion contained in it, I will summarise very briefly the transformation in the scope and character of the sovereignty of the States, in the event of their accession, which is effected by the Act. That sovereignty is very considerably “impaired” and wholly transformed. In this respect the Act itself is quite as revolutionary as was the original Bill. The amendments put up by my colleagues and myself to the Secretary of State in 1935, in accordance with our instructions and with the representations contained

(1) “Chamber of Princes: Joint Opinion of the Rt. Hon. Sir William Jowitt, K. C., Mr. J. H. Morgan, K. C., and Mr. D. N. Pritt, K. C.” page 21.

(2) “Chamber of Princes: Joint Opinion of the Mr. Wilfrid Greene, K. C., Rt. Hon. Sir William Jowitt, K. C., and Mr. J. H. Morgan, K. C.” page 17.

in the "Views of Indian States", were, to a considerable extent, not accepted by the India Office while the effect of their acceptance in other cases was merely verbal. In other words, the form of certain clauses, affecting the sovereignty of the Princes, was changed but the substance of the clauses remained the same. Two instances will suffice. Three of the most distinguished members of the Order of Princes, namely Their Highnesses the Maharaja of Patiala, the Nawab of Bhopal, and the Maharaja of Bikaner, in a letter of 27th February 1935, addressed to the Viceroy at a critical moment in the passage of the Government of India Bill, formulated certain criticisms of the Bill and expressed the gravest apprehensions if "the fundamental points" put forward by them were not accepted.<sup>1</sup> Among these fundamental points Their Highnesses set out the following:

"The Princes have never agreed to accept any Act of the British Parliament as binding on them, and no Prince will, as contemplated by Clause 6 (1) (a) of the proposed Bill, declare 'that he accepts this Act as applicable to himself *and his subjects*'."

These words "and his subjects" occurred and recurred throughout the original draft of the Bill and the Princes took exception to them as implying a diminution, as they unquestionably did, of their sovereignty over their subjects. As a result of their objections, amendments to the Bill were accepted by the Government, and duly passed, omitting the words "and his subjects." The question therefore arises as to whether those amendments have "saved" the existing sovereignty of the Princes over their subjects. To that question there can only be one answer. The amendments were purely verbal and quite illusory. They have not changed the legal effect of the original draft of Section 6 of the Act in the slightest degree. To legislate for a Federated State is to legislate for the subjects of the Ruler of that State and it matters not whether the subjects are expressly mentioned as coming within the scope of the Federal legislative authority or whether they are not so mentioned. An examination of the wording of Section 99 of the Act puts this conclusion beyond doubt. That Section provides that the Federal Legislature may make laws "for the whole or any part of British India or for any Federated State". The legislative authority of the Federation is therefore described, in this Section, *in identical terms in the case of both British India and of the States*. Now there can be no question that power to legislate "for British India" means power to legislate for all the subjects of His Majesty in British India and indeed for everybody else resident therein. Indeed, the constitutions of all the Dominions and Colonies

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(1) "Views of Indian States" (Command Paper 4843 of March, 1935) pages 14-16.

invariably define the grant of legislative power in geographical terms as a power to legislate for the territory. They never specify it as a power to legislate for His Majesty's subjects in the colony, for the simple reason that a power to legislate for the territory always carries with it, as a matter of course, the power to legislate for all persons therein. It is therefore obvious, without further comment, that the subjects of every Ruler of a Federated State will be just as much subjected, and as directly subjected, to the Federal authority as His Majesty's subjects. Their allegiance will henceforth be divided between the Ruler and the Federation. The change of words in Section 6 of the Act has therefore entirely failed to meet the objections raised by Their Highnesses of Patiala, Bhopal and Bikaner. Yet "the counsel" who is responsible for the Explanatory Memorandum circulated to the Constitution Committee quotes this very Section of the Act in support of his confident opinion that the sovereignty of the Princes is "adequately safeguarded".

7. Turning from the legislative sphere to the executive, I find this confident statement of "counsel" in the Memorandum laid before the Constitution Committee even more misleading. It will be recalled that, during the progress of the Government of India Bill, the States were extremely apprehensive of the effect on their sovereignty of the penetration into their States of numbers of Federal officials administering Federal law *and enforcing it*. They therefore sought accordingly to secure amendments to the Bill designed to enable them to exclude the direct exercise of the executive power of the Federation. The amendments, contained in Clause 8 of the Act, which I and my colleague succeeded in obtaining, were, however, quite inadequate to secure all that the Princes desired. Sub-section 2 of Section 8 is clearly no "safeguard". The effect of that sub-section is to "exclude" in certain contingencies, which I will deal with later, the continued exercise of the executive authority of the Ruler in his State even in matters in which he has hitherto been in the habit of exercising it. It is therefore a manifest absurdity on the part of the writer of the Explanatory Memorandum to cite Section 8 of the Act, as he does, in support of his conclusion that the sovereignty of the States is maintained "unimpaired." It is of the utmost importance that the Princes should bear in mind that the *coercive* power of the Federal Government, in securing Federal legislation to compel the States to carry out any executive obligations imposed on them, is quite unlimited under the Act. The Federal Legislature is, as has been well said in a Canadian case, "omnipotent"<sup>1</sup> within the Federal sphere and, although the

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(1) "Jurisdiction conceded, the will of the Legislature is omnipotent, according to British theory and knows no superior"—*Severn v. the Queen* 2. S. C. R. p. 81.

States hope and expect that the enforcement of Federal obligations upon a State will be confined to the "Viceroy" in the exercise of paramountcy, it is not so confined either in the Act or in the draft Instrument of Accession. The hope and expectation of the Rulers in this matter may turn out to be a painful delusion and it is not at all impossible, legally speaking, that they may find themselves subjected to the same drastic legislation, of a penal character, as that to which the States of Australia have recently been subjected<sup>1</sup>.

But there is another Section of the Act which goes even further in the direction of "impairing" the "sovereignty" of the States. It is a Section without precedent in any Federal Constitution and may be properly described as "anti-Federal"—a term used in another connection by the Political Officers—in that it is fundamentally opposed to the Federal principle that Federated States shall never be compelled by the Federal Legislature to act as the agents or instruments of the Federal Government. It is a manifest violation of Federal principles as understood and applied in Australia and Canada, in both of which Federations the Federal Legislature has no such general power. The Section in question is Section 124 sub-section (3). By that sub-section the Federal Legislature is empowered to compel the States to act as its agents by "imposing" duties on the States in respect of any Federal Act extending to a State. I will deal fully with the implications of this sub-section at a later stage in this Opinion. The dangers to the Indian States of this innovation cannot be better expressed than in the words of the leading authority on the Federal Constitution of Australia which are as follows:

"The Commonwealth (*i. e.*, the Australian Federation) may not require the organs of the State Governments to act as its agents or instruments. The States have their own functions to fulfil and the admission of a paramount power in the Commonwealth to cast upon State organs the execution of Commonwealth objects without the consent of the States would be, in the end, to destroy the independence of the States"<sup>2</sup>

But this is exactly what Section 124 of the Government of India Act enables the Federal Legislature to do.

8. It remains to consider this "Explanatory Memorandum" in the light of the "federal union" created by the Act. A federal union means, in law, the surrender of sovereignty and an irrevocable surrender. In the Hyderabad

(1) This Australian legislation, and the leading cases upon it, are dealt with below (paragraph 15).

(2) Harrison Moore, "The Commonwealth of Australia", (2nd edition) at page 439.

Memorandum (at page 2, paragraph 2) objection is taken to the words in the draft Instrument of Accession in which the Ruler's "purpose" is declared to be that of "uniting" in a Federation. The State of Hyderabad has had the advantage of being advised by a distinguished English counsel, Mr. Walter Monckton, K.C., and everything that Mr. Monckton says or suggests is entitled to respect. His point is important but it is altogether too late, in my opinion, to do anything to avert the consequences which, in marked contrast to the author of the Explanatory Memorandum, he appears to apprehend. The union created by the Federation Act is an organic union and nothing in the way of verbal amendments in the Instrument such as Hyderabad proposes can avail in the slightest degree to alter the "uniting" character of that union. The words used in the Act, *i. e.* the words "federally united", are identical, as an expression of the intention of Parliament, with those of the Canadian and Australian Constitutions and there is no escape from them. Nothing short of an amendment of the Act itself could alter their effect. The only way to alter their effect would be to secure to the States the right of withdrawal, in the event of certain contingencies, from the Federation. Such a right is commonly known as "the right of secession". In accordance with instructions of the Chamber of Princes and the views expressed by Their Highnesses of Patiala, Bhopal, and Bikaner<sup>1</sup> and by the States' Ministers Committee<sup>2</sup>, I and my fellow counsel endeavoured to secure from the Secretary of State in June 1935 an amendment to provide for the "right of secession" in the event of "the breakdown" of the normal authority of the Federation as contemplated by Section 45 of the Act. We failed to secure it. Our draft amendment<sup>3</sup> was decisively rejected.

Not only is there no right of secession under Section 45, but that section is so drafted as to enable the whole of "India", *including the Federated States*, to be subjected indefinitely to the dictatorial powers of the Governor-General for any number of years.<sup>4</sup> But it is now altogether too late to make any attempt to secure any amendment of Section 45 of the Act and I certainly do not advise the Chamber of Princes to do anything of the kind. I

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(1) "Views of Indian States", p. 17.

(2) *Ibid.*, p. 8.

(3) The draft amendment submitted by counsel and rejected by the Secretary of State was as follows:—  
 "Where by virtue of a proclamation under this section any provisions of this Act relating to any Federal body or authority remain suspended for a period of more than two years, the Ruler of any Federated State at any time after the expiration of the said period and whilst any of the said provisions continue to be so suspended, may by an Instrument executed by himself and delivered to the Governor-General declare that as from such date as may be specified in that Instrument *the Instrument of Accession of his State is abrogated and as from the date so specified his State shall cease to be a Federated State within the meaning of this Act*".

(4) This is an aspect of Section 45 which has escaped all comment, but immediately after the rejection of the Draft amendment I drew attention to it in a confidential memorandum. At the request of Sir Prabhshankar Pattani, I deal with the matter below.

should have thought it unnecessary to go into the matter at this late stage but for the anxiety of His Highness the Maharaja of Patiala to have my opinion on the point. I need say no more on the subject beyond observing that the Federal Union provided for by the Act is, in the absence of any right of secession, an organic union and indissoluble. As such, it necessarily involves a fundamental surrender of sovereignty, partial though that surrender may be. The author of the "Explanatory Memorandum" has either ignored this elementary fact or is ignorant of it.

9. I conclude with some observations on the "sovereignty" of the States acceding to the Federation in relation to the amendment of the Constitution Act. The subject of amendment may be looked at from two points of view :

- (1) Amendments of the Act on the initiative of the States,
- (2) Amendments of the Act in opposition to the wishes of the States but on the initiative of the Imperial Government or the Federal Government.

As regards the first case, the States might at some future date find their rights, authority and powers so seriously curtailed, as the result of judicial construction of the Act, as to move them to petition the Government and Parliament of Great Britain to amend the Act in such a manner as to restore the construction which the Rulers of the States had put upon the Act when they decided to accede to the Federation. This is, of course, the only way in which the judgment of the Supreme Court of Appeal, interpreting an Act of Parliament in a sense contrary to that intended by the Legislature which passed it or to the intentions of the parties who promoted it, can be "corrected". The possibility of such a remedy is not excluded by the Act but, as a matter of constitutional practice, it is extremely unlikely that the Government and Parliament of Great Britain would consent to give effect to any such Petition on the part of the States. Legislation to give effect to such a Petition would, *ex hypothesi*, mean legislation to limit the powers of the Federal Legislature as interpreted by the courts. A Federal Legislature, like every other Legislature, is jealous of its powers and I do not know of a single case in which such a Legislature has ever supported a Petition in favour of a limitation of its powers. If, as is extremely probable, the Federal Legislature of India, in which the States will always be in a minority, opposed such a Petition, such opposition would almost certainly be decisive with the British Government against any Parliamentary legislation to give effect to it. In spite of the strong tendency of judicial construction in the direction of the curtailment of "State rights" apparent in the development of the Federal

Constitutions of Australia and Canada<sup>1</sup> no amendment to restore those rights has ever received the support of the Federal Legislatures of the two Dominions. As a result, no such amendment has ever been made. It is significant that, in spite of the growing agitation of four out of the six States of Australia, the only amendment of the Federal Constitution which has ever been made has been an amendment (section 105 A) enlarging, instead of diminishing, the Federal power. The explanation of this somewhat paradoxical development is that the four States in question are hopelessly outnumbered, in point of representation, by the two largest constituent units in the Lower House, even as the Indian States will be outnumbered. The two largest constituent units, New South Wales and Victoria, dominate the Lower House, and in virtue of their domination, have no desire to see its legislative powers curtailed.

10. This question of constitutional amendment has an important bearing upon that I have called the "indissoluble" character of the Federal union which will be created by the accession of the States. The word "indissoluble" is nowhere used in the Act as it is in the preamble to the Federal Constitution of Australia. But the union is just as indissoluble as in the case of the Australian Commonwealth and in the same sense. The States acceding to the Federation have, as has been explained in a preceding paragraph, no right of secession. Secession is only possible if the Imperial Parliament, at the request of the States, amends the Act to that effect. This, it may be taken as certain, the Imperial Parliament will, as a matter of constitutional practice, never consent to do. To do so would be to negative the "pledge" of the ultimate grant of Dominion Status made by the Secretary of State during the passage of the Bill through the House of Commons<sup>2</sup>. The failure of the Petition of the State of Western Australia for secession from the Commonwealth may be regarded as a precedent fatal to any chances of such a petition by the Indian States being granted and implemented by the Imperial Parliament. In that case, of which I can speak with particular knowledge as Counsel for the State of Western Australia, the Joint Parliamentary Committee not only rejected the Petition but decided that it could not even go into the merits of the case. The ground of their decision was that "the established constitutional conventions of the Empire"<sup>3</sup> put it "outside the competence" of Parliament to give effect to such a Petition.

11. In the two preceding paragraphs I have dealt with the possibility of amendments of the Act on the initiative of the States. It only remains to consider

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(1) This tendency is explained and illustrated in paragraphs 15 and 16 of this Opinion.

(2) This matter is fully dealt with in paragraph 18 below.

(3) "Report of the joint Parliamentary Committee on the Petition of Western Australia" page X.

the possibility of amendments of the Act in opposition to the wishes of the States, on the initiative of the Imperial Government or of the Federal Government. Are the States completely protected against such amendments taking the form of an extension of Federal powers at their expense and in violation of their Instruments of Accession? This was a question carefully considered in the second Opinion which I wrote for the Chamber of Princes in 1935 and the answer given therein was that under the Government of India Act such legislation would, in virtue of the words of section 6 sub-section 5, be held to be of "no legal effect". The view was also expressed in that Opinion that in the event of Parliament passing such legislation "the States would be entitled to claim the right to secede". But that is a very different thing from saying that, in such circumstances, they would have a legal right to secede. In my opinion, they would not. The words used in sub-section 5 of section 6, as also in section 45 of the Act, are that certain legislation, to the prejudice of the rights of the States, shall not be passed "without affecting" the accession of the States. But the words "affecting the accession" cannot be construed, legally speaking, as being equivalent to "terminating accession". If they meant so much, one would expect to find the word "terminating" actually used and not such an ambiguous and attenuated expression as "affecting". In my opinion, all that the word "affecting" in these sections of the Act means, or can mean, is "affecting the terms of accession". That is a very different thing from affecting the substantive act of accession. If the Imperial Parliament were, in the event of its legislating in violation of the terms of the Instrument of Accession, to use the *non obstante* words "Notwithstanding anything contained in section 6, sub-section 5, of the Government of India Act", then such legislation would, unquestionably, be valid and the Privy Council would have no option but to declare it of full legal effect. It must never be forgotten that no Act of Parliament can bind a future Parliament and that any future Parliament will be quite free to repeal the self-imposed limitation on its powers contained in sub-section 5 section 6. The Statute-book is full of examples of repealing legislation of this kind. A familiar example is the case of the Union Act of 1800. The Parliament which passed that Act enacted that a certain section of it should be observed "for ever". None the less the Parliament of 1867 repealed the section.

12. It will be recalled that Clause 6 of the draft Instrument of Accession provides as follows :

"Nothing in this Instrument shall be construed as authorizing Parliament to legislate for or exercise jurisdiction over this State or its Ruler in any respect".

Do these words operate to prevent Parliament from so legislating and, in particular, from legislating in violation of the Instrument of Accession? There can be no doubt about the answer to this question. They do not: No treaty, not even a treaty with a Sovereign Power, can operate to limit the omnipotence, as it has been rightly called, of Parliament. Parliament can legislate in derogation of any treaty. There is no rule of law, whether of international law or of constitutional law, to prevent Parliament from legislating for or exercising jurisdiction over the Indian States or their Rulers. It is, indeed, a rule of international law that British statutes will not be held to apply to foreigners outside British territory. But that is only a rule of construction. If the words of the statute make it clear that Parliament intended it to apply to foreign States and their subjects, the statute will apply. This principle has been well expressed in a leading case in the following words: "If the legislature of England in express terms applies its legislation to matters beyond its territorial capacity, an English court must obey the English Legislature, however contrary to international comity such legislation may be"—*Niboyet v. Niboyet* (1878) 4 P. D. 1. The words of Clause 6 of the draft Instrument of Accession are therefore quite powerless and inoperative to protect the States against further legislation, even legislation violating the terms of the Instrument of Accession itself. It is, of course, true that Parliament very rarely legislates to bind foreigners in foreign territory although it has done so in one instance. It refrains from doing so for a very simple reason. The reason is that such legislation would be contrary to the principle of International Law known as "the comity of nations" and might, indeed, provoke retaliation. But the principles of International Law have no application to the Crown and Parliament of Great Britain in their relations with the Indian States. I do not say that the Imperial Parliament is likely, as a matter of fact, to legislate in violation of the Instruments of Accession. All I am concerned to point out is that clause (6) of the Draft Instrument cannot be regarded as a legal safeguard against such a contingency.

13. It will now, I think, be clear that the views expressed in the "Explanatory Memorandum" laid before the Constitution Committee as to the "unimpaired sovereignty" of the Indian States are wrong in law, misleading and dangerous. The "Explanatory" Memorandum explains nothing and confuses everything.

### Section III.

#### THE INTERPRETATION OF FEDERAL CONSTITUTIONS WITHIN THE EMPIRE.

14. In the present negotiations with the Government of India the objective of the Chamber of Princes should be mainly directed to securing such definitive limitations of the Federal Legislative List as will, as far as possible, secure the States, after their accession to the Federation, from finding themselves caught "in a trap." By that I do not, of course, mean to impute any intention whatsoever on the part of the authors of the Act to lay a trap. The Act has, as I observed in the Opinion upon the Bill which I wrote for the Chamber in February 1935, been drafted with a "scrupulous regard for the rights of the Rulers of the States", so far as the continuance of such rights is compatible with any scheme of Federation at all. What I do mean is the simple historical fact that always and everywhere the contracting parties to a Federal Constitution have found that, as a result of judicial construction, the Federal contract has turned out to have a meaning which they never intended when they made it. On the whole, this judicial construction has resulted in their finding that they have given up powers, rights and authority which they never intended to give up. None the less the surrender of these rights has proved to be irrevocable. It could only be revoked either by secession, in other words withdrawal from the Federation, or by amendment at the instance of the States of the Federal Constitution. Neither course will be open to the States once they have acceded to the Federation — an aspect of the matter which I have already dealt with earlier in this Opinion.<sup>1</sup> If it be, in the words of Burke, "no small part of political wisdom to know what to avoid", as undoubtedly it is, the Indian States will do wisely to pay careful attention to the unforeseen consequences which have followed the development of Federalism elsewhere and then seek, by appropriate limitations of the Federal Items and otherwise, to avoid them. With these unforeseen consequences I proceed to deal.

15. The "historical fact" itself is indisputable. I will illustrate it, briefly enough, by what has actually happened in the case of the two existing Federal Constitutions within the Empire. Bearing in the mind that this opinion will be read largely by those who are not trained lawyers, I will quote at the outset some striking observations in non-legal language from a leading article in the "Times" on the subject of the agitation in Australia, extending to

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(1) See paragraphs 8 and 9 above.

four out of the six constituent States and now lasting over many years, excited by the decisions, adverse to State rights, which have been given by the Federal High Court.

“The Constitution established by the Act of 1900 has created between the Commonwealth and the States a relationship very different from anything which could have been foreseen by its authors. In drafting it they took the most elaborate precautions to preserve to the States all the rights and powers which were not explicitly assigned to the Federal Government and the Federal Parliament. *These precautions, however, have proved ineffective.*”

—The “Times”, 24 Feb. 1934.

Of a very recent judgment of the High Court in November last, the text of which is not yet before me<sup>1</sup>, the “Times” in another leading article has observed:

“The judgment is described in Australia as one of the most far-reaching ever delivered in the High Court and as potentially destructive of the most carefully safeguarded rights of the States.”

—The “Times”, 14 November, 1936

These are broad statements of fact. I proceed to explain them in terms of law. The Federal Legislature of Australia is endowed with what have been called “plenary powers” in the Federal sphere. The Federal Legislature of India will unquestionably be held to be endowed with the same powers. This doctrine of plenary powers has been described in a whole series of judgments by the Privy Council, alike in Canadian and Australian cases, as meaning that once legislative powers are conferred by Parliament upon an overseas Legislature, the Act granting such powers must be held to authorize “the utmost discretion of enactment” in the exercise of such powers, so much so that, within the prescribed sphere, the authority of the Federal Legislature is as “sovereign” as that of the Imperial Parliament itself. The result of the application of this doctrine by the High Court of Australia is forcibly illustrated by a recent judgment in which it was held that, in order to enforce a certain Section (105 A) of the Federal Constitution, a Federal law empowering the confiscation of the revenues of a State in default in the payment of interest on guaranteed loans, was a valid exercise of Federal power. The decision in this case—*The State of New South Wales v. Commonwealth and Others* (1931-1932) 46 C. L. R., 155—has been described by the present Attorney-General of the Commonwealth, Mr. Menzies, as “the death-knell

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(1) The case is *In re Air Navigation Act*. I have written to my friend Sir J. G. Latham, the Chief Justice of Australia, for the text of the judgment.

of State rights"<sup>1</sup>. No such decision was ever contemplated when the Section of the Constitution in question was accepted by the States. They were, in fact, assured by the Attorney-General of the Commonwealth, Mr. Latham<sup>2</sup> that the Section would never have the consequences which the High Court subsequently decided that, as a matter of law, it did have. The result of this and earlier decisions, such as the decision in the *Commonwealth of Australia v. The State of New South Wales* (1923) 32 C. L. R., 310, has been that the conception of a "sovereignty" being secured to the States, which played so large a part in the intentions of the statesmen who drafted the Federal Constitution at the Melbourne Convention of 1898 which preceded its adoption, has wholly disappeared in the Australian courts. "The appellation *sovereign state*", declared the High Court in the case last cited, "as applied to the construction of the Commonwealth Constitution, is entirely out of place and worse than unnecessary."

16. The same things has happened, although not to the same extent, in the case of the Federal Constitution of Canada. In a famous case, known as *Russell v. The Queen* 7 Appeal Cases, 829, the Privy Council put a construction on the power of the Federal Legislature so wide that, for the time being, it threatened to upset altogether, in favour of the Federal Legislature, the balance of distribution of legislative power between the Federation and its constituent units and to make the latter wholly subordinate to the former. It is only right to observe that, after a period of uncertainty extending over 40 years, the Privy Council held, in effect, that *Russell v. The Queen* had been wrongly decided. But one cannot exclude the possibility of a similar period of uncertainty, highly detrimental to State rights, in the early years of the Federation of India. There have been many other decisions, notably in the *Fort Frances Pulp Co. case* (1923) A. C. 695, the *Aeronautics Case* (1932) A. C. 54 and the case of *Attorney-General of British Columbia v. Attorney-General of Canada* (1924) L.J.P.C. 129 which have operated to extend the Federal powers to a degree that was certainly never contemplated by the contracting parties.<sup>3</sup> In Canada, as also in Australia, words in the Federal Constitution purporting to exempt from Federal taxation the "property" of the "State" Governments have been held to be largely inoperative.<sup>4</sup>

17. The same tendency, adverse to the rights of the constituent units of the Federation and, what is equally important, contrary to their intentions as

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(1) See Report of J. P. C. appointed to consider Petition of W. Australia p. 8 of Proceedings.

(2) *Ibid* p. 38.

(3) These cases in their bearing upon the particular problems affecting the Indian States are dealt with below.

(4) The leading Australian case is *Attorney-General of New South Wales v. Collector of Customs* (1908) 5 C.L.R. 818; the leading Canadian case is *A-G. for British Columbia v. A-G. for Canada* (1924) L.J.P.C. 129.

contracting parties has been apparent in what may be called the fiscal sphere. The balance of power between the Federal Government and the State Governments, devised by the parties to the Federal contract, has been largely upset, to the detriment of the States in Australia and the Provinces in Canada, by the increase in Federal expenditure, unforeseen at the time the Federal Constitution was accepted, and the consequent exhaustion, in the Federal interest, of the taxable capacity of the States and Provinces. The situation in Australia has been aptly described in the following words:

“The Constitution contemplated that whenever there was a surplus of Commonwealth revenue over expenditure, the excess should be distributed among the States but it was tempting and easy for Commonwealth Treasurers to increase their expenditure up to the level of their revenue. And where there did remain a surplus they found means of evading this constitutional obligation.”

—The “Times”, 24 Feb. 1934.

The section of the Australian Constitution referred to in this extract provides that “the Parliament of the Commonwealth may provide on such basis as it deems fair for the monthly payment to the States of all surplus revenue of the Commonwealth”. Such sections purporting to impose such “imperfect obligations”, as they have been called, can never be enforced in the Courts and if the Federal Legislature chooses to disregard them the States are helpless. There are sections of a similar character in the Government of India Act, in particular, section 147 dealing with the remission of cash contributions and the controlling provision of section 138 (2), as also section 141 (2) dealing with the sanction of the Governor-General for the imposition of Federal surcharges on income-tax in the case of the States. I will deal with the effect of these sections more fully in the proper place. I content myself at this stage with saying that the provisions of these sections of the Government of India Act are as unenforceable in law as the section of the Australian Constitution previously quoted has proved to be. Whether, at this late stage, anything can be done to secure the Indian States against the same impoverishment of their fiscal resources as has overtaken the States of Australia and the Provinces of Canada I will consider in a moment. As regards the exhaustion of the taxable capacity of the units by unforeseen increases of Federal taxation, the danger to the Indian States may not, indeed, be so great as that which has attended the developments of Federation in Australia and Canada for the simple reason that in

those two Dominions there are no restrictions on the scope of the taxing powers of the Federation. In both those countries the Federal Government is empowered to impose any kind of tax, direct or indirect. Under the Government of India Act the Federal Legislature can, with the exception of surcharges on Income-tax, only levy such taxes under such heads of the Federal Legislative List as the States accept. But in so far as the States accept any particular item of taxation, Customs, Excise, Succession duty, Stamp duty, Income-tax, they must be prepared to find the exercise of the Federal powers, with the priority attaching to it, as exhaustive of their resources as it has proved to be in Australia and Canada, unless suitable limitations on their acceptance of such items can be devised and accepted.

18. Another factor which has operated to increase the predominance of the Federal power at the expense of the State units has been, in the words of their Lordships in a Privy Council case, "the silent operation of constitutional principles". That such principles will play their part in the development of the new Federal Constitution cannot be doubted. No self-governing Constitution in the British Empire has ever remained in a state of arrested development. It is the duty of counsel advising the Chamber to consider carefully the ultimate effect of such development upon the States acceding to the Federation. This I proceed to do. There is one constitutional principle which has operated, in the case of Australia, to depress considerably the rights of the States. It is the principle that the Governor-General should act on the advice of Ministers representing the majority in the Lower House of the Federal Legislature. The powers of the Governor-General, as provided for in the text of the Federal Constitution of Australia, are, as in the case of the Government of India Act, of a dual character. In certain matters (see Sections 5, 57, 58, 64, 128.) it is "the Governor-General" who is empowered to act. In other matters it is "the Governor-General *in Council*" who is empowered to act. In the former case the Governor-General acted, and was intended to act, in his discretion. In the latter case he acted, and was intended to act (see S. 63), on the advice of Ministers. But it has now come to be the accepted rule that *in all cases* the Governor-General must act solely on the advice of Ministers. His "discretion" has disappeared. It has disappeared, not as the result of any amendment in the Constitution Act — no such amendment has in fact been made. The disappearance is due to the "silent operation", in other words the gradual and unobtrusive development, of the principle that in all the self-governing Dominions the Governor-General must act solely on the advice of Ministers. The principle is one of the applications, in the executive sphere, of what is known as the doctrine of "Dominion Status". It was adopted as early as 1914 by the Governor-General of Australia

who, in pursuance of it, declined to exercise the "discretion" conferred upon him by the Constitution to submit to the electorate proposals *by the States*, in the form of resolutions of the Senate, for the amendment of the Constitution. His action was a virtual abdication of the functions conferred upon him by the Act. The ground of his refusal was that he felt himself compelled, "following" as he explained, "the established usage of responsible government", to act on the advice of his Ministers who objected to the proposals of the of the Senate. This "degradation", as it has been called in Australia, of the Senate as the custodian of the State rights was directly contrary to the intentions of the Convention which drafted the Federal Constitution<sup>1</sup>, but the Courts were powerless to interfere. The exercise or the non-exercise of the discretion of the Governor-General could not be the subject of any question in the Courts of Australia. They have no jurisdiction to interfere in such matters, even as the Federal Court and the Privy Council will have no jurisdiction to interfere in the exercise or non-exercise of the Governor-General's discretion under the Government of India Act. One cannot exclude the possibility of a departure, similar to that which has taken place in Australia, in the course of time in the exercise of the Governor-General's discretion under the Government of India Act in proportion as the principle of "responsible government" to its fullest extent develops in the Federation. That such development will occur has, in fact, been the subject of an express "pledge" by the Secretary of State in the course of debates on the Government of India Bill in the House of Commons. I refer to the pledge of Dominion Status. If and when that pledge is redeemed and "Dominion Status" is granted to the Federation of India, the whole of the "safeguards" for the rights and interests of the States, contained in the Act, must inevitably disappear. They must disappear because their continuance is quite incompatible with the grant of Dominion Status to India. Such a disappearance can be effected without any amendment of the Act and therefore can in no way "affect" the accession of the States. It can be effected by a simple despatch from the Secretary of State to the Governor-General directing him in future to exercise his "discretion" solely on the advice of his Ministers. I will deal with this matter more fully when I come to consider the Instrument of Instructions to the Governor-General. It is important, in this connection, to observe further that the whole of the provisions in the Act as to the power of the Governor-General "in his discretion" to summon and prorogue the Legislature (section 19), to dissolve the Federal Assembly [section 19 (2) c], to make rules [section 28 (4)], to convene joint sittings

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(1) For the history of this departure, see Report of the Joint Parliamentary Committee on the Petition of the State of Western Australia at pages 33 to 37.

of both Chambers ( section 31 ), to assent to Bills ( section 32 ), to prohibit discussion on the personal conduct of a Ruler of any Indian State ( section 38 ), to give or withhold his "previous sanction" ( sections 108 and 109 ), and many other sections of a like nature in the Act, are quite unenforceable in law. They are, in fact, purely "political" safeguards. As such they resemble what Dicey calls those "conventions" of the constitution which depend entirely for any force they may have on the degree to which they are voluntarily respected and on nothing else. With the development of full self-government in India they too must disappear.

19. That many of the developments, so adverse to the rights of the States, which I have summarized in the preceding paragraphs of this Opinion, are neither intended nor contemplated by the British Government and the British Parliament in the enactment of the Government of India Act may be taken as certain. Neither were they intended nor contemplated by the Government and Parliament which was responsible for the enactment of the Federal Constitutions of Australia and Canada. The fact remains that those developments have taken place. The explanation is to be found in the fact that once a Bill has received the Royal Assent and been placed on the Statute-Book, it has passed beyond the control of the Legislature which enacted it and becomes subject exclusively to the control of the Courts whose duty it is to interpret it. In such interpretation the intentions of Parliament, as expressed in the debates on it, are entirely ignored by the Courts which, indeed, will not admit anything said or undertaken by the Minister in charge of the Bill, or by anyone else, to govern their interpretation of it. That interpretation has on many occasions been in direct contradiction of the explanations given to the House of Commons as to the meaning of particular clauses of the Bill. A remarkable case in point occurred only two years ago when the Privy Council, in the case of *Moore v. Attorney-General of the Irish Free State* (1935) A.C. 484, held, in effect, that the assurances of the Attorney-General, given in the course of the debates on the measure in the House of Commons, that the Statute of Westminster would not enable the Irish Legislature to repeal or amend the Anglo-Irish "Treaty" were, in point of law, wrong. The Irish Legislature has in fact by subsequent legislation availed itself of the powers conferred by the Statute of Westminster to repeal the larger part of the Treaty and the Privy Council held that this repealing legislation was within those powers and must prevail.

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## Section IV.

### THE INTERPRETATION OF THE GOVERNMENT OF INDIA ACT BY THE COURTS.

20. The question arises whether anything can be done at this stage to secure the States against similar interpretations of the Act by the Courts such as may not only defeat the intentions of the States in acceding to the Federation but may also negative the assurances of the British Government on which the States accede to it. The matter is so important, indeed so vital to the future of the States, that I propose to examine it in some detail. The Political Officers in their interviews with the representatives of the different States have, with conspicuous honesty, pointed out that anything said by them in explanation of the Act, though true to the best of their knowledge and belief, cannot be regarded as "authoritative" inasmuch as the Act, the Instrument of Accession and the Items in the Federal List "can be authoritatively defined only by the Federal Court and the Privy Council". But this is true not only of any explanations given by the Political Officers but also of every explanation given of the clauses of the Bill in its passage through the House of Commons by the Secretary of State for India and by the Attorney-General himself. It is equally true of any pledges given by the Secretary of State, even when given in the form of official correspondence, in official publications, such as the Note, Despatch, and Memorandum contained in the Command Paper of March 1935 entitled "Views of Indian States". No such explanations and no such pledges, although given in good faith, will be or can be of the slightest value, legally speaking, once the States have acceded to the Federation. The Privy Council will, in accordance with a well-known rule of law, not admit any evidence of any such explanations having been made or of any such pledges having been given in support of any contention by the States as to the meaning of the Act and its schedules. I observe that Sir Manubhai Mehta, in the Report of the discussions with the Mudhol Durbar, drew attention to certain pledges given by Sir Samuel Hoare in the House of Commons in February 1935. I in no way dissent from the admirable argument put forward by Sir Manubhai Metha in that report. All I am concerned at this stage to establish is that if the States are relying on any such official explanations and official pledges as safeguards for the protection of their interests when Federation is established, they must secure their incorporation in some kind of document which shall have the same force as the Statute itself and be judicially noticed. If they are not so incorporated, no court can or will take any notice of them.

21. What I have said above of the inadmissibility of the pledges and explanations of the Secretary of State as evidence of the intention and meaning of the Act is equally true of the resolutions of the Round Table Conference and the recommendations of the Joint Parliamentary Committee. The Proceedings of the Round Table Conference bear the same relation to the Act as the Proceedings of the Melbourne Convention of 1898 and the Quebec Resolutions of 1864 (upon which the Federal Constitutions of Australia and Canada were founded) bear to the Constitution Act of those two countries. But neither the Melbourne Convention Proceedings nor the Quebec Resolutions have ever been admitted by the Privy Council to govern or explain the meaning and intention of the Federal Constitutions themselves. The recommendations of the Joint Parliamentary Committee, even where the draftsmen of the Act have intended to follow them, will be equally inadmissible as evidence of the meaning and intention of the Act. Many cases from the Law Reports could be cited in support of all that I have said in this and the preceding paragraphs as to the inadmissibility, and therefore the worthlessness, legally speaking, of any such recommendations, explanations, and pledges unless they are already to be found in the Act or are incorporated in the Instruments of Accession or some statutory document. But one case, and a very recent one, on the interpretation of statutes will suffice. I refer to the judgment of the House of Lords in *Assam Railways etc. V. Inland Revenue Commissioners* (1935) A. C. 445. In that case, counsel for the appellants attempted to cite, in support of his construction of a statute, the meaning of which was in dispute, namely the Finance Act, certain recommendations contained in the Report of a Royal Commission which the statute purported to adopt. Counsel for the respondents objected to the Report being admitted and the House of Lords upheld the objection. Lord Wright laid down the general principle in the following words:

“Counsel sought to introduce into his argument certain recommendations from a Report of a Royal Commission of Income Tax in 1920; he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the Legislature in enacting the section.....But on principle no such evidence for the purpose of showing the intention, that is the purpose or object, of the Act is admissible;..... It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention.”

22. The considerations advanced in the two preceding paragraphs of this Opinion have an obvious bearing on the proposal made by Sir Akbar Hydari in his letter of January 21st, 1937, addressed to the Political Secretary to the Government of India, Sir Bertrand Glancy. In that letter he makes the important suggestion, on behalf of the Informal Committee of Ministers, that,

“Some means, not inconsistent with the canons interpretation, could be found of putting on record and of making available for the assistance of the Courts the intentions of the parties and the agreed understanding between them.”

The suggestion is a valuable one but involves an unprecedented departure, legally speaking, and may prove very difficult to put into operation. I have already in paragraph (20) of this Opinion indicated that some such expedient arises for consideration but it is a rather desperate expedient. I will discuss, in due course, the question of how, if possible, effect can be given to it. Before doing so, it is necessary, however, to consider the question of the rules of law which will govern the interpretation of Instruments of Accession and this I proceed to do.

## Section V.

### THE INSTRUMENTS OF ACCESSION AND THEIR INTERPRETATION BY THE COURTS.

23. The Instruments of Accession will, generally speaking, be subject to the same rules of interpretation as those, explained in the preceding Section of this Opinion, which apply to statutes. A statute has, indeed, been described by Lord Blackburn as “an instrument in writing” and the general rule applicable to deeds or instruments on the one hand and to statutes on the other is the same, namely that “no extrinsic evidence of the intention of the parties to the instrument, whether at the time of executing the instrument or before or after that time, is admissible”—*Shore v. Wilson* (1842) 4 State Trials, N. S. App. 1370. Even if the Instruments were to be regarded as treaties in the sense accorded to such agreements in International law, it must, I think, be taken as certain that any extrinsic evidence of what was said or done in the negotiations preceding the accession of the States to Federation will be held by the Privy Council to be totally inadmissible as evidence of the meaning of the Instruments or of the intention of the parties, the Crown

on the one hand and the Rulers on the other, who made it. English Courts, in construing a Treaty, follow the same rules as they apply to the construction of statutes and other instruments namely that "the text must be construed as it now stands in the ratified Convention, and the intention of its proposer is immaterial"—*Porter v. Freudenberg*, C. A. (1915) at page 876. The proposed "Instruments" are something less than treaties in International law and something more than "instruments" at common law. They will not be treaties such as the British Government would consent to register at Geneva or to submit to the interpretation of the Hague Court. On the other hand they will be more than an instrument as between private parties at common law as their validity, as distinct from their scope and interpretation, cannot, in virtue of the provision of Section 6 sub-section (9), be subject to question in the Courts. They represent, indeed, something quite unique alike in Constitutional law and in International law. The nearest approach to them is the Treaty of Union between England and Scotland, although the analogy must not be pressed too far. I only know of one case, *Lord Advocate v. Walker Trustees* (1912) A. C. 95, upon the the interpretation of that Treaty and in that case the Court held that in the interpretation of one of its articles extrinsic evidence could not be admitted.

24. If, therefore, it is desired to adopt the suggestion, contained in Sir Akbar Hydari's letter of January 21st, to "place on record" the intentions of the parties and "the agreed understanding between them", that can only be done by incorporating those "understandings" in the body of the Instrument itself or one of the Schedules. But there are, as I have already remarked (paragraph 22), great legal difficulties in the way. If such an understanding is intended to govern the interpretation of the Act itself it can, I think, only be effected by an amendment of the Act. The scope and the operation of the Act can, indeed, be restricted by the terms of the Agreement, and the Act, of course, expressly provides in the case of the States for such restrictions under section 6 and other sections. To that extent it partakes of the character of the British Extradition Act the operation of which may "limited"—see *R. v. Wilson* (1877) 3 Q. B. D. 42—in its application to foreign States by Orders in Council giving effect to treaties made with such States. But no extradition treaty could limit the meaning of the terms used in the Extradition Act, as distinct from limiting the operation of the Act. To do so would amount to amendment of the Extradition Act itself. Nor can a Treaty, nor the negotiations for a treaty, be resorted to for the purpose of construing an Act of Parliament—see *In re Carter Medicine Company's Trade Mark* (1892) 3 Ch. at page 476. And it is, as I understand, apprehensions

as to judicial construction of the Act, contrary to the intentions of the States, which Sir Akbar Hydari's proposal is designed to meet. But it is difficult to see how any document "recording" the "agreed understandings" of the parties could be made available to govern, for example, the interpretation of the Items in the Legislative List accepted by a State. In the interpretation of those Items the Privy Council is bound to apply the ordinary canons of construction and decided cases to determine, for example, the meaning of the term "excise" and to apply the same meaning in the case of the Provinces and of the States in determining whether a Federal Act, is, or is not, an "Excise" Act, subject only to such limitations on the scope, or operation, of such legislation as a particular State may have stipulated in its Instrument of Accession. But to vary the legal meaning of such a term as "excise" and to arrest any judicial development of that meaning, prejudicial to the "intentions" of the States as "parties", would require a new "interpretation section" of the Act itself.

25. The proposal, contained originally in the report of the Hydari Committee, that a Schedule should be annexed to the Instrument of Accession setting out certain "extraterritorial" rights or privileges at present enjoyed by the Rulers in British India and "protecting" them from "interference by Federal legislation" raises the same difficulty. "The specification in a separate Schedule of these rights outside the State will", the Committee reported, "bring such rights under the protection of the Federal Court". I doubt this. The power of legislation of the Federal Legislature in *British India* is expressed in the Act in the most "general" terms [see section 99(2)] and within the sphere of Federal subjects, is when exercised in British India exclusive [see section 100 (1)]. In view of these sections in the Act itself, no Clause in the Instrument of Accession and no Schedule thereto could operate, in law, to restrict the operation of Federal laws in British India itself and I feel sure that the Privy Council would therefore declare such a Schedule to be of no effect. To hold otherwise would be contrary to the whole trend of Privy Council decisions as to "the plenary powers" of legislatures created by Act of Parliament. What the "suggested Schedule" proposes to do is to impose a kind of "servitude" on the exercise of such plenary powers and it is, to my mind, inconceivable that the Federal Court and the Privy Council would take any notice of it. It must always be remembered that the Act and the Instruments of Accession will be read together and when there is any conflict between them it is the Act which will prevail. Most of the "extra-territorial" rights and privileges which it is sought to reserve rest on a kind of "dispensing power" conferred on the Governor-General by particular Acts of the Indian Legislature. For

example, the privilege of Rulers, whose salute is not less than 19 guns, to import free of duty articles intended for their personal use rests on section 23 of the Sea Customs Act (No. VIII of 1878) whereby the Governor-General is given power to exempt such articles from the payment of duty. The privilege of Rulers to be exempted from payment of income-tax in respect of property in British India rests in the same way upon section 60 of the Income-tax Act (No. XI of 1922) empowering the Governor-General to exempt "any class of persons" from such payment. In other words, these privileges rest upon British Indian statutes and might at any time be withdrawn by an amendment of those statutes by the existing Central Legislature. It is, to my mind, quite inconceivable that the Federal Court and the Privy Council would hold that the powers of legislation in *British India* conferred by the Government of India Act upon the Federal Legislature are less than the corresponding powers of the pre-existing Central Legislature or, what amounts to much the same thing, that an agreement in the form of an Instrument of Accession, to which the Federal Legislature is, *ex-hypothesi*, not a party, could operate to diminish them. The same observation applies to the proposal of the Constitution Committee<sup>1</sup>, following the recommendations of the Punjab States Council<sup>2</sup>, to insert as a general limitation under Schedule I to the Instrument of Accession providing that the Federal Legislature, and also the Provincial Legislatures, shall not have power to levy by any legislative or executive act any discriminatory duty. I think that any such clause, even if accepted by the Crown, would be quite inoperative in law. The question of "discrimination" is, however, so important that I reserve it for separate consideration.

26. I turn from consideration of the Instrument itself to its "recitals". A suggestion was made, at one of the meetings of the Constitution Committee, that the first paragraph of the recital declaring that "proposals for the establishment of a Federation in India have been discussed between representatives of His Majesty and of the Rulers of the Indian States" would operate to make the record of such discussions admissible by the Federal Court and the Privy Council as evidence of the intentions of the parties. This suggestion has no foundation in law. The reason is that the recital of an Instrument can no more be invoked to govern the meaning of the operative clauses of the Instrument than the preamble of a statute can be invoked to govern the interpretation of the enacting words. When the words in the operative clauses of an instrument are clear and unambiguous, they cannot be controlled by any words in the recital. And if the recital cannot be invoked, then *a fortiori*

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(1) See interim Report of Constitution Committee paragraph 13.

(2) See its report page 10(a).

no "discussions" referred to in the recital can be invoked. In this respect the "discussions" referred to in the recital bear much the same relation to the Instrument as does a protocol to a treaty in cases where the protocol is either not incorporated in the treaty or not annexed to it. A protocol is a record of the discussions and resolutions during the negotiations preceding the treaty. If such a protocol is neither signed nor annexed to the treaty, even an International Court *i.e.* the Permanent Court of International Justice, will refuse to take notice of it (see Permanent Court of International Justice, Series B, No. 14 at pp. 32-34). If it is so annexed, still more if, as happened in the case of the International Treaty (Convention) for the Protection of Industrial Property of 1883, the contracting parties not only sign the protocol but declare it to have the same force and effect as the treaty itself, then such force it will have. In that case the Protocol defined the meaning to be attached to certain articles of the Treaty itself. This is an argument for the execution of a supplementary Agreement, placing on "record" the intentions of the parties, to be annexed to the Instrument of Accession and to be declared reciprocally by the Crown in its Acceptance and by the Ruler in the body of such Supplementary Instrument to be of the same force and effect as the Instrument of Accession itself. It might be made a term of such agreement itself that the Ruler's accession was conditional on the Federal Legislature, *i.e.* the "Crown in the Federation", executing as a condition subsequent an agreement with the acceding State undertaking to preserve the Ruler's extra-territorial rights and privileges. The Federal Legislature could, however, always by legislation revoke such an agreement. The only way the States could protect themselves against such revocation would be by stipulating in the supplementary agreement that the consequent failure of this condition subsequent should entitle them to withdraw from the Federation, in other words, to secede. I do not recommend such a stipulation—I merely point out that it is the only resource if it is desired to "protect" adequately *i.e.* legally the States from "interference" with such extra-territorial rights and privileges. The only alternative is to secure an amendment of the Government of India Act itself, imposing on the Federal Legislature a restriction of its powers to legislate in the matter of these rights and privileges. But the stipulation in the Instrument of Accession or the supplementary agreement claiming the right to secede in the case considered would also involve an amendment of the Act as the text of the Act itself excludes the existence of any such right. It must always be remembered that whenever a right or a privilege or an exemption from "discrimination" exists in the case of a legislature created by Parliament that right is secured, and can only be secured, by restrictive words to that effect contained either in the Constitution,

*i.e.* the Constitution Act, itself as in the case of the Australian Commonwealth or in some other Imperial Act controlling the grant of the legislative power as was the case with the Irish Free State Agreement Act. There is no other way.

27. The analogy I have instituted in the preceding paragraph between Protocols and a Supplementary Instrument or Agreement must not be carried too far. It holds good as far as I have applied it to the solution of the particular problem, namely the protection of the extra-territorial rights of the Ruler in British India but no farther. In other words, I do not think this expedient of a Supplementary Instrument or Agreement will avail to solve the general problem raised by Sir Akbar Hydari's letter, namely that of "finding some means, not inconsistent with the canons of interpretation, of putting on record and making available *for the assistance of the Courts* the intentions of the parties and the agreed understandings between them". What are the "intentions of the parties" and "the agreed understandings"? They would be extremely difficult to reduce to legal language. Are they to take the form of resolutions of the Chamber of Princes? Or of the resolutions of the Round Table Conference? Or of some letter from the Secretary of State? No Act of Parliament has ever been subjected to such extrinsic sources of interpretation and it is difficult to see how it could be. In my view, the Federal Court and the Privy Council would, in accordance with the "canons of Interpretation" followed by the courts for centuries, hold that such a record would be void and of no effect. The record contemplated is presumably some sort of agreement or some interchange of correspondence between the Chamber of Princes and the Secretary of State as representing the Crown. But the Crown has no power whatsoever, either by agreement with the Princes or even by way of treaty with a fully sovereign and foreign State, to impose on the Courts any particular interpretation of an Act of Parliament. To attempt to do so would be to attempt to legislate out of Parliament. No treaty can control the interpretation of an Act of Parliament. The course suggested is, at one and the same time, highly unconstitutional and legally impossible. The only way of "putting on record" the "agreed understandings" is to incorporate them in a new Act of Parliament to control the interpretation of the Government of India Act in much the same way as the Anglo-Irish "agreement for a treaty" in 1922 was put into an Act of Parliament, namely the Irish Free State Agreement Act, and expressly declared in the subsequent Irish Free State Constitution Act to govern the interpretation of the Constitution. I do not think the Government of India would welcome the suggestion of further Parliamentary legislation to give effect to Sir Akbar Hydari's suggestion, nor can I recommend it.

28. I think the suggestion is based on a misconception of the whole character of the Federation. It is, as regards the States, not an "alliance" but a union and a legislative union. The relationship of the Rulers of the States to the Crown *at present* may be regarded as something in the nature of an alliance, although it is an alliance of a very peculiar kind, in that the Rulers have no power whatsoever, unlike the case of an alliance in International law and diplomacy, to terminate the alliance. Indeed, it is rather significant of the views of the Crown and Parliament as to exclusion of the existing relationship from the domain of International law that the term "alliance", although of frequent occurrence in earlier Acts of Parliament relating to India, has now disappeared from the Statute-book. The term "alliance" is never used in the new Act in its references to the nexus between the States and the Crown. The word used is "relationship". Nor is the status of the States ever referred to in terms of "sovereignty" — the term never occurs in the Act, although it does occur in the Instrument of Instructions and in the draft Instrument of Accession. Even more significant is the omission of the word "treaty" in connection with accession. The word used is "instrument", a term which has certain historical associations in English Constitutional History but is, I think, quite unknown in the domain of International law. My point in making this distinction is simply this: if the "Instrument of Accession were a treaty between two sovereign States, "recognized", which the Indian States are not, as sovereign in International law and Diplomacy, and if further it were a treaty *in no way requiring to be "implemented" by a Statute* — such, for example, as the Treaty of Locarno — then, but only then, Sir Akbar Hydari's proposal could be given full effect by annexing to it, duly signed by the contracting parties and ratified, any documents designed to govern its interpretation. It is only in such cases that the interpretation of the treaty is a matter purely of agreement between the parties and open to the admission of any extraneous evidence of intention that they may seek to admit. But the Instrument of Accession will not be a Treaty and therefore such an expedient is ruled out.

29. The use of the word "Instrument" in place of the word "Treaty" in the sections of the Act referring to the accession of the States is, no doubt, deliberate on the part of the draftsman. It is, I think, the only word which could have been used — in other words it is the only appropriate one. It is the only term consistent with the establishment of such a Federation as that contemplated, or indeed of any Federation, as distinct from a Confederation, at all. Treaties, even the rare class of treaties purporting to be made "forever", are always terminable, if not by notice then by that doctrine of Change of Circumstances known as *rebus sic stantibus* i. e. that "every treaty is understood to apply only so long as the circumstances

contemplated by it continue to exist". But the proposed Federation, like every other Federation, is not terminable—it is perpetual. Very important consequences follow from the fact that it is not a treaty. The rule of construction applicable to treaties, namely that, as a classical authority puts it, "no treaty can be taken to restrict by implication the exercise of rights of sovereignty" (Hall, *International Law*, 8th edition, p. 394) has consequently no application to the Instruments of Accession. Or, to put it another way, the rule of construction of treaties between sovereign States that "one of the highest rights of sovereignty, namely *the right of legislation*" (Hall, page 394,) must be held to be reserved, has no application to the Instruments of Accession. Indeed, those Instruments are nothing if not the surrender of rights of legislation. This rule of Construction has been put another way by another authority (Oppenheim, *International Law*, 4th edition, page 762) in the words "that meaning is to be *preferred* which is less onerous for the party assuming the obligation or which interferes less with the territorial and personal supremacy of the party". In view of the doctrine of the Constitutional law of the British Empire, to which I have frequently referred in this Opinion, namely the doctrine that a grant by Parliament of legislative powers to an overseas legislature implies "plenary powers", I think that any idea that the Instrument will be interpreted narrowly and in favour of the exemption of the States from Federal authority must now be dismissed. The views I expressed in 1935 on page 12 of the Opinion for the Chamber of Princes on the text of the Bill were, I now think, too optimistic from the point of view of the States. It appears to me, on further reflection, that the doctrine of "implied" or "ancillary" powers will be applied by the Privy Council to its fullest extent in deciding the scope and validity of Federal legislation on Federal subjects as "accepted" by the States. This is a matter which I will deal with more fully when I come to deal with the legislative powers of the Federation and the Federal Items. But I will, at this stage, illustrate what I mean by it by a simple example. Under the Government of India Act there is no section, apart from the "railway" section (section 185) which expressly empowers the Federal Legislature to acquire land compulsorily in the Federated State. Nor does the compulsory acquisition of land appear anywhere among the Federal Legislative Items. None the less, the power will, in my opinion, be held to exist, in the case of a Federated State, whenever its exercise is "ancillary" to the effective exercise of legislative power in regard to any "Item" — Items 2 and 7, for example — which may have been accepted by a Federated State. The cases on the interpretation of the Federal Constitution of Canada are, to my mind, decisive on this point. In that Constitution *i. e.* the British North America Act, the Federal legislature

is no where expressly given the power of expropriation i. e. the power to acquire land compulsorily.<sup>1</sup> None the less, it has been held in a whole series of Privy Council cases. in particular *The Attorney General for Quebec v. Nipissing Railway Co.* (1926), A. C. P. 724, that the Federal power to legislate in respect of "any matter" must "necessarily, to a certain extent, enable the Legislature so empowered to affect proprietary rights" and to affect them to the extent of enabling the Legislature to acquire lands, even the Crown lands of the Federal units, compulsorily. In this respect, as in many others, the States acceding to the Federation must be prepared to find that they have, *by mere implication* given up many powers the surrender of which is nowhere to be found in their Instruments of Accession. If those Instruments were "treaties" in the proper sense of the word, which they are not, no such implication would be involved.

30. It only remains for me to consider, in dealing with the subject of Instruments of Accession, the latitude with which they may be made and negotiated. In other words what limitations to acceptance of the Act does the Act permit? Although I am in general agreement with the lucid and admirable explanations of the Act which the Political Officers have given to the representatives of the States, I find myself on one point, a point of law, unable to agree with them. As I understand the Political Officers hold that the States cannot, by their Instruments of Accession, "limit" the exercise of the legislative authority, and with it the executive authority, or anything else, except in relation to the Items in the Legislative List. In support of this contention they cite sub-section (2) of section 6. I am unable to agree with this view. The sub-section says:

"An Instrument of Accession *shall specify* the matters which the Ruler accepts as matters with respect to which the Federal Legislature may make laws for his State, and the limitations, if any, to which the power of the Federal Legislature to make laws for his State, and the exercise of the executive authority of the Federation in his State, are respectively to be subject".

But, if the contention of the Political Officers were correct, the first words of this sub-section should run "An Instrument of Accession shall *only* specify." The word "*only*" is not to be found therein. In my view,

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(1) Section 117, giving power to the Federal authority "to assume any lands or public property", is strictly limited to lands "required for fortifications or for the defence of the country" and, even so, has been held by the Privy Council to refer to executive power not legislative. None the less a legislative power to expropriate has been held, as is explained above, to be implied.

sub-section (2) should be read along with sub-section (4) which speaks of an Instrument of Accession as being unacceptable, indeed inadmissible, "if it appears that the terms thereof *are inconsistent with the scheme of the Act.*" Any proposal to contract *altogether* out of the legislative, executive or judicial authority of the Federation would obviously be a proposal inconsistent with "the scheme" of the Act. But a proposal to contract out of the operation of particular provisions of the Act, such as, for example, the provision in section 138 (3), as to Federal surcharges on Income-tax, cannot, to my mind, be regarded as inconsistent with the scheme of the Act. The word "scheme" can, surely, only mean the general plan or design, in other words the distribution of authority between the various organs of the Federation—Legislature, Executive and Judiciary. And to construe the words of sub-section (2) of section 6, namely that an Instrument of Accession "shall specify" certain limitations as meaning that the States shall only be allowed to specify the limitations recited therein seems to me to offend against a well-known rule as to the interpretation of Statutes. That rule is that wherever a particular construction of words would involve "hardship" or "injustice" an alternative construction is to be preferred.

## Section VI.

### THE INSTRUMENT OF INSTRUCTIONS.

31. It will be recalled that various proposals have been made for the inclusion in the Instrument of Instructions to the Governor-General of provisions for the protection of the rights and interests of the States, in particular in such matters as "discrimination". There are already certain provisions to that effect in the Instrument of Instructions issued by the India Office.<sup>1</sup> The question arises as to what, if any, legal efficacy is to be attached to the Instrument of Instructions. I have already indicated in an earlier paragraph of this Opinion that the provisions of the Instrument of Instructions are unenforceable in law and that "the silent operation of constitutional principles" may, and probably will in the long run, result in the "safeguards" contained in the Instrument becoming a dead letter. As I explained, the development of "Dominion Status" in India would be quite incompatible with the observance by the Governor-General of any "instructions" involving his exercise of discretion, *i. e.* his acting

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(1) See, in particular, Clause XV.

independently of his Ministers. "Dominion Status" means full responsible Government and there is no room in such responsible government for any "special responsibilities" of a Governor-General at all. The Instrument itself hints, in somewhat obscure words<sup>1</sup>, that Dominion Status is the ultimate objective and the Secretary of State in the Commons debate<sup>2</sup> on the clause of the Bill (section 13 of the Act) dealing with the Instrument of Instructions made it clear that the Instrument was drafted with such a constitutional development in view. The Instrument of Instructions must therefore, I think, be regarded as a purely transitory "safeguard" destined in due course to lose all significance.

32. Even as things stand at the present moment and without anticipating the grant, which may be either proximate or remote, of "Dominion Status" to a Federated India, the safeguards provided by the Instrument of Instructions are by no means so "safe" as might appear. An examination of the sections of the Act (sections 13 and 14), the Schedule (Schedule II) dealing with amendments of the Act, and the recitals of the Instrument itself will, I think, make this clear. It is provided by section 13 that the Instrument of Instructions, and any Instrument revoking or amending it, shall require the approval of both Houses of Parliament. It is further provided by section 14 that the Governor-General in exercising his "discretion" as required by the terms of the Instrument itself, shall be subject to the "general control" of the Secretary of State, with whose "particular directions" he "shall" comply. It will at once occur to anyone familiar with the way the Government of India is carried on that the Secretary of State may at any moment by a secret despatch issue "particular directions" to the Governor-General not to exercise his "discretion", to protect the States, in some matter where he apprehends that such protection might provoke opposition and agitation from political parties in British India. It is true that sub-section (2) of section 14 goes on to make what at first sight looks like a provision that such "particular directions" shall not be "inconsistent" with the terms of the Instrument of Instructions. But who is to be the judge of such "inconsistency"? The section provides that the only person who is to judge of the "inconsistency" or otherwise, of such directions is to be the person who gives them namely the Secretary of State. The sub-section provides that the Secretary of State is "to satisfy himself" of the consistency of his conduct. No man, certainly no politician bent on the pursuance of a cherished policy, has any difficulty in "satisfying himself" of his consistency. The Secretary of State has not to satisfy the States; he has not even to satisfy the Courts which,

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(1) See Clause XXXI.

(2) See Hansard, Parliamentary Debates (5th March, 1935) page 1890.

indeed, are expressly excluded [ see sub-section (2) of section 13 and sub-section (1) of section 14 ] from jurisdiction in this matter. He has not even to satisfy "both Houses of Parliament". The House of Lords has, and will have, no control over the particular directions, in violation of the Instrument of Instruction, which he may give — for the simple reason that a Secretary of State is responsible, so far as he is responsible at all, not to the House of Lords but to the party in a majority in the House of Commons. The effect of all this is to destroy the security apparently provided by the requirement in section 13 that the Instrument of Instructions shall be approved by *both* Houses of Parliament. "Particular directions" of the Secretary of State, instructing the Governor-General to depart from the terms of the Instrument, cannot come under the control of the House of Lords at all. It follows from this that the provisions contained in sub-section (5) of section 6 and Schedule II of the Act to the effect that the sections relating to the Instrument of Instructions shall not be amended without "affecting" the accession of a State are quite worthless.

33. An examination of the recitals of the Instrument of Instructions affords a remarkable confirmation of this conclusion, if indeed confirmation is needed. The third paragraph of the recitals expressly provides that "the general provisions" of the Instrument, such as Article XV requiring the Governor-General to protect the States against "prejudicial" action by his Ministers or by the Legislature, shall be read as being "without prejudice" to the right of the Secretary of State to give the Governor-General particular directions and "without prejudice" to "the duty" of the Governor-General to obey "*any*" directions so received. This paragraph in the recitals of the Instrument completely reverses the principle laid down in section 14 of the Act. That section provides, or purports to provide, ( it depends entirely for its efficacy on the "self-satisfaction" of the Secretary of State ) that any particular directions given by the Secretary of State to the Governor-General shall be subject to the Instrument of Instructions. But the paragraph of the recitals to the Instrument itself provides that the Instrument of Instructions shall be subject to the particular directions. Instead of the rule, *i. e.* the Instrument of Instructions, governing the exception, *i. e.* the "particular directions", the exception is to govern the rule. And this in fact, as a matter of constitutional usage, is exactly what may be expected to happen.

34. I need add little, if anything, to what I wrote in 1935 in the Opinion written for the Chamber on the subject of the purely "political" character of any Instrument of Instructions. The Instrument, as I then wrote, "merely instructs the person to whom it is issued how to exercise the prerogatives

delegated to him, whether by Letters Patent or by the Constitution Act" and "the proper exercise of such prerogatives is entirely a matter between the Governor-General and the Crown and no court can enquire whether the former acted or did not act in compliance with his Instrument of Instructions". The Courts have repeatedly held that they cannot issue a Writ of Mandamus to compel an officer of the Crown to perform a duty "owed to the Crown" and the exercise of the prerogatives is, of course, just such a duty. To hold otherwise, even if the Courts could so hold, would, as Lord Sumner put it in a leading case, involve the Courts in doing, or attempting to do, what no court can ever do, namely undertaking the government of the country. On one point I would like to qualify certain statements, so far as my apparent responsibility for them is concerned, which appeared in the Opinion on the text of the Bill referred to at the beginning of this paragraph. That Opinion was a Joint Opinion but I think there can be no objection, at this distance of time, to my stating that the whole of it, with the exception of a few sentences inserted by one of my colleagues, was written by me. With certain of those sentences, appearing on page 28 in connection with the subject of the Instrument of Instructions, I was disinclined to agree, as being of too optimistic a character. Indeed, had the actual Instrument of Instructions been before us, which it was not (see page 4 of the Opinion), I should have felt bound to express my dissent — as at a later stage of our deliberations I duly did. The sentences I refer to are those in which it was suggested that the "practical efficacy" of the Instrument of Instructions would in fact, though not in law, be considerable, inasmuch as a disregard of its spirit would be "a grave dereliction of duty". No doubt it would, but such moral considerations have, unfortunately, little weight with statesmen bent on the pursuit of a particular policy.

35. In this connection I think it my duty to observe that the "sanction" of impeachment, as a restraint on a Governor-General who violated the letter or the spirit of the Instrument of Instructions, must, in my opinion, be dismissed as wholly useless because wholly obsolete. In the Opinion referred to, it was stated that a Governor-General so acting would be "liable to impeachment". But impeachment is as dead as Warren Hastings. I will conclude this Section of this Opinion by repeating some observations of mine which were recorded in a confidential Memorandum written in June 1935. They were as follows:

"As a constitutional lawyer, I entertained and still entertain considerable misgivings as to whether I ought to have concurred in this reference to the "sanction", if sanction it be, of impeachment. It may

easily have conveyed to the Princes, and their Ministers, that, in the possibility of impeachment of a Governor-General disregarding his duty towards them, there was a real safeguard. In fact it is no safeguard at all. Impeachment is as obsolete as the theoretical prerogative of withholding the royal assent to bills passed by both Houses of Parliament. All the leading constitutional authorities are unanimous as to this. Anson dismisses impeachment as wholly obsolete<sup>1</sup>. Dicey does the same, treating it as a matter of pure "antiquarianism" and is almost jocular on the impossibility of its ever being resorted to again<sup>2</sup>. One has to face the political realities of the situation and dismiss altogether such an academic conception as the "rusty" weapon, as Dicey calls it, of impeachment. The practical aspect of the matter is this:—the real danger to be apprehended is that a Governor-General, whether under conditions of emergency or under normal conditions, will disregard his special responsibilities, not in defiance of the Secretary of State, and his "Instruction", but in deference to him. Obviously, a Governor-General who acted in defiance of a Secretary of State could be, and in fact would be, at once recalled. Now any Secretary of State who thus instructed the Governor-General would, of course, only do so if the party to which he belonged was hostile to the maintenance of the rights of the States. That such a party may, sooner or later, obtain a majority in the House of Commons is quite conceivable. In such a case, impeachment, *i. e.* impeachment either of the Secretary of State or of the Governor-General, would, apart from the fact that it is wholly obsolete, not even be theoretically possible. The procedure, the only procedure admissible, in impeachment is a motion carried by the House of Commons. If carried, the motion results in trial by the House of Lords on "Articles of Impeachment" drafted by the Commons. But, *ex-hypothesi*, in the case under consideration the Governor-General and the Secretary of State, in ignoring the rights of the States, would be acting in accordance with the wishes of a majority of the House. Impeachment would therefore be impossible. As a matter of fact, and even of law *i. e.* constitutional usage, impeachment is wholly inconsistent with our modern constitutional system. It is a survival, *i. e.* a relic, of the days when the Secretaries of State and other Ministers were not yet responsible to the House of Commons. In this connection it should be observed that not only has

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(1) See Anson, "*Law and Custom of the Constitution (Parliament)*" 4th edition, p. 363.

(2) See Dicey, "*Law of the Constitution*" 6th edition p. 387.

the introduction of "responsible government", *i. e.* the Cabinet system, rendered impeachment obsolete but that the transformation in the relations of the two Houses of Parliament to one another has made recourse to such a procedure by the Commons quite unthinkable. No House of Commons to-day would avail itself of a procedure in which, while the Commons are merely the accusers, the judgment on their accusation is the sole privilege of the Lords. It is quite inconceivable that the House of Commons would thus entrust to the House of Lords the ultimate and exclusive control over the conduct of the Governor-General of India. As Maitland observes, when emphasizing the obsolete character of impeachment (*Constitutional History of England* p. 477), "a modern House of Commons will hardly be brought to admit that in order to control the King's advisers it needs the aid of the House of Lords".

36. A suggestion was put forward at one of the meetings of the Constitution Committee that the "special responsibilities" of the Governor-General to protect the rights and interests of the States should be incorporated in the Instruments of Accession. To that suggestion the objection was made that it would "weaken" the Governor-General's exercise of these responsibilities if they were "made subject" to determination by the Courts. Both the suggestion and the objection to it rest upon a misconception. The incorporation of the Governor-General's special responsibilities in the Instrument of Accession would neither strengthen nor weaken his exercise of them. It would leave the position exactly as it is under the Instrument of Instructions. The exercise of the Governor-General's responsibilities cannot be made subject to the Courts by any provisions incorporated in the Instrument of Accession. I therefore advise against any such incorporation. It is hardly necessary for me to say that, in the foregoing observations in this Section on the weakness of the Instrument of Instructions as a safeguard for the protection of the rights of the States, no reflection whatsoever on the good faith of the Government which is responsible for it, is intended. So long as that Government is in power, there can be no reason to doubt that the Instrument will be honourably observed alike in the letter and in the spirit. But a Government, equally with the Parliament to which it is responsible, cannot bind its successors. As things are, therefore, the Instrument will hold good, as a "safeguard", for just three years and no more. What may happen after the dissolution of the present Parliament it is idle to speculate.

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## Section VII.

### Sub-Section A.

#### THE LEGISLATIVE POWERS OF THE FEDERATION.

37. I proceed to consider the implications of the Act in the matter of legislative powers. I may say at the outset that I do not share some of the apprehensions as to its scope which have found expression in the Hyderabad Memorandum of January 1937. I refer, in particular, to the suggestion, contained in paragraph 22 of that Memorandum, that Sections 100 (4) and 104 of the Act, might be held by the Courts to enlarge the power of the Federal Legislature to legislate for the States *beyond* the ambit of the Items contained in the Legislative list when accepted, in their Instruments of Accession, by the States. Section 100 (4) provides that:

“the Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof”.

The Hyderabad suggestion, as I understand, is that these words might empower the Federal Legislature to make laws for Federated States. I am bound to say that I think the suggestion fantastic. No Court, least of all the Privy Council, could conceivably hold, that this sub-section operated to enable the Federal Legislature to legislate for the States. To do so would be to violate all the rules of interpretation followed by the Privy Council, in common with English Courts, as to the construction of statutes. Two of those rules are (1) that, in order to ascertain the meaning of a sub-section, one should look at the whole section and (2) that, in order to ascertain the meaning of a Section of an Act, one should look at the whole Act. Applying the first of these rules, it is quite clear that sub-section (4) of Section 100 must be read in the light of the object of that section and that object is, quite clearly, to provide for the distribution of legislative power between the Federal Legislature and the Provincial Legislatures *and for nothing else*. It was necessary to insert sub-section (4) in order to make provision for the special position of Chief Commissioner's Provinces to which [see the definition in sub-section (3) of Section 4] this sub-section clearly refers.<sup>1</sup> Indeed, it would be an almost violent misconstruction of the Section and indeed, of the whole scheme of the Act to assume that it enables the Federal Legislature to legislate for the Federated States in the whole

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(1) Another object of the sub-section is to enable the Federal Legislature to legislate extra-territorially over the whole field in the case of British subjects coming within the categories (a) and (b) of sub-section (2) of Section 99.

of Provincial Subjects while excluded, as it is, from legislating for the Provinces in those matters. Applying the second rule of interpretation, it is clear that such a construction would violate altogether the federal character of the Act and indeed make nonsense of it. One really must give the Federal Court credit for a little intelligence.

38. The same criticism applies to the suggestion, contained in the Hyderabad Memorandum, that Section 104 may enable the Federal Legislature to legislate for the States in "residual" matters *i. e.* in matters not to be found either in the Federal List or in the Provincial and Concurrent Lists. It is perfectly clear from the report of the Joint Parliamentary Committee that the provision in this section is intended to refer to the Federal Legislature when legislating *for British India*, in relation to the Provinces, and for British India alone.<sup>1</sup> But in view of the fact that that Report will not be admissible in the construction of Section 104 by the Courts, I exclude it and confine my observations to the actual words of section 104 and apply to them the ordinary rules of interpretation. Now, clearly, the residual powers of legislation, provided for in this section, refer to such subjects as, in spite of the exhaustiveness of the enumerations, may, at some future date, be found not to have been enumerated in *any of the three Lists*. In such an event, doubt, involving litigation, would arise as to whether such unenumerated subjects fell within the Federal or Provincial (or Concurrent) sphere, just because the whole field of legislative activity is mapped out, by the Act, between the Federal Legislature *in British India* and the Provinces of British India. But no such field is mapped out between the Federal Legislature and the States for the simple reason that there is no State List at all. Therefore no question of residuary powers arises as between the Federal Legislature and the States—the mere fact that the Federal powers alone are enumerated leaves the States in possession of the residuary powers. It is only where, as is the case with the Federal Constitution of Canada and as is the case with the British India sphere of the Indian Federation, there is double enumeration, on a mutually exclusive basis, of Federal powers on the one hand and powers of the Federal Units on the other, that difficulties as to where the residuary powers reside could arise. In such a case some provision has to be made, as it is made in Section 91 of the Canadian Constitution, that any residual powers not enumerated in either Lists shall reside somewhere. In Canada it is provided that they should reside with the Federation. In the British India sphere of the proposed Federation they are to reside either with the Federal Legislature or the Provincial Legislatures at

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(1) See report of the J. P. C. paragraph 54 (page 32).

the discretion of the Governor-General. This is all that Section 104 provides. It is surely obvious, as a matter of construction, that Section 104 could not possibly refer to the States. If it did, one would expect to find that the Governor-General's express power thereunder to decide whether a "residual" subject shall be entrusted, for purposes of legislation, to "the Federal Legislature or a Provincial Legislature" would be extended, by express words in the section, to a power to decide also whether such residual subjects should be entrusted "to the Federal Legislature or the States". If ever the rule of interpretation *Expressio unius exclusio alterius* applied, it applies here.

39. The Hyderabad representative on the Constitution Committee, Mirza Ali Yar Khan, has asked me to examine, in this connection, the meaning of the general section conferring powers on the Federal Legislature, namely Section 99 sub-section (1).<sup>1</sup> This sub-section provides that:

"Subject to the provisions of this Act, the Federal Legislature may make laws for whole or any part of British India or for any federated State and the Provincial Legislature may make laws for the Province or any part thereof".

Before considering the meaning of the words "for any Federated State" it may be as well to explain the words "for any part of British India" as their meaning will serve to throw light on the words relating to "any Federated State". In my view the words "for any part" are intended to give the Federal Legislature power to legislate in a particular federal matter for a part of British India without legislating in that same matter for the whole of British India. In other words, they are meant to enable it to legislate *locally*. It has long been a subject of dispute among constitutional authorities as to whether a Federal Legislature can, in the exercise of its admitted Federal powers, pass a law applying to one federal unit and not to another. For example, Professor Harrison Moore raises the question—without answering it<sup>2</sup>—whether the Federal Legislature of Australia could pass a Bankruptcy Act (bankruptcy being admittedly a Federal subject) *for one State* and enact that it should not apply to the other States. In the same way, doubt would have arisen but for the provisions of Section 99 (1) whether

(1) The meaning of sub-section (2) of Section 99 is, I think, clear enough. It merely confers on the Federal Legislature the same extra-territorial powers as those exercisable by the British India Legislature under Section 65 (1) of the Government of India Act of 1919 and previously (cf. Act XXI of 1879), with certain extension in the case of Federated States.

(2) Harrison Moore, *The Commonwealth of Australia* p. 284. Another writer (Kerr, *The Law of the Australian Constitution*, at p. 71) speaks of "the almost total absence of authority on the point". It has been suggested (Harrison Moore p. 284) that, in the case of the Federal Parliament of Canada, the Parliament *can legislate locally*. This is true but it is in consequence of a specific provision to that effect at the end of section 91 of the British North America Act which enables the Federal Parliament to legislate locally in the exercise of its *exclusive powers* but not otherwise—see *Local Prohibition Case* (1896) A. C. 348.

the Federal Legislature of India could legislate on a Federal subject for one Province without legislating at the same time by the same law for the other Provinces. The effect of Section 99 (1) is to provide that it can. It follows, I think, that Section 99 (1) is intended to enable the Federal Legislature to legislate for one Federated State, *i. e.* "any" Federated State, without legislating at the same time by the same law for other Federated States even though the other States have federated in respect of the subject dealt with by the Law. Such a power of legislative distinction between one Federated State and another may, obviously, lead to discrimination. For example, a federal excise tax might be levied, under such "local" legislation, on one State without being levied on other States. But that is an aspect of the matter which I will consider more fully when I come to deal with the subject of "Discrimination". My conclusion as to the meaning of Section 99 (1) may be incorrect. If it is so, so much the better for the States. If my conclusion is incorrect, the only alternative meaning of the words "for any State" must be that they are intended to make provision for what obviously requires provision, namely that the Federal Legislature shall have a power to legislate for all States acceding to the Federation. The word "any" is capable of meaning either "all" or "any one".

40. I feel quite certain that Section 99 (1) does *not* enable the Federal Legislature to legislate for Federated States in any matter which has not been accepted by that State as a federal subject. Here again, it would do violence to the whole scheme of the Act if one were to interpret Section 99 as empowering the Federal Legislature so to legislate. Such a construction would destroy the "federal" character of the Act and no Court could or would so construe it. It will be observed that the opening words of sub-section (1) of Section 99 qualify all that follows with the limitation "subject to the provisions of this Act". This means and must mean, among other things, subject to Section 101 and to Section 6 (2). But the Hyderabad Memorandum betrays a certain nervousness as to whether Section 101 is adequate. The Memorandum accordingly considers (paragraph 22) that the second part of clause 4 of the revised draft of the Instrument "ought to be included". The second part in question provides that,

"the Federal Legislature shall not have power to make laws for this State save with respect to the matters so specified and subject to the said limitations".

I do not share the nervousness but I respect it. I therefore see no objection to the insertion of this additional sub-clause in the Instrument of Accession. The same result would be achieved by the adoption of clause 13 of the revised draft, amending clause 6 of the Government of India draft, by inserting, among other things, the "reservation" in so many words, of all the

powers, authority and rights of the Ruler not expressly surrendered by the Instrument itself. There is a section of the Australian Commonwealth Act (Section 107) similar in principle and somewhat similar in terms to this clause 13 which runs as follows:—

“Every power of the Parliament of a colony which has become or becomes a State shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, *continue* as at the establishment of the Commonwealth”.

This Section of the Australian Commonwealth Act expresses what clause 4 (2) and clause 13 of the revised draft seek to express, namely the principle that all powers not expressly conceded by the States to the Federation are reserved to the States. The Section has played a very important part in the judicial construction by the Privy Council of the Australian Federal Constitution as establishing the exclusive rights of the States to legislate for matters not conceded to the Federation — in particular in the case of *Attorney General to the Commonwealth v. Colonial Sugar Refining Co.*, (1914) A. C. 237. In that case the Privy Council held, that the effect of Section 107. was to vest exclusively in the States the residuum of powers and to place upon the Federal Government “the burden”, *i.e.* the onus of proof that legislation affecting the liberty of the subject in the States was within its powers.

41. I turn to the next of the “legislative” sections of the Act — Section 106. This Section deals with legislation for the “Implementing” of International Treaties and Agreements. It is at first sight in the nature of a restraint on legislative power in that it provides that the Federal Legislature shall not “*by reason only*” of Item 3 in the Federal Legislative List have power to make “any” laws implementing such Treaties unless the previous consent of the Ruler to such legislation has been obtained. The words “by reason only” require careful examination. Taken in conjunction with the provisions of sub-section (3), they narrow considerably the scope of the apparent restraint on the federal power. The result is clearly, I think, to enable the Federal Legislature to make any law implementing an International Treaty in relation to any legislative Item which the States have accepted. If, for example, a State accepted Posts and Telegraphs (Item 7), then any Federal Legislation to give effect to an International Treaty such as the Perne Postal Convention will apply to the State *without* the “previous consent” of the Ruler. The effects of the words “by reason only” and of the sub-section (3) are therefore to cut down

very considerably the requirement of the previous consent of the Ruler to federal legislation "implementing" Treaties. The exception created by sub-section (3) to the rule laid down by sub-section (1) as to the requirement of the "Ruler's consent" is likely, in practice, to leave very little of the rule itself. How very far-reaching the power of the Federal Legislature would be to implement Treaties *without* the Ruler's consent may be illustrated by considering the effect of the exception, contained in sub-section (3) of Section 106, on the acceptance by the States of Item 24 *i. e.* "Aircraft and Air Navigation". If a Ruler accepts this Item, he will be bound by any federal legislation "implementing" the Convention relating to aerial navigation. Such legislation may, and almost certainly will, go far beyond the scope of the existing *voluntary* adherence to the general principles of that Convention which the Rulers have given in deference to the wishes expressed by Government of India, by their acceptance of the Indian Air Navigation Rules, following the Government of India Resolution (No. 150-R/31) of the 8th of August 1933. How very far the scope of legislation to give effect to the Aerial Navigation Convention may go, and how very deep may be its penetration into the "autonomy" of the States, is forcibly illustrated by the Privy Council's decision in a leading case from Canada, namely, *In re the Regulation and Control of Aeronautics in Canada* (1932) A. C. 54. In that case the Federal Units *i. e.* constituent Provinces of Canada challenged the validity of a Federal Act and federal regulations designed to "implement" the Federal Government's adhesion to the International Convention relating to the Regulation of Aerial Navigation. The Federal Legislation in question contained, in the words of the Privy Council, "a vast body of regulations", embracing "hundreds of details", each and all of them making it an offence punishable on summary conviction to disobey the regulation. The legislation put it within the exclusive powers of the Federal Government to license "all" pilots, "all" aircraft, and "all" aerodromes irrespective of whether or not the pilots, aircraft, and aerodromes were confined, in their operations, to the internal transport of a Province. None the less, the Privy Council held, that the whole of this Federal Legislation, in spite of its obvious interference with the autonomy of the Provinces in the matter of "property and civil rights", was a valid extension of the federal power. This decision of the Privy Council and with it any federal legislation to give effect to the Aerial Navigation Convention, will become directly applicable to the Federated States on their acceptance of Item 24 and there is nothing in Section 106 to prevent its application. In exactly the same way, any legislation "implementing" the Radio Convention will become applicable to the federated States on their acceptance of Item 7 in the matter of "broadcasting". Another decision of

the Privy Council in another leading case from Canada is of direct application to the Indian States in this respect—I refer to *In re Regulation and Control of Radio Communication in Canada* (1932) A. C. 304, in which it was held that Federal legislation to “implement” International Radio Telegraph Convention of 1927 was valid.

42. It will be seen, therefore, that the present position of the States in the matter of International Treaties will undergo a radical transformation. At present they are not bound by such treaties at all but, in deference to the persuasion of the Government of India re-inforced by considerations of “paramountcy”, particularly in the “strategic” sphere, they voluntarily fall into line by accepting the “Resolutions” of the Government of India. In future, the optional character of their acceptance of such treaties and such resolutions will entirely disappear whenever a treaty relates to a Federal Legislative Item included in their Instruments of Accession. There is all the difference in the world, legally speaking, between a Ruler’s acceptance of a Government of India Resolution and his subjection, for subjection it will be, and the subjection of all his subjects to a federal Act implementing a treaty. The “sanction” attached to the Resolution is “paramountcy”, the sanction attached to a Federal Act is punishment, for any contravention of it, by way of conviction by a Court exercising federal jurisdiction. In this connection, I would draw attention to the words “External Affairs” which precede, in Item 3 of the Federal Legislative List, the words “Implementing of Treaties”. What do the words “External Affairs” mean? And what is the effect of their meaning on the words which follow them? The term “external affairs” is, legally speaking, a very unscientific one occurring nowhere else in the Statute book except in the Australian Commonwealth Act (see Section 51 Item XXIX). The earliest and the most authoritative commentator on that Act describes the term as “least capable of definition” and it has, in fact, remained undefined right down to three months ago, when it was the subject of a far-reaching judgment by the High Court of Australia. The text of this judgment to which I have referred earlier in this Opinion,<sup>1</sup> is not yet before me. But the substance of it has appeared in the “Times” of November last. From that report it would appear that the High Court held that if the provisions of the Federal Act “implementing” the Air Navigation Convention had been enacted in the form of an Act relating to the Federal “Item” of External Affairs, the Act would have been valid. It seems clear that the High Court held that any Federal Act, expressly enacted to implement any International Treaty, would be valid even though the subject-matter was a matter reserved to the States. Whether the Privy Council, which is not bound by the

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(1) See paragraph 15 above.

decisions of the High Court of Australia, would take the same view it is impossible to say. But I would suggest that the States should either not accept Item 3 or should at least qualify their acceptance of it.

43. Section 107 presents no difficulties of interpretation and need give rise to no anxieties. It provides for what a Canadian writer, Mr. Justice Claments, has happily called "Federal Paramountcy". By sub-section (3) of the Section a law of a State, which is "repugnant" to a Federal Law extending to that State is, to the extent of its repugnancy, void. The principle runs through all federal constitutions and may be either expressed, as in the case of the Australian Commonwealth Act, (see Section 109) or implied as in the case of the British North America Act *i. e.* the Federal Constitution of Canada. The Canadian Constitution makes no express provision for the application of this rule to its interpretation but the rule has been adopted, as it was bound to be, to meet the case of conflict, by the Privy Council in the case of *The Grand Trunk Railway vs. Attorney General for Canada* (1907) A. C. 65, following two earlier Canadian cases. The operation of the rule, in the case of India, cannot be better explained than in the words of Lord Dunedin in this case:

"there can be a domain in which Provincial (i. e. "State") and Dominion (i. e. Federal) legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, and if the field is not clear and in such domain the two legislations meet, then the Dominion legislation must prevail."

Applied to India, this means that the laws of the Federated States and their right to legislate, in respect of any federal Items accepted by them, will continue in operation unless and until the Federal Legislature enacts a law in respect of that Item. If and when the Federal Legislature passes such a law, the State laws in respect of such a matter, will be void to the extent (but not otherwise) of their inconsistencies with the Federal legislation. There is, in fact, under the Act a concurrent power in the States and in the Federation to legislate on Federal Items accepted by the States. It must always be borne in mind, however, that this doctrine of Federal Paramountcy gives such a priority to federal legislation over State legislation that a Federal Act may take complete possession by a kind of "effective occupation", of the whole field of State legislation in regard to a federal subject. For example, the Federal Legislature might pass Excise Acts so comprehensive in respect of the commodities subjected to the excise duty, and so exorbitant in the scale of duty imposed as to make the States' concurrent power of levying excise duties virtually inoperative. In virtue of the rule of Federal Paramountcy, a federal tax always has priority over a State tax.

There is striking example of the application of the doctrine to Federal and State taxation in the case of *Commonwealth of Australia vs. the State of Queensland* 20 C. L. R. 148.

44. There remain for consideration what may be called the fiscal sections of the Act in so far as they confer legislative powers. Certain questions in this connection have been submitted to me by Mr. Subedar, whose masterly Memorandum on the financial implications of the Act I have had the opportunity of reading, and I will deal with those questions in this and the succeeding paragraphs. There is only one section<sup>1</sup> of the Act which directly authorises the imposition of taxation on the Federated States and this is Section 138 sub-section (3), dealing with federal surcharges on Income Tax. It does not, of course, of itself impose such taxation but provides that if and when a Federal law imposes surcharges for federal purposes by way of increase in Income Tax the law "shall provide" for the payment by each Federated State, in which taxes on income are not leviable, of a contribution to the revenues of the Federation. The question has been put to me whether this sub-section operates to bind such Federated States in the absence of their acceptance of it. In my view, it does. I disagree with the contrary view expressed in the opening sentences of paragraph 21 of the Hyderabad Memorandum. On the other hand, I think that the States could "contract out" of the operation of Section 138 (3) and *a fortiori* could "limit" their acceptance of it. The same observations apply to the Section 139 dealing with Corporation Tax. As regards the sections providing for the assignment of the proceeds of certain taxes or their partial distribution [Sections 137, 138 (1), 140] they will, of course, apply to any States which "accept", by their Instruments of Accession, these taxes. If they do not accept them, they will not apply. It should be pointed out, however, that no Court can compel the Federal Legislature to pass the legislation necessary to effect the assignment and distribution contemplated. A Court can never compel a legislature to legislate. Still less will the Courts be able to interfere in such questions as "the principles of distribution" referred to in sub-section (1) of Section 140 or in the determination of what constitutes "financial stability" in the case of Proviso (ii) to Section 138 (2). The fact that the words "shall" and "shall not" occur and recur in these fiscal sections does not make the commands implied by the use of such words enforceable in the Courts. The word "shall", and equally the words "shall not", occurring in a Statute, may be either imperative or "merely directory" as was observed by Lopes L. J. in *In re Thurlow* (1895) 1 Q. B. 724. And so here. There is no means known to the law

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(1) There is another Section i. e. Section 139, dealing with Corporation Tax, which may be said to authorize indirectly the imposition of taxation.

of compelling a Government or a Legislature to carry out financial obligations of this kind. That is why, as I have explained above,<sup>1</sup> similar sections in the Australian Commonwealth Act as to the distribution of Federal revenues have proved unenforceable and have, in fact, been disregarded with impunity by the Federal Government. It should further be observed that the intended effect of the words as to "practicable economies" in section 141 (2) and as to "financial stability" in Proviso (ii) to Section 138 (2) may be entirely negated by increases in "non-votable" expenditure deliberately designed to frustrate the intention of the Act. This is what has happened in Australia. And it must always be remembered that, as is pointed out by Mr. Subedar at page 25 of his financial Memorandum, any majority in the Federal Legislature "will be helpless to resist" such increases. The States, equally with the Provinces, will have no control over them.

45. Before leaving this subject, I will deal with a question submitted to me by Mr. Subedar as to whether the acceptance by the States of Items in the Federal List *other than Items of taxation* (*i. e.* Items 44, 45, 46, 47, 54, 55, 56, 57 and 58), will render the States liable to taxation in connection with such Items. For example, will the acceptance of Item 28 (Cheques, Bills of Exchange, Promisory Notes etc.) render the States liable to taxation in the form of a stamp duty on cheques and bills of exchange? The answer to this question is definitely No. On the other hand, the acceptance of a "non-fiscal" Item would carry with it the acceptance of a power on the part of the Federation to impose licences and fees in respect of that Item. A licence or a fee is not a tax—see *Institute of Patent Agents vs. Lockwood* (1894) A. C. p. 360 if, as is usually the case, it represents a payment for services rendered. If, on the other hand, it is not a payment for services rendered, as in the case of a licence to sell an article varying with the quantity of the article sold, then it is a tax—see *The Attorney General vs. Wilts United Dairies Ltd.* (1922) 91 L. J. K. B. 897. In such a case, the licence is really in the nature of an excise, and "excise" has been defined by the Privy Council as meaning any *levy* on the growth, manufacture or sale of a commodity.

46. There is one legal doctrine which must never be forgotten in considering the legislative power conferred by the Act and by the Legislative Items when accepted by the States. It is the doctrine of "implied" powers or, as it is sometimes called, "ancillary" powers. This doctrine was fully dealt with in the Joint Opinion for the Chamber of Princes written in 1934 and 1935 and I would refer here to what I wrote there. I have already in an earlier

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(1) See paragraph 17 above.

paragraph<sup>1</sup> of this Opinion, alluded to this doctrine. It has had an immense effect in enlarging the scope of the Federal Legislature at the expense of the federal units, alike in the case of Canada and of Australia. It is in virtue of it that a power of expropriation will certainly be held to be implied in the case of any federal Items accepted by the States if the expropriation be "ancillary" to the Federal power to legislate in respect of such an Item. Its operation is forcibly illustrated in a Privy Council case—*The Grand Trunk Railway Company v. Attorney General for Canada* (1907) A.C. 65. In that case it was held, that the federal power to legislate in regard to railways "implied" a power to legislate in regard to the industrial relations between a Federal Railway Company and its employees (in this case the employer's liability for accidents) *although* industrial legislation was one of the powers, "exclusively" assigned, under the Constitution, to the Provinces. The application of this case to railways and to Item 20 of the Legislative List, in the case of the Government of India Act, is too obvious to require further comment from me. The attitude of the Privy Council in favour of such a wide construction of Federal powers cannot be better illustrated than by a quotation from its decision in a recent case, namely that "in interpreting a constituent or organic statute such as the Act (i. e. the British North America Act), *that construction most beneficial to the widest possible amplitude of its powers must be adopted*": *British Coal Corporation vs. The King* (1935) A. C. 500, at page 518.

### Sub-Section B.

#### THE FEDERAL LEGISLATIVE LIST.

47. It was pointed out in the Joint Opinion of Counsel on the text of the Government of India Bill in 1935, that it was "quite impossible for us within the time at our disposal to scrutinise", as we were requested by the Chamber to do, "each and all of the 59 subjects enumerated in the Federal List".<sup>2</sup> We further pointed out that many of the 59 Items grouped together under one subject, *e. g.* Item 27, a number of things which, although similar, were entirely different things in law, and that "to define accurately", as we were asked to do, every one of these Items and these things, from the point of view of the *scope* of the Federal Legislative powers, would "involve consideration of a whole number of cases". The same difficulty, the difficulty of time, is present to me now. The meaning and scope of the legislative subjects set out in

(1) See paragraphs 29 above

(2) Joint Opinion page 16 (paragraph 13).

these 59 Items would involve me in an examination of hundreds of cases in the Law Reports and, at this stage and in this Opinion, it is impossible for me to undertake a task of such magnitude. I must therefore confine this Sub-Section of my Opinion, to some general observations. Some of the Items, such as Items 3, 24 and 28 I have already dealt with, to some extent, in earlier paragraphs of this Opinion.

48. To estimate, with any degree of certainty, even in the light of decided cases, what will be the repercussions of this List and the Items contained in it upon the existing legislative independence of the States is extraordinarily difficult. Its draftsmanship is quite the worst I have ever encountered in any Act of Parliament. Subjects are thrown together under particular heads which have no relation whatsoever to one another, as in the case of Item 1, with the result that the Federal Court will find the greatest possible difficulty in applying many well known rules of interpretation, such as the *ejusdem generis* rule and the rules governing the collocation of "particular words" and "general words". Other Items, such as Item 42, are superfluous, in that they would be "implied", as a matter of law, even if they were not there. Another Item, 43, is either superfluous or dangerous — superfluous if it is implied, as a matter of law, and dangerous if it is not. As a separate Item, it is capable of being construed as giving a power to *subpoena* the subjects, including the Ministers and officers, of any Ruler to attend and to answer under penalty any questions addressed to them by a roving Federal Commission — and thus to constitute just such a "general control over the liberty of the subject" as was condemned as a kind of federal usurpation by the Privy Council in the case previously referred to.<sup>1</sup> Any one who compares this disorderly Legislative List and its long cumbersome sentences, strung together by the aid of the semi-colons, with the simple and precise Legislative Lists to be found in the Australia Commonwealth Act and the British North America Act, will at once be struck by the difference. If this were merely a question of literary form, it would not matter. One hardly expects, and never finds, literary grace in an Act of Parliament. The real trouble is that, as a matter of law, everything may turn on the form and order of words in a statute and even on its punctuation. In a famous State trial a man's life hung on the punctuation of a sub-section of the Statute of Treasons. And so here. The legislative independence of the States may, in particular matters, be found to hang on the absence or presence of a full-stop. For the unsatisfactory character, legally speaking, of the Federal Legislative List, it would perhaps not be fair to hold the draftsman altogether responsible, as the List was, in substance,

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(1) *Attorney General for the Commonwealth vs. Colonial Sugar Refining Company.*

the work of the Joint Parliamentary Committee, of one of the putative fathers of the "Proposals", and of the Federal Structure Committee of the Round Table Conference. The root of the trouble lies in the fact, as the reports of all the Committees go to show, that the Federal List was drawn up with direct reference to the Provincial List and the Concurrent List, in other words, with reference to the Provinces and not to with reference to the States at all. And for some reason, which has never been made public, the Round Table Conference, having begun by expressing the opinion that the advantage of a single Legislative List would be "very great" in comparison with the disadvantage, as "greatly increasing the risks of litigation", of a double list, ended by producing a triple list.

49. In this Opinion, I must, owing to the exigencies of time, confine my examination of the Items in this List, in so far as I have not examined them in earlier paragraphs of this Opinion, to the first Item, namely the Item which deals with Armed Forces. It is, in some ways, the most important of them all and has rightly received a good deal of attention in the Hyderabad Memorandum. I may say, at the outset, that I do not agree with the opinion of the Hyderabad Counsel, much though I respect it, as to the implications, the dangerous implications as he regards them, of this Item. He arrives at the startling conclusion (page 32 of the Memorandum) that,

"there would be nothing to prevent the Federal Legislature under Item 1 from passing a law providing for compulsory service—a form of enrolment—applicable to the States subjects".

If this sentence means, as it appears to mean, "applicable to the States' subjects *in the States*", in other words the imposition of compulsory service upon the States, I totally dissent. The Hyderabad argument is based on analogy and, as some one has remarked, analogy is a very dangerous horse to ride as it frequently runs away with the rider. The analogy prayed in aid in the Memorandum is the Army Act of the Imperial Parliament and its provisions as to "enrolment". Enrolment, it is suggested, includes "compulsory service". It does nothing of the kind. If it did, it would not have been necessary, as it was, for Parliament to pass a special Act in 1916 for the conscription of the civil population. Further more, no Court, least of all the Privy Council, would or could possibly, in my opinion, construe Item 1 as extending to the conscription of Ruler's subjects in view of the fact that the residuary powers of legislation will belong to the Federated States. The decision of the Privy Council in *Attorney General for the Commonwealth vs. Colonial Sugar Refining Co.* (1914) A. C. 237 is, in this matter of direct application to Item 1, so far as the States are concerned,

and in that case, it will be recalled, the Privy Council held that where, as in Australia and also (in the case of the Federated States) in India, the residuary, *i. e.* the unenumerated powers, belong to the States, the powers of the Federal Legislature do not extend, in the absence of express words, to a "general control over the liberty of the subject". Compulsory service is nothing if not a general control over the liberty of the subject. Lastly, the Hyderabad Memorandum has overlooked the significance of Section 102 (1) in this connection and the change made in Item 1 of the Federal Legislative List as compared with Item 1 of the original draft of the List contained in the "Proposals for Indian Constitutional Reforms". In the Proposals, the first Item was "The Common Defence of India in time of emergency declared by the Governor-General". This form of words, if it had been retained and accepted by the States in their Instruments of Accession as an Item, would certainly have authorised the imposition, by a federal statute, of compulsory service upon the States. But the words are not retained. They have disappeared altogether from the List. In place of them is to be found, in the body of Act, a section, Section 102 (1), the operation of which is specifically confined to the Provinces. That Section does not cover exactly the same ground as that of the omitted Item but it does cover a great deal of it.

50. I conclude with a general observation on the character of the limitations, both general and particular, which the Constitution Committee and other Committees have sought to impose by their proposals. The observation is this: The States must really bear in mind that there will have to be a definite limit to limitations. In other words, Federation will never be brought into existence, and will certainly never become a "working proposition" if it is sought to impose limitations on the acceptance of Items in the Legislative List such as would prevent the Federal Legislature from legislating *effectively* at all. Such is the effect, for example, of the proposed "general limitations" that,

*"no land or other property shall be acquired in this State on behalf of His Majesty for any federal purposes or on behalf of the Federal Railway Authority or any other authority of the Federation except with the consent of the Ruler and upon such terms as may be mutually agreed upon"*

I cannot imagine that the Government of India will or can accept this limitation nor can I recommend its acceptance. It would be quite impossible for the Federal Legislature to legislate effectively in regard to many, if not

most, of the Items if it not had a power to acquire land *without* the consent of the Ruler. Power to acquire land compulsorily, when such acquisition is essential to the effective exercise of the Federation's legislative powers is, as I have already observed, implied by the Privy Council in the case, of Canada and expressed in the Constitution Act itself in the case of Australia. If the limitation proposed were confined to the exemption of the Ruler's private estates and of the public lands of his State, it would be reasonable enough — there is a corresponding exemption in the case of "Crown lands" in the Australian Commonwealth Act and the British North America Act. But to insist that "no land" in a Federated State shall be acquired by the Federation "without the consent of the Ruler" is to hold the Federation up to ransom and to paralyse its action if the Ruler chooses to withhold his consent. The same criticisms as to what I can only call the destructive character of some of the proposals of the Constitution Committee and other Committees apply to the limitations which have been suggested in the case of Item 24 (limitation 5 of Item 24 suggested by Bombay Conference of Ministers), Item 33 (limitation 2 of Item 33 suggested by the Punjab States' Council) and many another. The limitation 2 of Item 33, suggested by the Punjab States' Council, is particularly objectionable and indeed futile and could never have been suggested by anyone familiar with the numerous cases on "Companies" decided by the Privy Council in the case of Canada. It is a thoroughly "anti-federal" limitation. It is, in fact, purely destructive and, totally inconsistent with any acceptance of the Item at all.

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## Section VIII.

### THE EXECUTIVE POWERS OF THE FEDERATION.

51. It is a matter of "common form" in the Constitutional law of the Empire that the executive power is, in the case of an Act of Parliament granting a constitution, co-extensive with the legislative powers. In other words, if the executive power is not expressly granted, its grant will none the less be held to be implied and implied in "co-extensive terms". But the executive power may be wider than the legislative power. It is wider in the Government of India Act, as will appear in a moment. Moreover, it must not be forgotten that the Act is, at the moment, incomplete in the sense that it is to be supplemented by Letters Patent, not yet published, constituting the Office of Governor-General.<sup>1</sup> Such Letters Patent will, following the invariable custom, delegate to the

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(1) See the reference to the proposed Letters Patent in the recitals of the Instrument of Instructions.

Governor-General certain powers not to be found in the Act, in other words prerogatives and, in particular, the prerogative of mercy, *i. e.* the pardoning power. Hitherto there have been no Letters Patent constituting the Office of Governor-General because in the case of India, unlike that of the Dominions and Colonies where the Office is created by Letters Patent, the office was long ago created by statute.<sup>1</sup> I confine myself therefore to the Executive power as defined in the Act itself. That power is expressed in the Act in wider terms than the legislative sphere — see, for example, Section 8 (1) b where, after defining it as extending to matters co-extensive with the legislative powers it is enlarged to include the raising of Armed Forces. It further extends, beyond the legislative sphere of the “Legislature”, to “defence” which is described as a “function” of the Governor-General the expenditure on which is [see Section 33 (3)] “charged on the revenues of the Federation” and is non-votable and therefore outside the sphere of the Federal Legislature. This complete divorce of wide executive powers from the Legislature, *i.e.* the complete detachment of the exercise of the powers from the exercise of the powers of the Federal Legislature, is peculiar to the Act and not to be found in either of the two Federations within the Empire. The result of it would be that the States, in agreeing to the formula of acceptance by way of “declaration” laid down in Section 6 (1) (a), would be accepting certain executive powers over which they, in common with the representatives of a Province in the Federal Legislature, will have no control *unless* they expressly except, as they are permitted to do by the proviso (ii) to Section 8 (1), the exercise of these powers by their Instruments of Accession. This they must be careful to do if they wish to continue to exercise their control in such matters.

52. On the other hand there is no such direct provision, in so many words, in the Act for the exclusion of that part of the executive authority of the Federation which is co-extensive [Section 8 (1) a] with the authority of the Federal Legislature. In fact, Section 8 sub-section (2) contemplates the “exclusion” of the executive authority of a Ruler in his State in any Federal matter from the moment the Federal Legislature passes a law in respect of that particular matter. It is, however, clear that in virtue of section 6 (2) the Ruler may by his Instrument of Accession “limit”, in other words reserve to himself, the exercise of the federal executive authority in regard to such a matter. There is also a provision in Section 125 (1) that “agreements” may be made, whether an express stipulation to that effect has been made in the Instrument of Accession or not, for the “administration” by the Ruler or his officers of a Federal subject. The distinction between “executive” and administrative functions is nowhere made clear but I think the distinction really amounts

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(1) By the Charter Act of 1833 (3 and 4 Williams IV chap. 85) Section 39.

to this: if the *executive* power is reserved by a Ruler, the Federation cannot interfere in his exercise of that power, whereas, if a delegation of *administrative* power is negotiated, and negotiated it has to be, by an "agreement" the Federation *can* interfere. Indeed, there is specific provision in the latter case for "inspection" and "directions" and, although nothing is said as what is to happen if the Governor-General "in his discretion" is dissatisfied with the Ruler's administration, I think that he could revoke the agreement in such a case. An agreement under Section 125 (1) appears to me to be in the nature of a *delegation* of executive power and, as such, is a very different thing from a reservation by the Ruler of the executive power itself. The Executive in England frequently delegates, under statutory powers, the administration of its functions, for example, in such matter as Public Health, to either the local authorities or direct to the officers of local authorities which officers, in such cases, although appointed by the local authorities are only removable with the consent of the Government Department. But if, as has frequently happened in the administration of The Poor Law, a local authority is in default in its administration, the Government Department may step in and take over the administration itself. It appears to me that the Federation might do the same in the case of unsatisfactory administration of Federal subject by the Ruler. I do not think the words of sub-section (2) of Section 125 exclude the Federal Legislature from passing coercive legislation to this effect, at any rate in the case of an agreement as to administration by the Ruler negotiated subsequent to the Instrument of Accession and *not* the subject of "provision in that behalf" in the Instrument itself.

53. The whole position in regard to the sanction *i. e.* penalties "to which a Ruler who is in default in the matter of administration" of Federal subjects is extremely debateable and dangerously uncertain. Where he has, by his Instrument of Accession, *reserved* executive powers, and has exercised them in an unsatisfactory manner and even where he has not so reserved them, his action or inaction is clearly subject to the provisions of Section 128 as to "directions" by the Governor-General. In such case the opinion of the Federal Court, may, at his instance or at the instance of "the Federation", be invoked as to "whether the executive authority of the Federation is exerciseable" in the Federation. But such an opinion of the Federal Court will amount to no more than a declaratory judgment and will, in any case, not extend to the question of whether he is or is not in default. Still less will the Court's opinion determine what, if any, sanction is to be attached to his default. This is an aspect of the matter which I will deal with when I come to the question of the invocation of "paramountcy", *i. e.* of

the powers of the Viceroy as to the ultimate "sanction" for the exercise of the Federal authority over the States. But as regards one peculiar Section of the Act there seems to be no room for doubt. I refer to the very peculiar<sup>1</sup> Section, or rather Sub-section, of the Act *viz.* Section 124 (3) which enables the Federal Legislature to "impose duties" upon a State. In view of the doctrine of "plenary powers" and "implied powers", previously referred to, I think it would be well within the power of the Federal Legislature to enforce its will, in case of default by a State, in the matter of such imposed duties by any coercive measures which the Legislature might think fit. If, for example, the duty of the levy and collection of a Federal tax were "imposed" on a State by a Federal law and the State was in default in the collection and levy, it would, in my view, be within the powers of the Federal Legislature to enact a law confiscating the proceeds of the revenues of that State lying either in the State Bank or in a Bank in British India in so far as such confiscation was necessary to make good the default. The case of *The State of New South Wales vs. the Commonwealth* (1931-1932) 46 C. L. R. 155 is not exactly comforting in this respect.<sup>2</sup>

54. I return to the question of "reservation" of executive powers by the Rulers in their Instruments of Accession. The mere idea of that reservation is "anti-federal" in the sense that it is utterly contrary to the principle of a *division* of powers, legislative, executive and judicial, to be found in every other Federal constitution. If adopted generally, in the case of the Federation of India, it would reduce the Federation to a mere legislative union. But the proposed departure is insisted on in the Hyderabad Memorandum wherein (at page 21) it is remarked :

"Throughout the Round Table Conferences the discussion as to the division of powers between the Federation and the Units proceeded upon the basis of a *clear cut distinction* between policy and legislation on the one hand and administration on the other..... It was on this footing that the State envisaged the question of accepting any given subject as federal. The distinction has been dropped in the White Paper but the State desires to make it plain that it adheres to the substance of the conception and desires that it should, as far as possible, be realised in practice, whichever form the constitutional provision may take."

The answer to this argument is that "a clear cut distinction" between policy and legislation on the one hand, and "administration", (which

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(1) See paragraph 7 above as to the unprecedented character, legally speaking, of this sub-section.

(2) See paragraph 15 above.

presumably means here the executive power) on the other hand, does not exist and is utterly impossible either of "realisation in practice" or of "constitutional provision" to that effect. It implies the introduction into the Act of a theory of division of the Federal powers in the Federal sphere itself (I am not referring to division of powers between the Federation and the States) which is quite incompatible with the principles which will be applied, and must be applied, to the interpretation of the Act by the Privy Council and indeed to the interpretation of any Act of Parliament involving the grant of legislative powers. That interpretation is that the powers of the legislature extend to the delegation to the Executive of its own powers to legislate. The theory was applied, a great many years ago, to British India in the case of *R. V. Burah* L. R. 3 App. Ca. p. 889 and has been consistently applied by the Privy Council to the case of every overseas legislature in the British Empire. Indeed, under modern conditions and in view of the growing complexity of legislative problems, it would be impossible to carry on the government of a country if the legislature could not, and did not, delegate to the Executive Departments concerned with the administration of Acts the power to legislate, by way of Statutory Rules and Orders, in the execution of the Act. The Indian Statute-book itself is full of examples of such delegation of legislative power. But if, in the case of the States, the Federal Executive was wholly divorced from the Federal Legislature, it would be wholly impossible to do that. There is no "clear-cut distinction" between "policy" and "administration" and it would be impossible to devise one. The "policy" of an Act is inseparable from its execution. Moreover it would be impossible to institute, much more to develop responsible government in the Federation, if the executive power was reserved to the States. The whole idea of responsible government is that a Federal Executive should be responsible to the Federal Legislature. If the States were allowed to reserve to themselves the executive power, the Federal Government, so far as the States were concerned, would be shorn of its responsibility to the Federal Legislature. The States must really make up their minds either to accept a share in the government of the Federation or to remain outside the Federation altogether. The Hyderabad proposal is quite incompatible with the entry of the States into the Federation at all.

## Section IX.

### THE JUDICIAL POWER IN THE FEDERATION.

55. The subject of the judicial power calls for very little comment, as the provisions of the Act are quite clear in this respect and the States have,

I think, nothing to fear. The matter was fully dealt with by the present writer and his colleagues in the Opinions written for the Chamber of Princes in 1934 and 1935 and I see no reason to qualify what appears therein. As regards the operation of Section 215, enabling the Federal Legislature to confer "ancillary powers" upon the Federal Court, I agree with the view expressed in the Hyderabad Memorandum that it does not enable the Legislature to enlarge the powers of the Federal Court unless the States accept Item 53 of the Federal Legislative List and even so, any powers conferred must be "supplemental" and not inconsistent with the provisions of the Act. As regard the meaning of Section 204, a great deal of rather confused discussion took place at the meetings of the Constitution Committee which eventually decided to refer the matter to me for my opinion. I therefore proceed to deal with it. The section confers an original jurisdiction upon the Federal Court to decide "disputes" between "the Federation, any of the Provinces or any of the Federated States" if the dispute concerns "the existence or extent of a legal right". Its judgments in such cases are to be merely "declaratory judgments" in other words they need not involve any consequential relief. The jurisdiction thus conferred resembles in some respects that conferred on the Federal High Court of Australia which, by Section 75 of the Constitution, is empowered to decide "matters between States", a jurisdiction enlarged by the Australian Judiciary Act 1903-1907 to include "matters involving questions as to the limits *inter se* of the constitutional powers of the Commonwealth and the States, or of any two or more States". The effect of proviso (i) to Section 204 of the Government of India Act is to vest in the Federal Court a very similar jurisdiction in the case of the States, in other words jurisdiction to decide "the limits *inter se*" of the constitutional powers of the Federation and the Indian States which have acceded to the Federation.

56. But the uncertainty at the meetings of the Constitution Committee related not so much to the meaning of this Proviso as to the meaning of Proviso (iii), in particular as to whether the "agreements" therein referred to include agreements made by any State or only to agreements made by a Federated State. Now, a proviso is meaningless if it is isolated from the Section or sub-section which it qualifies and inasmuch as the substantive sub-section 204 (1), refers only to "Federated States", the words "any State" in Proviso (iii) thereto can only refer to a Federated State. A further question was put to me as to what may be "the agreements" referred to in Proviso (iii). The answer is that they must be agreements relating to non-Federal matters as it is only in regard to such matters that agreement is necessary. A dispute about water rights in the case of a State which had contracted

out of Sections 130-133 would be such a non-Federal matter. In such cases hitherto the Viceroy has, in virtue of certain recommendations contained in the Montagu-Chelmsford Report,<sup>1</sup> appointed an *ad hoc* Commission of Inquiry. An appeal in such Cases will, in virtue of Section 208, lie to the Privy Council. The construction I have put upon the original jurisdiction vested in the Federal Court by Section 204 is obviously that contemplated by the Joint Parliamentary Committee in its argument in favour of some such jurisdiction "between *Federal Units*"<sup>2</sup>. Some such jurisdiction is essential in all Federal systems and is duly to be found in them. A minor problem was raised by Mr. Sharma on the discussions of this Section of the Act at the meetings of the Constitution Committee, namely whether the words "any dispute between any two or more of the following parties, that is to say the Federation, any of the Provinces or any of the Federated States" confined the jurisdiction to (1) a dispute between two, and only two, Federated States; (2) a dispute between two, and only two, Provinces. I can see no difficulty here. The word "any" preceding the word "Provinces" and preceding the words "Federated States" clearly refers back to the words "any two or more". Constitutional disputes in which there has been a "joinder of parties" are common enough in the exercise of similar original jurisdiction by the Federal High Court of Australia.

## Section X.

### "DISCRIMINATION".

57. The subject of "discrimination" has clearly greatly exercised the minds of the representatives of the States at all their discussions and I am bound to say that an extraordinary degree of confusion appears to exist, alike as to the meaning of such sections of the Act as deal with the matter at all and as to what it is legally possible to achieve, by way of protection, within the four corners of the Act. For example, I observe that in paragraph 38 of the Hyderabad Memorandum it is stated that the "State is advised" that Section 108 (1) "does, in effect, enable the Governor-General in his discretion to prevent discriminatory taxation under either of the above three Items", namely Items 44, 45 and 46. This is a surprising mistake. Item 44 refers to "Customs", Item 45 refers to "Excise". But Section 108 (1) is confined, in so many words, to the taxation of "persons". In other

(1) Report on Indian Constitutional Reforms p. 245 paragraph 308.

(2) See J. P. C. Report page 193 (paragraph 324), "Original Jurisdiction of the Federal Court".

words it refers to direct taxes. Customs and Excise are not direct taxes but indirect. The distinction between the two classes of taxes, a tax on persons and a tax on things i. e. on commodities, is a fundamental distinction in law, constantly made in Privy Council cases on the taxing power in Canada. The confusion, apparent in all the discussions in the Committees of representative of the States, as to what is legally possible having regard to the character of the Act itself, in order to protect the States against "discrimination", is even greater. In all these discussions those who participated in them seem to have lost sight of the elementary fact that the States cannot demand more of the Federation, in the matter of discrimination than they are prepared to give. And in the Act they give nothing, that is to say there is no provision of the Act by which the States are prohibited from discriminating against the Federation or its Provincial Units. In the second Joint Opinion of Counsel for the Chamber of Princes I pointed out (see page 20, paragraph 24) that "none of the statutory protections therein proposed", i. e. in the text of the Bill, "extend to the subjects of the Federated States" but that the exclusion of States' subjects from protection really amounts "to a recognition of the internal sovereignty of the States" inasmuch as it was the logical consequence of the freedom of the States to discriminate as they please, by their own laws, against British subjects. I proceeded to point out that any extension of the protection afforded by the sections of the Act to British subjects to the case of the States' subjects "would only be possible at the price of the *acceptance by the States of a limitation in their own legislative powers*". Furthermore, any such proposal as that contained in Additional Clause 9 (see page 18 of the "Set of Papers" circulated to the Constitution Committee) would involve the amendment of the Act, as they constitute a restriction on the existing powers of the Federal Legislature as enacted in the Act.

58. There is a fundamental mistake at page 18 of the "Set of Papers" [Memorandum Explanatory of Agendum 3 (ii)] which shows how deep-rooted is the confusion of thought obscuring the discussions of this subject. Therein it is observed, in support of Additional Clause 9, that "in all Federal Constitutions a non-discriminatory clause of this nature usually finds place". But in every one of those Constitutions "Trade and Commerce" between *all* Federal Units is "free". In the case of the Indian Federation it is not. This distinction goes to the root of matter. Let us consider what the situation in the case of the Government of India Act really is. There is no such provision as that of Clause 9 in the Act except in the case of Section 297, which Section is confined to the Provinces and may at any time be repealed by Parliament without affecting the Instrument of Accession. It will

be convenient if, for the sake of simplicity, I confine my observations in the first instance to the proposal to secure the States against discrimination by way of Provincial legislation or Provincial executive action. Paragraph (a) of sub-section (1) of Section 297 is obviously aimed primarily at securing freedom of trade and commerce between the Provinces and at preserving unimpaired the Federal power of legislation in regard to Customs which, so far as it affects the Provinces, is exclusive. In the case of the Provinces this Federal power in the matter of Customs is identical with that conferred "exclusively" on the Federal Parliaments of Australia (S. 90) and Canada [S. 121 and 91 (3)]. The Constitution Acts of these Dominions further provide, accordingly, that there shall be "freedom" of trade between the constituent units of the two Federations. The interpretation placed on the respective Sections by the Privy Council has been, in the case of Australia, that no State may control production within the State in such a manner as to limit *e.g.* by a quota system, the sale of products sought to be controlled to buyers in another State *James vs. Cowan*. (1932) A. C. p. 542. In the case of Canada, no Province can impose a tax which should have the effect of causing products of the Province to be sold at a lower price within the Province than outside it — see *Attorney General for British Columbia vs. McDonald Murphy Lumber Co.*, (1930) A. C. p. 357. In both cases the legislation was challenged on the ground that it "discriminated", but the ground on which the legislation was held invalid was that it interfered with the "freedom" of inter-State and inter-Provincial commerce respectively. These restraints on "State" legislation in Canada and Australia are, however, based on the reciprocal obligation of the Federal Legislature itself to abstain from any measures which would, directly or indirectly, interfere with such freedom, as was recently decided in *James vs. Commonwealth of Australia* (1936) A. C. p. 578. These restrictions on State and Federal legislation are reciprocal, in the case of these two Federations, in that they are rooted in one and the same Section of the Constitution, the Section prescribing freedom of inter-State trade.

59. In the case of the Government of India Act there is no such reciprocal obligation. The Federal Legislature is nowhere restrained from interfering with freedom of trade between one Province and another. Nor is the Federal Legislature, as it is in Australia, forbidden to discriminate in the matter of taxation, customs, excise and bounties. The Federal Legislature can, when legislating in these matters, discriminate between one Province and another and, in view of its power to legislate "exclusively" in subjects enumerated in the Federal List, might legislate locally for one Province by levying an excise duty, the operation of which was confined to that Province or, what amounts

to much the same thing, <sup>a</sup> varying the rate of an excise duty as between one Province and another. There is no provision in the Government of India Act, as there is in the Australian Commonwealth Act, requiring the Federal customs and excise duties, and indeed Federal bounties, to be "uniform" throughout the Provinces of British India. Paragraph (a) of sub-section (1) of Section 297 is, however, worded in sufficiently wide terms to secure any neighbouring State, whether Federated or not, from any prohibitory or restrictive legislation by a *Provincial* legislature in the matter of trade and commerce between the State and the Province and it is clear from the Canadian and Australian appeal cases which I have dealt with above that the paragraph will be interpreted by the Privy Council in such a manner as to secure the States completely from any discrimination against them, or one of them, in the form of interference with their trade and commerce, so far as *action by the Provinces* is concerned. The fact remains, however, that this paragraph, like the paragraph following it, may be repealed by an amending Act of Parliament without the consent of the States. Such a contingency is, however, improbable as its repeal would also enable the Provinces to restrict inter-Provincial trade and such legislation would be "anti-Federal" or, to speak more properly, would reverse the process of what the Joint Parliamentary Committee has called "the full development of Federation". To sum up, the conclusion at which I arrive is that the States must content themselves with such protection as is afforded them by Clause XV of the Instrument of Instructions to the Governor-General. And that protection is, of course, purely "political", in other words it is unenforceable in law.

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## Section XI.

### PARAMOUNTCY AS A FEDERAL SANCTION.

60. I do not propose in this Opinion to set sail upon the uncharted sea of "Paramountcy". But the matter has been raised in the discussions and so far as it is relevant to the issue I will deal, very briefly, with it. The position appears to be that the States, at one and the same time, seek to exclude Paramountcy altogether from the Federal sphere, as regards "the exercise of Federal authority", and having thus excluded it, to bring it in again, by a kind of back door, as the "sanction" which is to ensure the observance by the States of their Federal obligations. This is a somewhat paradoxical proposition. In so far as this dual proposal — to be found in

Additional Clauses 1 and 2—is designed to preserve the direct relationship between the States and the Crown, it is intelligible enough. It is a matter of common knowledge that certain Indian writers, including a lawyer of considerable distinction namely Sir Shivaswamy Iyer in his book *Indian Constitutional Problems* of which he has been good enough to send me a copy, hold the view that the relationship of the Princes to the Crown is a relationship with the Crown in British India, in other words with the King “in the right” of British India and not with the King in his British, or rather his Imperial capacity. This view is incorrect. It is negatived alike in the Montagu-Chelmsford Report and in the Report of the Indian States Committee, commonly known as the Harcourt Butler Committee<sup>1</sup>. The dissentient view of Sir Shivaswamy Iyer and his school is obviously perilous to the future of the States inasmuch as it is, and is unaffectedly intended to be, an argument in favour of the ultimate incorporation of the States in British India. But it appears to me that the proposals to re-introduce the Viceroy and the “paramountcy” powers into the Federation by way of a “sanction” for the enforcement of the Federal authority is calculated, in the long run, to operate in the same direction. Indeed, the dualism of the office of the Governor-General contemplated by the Act itself seems to me an artificial one and must result either in the “Viceroy” being completely absorbed in the Governor-General or in the separation of the two offices by their assignment to two separate persons. This separation is bound to come if and when “Dominion Status” is granted to India, even as it has come in the case of the Union of South Africa where the offices of Governor-General of the Union and of High Commissioner for South Africa, formerly united in the same person, have now been vested in two persons completely independent of one another—one, the Governor-General acting exclusively on the advice of the Union Ministers and the other the High Commissioner acting exclusively on the instructions of the Imperial Government. Moreover, with the grant of Dominion Status to the Indian Federation, the enforcement of the Federal authority in the States must inevitably rest exclusively with the Federal Government. Sooner or later, therefore, Paramountcy as the “sanction” for the enforcement of Federal authority in the States must disappear.

## Section XII.

### THE IMPLICATIONS OF SECTION 45 OF THE ACT.

61. In paragraph 8 (note 4) of this Opinion I undertook to explain what I meant by saying that Section 45 of the Act is “so drafted as to enable

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(1) See paragraph 33, page 23. “We agree that the relationship of the States to the Paramount Power is a relationship to the Crown”.

the whole of India, *including the Federated States*, to be subjected indefinitely to the dictatorial powers of the Governor-General for any number of years". It should further be observed in this connection that if Section 45 *did* give a right of secession at the end of the three years' period of the contemplated dictatorship, the Secretary of State for India would be able to defeat the apprehended secession of the States by instructing the Governor-General to withdraw the Proclamation of Emergency just before the termination of the statutory period of three years and then after the lapse of one or two months issuing a new Proclamation. In this way the whole of "India", *including the Federated States* might, subject to the necessary "resolutions" being passed by Parliament, be subject indefinitely to the dictatorial powers of the Governor-General for any number of years. This is an aspect of the Secretary of State's amendment to clause 45 which has escaped all comments.

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#### CONCLUSION.

The Federal Constitution embodied in the Government of India Act is, in the language of Burke, "a contrivance of human wisdom to provide for human wants". As such, it is by no means infallible, for it is beyond the wit of man to devise anything that can be called perfect. But most of its imperfections, in so far as they are not the imperfections inherent in such a "half-way house" as Federation invariably is, are due to the fact that the authors of it have had to incorporate in one and the same political structure two fundamentally different polities, the Indian States and the Provinces of British India. This is the explanation of a certain want of harmony in the design. The constitution is like a building which, begun in one style of architecture is to be completed in another, in part Gothic, in part Renaissance, and it may well be that the distribution of stresses and strains of the structure will appear, in course of time, unequal to the burden of its support. In that case, amendment will become inevitable. It conforms to no theory of federalism, if such there be, but it is none the worse for that. It is empirical but so is the British Constitution and the British Constitution has endured while more fanciful constitutions have long since passed away.

I cannot conclude this Opinion without expressing my obligations to my friend Mr. D. G. Dalvi, Advocate of the High Court of Bombay and Junior Counsel to the Chamber of Princes who has given me the most devoted assistance in a task performed under great pressure of time, and one which without his assistance could never have been completed. He has brought to bear upon our discussions of the problems involved in it all the resources of a fine and

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J. H. MORGAN.

NEW DELHI,  
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