Privy Council Appeal No. 120 *of* 1913.

The Attorney-General for the Commonwealth of Australia and others - - - *Appellants,*

v.

The Colonial Sugar Refining Company, Limited, and others - - - - *Respondents.*

FROM

THE HIGH COURT OF AUSTRALIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 17TH DAY OF DECEMBER 1913.

Present at the Hearing.

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD SHAW.
LORD MOULTON.

[*Delivered by* THE LORD CHANCELLOR.]

The question raised by this Appeal is one of much importance. It turns on the true interpretation of the Constitution of the Commonwealth of Australia. It is only in exceptional cases that a question of this nature is submitted to the King in Council. Section 74 of the Constitution Act of 1900 provides that no appeal shall be permitted from a decision of the High Court of Australia upon any question, however arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by the Sovereign in Council. In the present case the High Court has taken the exceptional course of so certifying. The

reason is that the four Judges of that Court who heard the case were equally divided, and that under a Statutory power, relating to cases in which that Court is exercising original jurisdiction, the decision was come to by the casting vote of the Chief Justice.

Their Lordships have given anxious consideration to the question brought before them under these circumstances, and they have heard arguments of much ability and fullness from learned Counsel of the Bars both of England and of Australia.

The circumstances of the litigation may be stated comparatively shortly. The Commonwealth Parliament passed Royal Commissions Acts in 1902 and 1912. These Acts are now consolidated into the Royal Commissions Act, 1902–1912, and this contains the following among other provisions:—1 (*a*) Without in any way prejudicing, limiting, or derogating from the power of the King or of the Governor-General to make or authorise any inquiry, or to issue any commission to make any inquiry, it is enacted that the Governor-General may, by letters patent in the name of the King, issue such commissions, directed to such person or persons as he thinks fit, requiring or authorising him or them or any of them to make inquiry into and report upon any matter specified in the Letters Patent, and which relates to or is connected with the peace, order, or good government of the Commonwealth, or any public purpose, or any power of the Commonwealth. (2) Whenever the Governor-General by Letters Patent under the Great Seal of the Commonwealth issues a commission to any persons to make any inquiry the President or Chairman of the Commission, or the sole Commissioner, as the case may be, may by writing under his hand

summon any person to attend the Commission at a time and place named in the summons, and then and there to give evidence and to produce any books, documents, or writings in his custody or control which he is required by the summons to produce. By section 3 the Commissioners are empowered to administer oaths to witnesses. By section 5, if any person summoned to attend fails without reasonable excuse to attend or to produce documents, or books, or writings which he is required by the summons to produce, he is guilty of an offence and liable to a penalty of 500*l*. By section 6 if such person refuses to be sworn or make affirmation or to answer any relevant question, he is guilty of an offence and liable to the same penalty. By 6 (*a*) any witness who has been summoned is to appear and report himself from day to day until released from further attendance. By section 6 (*b*) if a person summoned as a witness fails to attend, the President or Chairman may issue a warrant for his apprehension, which the police may execute, with power to break and enter the defaulter's house. By section 6 (*d*) nothing in the Act is to make it compulsory for a witness to disclose a secret process, and by 6 (*dd*) no answer made is to be admissible in evidence in any court or criminal proceeding in any Commonwealth or State Court. Section 6 (*e*) establishes wilful contempt of a Royal Commission as an offence punishable by fine or imprisonment, and gives the President or Chairman certain of the powers of a Judge of the High Court in relation to contempt.

In 1911 the Government of the Commonwealth appointed a Royal Commission to inquire into the sugar industry in Australia, and in 1912 a new appointment of this Royal Commission was made. One reason for the new

appointment was that the amendment of the old Royal Commission Act to which reference has been made had been passed, and it was desired to make use of the powers which the amending Act conferred. The other reason was that the scope of the inquiry might be somewhat extended. The duty of the Royal Commission under the new appointment was to inquire into and report upon the sugar industry in Australia, and more particularly in reference to—

(*a*) Growers of sugar cane and beet;
(*b*) Manufacturers of raw and refined sugar;
(*c*) Workers employed in the sugar industry;
(*d*) Purchasers and consumers of sugar;
(*e*) Costs, profits, wages and prices;
(*f*) The trade and commerce in sugar with other countries;
(*g*) The operation of the existing laws of the Commonwealth affecting the sugar industry; and
(*h*) Any Commonwealth legislation relating to the sugar industry which the Commission thinks expedient.

The Appellants, other than the Attorney-General of the Commonwealth and the Appellant Brown, were the originally appointed members of the Commission, the Appellant Gordon having been the Chairman. Since the institution of these proceedings the latter has resigned the position of Chairman because of ill-health, and the Appellant Brown has been appointed in his place.

The Respondent Company is a sugar refining company incoporated under the law of the State of New South Wales, and carrying on an extensive business in Australia and elsewhere. The other Respondents are the Directors and General Manager of the Company. Early in 1912 the Secretary of the Royal Commission

wrote to the Respondents enclosing a list of questions which the Commission proposed to address to the Respondent Company, and intimating that these questions were not designed in any way to limit the scope of the inquiry. He requested to be informed whether an officer of the Company would attend to answer the questions and give evidence and produce documents called for, and intimated that it might be necessary to issue a formal subpœna to the Directors and officers or some of them. Correspondence took place between the Secretary and the Company's solicitors. The Respondents objected to many of the questions put, and declined to produce all of the documents called for. Summonses to compel attendance and to give evidence and produce documents were issued on behalf of the Commission, and these summonses having been heard in the Police Court at Sydney, fines were imposed. The Respondents ultimately commenced this action in the High Court against the Commissioners, the Attorney-General of the Commonwealth being subsequently added as a Defendant. They claimed a declaration that the Royal Commissions Acts were *ultra vires* of the Commonwealth Parliament, and that the Respondents were consequently not bound to attend the meetings of the Commission or give evidence or produce documents; and, alternatively, that they were not bound to answer any questions or produce any documents which related to a subject-matter as to which the Commonwealth Parliament had no power to legislate, or which were not relevant to the terms of the Commission. Consequential relief in the form of an injunction was also asked for. Notice of motion for an interlocutory injunction was then given. On 4th October 1912 the Court, con-

sisting of the Chief Justice, Mr. Justice Barton, Mr. Justice Isaacs, and Mr. Justice Higgins, made an interim order the effect of which was that the Respondents were not to be required to answer questions or produce documents relevant only to (1) the internal management of the affairs of the Company : (2) the operations of the Company outside the Commonwealth, except so far as they related to the conditions of carrying on the sugar industry, irrespective of the persons by whom it was carried on ; (3) matters relating to the value of particular parts of the property of the Plaintiff Company, except such parts as were actually and directly employed in the production of sugar within the Commonwealth ; (4) details of salaries paid to officers of the Plaintiff Company, except so far as they were relevant to the actual cost of such production and management.

It is from this Order, which gave effect to the conclusion come to by the Chief Justice and Mr. Justice Barton, that the present Appeal is brought. Their Lordships agree with these learned Judges that if the Respondents were entitled to succeed, it was, under the circumstances of the case, and for the reasons given in the Judgment of the Chief Justice, right to grant an interim injunction. The real question in the case is whether the Respondents were entitled to relief at all. It was held by the High Court that they were so entitled, not on the ground of the invalidity of the Royal Commission Acts, for the four learned Judges all took the view that these Acts were within the legislative powers of the Commonwealth Parliament, but because, in the opinion of the Chief Justice and Mr. Justice Barton, an attempt was being made to exercise, under cover of these Acts, powers which were not and could not be

conferred by them. It was held that the powers actually and validly so conferred did not extend to inquiry into the internal or domestic management of the affairs of a company created under State laws, and that it was only as to its operations in matters within the area of the Federal power that regulations could be validly made by the Commission. The two learned Judges whose opinion prevailed were of opinion that the power of the Commonwealth Government to hold an inquiry by Commission exists only as incidental to powers presently vested in the Commonwealth by the Constitution, and that the mere fact that these powers might, by means of the machinery provided by the Constitution Act, be extended to other subjects such as some into which the Commission had proposed to inquire, did not authorise inquiry into such subjects. Mr. Justice Isaacs and Mr. Justice Higgins, on the other hand, were of opinion that the Commonwealth Parliament possessed the right to legislate for the purpose of obtaining information on existing matters which might form the subject of amendments to the Constitution. They based this conclusion on the construction of the Constitution Act itself. They were further of opinion that since, as the rest of the Court agreed with them in holding the Royal Commission Acts were not *ultra vires*, it was impossible to pronounce in advance that the questions sought to be put might not prove relevant to matters which were held by all the Judges to be proper subjects of inquiry.

Their Lordships think that this last conclusion is entitled to weight. For even assuming that what can only be made relevant by an amendment of the Constitution is excluded from the class of subjects as to which

the Commonwealth Government is entitled to insist on being furnished with information, it is hardly possible for a Court to pronounce in advance as to what may and what may not turn out to be relevant to other subjects of inquiry on which the Commonwealth Parliament is undoubtedly entitled to make laws. If in order to render the powers given by Royal Commissions Acts *intra vires* it is sufficient that they should be ancillary to possible subjects of present legislative capacity, as distinguished from being incidents in actual legislation about such subjects, and it is not easy to say that the questions proposed in the present case to be put, and the documents sought to be obtained, are not relevant as throwing light on possible legislation. For section 51 of the Constitution Act, which defines the legislative capacity of the Commonwealth Parliament, extends to subjects such as trade and commerce with other countries and among the States, taxation, bounties on production or export, statistics, and trading corporations formed within the limits of the Commonwealth. When their Lordships turn to the description of the information asked for as set out in the schedule to the summons which was served on the general manager of the Company they find that the scope of this description is indeed very wide, extending as it apparently does to the entire field of the Company's affairs, including its internal management. Its financial history and details of its transactions are called for, including the mode of its appropriation of profits. Particulars are, for example, to be given of its replacement and depreciation funds, of its "sundry creditors and suspense accounts," of the cost price and present value of each of its refineries and mills,

of the cost price and present value of its stocks and sugar, of the way in which its estimate of net profits has been arrived at, of the cost per ton of refining, taking by-products into account, of the quantity of sugar cane crushed and the extraction results showing the percentage of loss in manufacture, with the cost of manufacture in detail; of the names of the growers of the cane, and the analyses of the cane in each case; of the average prices received from wholesale buyers, with the rebates and discounts allowed, and of the resolutions of the directors relative to the prices which should be paid for cane and raw sugar, and at which refined sugar should be sold. These are examples taken from a series of questions which obviously must disclose many details of the mode in which the Company carries on its business. To be compelled to answer them is a serious interference with liberty. But if there exists a right in the Government of the Commonwealth to put them, so far as relevant to a merely possible exercise of its actual legislative powers, the policy of doing so is something on which their Lordships are neither at liberty nor competent to express an opinion, and it seems to them impossible to say in advance which of these questions, if they can be insisted on at all, may not turn out in the course of a prolonged inquiry to be relevant or even necessary for the guidance of the legislature in the possible exercise of its powers.

But there remains the question which goes to the root of the controversy between the parties. Were the Royal Commissions Acts *intra vires* of the Commonwealth Parliament? This is a question which can only be answered by examining the scheme of the Act of 1900, which established the Commonwealth Constitu-

tion. About the fundamental principle of that Constitution there can be no doubt. It is Federal in the strict sense of the term, as a reference to what was established on a different footing in Canada shows. The British North America Act of 1867 commences with the preamble that the then Provinces had expressed their desire to be federally united into one Dominion with a Constitution similar in principle to that of the United Kingdom. In a loose sense the word "federal" may be used, as it is there used, to describe any arrangement under which self-contained States agree to delegate their powers to a common Government with a view to entirely new constitutions even of the States themselves. But the natural and literal interpretation of the word confines its application to cases in which these States, while agreeing on a measure of delegation, yet in the main continue to preserve their original Constitutions. Now, as regards Canada, the second of the Resolutions, passed at Quebec in October 1864, on which the British North America Act was founded, shows that what was in the minds of those who agreed on the Resolutions was a General Government charged with matters of common interest, and new and merely local Governments for the Provinces. The Provinces were to have fresh and much restricted Constitutions, their Governments being entirely remodelled. This plan was carried out by the Imperial Statute of 1867. By the 91st section a general power was given to the new Parliament of Canada to make laws for the peace, order, and good government of Canada without restriction to specific subjects, and excepting only the subjects specifically and exclusively assigned to the Provincial Legislatures by section 92. There followed an enumeration of subjects which were

to be dealt with by the Dominion Parliament, but this enumeration was not to restrict the generality of the power conferred on it. The Act, therefore, departs widely from the true federal model adopted in the Constitution of the United States, the Tenth Amendment to which declares that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to their people. Of the Canadian Constitution the true view appears, therefore, to be that, although it was founded on the Quebec Resolutions and so must be accepted as a treaty of Union among the then Provinces, yet when once enacted by the Imperial Parliament it constituted a fresh departure, and established new Dominion and Provincial Governments with defined powers and duties both derived from the Act of the Imperial Parliament which was their legal source.

In fashioning the Constitution of the Commonwealth of Australia the principle established by the United States was adopted in preference to that chosen by Canada. It is a matter of historical knowledge that in Australia the work of fashioning the future Constitution was one which occupied years of preparation through the medium of conventions and conferences in which the most distinguished statesmen of Australia took part. Alternative systems were discussed and weighed against each other with minute care. The Act of 1900 must accordingly be regarded as an instrument which was fashioned with great deliberation, and if there is at points obscurity in its language this may be taken to be due not to any uncertainty as to the adoption of the stricter form of federal principle, but to that difficulty in obtaining ready agreement about phrases which attends the drafting of legislative measures by large assemblages.

Their Lordships will now examine the Commonwealth Constitution Act in the light of these observations with a view to answering the question whether the Royal Commissions Acts of the Australian Parliament were within the powers which by this instrument were transferred by the federating Colonies to the new Central Parliament. It is plain that excepting in so far as such powers were so transferred they remained exclusively vested in the States. This results not merely from the broad principle laid down in section 51, to which reference will presently be made, but from section 107 which enacts that "any power "of the Parliament of a Colony which has "become or shall become 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, "or of the admission or establishment of the "State, as the case may be." At the time of Federation the federating Colonies possessed full powers, delegated to them by the Imperial Parliament, of legislating for the peace, order, and good government of their people. It is clear that the powers which the Royal Commissions Acts affect to exercise, of imposing, under penalties, new duties on the subjects or people residing within the individual States, were before Federation vested in the legislatures of these States. If so, the burden rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament to show that this was done. In order to see whether this burden can be discharged, it is necessary to look closely at the wording of section 51. The section commences by declaring that the Parliament of the Commonwealth shall, subject to the new Constitution, have power to make laws for

the peace, order, and good government of the Commonwealth. But this power is not conferred in general terms. It is, unlike the corresponding power conferred by section 91 of the Canadian Constitution Act of 1867, restricted by the words which immediately follow it. These words are "with respect to," and then follows a list of enumerated specific subjects. Their Lordships have already referred to the material heads in this list. None of them relate to that general control over the liberty of the subject which must be shown to be transferred if it is to be regarded as vested in the Commonwealth. It is of course true that under the section the Commonwealth Parliament may legislate about certain forms of trade, about bounties and statistics, and trading corporations. Such legislation might possibly take the shape of statutes requiring and compelling the giving of information about these subjects specifically. But this is not what the Royal Commissions Acts purport to do. Their scope is not restricted to any particular subject of legislation or inquiry, and no legislation has actually been passed dealing with specific subjects such as those to which their Lordships have referred as matters to which legislation might have been directed giving sanction to some of the inquries which the Royal Commissioners are now making. And the field of the Royal Commissions Acts—which are to apply to any Royal Commission, whether issued under statutory authority or under the Common law powers of the Crown—goes far beyond any of the first 36 of the classes of subjects enumerated in the section. It was held by Mr. Justice Isaacs and Mr. Justice Higgins that the inquiries directed by the Commission might well be relevant to the question of the desirability of a change of the Constitution which might take place either under

the express provisions of section 128 by special legislation passed under certain conditions and approved after a referendum in the States, or possibly under subhead 38 of section 51, which enables the exercise by this Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which could at the establishment of the Constitution be exercised only by the Parliament of the United Kingdom or the Federal Council of Australia. But their Lordships think that the answer to this argument given in the Judgments of the Chief Justice and of Mr. Justice Barton is conclusive. No such power of changing the Constitution, and thereby bringing new subjects within the legislative authority of the Commonwealth Parliament, has been actually exercised, and until it has been it cannot be prayed in aid. No doubt the Act of 1900 contains large powers of moulding the Constitution. Those who framed it intended to give Australia the largest capacity of dealing with her own affairs, and the Imperial Statute enables her to act without coming to the mother Parliament. But the people of Australia have elected to put into the Act restrictions on change of another kind. Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the Statute what rights of legislation the federating Colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion.

Nor, in their Lordships' opinion, is the question carried further by subhead 39, which declares to be within the legislative capacity of the Central Parliament matters incidental to the execution of any power vested by this Constitution in the Parliament, or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth. These words do not seem to them to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law. The authority over the individual sought to be established by the Royal Commissions Acts, the new offences which they create, and the drastic powers which they confer, cannot, in their Lordships' opinion, be said to be incidental to any power at present existing by statute or at common law. A Royal Commission has not, by the laws of England, any title to compel answers from witnesses, and such a title is therefore not incidental to the execution of its powers under the common law. And until the Commonwealth Parliament has entrusted a Royal Commission with the statutory duty to inquire into a specific subject legislation as to which has been by the Federal Constitution of Australia assigned to the Commonwealth Parliament, that Parliament cannot confer such powers as the Acts in question contain on the footing that they are incidental to inquiries which it may some day direct. Having arrived at this conclusion, their Lordships do not think that the Royal Commissions Acts in the form in which they stand, could, without an amendment of the Constitution, be brought within the powers of the Commonwealth legislature. Their Lordships hesitate to differ from

Judges with the special knowledge of the Australian Constitution which the learned Judges of the High Court and not least the Chief Justice and Mr. Justice Barton possess, but the question they have to decide depends simply on the interpretation of the language of an Act of Parliament, and in the present case they have formed a definite opinion as to the interpretation which must be placed on the words used. Without redrafting the Royal Commissions Acts and altering them into a measure with a different purpose, it is, in their Lordships' opinion, impossible to use them as a justification for the steps which the Royal Commission on the sugar industry contemplates in order to make its inquiry effective. They think that these Acts were *ultra vires* and void so far as they purported to enable a Royal Commission to compel answers generally to questions, or to order the production of documents, or otherwise to enforce compliance by the members of the public with its requisition.

It will be sufficient to make a declaration to this effect with liberty to apply to the High Court to enforce it by injunction or otherwise. Their Lordships will therefore humbly advise His Majesty that such a declaration should be made, and that such liberty to apply should be granted, and that the Order of the High Court should be varied accordingly. As the Respondents have substantially succeeded the Appellants must pay the costs of this Appeal. The costs of the application of the 10th June 1913 will be costs in the Appeal.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH OF AUSTRALIA AND OTHERS

v.

THE COLONIAL SUGAR REFINING COMPANY, LIMITED, AND OTHERS.

JUDGMENT OF THE
LORD CHANCELLOR.

LONDON:
PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.