CASE AND COMMENT

TRETHOWAN'S CASE RECONSIDERED

CONSTITUTIONAL LAW — AUSTRALIA — COURT, LEGISLATURE, AND EXECUTIVE AND THE LIMITS OF THE JUDICIAL PROCESS — TRETHOWAN'S CASE[1], AND THE NEW SOUTH WALES CONSTITUTIONAL CRISIS OF 1931-2, RECONSIDERED.

A recent decision of the High Court of Australia, *Hughes and Vale Pty. Ltd.* v. *Gair,*[2] is interesting among other things for some remarks let fall by the Chief Justice, Sir Owen Dixon, as to Trethowan's case in which he had participated a generation before while an associate Justice of the High Court. Trethowan's case, concerning as it did, in its substantive aspects, the law-making powers of the Parliament of New South Wales, the legislature of a member State within the Australian federal system, was largely confined in interest to Australian students for a number of years,[3] but then blossomed overnight into some greater prominence as a result of being adopted by the Appellate Division of the Supreme Court of South Africa in support of its decision recently in the first "Colored Voters" case, *Harris* v. *Minister of the Interior,*[4] which has seemed to some commentators, over and beyond the South Africa issues, to offer some more far-reaching propositions as to the limits to the law-making powers of the legislatures of the independent, self-governing member-countries of the Commonwealth of Nations.

The Hughes and Vale case, now passed on by the High Court of Australia, arose out of a Bill passed by the Legislature of the State of Queensland[5] continuing in force a licensing system already provided under existing State

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[1]*Attorney-General (New South Wales)* v. *Trethowan* (1931), 44 C.L.R. 394 (High Court); (1931), 47 C.L.R. 97 (Privy Council).

[2]Reported in (1955), 28 Aust. L. J. 437. Discussed in Cowen, note, (1955), 71 L. Q. Rev. 336; Kahn, note, (1955), 72 So. Afr. L. J. 201.

[3]c/f the remarks of Professor Sawer, in discussing it for British readers a decade after the date of decision: "It is necessary to recall the facts . . . because they are already forgotten by most people outside New South Wales." Sawer, "Injunction, Parliamentary Process, and the Restriction of Parliamentary Competence." (1944), 60 L. Q. Rev. 83.

[4](1952), 2 S. A. L. R. 428 (A.D.) For an alternative thesis to justify the continued binding force at the present day of the "entrenched clauses" of the South Africa Act, 1909, (the South African Constitution), on the basis of the existence of a local South African root (or Grundnorm) for the Constitution, see McWhinney, "The Union Parliament, the Supreme Court and the "Entrenched Clauses" of the South Africa Act," (1952), 30 Can. Bar Rev. 692, 718-720; Griswold, "The Demise of the High Court of Parliament in South Africa," (1953), 66 Harv. L. Rev. 864, 870-1.

[5]The Legislature of Queensland, alone of the Australian States, is unicameral. A Labour administration some thirty years ago induced the State Governor of the day to appoint enough of its own supporters to the then purely nominee Upper House to secure

legislation in respect to inter-State traffic by roads in Queensland. The unusual feature of the case, as presented to the High Court of Australia, was that the plaintiffs, without waiting for the Bill to receive Royal assent, immediately made a motion for an *ex parte* injunction restraining first the Speaker of the State Legislative Assembly and permanent officers of the State House, and second the State Premier and other members of the State Cabinet, from presenting the Bill in question to the State Governor for Royal assent, until further order.

In speaking on behalf of a unanimous Court which refused the application for injunction, Chief Justice Dixon noted that while such an application was "not unprecedented", it was at least "very exceptional. We do not think it should be granted on this occasion or later or in any case."[6] The Chief Justice pointed out that in the present case the plaintiffs, once the Bill was assented to, would have their remedy, and that if a *prima facie* case were then made out, the Court would not be slow to intervene.[7]

Having been reminded by counsel in argument that in Trethowan's case the Full Court of the New South Wales Supreme Court had granted an *ex parte* injunction restraining the President of the Legislative Council (Upper House) of New South Wales and also members of the State Cabinet of New South Wales from presenting, for Royal assent, two measures passed by the State Legislature, and that the High Court of Australia had done nothing to disturb this injunctive method of proceeding on appeal,[8] Chief Justice Dixon, of necessity, was at some pains in his opinion to limit and distinguish that case. Chief Justice Dixon pointed out that when, in Trethowan's case, the High Court granted special leave to appeal to itself from the State Supreme Court, it had ordered that that appeal be limited to the substantive issue of the law-making powers of the State Legislature as purported to be employed in the two Bills in question, thus necessarily excluding from the High Court's consideration the other (and perhaps prior) issue of whether the remedy actually sought, the injunction, could be availed of by the original plaintiffs at that stage (that is, prior to Royal Assent being given to the two Bills). In explanation of his own part in the 1931 decision in Trethowan's case, in which he wrote a concurring opinion, Chief Justice Dixon commented: "I can say from my own personal recollection that when the Court limited the grant of special leave so that the question [of the availability of an injunction to

passage of a Bill abolishing the Upper House. A simple majority in each House of the State Legislature was all that was necessary to effect an amendment of the Queensland State Constitution. c/f the parallel action by a Labour administration in the neighbouring State of New South Wales in 1930 to abolish the then nominee Upper House of that State *(infra.)*.

[6](1955), 28 Aust. L. J. 437, 438.

[7]*Ibid.*

[8]*Trethowan* v. *Peden* (1930), 31 S. R. (N.S.W.) 183 (Supreme Court of New South Wales); *Attorney-General (New South Wales)* v. *Trethowan* (1931), 44 C. L. R. 394 (High Court).

restrain presentation of a Bill for the Royal assent] should not be argued, . . . it was not because the Court was of opinion that the decision of the Supreme Court on that particular point was right, but because it was thought inconvenient to allow a procedural question of that sort to intrude itself into such a matter calling for urgent and definite decision. For myself I have long entertained a doubt as to the correctness of the decision of the Full Court of New South Wales in that case even on the terms of [the State Constitution]."[9] The Chief Justice went on: "Because of the doubt I then entertained, which I still entertain as to the correctness of that decision, in my own judgment delivered in this Court in Trethowan's Case (1931), 44 C.L.R. at p. 426, in speaking of the hypothesis I put of a similar Bill coming before the United Kingdom Parliament, I used the expression that if it was found possible, *as appears to have been done in this appeal,* to raise for judicial decision the question whether it was lawful to present a Bill for that assent, the Courts would be bound to pronounce it unlawful to do so."[10]

The authoritative doubts thus expressed by Chief Justice Dixon as to Trethowan's case are interesting, not merely because of his own part as a member of the Court majority in that decision, but also because of his dominant role as Chief Justice and in terms of his own personality also, on the present bench of the High Court. It is appropriate to comment at this stage on the background facts to Trethowan's case. In 1929, the New South Wales Parliament, a bicameral legislature, had a nominee Upper House composed of members holding office for life and appointed by the State Governor.[11] The Bavin (Conservative coalition) Ministry, whose term of office was drawing to a close and which appeared unlikely, from the drift of by-election voting, to be re-elected, passed an Act in 1929 amending the State Constitution to provide that no Bill to abolish the Upper House should become law until, in addition to securing passage through both Houses of State Parliament (the amending procedure for all provisions of the State Constitution) it had also

[9](1955), 28 Aust. L. J. 437, 438.

[10]*Ibid.*

[11]It was still open to controversey, in 1929, whether a constitutional convention had yet developed requiring the State Governor to act on the advice and direction of the State Premier of the day in the making of appointments to the Upper House. During the first Lang Labour Party government in New South Wales (1925-27), the State Governor, Sir Dudley de Chair, had appointed 25 extra Labour supporters to the Upper House so as to enable the passage of a Bill abolishing the Upper House. (A simple majority in each House was all that was necessary to effect an amendment to the State Constitution). The Bill failed to pass the Upper House, however, owing in part at least to the defection of several Labour Party supporters. The State Premier then requested further appointments which would secure for the Labour Party a definite majority in the Upper House, but the State Governor, after consulting with the then Secretary of State for the Dominions (Mr. Amery) declined to act. The State Cabinet insisted throughout, though unsuccessfully, that the State Governor had no discretion at all but was bound to act on the advice of his Ministers in the matter. See generally, Evatt, *The King and His Dominion Governors* (1936), p. 121 et seq.

been approved by the electorate of New South Wales at a public referendum held on the question.[12] The Bavin Government then went to the polls and, as had been expected, was defeated. A Labor government under Mr. J. T. Lang took office and promptly, in 1930, introduced two measures, which were passed by both Houses of the State Parliament. The first measure purported to repeal the 1929 constitutional amendment (passed by the Bavin government) requiring a referendum as a condition precedent to the abolition of the Upper House; the second measure then abolished the Upper House.[13] The decision of the High Court of Australia,[14] which was reached once the question of whether an injunctive remedy could be availed of prior to presentation of the Bills for Royal assent had been by-passed, was given by a three-to-two vote, (Rich, Starke, and Dixon JJ. making up the majority, and Gavan Duff C.J. and McTiernan J. dissenting). The High Court majority held that the requirement of a referendum as a condition precedent to the abolition of the Upper House (inserted by the 1929 constitutional amendment) was a "manner and form" requirement binding on the State legislature from the time of passage of the 1929 amendment in terms of section 5 of the Colonial Laws Validity Act, 1865.[15]

Sir Owen Dixon's current reservations as to the correctness of the majority approach in Trethowan's case to the procedural issue are important, especially in view of the closeness of the vote in the High Court in Trethowan's case; though curiously enough neither of the two dissenting justices, Gavan Duffy

[12]The procedure for amendment of the federal Constitution of Australia (s. 128 of the Australian Constitution), provides that proposals for amendment are to be initiated by simple majorities in the National Parliament and then ratified by popular majorities in a majority of the States at a public referendum held throughout Australia. The referendum machinery was borrowed by the Australian constitution-makers from the Swiss constitution, but in practice it has proved to be in Australia a veritable graveyard of proposals for constitutional amendment, whatever the nature of the proposals and whatever political parties have advanced them. See generally, my study, "Amendment of the Constitution", in Bowie and Friedrich eds., *Studies in Federalism* (1954), p. 790 et seq.

[13]Though Premier Lang had a very large majority in the Lower House, he was in a minority in the Upper House. The Upper House's acquiescence in the passage of the two measures can in part perhaps be attributed to awareness of the possibilities that the State Governor of the day, Sir Phillip Game, might yield to the pressure of the new Premier's very large electoral mandate and agree to the "swamping" of the Upper House by appointment of Labour Party supporters, remembering that a similar threat had caused the House of Lords to surrender to the Asquith government in the English constitutional crisis of 1910-11 that resulted finally in the passage of the Parliament Act, 1911.

[14](1931), 44 C. L. R. 394 (High Court); confirmed by the Privy Council on appeal, (1931), 47 C. L. R. 97 (P.C.).

[15]28 and 29 Vict. c. 63. Section 5 provides: "Every representative legislature shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers and procedure of such legislature, provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament [i.e. the United Kingdom Parliament] . . . or colonial law for the time being in force in the said colony."

C.J. and McTiernan J. rested his arguments on this point but chose instead to follow the majority justices into debate on the substantive issue. Now, in contrast to the High Court of Australia the United States Supreme Court, as Mr. Justice Frankfurter is never slow to remind his brother justices, reaches substantive issues last, not first; the Court must not anticipate a constitutional question, and the opening enquiry must in every instance be directed to procedural matters, whether the plaintiff is properly in Court.[16] By these standards, the High Court of Australia in Trethowan's Case (and for that matter the Privy Council on appeal) was extremely hasty to rule on the constitutional issue — the law-making powers of the New South Wales Parliament. Sir Owen Dixon's new sensitiveness on the procedural issue no doubt stems from his close personal association with Mr. Justice Frankfurter, first formed during a Wartime ambassadorship in Washington. The High Court of Australia has over the past decade, in marked contrast to its extremely positivist approach in other matters, shown itself very ready to adopt a flexible approach to procedural issues and to shape remedies so as to allow the speediest and fullest ruling on substantive, policy questions: this disposition on the part of the High Court, manifesting itself in its increasing approval of the recourse to the declaratory judgment and the injunction as public law remedies,[17] stands, as we have noted, in sharp contrast to the strictness of the United States Supreme Court's approach in this regard, and goes indeed a long way towards approaching the Canadian Supreme Court's freedom in ruling on policy questions, uncluttered by procedural issues, through the Advisory Opinion.[18] Correspondingly, however, it may explain the increasing and, in the writer's view, unfortunate abstractness of the High Court's constitutional opinions over that same time period,[19] since it means that issues are ruled on remote from the concrete setting of social and economic facts in which they arise.[20] On no occasion since 1931, however, has the High Court

[16]The classic statement of the U. S. Supreme Court's position in this regard is still the dicta by Brandeis J. in *Ashwander* v. *T.V.A.* (1935), 297 U.S. 288. For a recent strong re-affirmation of these principles, see Warren C. J. for the Court in *Peters* v. *Hobby* (1955), 75 Sup. Ct. 790, at 793-4.

[17]See generally Friedmann, "Declaratory Judgment and Injunction as Public Law Remedies", (1949), 22 Aust. L. J. 446.

[18]The High Court of Australia, for example, has not hesitated to grant a declaratory judgment at the suit of a State Attorney-General against the National government to restrain it from giving effect to an unconstitutional act before it was proclaimed. *Attorney-General for Victoria* v. *Commonwealth* (Pharmaceutical Benefits Case), (1945), 71 C. L. R. 237.

[19]c/f the cogent remarks in this regard of a thoughtful American observer, Freund, in Cahn ed., *Supreme Court and Supreme Law*, (1954), at pp. 87-8.

[20]There are advantages, in this regard, of seeing an Act in working operation before passing on the issue of its constitutionality. The decision of the United States Supreme Court in 1935 in *Schechter Poultry Corp.* v. *United States* (the so-called "sick chicken" case) (1935), 295 U.S. 495, to invalidate President Roosevelt's N.I.R.A. was undoubtedly

returned to the practice which it, in effect, sanctioned for itself in Trethowan's case of ruling on a measure prior even to its submission for Royal assent.[21]

In passing it may be noted that quite apart from the taint of illegitimacy now attaching to the preliminary, procedural aspects of the High Court's ruling in Trethowan's case, the substantive aspects of the decision have also come under fire in recent years. Professor Friedmann[22] has pointed to some of the logical consequences of the majority holding in that case that the additional requirement of popular referendum approval to any measure abolishing the Upper House is a "manner and form" provision binding on the State legislature for the future. Suppose that the Bavin government in 1929 had required not merely approval at a popular referendum as a condition prerequisite to constitutionality of the measure, but approval by an extraordinary majority, say eighty per cent or for that matter one hundred per cent of the electorate. Under such conditions, obviously, amendment of the State Constitution to abolish the Upper House would effectively become impossible, and yet, flowing from the majority holding in Trethowan's case, it would be a "manner and form" requirement binding on the State Legislature. The way out of this dilemma is perhaps provided by the reflective dissenting opinion of Mr. Justice McTiernan of the High Court, in Trethowan's case.[23] Mr. Justice McTiernan drew a distinction between a requirement as to "manner and form", which in his view must be followed by the State Legislature, and a requirement as to substance to which no legislative majorities could bind their successors.[24]

This, it is submitted, is a necessary distinction to be made by the Courts in the future if the extreme consequences flowing from the unqualified majority holding in Trethowan's case are to be avoided in the future.[25]

The real difficulty with Trethowan's case, however, is that in retrospect it looks like a piece of *ad hoc* decision-making by the judges, designed to counter the (according to general opinion today) rather incompetent and arrogant administration that happened to hold office in the State of New

assisted by the fact that the scheme had been in operation by that time for several years and been clearly demonstrated, in its key organizational feature of corporatist, industry associations, to be a highly inefficient form of economic planning .

[21]Note in this regard, however, the reservations as to the procedural aspects of Trethowan's case expressed by Professor Sawer as early as 1944. Sawer, *op. cit.* (1944), 60 L.Q. Rev. 83, 85-6.

[22]"Trethowan's Case, Parliamentary Sovereignty, and the limits of Legal Change", (1950), 24 Aust. L. J. 103.

[23](1931), 44 C.L.R. 394, at p. 433 et seq.

[24]*Ibid,* pp. 442-4.

[25]It is not, of course, necessary to agree with McTiernan J.'s factual application of his test in the instant case, in effect that the 1929 Act's requirement of approval at a public referendum (by simple majority of the popular vote) is a requirement of substance and not of "manner and form" and therefore not binding on the State Legislature for the future. c/f the views on this point of Friedmann, (1950), 24 Aust. L. J. 103, at p. 106.

South Wales at that time. The stormy career of the Lang administration which began in 1930 and ended abruptly in mid-1932 with its dismissal by the State Governor of the day[26] was productive of at least three distinct types of constitutional controversy — first as to the limits, if any, to the legislative competence of the Parliaments of the various member-States of the Australian federal system (the substantive issue in Trethowan's case); second, the extent to which the prerogative powers, especially as to dissolution, still inhered as late as 1932 in the Governors of the Australian States (the controversy as to the constitutional propriety of the State Governor, Sir Phillip Game's, dismissal of Premier Lang in 1932); thirdly, the extent to which, under the Australian federal system, there exists a primacy of the federal (National) government over the governments of the member-States, particularly in matters arising out of or concerning financial policy. The first two types of controversy raise what one might call (in the American sense) separation-of-powers questions having to do with the powers *inter se* of the various arms of government.

The remaining type of controversy is of a different nature, involving questions of federalism and the division of legislative powers between central and local law-making authorities. Since, unlike the first two categories of matters, there was no possible analogy to be derived here from United Kingdom practice, the answer would have to be worked out either by comparison with other federal systems or else settled in a purely Australian context. The background facts, though complex, revealed a clear conflict of views as to the nature and powers of State Governments within the Australian federal system. Under arrangement between the federal government and the Australian States in 1927, it had been agreed to centralize in the federal government arrangements for the overseas borrowing of money and floating of loans by the various Australian States, the federal government in return assuming liability for those external State debts. This agreement had been concretised as a formal Amendment, (s. 105A), to the federal Constitution of Australia, the federal government being given, under the terms of this constitutional amendment, power to make laws for the "carrying out" by the parties of the agreement (s. 105A ss. 5). Premier Lang of New South Wales had advocated, early in 1931, at the Conference of State Premiers with the federal Government, (at that time a Labor Government headed by Prime Minister Scullin, whose financial policies to counter the Economic Depression Premier Lang opposed as too cautious), that the Australian governments should refrain from paying interest to British bondholders 'until Britain had dealt with the

[26]The action of the State Governor (Sir Phillip Game) in dismissing the Lang Ministry in 1932, has been trenchantly criticised, Evatt, *The King and His Dominion Governors* (1936), p. 157 et seq. All subsequent practice by State Governors within Australia and by the Governors-General of Australia has accorded with the thesis that the prerogative powers as to dissolution are to be exercised strictly on the advice, and only on the advice, of the State Premier or Prime Minister concerned.

Australian overseas debt in the same manner as she settled her own foreign debt with America'.[27] Early in 1932, the federal government (this time a Conservative coalition ministry which had defcated the Scullin ministry at the federal general elections held in December, 1931) arranged for the passage of legislation providing for the seizure of the revenues of the New South Wales State government for the purpose of meeting the liability of that State for interest payments to Overseas bondholders. This Federal legislation was upheld by the High Court of Australia on April 6th, 1932, as being within the legislative power to "carry out" the Federal-State Financial Agreement of 1927, conferred upon the Federal Parliament under the new section 105A of the Federal Constitution.[28] The next action by the Federal Government was to require the various trading Banks to pay over to the federal government the amounts of balances standing to the credit of the New South Wales State Government, in order to apply these sums towards the discharge of State interest liabilities to overseas bondholders. The High Court of Australia on April 22nd, 1932, upheld this action, ruling in addition that the federal government might seize, as well as the ordinary revenues of the State deposited with its bankers, money received by the State under certain statutes and orders of Court for specific purposes and to meet particular claims, for example estates administered by the Master in Lunacy, the Public Trustee, and the Registrar of Probates.[29] On May 13th, 1932, the Lang Ministry, as already noted, was dismissed from office by the State Governor, Sir Phillip Game.

In reviewing, with all the advantages of hindsight, the events of the exciting and stormy two ycars of the Lang Ministry from its election in 1930, to its dismissal in 1932, and attempting to assess its full constitutional implications, the following submissions are now made:—

(1) The drastic legislative action taken by the federal government of Australia to enforce the continuance by the State Government of New South Wales of payment of interest on State debts to Overseas bondholders was correctly upheld by the High Court of Australia. The financial plans to counter the effects of the World Economic depression upon Australia[30] of both federal ministries (the Scullin Labor ministry which was defeated in December, 1931, and the Lyons Conservative coalition which followed it)

[27]Quoted in Evatt, *op. cit.*, at p. 157.

[28]*New South Wales* v. *Commonwealth* (No. 1), (1932), 46 C.L.R. 155, (Gavan Duffy C.J. and Evatt J. dissenting). Application for certificate to appeal to the Privy Council refused by High Court, *New South Wales* v. *Commonwealth* (No. 2), (1932), 46 C.L.R. 235 (Evatt J. dissenting).

[29]*New South Wales* v. *Commonwealth* (No. 3), (1932), 46 C.L.R. 246 (Gavan Duffy C.J. and Evatt J. dissenting).

[30]The strength of the impact of the depression upon Australia at that time lies in the fact that Australia was still predominantly a primary producing country, and world prices for both wool and wheat, which were the backbone of the Australian economy, had collapsed altogether.

which were in office during Mr. Lang's term of office as State Premier from 1930 to 1932, involved Australia's maintaining its Overseas financial obligations. On pragmatic grounds, it is submitted, a single policy for Australia in this area was vital, and in any conflict between State and National policies the National policy must prevail. Such an attitude would involve, of course, no necessary ruling on the ultimate economic merits of either the Scullin-Theodore programme, the Lyons' policies, or the so-called "Lang plan": it rests instead on the technological argument that in the shaping and direction of over-all financial policy in a federal system, the federal or central government, in case of conflict, must have primacy.

(2) The action of the State Governor, Sir Phillip Game, in dismissing the Lang ministry in May, 1932, was unwise and also, it is suggested, improper. Even assuming Sir Phillip Game was influenced by policy arguments, of the type we have noted already, that the federal government must be given primacy in its financial programme, the fact remains that by the time he acted the High Court had already established this point quite decisively in favour of the federal government and there was no reason to assume that the court could not cope with any further problems in this regard that might arise in the future. Being limited to a three year term of office anyway, the Lang ministry had another year to go before facing the electors of New South Wales. In intervening as he did, it is submitted, Sir Phillip Game made a regrettable departure, with no substantial policy considerations to justify it, from the English and Australian conventions which had developed by that time to the effect that the prerogative powers are to be exercised on the advice, and only on the advice, of the government of the day concerned.[31]

(3) The intervention by the High Court of Australia in Trethowan's case in 1931, having regard to its weakness on the preliminary, procedural issue, was, it is submitted, unduly hasty, and Sir Owen Dixon's reservations today[32] about the High Court's action in that case are to be welcomed on that account. Apart, however, from any purely procedural deficiencies in the High Court's action, a further question arises as to the wisdom of judicial involvement in narrow partisan struggles of the nature of the contest over the New South Wales Upper House.[33] Was there in this regard any special long-range significance in the whole affair requiring a Court ruling at that stage, or was

[31]For a general discussion of the scope of prerogative powers as to dissolution today, see my remarks, "The Governor-General" (1955), 33 Can. Bar Rev. 505. "The Head of State (King, Governor-General, President) in the Commonwealth Countries — the Scope of Prerogative Powers To-day." (1955), Vyavahara Niruaya (University of Delhi, Faculty of Law) p. 112.

[32]*Hughes and Vale Pty. Ltd.* v. *Gair,* reported in (1955), 28 Aust. L. J. 437, (*supra*).

[33]"In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. [Footnote omitted] Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." Per Frankfurter J., for the Court, *Tenney* v. *Brandhove* (1951), 341 U.S. 367, at p. 378.

the end result of the Court's involvement merely to preserve (for such time as the Lang government held office) one cheap political stratagem (the Bavin government's death-bed legacy of 1929) over another cheap political stratagem (the Lang government's two bills of 1930)?[34] What, of course, we are concerned with now are the limits, if any, that Courts should impose on themselves in the exercise of the power of judicial review, a matter that has been the subject of considerable judicial introspection in the United States but very little, if at all, in the Commonwealth Countries. The tendency with the contemporary United States Supreme Court has been to limit its judicial activism to the areas of its "special competence":[35] the phrase involves, of course, something of a covert value judgment but it is still useful as a comprehensive term covering the two main areas of constitutional law in which the Supreme Court has felt a special obligation to intervene in recent years — the umpiring of the federal system[36] (division of legislative powers — member-States against Nation and Nation against member-States); and the preservation of the liberal way[37] (maintenance of civil liberties — Man against the State).[38] Sir Owen Dixon's *arrière pensée* in the High Court of Australia does not affect the substantive issues of Trethowan's case, but to the extent that it goes beyond the mere taking of a procedural point it may foreshadow a new Frankfurterian notion of the propriety and practical utility at times of judicial self-restraint that so far has not been evident in the High Court's approach to the Australian Constitution.

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[34]Responding to the Labour Party's bitter criticisms of the New South Wales Upper House, the new Conservative ministry under Mr. Stevens, which replaced the Lang ministry in 1932, in one of its earliest actions took steps to reform the Upper House at the two points at which it was most vulnerable to attack — the life-time tenure of its members and the strictly nominee character of its membership, both these provisions being abolished in favour respectively of a twelve-year term of office and of a form of indirect election to membership through an electoral college consisting of the members for the time being of the Upper and the Lower Houses of the State Parliament. Fourteen unbroken years of Labour administration in New South Wales since 1941 have substantially converted the Upper House into a haven for retired politicians and Union officials, and with the recent provision of a financial allowance for members of the Upper House there no longer seems to be much sentiment (at least among any of the members of the Upper House) for its abolition.

[35]c/f Hamilton and Braden, "The Special Competence of the Supreme Court", (1941), 50 Yale L. J. 1319.

[36]Braden, "Umpire to the Federal System" (1942), 10 U. of Chi. L. Rev. 27; Freud, "Umpiring the Federal System" (1954), 54 Col. L. Rev. 561.

[37]c/f the well-known dicta of Stone J. in *U.S.* v. *Carolene Products* (1938), 304 U.S. 144, at p. 152 f.n. 4.

[38]The major example of the U.S. Supreme Court's venturing outside these two areas in the last few years, the Steel Case (*Youngstown Sheet and Tube Co.* v. *Sawyer* (1952), 343 U.S. 579), which involved classieal separation-of-powers considerations, is not generally considered one of the happier examples of the U.S. Supreme Court at work. Note in this regard the penetrating criticisms by Freud, "The Year of the Steel Case" (1952), 66 Harv. L. Rev. 89.

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