THE

ANNOTATED CONSTITUTION

OF THE

AUSTRALIAN COMMONWEALTH

BY

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OF VICTORIA IN THE NATIONAL AUSTRALASIAN CONVENTION 1897-8

AND

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the questions relating to the light-house system of Australia, and further having ascertained that in many cases lights are most needed in the colonies possessing the smallest population, this Conference is of opinion that the future erection and maintenance of light houses should be conducted under a Federal system, whereby the cost would be proportionately borne by the colonies that may now or hereafter join such Federation upon a population basis."

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51. (viii.) Astronomical and meteorological[171] observations:

HISTORICAL NOTE—These words were first inserted at the Adelaide session, 1897. In Committee Mr. Reid questioned the necessity of retaining them, but the sub-clause was agreed to. (Conv. Deb., Adel., pp. 775-6.)

§ 171. "Astronomical, &c."

"It is very desirable that we should have uniformity throughout Australia with regard to these things. I am not so much wedded to the astronomical, but, in regard to the meteorological observations, it is most essential that there should be uniformity throughout Australia. On a former occasion I pointed out that one of our best observers, Mr. Wragge, was very anxious we should have these observations in Tasmania. There was no obligation on the part of the Tasmanian Government to establish these observations on Mount Wellington, but there is a general consensus of opinion among the best men that these observations would be invaluable to Australia. Why should the Government of Tasmania be called upon to meet an expenditure of this kind when it is admitted by the best men in Australia and elsewhere that these observations would be of more value to Australia than they could be to Tasmania, which happens to be the position from which they could be taken? If there is anything which ought to be the subject of a Commonwealth law, it is these observations, which will undoubtedly prove of great value to shipping and other interests of Australia." (Sir J. Abbott, Conv. Deb., Adel., 1897, p 775-6.)

"With regard to the astronomical observations it is very important that they should be under Federal management. Take the case of the United Kingdom at the present time. There we have an observatory at Greenwich which I apprehend is the chief northern observatory of the empire. There is an observatory in Dublin, and another in Edinburgh, both admirably managed institutions, but we do not hear of them conflicting with the observatory at Greenwich, which maintains the paramount position in the United Kingdom. The same is the case with the Washington observatory of the United States. So also we should have an observatory in the Commonwealth which should rank before the other observatories. It commends itself to our intelligence that there should be a federal observatory, to take precedence over other observatories. I think there are obvious reasons that the meteorological observations should be placed under one general control, and I trust that the Convention will not object to the clause as it stands." (Mr. C. H. Grant. *Id.* p. 776.)

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51. (ix.) Quarantine[172]:

HISTORICAL NOTE.—"Quarantine and the establishment and maintenance of marine hospitals" is specified in sec. 91 of the British North America Act (sub-s. 16). "Quarantine" was one of the subjects which might be referred to the Federal Council of Australasia under the Act of 1885. It was included in the Commonwealth Bill of 1891, and in the Adelaide draft of 1897. At the Sydney session, Mr. R. E. O'Connor thought the sub-clause should be restricted to infection from outside, and moved to substitute "Public health in relation to infection in contagion from outside the Commonwealth." This was negatived by 19 to 13 votes. (Conv. Deb. Syd., 1897, pp. 1071-3.)

§ 172. "Quarantine."

Scope.—Quarantine was originally the term of forty days, during which a ship arriving in port, and suspected of being infected with a malignant or contagious disease, was required to remain isolated and was forbidden all intercourse with the shore. Hence it came to mean restraint or inhibition of intercourse; also the place where the infected or prohibited vessels were stationed. With the expansion of sanitary science and legislation, quarantine has acquired a much wider signification than that which it first possessed. It is now comprehensive enough to cover any forced stoppage of travel, or of transit, or of communication, as well as compulsion to remain at a distance, or in a given place, without intercourse, on account of any malignant, contagious, or dangerous disease on land as well as by sea. (Webster's Internat. Dict.)

Quarantine in the United States.—The Constitution of the United States of America does not expressly confer on Congress jurisdiction to deal with quarantine. Laws relating to quarantine may, although not so intended, operate as a regulation of trade and commerce. Congress, like the Federal Parliament, has the exclusive power to regulate inter-state and foreign commerce. Hence it follows, that inasmuch as quarantine regulation necessarily involves temporary interference with and restraint of the movements of commerce, and of those engaged in it, the power of the States to deal with quarantine, although not taken from them and handed over to Congress, is strictly speaking very limited. In practice, however, the States pass quarantine regulations until Congress shall have interposed by independent legislation over the subject, or shall have forbidden State laws in relation thereto. So far Congress has not passed laws inconsistent with State quarantine laws; on the contrary it has adopted some of the State laws bearing on the subject. (Morgan's Steamship Co. *v.* Louisiana, 118 U.S. 455.)

Quarantine Under the Commonwealth.—The Federal Parliament has received a clearer and fuller grant of power relating to quarantine than Congress. It is given to Congress by implication; it is conveyed to the Federal Parliament directly. Out of that express grant amplifications and developments may flow which could not have been evolved from an implication. The Federal Parliament may deal with quarantine without reference to the interests of trade and commerce, but as an independent question having regard to the sanitary condition and welfare of the Commonwealth as a whole. It will be able to provide for the isolation, segregation, remedial and preventive treatment of animals and plants and their diseases wherever found within the Commonwealth. It would probably be able, if deemed desirable, to grapple with such problems as the tick plague or a phylloxera pest, in stamping out which the whole of Australia is interested. Such a power would only be exercised in cases of universal interest and of far-reaching importance, and for the purpose of reinforcing and not superseding the ordinary sanitary laws, institutions and authorities in operation within the respective States.

Canadian Cases.—By the Canadian Constitution, sec. 91, sub-sec. 11, the Dominion Parliament has exclusive jurisdiction over quarantine and the establishment and maintenance of marine hospitals. In Ringfret *v.* Pope, 12 Quebec L.R. p. 303, it was held that the preservation of the public health within the Province was a matter of merely local or private nature which, by sec. 92, sub-sec. 16, is exclusively within the jurisdiction of the provincial legislature. Cross, J., dissented from this decision, so far as it concerned the establishment of a central board of health with a system of subordinate boards. He said:—"Although the provincial legislature might make and enforce police regulations directly, or by giving that power to be executed by the municipalities so as to promote health within their several jurisdictions, or deal with the subject in a sense that was purely local, the Dominion legislature could deal with it in a general sense, and take appropriate measures to prevent or mitigate an epidemic, endemic or contagious disease, with which the Dominion, or any part of it, was threatened." In 1869 a Bill providing for vaccination was not proceeded with in the Dominion Parliament, as it was

considered doubtful if it was within its jurisdiction. (Bourinot's Parliamentary Procedure and Practice, 2nd ed. p. 674, citing Com. Deb. 1869, p. 64; Sen. Deb. 1879, p. 47; Lefroy, p. 659.)

The Legislature of British Columbia passed an Act enabling the Corporation of Vancouver to make by-laws for regulating, with a view to preventing the spread of infectious disease, the entry and departure of ships at the port of Vancouver, and the landing of passengers and cargoes from ships or from railroad cars. In the case of the Canadian Pacific Navigation Co. *v.* The City of Vancouver, 2 Brit. Columb. 193, it was held that this was not an infringement of the Dominion power to regulate trade and commerce. But according to the report of Sir John Thompson, Minister of Justice of Canada, dated 28th January, 1889, respecting the Nova Scotia Acts of 1888, authorizing the Governor in Council to regulate "with a view of preventing the spread of infectious disease, the entry or departure of boats or vessels at the different ports or places in Nova Scotia," and the report of the same Minister, dated 21st March, 1891, on the Manitoba Act respecting the diseases of animals, it would seem that, in the opinion of the federal authorities of Canada, such legislation is an invasion of the Dominion power over quarantine. "The British North America Act," says Sir John Thompson, "gives exclusive legislative power to the Parliament of Canada in respect of quarantine, navigation and shipping. It would clearly not be competent for a provincial legislature to make an enactment relating to the arrival of vessels, vehicles, passengers or cargoes from places outside the province, but it may be that provincial control may be exercised in relation to transport from one port of the Province to another, subject, of course, to any regulation on the subject of quarantine by the federal authority."

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51. (x.) Fisheries[173] in Australian waters beyond territorial limits[174]:

HISTORICAL NOTE.—Sec. 91 of the British North America Act empowers the Parliament of Canada to make laws as to "sea coast and inland fisheries" (sub-s. 12). "Fisheries in Australasian waters beyond territorial limits" was one of the independent legislative powers of the Federal Council, under the Act of 1885; and the sub-clause in its present form was inserted in the Commonwealth Bill of 1891. In the Adelaide draft of 1897, it was adopted, with the addition of the words "and in rivers which flow through or in two or more States." In Committee these added words were omitted. (Conv. Deb., Adel., pp. 776-8.) At the Sydney session, Mr. Kingston suggested "Australasian" for Australian, and also the insertion of some definition of Australasian waters; but no amendment was moved. (Conv. Deb., Syd., 1897, pp. 1073-4.) At the Melbourne session, after the first report, Mr. Barton moved an amendment to make the sub-clause read "Sea fisheries in Australian waters." Mr. Kingston and others, however, pointed out the necessity of express words, in order to give power outside territorial limits, and the amendment, by general consent, was negatived. (Conv. Deb., Melb., pp. 1855-74.)

§ 173. "Fisheries."

A fishery, at common law, is a right incidental and annexed to the lordship or ownership of the soil over which the waters, the habitat of the fish, flow. On the sea coast, within three miles of the shore, and in the bays, arms, rivers, and creeks connected with the sea and within the tidal pulsation, fisheries are presumed to belong to the Crown, which can dispose of the right to private persons by license or lease. In non-tidal waters it is presumed that the fisheries belong to the persons who own the riparian lands over which the waters flow, or the land adjacent thereto. (Murphy *v.* Ryan, 1868, Ir. Rep. 2 C.L. 143.) At common law, therefore, the right of the public to fish

The Governor of a colony, though bearing the title of Commander-in-Chief, is not invested with the command of Her Majesty's regular forces in the colony without special appointment. He is not entitled to take the immediate direction of military operations, or, except in cases of urgent necessity, to communicate officially with subordinate military officers. (Revised Regulations, Colonial Office List, 1892, p. 301.)

Transfer of certain departments.

69. On a date or dates to be proclaimed by the Governor-General after the establishment of the Commonwealth, the following departments of the public service in each State shall become transferred[282] to the Commonwealth :—

Posts, telegraphs, and telephones :
Naval and military defence :
Lighthouses, lightships, beacons, and buoys :
Quarantine.

But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Historical Note.—The clause as passed in 1891 was :—

"The control of the following Departments of the Public Service shall be at once assigned to and assumed and taken over by the Executive Government of the Commonwealth, and the Commonwealth shall assume the obligations of any State or States with respect to such matters, that is to say—Customs and Excise, Posts and Telegraphs, Military and Naval Defence, Ocean Beacons and Buoys, and Ocean Lighthouses and Lightships, Quarantine." (Chap. II. sec. 10.)

In Committee, Mr. Wrixon asked whether sub-departments attached to the Customs department (*e.g.*, Immigration Office, or Mercantile Marine Office) would be included. Sir Samuel Griffith was clear that they would not. Mr. Baker raised the question whether telephones would be included in "Posts and Telegraphs." Mr. Douglas thought that the Customs and Excise Department was the only one which need be taken over at once. He moved to omit "Posts and Telegraphs," and also "Ocean Beacons," &c.; but this was negatived. (Conv. Deb., Syd., 1891, pp. 778-9.)

At the Adelaide session the clause was introduced in substantially the same words. In Committee Mr. Higgins raised the question whether "obligations" included public debts. Mr. Barton thought that only current obligations were meant. Mr. Walker moved to add "railways," but after a short debate this was negatived by 18 votes to 12. (Conv. Deb., Adel., pp. 920-34.) Verbal amendments were made on reconsideration. (*Id.* pp. 1201-2.)

At Melbourne, a suggestion of the Legislative Assembly of New South Wales, to provide for the transfer "as soon as possible after" the establishment of the Commonwealth, was negatived, and a suggestion of the Legislative Council of New South Wales, to provide for the transfer on "a date to be proclaimed by the Governor-General after" the establishment, was adopted. On Mr. Barton's motion, the words "Executive Government of the" were omitted. Sir John Forrest suggested that the internal posts and telegraphs of each State should be retained, as the existing postal union was sufficient. On Dr. Quick's motion, "telephones" were added. (Conv. Deb., Melb., pp. 262-5.) Drafting amendments were made after the first report and before the fourth report.

§ 282. "Departments . . Transferred."

By the operation of the Constitution, and without the necessity of any other formal act, the departments of Customs and Excise in each State will become transferred to the Commonwealth simultaneously with the establishment of the Commonwealth, on 1st January, 1901, the day named in the Queen's proclamation (clause 4). The other departments of the Public Service in each State enumerated in this section will become transferred to the Commonwealth on the date or dates to be proclaimed by the Governor-General.

In addition to the departments mentioned in this section, which will become transferred without the necessity of federal legislation, there are other departments which will come under the control of the Commonwealth whenever the Federal Parliament chooses to authorize their transfer ; such as Astronomical and Meteorological Observations (51.—viii.) ; Census and Statistics (51.—xi.) ; Currency and Coinage (51.—xii.) ; Bankruptcy and Insolvency (51.—xvii.) ; Copyrights, Patents, and Trade Marks (51.—xviii).

Revenue and Expenditure.—One result of the transfer of a department will be that the State from which it is transferred will be relieved of the annual expenditure in respect of the department and the property used in connection therewith, and will be compensated for the value of such property. Another result will be that the State will be deprived of the revenue received in connection with the department.

The following table, based on a return presented to the Convention at the Melbourne session (Conv. Proceedings, Melb., p. 231) shows :—(1) the annual expenditure of which each State will be relieved in respect of the above mentioned services, together with interest at 3 per cent. on the value of property used in connection therewith ; (2) the annual revenue of which each State will be deprived in connection with such services (apart from the taxation revenue from duties of Customs and Excise). The figures are those of 1896 or 1895-6 :—

I. ANNUAL EXPENDITURE.

Department.	Victoria.	New South Wales.	Queensland.	South Australia.	Tasmania.	Western Australia.	Total
	£	£	£	£	£	£	£
1. Customs and Excise (less cost of border offices)	75,588	78,608	40,915	28,266	7,888	30,509	261,774
2. Posts, telegraphs, and telephones	559,881	763,550	353,869	247,729	62,945	212,728	2,202,702
3. Naval and military defence	198,785	214,206	105,480	33,459	12,593	10,620	575,173
4. Lighthouses, lightships, beacons and buoys	17,356	16,908	32,844	15,018	5,950	12,077	100,153
5. Quarantine	4,050	5,537	3,496	1,431	165	685	15,364
6. Astronomical and	4,050	5,911	2,391	947	97	253	13,649
7. Meteorological	6,444	11,599	5,238	1,767	1,244	1,800	28,092
8. Census and Statistics	23,395	18,000	.....	.....	.....	.....	41,395
9. Currency and Coinage	4,542	3,599	2,685	2,241	100	1,248	14,415
10. Bankruptcy and Insolvency	2,411	2,981	2,057	395	250	101	8,195
11. Copyrights, Patents, and Trade Marks							
Total Amounts	896,502	1,120,899	550,975	331,283	91,232	270,021	3,260,912

come within the constitutional prohibition. (Inman *v.* Tinker, 95 U.S. 238.) It has been held that a tax on every boat is a tax on boats, not on commerce (St. Louis *v.* Wiggins Ferry Co., 11 Wall. 423); but a tax on a vessel every time she enters a certain harbour is not a tax on the vessel, but a tax on the business conducted by the vessel on entering the harbour. (Steamship Co. *v.* Port Wardens, 6 Wall. 31.) The reasonableness of the rates charged for wharfage may be enquired into by the Federal Courts, to ascertain whether in effect they amount to a duty on tonnage. (St. Louis *v.* Telegraph Co., 139 U.S. 463.)

Quarantine.—Until the control over the various departments of quarantine is assumed by the Federal Government, the States will continue to manage the quarantine stations and to enforce the quarantine laws. Such laws may require persons engaged in commerce to submit to medical examinations, and, if necessary, to remain isolated for statutory periods. They may impose a charge on each vessel to defray the expenses of inspection. In Train *v.* Boston Disinfectant Co., 144 Mass. 523, it was decided that a State may, by its officers, disinfect all rags arriving at a port, and compel the owner to pay the cost of disinfection. An ordinance of St. Louis provides that steamboats coming from below Memphis, having had on board more than a specified number of passengers during the voyage, should remain in quarantine for not less than 48 hours and not more than 20 days. It was held that this was a valid sanitary and quarantine law. (St. Louis *v.* McCoy, 18 Missouri, 238.)

The question whether wharfage, quarantine, and other such dues, fees and charges, demanded by a State, are *bona fide* compensations for services rendered, or are mere obstructions to commerce, must be determined according to the facts and circumstances in each case. Such exactions must be fair, reasonable and uniform, and must not exceed the requirements of the occasion. Charges which in the opinion of the Federal Courts are excessive or discriminating could be declared unconstitutional, as involving violations of the rule of inter-state commercial freedom.

Fisheries and Game Laws.—Control over game and fisheries within the limits of a State is reserved to the State. In the enforcement of its game laws, a State could prohibit all traffic in the meat of game within its limits, without reference to the place where the animal was captured. (Magner *v.* People, 97 Ill. 33.) As to whether a State could prohibit the exportation of animals protected by its game laws, there is a conflict of authority. (Geer *v.* Connecticut, 161 U.S. 519.) A State law prohibiting the sale of fish and game, at a time when they could not, under the law, be caught within the limits of the State, has been held to be operative upon the sale of goods shipped from another State, the reason given being that the statute could not be enforced with reference alone to fish or game caught in the State. (Prentice and Egan, Commerce Clause, p. 152.)

Excise Duties.—It has been already stated that, in the Constitution of the Commonwealth, freedom of inter-state trade and commerce is secured by two constitutional provisions: (1) by the express declaration of sec. 92, that trade and commerce between the States shall be absolutely free; and (2) by the withdrawal from the States of the power to impose duties of customs and excise (sec. 92). In discussing the foregoing cases we have been considering merely the probable effect of the constitutional affirmation of absolute commercial freedom between the States. It remains to consider how far the immunity of inter-state trade and commerce from State taxation is secured through the exclusive control of excise being vested in the Federal Parliament. This depends upon the meaning to be assigned to "excise." In our notes to sec. 90, the various meanings of "excise" have been referred to; the first and original one being that in which it is restricted to duties on the manufacture and production of commodities in a State; whilst in another sense it has been extended to cover a host of additional imposts—such as licenses to auctioneers, pawnbrokers, peddlers, dealers, and persons permitted to carry guns and run carriages. The bulk of authority is in favour of the limited connotation of the term; and if that view be correct the States of the Commonwealth will retain almost the same powers of taxation as those of the American

A railroad company whose charter of incorporation does not exempt it from State control may be required by State legislation to convey when called upon, and to charge no more than a reasonable compensation, which may be limited by statute. (Winona, &c., R. Co. *v.* Blake, 94 U.S. 180. *Id.* p. 39.)

A statute of Illinois, enacting that any railroad company within that State which charges for transporting passengers or freight of the same class, the same or a greater sum for any distance than for a longer distance, shall be liable to a penalty for unjust discrimination, is, when applied to contracts for shipment beyond the State limits, a regulation of commerce among the States, and is so far void. (Munn *v.* Illinois, 94 U.S. 113; Chicago Burlington, &c., R. Co. *v.* Iowa, *id.* 155; Peik *v.* Chicago and N.W.R. Co., *id.* 164, examined and explained and partly over-ruled; Wabash, &c., R. Co. *v.* Illinois, 118 U.S. 587. Baker Annot. Const. p. 39.)

Canvassing Agencies.—An agency for a line of railroad between Chicago and New York, established in San Francisco for the purpose of inducing passengers going from San Francisco to New York to take that line from Chicago, but not engaged in selling tickets for the route, or receiving or paying out money on account of it, is an agency engaged in inter-state commerce; and a municipal license tax sought to be imposed upon such agency is unconstitutional. (McCall *v.* California, 136 U.S. 104; Norfolk and W.R. *v.* Pennsylvania, 136 U.S. 114. Baker, Annot. Const. p. 42.)

Locomotive Engineers.—A State statute which requires locomotive engineers, engaged in running locomotive engines on railroads which are operated in and through different States, to be examined as to their power of distinguishing the colours of signals, and which requires the corporation whose trains are so operated to pay a fee for such examination, is not repugnant to the commerce clause until Congress legislates upon the subject. (Nashville, &c., R. Co. *v.* Alabama, 128 U.S. 96. Baker, Annot. Const. p. 36.)

Quarantine Regulations.—A statute of Missouri which prohibited Mexican, Texas, or Indian cattle from being driven or conveyed through the State between March and December of each year is in conflict with the commerce clause. It is more than a quarantine law, which a State in the exercise of its police powers may enact. (Railroad Co. *v.* Husen, 95 U.S. 465. Baker, Annot. Const, p. 29.)

A law of Iowa, which provides that a person having in his possession within the State "Texas cattle" which have not been wintered north of the northern boundary of Missouri and Kansas shall be liable for any damage which may accrue from spreading the disease known as "Texas cattle fever," is not in conflict with the commerce clause. (Kimmish *v.* Ball, 129 U.S. 217. Baker, Annot. Const. p. 40.)

The laws of the States on the subject of quarantine, while they may in some of their rules amount to a regulation of commerce, though not so designed, belong to that class of laws which a State may enact until Congress interposes by legislation over the subject, or forbids State laws in relation thereto. Congress has not done this, but has adopted the State laws upon that subject. (Morgan's Steamship Co. *v.* Louisiana Board of Health, 118 U.S. 455. Baker, Annot. Const. p. 40.)

The statute of Minnesota providing for inspection within the State of animals designed for meat, by its necessary operation practically excludes from the markets of that State all fresh meat slaughtered in other States, and directly tends to restrict the slaughtering of animals whose meat is to be sold in Minnesota to persons engaged in such business in that State. This discrimination is an incumbrance on commerce among the States, and is unconstitutional. It is not a rightful exercise of the police power of the State. (Minnesota *v.* Barber, 136 U.S. 313. Baker, Annot. Const. p. 41.)

State Tax on Commercial Agents.—A State law imposing a license-tax upon peddlers selling goods not grown or manufactured in the State is in conflict with the commerce clause. (Following and re-affirming Welton *v.* Missouri. Morrill *v.* Wisconsin, Book 23, p. 1009, L.C.P. Co. Ed. U.S. Sup. Ct. Rep. Baker, Annot. Const. p. 28.)

No State may impose upon the products of other States brought therein for sale or use, or upon citizens engaged in the sale therein or the transportation thereto of the products of other States, more onerous public burdens or taxes than are imposed upon like products of its own territory. (Guy *v.* Baltimore, 100 U.S. 434. *Id.* p. 28.)

A law of a State requiring a person engaged in peddling goods, wares, and merchandise, not produced in the State, to take out a license and pay a tax thereon, where no such license or tax is required of persons selling similar articles which are the growth, produce or manufacture of the State, is in conflict with the commerce clause. (Welton *v.* Missouri, 91 U.S. 275. *Id.* p. 27.)

A tax on the amount of sales made by an auctioneer is a tax on the goods sold. And if the tax is upon sales of imported goods sold in the original packages, and for the importer, it is a regulation of commerce; and such tax, if laid by a State or under its authority, is invalid. (Cook *v.* Pennsylvania, 97 U.S. 566. *Id.* p. 27.)