II. Commonwealth.

Introductory.

The legislation here reviewed consists of little more than one-fifth of the enactments of the Commonwealth Parliament for 1948, during which more than ninety Acts were added to the federal statute book. Many of these deal with such matters as customs, excise, the federal public service, appropriation and supply, and the regulation of certain industries, and are not included in this review. Statutes which affect the general law, and those regulatory and fiscal enactments which may be of general interest, are included; but the test of "importance" used in making the selection is merely pragmatic.

I. CONSTITUTIONAL.

Increase of membership of both Houses.

The ultimate purpose of the Representation Act[1] is to effect the enlargement of the House of Representatives. Under section 24 of the Constitution it is provided (a) that the House of Representatives shall consist of members chosen directly by the people of the Commonwealth and (b) that the number of members shall be, as nearly as practicable, twice the number of Senators; therefore the first step is to increase the number of Senators (as section 7 of the Constitution permits). The greater part of this Act is accordingly devoted to the increase of the number of Senators from each State and to the maintenance of regularity in the rotation of the senatorial term of office under section 14 of the Constitution, the number of senators from each State being increased from six to ten and the Constitution requiring one-half to retire at the end of each period of three years.

Section 5 of the new Act deals with the period of service of each of the senators to be chosen at the first elections held after the commencement of the Act (i.e., 18th May, 1948).[2] At those elections there will be seven vacancies to be filled in each State apart from any casual vacancies that may have occurred.[3] Of the candidates elected, the first two (not being retiring senators) are to hold their places for six years as from 1st July, 1950; the places of the last two to be elected will become vacant on 30th June, 1953—but if the sixth and seventh places (or either of them) are filled by retiring senators they will be held for three years only and the persons elected

[1] No. 16 of 1948.

[2] The next election to the Senate will be held on 10th December, 1949, simultaneously with the general election to the House of Representatives which by that time will have reached the end of its three-year term; but the successful candidates (except those who are already senators) will not take their seats until 1st July, 1950.

[3] As to which see Constitution, sec. 15, and Senate Elections Act 1903-1922 (No. 2 of 1903 as amended by No. 22 of 1922).

to the fourth and fifth vacancies will hold office for six years. If the first dissolution of Parliament after the commencement of the Act is a double dissolution[4] ten senators will be elected from each of the six States.

Since the number of members of the House of Representatives depends upon the number of senators, section 8 of the Act avoids the last determination of electoral boundaries for that House and directs the Chief Electoral Officer to make a new determination based on a Senate of sixty.[5]

Adoption of proportional representation.

By the Commonwealth Electoral Act[6] proportional representation is introduced for the first time into federal politics, but only for the election of senators; members of the other House will continue to be elected by single-member constituencies. Proportional representation is not novel in Australia, having been used in Tasmania and in New South Wales. Introduced in the former in 1907, it is still in operation; in New South Wales it was used at three general elections to the Assembly until it was discarded in 1926,[7] although it is still used in that State for elections to the Legislative Council, the Council and the Assembly sitting together as one electorate for that purpose.[8]

The present Act amends section 135 of the Commonwealth Electoral Act 1918-1946[9] by omitting sub-sections (5) to (14) and inserting new provisions in their stead; it also amends section 9 of the Senate Elections Act 1903-1922 by substituting a new sub-section (2). The existing rules for marking Senate ballot papers are not altered; i.e., the elector must still vote for all candidates in the numerical order of his preference. This constitutes a departure from proportional representation as usually advocated, under which an elector can stop distributing his preferences at any stage. Where he is not required to vote for every candidate, none of the candidates opposite whose names he has put no number will derive any benefit from that particular ballot paper. But in elections under this Act the elector *must* vote for all candidates if his ballot paper is not to be declared informal; hence he must distribute his preferences with a view not only to the candidates whom he favours most but also

4 i.e., under sec. 57 of the Constitution (the "deadlock" provision). A double dissolution has been granted once only, in 1914; see 4 *Round Table* 733, 5 *Round Table* 201, 209.

5 See also Constitution, secs. 24, 27.

6 No. 17 of 1948.

7 Introduced by (New South Wales) *Parliamentary Elections (Amendment) Act,* No. 40 of 1918, which was repealed by No. 12 of 1926.

8 See (New South Wales) *Constitution (Legislative Council Elections) Act* 1932-33.

9 No. 27 of 1918, as amended by No. 31 of 1919, No. 14 of 1921, No. 14 of 1922, No. 10 of 1924, No. 20 of 1925, No. 17 of 1928, No. 2 of 1929, No. 9 of 1934, No. 19 of 1940, and No. 42 of 1946.

to those whom he favours least. The system operates in two ways; firstly, by distributing the second and subsequent preferences shown on the surplus votes of those candidates who have obtained more than the necessary quota and, secondly, by distributing the next available preferences of the candidates who have obtained the lowest number of first-preference votes.

The first count is taken by crediting to each candidate all the first-preference votes cast in his favour; the total number of valid first preference votes is also ascertained. A "quota" is then obtained by dividing the total number of valid first preference votes by one more than the number of candidates to be elected (for example, if there are seven vacancies the divisor is eight) and adding one to the quotient thus ascertained, fractions being ignored. This method applies in a modified form to a multi-member constituency the principle of the absolute majority in a single-member constituency where the system of preferential voting is enforced. Any candidate who obtains first-preference votes equal to or greater than the quota is at once elected; if he has received more than the quota, his surplus votes have to be transferred to the "continuing candidates" in accordance with an elaborate formula. The method is—(a) the "transfer value" of the elected candidate's surplus votes is calculated by dividing the number of those votes by the total number of first-preferences received by him, the resulting figure necessarily being a fraction; (b) all the ballot papers which show a first preference for the elected candidate are re-sorted in separate parcels under the names of each of the continuing candidates to whom the next preference is given; (c) the number of votes in each parcel is multiplied by the "transfer value" as previously ascertained, the multiple so obtained being the number of votes to be transferred; (d) the Divisional Returning Officer then takes at random from each parcel a number of ballot papers equal to the appropriate multiple, and adds them to the first-preferences received by the continuing candidates.

If, as a result of this procedure, a continuing candidate now has a total number of votes equal to or greater than the quota he is declared elected. If he has more than the quota, his surplus votes have to be transferred by a procedure which differs in that the "transfer value" is ascertained only of those votes which he received from a candidate previously elected. At each stage at which one or more candidates is elected, a number of ballot papers equal to the quota is set aside as "finally dealt with" and plays no part in the remainder of the process.

If, however, after the first counting of the first-preference votes, or after the transfer of the surplus from an elected to a continuing candidate, no candidate (or continuing candidate, as the case may be) reaches the quota, the next step is to eliminate the candidate who received the lowest number of first-preference votes and to allot the ballot papers according to the next preference shown thereon. If this does not give a quota to any continuing candidate, then the

second lowest candidate is eliminated and his preferences distributed, this procedure being repeated as often as is necessary until some candidate reaches the quota. It will be noted that when votes are re-allocated in this way their "transfer value" is unity. Sub-section (7) provides that where at any stage the total number of surplus votes is less than the difference between the total votes of the two continuing candidates with the lowest number of first-preference votes, these latter are to be distributed before the re-allocation of the surplus votes of the successful candidates.

In certain circumstances the Commonwealth Electoral Officer must vote or exercise a power similar thereto: (1) where it is necessary to exclude a candidate, and two or more candidates have an equal number of votes, he decides which is to be excluded first; (2) if two or more successful candidates have an equal number of votes he decides the order of their election and of the transfer of the surplus votes; (3) if, in the final count for filling the last vacancy, two candidates have an equal number of votes, he decides by his casting vote which is to be elected.

One of the criticisms levelled at proportional representation is that it cannot, without great trouble and expense, fill a casual vacancy or provide for a by-election. The orthodox answer given by supporters of proportional representation is to be found in sub-section (2), which provides that in the event of a casual vacancy the remaining votes cast at the previous general election are to be counted afresh and the continuing candidate who, after further transfers have been carried out at this subsequent scrutiny, first receives the necessary quota is to be declared elected to the casual vacancy. The manner of effecting these transfers is that prescribed by the amended section 135.

Under the new method candidates will be elected on a "quota" instead of by a majority as under the "block vote" (or, as it is also known, the "Australian Senate system") as in the past. Under the "block vote" a party with a not overwhelming majority of popular votes may conceivably capture all or nearly all the vacant seats in the Senate; the elections of 1925, 1934, and 1946 exemplify this point.[10] The slenderness of a popular majority may not be reflected in the Senate. Under proportional representation, since the necessary quota will always be substantially less than one-half of the valid votes cast, and because it is unlikely that one man or one party will ever monopolise the first-preference votes, the distribution of Senate seats among the major political parties will more truly reflect the choice of the country.

[10] In 1925, government candidates won all seats; the opposition candidates polled 44.5% of the first-preference votes. In 1934 government candidates again won all seats; in 1946 government candidates won all except three. In the 1946 election the government candidates were Labour; in 1925 and 1934 elections, non-Labour.

Proportional representation seems to be founded on a compromise between the view that the majority of seats *should* go to the political party which emerges successful from the competitive struggle for the people's votes and the view that seeks to give to minority parties the representation that they have "earned." The emphasis is on party rather than on the individual member, and although this latter is the classical desideratum of parliamentary representation the former fact is more true of the contemporary political scene. The recognition of party politics is in fact made by the Constitution which in section 64 makes provision, in effect, for setting up cabinet government in the Commonwealth, and by constitutional law generally in statutes, regulations, and standing rules and orders which refer to "the Government" and to "the Opposition."

Pensions for members.

The Parliamentary Retiring Allowances Act[11] introduces a system of pensions for members of Parliament who retire after this Act came into operation on 1st December, 1948. It establishes a Parliamentary Retiring Allowances Trust and a Parliamentary Retiring Allowances Fund, and determines the contributions to be made by members and by the Commonwealth and the pensions and other benefits to be paid to retiring members.

The Trust is a body corporate with the usual attributes, the trustees being the Treasurer, two senators, and two members of the House of Representatives. The powers and functions of the Treasurer may be exercised by any Minister authorised in writing by the Treasurer, but such an authorisation does not prevent the Treasurer personally from exercising those powers and functions. A majority of the trustees can bind the Trust; its seal can be attached to documents only on resolution of the trustees and requires to be authenticated by the signatures of two of them. The Fund consists of (a) contributions, fixed at £156 per annum, made by members; (b) money paid in by the Commonwealth, i.e., (i) an amount equal to sixty per cent. of each pension paid out of the Fund, and (ii) an amount equal to the "Commonwealth supplement";[12] and (c) income from investments.[13]

If a member's retirement is involuntary, and his period of service is not less than eight years, he is entitled to a pension of £8 per week

[11] No. 89 of 1948; cf. Western Australian legislation, (*supra*).

[12] The "Commonwealth supplement" is an amount equal to one and a half times the contribution paid or deemed to have been paid by a member during his period of service or eight years, whichever is the less; for this purpose the Act is deemed to have commenced at the beginning of the member's service. It will be noted that the Commonwealth supplement is payable from the commencement of the member's service, but that his liability to contribute only dates from the actual commencement of the Act.

[13] The assets of the Fund are to be invested in Commonwealth securities or in securities authorised by the Trustee Acts of the several States.

provided he was forty-five or older on retirement; if he is under that age the pension does not start until his forty-fifth birthday. Where a member's retirement is involuntary and the period of his service less than eight years, he is entitled only to a refund of his contributions and to payment of the "Commonwealth supplement." When a member retires voluntarily after service of twelve or more years he is entitled to the full pension of £8 per week; but if he has served for less than twelve years he is entitled only to a refund of his contributions. If a member is re-elected after having taken a pension or other benefit, the prior period of service is not taken into account when calculating the length of the second period of service unless he contracts with the Trust to repay whatever money he has received from the Fund; on re-election the pension then is cancelled, and the member's rights and liabilities under the Act are the same as if he had never received a pension.

The widow of a member, or of a past member who was receiving a pension, is entitled at her option either to be paid £5 per week during her life or until re-marriage, or to the sum of her late husband's contributions and the "Commonwealth supplement" less the amount of pension, if any, received by him. If the widow is ten years younger than the deceased and married him within five years of his death or after he became entitled to a pension, the Trust has an absolute discretion to reduce the rate or period of the pension or to decide that no pension whatever be paid. If the member or pensioned ex-member is not survived by a widow, his personal representative is entitled to receive the amount of the deceased's contributions less the amount of pension paid. Where the deceased member or ex-member was a woman who is survived by a widower and the latter was, in the opinion of the Trust, totally dependent on her by reason of his mental or physical incapacity, he may be granted a pension at such rate, not exceeding £5 per week, as the Trust in its absolute discretion may determine.

Parliamentary representation of the Capital Territory.

Hitherto without representation in the federal Parliament, the inhabitants of the Australian Capital Territory and of Jervis Bay are to receive, by the Australian Capital Territory Representation Act,[14] the same limited rights as the inhabitants of the Northern Territory. They will have one member, who is to be elected to the House of Representatives under the provisions of the Commonwealth Electoral Act 1918-1948 insofar as it can be made applicable; he will be chosen at the same time as the general election except when the need for a by-election arises. He is to have all the powers, immunities, and privileges given to members by the Constitution, and is to have the benefit of the Parliamentary Allowances Act 1920-1947. But he is under the following disabilities: (a) He cannot vote on any question arising in the House other than a motion for disallowance of any

[14] No. 57 of 1948.

Ordinance of the Australian Capital Territory or an amendment of such a motion; (b) his presence in the House is ignored for the purpose of ascertaining whether a quorum is present; (c) he is ineligible for the Speakership and for the Chairmanship of Committees and cannot perform the duties of either office; and (d) he is again ignored in ascertaining whether there is an absolute majority in the House of Representatives (or in both Houses at a joint sitting under section 57 of the Constitution).

II. INTERNATIONAL LAW.

Diplomatic privileges and immunities.

The International Organisations (Privileges and Immunities) Act[15] falls into two parts, one relating to the use within Australia of certain names in trade and commerce, the other approving and adopting into the municipal law of Australia the General Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of UNO on 13th February, 1946. Section 4 of the Act forbids the use, in connection with any trade, business, calling or profession of the name, official seal or emblem of the United Nations or of any other prescribed international organisation, and the use of any name, seal or emblem so nearly resembling the foregoing as to be likely to deceive.

The Convention is printed as a Schedule to the Act and calls for no comment except in two points. The grant of juridical personality to the United Nations by Article I appears to be made for the purposes of the municipal law of the signatory states and does not necessarily determine the larger question of the legal personality of the United Nations in international law. Article II provides for immunity from legal process of all property owned by the United Nations, except when the immunity is waived; but such a waiver is not to be deemed to extend to any measure of execution. Furthermore, it is submitted that such a waiver would not extend to an award of costs where the United Nations is unsuccessful: See *Emperor of Austria v. Day.*[16]

Protection of whales.

The Whaling Act[17] amends an Act of 1935[18] and introduces into Australian law the conditions for the lawful killing of whales prescribed by the International Convention for the Regulation of Whaling signed at Washington on 2nd December, 1946. The policy of the Act is to protect whales from indiscriminate slaughter; whales in the Antarctic are rapidly diminishing in number and, according to some natural scientists, may die out altogether if not further

[15] No. 72 of 1948.
[16] (1860) 30 L. J. (N.S.) Eq. 690.
[17] No. 66 of 1948.
[18] Whaling Act, No. 62 of 1935.

protected. This policy is implemented by (a) including grey whales among the protected whales; (b) prohibiting the capture of whales of less than the prescribed minimum length; (c) requiring all captured whales to be accurately measured; (d) requiring a report on all whales lost after being killed; (e) providing for continuous inspection while operations are in progress by the requirement that "at least two officers (performing duties under the Act) shall be maintained" on every ship used for treating whales; and (f) prohibiting any remuneration being paid for the killing of protected whales (the object here being to preclude the possibility of gunner and crew killing a whale "by mistake" and then claiming a bonus).

International trade.

The International Trade Organisation Act[19] adopts the General Agreement on Tariffs and Trade (signed at Geneva on 30th October, 1947) and the Havana Charter for an International Trade Organisation (signed on 24th March, 1948). It also authorises the deposit of instruments of acceptance conditionally upon the United Kingdom and the United States having already done so (sec. 4).

III. CITIZENSHIP AND IMMIGRATION.

It is stating the obvious to remark that the statute book reflects the movements, problems, and conflicts of interest of the day. The Lancastrian parliaments were preoccupied with the effects of the Black Death and the Hundred Years War, the emancipation of the serfs, the growth of trade, and the lawlessness of the nobles. Tudor statutes mirror clearly the forceful personality of Henry VIII and the contrasting religious policies of Edward VI and Mary, the rapidly rising cost of living, and Elizabeth's religious settlement.

It is not strange, therefore, that in contemporary Australia the law relating to nationality and immigration should be overhauled in some respects, in others completely re-cast, and the scope of the whole greatly expanded. Migrants are flocking to Australia, to them an asylum; the creation of an Australian citizenship as a legal category reflects both Australia's present emphasis on her national status in the councils of the world and the encouraged influx of large numbers of persons of non-British stock and outlook. Furthermore, the Nationality and Citizenship Act[20] is itself part of the present trend in the public laws of the British Commonwealth of Nations, most of the members creating a local citizenship alongside the common status of British subject.

In its report the Imperial Conference of 1937 stated that "it was recognised that to a greater or less extent members of the Commonwealth, whether or not they have given legislative definition to such a concept, do distinguish for some practical purposes between British

[19] No. 73 of 1948.
[20] No. 83 of 1948.

subjects in general and those British subjects they regard as being members of their own respective communities." The phrase, "members of the community," denotes persons whom that member of the Commonwealth had decided to regard as "belonging" to it for the purpose of civil and political rights and duties, immigration, deportation, diplomatic representation, or the exercise of territorial jurisdiction. In the light of these considerations the Conference reached the conclusion that "it is for each member of the British Commonwealth to decide which persons have with it that definite connection envisaged in the Report on the Operation of Dominion Legislation 1929 which would enable it to recognise them as members of its community. It is desirable, however, to secure as far as possible uniformity in principle in the determination by each member of the Commonwealth of the persons, being British subjects, to be regarded as members of its own community."

From this conclusion came the 1948 nationality legislation of the United Kingdom and the Dominions. The common code system has been swept away; the common status remains—at present. The British Nationality and Status of Aliens Act 1914-1943[21] is now repealed by the British Nationality Act 1948,[22] this latter enactment being complementary to the statutes which have been passed by other members of the British Commonwealth for the purpose of defining the citizenship of "their own respective communities" and of reaffirming the common status of "British subject."

Section 7 of the federal Act provides that an Australian citizen or a citizen of the United Kingdom and Colonies, Canada, New Zealand, the Union of South Africa, India, Pakistan, Southern Rhodesia, and Ceylon is by virtue of that citizenship a British subject.[23] Section 8 enables an "Irish citizen" who would otherwise be an alien by reason of the exclusion of Eire or the Republic of Ireland from the preceding section to give notice in writing to the Minister, setting out one or more of the specified grounds, that he claims to remain a British subject.

Part III sets out how Australian citizenship can be acquired and how it can be lost. It may be acquired by birth or descent, by registration or naturalization. The test of citizenship by birth re-enacts the common law doctrine of *ius soli* and is based on the concept of allegiance to be found in Coke.[24] Citizenship by descent, as allowed by section 11, is an attempt to compromise between the need to avoid dual nationality and the desirability of giving effect to the claims of "Australians" born abroad. A provision similar in effect was originally inserted in the "common code" by section 1 of

21 4 & 5 Geo. 5, c. 17, as amended.
22 11 & 12 Geo. 6, c. 56, s. 34.
23 *Semble,* this must be read down to imply "so far as concerns their status in Australia."
24 *Co. Litt.,* sec. 198, and *Calvin's Case,* (1608) 7 Co. Rep. 1a, at 17a.

the British Nationality and Status of Aliens Act 1922[25] as a result of the enlistment, during the first World War, of persons of British descent settled in South America and elsewhere. Thus the *ius sanguinis* was also introduced; but since it must now be coupled with the voluntary act of registration at an Australian consulate within one year of the birth of the propositus it is neither racial nor political but merely allows, by a voluntary act, the expression of a justifiable sentiment.

A certificate of registration grants citizenship, but can be issued only to persons to whom section 7 applies, i.e., to British subjects as there defined, and in certain circumstances to Irish citizens. Since, under the legislation now in force in the British Commonwealth, a person is a British subject by virtue of his citizenship of a member thereof, he no longer acquires the rights of an Australian citizen automatically. He can do so, however, on registration. There are six conditions (set out in section 12) that he must fulfil, including a residence qualification of five years (which, on application being made, the Minister in his discretion may reduce to a period of not less than twelve months). The Minister may grant a certificate of registration to a woman who is a British subject or an Irish citizen and who is married to an Australian citizen subject to the one condition, that she is residing here with her husband as a permanent resident; the children of the grantee may be included in such a certificate.

At common law an alien could become a British subject only by an Act of Parliament. The Court of Common Pleas, in *Craw v. Ramsey*,[26] held that "the law of England is, that no alien can be naturalized but by Act of Parliament, with the assent of the whole nation." An alien, however, could become a "denizen" by letters patent under the prerogative, but denization carried less rights than naturalization. After the passing of the Aliens Act 1844[27] an alien could be naturalized by executive act, and certificates of naturalization now replace both naturalization by private Act and denization. There is, of course, no common law status of "Australian citizen" or of "citizen of the United Kingdom and Colonies."

Naturalization under the federal Act of 1948 is now the method of obtaining Australian citizenship open to aliens or protected persons (defined as "persons who are included in such prescribed classes of persons as are under the protection of the Government of any part of His Majesty's dominions"). The applicant must first make, one year or more after his entry into Australia or New Guinea, a declaration of intention to apply for a grant of naturalization. He must then apply for the certificate not earlier than two nor more than seven years after his declaration of intention. The Minister

[25] 12 & 13 Geo. 5, c. 44.
[26] (1669) Vaughan 274, at 284.
[27] 7 & 8 Vict., c. 66.

may then grant a certificate provided that the applicant fulfils the other conditions prescribed by the Act.

Under the maxim *Nemo potest exuere patriam* a natural-born British subject could not, apart from statute, divest himself of his British allegiance. However, after the Naturalization Convention of 13th May, 1870, and section 6 of the Naturalization Act 1870,[28] British allegiance could be shed by voluntarily becoming naturalized in a foreign state; the methods whereby British nationality could be divested under the British Nationality and Status of Aliens Act 1914 were set out in sections 13-16 of that Act. Under the present enactment citizenship may be lost on the acquisition of another nationality by some voluntary and formal act other than marriage, by renunciation, by service in the armed forces of an enemy country and, in the case of citizens by registration or naturalization, by seven years' continuous residence outside Australia or New Guinea. Under previous legislation naturalization in an *enemy* country was an act of treason; it was also, for civil purposes, a nullity where to recognise it would be against public policy.[29] However, section 19 of the present Act provides that conduct otherwise treasonable (namely, service in the armed forces of an enemy) shall divest an Australian citizen of his citizenship if he is already a national or citizen of that country under its law; this provision appears to exclude the rule in *Ex parte Freyberger*[30] and to make it possible for a person of dual nationality to repudiate his Australian citizenship in time of war by opting for his alternative citizenship or nationality. But it is submitted that the rule in *Lynch's Case*[31] still applies where there is no question of dual nationality, and that an Australian citizen cannot use section 17 to escape a charge of treason on the ground that he owed no allegiance consequent upon his voluntary adoption of enemy nationality in time of war: *Ex delicto non oritur ius*.

A person who has obtained citizenship by registration or naturalization may be deprived of it if the Minister is satisfied that he is disloyal or has traded or communicated with the enemy; or that he was registered or naturalized by fraud, false pretences, or concealment; or that he was not at the date of registration or naturalization of good character; or that he has within five years after that date been sentenced in any country to imprisonment for twelve months or more.

At common law marriage did not affect a woman's nationality; a British woman who married an alien did not lose her British nationality. However, in order to avoid any risk of dual nationality, the Naturalization Act 1870 provided that "a married woman shall

[28] 33 Vict., c. 14.

[29] *R. v. Lynch*, [1903] 1 K.B. 444; *Ex Parte Freyberger*, [1917] 2 K.B. 129. But contrast, on its special facts, *In re Chamberlain's Settlement*, [1921] 2 Ch. 533.

[30] [1917] 2 K.B. 129.

[31] [1903] 1 K.B. 444.

be deemed to be a subject of the state of which her husband is for the time being a subject."[32] This general principle was preserved in the British Nationality and Status of Aliens Act 1914. In 1933 another Act, giving effect to a "Convention on certain questions relating to the Conflict of Nationality Laws signed at the Hague on 12th April, 1930," preserved British nationality for a woman who married an alien but did not thereby acquire his nationality, but in no other case.[33] It was after 1933, and largely owing to differences of opinion between the United Kingdom and the Dominions regarding the nationality of married women, that the "common code" system began to show signs of breaking down. The Australian Commonwealth Parliament in 1936 passed an amendment to its nationality laws,[34] to provide that any woman who became an alien by reason of her marriage and of her acquisition of her husband's nationality could make a declaration that she wished to retain, while in Australia, the rights of a British subject; on making the declaration she became, within Australia, entitled to all political and other rights, powers, and privileges and subject to the duties and liabilities to which a natural-born British subject was entitled or subject. A later amendment[35] went further by providing that a British woman who married an alien should be or continue to be a British subject while in Australia unless she made a declaration opting for her husband's nationality.

Section 17 of the present Act expressly excepts marriage from the "voluntary and formal" acts whereby citizenship is lost; section 27 provides that when, prior to the commencement of the Act, a woman ceased to be a British subject by reason of marriage, she shall be deemed to have been a British subject immediately before the commencement of the Act. After that date she is a British subject by virtue of the Act itself; and if she had been born in Australia or New Guinea or had been naturalized in Australia or had, immediately prior to the commencement of the Act, been ordinarily resident here for five years, she became an Australian citizen on and from the date on which the Act came into operation (i.e., 26th January, 1949, the date which is celebrated as the anniversary of the foundation of Australia).

Passports.

The Passports Act[36] amends an Act of similar title of 1938, and is intended to be complementary to the Nationality and Citizenship Act. It therefore amends the Principal Act to enable passports to be issued to Australian citizens in a form which should readily enable them to secure recognition of their citizenship as well as of

[32] 33 Vict., c. 14, sec. 10(i).
[33] 23 & 24 Geo. 5, c. 49.
[34] Nationality Act, No. 62 of 1936.
[35] Nationality Act, No. 9 of 1946.
[36] No. 85 of 1948, amending No. 15 of 1938.

their British nationality. Passports may also be issued under this Act to British subjects who are not Australian citizens.

Immigration.

With the post-war expansion of immigration to Australia, some unscrupulous individuals have turned the misfortunes and desperate needs of others to their own advantage; by posing as "agents" and by holding themselves out as able to procure passages on ships or aircraft or to obtain special treatment from the Department of Immigration they have been able to extort large sums from unfortunate would-be migrants. A new Act[37] amends the Immigration Act 1901-1940[38] by inserting provisions directed against "racketeering" in the needs of desperate people while at the same time recognising the beneficial effect that properly conducted immigration agencies can have in the execution of Australia's migration plans. These provisions seek to regulate and not to abolish migration agencies, and do so by the following means:—(a) No person may demand or receive a fee or commission for arranging applications for admission into Australia or for arranging or securing passages unless he is a registered agent; (b) regulations may prescribe the maximum fees which a registered agent may charge; (c) any amount paid in excess of the prescribed fees shall be refunded; (d) the registration of those agents who neglect the interests of their clients or who are guilty of other misconduct may be cancelled.

This measure also introduces a requirement copied from the immigration laws of the United States; a migrant is now required to make a declaration that he is not a person who advocates "the overthrow by force or violence" of the established government of the Commonwealth or of any State or civilised country.

Immigrant children.

In 1946 a new topic was added to the law relating to minors and to migration by the Immigration (Guardianship of Children) Act, which has now been amended to include certain provisions enlarging its scope.[39] A new section 6A prohibits an immigrant child from leaving Australia without the consent of the Minister; but the latter is not to refuse his consent unless he is satisfied that to grant it would be prejudicial to the interests of the child. It is now an offence, carrying with it as maximum penalty a fine of £100 or six months' imprisonment, to aid, abet, counsel or procure an immigrant child's departure from Australia contrary to the Act. Under the

[37] Immigration Act, No. 86 of 1948.

[38] No. 17 of 1901, as amended by No. 17 of 1905, No. 19 of 1905, No. 25 of 1908, No. 10 of 1910, No. 38 of 1912, No. 51 of 1920, No. 47 of 1924, No. 7 of 1925, No. 56 of 1930, No. 26 of 1932, No. 37 of 1933, No. 13 of 1935, and No. 36 of 1940.

[39] Immigration (Guardianship of Children) Act, No. 62 of 1948, amending No. 45 of 1946.

Principal Act the Minister could place immigrant children in the custody of a person representing an authority or organization approved by the Minister; this provision is now repealed, the Minister being empowered to place an immigrant child in the custody of any person who is willing and who is, in the Minister's opinion, suitable to be the custodian of the child. Finally, the responsibilities and powers of the Minister are increased by making him the guardian of the property as well as of the person of every immigrant child; he has the same rights, powers, duties, and obligations as a natural guardian would have. The Governor-General may make regulations prescribing the rights and duties of the Minister as "guardian of the estate in Australia of immigrant children," including provisions for the receipt, disposition, management, and control of the property of immigrant children, and of deceased immigrant children from death until grant of administration. Regulations may also be made to prevent immigrant children from leaving Australia without the Minister's consent.

Deportation of aliens.

Under the Immigration Act[40] the only aliens liable to deportation were those who had been convicted of a crime of violence against the person, or of extortion by force or threats, or of attempting to commit such offences, or who had been convicted of any other criminal offence for which they were sentenced to imprisonment for one year or longer. This power was subject to further restrictions—(a) before an alien could be deported an order for deportation had to be signed by the Minister for Immigration upon the expiration of, or during the term of, his imprisonment; (b) if an alien had been convicted on a number of occasions of offences none of which had been punished by imprisonment for one year or longer, he was not within the scope of the Act; (c) as the Act was passed under the constitutional power over immigration, it could not be applied to a person who had ceased to be an immigrant, such as an alien who had made his home here permanently and thereby became a member of the Australian community.[41]

The Aliens Deportation Act 1948 is based on sec. 51 (xix)[42] of the Constitution; it repeals the Aliens Deportation Act 1946[43] and sets out the new principles on which authority to deport an alien will be founded. The Minister may, by notice in writing, summon an alien whose character and conduct are such that in the opinion of the Minister he ought not to be allowed to remain here to appear before a Commissioner (who is appointed by the Governor-General and must be or have been a Supreme Court judge) at the time and

[40] See note 38, (*supra*).
[41] See *Ex parte Walsh and Johnson,* (1925) 37 C.L.R. 36.
[42] Which gives the Commonwealth Parliament power to legislate as to "Naturalization and aliens."
[43] No. 29 of 1946, repealed by No. 84 of 1948.

place specified in the summons. The Commissioner is not, in his investigation, "bound by any rules of evidence," but may inquire into the character and conduct of the alien "without regard to legal forms." Having completed his inquiry the Commissioner then reports to the Minister who will, if it is so recommended by the Commissioner, make an order for deportation. The family of an alien under a deportation order may notify the Minister requiring him to include their names in the order.

The remaining provisions are machinery and relate to such matters as the duty of the master of the vessel on which the alien is embarked, the custody and arrest of an alien pending deportation, and the offences of concealing deportees or of assisting them to evade deportation.

IV. TRADE MARKS.

The Trade Marks Act,[44] amending the Principal Act of 1905-1936,[45] has two principal objects: First, to provide a system of registration of *users* of trade marks, and, second, to permit in certain cases the assignment of trade marks without assignment of the goodwill of the business concerned.

Registration of users.

The Principal Act provided that only the proprietors of trade marks could apply for registration; the grant of a licence by the proprietor of an Australian trade mark permitting another person to use it on goods other than those of the proprietor was regarded as a form of deception on the buying public which invalidated registration of the trade mark. This rule was inflexible, and applied even if the proprietor owned or controlled the business of the licensee. Secondly, a parent company which was the owner of a registered trade mark could not license a subsidiary company to use the mark. The amending Act steers between the Scylla of unrestricted licensing and the Charybdis of proprietorship-user.

Before a party may be registered as the user of a trade mark the Registrar must be satisfied as to the relationship between the proprietor and the proposed registered user. Particulars must be furnished showing the degree of control by the proprietor over the permitted use, and the conditions generally which will govern its use. Thereupon the Registrar must decide whether it is in the public interest to grant the application. But his discretion does not stop at this point, nor does his control cease with the registration of a registered user. He is empowered to cancel registration on the ground that the registered user has used the trade mark in such a way as to cause or to be likely to cause deception or confusion, or

[44] No. 76 of 1948.
[45] Trade Marks Act, No. 20 of 1905, as amended by No. 19 of 1910, No. 19 of 1912, No. 7 of 1919, No. 25 of 1922, No. 45 of 1934, and No. 75 of 1936.

on the ground that the proprietor or registered user had made some misrepresentation or had failed to disclose some fact material to the application for registration. But all decisions of the Registrar are subject to an appeal to the High Court.

A registered user has no power to assign or transmit his right to the use of the trade mark.

Assignment.

Under the Principal Act a trade mark could not be assigned except with the goodwill of the business in connection with which it was used. Furthermore, it has been laid down by the courts that a vendor cannot sell goodwill apart from the business to which it attaches. The effect of these rules, when taken together, was that a designer of a trade mark was unable to incorporate a company to which he could then transfer the mark, nor could a parent company establish a subsidiary with its own factory and transfer the mark to it. The amending Act substitutes a new section 58 and, while retaining the general prohibition against assignment without goodwill, limits the circumstances in which the validity of an assignment can be attacked and the period within which it is liable to attack. An assignment without goodwill will not be invalid unless one of three factors can be shown. The first is where the trade mark was not in actual and *bona fide* use in Australia by the assignor or his predecessor in title at any time prior to the assignment; but this rule does not apply where a trade mark has been registered with the intention that it should be assigned to a new company yet to be formed or that some person should be permitted to use it as a registered user. The second is where the assignee has used the trade mark in such a way as to lead to the belief, contrary to the facts, that the goods upon which the mark is used by the assignee are manufactured or dealt in by the assignor. The third is where the trade mark continues to be used by the assignor in relation to other goods and the public is likely to be deceived by the use of the trade mark by assignor and assignee on their respective goods.

V. WEIGHTS AND MEASURES.

With a possible view to the future rationalisation of our archaic system of weights and measures (a possibility which every schoolboy will heartily welcome), the Weights and Measures (National Standards) Act[46] vests in the Governor-General power to make regulations prescribing the sole legal unit of measurement of any physical quantity and requires the Commonwealth Scientific and Industrial Research Organisation to maintain standards of measurement in terms of the Commonwealth units. By virtue of section 10 contracts entered into on or after the date from which these legal units are prescribed must be in terms of the relevant unit or are void.

[46] No. 29 of 1948.

Similarly, all taxes, duties, charges and tolls under the laws of the Commonwealth, or of a State or Territory, must be in terms of the relevant unit. Section 3 provides that nothing in the Act is to affect any State or Territorial laws relating to improper practices in regard to weights and measures.

VI. BROADCASTING.

The Australian Broadcasting Act[47] amends the Principal Act of 1942-1946[48] by bringing within its ambit television and facsimile broadcasts, by establishing an Australian Broadcasting Control Board, by giving the new Board wide powers over the whole field of broadcasting both national and commercial, by increasing the membership of the Australian Broadcasting Commission and bringing that body more under the control of the executive government.

"Facsimile station" is defined to mean "a station for the transmission of fixed images intended for reception in a permanent form by the general public."

A new Part IA is added to the Principal Act for the purpose of establishing an Australian Broadcasting Control Board, a body corporate with the customary powers and functions. The Board is to consist of three members appointed by the Governor-General, and is empowered to give orders and directions. Orders are to be written but are not to be deemed to be Statutory Rules;[49] they are to have the force of law but are subject to sections 48 and 49 of the Acts Interpretation Act 1901-1947.[50] Directions may be given orally or in writing; if orally, they must be recorded within twenty-four hours; if in writing, a copy must be served on the person directed. The functions of the Board are to ensure (1) that the services of broadcasting stations, television stations, and facsimile stations accord with the plans prepared by the Board; (2) that the technical equipment of the stations conforms with appropriate standards and is not altered without the consent of the Board; (3) that adequate and comprehensive programmes are provided; and in relation to this last function, to ensure (i) that there is a reasonable variety of programmes, (ii) that divine worship is adequately broadcast; (iii) that an equitable basis is provided for the broadcasting of political or other controversial matter; and (iv) that advertising time be restricted and that stations remain open for reasonable periods. Subject to the direction of the Minister the Board determines the situation, operating power, and frequency of any station and regulates the establishment of networks. It may be assisted in its function as to programmes by Broadcasting Advisory Committees appointed by the Minister for each State.

[47] No. 64 of 1948.
[48] No. 33 of 1942 as amended by No. 39 of 1946.
[49] i.e., they are not to be published in the annual volume of Statutory Rules.
[50] i.e., they must be published in the Government Gazette and may be disallowed by either House of Parliament.

The membership of the Australian Broadcasting Commission, which controls the national broadcasting service and does not accept advertisements of any description, is increased from five to seven; the new members are to be appointed from the Department of the Treasury and from the Postmaster-General's Department. Some check on the activities of the Commission is provided by a new provision that "no moneys shall be expended by the Commission except in accordance with estimates of expenditure approved by the Treasurer."

VII. INCOME TAX.

The Income Tax Assessment Act 1948[51] amends the Principal Act mainly by altering a number of provisions relating to private companies. The definition of such a company, for the purposes of this Act, now means a company which has not more than twenty shareholders, or a company in which the major voting power can be exercised by one person or by not more than seven persons, or a company in which one person or not more than seven persons can exercise seventy-five per cent. of the voting power; but it does not include a company in which the public is substantially interested, nor a subsidiary of a public company.

Before the passing of this Act shareholders in private companies which did not distribute a dividend for the year of income were in a more favourable position than partners or individual proprietors, because the undistributed profits tax which would be levied would be deducted from the taxable income for the year in which that tax was paid. The amount for the two years could subsequently be distributed as a dividend free of further tax.[52] The definition of "distributable income" has been altered to withdraw this deduction. In order to preserve the structural stability of private companies and to allow them to build up reserves, the Act grants exemption from undistributed profits tax if such companies pay out as dividends a certain proportion of their distributable income. To obtain the exemption they must pay out (a) seventy per cent. of the first £2,000 of distributable income, (b) seventy-five per cent. of the second £2,000, (c) eighty per cent. of the third £2,000, (d) eighty-five per cent. of the fourth £2,000, and (e) ninety per cent. of the remainder.

Section 105A is directed against persons interested in two or more private companies. The income from each private company is to be consolidated and tax levied on the consolidated income.[53]

[51] No. 44 of 1948, amending the Income Tax Assessment Act — No. 27 of 1936, as amended by No. 88 of 1936, No. 5 of 1937, No. 46 of 1938, No. 30 of 1939, Nos. 17 and 65 of 1940, Nos. 58 and 69 of 1941, Nos. 22 and 50 of 1942, No. 10 of 1943, Nos. 3 and 23 of 1944, Nos. 4 and 7 of 1945, No. 6 of 1946, and Nos. 11 and 63 of 1947.

[52] On this point see "E. Kellie", *I can get it for you tax-free*, c. 2 — *How to work the private Company racket.*

[53] For the position before this amendment see "E. Kellie", op. cit., c. 3 — *Fission your company.*

A substituted section 160ABA extends to four years the present two-year concession to directors, managers, consultants, and administrative officers visiting Australia for the purpose of "manufacturing, mercantile or mining business or a business of primary production"—provided that the Secondary Industries Commission and the Treasurer are satisfied that the visitor's services have assisted or will assist Australian industry—and requires them to pay no greater measure of taxation than they would have had to pay in their own country.

The secrecy provisions of section 16 of the Principal Act are amended so as to authorise the Commissioner of Taxation to communicate confidential information to the Director of Social Services and to the Universities Commission.

VIII. INDUSTRIAL REGULATION.

Marketing of hide and leather.

The purpose of the Hide and Leather Industries Act[54] is to continue the organised marketing of hides and leather after the expiration, on 31st December, 1948, of the existing Commonwealth scheme which had been administered under the National Security (Hide and Leather Industries) Regulations. This measure does not contemplate the continued existence of an exclusively federal instrumentality acting throughout the Commonwealth by virtue of powers conferred only by federal Acts and regulations. It is based on complementary federal and State legislation.

A Hide and Leather Industries Board is established, consisting of a chairman and eleven members appointed by the Minister and holding office during his pleasure. The members of the Board other than the Chairman are (a) six cattle raisers, one nominated by the appropriate minister in each State; (b) one hide broker; (c) one hide merchant or exporter; (d) one representative of Australian meatworks; (e) one master tanner or leather manufacturer; and (f) one representative of the Australian Leather and Allied Trades Employees Federation; the Board takes the place of the Board constituted under the National Security Regulations and assumes all the assets, rights, obligations, liabilities, contracts and agreements of the latter.

In the federal Territories, hides are acquired directly by the Board; in the States, in accordance with the provisions of their several laws. The Act sets forth the basis of appraisement and payment and the procedure to be adopted for marketing, whether for home consumption or for export, and enables the Board to license dealers, export hide and leather, require the furnishing of returns, make financial arrangements, and make regulations not inconsistent with the Act.

[54] No. 71 of 1948.

The distribution of wool profits.

The distribution to woolgrowers of the profits that will accrue to the federal government from transactions in wool and sheepskins under the war-time arrangements between that government and the United Kingdom will be governed by the Wool Realisation (Distribution of Profits) Act.[55]

In 1939, shortly after the outbreak of war, an arrangement was made between the two governments under which the federal government acquired from the growers, and the United Kingdom purchased, all wool in Australia. The period of the arrangement was the duration of the war; but it was not terminated until 31st July, 1948. The stocks of wool that had accumulated during the war were to be sold under the Wool Realisation Act 1945;[56] owing to the post-war demand for wool the accumulated stocks have been sold much earlier than had been expected, although it is not yet possible to assess the final figure of "Wool Disposals Profit."

The Act is divided into six Parts. Part I deals principally with definitions. Part II, headed "Distributable Profits," sets out the procedure for notification of the amount of the Wool Disposals Profits and provides for progress payments to be made if they are considered justified. Part III sets out who shall participate in any distribution of profits and who shall not. The amount to be paid to each supplier of "participating wool" is a proportion of the total distributable profit equal to the proportion which the appraised value of the supplier's wool bears to the appraised value of all participating wool. Special provision is made for the method of payment in case of bankruptcy, death, defunct companies, companies in liquidation, dissolved partnerships, and whenever there is doubt as to the proper recipient. Part IV deals with the method of distribution to the persons entitled and, to obtain accurate lists of such persons, makes use of the services of the selling brokers who received wool and submitted it for appraisement under the National Security Regulations. These brokers will furnish returns giving the name and address of every person who supplied participating wool to them from 1939 to 1945, and a statement of the appraised value of the wool. The returns, certified by the broker making them, are to be checked by the Australian Wool Realisation Commission, which may appoint the brokers as its agents for distribution of moneys payable under the Act; the brokers may deduct commission from every amount paid through them.

Part V deals with certain of the financial aspects of distribution and provides that the Commonwealth Bank may make advances, on the government's guarantee, to the Commission. The latter, subject to the Minister's approval, may set aside such sums as it may consider necessary for indemnifying itself in respect of losses incurred

[55] No. 87 of 1948.
[56] No. 49 of 1945.

in the performance of its functions. Part VI protects the Commission against any action or proceedings for money claimed to be payable under the Act, or for any damages arising out of anything done by the Commission in good faith. It prohibits absolutely any assignment of shares in a distribution or of the possibility of such a share, until after the distribution is actually made. Any moneys remaining unpaid for two years are to be paid to the credit of the Wool Industry Fund.[57]

The pooling of wheat.

By the Wheat Industry Stabilisation Act[58] the Commonwealth, in collaboration with all States, puts a "wheat stabilisation plan" into effect. The major provisions are

(1) The Commonwealth government guarantees to growers a minimum price of 6s. 3d. per bushel for bulk wheat of fair average quality free on rails at ports of export.

(2) The guaranteed price is to vary according to the index of production costs for each season, the basis of comparison being the production costs for the 1947-1948 season.

(3) The guaranteed price applies to wheat marketed through approved organizations up to the end of the 1952-1953 season.

(4) Approved organizations are the Australian Wheat Board and those organizations which are established by the States for the purpose of receiving and marketing wheat as agents for the Australian Wheat Board.[59]

(5) The guaranteed price is payable in respect of any quantity of wheat not exceeding one hundred million bushels exported in any one season.

(6) To meet the guaranteed price a Stabilisation Fund is to be created by means of a tax[60] imposed on exported wheat.

(7) The tax is imposed only when the export price is higher than the guaranteed price, and is then to be one-half of the difference between the two prices but so as not to exceed 2s. 2d. per bushel.

(8) The tax is imposed on the 1947-1948 and later crops.

(9) No refund of tax may be made from the Fund;[61] but the Commonwealth has agreed that it will not hold an excessive amount

[57] See Wool Industry Fund Act, No. 52 of 1946.
[58] No. 48 of 1948.
[59] Cf. (Western Australian) Wheat Stabilisation Act, (*supra*).
[60] Imposed by Wheat Export Charge Act, No. 49 of 1948.
[61] Except for the 1945-1946 and 1946-1947 season; see Wheat Tax (Repeal and Refund) Act, No. 47 of 1948, which provides for the refund of the wheat tax levied for those seasons and prevents payment of the proceeds of that tax into the Wheat Prices Stabilization Fund.

in the Fund but will consider a refund of tax to the oldest contributing pool whenever the financial prospects of the Fund justify it.

The Australian Wheat Board consists of a chairman, a member engaged in commerce and experienced in the wheat trade, a finance member, a representative of flour mill owners, a representative of employees, two wheatgrowers from each of New South Wales and Victoria, and one wheatgrower from each of Queensland, South Australia, and Western Australia. The chairman and the members other than the wheatgrowers are appointed by the Minister and hold office during his pleasure; the wheatgrower members are nominated by State ministers. The Board is a body corporate of orthodox pattern.

Subject to the approval of the Minister the Board may license receivers of wheat on its behalf and may appoint overseas agents. It may, subject to any directions by the Minister, buy or sell wheat, flour, corn sacks, semolina, jute, and jute products; it may grist or arrange the gristing of wheat; it may manage and control all matters connected with the handling, storage, protection, treatment, transfer, and shipment of wheat, and do all things incidental to any of these objects. The property, rights, and obligations of the Board established under the National Security Regulations are transferred to the new Board.

Payment by the Board in good faith of any moneys payable under the Act is a good discharge of the Board from any further liability; no member of the Board can be made personally liable for any of its acts. It may arrange with the Commonwealth Bank for advances. By section 33, State laws relating to the purposes of the Act are not to be limited in their operation so long as they can take effect without prejudice to the Act; in its intra-State operations the Board is subject to State price-fixing laws.

IX. WATER SUPPLY.

Subsidies to Western Australia.

The Western Australia Grant (Water Supply) Act[62] grants to the named State £2,150,000 to subsidise the installation of a water scheme for the agricultural areas, for towns in the Great Southern district, and for the goldfields; the details of the scheme are set out in a State Act of 1947.[63] The times and amounts of payment are to be as determined by the Commonwealth Treasurer; but no payment may exceed, or when added to previous payments may exceed, one-half of the sum which the State Auditor-General certifies as having been spent on the scheme.

[62] No. 52 of 1948.
[63] Country Areas Water Supply Act, No. 62 of 1947.

The riparian waters in south-east Australia.

The River Murray Waters Act[64] has for its main object the ratification of an agreement made on 26th November, 1948, between the federal government and the governments of New South Wales, Victoria and South Australia. This agreement varies the River Murray Agreement of 9th September, 1914 (as amended in 1923 and 1934) and provides for the increase of the Hume Reservoir from 1,250,000 acre-feet to 2,000,000 acre-feet by increasing the height of the Hume Dam; it also provides for better use of the storage of Lake Victoria and for the widening and improvement of the inlet channel into that Lake. A further object is the better protection of the catchment area from erosion, New South Wales and Victoria undertaking to take effective measures in that regard. The Commission is required to inspect, and the States to report, annually on the condition of the catchment area. It is also empowered to initiate proposals for better conservation and regulation of the waters of the Murray and to approve, with or without amendment, any proposed works affecting the use, flow, control or storage of water, and to stipulate conditions of operation or control.

The Act also contains a clearer definition of the method of distributing the available water among the three riparian States.

L.F.E.G.

[64] No. 90 of 1948.

NOTES OF CASES

Licensing Act 1911-1946—extent of duty of licensee to prevent drunkenness on licensed premises.

In *Walsh v. Rosich*[1] the Full Court had once again to consider and to attempt to define the duties of licensees and their servants in relation to drunken persons on licensed premises. The appellant, who was the licensee of the Red Lion Inn, was charged and convicted in a Court of Petty Sessions with an offence under section 163 of the Licensing Act 1911-1946 of permitting drunkenness on the premises. The evidence showed that the appellant's barman during a busy period served four drinks to a party of customers in the public bar and then walked to the saloon bar to obtain some change. An assistant barman remained in the public bar. During the absence of the barman, a drunken man entered the bar and sought to join the four customers who had been served with their drinks. One of these customers, who knew the drunken man but wanted to get rid of him, gave him one of the drinks and suggested he should go home. At that moment, the barman returned to the bar and almost simultaneously the respondent and other police officers entered. The appellant was engaged in the saloon bar and did not know of the presence of the drunken man until after the police had commenced enquiries as to how the man came to be served with the beer.

Section 163 of the Licensing Act provides that "no licensee shall permit drunkenness or any indecent or disorderly conduct to take place or any reputed prostitute or thief to remain on any part of his licensed premises," and it is provided by section 166 that "where a licensee is charged with permitting drunkenness and it is proved that any person was drunk on his premises, it shall lie on the licensee to prove that he and the persons employed by him took all reasonable steps to prevent drunkenness on the premises." There is, however, another section in the Act dealing with drunkenness on licensed premises, *viz.*, section 142, which provides that "if any licensee or any servant or agent of a licensee, knowingly or carelessly, allows any intoxicated person to remain in or upon licensed premises," he commits an offence. The fact that the penalty provided for a breach of section 142 is of less amount than that provided by section 163 tempted Counsel for the appellant to ask the Court to read down the latter section so as to give it a narrower meaning and restrict its application only to cases where drunkenness was caused or contributed to on the licensed premises. Counsel for the respondent, how-

[1] (1947) 49 W.A.L.R. 74.

ever, pointed out that the heavier penalty could well be justified by the fact that section 163 dealt with a number of offences of varying seriousness; in the result both judges constituting the Court declined to speculate how the construction of section 163 should be modified by the presence of section 142.

The appellant argued that to permit drunkenness connotes knowledge by the licensee or his servant for the time being in control of the bar, or at the least some opportunity of knowledge, of the presence of the drunken person. He further argued that a reasonable time must elapse after a drunken man comes onto the premises to enable the licensee or his servant to eject him, and that in the instant case that reasonable time had not elapsed.

The respondent relied on *Rolfe v. Willis*[2] in which Griffith, C.J., in considering a section of the Liquor Act 1912 (New South Wales) analogous to section 163 of the Licensing Act, expressed the opinion that failure to prevent a drunken person from entering licensed premises or, if reasonable steps have been taken to prevent his entering, failure to eject him within a reasonable time, is failure to take reasonable steps to prevent drunkenness. The respondent contended that there was no evidence that the licensee had taken any steps to prevent the entry of drunken persons and that the question of whether there had elapsed a reasonable time after the entry in which the drunken man should have been ejected did not arise. It was pointed out that the whole question was one of fact, and that the Magistrate, having convicted, must have found as a fact that the licensee had not taken all reasonable steps to prevent drunkenness.

The Court (Dwyer, C.J., and Walker, J.), while hesitating to differ from findings of fact by a magistrate, expressed the view that there are times when it is necessary to review them, particularly when there is no stated finding and the only method of ascertaining the suggested finding is by inference based on the conviction of the defendant, and therefore held that in the instant case they were justified in reviewing the facts. It may be doubted whether the expressed hesitation was anything more than a formal recognition of a general principle as in practice the learned Chief Justice has not been slow to find justification for differing from a magistrate on questions of fact if he considers the justice of the case so requires. The Court then held that, on the evidence, it was clear that, firstly, neither the licensee nor the barman was aware of the fact that there was a drunken man on the premises; secondly, their ignorance did not arise from any dereliction of duty or wilful closing of the eyes to conditions that existed; and thirdly, that there had been no opportunity to take whatever were the desirable steps towards dealing with the drunken man who was there. Walker, J., expressed the view that if a publican can prove that he had done what would be the reasonable thing to prevent drunkenness in the bar by instructing

[2] (1916) 21 C.L.R. 152.

his servants not to serve and supply liquor to drunken people, he must be given a reasonable opportunity when he becomes aware of the presence of the drunken man in his bar to take those measures which section 166 imposes upon him. Neither judge adverted to the duty (if any) of a licensee to prevent drunken persons from actually entering the licensed premises except that the Chief Justice, during argument, expressed the opinion that it would be obviously unreasonable to expect a licensee to station someone at the doors to see that no intoxicated persons entered. In the result the appeal was allowed and the duties of licensees in relation to this particular section are thus placed on a reasonably practical basis.

R. V. NEVILE.

Licensing Act 1911-1946—what constitutes a club for the purposes of the Act—whether ownership of premises is a necessary factor.

Cooper v. Bennett and Bawden,[3] an appeal from the Supreme Court of Western Australia to the High Court, should serve to remind the draughtsman that words used in the daily conversations of mankind have little certainty of meaning. Bennett and Bawden were charged with supplying liquor on the premises of an unregistered club contrary to section 203 (1) of the Licensing Act 1911-1946. The premises in question belonged to the Royal Antediluvian Order of Buffaloes of Western Australia under the Grand Lodge of England (Incorporated), and at the time of the alleged offence were being used by the Leederville Lodge of the Order for a meeting. Of this Lodge the defendants were respectively the city waiter and the assistant city waiter, and as such were required to "attend to all requirements of members, and act under the order of the Worshipful Primo." The requirements of the members were inter alia of an alcoholic nature, and it was the supply of beer in response to such requirements which resulted in the present charge. In order to sustain the charge it was necessary for the prosecution, irrespective of the question of "supply," to show that the premises were in fact "the premises of an unregistered club."

The Act defines an "unregistered club" as a club which is required under the Act to be registered but is not registered. The Act does not in fact "require" any club to be registered, but enables certain clubs to register and thereby gain specified privileges. Latham, C.J., dealt with this question as follows:[4] "When, then, can it be said that registration of a club is 'required' under the Act? This provision can mean only that registration is required for the purposes of the Licensing Act; that is, where registration is necessary in order to comply with the provisions of the Act. There is no such necessity unless liquor is sold or supplied on the premises of the club." In his

[3] (1948) 50 W.A.L.R. 72.
[4] *ibid.*, at 82.

opinion there is no obligation to register a club, even though it may satisfy all the conditions specified in the Act for registration, unless it is desired to serve liquor. His Honour then stated that in his opinion the question of whether the premises involved were the premises of an unregistered club involved the consideration of two distinct matters, because "the question whether the Order is a club has to be determined for the purpose of reaching a conclusion as to whether the premises were the premises of the club."[5] A negative answer to either of these questions would be fatal to the prosecution.

In His Honour's view it is not a necessary attribute of a club that it should own property; some clubs may have no property at all. Clubs, he stated, are voluntary, non-profit making associations, but they vary almost indefinitely in other characteristics.[6] Having stated these propositions of law—these generalisations in the law, if one may with respect so call them—His Honour decided that the Order was not a club, but what characteristics the Order possessed or lacked which prevented it from being a club His Honour does not say.

The Chief Justice then proceeded to consider whether the premises were club premises. This question was, with respect, only of academic interest when one considers the way in which His Honour had already separated the issues, and the answer to it could not in any circumstances throw light on the question of club or no club, as a club "may have no property at all."[7]

Dixon, J., was only concerned to discover the meaning of the word "club" in the context of the Licensing Act, and in this context he said that it is the "insistence on an establishment for the common personal benefit of the members (which) brings out what is of importance."[8] Approached in this manner, the two questions separated by the Chief Justice become one, and an affirmative answer to the second question would have the effect of bringing an organisation otherwise not a "club" within the meaning of that word as used in the Act. In His Honour's opinion "we can put aside the application of the word to bodies of people who are associated together for purposes to which the occupation of premises is not indispensable, as for instance a walking club, a dining club, an athletic club, and clubs for particular games or exercises."[9]

The answer given to this telescoped question would not appear to have brought with it much certainty for posterity. A club, it seems, "may be formed for any object that is neither gainful nor unlawful,"[10] yet the Order in this case was not a club apparently

[5] *ibid.*, at 84.
[6] *ibid.*, at 83.
[7] *ibid.*, at 83.
[8] *ibid.*, at 88.
[9] *ibid.*, at 87.
[10] *ibid.*, at 88.

for the reason that it had no premises appropriated to the exclusive use of its members.[11] Cryptically, "no premises, no club."

It is submitted that Sir Owen Dixon based his conclusion on a line of reasoning similar to that which was strongly pressed upon the Court by the appellants, but which was decisively rejected at least by the Chief Justice.[12] The argument was put in this way: Before a club can be registered under the Act it must consist of thirty members;[13] the Order has only twenty-seven members; it could not therefore be registered under the Act; it could not therefore be said to be required to be registered, and therefore could not be said to be an unregistered club.[14] It is submitted that Sir Owen Dixon's judgment contains a similar fallacy. In his view a club without premises is not a club within the meaning of the Act. The Order has no premises appropriated to the exclusive use of its members; the Order is therefore not a club which can be registered under the Act; it could not, therefore, be said to be required to be registered, and therefore is not an unregistered club.

It is reasonable to add that such an argument would not have been possible had the Licensing Act been more carefully drafted.

F. T. P. BURT.

Interpretation of wills—words "my nephews and nieces" taken to include nephews and nieces of testator's wife.

The judgment of Wolff, J., in *In re McIntyre*,[15] in which His Honour held the words "nephews and nieces" in a will to be sufficiently wide (on the particular facts) to include the children of the testator's wife's brother and sister, is yet another illustration of the straightforward construction which "is gaining increasing appreciation by the Chancery Bar, no less than by common lawyers."[16]

The deceased by a codicil to his will left certain property to "all my nephews and nieces." Between the date of the will (15th April, 1929) and the date of the codicil (19th April, 1934) the testator's only brother had died, leaving two children who survived both him and the testator. The testator had no sisters. On these facts it was obvious that if the words "nephews and nieces" were to be construed according to their primary signification[17] there would only be two persons in contemplation of the testator, at the time

11 *ibid.*, at 90.
12 *ibid.*, at 81.
13 Licensing Act 1911-1946, sec. 183.
14 *ibid.*, sec. 180.
15 Not yet reported.
16 Note on *Re Harari's Settlement Trusts*, [1949] 1 All E.R. 430, in 65 L.Q.R. 166.
17 *Wells v. Wells*, (1874) L.R. 18 Eq. 504, per Jessel, M.R., at 505, 506.

when he executed his codicil, who could possibly take. What, then, did the testator mean to convey by his use of the words "*all* my nephews and nieces"? Plainly the use of the word "all," and the use of the plural when referring both to nephews and nieces, indicated that those words were intended to be understood in their "ordinary meaning in a secondary sense,"[18] and so to include the nephews and nieces of the testator's wife.

F. T. P. BURT.

Divorce on ground of desertion—prior proceedings for maintenance in court of summary jurisdiction—estoppel by res judicata.

In *Seymour v. Seymour*[19] Wolff, J., of the Supreme Court had to decide whether to follow one of his own earlier decisions in *Merritt v. Merritt*[20] or to depart from it in the light of the decision of the Court of Appeal in *Winnan v. Winnan.*[21] The learned judge, with obvious misgivings, preferred the Court of Appeal; but before considering the facts in *Seymour* it is proposed to comment on *Winnan*, in which the Court of Appeal was called on to decide if a judgment of a court of summary jurisdiction can be set up by way of estoppel in subsequent divorce proceedings. The facts in *Winnan* were as follows:—

On 29th May, 1945, a wife took out a summons in a court of summary jurisdiction complaining that her husband had wilfully neglected to maintain her and their infant child. The husband defended in person and appears to have asserted that his wife's conduct had made life intolerable for him in the matrimonial home (i.e., that she had constructively deserted him; but as he was without legal advice it may be assumed that he was ignorant of the technical implications of his defence). The court decided in favour of the wife and ordered the husband to pay maintenance for her and for the child. By a petition dated 17th April, 1947, the husband sought a decree of divorce on the grounds of cruelty and desertion by the wife, the charge of desertion being based on the conduct of which he had complained before the court of summary jurisdiction but which that court had not regarded as exonerating him from his obligation to maintain her.

Res judicata was not pleaded in the wife's answer to the petition, but was submitted *arguendo* by her counsel, who contended that the justices could not properly have held the husband guilty of wilful neglect to maintain the wife if she had deserted him at the time when that neglect was alleged, but that they must be presumed to have considered the question of desertion and to have decided the

18 *Sherratt v. Mountford,* (1873) L.R. 8 Ch. App. 928.
19 Not yet reported.
20 (1945) 48 W.A.L.R. 34.
21 [1948] 2 All E.R. 862.

point in the wife's favour when they granted an order for maintenance. He submitted, therefore, that the justices had adjudicated on the issue of the wife's desertion, that the matter was *res judicata,* and that the husband was estopped in subsequent divorce proceedings from alleging desertion on the same facts.

The Court of Appeal (Lord Morton of Henryton, Bucknill, and Asquith, L.JJ.) held that, as constructive desertion would be a defence to a charge of wilful neglect to maintain, the justices must have applied their minds to that question and that their order for payment of maintenance showed that they had decided that the wife was not guilty of constructive desertion; but the Court went on to decide that the allegations in the husband's petition for divorce did not thereby become *res judicata,* as this would lead to a very undesirable limitation on the jurisdiction of the divorce court.

Bucknill, L.J., read the judgment of the Court. Reference was made to the rule of *res judicata* as stated by Lord Shaw in delivering the judgment of the Judicial Committee in the case of *Hoystead v. Taxation Commissioner*[22]: "It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any point, whether of assumption or admission, which was in substance the *ratio* of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson,*[23] by Wigram, V.-C., as follows: 'I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law."

Finney v. Finney[24] and *Kara v. Kara*[25] were also discussed by the Court of Appeal. In *Finney* a wife petitioned for divorce on the ground of her husband's cruelty and adultery. About a year before,

22 [1926] A.C. 155, at 170.
23 (1843) 3 Hare 100, at 114-115.
24 (1868) L.R. 1 P. & D. 483.
25 [1948] 2 All E.R. 16.

the wife had petitioned for judicial separation on the ground of cruelty, the allegations of cruelty being the same as those set out in the petition for divorce. The petition for judicial separation had been heard and dismissed. The husband demurred to the allegations of cruelty being raised in the second petition, and his objection was upheld. In *Kara* the husband petitioned for a divorce on the ground of his wife's adultery. The wife denied the adultery and petitioned for a divorce on the ground of the husband's cruelty. The wife had previously obtained an order against the husband in a court of summary jurisdiction on a charge of cruelty, the facts being substantially the same as those on which the charge of cruelty was based in the wife's petition. The Court of Appeal considered that the finding of cruelty by the court of summary jurisdiction did not prevent the divorce court from finding that there had been no cruelty, and held that the charge of cruelty against the husband had not been proved.

Although *Harriman v. Harriman*[26] was not discussed in detail by the Court it was said to be an authority for the proposition that estoppel cannot be pleaded in the divorce court. In the course of his judgment in that case, Cozens-Hardy, M.R., said: " . . . the jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow the parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied." Fletcher Moulton, L.J., in discussing the evidence required by the Court on petitions for divorce, referred to the duty of the Court to satisfy itself of the facts: "By s. 31 of the Matrimonial Causes Act 1857," he said, "the relief is made dependent on the Court being satisfied on the evidence that the case of the petitioner has been proved. 'Proved' here means proved as a fact, and not merely proved *inter partes*. Hence no estoppels binding the parties are necessarily sufficient to entitle a party to such relief. The Court is not bound to be satisfied of the necessary facts because the one party is estopped as against the other from denying them."

Bucknill, L.J., continuing the judgment in *Winnan's* case, stated that counsel for the wife had argued that although estoppel *inter partes* did not bind the divorce court, this principle only applied where a spouse had been found guilty of a matrimonial offence, not where he or she had been acquitted of such an offence. In other words, the wife's counsel contended that there was a distinction between decisions of acquittal and decisions of conviction. The learned Lord Justice said that there was no direct authority for this proposition.

The Court decided that the issue of the wife's desertion, assumed to have been considered by the court of summary jurisdiction, and the right of the husband to petition for a divorce on the ground of

26 [1909] P. 123.

her alleged desertion, were not the "same subject of litigation" within the definition of *res judicata* given by Wigram, V.-C., in *Hoystead's Case*. Bucknill, L.J., giving his reasons for this decision, said: "So to hold would, in my opinion, lead to a very undesirable limitation on the jurisdiction of the divorce court. Many questions, such as adultery by the wife, condonation, connivance, or neglect or misconduct conducing to such adultery, may be raised before the justices, and if it is to be held that in every case where the justices have decided such a question the matter is *res judicata*, and that, therefore, the parties cannot raise it in proceedings in the divorce court (unless, indeed, the point is one governed by the rule in *Harriman v. Harriman*), then I think that the jurisdiction of the Divorce Court would be grievously impaired."[27]

This decision appears to have been based on expediency rather than on law. The cases of *Finney* and *Kara* would seem to have established the principle that where a charge of a matrimonial offence has been made against one party and dismissed, that same charge may not be made against the same party in another court (*nemo debet bis vexari pro una et eadem causa*), but where a charge of a matrimonial offence has been found proved in a court of summary jurisdiction and the successful party subsequently petitions for a divorce in the divorce court alleging the same matrimonial offence, the divorce court is not debarred from enquiring into the facts and deciding whether or not the matrimonial offence was in fact committed.

Admittedly in *Finney* the previous proceedings had been in the higher court, being a petition for judicial separation, but if the principle applied there is strictly followed a decision in any court of record (and courts of summary jurisdiction—at least in Western Australia—are courts of record[28]) dismissing an allegation of a matrimonial offence should act as an estoppel against the same allegation in the divorce court.

Lord Merriman, P., in *James v. James*[29] referred to the distinction between decisions of acquittal and decisions of conviction when he said, "When it is a question of seeking to oblige a court to decide something contrary to its own belief on the facts because some other court has decided in the affirmative, there is the consideration that so to oblige the court would be running contrary to the statutory duties imposed on the court, whereas where a party who has already been defeated in bringing a claim for relief is trying to do exactly the same thing again, the same consideration does not apply to prevent him from being estopped from bringing that evidence before the court at all."

[27] [1948] 2 All E.R. 862, at 869.
[28] *Gapes v. Gapes,* (1924) 26 W.A.L.R. 144.
[29] [1948] 1 All E.R. 214.

It is submitted that on this reasoning the decision of the justices in *Winnan* should have been held to estop the husband from alleging the same facts in the divorce court. The husband had accused the wife of constructive desertion in the lower court as a defence to her claim for maintenance. The wife was acquitted of the charge by the justices and an order for maintenance was made in her favour. The husband later alleged the same constructive desertion in his petition to the divorce court, and even though the wife argued that the matter was *res judicata,* the Court of Appeal held that the higher court was not estopped because to hold otherwise would "lead to a very undesirable limitation on the jurisdiction of the divorce court."

The decision in *Winnan* was taken by Wolff, J., as an authority in *Seymour v. Seymour*. Here the wife left the husband on 11th May, 1945, and did not return to him. In May, 1947, the wife applied to a Married Women's Protection Court alleging that her husband had treated her so badly that she was forced to leave him and that he had failed to pay any maintenance for herself or for her children. The husband disputed the wife's allegations and contended that there was trouble between them because of her fondness for another man. He denied that he had ill-treated her. In fact he claimed that the wife was the deserting party. The Court made an order for maintenance in favour of the wife. In 1949 the husband petitioned the Supreme Court for a dissolution of the marriage on the ground that the respondent wife deserted him on 11th May, 1945.

The learned Judge had the same question before him in *Merritt v. Merritt*[30] which was decided before the judgment of the Court of Appeal in *Winnan*. The facts were very similar to those in *Seymour*. The respondent wife had taken proceedings under the Married Women's Protection Act on the ground of the petitioner's wilful neglect to provide reasonable maintenance and the court after hearing the parties made an order for separation and maintenance. The husband told a story before the magistrates which if accepted might have been construed as amounting to desertion by the wife. Subsequently the husband petitioned for a divorce on the ground of his wife's desertion and alleged the same facts which he had brought forward as a defence in the court of summary jurisdiction. The respondent wife raised the plea that the finding of the lower court that she had not deserted the petitioner constituted an estoppel. The learned Judge upheld the wife's plea and dismissed the petition.

In *Seymour* Wolff, J., referred to his previous decision in *Merritt* but indicated that *Winnan* was a direct authority which he reluctantly proposed to follow. He therefore considered the facts and granted the petitioner his decree.

It has been suggested that the decision in *Winnan* was bad law but good sense. Certain duties are by statute imposed upon the

30 (1945) 48 W.A.L.R. 34.

divorce court in connection with petitions for dissolution of marriage. The court is obliged to enquire carefully into the facts. It must ensure that there is no collusion between the parties and that the offences complained of have not been connived at or condoned. It has been argued that it is unreasonable to suggest that this important duty imposed on the divorce court need not be fulfilled whenever a court of summary jurisdiction has found that a certain charge has not been proved—and this in the course of proceedings *inter partes* for maintenance where the same duty of enquiring as to collusion, connivance, or condonation is not imposed on the court. Previous decisions in the divorce court may be pleaded by way of estoppel in any subsequent divorce proceedings; this is logical because it was the duty of the court which first heard the matter to ascertain all the facts and to ensure that there were no collusive agreements between the parties.

It has been suggested by P. E. Joske[31] that "it may be that the decision of an issue as to the validity of a marriage which involves status and is of public interest, cannot be governed by an estoppel arising *inter partes*."

Bucknill, L.J., concluded his judgment in *Winnan* in these words: "The point is bare of authority and I do not find it easy to give any clear cut reason why the rule of *res judicata* should not apply here, but I am satisfied that those who first formulated the rule never intended it to apply in such a case as this." It is submitted with respect that, upon a correct interpretation of the intention of the legislature in enacting the relevant provisions relating to the duty of the divorce courts to enquire into the facts of each case, and taking into consideration the two principles underlying the rule of *res judicata*, i.e., (1) that it is in the interest of the State that there should be an end of litigation, and (2) that no person should be twice vexed for the same cause, decisions of courts of summary jurisdiction finding a matrimonial offence proved should not prevent the divorce court, upon a petition by the successful party, from enquiring into the same facts to ascertain whether it considers that the offence was committed, but that a decision of magistrates dismissing a charge against a party should act as an estoppel if the same facts are subsequently adduced to prove the same charge against the same party in the divorce court.

The relevant statutes (in Western Australia, the Supreme Court Act 1935-1947) require that before taking the serious step of decreeing the dissolution of a marriage the court must be sure that the decree is not being obtained contrary to the justice of the case. Therefore, if a petitioner alleges that the respondent has committed a certain matrimonial offence and suggests to the divorce court that there is no need to enquire into the matter because the offence has already been found proved by a court of summary jurisdiction, he

[31] *The Laws of Marriage and Divorce in Australia* (2nd edn), 246.

will be informed by the court that he cannot obtain a decree so easily and that the offence must again be fully proved. But if it is the respondent who raises the principle of estoppel by *res judicata* in the divorce court, stating that he has already successfully contested the allegations of the petitioner in a lower court, what danger is there of the court's granting a decree contrary to the justice of the case if the plea of the respondent is upheld? In this case the rule of *res judicata* as stated in *Hoystead v. Taxation Commissioner* should be permitted to prevail.

C. E. POLLETT.