FEDERAL PLACES AND EXCLUSIVE LEGISLATIVE POWERS[1]

INTRODUCTION

In addition to States and Territories the Constitution contemplates a third category of land consisting of places acquired by the Commonwealth for its own or public purposes. The Commonwealth may acquire such places in various ways. Section 85 of the Constitution vests in the Commonwealth all State property, including land,[2] exclusively used by a State public service department which is transferred to the Commonwealth. The section provides also for the acquisition by the Commonwealth of State property, including land, which is used but not exclusively used by such a department. Section 51(31) of the Constitution does not vest any property in the Commonwealth but confers express power to legislate generally with respect to the 'acquisition of property[3] on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws'. And there is no reason why the Commonwealth should not acquire land by gift.[4]

In whatever way land is acquired, upon acquisition the question arises what is the source of legislative power with respect to it thereafter. One theoretical solution might have been that every piece of land belonging to the Commonwealth is a Territory for which legislative power is provided by section 122. This suggestion encounters many difficulties, not the least of which is regarding an office block or a telephone booth as a Territory. It may be discarded because the

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1 Cowen, *Alsatias for Jack Sheppards?: The Law in Federal Enclaves in Australia,* SIR JOHN LATHAM AND OTHER PAPERS, 171, reprinted from (1960) 2 M.U.L.R. 454; Lane,*The Law in Commonwealth Places,* (1970) 44 A.L.J. 403; Lane, *The Law in Commonwealth Places—A Sequel,* (1971) 45 A.L.J. 138; Ryan and Hiller, *Recent Litigation and Legislation on Commonwealth Places,* (1971) 2 A.C.L.R. 163.

2 The vesting provision, s. 85 (i), does not expressly mention land but uses the formula 'property . . . of any kind', which is comprehensive enough to include land, especially as s. 85 (ii), the acquisition provision, makes specific reference to the valuation of interests in land.

3 It is well established that property for the purposes of s. 51 (31) includes land.

4 Cf. Worthing v. Rowell & Muston Pty. Ltd., (1970) 44 A.L.J.R. 230, 245 per Windeyer J.

High Court has established[5] the fundamental proposition that land acquired by the Commonwealth as a federal place does not cease as a matter of sovereignty or political dominion to be part of the State from which it is acquired, whereas land accepted by the Commonwealth as a Territory does. Moreover in contradistinction to section 122 the Constitution provides expressly in section 52(1) for legislative power with respect to 'all places acquired by the Commonwealth for public purposes'.

Pursuant to section 52(1) the Commonwealth has enacted the Commonwealth Places (Application of Laws) Act 1970 (Cth.), the purpose and apparent effect of which is to adopt for federal places the laws operative from time to time in the States in which they are situated.[6] In so far as these are State laws they necessarily operate in federal places under the Act as federal laws in identical terms, not directly as State laws. The Act is prospective as well as retrospective in operation[7] and includes numerous consequential provisions designed to anticipate ancillary problems, particularly with respect to federal jurisdiction, supplementary regulations and the reapplication of State law on retransfer of a federal place to a State. The States have enacted complementary statutes.[8]

Only time will tell whether this legislation has been drafted successfully. This is of comparatively minor importance, as also are certain questions arising out of section 52(1) of the Constitution which affect the scope of the Commonwealth Act. The Act applies to Commonwealth places and defines[9] such places in effect as places within the meaning of section 52(1). It has yet to be decided whether places within section 52(1) include, for example, a motor car, a ship, an aeroplane or one floor of a building held on stratum title.[10] Similarly it is not clear whether a long lease, a short lease, a licence to occupy

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5 Id. at 232-233, 237, 238, 244, 250; R. v. Phillips, (1970) 44 A.L.J.R. 497, 498, 500, 503, 510.

6 s. 4 (1).

7 Ibid.

8 At the time of writing each State except Tasmania has enacted a Commonwealth Places (Administration of Laws) Act 1970. Only the South Australian Act is of indefinite duration. The others are expressed in s. 15 to expire on 31 December, 1971. It is suggested by O'Brien in a case note at (1971) 8 M.U.L.R. 320, 328 that these State statutes may be invalid as laws with respect to federal places. Cf. Lane, *The Law in Commonwealth Places—A Sequel,* (1971) 45 A.L.J. 138, 144.

9 s. 3.

10 Cf. Worthing v. Rowell & Muston Pty. Ltd., (1970) 44 A.L.J.R. 230, 233 per Barwick C.J., 244 per Windeyer J.

or mere occupation and use amount to an acquisition within this section;[11] nor whether the term "public purpose" means any purpose to which the Commonwealth decides to put land or has some more restricted meaning.[12] The need to decide such questions as these will not arise if the legislation is successful, for the practical result of that will be uniformity of law between federal places and the States in which they are situated. What happens if a federal place lies across the border between two States is equally best left to await the occasion.

The constitutional interest of federal places and the legislative power of section 52(1) with respect to them is however by no means limited to the Commonwealth Places (Application of Laws) Act. The need for such a statute was revealed suddenly by two cases in the High Court in 1970, *Worthing v. Rowell*[13] and *R. v. Phillips*.[14] These cases, together with a sequel, *Stocks and Holdings*,[15] also in 1970, raised issues on the character of an exclusive legislative power, and the effect on a law of transferring the power to enact it from one legislature to another or others, which transcend the immediate problem of federal places. These cases are discussed in detail below.[16] The discussion is preceded by an analysis of the constitutional background against which they arose.

CONTINUITY PROVISIONS

The form of federation adopted for Australia entailed not only the creation of the Commonwealth and the States but also the simultaneous abolition of the colonies. There was thereby created as a corollary the possibility of a legislative vacuum: without appropriate continuity provisions the laws of the colonies might have ceased to apply before the Commonwealth and the States had had time to enact new laws, within their respective competences, to replace the colonial laws. To some extent both the Constitution Act and the Constitution

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11 Such questions are not necessarily concluded by decisions on Constitution s. 51 (31). The proposition that acquisition of a given interest in land can be made by the Commonwealth only on payment of just compensation does not entail the proposition that any such interest is a federal place within s. 52 (1). The functions of the two sections are different.

12 Cf. the suggestion, which has been consistently rejected by the High Court from the Railway Servants' case, (1906) 4 C.L.R. 488 to the Professional Engineers' case, (1959) 107 C.L.R. 208, that governmental powers are sometimes limited to governmental functions. The difficulty is definition of governmental function.

13 (1970) 44 A.L.J.R. 230.

14 (1970) 44 A.L.J.R. 497.

15 (1970) 45 A.L.J.R. 9.

16 Below, nn. 38, 48, 62.

itself anticipate this possibility. Covering clause 4[17] empowers the colonies to make prospective laws within the legislative powers of the States to come into effect on the establishment of the federation. Section 107 of the Constitution provides for the continuation of colonial powers in the following terms:

> 107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission of the State, as the case may be.

It will be observed that both covering clause 4 and section 107 are concerned with powers, not with laws made under those powers. The continuing in force of colonial laws in general is nowhere dealt with expressly. The assumption appears to have been that they would automatically continue in force to the extent that their subject matters were within State legislative power after federation. This result is convenient, is undoubtedly what was intended, and has been implicitly accepted by the courts.[18] Moreover it is borne out by the terms of section 108 of the Constitution, which deals with the particular question of colonial laws on subjects which after federation fell within the legislative powers of the Commonwealth. Section 108 is as follows:

> 108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

The effect of this section needs some analysis.

CHARACTERISTICS OF COMMONWEALTH LEGISLATIVE POWERS

It is well to approach the construction of section 108 by recapitulating the distinguishing characteristics of the different classes of

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17 I.e., Commonwealth of Australia Constitution Act 1900 (U.K.), s. 4. The Constitution itself is s. 9 of the Act.

18 Cf. R. v. Bamford, (1901) 1 S.R. (N.S.W.) (L.) 337, 356 per G. B. Simpson J.: a pre-federation colonial statute not inconsistent with any Commonwealth law and not relating to any matter within the powers of the Commonwealth Parliament 'continues in force . . . inherently'. But the assumption referred to in the text was made in innumerable cases *sub silentio*. Cf. Buchanan v. Commonwealth, (1913) 16 C.L.R. 315.

legislative powers acquired by the Commonwealth at federation. There are first such powers as weights and measures under section 51(15) and bankruptcy under section 51(17) which are concurrent in the sense that although power to legislate with respect to that subject matter is given to the Commonwealth, it is not taken away from the States. To the extent that section 108 applies to laws on the subject matter of a concurrent power, it appears to be of little if any importance, for it merely expresses what is the case anyway. If it be assumed, as it always has been, that colonial laws on subjects within State power continue in force until altered or repealed by the competent post-federation legislature, it necessarily follows that this is as true of laws on concurrent subject matters as of laws on subject matters wholly within the competence of the States. Section 108 says no more.

The second category of Commonwealth legislative power consists of such powers as borrowing money on the public credit of the Commonwealth under section 51(4) and the definition and investment of federal jurisdiction under section 77, which are exclusive in the sense that their subject matters are of a character which could not possibly be within State legislative competence unless expressly assigned thereto, which they are not. These may be called implied exclusive powers.[19] By definition section 108 cannot have any application here because there cannot have been any colonial laws on these subjects. There is therefore nothing to continue.

Thirdly there are such Commonwealth legislative powers as the imposition of customs duties under sections 51(2) and 90 which are exclusive in the sense that, although their subject matters are in character capable of falling within State legislative power without being expressly assigned thereto, they are in the event expressly made exclusive to the Commonwealth. These may be called express exclusive powers. It is in relation to this class of legislative power that section 108 has significant operative effect.

CONSTITUTION SECTION 108 AND EXPRESS EXCLUSIVE POWERS

By definition it is possible for there to have been colonial laws on subjects within this third category. Indeed there certainly were such laws, customs duties being a prominent example. As it happens, the power to impose customs duties did not become exclusive to the Com-

19 I.e., their exclusiveness is implied. They are of course express powers. It is not relevant to the present discussion but there is also a category of Commonwealth legislative power which is both implied and impliedly exclusive. An instance is power to legislate with respect to its own public service beyond the very limited scope of Constitution ss. 52(2) and 69.

monwealth immediately on federation. Under section 90 of the Constitution this power became exclusive a little later, when the Commonwealth imposed uniform duties of customs for the country as a whole.[20] The effect of section 108 therefore does not arise in this context, for until the enactment of the uniform Commonwealth Act bringing section 90 into operation, the power to impose customs duties was concurrent in character. As has been seen, section 108 is innocuous to the point of superfluity in its application to concurrent powers. Nevertheless it is convenient by way of illustration to consider the position which would have arisen if the power to impose customs duties had become expressly exclusive to the Commonwealth immediately upon federation.

If a legislative power is exclusive to the Commonwealth the States have no legislative power at all with respect to its subject matter. The questions to which it gives rise turn on the definition of the subject matter and therefore of the scope of the power itself. In particular the distinction between a power and a law made under a power does not come in issue, for any relevant State law will normally have been enacted after the power became exclusive to the Commonwealth, so that the validity of the law depends on the scope of the power. The question which arises under section 108 is whether it gives a continuing validity to colonial laws on subjects which at federation fell within the express exclusive legislative powers of the Commonwealth. This question suggests the further one, which is logically anterior to it, whether such laws would have had continuing validity in any event.

It has been seen that colonial laws on subjects within State legislative power have been given continuing validity, although on what basis is not clear. This cannot be attributable to section 108, for by its express words that section is limited to subjects within Commonwealth power and therefore can have no application to laws on the many subjects which after federation were wholly within the legislative powers of the States. The most likely explanation is that since the relevant colonial laws were valid in inception, they remained valid unless invalidated by some incident of federation. Neither the Constitution Act nor the Constitution expressly invalidates any colonial laws. On the contrary, sections 107 and 108 tend to confirm their continuing validity, and to these may perhaps be added section 106,

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20 Customs Act 1901 (Cth.).

which continues the pre-federation constitutions of the States.[21] It follows that colonial laws not inconsistent with the Constitution remain valid. There is no reason why this should not apply as much to laws on subjects which after federation are within the exclusive power of the Commonwealth as to laws on concurrent subjects or laws wholly within State competence. The post-federation distribution of legislative power affected the competence of the various new legislatures to repeal or amend the colonial laws or to enact new laws similar in character, but had no relevance to their continuing validity.

This result is both useful and in conformity with such provisions of the Constitution Act and the Constitution as envisage continuity of laws and institutions. It is useful because it avoids the possibility of legislative vacuum. Moreover it does so on a more reasonable basis than the argument leading to a vacuum in the case of express exclusive powers. This argument must be that any colonial law on a matter which at federation fell within such a power ceased to have effect at that moment because it was the constitutional intention that after federation only Commonwealth laws should govern that matter. The weakness of this argument is that it assumes without warrant an additional, and unlikely, constitutional intention that until the Commonwealth is able to legislate on such matters they are governed by no law at all.[22] This assumption is the less likely in that there are many indications in the Constitution that where the possibility of legislative vacuum occurred to the framers, they took pains to provide against it. Sections 107 and 108, and possibly 106, are illustrations. Similarly the postponing under section 90 of the exclusiveness of the powers to impose customs and excise duties and to grant bounties. And similarly also a number of provisions[23] that State laws should govern such matters as the composition of and election to the federal Senate and House of Representatives, which otherwise necessarily fall within Commonwealth exclusive competence. It can of course be argued that the very presence of these sections shows that where they are absent only Commonwealth law can apply. This argument lacks

21 This section is elliptically expressed because it says that the constitution of each State shall continue as at the establishment of the Commonwealth, whereas it means the pre-federation constitution of the State's colonial predecessor, but the meaning is obvious.

22 Subject to the possibility mentioned below (text following n. 76) that some form of common law might have applied. Cf. R. v. Bamford, (1901) 1 S.R. (N.S.W.) (L.) 337, 341, where Owen J. in argument makes the same suggestion.

23 Constitution ss. 7, 9, 10, 25, 29, 30, 31.

cogency, for it depends on an assumption that there would be a legislative vacuum wherever the framers thought there would be a legislative vacuum. They were not necessarily right.

If it be accepted therefore that colonial laws remain operative unless they are inconsistent with federation, and that the circumstance that their subject matters fall after federation within Commonwealth exclusive power is not such an inconsistency, the question arises what effect section 108 has on this situation. Its effect appears to be straightforward and unambiguous. The first part of the section says that colonial laws on matters now within Commonwealth competence continue in force in the States. The only reservation is that the continuation in force of such laws under section 108 is subject to the Constitution. This can mean only that section 108 does not have the effect of overriding or contradicting any other provision or effect of the Constitution which would terminate the operation of such laws. It has already been seen that there is no compelling reason why the exclusive power provisions should have this effect. The result of the first part of section 108 is therefore that colonial laws continue in operation until repealed, amended or replaced by a competent legislature. To this point the section makes no change in the situation as it would have been in any event.

The second part of section 108 however, which is not made subject to the rest of the Constitution, does make a change. It alters the definition of competent legislature by expressly empowering the States to alter or repeal 'any such law' until 'provision is made in that behalf' by the Commonwealth. The expression 'provision is made in that behalf' presumably means until legislative action is taken on the relevant subject matter. In so far as the wording is apt to refer to concurrent powers therefore, this part of section 108 also adds nothing to the situation as it would have been anyway. The States have by definition powers of alteration and repeal which are displaced only by the inconsistency rule of section 109 if and when the Commonwealth takes legislative action. There is a difference however in the case of exclusive powers. In the absence of section 108 the States have no power to legislate with respect to the subject matter at all. Even a law repealing another law is legislation with respect to the exclusive subject matter. The case is *a fortiori* if alteration and not mere repeal of an existing law is in question. The effect of section 108 therefore emerges as the preservation in the State legislatures of a limited and temporary competence in respect of matters otherwise within the exclusive competence of the Commonwealth.

The purpose of such a power was no doubt to leave it open to the States to make minor adjustments to legislation on matters intended in due course to become the sole responsibility of the Commonwealth until such time as the matter was taken up by the Commonwealth on a national scale. Such a limited, although useful, purpose explains the definition of State power in terms of alteration and repeal only. It is reasonable to suppose that it was not intended to enable the States to initiate wholly new legislative policies on such matters but only to make minor interim amendments, or else by repeal to leave the field entirely clear until the Commonwealth took action. If the question had ever presented itself there would have been a need to define the limits of mere alteration, but this is not formidable.[24] The wording of section 108 is apt for the purpose apparently in view. It has however given rise to a practical problem which would not have been easy to foresee.

CHARACTER OF CONSTITUTION SECTION 52 (1)

Most Commonwealth legislative powers envisage the regulation of a class of activities or transactions the description of which constitutes the description of the power itself. Some, such as defence and external affairs, are better thought of as regulating the achievement of a purpose, and others, such as the definition and investment of federal jurisdiction, as regulating the conferment of power on subordinate or coordinate institutions. They do not normally envisage the regulation of activities, purposes or other matters by reference to geographical area, for by definition they are intended to operate throughout the Commonwealth as a geo-political unit. An exception is section 122, conferring power to legislate generally for the government of the Territories. There is a difference of character between such a power as section 122 and the generality of Commonwealth legislative powers which is relevant to the present discussion.

If the Commonwealth omits to legislate on a subject within its powers, the consequence in the usual case is not remarkable. An activity remains unregulated, a purpose not effectuated or a subordinate or coordinate power not conferred. If the matter is concurrent it may be affected by State legislation instead. But whatever the

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24 There is some analogy with the power of Parliament under Constitution s. 73 to make exceptions and regulations of the appellate jurisdiction of the High Court. The High Court has declined to define the limits of this power precisely but has indicated that it does not extend to the abolition of a whole category of appellate jurisdictions: HOWARD, AUSTRALIAN FEDERAL CONSTITUTIONAL LAW, 161-162.

particular situation which results from the absence of Commonwealth legislation, the general structure of laws within which the community operates remains unaffected. This is not the case if the Commonwealth omits altogether to legislate under section 122 with respect to a Territory. Unless there is some antecedent law which continues in force in the Territory, the result of Commonwealth inaction is, *prima facie* at all events,[25] the total absence of law in that Territory. Such a result cannot be described as unremarkable but it has arisen, and required speedy legislative attention, in the related context of federal places.

A federal place was described above[26] as land acquired by the Commonwealth for its own or public purposes, not being land accepted by the Commonwealth as a Territory. A small example is a post office and a large one a military base. It has already been mentioned[27] also that as a matter of sovereignty or political dominion a federal place does not cease to be part of the State from which it is acquired, and that Commonwealth legislative power with respect to such a place arises under section 52(1), which is an express exclusive power. This combination of circumstances gives federal places unique interest in relation to the operation of laws and legislative powers under the Constitution, for they appear to supply the only contexts in which there can be operative colonial laws on a matter within express Commonwealth exclusive power and in which a legislative vacuum, possibly amounting to a total absence of law, is likely to occur. As mentioned in the previous paragraph, a legislative vacuum might occur also in relation to a Territory, but as a practical matter is much less likely to do so because the acceptance of Territories is a far less frequent and commonplace event than the acquisition of a federal place.

THEORETICAL SITUATION IN FEDERAL PLACES

Were the matter otherwise unaffected by case law the position with respect to law operative in federal places, on the basis of the principles discussed above, would be as follows. Since federal places remain parts of the States from which they are acquired they remain subject on acquisition to exactly the same laws as they were subject to before acquisition. The only change which takes place is that henceforth, by virtue of section 52(1), the Commonwealth is the sole authority with power to make new laws. The only qualification of this proposition is that if there is a colonial law in continued operation in the relevant

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25 See above, n. 22.
26 First sentence of the paper.
27 Above, n. 5.

State, and therefore in a place acquired within that State, the State legislature retains a power of alteration or repeal of that law in its application to the federal place by virtue of section 108 of the Constitution. This is because, whatever the general subject of the law, upon acquisition of the place by the Commonwealth it becomes also a law relating to a matter within the powers of the Commonwealth, namely that federal place. As such it is directly within the words of section 108.

It is to be observed that this argument assumes that if a law on any subject has operation within a federal place it is properly characterised as a law with respect to that place. An alternative interpretation of section 52(1) is more restrictive: that a law is a law with respect, in the words of the section, to 'places acquired by the Commonwealth for public purposes' only if in some sense it is related to such places in their capacity as federal places.[28] The obvious difficulties of application of so vague a criterion may be disregarded because the High Court has adopted the wider characterisation of laws under section 52(1).[29] The advantage of the narrower characterisation was that it limited the scope of Commonwealth exclusive power in relation to federal places and therefore, in conjunction with the doctrine that places remain parts of States, left undisturbed the application of most State laws to such places. As a practical matter this was clearly a desirable result.

The theoretical position arrived at, that no change takes place in the laws operative within a federal place on its acquisition because it remains part of the relevant State, but that, subject to the limited operation of section 108, the sole legislative authority thereafter is the Commonwealth, is not altogether satisfactory because it produces a situation in which the legal structure of the federal place is likely to be inconspicuously eroded. The erosion is a natural consequence of the normal process of repeal of old laws and enactment of new ones. Assume that at the time of acquisition the laws applicable in a federal place are made up of Commonwealth laws of general application, State laws, and colonial laws continued within the State. The repeal and replacement of the Commonwealth laws is immaterial because the new laws apply in federal places as much as anywhere else. But

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28 This was the line of thought which commended itself to the dissenters, McTiernan, Kitto and Owen JJ. in Worthing v. Rowell & Muston Pty. Ltd., (1970) 44 A.L.J.R. 230, 237, 239, 248. In modified form it appears to have influenced Walsh J. in each of the 1970 cases: see below, nn. 43-47.

29 Below, nn. 42, 47.

because of the exclusive power of the Commonwealth over federal places, State laws which replace either older State laws or continued colonial laws do not apply there. In the absence of appropriate Commonwealth action there is an increasing legislative vacuum.

This situation is not helpful because it tends to the creation of legal chaos, but as a matter of constitutional interpretation is not easily to be avoided. It has at least the merit that at the time of acquisition federal places remain within the legal structure of the State. Gaps in the law appear only gradually thereafter and not abruptly upon acquisition. It is therefore to be regretted that the High Court has, by a majority, adopted instead a doctrine which produces chaos immediately upon acquisition. The reasoning which leads to this result has, with respect, no element of necessity about it and should therefore not have been adopted in preference to an acceptable and self-consistent alternative with less drastic consequences. It is not a satisfactory reply to this criticism that remedial legislation by the Commonwealth would have been needed in any event. It ought to be a principle of constitutional interpretation that occasions for such legislation should be minimised.

COLONIAL LAWS: R. v. BAMFORD

The relevant authorities are three cases which followed close upon each other in 1970, but there should be noticed first the decision of the Supreme Court of New South Wales in *R. v. Bamford*[30] in 1901. D was convicted by a State court of larceny in a post office, which at the relevant time had become a Commonwealth place, at Armidale in New South Wales. The charge was laid under a colonial Act[31] which continued in force in the State. The Supreme Court by a majority[32] upheld the conviction on the basis that the post office remained part of the State of New South Wales to which, in the absence of relevant Commonwealth legislation, the colonial law applied. Owen J.[33] regarded the continuation in force of the colonial law as following from section 108 of the Constitution because in its application to a federal place it related to a matter within the powers of the Commonwealth. He declined to draw any distinction in this context between concurrent and exclusive powers except that in the case of exclusive powers he read section 108 as preserving in State legislatures a power of

30 (1901) 1 S.R. (N.S.W.) (L.) 337; Stephen, Owen and G. B. Simpson JJ.
31 Postage Act 1867 (N.S.W.).
32 Owen and G. B. Simpson JJ., Stephen J. dissenting.
33 (1901) 1 S.R. (N.S.W.) (L.) 337, 351-352.

amendment and repeal pending legislative action by the Commonwealth.[34] In short he read section 108 in the obvious way to reach the obvious conclusion. The other member of the majority, G. B. Simpson J.,[35] analysed section 108 with less precision but took the point that in so far as colonial laws were not continued in force in a State by that section they continued 'inherently'.[36] *R. v. Bamford*[37] therefore reached the result to be expected by an uncontentious route.

POST-ACQUISITION STATE LAWS: WORTHING v. ROWELL

Worthing v. Rowell[38] in the High Court in 1970 was the next step of any importance[39] taken in the interpretation of section 52(1) and related matters. It was an action for breach of statutory duty brought against his employer by a building worker who had been injured in the course of his employment. The basis of the claim was an assertion that regulations made in 1950 under the Scaffolding and Lifts Act 1912 (N.S.W.), had not been complied with. The work was being carried out and the injury occurred on a Commonwealth air force base at Richmond in New South Wales, the land for which had been acquired at some time after 1912 but before 1950. The question in the High Court was whether the 1950 regulations applied to the Richmond base.

The analysis of the law made above leads to the conclusion that the regulations did not apply because at the date when they were enacted the Commonwealth had become the exclusive legislative authority for the Richmond base. By a majority of four[40] to three[41] the High Court came to the same conclusion for the same reason. Since there was no question that the base was a place acquired for a public purpose, the only issue was whether the regulations were properly characterised as laws with respect to such a place if they applied to it. Barwick C.J.,

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34 Contra Windeyer J., Worthing v. Rowell & Muston Pty. Ltd., (1970) 44 A.L.J.R. 230, 246.

35 (1901) 1 S.R. (N.S.W.) (L.) 337, 356.

36 Ibid.

37 (1901) 1 S.R. (N.S.W.) (L.) 337.

38 (1970) 44 A.L.J.R. 230, Barwick C.J., McTiernan, Kitto, Menzies, Windeyer, Owen and Walsh JJ.

39 Minor references in the present context are: In re Income Tax Acts (No. 4), Wollaston's case, (1902) 28 V.L.R. 357, 375-377, 391-392; Commonwealth v. New South Wales, (1923) 33 C.L.R. 1, 46, 60; Federal Capital Commission v. Laristan Building etc. Pty. Ltd., (1929) 42 C.L.R. 582; Kingsford Smith Air Services Ltd. v. Garrisson, (1938) 55 W.N. (N.S.W.) 122; Spratt v. Hermes, (1965) 114 C.L.R. 226, 258, 262-263.

40 Barwick C.J., Menzies, Windeyer and Walsh JJ.

41 McTiernan, Kitto and Owen JJ.

Menzies and Windeyer JJ.[42] held that they were on the ground that section 52(1) had the effect of making the Commonwealth the sole legislative authority for laws of any description. Walsh J.[43] accepted that building regulations of the kind in issue were capable of being laws with respect to a place within section 52(1) but reserved the question whether every kind of law was capable of acquiring that character by virtue merely of being intended to operate in a federal place. He cited as instances[44] 'laws relating to the form in which contracts or wills should be made in such places and dealing with the validity and the operation of such instruments', suggesting that they might not fulfil the requirement of having 'a direct and substantial connexion with the place'. He repeated this doubt in *R. v. Phillips*,[45] the next case in the 1970 trio, and did not withdraw it in the third, *Stocks and Holdings*,[46] but he appears to be alone in this view. In *R. v. Phillips*[47] the wider characterisation was accepted also by McTiernan, Owen and Gibbs JJ. It may therefore be taken as established.

PRE-ACQUISITION STATE LAWS: R. v. PHILLIPS

R. v. Phillips[48] arose in Western Australia. D was charged in a State court with an offence of gross indecency, contrary to section 184 of the Western Australian Criminal Code, the current version of which was enacted in 1913.[49] The charge was founded on an assertion that D had committed certain actions on a Commonwealth aerodrome, called the Pearce aerodrome, at Bullsbrook in Western Australia, the land for which had been acquired as an air force base in 1935. The question in the High Court was whether the 1913 Code applied to the Pearce aerodrome. The analysis of the law made above leads to the conclusion that the Code did apply because acquisition of the

42 (1970) 44 A.L.J.R. 230, 235, 242, 247.

43 Id. at 250.

44 Ibid.

45 (1970) 44 A.L.J.R. 497, 507-508.

46 (1970) 45 A.L.J.R. 9, 18, where, in holding that the law in question in that case also was a law with respect to a federal place, he said: 'No other conclusion could be consistent with the reasons of *any* of the members of the Court who constituted the majority in *Worthing's* case'. (Emphasis added.) It will be recalled that he was one of the majority but differed from the others on this very point.

47 (1970) 44 A.L.J.R. 497, 500, 507, 511.

48 (1970) 44 A.L.J.R. 497, Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

49 Criminal Code Act Compilation Act 1913 (W.A.), Appendix B, Schedule.

Pearce aerodrome did not remove it from the State and the Commonwealth had not taken any subsequent legislative action to terminate the operation of this State law. The same conclusion was reached for the same reasons by Windeyer, Walsh and Gibbs JJ., but the majority, Barwick C.J., McTiernan, Menzies and Owen JJ. held that the operation of State law ceased immediately upon acquisition. Their reasons were as follows.

The most succinct was that of McTiernan J.[50] He regarded *Worthing v. Rowell*[51] as establishing that general laws of the kinds in issue in the two cases were laws with respect to a federal place if they applied in the federal place. Since the power to make laws with respect to federal places is exclusive to the Commonwealth, it followed that the State laws could not validly be of that character. Therefore they could not apply to the federal place. The difficulty with this argument is that there is a gap in the reasoning. The power of the Commonwealth which is exclusive by the express words of section 52(1) is a power, also by the express words of the section, to 'make' laws. There is no necessary logical connexion between a power to make laws of a given description and the continued operation of laws of that description which were validly made before that power came into effect and which at the time they were made were not of that description. In other words, even if, which is itself debatable, section 184 of the Western Australian Criminal Code became a law with respect to the Pearce aerodrome in 1935, it was certainly not made at or after that time. Therefore it did not infringe the exclusive power of the Commonwealth to make such a law.

The only answer which it seems possible to make to this criticism, although no member of the Court said anything like it, is that since the exclusive power of the Commonwealth arose immediately on federation, any State law made from that time on was implicitly invalid in its potential application to federal places. To which a reasonable response is that it seems a rather strained way to arrive at an undesirable result. Even if accepted it does not satisfactorily support the characterisation argument on which McTiernan J. chiefly relied. It is, with respect, doubtful whether *Worthing v. Rowell*[52] decided that *upon* acquisition a general State law becomes a law with respect to the place acquired. A more obvious understanding of the case is that a law of that kind made *after* acquisition, whether by State or

50 (1970) 44 A.L.J.R. 497, 500-501.
51 (1970) 44 A.L.J.R. 230.
52 Ibid.

Commonwealth, is a law with respect to the place acquired. A decision in this sense carries no implication at all as to the characterisation of laws made before acquisition. If it is said again that an anterior State law is to be impliedly characterised as a law with respect to federal places which are not yet in existence and may never come into existence, the appropriate response seems once more to be that this is a remarkable metaphysical convolution in an unworthy cause.

The other members of the majority in *R. v. Phillips*,[53] Barwick C.J., Menzies and Owen JJ.,[54] took the more explicit but equally debatable ground that the grant of exclusive power to the Commonwealth implied the cessation of State laws on and from acquisition for its full effectuation. They based this on a doctrine that the continued operative validity of laws depends on the continued operation of the legislative power which gave them that validity initially. This proposition in turn they supported by reference to section 108 of the Constitution, reading the first part of that section as continuing the operation of colonial laws which would otherwise have ceased to have effect on federation because they fell within Commonwealth exclusive power. They should have supported it also by reference to section 107, transferring colonial legislative powers to the States, in order to explain the continued operation of colonial laws generally as State laws. On this view section 108 is more widely expressed than it need be because it can have effect in relation only to laws on matters within Commonwealth exclusive powers. However one approaches the general question of the continued operation of laws, this last proposition about section 108 seems to be correct.[55] The rest of the argument is less cogent.

LAWS AND POWERS

The question presented is whether the doctrine that the continued operation of laws depends on the continued operation of the legislative power which gave them original validity necessarily entails the cessation of State laws in federal places immediately upon acquisition. It has already been observed[56] that no inference can be drawn from the presence or form of any section of the Constitution as to what the situation would have been in its absence. The most that any section reveals is what the framers of the Constitution thought that the situation would or might be without it. Even if such an inference is

53 (1970) 44 A.L.J.R. 497.
54 Id. at 499-500, 502-503, 507.
55 But see above, n. 34.
56 Above, text following n. 23.

a correct speculation about the opinions of the framers, it does nothing to establish that those opinions were right. It is moreover reasonable to take account of the possibility that some sections owe their presence or form to an abundance of caution, either owing to doubt about the situation without them or to make doubly clear what was intended.

For these reasons the reliance placed by Barwick C.J., Menzies and Owen JJ. on section 108 merely begs the question. The fallacy appears most clearly in the following passage from the judgment of Menzies J.[57]

> It seems, therefore, that, although s. 108 has no direct application here, its provisions do indicate clearly that, without it, colonial laws upon a matter within Commonwealth exclusive legislative power would not have continued in force in the territory of a colony once it became a State. In other words, it shows that it requires express constitutional authority to maintain, as the laws of a State, laws in force at the time when the power to make such laws becomes exclusive to the Commonwealth Parliament.

With respect, section 108 shows nothing of the kind. It is entirely neutral on the question whether colonial laws would have continued in operation after federation in the absence of express provision. What it does show is that they did in fact continue in operation in so far as they fell within the words of section 108, for if they did not continue for any other reason they continued under section 108. To infer from the section that without it colonial laws would not have continued in operation is to assume an answer to the very question at issue, which is whether they would have done.

Leaving aside misplaced reliance on section 108, the question remains whether the continued validity of a law depends, in the absence of express constitutional provision, on the continuance of the original enacting power. Whichever way this question is answered, the conclusion arrived at in *R. v. Phillips*[58] seems to be wrong. If, contrary to the view of Barwick C.J., Menzies and Owen JJ., it is not correct that the law depends on the power in this way, then the whole basis for denying the application of the 1913 Code to the Pearce aerodrome disappears. About this there can be no disagreement. But if it is in fact correct that the law does depend on the power in this way, these three judges appear, with respect, to be hoist with their own petard.

It is common ground that the colonial legislatures ceased to exist on federation. If the powers which they exercised continued in any

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57 (1970) 44 A.L.J.R. 497, 502.
58 (1970) 44 A.L.J.R. 497.

sense to exist it can be only because they were transferred to the legislatures which succeeded the colonial legislatures. These did not consist of the States alone but of the States and the Commonwealth collectively. It is immaterial that some of the powers of the colonies were transferred to the States alone, some to the Commonwealth alone and some to both. The point, and it is a point which appears to have been entirely overlooked in *R. v. Phillips*,[59] is that the power which gave original validity to colonial laws on matters subsequently assigned exclusively to the Commonwealth did not cease on federation or at any other time. It continued in the Commonwealth. From this it follows that section 108 was not necessary for the continuance in force of colonial laws on matters within Commonwealth exclusive power and that to the extent that they said that it was, Barwick C.J., Menzies and Owen JJ. were contradicting themselves. By parity of reasoning their decision on the facts of the case was similarly self-contradictory. When the Commonwealth acquired the land for the Pearce aerodrome in 1935 all that happened in terms of legislative power was a transfer from State to Commonwealth of the power to enact such laws as section 184 of the State Criminal Code of 1913. Since the power continued in existence, the law, according to their argument, should have continued in force.

EFFECT OF R. v. PHILLIPS

As a matter of authority *R. v. Phillips*[60] has no doubt settled the law for federal places in the sense that, apart from Commonwealth legislative action to the contrary,[61] all State law ceases to apply upon acquisition. But there is no reason why the case should be regarded as settling such more general issues as the relation of a law to the power under which it was enacted, the continuing force of laws, and the character and effect of an exclusive legislative power. It is to be noted that one member of the majority, McTiernan J., did not join in the reasoning relied on by Barwick C.J., Menzies and Owen JJ. and that the minority, Windeyer, Walsh and Gibbs JJ., adopted reasoning similar in all essential respects to the analysis advanced above. These general issues may therefore be regarded as still open, the conflicting views being most clearly set forth in the judgments of Menzies and Gibbs JJ. respectively.

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59 Ibid.
60 Ibid.
61 Above, n. 6.

RETRANSFER TO STATE: STOCKS AND HOLDINGS

The third case, *Stocks and Holdings*,[62] turned on the effect of transferring a federal place from the Commonwealth back to the State. In 1929 the Commonwealth acquired land at Long Bay in New South Wales as a rifle range. In February, 1965, part of this land was transferred by the Commonwealth back to a State instrumentality, the Randwick Municipal Council. The retransferred land was at all relevant times geographically within an area designated for State local government purposes the Cumberland County District. In 1951 a New South Wales planning ordinance was enacted for this District. In August, 1965, six months after the retransfer by the Commonwealth, an interim development order was made under the ordinance in respect of the relevant land. Subsequently the land was acquired from the Council by the defendants. They applied under the ordinance and the order for consent to build a hotel. The consent was given but its validity was challenged. Three questions were presented to the High Court: (1) whether the 1951 ordinance bound the Commonwealth as owner of the land, (2) whether on retransfer of the land to the Randwick Council in February, 1965, the 1951 ordinance bound the Council, and (3) whether the development order of August, 1965, bound the Council and subsequent owners.

Inevitably the whole Court answered no to question (1). On no view could a State planning ordinance enacted after the acquisition by the Commonwealth of a federal place apply to such a place, for in character it was a law capable of being a law with respect to that place and it had been enacted at a time after State legislative power with respect to that place had ceased. The chief interest of the case lay in question (2), whether a State law applying to the area in which the federal place is situated automatically applies to the place when it becomes reincorporated into the State. Since this is affected by the preliminary question whether any laws continue in force in the place from the time when it was a federal place, and *R. v. Phillips*[63] suggests that on reincorporation into the State all antecedent laws cease to have effect, it is instructive in the first instance to consider the situation apart from the decision in *Stocks and Holdings*.[64]

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62 Attorney-General for New South Wales v. Stocks and Holdings (Constructors) Pty. Ltd., (1970) 45 A.L.J.R. 9, Barwick C.J., McTiernan, Menzies, Windeyer and Walsh JJ.

63 (1970) 44 A.L.J.R. 497.

64 (1970) 45 A.L.J.R. 9.

THEORETICAL SITUATION ON RETRANSFER

The situation where a federal place is returned to a State is in one respect materially different from the situation where it is acquired from a State. In the absence of continuing laws the difficulty with new federal places is the absence of law. Hence a doctrine of continuation of laws is desirable to avoid this eventuality. The opposite is the case where a place reverts to a State. The desideratum becomes the quickest convenient reabsorption of the place into the general legal structure of the State. A doctrine of continuation of laws only hampers this process. Were it not for *R. v. Phillips*,[65] the laws operative in a federal place immediately before reversion to the State would be federal laws enacted for the place and State laws continuing from before acquisition, possibly including continued colonial laws. Assume that these laws continue after retransfer to the State. An awkward situation may arise with continued Commonwealth laws, for it may transpire that they can be neither repealed nor replaced.

They cannot be repealed by the Commonwealth because the law repealing them is a law with respect to the federal place, and this law the Commonwealth has no power to enact because the federal place is no longer in existence. But possibly they cannot be repealed by the State either because they are not State laws. If it be argued that this is immaterial because new State laws can be enacted, section 109 of the Constitution has to be taken into account: if the new State laws are inconsistent with the continued Commonwealth laws, which they are because by hypothesis the Commonwealth laws continue in valid operation, they are displaced by the Commonwealth laws. An impasse is thereby reached which is to be avoided because it is in the highest degree inconvenient in that no-one can change the law. The solution appears to be that the Commonwealth laws do not continue in operation because the matter on which they operate, the federal place, is no longer in existence. This does not conflict with the rule suggested above, that in the converse situation State laws continue to apply in the federal place until replaced by Commonwealth law, because the basis of that rule was that a federal place is still part of the State as a matter of sovereignty or political dominion. Since a federal place never becomes part of the Commonwealth in this sense, but only as the subject matter of a legislative power, it follows that if the subject matter disappears there is nothing upon which either the power or laws made under it can operate.

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65 (1970) 44 A.L.J.R. 497.

There remain State laws, including colonial laws, continued from before acquisition. The suggestion made above[66] was that these ought to continue to apply on the basis that the federal place remains at all times part of the State. If this were correct they could easily be disposed of on retransfer to the State by a rule that upon that event current State law applies immediately to the former federal place and impliedly repeals all such earlier laws as are no longer part of State law. As with Commonwealth laws therefore there is readily available an analysis which results in the instant reabsorption of the federal place into the legal structure of the State. In so far as *R. v. Phillips*[67] suggests, as it appears to do, that upon retransfer to the State all antecedent laws cease to have effect, it is in accord with this result but does not actually produce it because that case has nothing to say on the question whether laws operative in the State generally apply automatically to the retransferred place.

This gap in the case law appears to be filled by opinions expressed in *Stocks and Holdings*.[68] Before referring to them it is to be noted that although it is State laws which are particularly under consideration in this part of the discussion, the general body of law operative in the State includes also Commonwealth laws enacted otherwise than under section 52(1). They apply to the retransferred place either because they applied before and the transfer makes no difference or because they are operative in the State and therefore apply in the same way as do State laws upon retransfer.

EFFECT OF STOCKS AND HOLDINGS

Only one member of the Court in *Stocks and Holdings*,[69] Menzies J., held that the 1951 planning ordinance bound the Randwick Council on the retransfer of the land to it by the Commonwealth in February, 1965. He did so on the ground that the ordinance applied throughout to the relevant land but had no effect as long as the land was part of a federal place because it could not bind the Commonwealth as owner. It could not bind the Commonwealth both because as owner it is immune from State legislation restricting the use of the land and because a law made after acquisition which purports to have that effect infringes the exclusive power of section 52(1). Barwick C.J.,

66 Above, THEORETICAL SITUATION IN FEDERAL PLACES.
67 (1970) 44 A.L.J.R. 497.
68 (1970) 45 A.L.J.R. 9.
69 Ibid.

McTiernan, Windeyer and Walsh JJ. disagreed with Menzies J. in the result, holding that the 1951 ordinance did not bind the Council on retransfer, but they did so on the ground that the ordinance never included the relevant land within its scope because for it to do so in 1951 would have been to infringe section 52(1). Since the ordinance never applied to that piece of land, it could not apply to the new owner in 1965. In other words, the decision of the majority turned not on any doctrine of general non-applicability of existing State law to retransferred places but on the character of the particular law in question.

On the contrary, Windeyer J. said:[70]

> A person who becomes a tenant in fee simple of land in a State holds it subject to the law for the time being in force in the State. I do not think that he can obtain any immunities by looking back to a time when some other law prevailed with respect to his land. For example, a person who becomes the owner of land that was once part of a Commonwealth rifle range cannot say that he is at liberty to disregard State laws relating to the discharging of firearms. In short, a person who becomes a landowner by transfer of land from the Commonwealth is in the same position as a person who acquires land in the State from any other transferor.

Menzies J. necessarily held the same view. Walsh J., with whom Barwick C.J. agreed,[71] expressly guarded himself against being thought to imply by his decision on the particular law before him that State laws in general would not apply to the former federal place. McTiernan J. did not advert to the question but his reasons for judgment are equally based on the character of the ordinance as affecting the use of specific land.

It is therefore reasonable to conclude that as a general rule law currently in force in a State applies to retransferred federal places as soon as they cease to be federal places. One qualification to this proposition is illustrated by *Stocks and Holdings*[72] itself, and is that State laws controlling the use of specific land do not normally apply immediately on retransfer because by hypothesis they do not include the land in the federal place within their defined scope of operation until specifically applied thereto. This qualification leads naturally to the question whether the State could enact an anticipatory law which would operate upon the land in the federal place immediately upon

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70 Id. at 16.
71 Id. at 19 and 10 respectively.
72 (1970) 45 A.L.J.R. 9.

retransfer. Consistently with his view that the 1951 ordinance potentially applied to the land in the federal place at all times, Menzies J. expressed the opinion[73] that the State could enact such a law, but Windeyer and Walsh JJ., Barwick C.J. apparently agreeing on this point also, expressed the opinion[74] that it could not. McTiernan J. did not advert to the question. The formal ground upon which the majority relied was that such a State law would be a law with respect to the federal place, and therefore invalid, as long as the place was in Commonwealth ownership. The substantial ground was that it would impede the Commonwealth's disposal of the land by placing anticipatory restrictions on its future use. It may be suggested that too much can be made of this. No sensible purchaser buys land without inquiring of the relevant State authority what is the planning situation in that area.

The third question in *Stocks and Holdings*[75] was whether the development order of August, 1965, bound the Council and subsequent owners. Menzies and Windeyer JJ. held that it did, the majority that it did not. Since the order was made after the retransfer of the land there was no constitutional reason why it should not bind the owner. The decision on question (3) therefore turned only on construction of the order and the antecedent legislation in order to establish the relationship between the two.

LEGAL VACUUM

In the foregoing cases it seems to have been assumed that the alternative to statute law is no law: that if State law ceases to apply to a place on its acquisition by the Commonwealth, the gap can be filled only by Commonwealth statute. In *R. v. Phillips*[76] Windeyer J. characterised the argument as follows:

> But now it is suggested that the acquisition by the Commonwealth of a piece of land for its public purposes has in the past made it at once a place where anything might be done with impunity, and where nothing that was done could have any validity in law, unless and until Commonwealth legislation should restore law and order there.

It is to be observed that, quite apart from the issues which have been discussed up to this point, an argument in this form is almost self-

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73 Id. at 14.
74 Id. at 16, 19 and 10 respectively.
75 (1970) 45 A.L.J.R. 9.
76 (1970) 44 A.L.J.R. 497, 504.

evidently wrong. State law and Commonwealth law enacted under section 52(1) are not the only possible sources of law for a federal place even on the most drastic view of the consequences of acquisition. There are also Commonwealth laws enacted under other powers and common law. No doubt these sources will prove defective if placed under prolonged pressure by the problems of daily life in a modern community, but they amount, particularly in the vital area of criminal law, to a great deal more than total absence of law.

As to generally applicable Commonwealth laws, examples particularly relevant to federal places are regulations made under the communications power of section 51(5) of the Constitution[77] for the conduct of the Postal Department, regulations made under the defence power of section 51(6) for the conduct of the military forces and military installations, and the Commonwealth Crimes Act. As to the common law, there seems to be no reason in principle why it should not be available to fill a legal vacuum in a country of common law antecedents. In the events which have happened there is no doubt little profit in speculating whether the content of the common law in this context should be sought by reference to English common law at the date of federation, to subsequent Australian State common law, or to some new concept of federal common law. Whatever the result in detail, the general concept of the common law remains available to avoid a legal vacuum in any context.

CONCLUSION

It is possible that the particular problem of identifying the law applicable in federal places will disappear as swiftly as it appeared in 1970. It is equally possible that it will give rise to further litigation on issues of relative detail. What is of more basic importance is whether the dubious theory enunciated by three members of the majority in *R. v. Phillips*[78] of the relation of the continuing validity of laws to legislative powers will have further influence. It is to be hoped not, for two reasons. The first is that in the form in which it was presented in *R. v. Phillips*[79] the theory lacks even elementary coherence and precision. The second is that even if it is capable of improvement as a matter of logic, it is an undesirable concept as a matter of policy, for it tends to produce discontinuity of laws. The

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77 'Postal, telegraphic, telephonic, and other like services'.
78 (1970) 44 A.L.J.R. 497.
79 Ibid.

purpose of law is to preserve order. A concept which supports the abrupt cessation of large areas of law in a community contradicts this purpose. Its early demise is therefore to be hopefully anticipated.

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