consequently taken to be of 14 Bloomsbury Square London even though he sleeps elsewhere; *Attenborough* v. *Thompson* (2 H & N p. 559). A considerable time would elapse before an affidavit could be obtained stating the precise residence of the witness.

HIS HONOR:—

The case cited is not conclusive. This Court, moreover, has established a practice which differs from that which obtains in England. "Residence" has always received the meaning of the place where a person sleeps. I shall grant the motion subject to the filing of an affidavit of the exact residence of the second witness.

Proctors for applicant, *Blake and Riggall.*

[See in accord *in re Cook* 6 ALT 117.]

IN THE WILL OF EDWARD HOFFMANN, DECEASED.

30th August, 1888.

Practice Probate—Administration c.t.a. granted by the registrar—Universal legatee—No debts—Administration bond dispensed with.

Motion on behalf of the administratrix *c.t.a.* for an order that the administration bond be dispensed with. The testator by his will dated the 17th April, 1888, gave all his property to his wife Norah Hoffmann, but appointed no executors. He died on the same day. The property being under £500, the registrar had granted administration *c.t.a.* to the widow Norah Hoffmann.

Cook in support—The widow is universal legatee: the property is small, and it does not appear that there are any debts. Under such circumstances the administration bond has been dispensed with; *In the Will of Claus Dohrmann* (7 V.L.R. (I.P.M.) 18).

HIS HONOR—I will grant the motion, as there do not appear to be any debts, and as the widow is universal legatee.

Proctor for applicant, *E. A. Smart.*

Before Holroyd, J.

IN THE WILL OF EDWARD JAMES, DECEASED.

30th August. 1888.

Practice Probate—Administration c.t.a.—Widow of testator entitled for life or until marriage, remainder to children—Sureties not dispensed with.

Motion for administration with the will annexed (dispensing with sureties) to Elizabeth James, widow of the deceased.

The testator died on the 10th June 1888, leaving a will dated the 10th November 1883, whereby he devised and bequeathed all his property in such a way, that his widow should have an estate for life or until she should contract a second marriage, with remainder to his children as therein set out. He appointed no executors.

MacDermott in support:—Administration *c.t.a.* should be granted dispensing with sureties. In the case of *In re Cooper* (1 W.W. and A'B. (E. and M.) 68), which exactly resembles this case, an order was made for administration *c.t.a.* and sureties were dispensed with.

HOLROYD, J.—I do not see on what principle sureties are to be dispensed with in cases like the present. I shall grant the application for administration, but shall require the bond to be executed in the usual manner.

Proctors for applicant, *Westley and Demaine.*

SITTINGS IN BANCO.

July 10 11 12 13, Sep. 3rd.

Before Higinbotham C.J., Williams, Holroyd, Kerferd, a'Beckett and Wrenfordsley J.J.

CHUN TEONG TOY V. MUSGROVE.

Aliens—Act of State—Sovereign State—Prerogative of excluding aliens—Loss of prerogative by Desuetude. Constitution—Constitution Statute 18 & 19 Vic. c. 59—Constitution Act 19 Vic.—Responsible Government Governor—Commission and Instructions—Matters local to Victoria—Chinese Immigrants Act 1865 No. 269 and Chinese Immigrants Restriction Act 1881 No. 723.

Where an alien being a Chinese immigrant within the meaning of the Chinese Immigrants Acts 1865 and 1881 was prevented from landing by the Collector of Customs whose act was authorised ratified and adopted by the Commissioner of Trades and Customs Her Majesty's Responsible Minister and by Her Majesty's Government for Victoria.

Held:—That the jurisdiction of the Court was not ousted by the plea that the Act complained of was an Act of State which being a wrongful Act done to an alien is a challenge to war or an invitation to treat and can only be authorised or ratified by a Sovereign State or by some agent authorised by the Sovereign on that behalf.

Held (*by the majority of the Court, Williams Holroyd a'Beckett, and Wrenfordsley J. J*). *That the prerogative of excluding aliens even if existent in England and even if it be local to Victoria and not controlled by the Chinese Immigration Acts can not be exercised here by the Governor of Victoria either with or without the advice of his Responsible Ministers or by Responsible Ministers alone inasmuch as the powers and prerogatives exercisable in Victoria are limited by the terms of the grant and neither the Constitution Act nor the Governor's Commission and Instructions contain such a prerogative.*

(By HOLROYD J.) *That the right of excluding alien friends if it ever existed as part of the prerogative in England has been excluded by Constitutional*

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usage hardening with time.

(*By the minority of the Court Higinbotham C.J. and Kerferd J.*) *That this prerogative if existent in England, is not controlled by the Chinese Immigrant Acts which give the immigrant no statutory right to land, is not part of the prerogative of peace and war or contrary to any rule of International Law; that it passed by the Constitution Act as a necessary incident of self government in this colony and so far as it may be necessary for the welfare and protection of the people of Victoria it is exercisable by the Governor in whom it is vested by law on the advice of Responsible Ministers and his acquiescence is sufficiently proved by the retention of Ministers in office; and that the rule of interpretation expressio unius exclusio est alterius should not be applied where the intention of the Statute appears to forbid it.*

(BY KERFERD, J.)—*That the plaintiff has no right of action on the further ground that he was here illegally and in violation of the Chinese Immigrants Acts, 1865 and 1881, as a number of immigrants in excess of the number allowed by the Statute were brought by the ship.*

(PER HIGINBOTHAM, C. J.,)—*The Constitution Act is the only source of the public rights of people of Victoria, and the design of the framers of the Act of a complete system of self-Government has found adequate though obscure legal expression therein. The two bodies created by the Act, the Government and Parliament, have co-ordinate and interrelated but distinct functions. The Executive Government are responsible to Parliament, and alone, have the right to guide and control the Governor in the absence of his statutory powers, with regard to the internal affairs of Victoria. Subject to the approval of Parliament and so far as not inconsistent with any Statute law or treaty, the Executive Government have a legal right and duty to do all acts necessary or expedient for the proper administration of the law, the conduct of public affairs and the security, safety, and welfare of the people of Victoria. The question whether a power may be necessary for the Government to exercise, is for the Court, the question whether the occasion for its exercise has arisen is for the Government, who are responsible only to Parliament. All prerogatives in Victoria are vested in the Governor, to be exercised on the advice of responsible Ministers and for all purposes within the Constitution Act, he is the local sovereign of Victoria. Those provisions in his commission and instructions which purport to convey powers already conveyed by the Act are void, and others inconsistent with the Act are illegal. The Court is at liberty in construing the Act to consider the special qualifications of the framer of the Bill, and the history and external circumstances which led to its enactment, and for that purpose to consult any authentic, public or historical documents.*

(PER WILLIAMS, HOLROYD, and a'BECKETT, J. J.)—*The proper way in construing this or any other Act of Parliament is to look at the Act itself and not at speeches or despatches.*

(PER WILLIAMS, J.)—*The principles of interpretation that all such powers as may be necessary to the working of a system, and without which the system itself would have no vitality should be inferred, should not be abused to create a primary power. The exercise of the prerogative of mercy in this colony is not derived from the Constitution Act but from other sources.*

(PER HOLROYD, J.)—*In interpreting the Constitution Act it is the intention of the Imperial Parliament that should be sought for, and the maxim "expressio unius est exclusio alterius, should be rigidly applied since the Crown is not bound or a prerogative affected unless expressly mentioned. It is not a conclusion of law that Her Ministers ratification' is Her Majesty's ratification, but only a presumption liable to be rebutted. As the penalty under the Chinese Immigrant Acts for bringing a number of immigrants in excess of the statutory number, is imposed on the master, the immigrant is legally here, though illegally brought here.*

(PER a'BECKETT, J.)—*Responsible Government has no definite comprehensive meaning and responsibility may attach to persons having powers strictly limited and its exercise does not indicate the extent of the authority from which it arises. The implication of assent by the Crown from the continuance of Ministers in office can only arise as to Acts which Ministers can lawfully do as such.*

(PER WRENFORDSLEY, J.)—*The prerogative right of the Crown to keep out aliens still exists, although its exercise may by the custom or legislative action of modern times be subject to Imperial Ministerial Responsibility.*

Points of law raised by the pleadings referred to the Full Court by Kerferd, J.

The following is the statement of claim :—

1. The defendant is and was at all times material to this action Collector of Customs within the meaning of the Chinese Act, 1881.

2. The plaintiff was an immigrant ariving from parts beyond Victotia within the meaning of the Chinese Immigrants Statute, 1881.

3. The plaintiff on or about the 27th day of April arrived in Hobson's Bay from parts beyond Victoria on board the ship Afghan, the said ship being a British ship, and one George Roy was the master of the said ship within the meaning of the Chinese Act 1881.

4. The said master George Roy, offered to pay and was always ready and willing to pay to the defendant as such Collector of Customs as aforesaid in respect of the plaintiff the sum £10, as provided in Section 3 of the Chinese Act 1881. Yet the defendant refused to allow the plaintiff to land in Victoria, and hindered and prevented the plaintiff from landing in Victoria, and altogether refused and declined to receive the said sum of £10. The plaintiff claims £1000.

The defence is as follows.—

1. The defendant says that he admits the allegations in paragraphs 1, 2 and 3 of the statement of claim.

2. He denies that the master of the said ship of

fered to pay, or was always ready or willing to pay, to him as such Collector of Customs, or at all in respect of the plaintiff, the sum of £10.

3. He denies that he refused or declined to receive the sum of £10.

4. The plaintiff was at the time of the committing of the grievances in the statement of claim mentioned a subject of the Emperor of China and owed allegiance to him and was not a British subject; and that whilst the several Acts of the Parliament of Victoria mentioned and referred to in the second paragraph of the statement of claim were in full force and unrepealed the plaintiff was a Chinese immigrant within the meaning of the said statutes, and as such immigrants had arrived in the Port of Melbourne in a certain British vessel called the Afghan of 1439 tons measurement, which said vessel had so arrived in the said Port with 268 Chinese immigrants on board, being 254 more Chinese immigrants than under the said statutes such vessel could lawfully bring into the said port of Melbourne; And the defendant further says that he had received instructions previous to the arrival of the said ship from the Commissioner of Trade and Customs, as and being the responsible Minister of the Crown for the Colony of Victoria, charged and entrusted with the administration of the laws of the said colony relating to the Customs and immigration, that there was an apprehension on the part of Her Majesty's Government for the said colony that a large influx of Chinese into the said colony was imminent, and that, in the opinion of the said Minister and of the said Government, such influx would be a danger and menace to the said colony and to the public peace thereof, and to Her Majesty's subjects residing therein, and would be in a high degree detrimental to their interests, and that, in the opinion of the said Minister and of Her Majesty's said Government, it was for the advantage of the said subjects so residing in the said colony, that such influx should be prevented, and no further Chinese, other than such as are British subjects should be allowed to enter the said colony, and that the said Minister and her Majesty's Government had determined to refuse to permit any Chinese other than such as were British subjects to land or enter the said colony; and such instructions, opinions and determination had been before the committing of the said grievances by the said Minister and Government communicated to the defendant, wherefore the defendant in obedience to such instructions and determination as such officer of Her Majesty's Customs as hereinbefore mentioned by command of our Lady the Queen, refused to permit the plaintiff to land in the said colony of Victoria, and hindered and prevented him from so landing, and wholly declined and refused to receive the said sum of £10 mentioned in the 4th paragraph of the statement of claim. And the defendant further says that his said acts in so wholly refusing to permit the said plaintiff to land in Victoria, and in so hindering and preventing him from landing, and in refusing to receive the said sum of £10 as aforesaid, were by him subsequently reported and communicated to Her Majesty's said responsible Minister, and were by him and by Her Majesty's said Government ratified and approved of as being acts of State policy.

The plaintiff, in his reply, joins issue on paragraphs 2 and 3 and the whole of paragraph 4, after the figures and words "1439 tons measurement." He will object that paragraph 4 is no defence as even Her Majesty's said Minister or said Government could not legally prevent the plaintiff from landing.

The following is the order of Mr. Justice Kerferd, referring the case to the Full Court :—

Upon hearing the solicitors for the plaintiff, and upon reading the consent signed by the solicitor for the plaintiff and defendant respectively, it is ordered that the action be determined by the decision of the Full Court on the arguments of the questions of law raised on the pleadings herein, and that the said questions of law be set down for argument before the Full Court, the defendant consenting to such questions of law being argued and determined. And it is further ordered that if the decision of the Full Court upon the said questions of law shall be in favor of the defendant, judgment in this action shall be entered for defendant, with costs to be taxed; and that if such decision be in favor of the plaintiff, the damages (if any) be assessed by a judge of the Supreme Court, and that judgment shall be entered for the plaintiff accordingly, with costs to be taxed, subject only in both cases to the right of appeal from such decision and judgment to Her Majesty in her Privy Council. This order is in no way to imply any admission of the facts of the case as raised upon the proceedings herein, except so far as is necessary for argument and determination of such law points.

The Court intimated that they would hear more than one counsel on either side.

Dr. Madden and *Mr. Hodges* (for the plaintiff). The case divides itself into two branches, the first having reference to the Chinese Immigration Acts of 1865 and 1881, Nos. 259 and 723; and the second is assuming that the power mentioned in the plea had ever existed in England, or exists now whether the Government of this colony could take the same steps, and do the same Acts which Her Majesty in England could do.

The important sections of the Victorian Statutes are Sec. 3 of No. 259, and secs. 2 and 3 of No. 723. The plaintiff claimed that under these sections he had a statutory right to land in Victoria on payment or tender of the poll-tax. [a'BECKETT J., Can you contend that the object of the Statutes was to give the Chinese a better right to land than other aliens?]

There is no prohibition against their landing, only a condition precedent and as was only fair it was provided that in case an excessive number were brought, the master who did, and not the Chinese who did not know our law, should pay the penalty of £100 for each one in excess. At least the number mentioned in the Statute should have been permitted to land and it was not suggested that the plaintiff was not among the first to present himself.

Coming now to the main branch of the case the

questions would arise whether the prerogative of excluding aliens ever existed in England? Whether if it did exist it did not not constitute part of the prerogative of war and peace? Whether it has not been lost by desuetude? Whether what was done there was an act of State? Whether this prerogative if it existed here could be exercised by the Governor with the advice of the Executive Council or by Ministers alone? And lastly whether it would be exercised here when the Legislature of this country had passed Statutes which control it?

The statement that this prerogative exists in *Chitty on Prerogative p.* 49: *Blackstone Vol.* 1 *p* 259 were based on a passage in *Puffendorf Bk.* III *ch* 3 *p* 252. But this passage did not bear out the statement in Chitty and it must be remembered that Puffendorf was no authority on English law as he was not an Englishman and his treatise was not a legal one. In *Comyns' Digest* Vol. VII *p* 45 it is stated that a subject of a King in amity may come into the Kingdom without license or safe-conduct though a king in amity or his ambassador who is *prorer* cannot. The same distinction is found in 4 *Coke p.* 36. [HIGINBOTHAM C.J. The words "in amity" seem to show it belongs to the prerogative of peace and war]—If the prerogative existed such a searcher for uncommon things as Comyns would surely have found it. The prerogative has not been exercised since the time of Elizabeth in 1571, 1574, 1575 (*May's Const. Hist. Vol.* 2 p. 296.) In 1793 in the debate on the first Alien Bill it was vehemently denied that such a prerogative ever existed or if it did whether it had not fallen into desuetude (34 Parl. Debates Hansard 1065) and in the course of a debate which took place in July 1816 on the second Bill it transpired that there was not a single instance for 500 years, where the prerogative had been exercised (Parl. Debates, Hansard Vol. IV of 1816) and a more potent criticism on its non-existence could scarcely be suggested. Again on the discussion of the last act 11 and 12 Vic. c 20, which was passed for the exclusion of a single person, Sir William Molesworth said that since 1793 this prerogative had been opposed by every man of note in the Liberal party; that neither Charles II James II or William III had ever dreamt of claiming it though they must often have longed for it; and that it was opposed to the practice and spirit of our ancestors and constitution and to the recorded opinion of every high authority on the Liberal side of the House. It was true that Lord Ellenborough and perhaps Lord Eldow were of opinion that the Crown had this prerogative but Forsyth in his *Cases on Constitutional Law p.* 181 says Lord Ellenborough's opinion is not the law of England. Why otherwise was it necessary to pass these Acts of Parliament to exclude aliens? Professor Dicey in his work on the *Law of the Constitution p* 337 *seq.* says that the executive cannot except under a statute expel any alien even a murderer from England but that there are times of tumult and invasion, when for the sake of legality itself the rules of law must be broken and the Ministry must trust for protection to an Act of Indemnity. *Forsyth p.* 369 says the executive cannot seize an alien and deliver him to a Foreign Government. [Higinbotham C.J. That is different from mere expulsion and can only be exercised under Extradition Treaties and Acts recognising those treaties.] It is significant that Chitty deals with this prerogative under the prerogative of peace and war. See also *Bacon's Abridgment Prerogative p.* 451. For these reasons it is submitted that the prerogative never did exist that if it did it has become obselete and if it does exist it is part of the prerogative of peace and war which admittedly we do not possess here.

The next question is whether this was an "Act of State." For definition see *Stephen's Digest of the Criminal Law of England Vol* II *p.* 61. The leading cases are *Buron v. Denman* 2 Ex. 167 and *Secretary of State for India* v. *Kamachee Boye Sahaba* 13 *Moo.* PCC 22. Acts of state only apply to acts which affect foreigners and which are done outside the jurisdiction by the order or with the ratification of the Sovereign herself or as in the Indian case of some one to whom full powers have been delegated by the Sovereign. In such cases the jurisdiction of the Municipal Courts is ousted and the right of action becomes merged in the International Right (*Feathers* v. *Reg.*, 6 *B. and S.* 257.) As between the Sovereign and his subjects there can be no such thing as an act of state (*Stephen's Vol.* II. p. 65.) But in this case the plaintiff being an alien was on board a British ship within a Victorian harbour, and aliens in the colony have under the Aliens Statute No. 256 equal rights with British subjects with the exception of certain rights which were specifically excluded, such as voting for members of Parliament. [Higinbotham, C.J.—That Act was only passed for the purpose of enabling aliens to hold real estate in the colony.] An Act of State was equivalent to a challenge to war, and required to be ordered or ratified by persons who had authority to declare war or to hear diplomatic representations for the purpose of avoiding war. Such an act being avowedly and admittedly illegal and done only in great emergency was wholly independent of prerogative which was an operation of law. It was extra-territorial, but the disabilities of aliens within the colony had been one by one removed, so that now an alien who came within any part of the British dominions and subjected himself to the laws was entitled to their protection (2 *Stephen's Commentaries* 5*th Ed. p.* 423.) This applied to a person who was on board a British ship even though it was within the port of another nation (*R.* v. *Anderson* 11 *Cox C.C.* 204.) Supposing an Imperial warship had fired on the Afghan while within Victorian waters could that have been ratified as an act of state? In the recent case before the New South Wales Court, Dalley C.J. held that where a Chinaman on board this very ship Afghan was prevented from landing *habeas corpus* would lie one of the grounds being that N. S. Wales was not a Sovereign State (*exp. Leong Kum Sydney Morning Herald May* 24*th*, 1888; *exp. Lo Pak Sydney Morning Herald May* 18th, 1888). [Higinbotham, C.J.—That case turned on the return to the writ.—The

remainder of the decision was not necessary.] If an alien was entitled to that extraordinary remedy why was he not entitled to have his wrongs dealt with. [Holroyd J. referred to *Cockburn on Nationality*, p. 149—"In respect of personal rights an alien so long as he remains on British soil is in the same position as a British subject]. In both aspects, therefore, that this was done to a person having the rights of a British subject, and that it was done by persons who did not represent a Sovereign State with authority to declare war, this is not an act of state. Coming to the next question, the plea in defence evaded certain difficulties. It did not say that the Governor-in-Council or the Governor by the advice of his Ministers had done this act, or that His Excellency had been any party to it at all. [The Attorney-General—We do not rest our case at all on any action of the Governor or any Order-in-Council. Our contention will be that this was done by Her Majesty through her responsible Ministers in and for Victoria, who have been retained in office.] It is not competent for Ministers of the Crown in and for Victoria to exercise any prerogative except through the Governor, or at least with his acquiescence, and even with his acquiescence, ministers could not exercise any prerogative of the Crown outside the limits of his commission, all other prerogatives being vested in the Sovereign State only. There are indeed certain prerogatives which enrich the personal estate of the Sovereign or are for the protection of the revenue which, since the Queen is present in all her dominions, apply by the very nature all over the Queen's dominions, such as the escheat or forfeiture of the property of a person guilty of treason and the priority of debts to the Crown over debts to the subject in insolvency, as in the Oriental Bank failure. [Higinbotham C.J.—The debt in those cases is not due to the Sovereign personally, but goes to the revenue.] Such prerogatives as these are enforceable in the local courts, and are contra-distinguished from prerogatives of Government as the right to convene or dissolve Parliament, the right to confer titular distinctions, and the right to declare war. Colonial Ministers had not the right to exercise these, which might involve the Empire in war or seriously embarrass its administration. They could only be exercised by a Sovereign State, or a state to which they had been delegated expressly. A Sovereign State must not be dependent (*Wheaton 2nd Ed. p.* 58) and a colony was dependent (*Halleck 1st Ed. p.* 65.) The Victorian Parliament is a non-sovereign legislative body, and bears distinctive marks of legislative subordination (*Dicey p.* 95 *et. seq. Colonial Law Act* 1865.) The Imperial Act authorising our Constitution Act, which is a schedule to it is 18 and 19 Vic. c. 55 and the Acts referred to in it are 5 and 6 Vic. c. 76; 7 and 8 Vic. c. 74; 13 and 14 Vic. c. 59. That Imperial Act made our right of legislation subject to certain reservations and the Imperial Parliament could if it choose repeal our Constitution and treat us as a Crown colony. The very essence of a prerogative in a Constitution such as ours is that it must be exercisable only by the Sovereign. There are certain things that can only be done by the advice of the Executive Council, but the prerogative is in the keeping of the Queen herself. Even the Lord Chancellor in the debate in 1793 said that this prerogative if it existed must be either in the King in Parliament or in the King alone. [Kerferd J.—In the present reign it has been laid down that the exercise of the prerogative can only be by advice.] In the New South Wales case the Chief Justice said that there was no inherent right in the King to exclude aliens and that the power if it existed was personal to the King and could not be delegated to the Governor or Government of a colony. In the Governor's commission and instructions only two prerogatives were given to him namely those of summoning and dismissing Parliament, and of mercy, and if he differed from the executive council he was instructed to exercise his own judgment. The former from its very nature he must exercise himself. [Kerferd J.—The incoming Ministry are answerable for his acts.] [There are many things a Governor can not do such as assenting to a certain class of bills that is he can not go behind his commission which is his power of attorney and which expressly limits his power and he may act as between himself and the Queen in some cases contrary to his minister's advice though he might bring about a very pretty quarrel. [Higinbotham C. J.—On what legal foundations are those instructions based except as to the instructions for the reservation of certain bills mentioned in the constitution act.] He could be removed if he did not obey them. If the Governor could not exercise this prerogative *a fortiori* his ministers could not. In *Musgrove v. Pullido* 5 App, Ca. 102 it was held that a Governor of Jamaica, had no delegation of sovereign authority unless it was given him by his commission. [Williams J.—Is that applicable here? Suppose a constitution has been granted to a colony which has a Governor acting with the advice of his responsible ministers by the Imperial Act, and then a Commission less extensive in its powers were issued which would prevail?] The act of Parliament would prevail but that case is not applicable. [Higinbotham C. J.—Jamaica had a constitution and a very ancient one. Williams J.—You must show that the commission is not inconsistent with the Constitution Act in this Colony. Kerferd J.—And that the statute does not confer upon the colony full and absolute power in local matters.] It is certain that it confers no such power *Expressio unius est exclusio alterius*. The right to exercise this prerogative is given neither to his Governor nor his ministers by the Act. The Constitution Act did not make the Governor a Viceroy. In this case knowing how Imperial interests were involved he might have refused his assent to the exercise of this alleged prerogative. Ministers if they wished to act without him must show their source of authority. The ultimate control even when self-government had been granted to the fullest extent to a colony remained in the Imperial Parliament. [*Todd Parliamentary Government in the British Colonies*, p 34 et. seq.,] as in the cases of the relations to foreign states the formation of treaties and alliances, the naturalisation of aliens, the declaration of war and peace and all regulations affecting the

disposition of the Imperial military forces and the present case is included in them. Todd states that the Governor was not bound to follow his Minister's advice where contrary to his instructions except where the emergency was so great that he committed a confessedly illegal act trusting to an act of indemnity afterwards. If he and his Ministry did not agree either the resignation or dismissal of Ministers must ensue and he must endeavour to get a new Ministry. [Higinbotham C. J.—That is merely an interesting statement of facts as they presented themselves to the writer and his views upon them and not a legal authority] We are treading an unknown path to a certain extent and any light is welcome especially from a man well competent to judge. See also *Hill v. Bigge*, 3 Moo. PCC, 465 *Cameron v. Kyte* 3. Knapp 332.

Lastly the New South Wales Court said that the Chinese Immigrants Acts were mandatory on the Collector of Customs who was bound to take the poll-tax. The Acts did not impose a penalty but conferred a right.

The Attorney-General (*Mr. Wrixon*), *Mr. C. A. Smith*, and *Mr. Box* (for the defendant)—The issue before the Court is whether the Government of Victoria can in any case and for any purpose prevent foreigners from landing. If it were the law that foreigners had the right to land, whatever public reasons the Government might have for preventing them, it would lead to very serious practical consequences, and deprive three-fourths of the British Empire of a right which belonged to every nation. It was said on the other side that an Act of Parliament could be obtained in case a cargo of foreign convicts or pirates were about to land, but the answer to that was that Parliament might not be sitting. [Williams J.—The Government in case of emergency might do an unlawful act and trust to a bill of indemnity.] Suppose the Government here had notification that war was imminent between Great Britain and Russia, and a cargo of Russians came to the Heads and proposed to settle near the batteries, could not the Government prevent them? According to the other side they would have a right to land, and if prevented a right of action. It is submitted that every nation has a sovereign right to interfere with aliens or foreigners entering its dominions; that this sovereign right is under the English Constitution vested in the Queen; and that this Sovereign right is exercisable in and for Victoria by Her Majesty's Government for Victoria. Every nation has the right vested in some organ to prohibit foreigners entering its territory (*Kent's Commentaries Vol 1 p. 37; Phillimore's International Law, Vol. 4 p. 2, quoting Rutherford Vol. I. p. 260, 2nd Ed.; Vattel Law of Nations Bk. 2 ch. 7 p. 169; Creasy's First Platform of International Law, p. 196*). In fact the old principle that an Englishman's house is his castle applies to country in International Law. The passport system of Europe is an example of this right, and so is the fact that Englishmen are not allowed to go into China beyond the treaty ports under pain of three months imprisonment. This right is a national right, and does not come under the peace and war prerogatives. No doubt some text writers as a matter of mere topographical arrangement put it under this heading because it is most frequently exercised in war, but its foundation was the right of every country to keep its empire to itself and live its life in its own way. Under the English Constitution this is lodged in the Sovereign, (*Chitty p. 49 Ed. of 1820; Blackstone Vol. I. p. 259.*) There were very good reasons why this prerogative had not been exercised in England for a very long time. Lord Eldon in the debate of 1793 pointed out that the Alien Bill was necessary to provide machinery for carrying out the prerogative of the Sovereign (*Hansard* Vol. 34 p. 1066.) [Holroyd J.—Do you make any distinction between landing and entering? These Chinamen were really in the country through being in port If your contention be correct it would justify you in seizing these aliens in Collins-street and expelling them.] They broke the law in entering at all. There is a distinction between sending an alien out when he is settled and forbidding him from coming into the country at all. [Higinbotham C.J.—In International Law there is a distinction between entering the port and landing on the soil of the country. Kerferd J.—In the Chinese Immigrants' Act Sec. 2 uses the words "shall arrive at any time in any port;" Sec. 3 "shall be permitted to land;" Sec. 4 "shall attempt to enter this colony."] There were numerous authorities to show that the Government could turn aliens out, and that is further than we need go. Lord Ellenborough in the debate of 1793 (*Hansard* Vol. 34 p. 1070) declared his decided opinion that the Crown possessed the prerogative of sending aliens out of the country, and maintained that such prerogative belonged of right not only to the monarch of England, but to the Sovereign of every country. Forsyth, who disagrees with this at p. 181, cites no authority for his statement. Sir Edward Northey, who was Attorney-General in 1705, and a very eminent lawyer, was of opinion that if certain Romish priests were aliens they could be compelled by law to depart from Maryland (*Forsyth's Cases on Constitutional Law p. 35*). The Alien Acts were only passed to provide machinery for the exercise of the Sovereign prerogative and they recognised its existence. Sec. 33 Geo. III. Chap. 4 Section 7 recognised the prerogative to exclude aliens from landing, and only provided machinery, while Section 18 gave the power to order aliens to live in a particular place. An exactly similar power is given to the Governor-in-Council by Act No, 259. So also the preamble and sections of 56 Geo. III. Chap. 4 Section 7 recognised the prerogative and merely provided more efficacious means for enforcing it If the prerogative existed then the mere fact that it had not been used for years did not deprive the Crown of its right. England prided herself on being the home for all nations and so there were few occasions in which it has been necessary. Would the prerogative of declaring war be lost if the nation were for many years at peace? A striking instance to the same effect was the claim recently made by the Crown to the gold recently discovered in Wales. So in the case of the Army Purchase Bill in 1871 which did not pass one

of the Houses the Sovereign intervened and exercised the prerogative and abolished purchase in the army by Royal warrant. (See also 5 *Canning's Speech p.* 205.) The provision in Magna Charta as to the protection of foreign merchants was put in because King John had abused the prerogative by worrying them and sending them out of the Kingdom and it only applied to cases where they were not publicly prohibited beforehand (*Cockburn on Nationality p.* 139.) There were numbers of instances where a prerogative undoubtedly existed where the Crown had asked Parliament to cooperate in providing machinery for specially enforcing it. Such was the Gunpowder Act 29 Geo. II c 16. Unless the prerogative was expressly taken away such Acts did not affect it. Lord Coleridge had said that an alien has no absolute right of asylum and that any country may expel a foreigner (*In re Woodall Times Law Reports May* 16 1888). It is not correct as stated by *May* that the prerogative has not been exercised since the time of Elizabeth, and it had been freely exercised before that. King John granted a charter allowing the Jews to reside in England (*Maddock's History of the Exchequer Chap.* VII *Sec.* 8.) In 1290 Edward I expelled the Jews by proclamation (*Lingard Vol.* III c 3 *p.* 254). Queen Elizabeth turned out the Spanish Ambassador and other Spaniards, not Ambassadors (*Froude Vol.* XI *p.* 620 *et. seq.*) In 1837 a Mr. Adam was expelled from Mauritius under an order of the Governor-in-Council and this was held good by the Privy Council (*Re Adam 1 Moo P.C. C. 460.*) In that case Mr. Adam had enjoyed the privileges and exercised the rights of a person domiciled in the island [Wrenfordsley J. That was under French Law. Mauritius is a colony by conquest, Victoria by occupation]. Here as there it is an executive and not a legislative act. There was also a recent case of expulsion from Jersey reported in the TIMES of 17th October 15th and 26th November 1855 when a number of French refugees were expelled by the executive for publishing outrageous libels in a newspaper which they had established—Under the English constitution the right to do this Executive Act is vested in the Sovereign in whom all executive authority centres. It is undoubted law that the Sovereign makes war or peace, cedes territory, sends and receives ambassadors, makes treaties, grants safe-conducts, commands the army and is the fountain of justice. *DeLolme on the English Constitution p.* 63 *Ed. of* 1853), Lord Brougham speaks much in the same words. By the writ of *ne exeat regno* which issues in the Sovereign's name she can prevent a foreigner leaving the kingdom *a fortiori* she can prevent a foreigner entering it. Her Majesty is the Chief Executive officer of England and the mouthpiece of the country as far as foreign nations are concerned (*Creasy's First Platform of International Law p.* 101; *Tarring on the Law relating to the Colonies p.* 15.) The Crown must act on an emergency and without reference to an Act of Indemnity and there might be no time to consult Parliament which might not be sitting. An Act of Indemnity is not required where aliens are dealt with but only in the case of subjects. Every emergency must be met as it arises and we must not let our neighbours acquire a giant's strength first (*Creasy p.* 281 *quoting Vattel.*) The next question is whether the prerogative is limited by the Acts passed by the Victorian Parliament. When the Statutory number is exceeded that is an offence. [Holroyd J. It is not made an offence in the Chinaman—which would be very unfair—but in the master.] The prerogative can only be taken away by express words not by implication (*Chitty on Prerogative p.* 382; *Maxwell on Statutes p.* 161). The Statutes impose restrictions on Chinese are not enabling and give them no right to demand admission and cannot possibly be construed into an invitation. The obstruction of an individual Chinaman might be strictly legal though morally wrong. He had no contract with the Government to be allowed to come here and can not sue an officer of the Crown for obeying instructions to prevent him. Can it be contended that by these Acts Chinese are put in a better position than other aliens—Such legislation cannot control the prerogative

The prerogative from its very nature is as vital here as in England. (*In re Bateman's Trusts L.R. 15 Eq.* 361; *Barton* v. *Taylor* 11 App. Ca. 197.) It is active all over the empire and if the Queen had the right to prevent foreigners entering at London she had the same right at Melbourne. But the Queen personally cannot exercise any prerogative or do any public act. These must be done through the properly appointed agents. Her judicial prerogatives could only be exercised through her judges her political prerogatives through her responsible Ministers (*Todd's Parliamentary Government of England Vol. I pp.* 169, 175; Hearn's Government of England pp. 118 124 126 162 2nd Ed.)

The prerogative could not be exercised by the Sovereign personally it must be exercised on her behalf either by Her Majesty's Ministers for Imperial affairs or Her Majesty's Ministers in and for Victoria. It would be contrary to law for the former to advise her with regard to the exercise of the prerogative with regard to local affairs in and for Victoria. The Court must take judicial notice of the fact that responsible government is established by law in Victoria. In *Buron* v. *Denman*, 2, Ex. 167, Baron Parke and the other judges took judicial notice of the position of Lord Palmerston as Secretary of State. No proof was given as to who Lord Palmerston was, or what his position was, or how he came to act on behalf of the Sovereign; but the Court took notice of the constitutional relation existing between Lord Palmerston and the Sovereign, though it was submitted for the plaintiff that the act of Captain Denman could not be an act of the Queen, because Her Majesty knew nothing about it. The knowledge and action of the responsible Minister were held to be the knowledge and action of the Sovereign, and it does not matter whether the Sovereign knows about it or not. [Holroyd, J. But has not the present Sovereign successfully protested against that assumption in the case of a Minister who sent despatches on his own account without the consent of the Queen.] The Sovereign can dismiss

her Ministers at any moment, but if she does not dismiss them they are her accredited agents, and their acts are hers. *Cameron* v. *Kyle*, 3 *Knapp*, 332, is not opposed to this view for that referred to a Governor who has a limited authority; but a responsible Minister for the Crown acts for the Crown in all political matters. The act of the Governor alone could not have bound the Crown in this case. In *Buron* v. *Denman*, it was held that a letter written by direction of the Minister was ample proof of satisfaction by the Queen, and that it was not necessary it should be under the great seal. The only knowledge proved in that case was the knowledge of the Minister. If the Sovereign disapproves of their acts she must dismiss them, and then the incoming ministers, since she can never act without advice are responsible for her action. A striking instance of this is Sir Robert Peel's case. He had to take the responsibility though he thought King William IV had made a great mistake in dismissing his Ministry. (*Gladstone's Gatherings Vol. I pp. 2-34.*) Coming now to the question of Responsible Government in Victoria. The first section of the Constitution Act, provided that Her Majesty by the advice and consent of the Council and Assembly may make laws for Victoria in all cases whatsoever. That defines the legal position of the Government and gives them coextensive execution and administration of the laws. Further on in sec. 2 of the Act, there are references to Responsible Ministers and to officers retiring on political grounds. In the Act No. 91 "The Officials in Parliament Act," a statutory statement was given that there should be Responsible Members of the Crown. The colonial legislature was entrusted with all the details of local representation, and internal administration (*Despatch of Lord John Russell forwarding the Constitution Act 20th July* 1855) A responsible form of Goverment had been unequivocally established, and the Imperial Government would not acknowledge any further responsibility for maintaining the internal tranquility of the country. (*Despatch of Duke of Newcastle 26th June*, 1863.) There was a distinct limitation of our power of self-government in the direction to the Governor to deal in a certain way with certain bills presented to him. If there was any further limitation Counsel on the other side should show it, otherwise the government had unlimited local powers. [Williams, J.—Have they the prerogative of mercy to the same extent as Her Majesty's Responsible Officers in England; if so, the Governor's commission is *ultra vires* so far.] Most undoubtedly they have, though they may not choose to interfere, otherwise persons might be hanged and no one be responsible for it. [Higinbotham, C. J. —Have they the prerogative of conferring titular distinctions.] That is doubtful. These titles are not local but for the whole Empire. [Kerferd, J.—The title of "Honorable" is limited to the colony.] That is only a title of courtesy like "Reverend." If the Constitution Act gave certain powers to the local Government any limitation in the Governor's commission or otherwise than a statutory limitation is illegal. [Higinbotham, C. J.—If anything given by the Constitutional Act except the power to make laws?]

It gives responsible Ministers.—[Higinbotham, C. J.—That is a large area which may cover all the powers of the Crown or only some of them.] It lies on the other side to show the limitations. After a colony has received legislative instructions, the Crown, subject to the provisions of an Act of Parliament, stands in the same relation to that colony as it does to the United Kingdom, *per Lord Westbury, In re Lord Bishop of Natal*, 3 *Moo. P.C.C. N.S.*, 148. [a'Beckett, J. —According to that contention Her Majesty could not be advised by her Imperial Ministers to prevent foreigners landing in Victoria. That might also give rise to great inconvenience. In case of an expected war, would an English man-of-war, which under the instructions of the Imperial Ministers, prevented foreigners from landing, be committing an illegal act.] No practical difficulty would arise. The governor could dismiss his Ministers if they were unpatriotic. [Higinbotham, C. J.—The Governor as Commander-in-Chief of the Army and Navy is not subject to responsible advice.] We do not possess the power of making war and peace because that is not local to Victoria, but what was done here was for the tranquility of Melbourne. [Holroyd, J.—That is not necessarily a local matter.] It is a local matter though it may have Imperial consequences, just as if the Government removed, as they undoubtedly might, all the Chinamen from one part of the colony to another. Of course there were cases on the border line and each must be judged on its own facts. If the Queen had been here and Lord Salisbury with her, neither of them could have directed the Collector of Customs to prevent the landing. [Higinbotham, C. J.—Unless she first dismissed her Victorian Ministers.] This prerogative is exerciseable only by the resident Ministers and it is of no importance whether it is viewed as coming from the sovereign directly, or whether it must be deemed to be vested in the Governor as a conduit pipe where it is necessary for the good Government of Victoria. [Higinbotham, C. J.—It is important to know if it is vested in the Governor, whether it came to him through the Act or by his commission and instructions, because in the latter case it can be altered, modified, or withdrawn, in the former it cannot.] At any rate since neither the Queen nor the Governor has dismissed Ministers, neither of them can be dissatisfied, and the Court will then assume that it is done with their sanction. It is well known that the Home Government was informed by cablegrams of what was going on. That this is a local matter is shown by the Imperial Government assenting to our Acts of Parliament restricting Chinese legislation. So too the Naturalisation Statute 33 and 34 Vic. C. 14, gave to each self-governing colony the power to deal with aliens as it thought proper, and in pursuance of that our Aliens Act was passed. The naturalisation of an alien was limited to the colony which admitted him. Preventing these foreigners from landing gave no right of war to China, it is only a matter of reprisal, but even if it did the fact that it might lead to war does not prove that it is not a local matter. The way in

which the Shenandoah was treated here was considered a *casus belli* by the United States. [Higinbotham, C. J.—In that case I can say from my own personal knowledge that the Government of Victoria had no belief that they were advising the representative of the Crown at any stage of the case. Wrenfordsley, J.—If the Act were against the comity of nations, and an indemnity had to be paid, the mother country would have to pay it. The Imperial Government might or might not ratify the action of the colonial authorities.] Even if a wrong has been done the plaintiff, who is not a British subject, can not sue for redress in our Courts of Law for an injury done to him by an Act of State. *Sweet's Law Dictionary; Stephen's, Vol. 2, p. 61; Pollock on Torts, p. 94; Buron v. Denman, 2, Ex. 167.* There is no authority for saying that an Act of State must be done without the jurisdiction, *Bacon's Works, Vol. IV., Ed. 1826.* [Williams, J., referred to *The Rolla, 6 C Rob. 364.*] Of course only Imperial Ministers could ratify an Act done outside the colony. [a'Beckett, J.—Then a British subject in Victoria who had contracted to bring a number of Chinese here, in case they were prevented by the Colonial Government from landing, could sue, though the Chinese could not.] That is precisely our contention. The plaintiff must either appeal to the Queen in Privy Council or go to his own Sovereign for an international remedy. His plea sets forth that he is a subject of the Emperor of China. An action for wrong is transitory. The ratification of an Act of State differs from all other ratifications by a principal inasmuch as in the former case the agent is relieved from all responsibility. *Buron v. Denman* was considered in *Chapman v. Ireland, 3, V.L.R., (L.) 242*, but then the defence of Act of State failed, though the Act was ratified by the Imperial Government because the plaintiff was a British subject. It is not contended that Victoria is a Sovereign State [Wrenfordsley, J. —But the earlier authorities you cited are only applicable to a Sovereign State.] We are quasi-sovereign and have full control over local matters. There is no legal obligation and no privity between an alien and a sovereign. The mere pleading of an Act of State is not sufficient. *Musgrove v. Pullido, L.R., 5, Ap. Ca., 102*, it must be shown to be such as in this case and *Buron v. Denman.* The New South Wales turned on the return to the writ that detention on the ship was not imprisonment.

Dr Madden and *Mr. Hodges* (in reply): The plaintiff had been invited to come and been led to believe on payment of £10 he would be permitted to land. In a similar case between two ordinary subjects there would be no doubt about the decision. The Government had ample means of protection in the laws of the colony by enforcing the penalties against the ship owners. How could the plaintiff tender his poll-tax if he was not allowed to enter? He could not be said to be illegally here when he was willing to pay the tax. If a cab was overcrowded it was not the passengers, but the cab driver who committed the offence, and so here it was not the Chinaman, but the master of the ship who was liable. [Higinbothan C. J.: Would the passengers in a cab not be liable where a municipality made a law forbidding cabs coming within its limits with more than a certain number of passengers?] He would not be liable. No doubt the purpose of the Acts was to exclude Chinese, but the Act did not say that not more than a certain number of Chinese should come, but if they did come that the master was to be liable. The penalty and consequent prohibition applied only to him. [Williams J.: But then the object of the act must be looked to, and that was to exclude Chinese. In the case of a cab the object would be to prevent too many passengers being carried.] The statute is penal, and must be construed strictly, and all the Chinese, or at any rate the first ten who presented themselves, on tendering the poll-tax, were entitled to land. For the purpose of considering this question as an act of state, an alien friend was, when within the territory or in a ship in port, in the same position as a British subject. The question arose who was a subject. A friendly alien while here is a local subject, owes allegiance, and is entitled to protection. *Craw v. Ramsay Vaughan's Reports*, 274; *Low v. Routledge*, 1 *Chap*, 42; 3 *H. of Lords at p* 113; *Broom's Constitutional Law* p 9. The Sovereign could not ratify an act done either against a natural born or local subject. In every case in which the defence of act of state had been allowed, the injured person had been outside the country. The case of "*the Rolla*" was considered in *Cameron v. Kyte.* The authorities cited for the existence of the prerogative all went back to Puffendorf. The statements of Lord Eldon and Lord Ellenborough as to its existence in England were disputed by Lord Holland and Lord Grey. In earlier times lawyers were never at a loss to find prerogatives for the King. Sir Francis Northey's opinion, relied on by the other side, was only the opinion of an Attorney-General of the day. The cases raked up of expulsion by the Sovereign were really no authorities. It was pointed out in *Hallam's Constitutional History, vol.* 1, *p.* 236, that numbers of similar proclamations to that under which the Jews were expelled were issued by Queen Elizabeth, making all sorts of absurd enactments as to the length of swords to be worn, &c. Hume pointed out that the Jews up to that time were in a very peculiar position, and outside the pale of the law. Their disabilities were well represented in *Ivanhoe.* One Norman King ordered a Jew to pay a sum of money under pain of having a tooth drawn every day till he complied. Many of the Jews expelled were English subjects. The case of the expulsion of Mr. Adams from Mauritius is no authority at all. It is expressly put as being under French law. As to the expulsion of Victor Hugo from Jersey, there is merely a newspaper statement of facts. The Alien Acts in England did not recognise the prerogatives, if they had it would have been stated in the preamble. If, however, the prerogative could not be enforced till an act was passed, we had no such act in this colony. The prerogative, if it ever existed, has become obsolete, as in the case of the power to create life peers. When it was proposed to make Sir James

Parke a life peer as Baron Wensleydale, the House of Lords protested against the admisssion. The Committee of Privileges, to which the matter was referred, reported and the House agreed that the Crown would not create life peers entitled to sit and vote in Parliament. The prerogative of creating life peers had not been exercised for 400 years, and had become obsolete by desuetude (*May's Parliamentary History of England, p 250; Hearn's Government of England*, 1st. *Ed. p.* 423). The Attorney-General agreed that the prerogative, if it existed, was vested in the Sovereign. He should go further and say that it can only be exercised by the Sovereign. (*Chitty on Prerogatives, p.p.*4, 9.) The case of prohibiting a foreign sovereign or ambassador who is prohibited from entering the kingdom, or expelling him after he has entered, does not apply to a subject of that foreign Sovereign, *Wheaton (pp.39, 437.)* The Chinese Acts and Alien Acts had abrogated the prerogative to a certain extent since, after having granted aliens certain privileges it would not be consistent with our notions of honour—and the Crown is the fountain of honour—to turn them out at a moment's notice. It was no matter whether the plaintiff was legally or illegally here. If he were illegally here he could be punished but not expelled. It was necessary to pass an Act of Parliament to expel expiree convicts who came to the colony. At any rate the Queen must exercise the prerogative personally. Counsel on the other side confounded the determination or will of the Sovereign with the executive hand that must give effect to that determination. She had to take the advice of her Ministers, but they did not supersede her. The Crown is a living potent thinking factor in our Constitution. [Higinbotham C.J.—But has not a responsible Minister implied authority to do ordinary and unimportant acts of Government without presenting his advice and getting direct authority.] It depends on whether it involves a matter of public policy. In such matter the Queen is entitled to be advised and consulted, and her authority cannot be implied. A Treaty concluded by Her Majesty's ministers would not be binding till approved of by Her Majesty. [Williams J.—Surely it would be valid if Ministers were allowed to remain in office.] The Queen was entitled to say she approved of their conduct in other respects, but not in the matter of the Treaty. Ministers of course might resign, and the Queen would have to get Ministers who disapproved of their act. [Higinbotham C.J.—Does not the doctrine that the Queen can do no wrong imply that there is no duty recognised by law apart from her responsible advisers?] They are only her agents, and she must be cognisant of every important act. She may act without the advice of Ministers or even against their advice, as in the case of the dissolution of Parliament.—Probably also she may refuse her assent to a measure (*Hearn's Government of England*, 1*st Ed. p.* 95.) In former times this prerogative was often exercised, and it either exists now or it is a further example of prerogatives being lost by disuse. The Sovereign has a duty, though it is of imperfect obligation (*Hearn 2nd Ed. pp.* 124, 127.) [Higinbotham C.J.—I know of no act done by the Sovereign who has responsible advisers for which she is amenable to human criticism or which is the legitimate subject of human judgment.] It was contended on the other side that the case of *Buron* v. *Denman* established the proposition that Ministers might act without the consent of the Crown. That is a very unsatisfactory authority, for Baron Parke in summing up to the jury told them he was very doubtful and a settlement of the case prevented a pending appeal. It is by no means clear that Her Majesty had not cognisance of the whole matter, for she must have known of the vote of a grant to Captain Denman made in Parliament. Besides, the Secretary of State might have had power to authorise and therefore ratify Captain Denman's Act under the Statutes for the Suppression of the Slave Trade, such as 6 and 7 Wm. IV. c. 6; 2 and 3 Vic, c. 73. [Higinbotham C.J.—What acts require Her Majesty's direct authority? Not every direction given to a clerk in a public office.] All public acts or acts of State policy as soon as they are challenged in any tribunal There are some matters such as directions to clerks about which there can be no doubt of Her Majesty's sanction. [Wrenfordsley, J.—According to you some acts are not void but voidable.] The next question is, can the prerogative be exercised by the local Ministers? The Governor's Commission conveyed to him certain prerogatives, namely, those of mercy and of calling and dissolving Parliament, and enjoined on him the necessity of acting on his own judgment. [Higinbotham, C.J.—Is the Commission a legal instrument? It can at any time be altered by the Royal will. Does there exist in Victoria by Statute any Constitution having responsible Government which the Royal Will cannot determine?] We have in the Act a very ample measure of Responsible Government. The Act refers to the prerogatives of calling and dissolving Parliament, of the administration of justice by the creation of a Supreme Court, and of granting the Royal minerals. Any instructions in the Commission necessarily inconsistent with the Act are of no force. The prerogatives of the Crown whether conveyed by the Act or not undoubtedly came to the colony through the Governor in whom they were vested, and he was to think for himself. He had not a mere portmanteau of prerogatives from which Ministers could take this or that at their pleasure, and neither by the Act or the Commission is the prerogative of excluding aliens given. [Holroyd J.—The prerogatives are to use your simile either in a box here or a box at home if there they can only be used on the advice of the Imperial Ministers—if here on the advice of the Colonial Ministers.] In section 37 of the act a distinction was drawn between what the Governor might do alone and what he must do by advice. For example all public officers must be appointed by advice except those who are appointed or retire on political grounds. Ministers here had less power than Imperial Ministers as the act only conveyed certain prerogatives. [Williams J.—The mention of certain of them are certainly a strong argument in your favour. Higinbotham C. J.—The Attorney-general argued that the Act must be inter-

preted as conferring all powers reasonably necessary for the administration of the law and of public affairs, in the colony.] Nothing is to be presumed as given by the Crown except what is mentioned. The case of *Barton v. Taylor*, relied on by the other side relates only to the power to maintain peace in Parliament. The Queen's assent to the Chinese Immigrants Acts may be *pro tanto* a further grant of her prerogative. By the Interpretation Act in the act the word "Governor" when used alone means the person for the time being representing the crown so he was not to act with the advice of the Ministers except when specially directed. [Higinbotham C. J.—Are not the grants in the Governor's commission void where already made by the act and illegal where opposed to it.] Lord John Russell's despatch, forwarding the Imperial Act showed that it was not intended to give us any powers which might lead to a conflict between the local and Imperial Governments. [Higinbotham C.J.—Lord John Russell stated in his despatch he would send out other instructions to the Governor to suit the altered relations; but with the exceptions of some verbal alterations they were the same now as in 1851, before the Act came into force.] Perhaps alterations were thought unnecessary. The exclusion of aliens was not of mere local concern and might lead to serious embarrassment between Imperial Government and China or France or Germany. Great Britain would have to pay the indemnity if our conduct were indefensible. [Higinbotham C.J.—A case may be on the border line and both local and Imperial to a certain extent. That would be a matter for conference and concession by the two sets of Ministers. The exercise of these two powers may be in conflict without either being annihilated.] This was clearly not a local matter. An Imperial Act was necessary in order to enable us to pass our Aliens Act dealing with naturalisation.

HIGINBOTHAM, C. J.—(His Honor, after reading the pleadings, said):—Upon these facts of the case disclosed in the pleadings and which are to be taken as admitted only as far as is necessary for the argument and determination of the questions of law raised by the pleadings, two grounds of defence distinct and distinguishable from each other have been relied on by the defendant. Before proceeding to consider the questions of law connected with these grounds, it will be convenient to notice an objection taken for the plaintiff at the outset of the argument. The defence on legal grounds to the action, in both its aspects, rests partly on the material allegation that the acts complained of were done in obedience to the instructions of Her Majesty's Victorian Government. But the pleadings are silent about any advice given by Her Majesty's Government to, or commands given to them by the Governor of Victoria, and it has been argued that it is consistent with the allegations in the pleadings that the Governor was never advised in this matter by Ministers, and did not at any time authorise or ratify their act. The Attorney-General, in the course of a luminous and powerful argument, contended that under the constitutional system of Victoria the prerogatives and powers of the Crown of England might be considered indifferently to be vested either in the Governor as the representative of the Crown or in the members of Her Majesty's Government for Victoria. If the latter hypothesis be accepted, the omission from the pleadings of a statement that advice had been given to the Governor would be of course unimportant. Upon the same hypothesis indeed, the office itself of the Governor would appear to be superfluous for the purposes of Government. But these views seem to me to involve a total departure from the analogy of the English form of government, and to be wholly opposed to the express provisions of Victorian law. In England all the prerogatives and powers of Government are lodged absolutely in the Sovereign. The Sovereign's responsible advisers have no legal power of government whatever vested in them. They have the right to advise the Sovereign, and it is their duty to obey and carry into executive act the commands of the Sovereign founded upon such advice. The Constitution Act, following the English exemplar, creates and vests in the Governor certain powers, but none in his advisers. The Governor is appointed by the Sovereign, and he derives his constitutional powers from the Constitution Act, to which the Sovereign has assented. He is therefore properly styled and regarded as the representative of the Crown in his character as the depositary of his statutory powers. Victorian Ministers are appointed by the Governor. They have no legal powers of government whatever vested in them by the Constitution Act. They have the right to exercise the function of advising the Governor as the representative of the Sovereign in the exercise of his statutory powers, and it is their duty to obey and to carry out into executive act the commands of the Governor founded upon such advice. They are styled in these pleadings "Her Majesty's Government" for Victoria, and I think they are properly so styled. They are paid salaries out of Her Majesty's Victorian civil list, and, although they do not tender advice to or receive commands from Her Majesty in person, or directly, it is they and they alone who advise and act for the representative of the Crown in this dependency of the Crown, and their executive acts, which it is within the powers of the Governor to command to be done, may properly be said to be commanded by Her Majesty as being the highest and ultimate source of all executive authority throughout the Queen's Dominions. In this view of the legal relations existing between the sovereign and her representative in Victoria and her Majesty's responsible Ministers for Victoria, the difficulty that appeared to embarrass the argument will be found to disappear, Her Majesty's Government for Victoria are responsible to the Parliament of Victoria for the acts of the representative of the Crown in Victoria. The nature of the advice given by them to the representative of the Crown is to be inferred from those acts. The advice actually given

is not announced except by the command or with the consent of the representative of the Crown. The Minister is privileged with respect to the advice given by him, and he cannot be compelled in a court of law to disclose it. The defendant's pleader appears to have exercised a wise discretion in not alleging the authority of the Governor for the acts of Her Majesty's Government. That authority will be presumed to have been given, and the allegat on if it were made, need not be proved—*Buron v. Denman*, 2 Ex. p. 190. If the allegation were made and could be traversed, the defendant might not be able to adduce evidence in proof of it. If no advice was in fact given in this case to the Governor, or if the acts done by the Victorian Government have not been in fact authorised or ratified by him, Her Majesty's representative is not without a constitutional remedy. But an act done by the responsible Ministers for Victoria in the ostensible discharge and within the apparent limits, of their functions as Ministers must be considered for all purposes, so long as Ministers are allowed to hold their offices, as the act of the Crown in Victoria, and it is properly described as having been done by the command of her Majesty.

The first defence is in the nature of a dilatory plea, and in effect denies the jurisdiction of this Court to entertain the action. The second defence claims to present an answer to the action on the merits. The first of these defences, which denies the jurisdiction of the Court, is founded upon the view that the act of the defendant, having been ratified and adopted by Her Majesty's Government for Victoria, is an act of state, and is, consequently, not cognisable by the municipal courts of Victoria. "The general principle of law was not, as indeed it could not, with any color of reason be disputed. The transaction of independent states between each other are governed by other laws than those which municipal courts administer. Such courts have neither the means of deciding what is right, nor any power of enforcing any decision they may make."—*Secretary of State in Council for India v. Kamachee Boye Sohaba*, 13 Moo. P.C., p. 75. This defence admits that the original acts of the defendant in refusing to allow the plaintiff to land in Victoria, and in preventing him from landing in Victoria, were wrongful acts, and furnish a cause of action on a wrong to the plaintiff. It asserts that such acts were by the Responsible Minister, and by Her Majesty's Government of Victoria, ratified and approved of as being acts of state. The act of adoption must be the act of the soverign power of the state, which adopts the act of the alleged wrong-doer; or, which is the same thing, it must be the act of a person authorised by the sovereign power as its agent or trustee to bind the adopting state. The act of state, in the sense in which the terms are used in the present case, may be considered to be either a challenge to war or an invitation to treat. The wrong complained of must, if reparation for it cannot be obtained in a municipal court, be the subject of a claim for compensation or redress against the sovereign of the state of which the alleged wrongdoer is a subject. The sovereign of that state, having adopted the act, must be prepared either to allow the claim, or to disallow it, and, if he disallow it, to support his disallowance by war or any other means at the command of the head of an independent state. A private dispute between the subjects of two countries may in such a case thus lead to war. The authorities which have been cited on this point show that no power short of the Sovereign, or of the agent or trustee authorised for that purpose by the Soverign can adopt an act done by a subject of the Sovereign to an alien so as to make that act an act of state, and thereby oust the jurisdiction of the municipal courts. In *Buron* v. *Denman*, 2 *Ex.* 167, the acts of the defendant in concluding a treaty with the King of the Gallinas, and firing the barracoons of the plaintiff and carrying away the plaintiff's slaves, were ratified by the Secretaries of State of the Foreign and Colonial Departments of the Imperial Government. It was held that such ratification rendered the defendant's act an act of state or an act of the Queen, for which the defendant was irresponsible. In the case of the *Secretary of State in Council of India v. Kamachee Boye Sohaba*, 13 *Moo. P.C. c.* 22, it appeared that the East India Company, which was empowered under certain restrictions to act as a sovereign state in transactions with other sovereign states of India, had by its agent seized the property the subject of the suit. It was held that the seizure was an act of arbitrary power on behalf the Crown of Great Britain by the East India Company, as trustee for the crown of the dominion and property of a neighboring state, an act not affecting to justify itself on grounds of municipal law; and that the act so done, with its consequences, was an act of state over which the Supreme Court of Madras had no jurisdiction. Is the allegation in the present case that the responsible Minister and her Majesty's Government for Victoria have ratified and approved of the acts of the defendant in preventing the plaintiff from landing in Victoria equivalent to an allegation that Her Majesty has ratified those acts? Has Her Majesty's Government for Victoria the power to advise the Crown, through its representative in Victoria, upon a question of this kind, so as to make that an act of state which, without Her Majesty's sanction and authority, express or implied, would not be an act of state? I am of opinion that these questions must be answered in the negative. Victoria, like the other self-governing British colonies, is a dependency of Great Britain. It possesses by statute law very large, and, in my opinion, almost plenary powers of internal self-government. But all the prerogatives and powers of the Sovereign are not vested by law in the Queen's representative in Victoria. Nor can all of them be the subject of advice to the Governor by the Queen's Ministers for Victoria. The prerogatives of war and peace, of negotiation and treaty, together with the power of entering into relations of diplomacy or trade and holding communication with other independent

states, to some one or all of which the power to do an act which shall constitute an act of state appears to be annexed, have not been vested in the Governor of Victoria by law, express or implied, and it is not suggested on these pleadings that all or any of these prerogatives and powers have been superadded by Royal commission or otherwise to those conferred on the Governor by statute law, so as to make the Governor of Victoria the trustee or agent of the Crown in the adoption of the act of an individual, and thus make the act the act of the Sovereign or an act of state. Even if such powers had been so super-added they would be exercisable by the Governor only as an agent or trustee of the Crown, and would not be the subject of responsible advice. The Ministers of the Crown for Victoria have not obtained the direct sanction of Her Majesty, and they could not by their own act in a matter of this kind bind the Crown. An English Minister could do so, because he acts for the Crown in respect of all its prerogatives and powers. A Minister of the Crown for Victoria cannot do so, because he acts for the Crown in respect of such powers only as are vested by law in the Governor, of which the power to do an act of state does not appear to be one. We are of opinion, for these reasons, that the act of the defendant has not been made an act of state, and that the jurisdiction of the Court to entertain the plaintiff's claim is not ousted.

The second line of defence is of a different kind. It has been contended for the defendant that his act in preventing the plaintiff from landing in Victoria was not only an act authorised and directed by the responsible Minister of his department, and afterwards adopted by Her Majesty's Government for Victoria, but that the act of the defendant was authorised by law as being an act done in exercise of an existing power or prerogative of the Crown of England to keep out or expel aliens at its discretion, and that this power or prerogative, or a power equivalent to it, had so far as it may be exercised for the safety and protection of the people of Victoria, passed by law to, and had been vested in the representative of the Crown for Victoria. If this view be sustained the facts stated raise not a dilatory plea, but a plea in bar and are a defence to the action.

The plaintiff has failed, in my opinion, to answer the authorities relied on by the defendant to show that the right to prevent aliens from landing on British soil, and to remove them after they have landed is an existing prerogative of the sovereign of England. The great preponderance of authorities both ancient and in recent times, is in favour of the defendant's view upon this question. The right is one that appears to be necessarily inherent in the sovereign power of every civilised society occupying a territory with defined limits. It is a right not unfrequently put in force at this day in several of the states of Europe. Its exercise may be irritating to individuals who are affected by it, and may weaken the comity between the States, but it is not deemed by international law to be a cause for war, or a ground of claim for compensation. The right and the duty of guarding it are recognised in the kindred institutions of the United States of America. "If any Government deems the introduction of foreigners or their merchandise injurious to the interests of their own people they are at liberty to withold the indulgence. The entry of foreigners and their effects is not an absolute right, but only one of imperfect obligation, and it is subject to the discretion of the Government which tolerates it. I am of opinion that every Government has the right, and is bound in duty to judge for itself how far the unlimited power of admission and residence of strangers and immigrants may be consistent with its own local interests, institutions, and safety."—*Kent's Commentaries on American Law*, vol. 1. p. 37-8. This right or prerogative has been undoubtedly exercised by the Sovereign of England, and its non-user in modern times in England is no evidence that the right itself has become extinct. Its continued existence, on the other hand, within the present century has been asserted by some of the most eminent English judges. The passing of the Aliens Acts affords no argument against the prerogative. These acts appear to have been enacted mainly for the purpose of improving and enlarging the means of carrying out more effectually the purpose of the prerogative. An argument against the use of this prerogative might, perhaps, be found in the fact that England, and also America, have in our own times in effect denied to China the same right to exclude foreigners from its territory which the English Crown and the American Republic claim for themselves. But the doctrine of English and American law as to the existence of the right cannot be affected by the injustice or inconsistency of the English and American Governments in practically witholding from another country the recognition of a right which they claimed for themselves.

Except for the purpose of ascertaining the nature and high authority of this prerogative, and that it is one that is essential to the security and well being of every human society, it is unnecessary, however, to consider whether the right to exclude aliens is, or is not, a continuing prerogative of the Crown of England. The question we have to determine in the present case is whether a power equivalent to this prerogative has, or has not, been vested by law in the representative of the Crown in Victoria, and can be exercised by the representative of the Crown upon the advice of his responsible Ministers. This part of the argument raises, for the first time in this court, constitutional questions of supreme importance. We are called upon for the purpose of adjudicating upon the rights of the parties in this case to ascertain and determine what is the origin and source of the constitutional rights of self-government belonging by law to the people of Victoria, and, if such rights exist, what is the extent and what are the limits assigned to them by law.

Imperial statute law is, admittedly, one source of the public—as distinguished from individual—rights of every dependency of the British Crown possessing powers of internal self-government. I think it must be added that such public rights have no other source. Our attention has been called in the argument to the commission and instructions issued by the Crown to successive Governors in Victoria, and it has been suggested that the alleged defective powers conferred on the Governor by the Constitution Act, have been supplemented by additional powers contained in those instruments. In my opinion this suggestion cannot be entertained in a court of law, which is called upon to deal with and determine a question of constitutional law. The commission and instructions to the Governor are issued by Her Majesty upon the advice of Her Majesty's Imperial Ministers. The powers and commands contained in them are always revocable by the Sovereign. Before the Constitution Statute those instruments constituted almost the only source of the authority of Government in Victoria. The Governor was then a mere agent of the Crown, and the officer of foreign service of the department of the Secretary of State for the colonies. As such agent and officer it was the Governor's single duty to exercise the powers from time to time given to him by the Crown, together with the few powers conferred on him by the Acts 13 and 14 Vict., c. 59, in conformity with and subject to the orders from time to time communicated to him by the Secretary of State. Since the Constitution Statute the Governor retains for many purposes the same legal character of an Imperial agent or officer, and is subject to similar orders. He is paid a salary out of Her Majesty's Victorian civil list, and his service can be lawfully commanded by the Crown in matters affecting Imperial interests. The relations during peace or in time of war of foreign independent states to Great Britain, so far as they may be affected by the indirect relations of such states to this dependency of Great Britain, the treatment of belligerent and neutral ships in foreign waters in time of war, the control of Her Majesty's military and naval forces within Victoria. the reservation of or assent to bills passed by the Legislature of Victoria, a subject expressly excepted by the constitution Statute from the operation of Victorian constitutional law, these and a variety of other questions by which Imperial interests may be affected, and with regard to which Victorian constitutional law does not prohibit interference by the Imperial Government, still forms subjects upon which commands may be lawfully issued to the Governor by the Imperial authorities. With reference to all such questions, the Governor is to fulfil his instructions without being controlled, and without a legal right to be assisted by the advice of Her Majesty's Ministers for Victoria. The expenses that may be incurred by the Governor in his character as an Imperial agent, would, in strictness, be chargeable upon the Imperial, and not upon the Victorian revenues. All such lawful instructions by the Crown to its agents are outside the sphere of the Victorian constitution, and do not form a part of the public law of Victoria. By the Constitution Act certain powers are granted to and vested in the Governor as the appointee or representative of the Crown, and the head of the Executive Government of Victoria. These powers constitute the sole basis of constitutional government in this colony, and in all other self-governing dependencies of Great Britain. They are not conferred by the Crown alone, but by an act of the Victorian Legislature which the Imperial Legislature authorised the Crown to assent to. They cannot be taken away by the Sovereign. The exercise of them in accordance with the Constitution Act cannot lawfully be interfered with either by Her Majesty or Her Majesty's Imperial advisers. They cannot be re-granted by Her Majesty so as to make them dependent on or revocable at the will of the Crown. The Governor in the exercise of those powers in and for Victoria is not an agent of the Crown, nor an officer of the Secretary of State for the colonies. A new and a distinct authority is conferred upon him by law on his appointment; he is created for all purposes within the scope of the Act of Victorian Legislature, the local sovereign of Victoria. This dual character of the Governor is not recognised in the Royal Commission and instructions which have been brought before us; nor in the letters patent, which, since February 21, 1879, have purported to make permanent provisions for the office of Governor and Commander in Chief in Victoria. All these instruments have been stated to be the same in substance as the commission and instructions which were formerly issued by the Crown to the Governor of New South Wales and to the Governor of Victoria, after separation from New South Wales, and before the Constitution Act came into operation. The provisions contained in them would be legal, and might be proper if they were communicated to a Governor who was only an agent of the Crown. Some of those provisions are now in my opinion void, as the powers they purport to convey have been already expressly or impliedly granted by statute law. Others are in my opinion illegal, as they are addressed to a Governor of a self-governing colony and purport to give him instructions with reference to the exercise of powers which are vested in him by statute law, and which it is his duty to exercise only in the mode provided by that law. The following are instances occurring in these instruments of grants that appear to be void :—1. The power to constitute and appoint judges and other officers. (*a*) This power has been granted to the Governor in Council by section 37 of the Constitution Act. 2. The power to convene and prorogue Parliament and to dissolve the Legislative Assembly. (*b*) This power has been granted to the Governor by section 28 of the Constitution Act. 3. The power to grant a pardon to an offender free or conditional. (*c*) The power of free pardon is, in my opinion, vested in the Governor by the Constitution Act, as being a power reasonably necessary for the administration of

criminal law in a self-governing community. The additional power of conditional pardon is vested in the Governor by the Criminal Law and Practice Statute 1864, Sections 318, 319. The following are instances of commands and authorities in the Governor's Commission, Instructions, and Letters Patent, which are, in my opinion, illegal, and contravene the express or the implied provisions of the statute law. 1. The command to do and execute all things that belong to his office, according to orders and instructions given under the sign manual, or by Order in Council, or by the Secretary of State (*d*). The instructions to consult the Executive Council in all but excepted cases (*e*). 3. The authority to act in opposition to the advice given to the Governor by the members of the Executive Council, if in any case he deem it right to do so, and to report thereon to the Crown (*f*). 4. The commands and authorities relating to the regulation of the power of pardon in capital cases (*g*). 5. The instructions relating to the terms of appointment of judges, justices, and other officers (*h*). 6. The command not in any case to make it a condition of pardon or remission of sentence that the offender shall absent himself or be removed from the colony (*i*.) The power to make this a condition of pardon or remission belongs to the Governor by statute law, "The Criminal Law and Practice Statute 1864," section 318; and the exercise of such power, if it be advised by Her Majesty's responsible Ministers for Victoria, cannot, in my opinion, lawfully be prohibited by Her Majesty. No cause has contributed in nearly the same degree to the general imperfect understanding, and the long conflict of educated opinion on the subject of the origin and source and the nature of Victorian constitutional law, and to the irregular and disturbed exercise of the functions of constitutional government in Victoria as the constant and still continuing claim of the Imperial Government to interfere, by means of instructions, with the independence of the Queen's representative. Dishonour is done to the Crown when it is advised to make grants of powers that are void, and to issue instructions that are illegal. Grievous injustice is done to the representative of the Crown who comes to the seat of his Government misinstructed in his duties and powers, and is required to undertake obligations which he ought not and cannot and does not fulfil. The embarrassments and difficulties in the administration of the affairs of government that have sprung from the same cause, and the unregarded protests of one branch of the Victorian Legislature, and matters of Victorian public history affecting the whole people, of which a court of law may take cognisance. (*k*) It is the duty of Victorian statesmen to protect the law of the constitution from unlawful interference. It is the duty of a judge of this court, in my opinion, when occasion requires, to declare that such interference is unwarranted by law, and that all instructions by her Majesty or the Secretary of State to the Governor of Victoria, not authorised by law, are, even when they are not expressly forbidden by law, outside the law of the constitution and cannot be appealed to to explain or add to or detract from that law, or to restrict its free operation. Putting aside all such instructions as I conceive that we are bound for the purposes of the present inquiry to do, we are compelled to the conclusion that in the Constitution Act as amended and limited by the Constitution Statute, and in that act alone we must look for the legislative grounds of the self-governing powers of this people. If those powers are not to be found there, or cannot be ascertained and defined with reasonably sufficient certainty upon view of that act

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(*a*) Letters Patent, dated 21st February, 1879. "VIII. The Governor may constitute and appoint, in our name and on our behalf, all such judges, commissioners, justices of the peace, and other necessary officers and Ministers of the colony as may be lawfully constituted, or appointed by us."

(*b*) Letters Patent, dated 21st February, 1879. "XI. The Governor may exercise all powers lawfully belonging to us in respect of the summoning, proroguing, or dissolving any Legislative body which now is, or hereafter may be established, within our said colony."

(*c*) Letters Patent, dated 21st February, 1879. "IX. When any crime has been committed within the colony, or for which the offender may be tried therein, the Governor may, as he shall see occasion, in our name and on our behalf, grant a pardon to any accomplice in such crime who shall give such information as shall lead to the conviction of the principal offender, or of any one of such offenders, if more than one; and further, may grant to any offender convicted in any court, or before any judge or any magistrate within the colony a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on any such offender, or any reprieve of the execution of such sentence for such period as the Governor thinks fit; and further, may remit any fines, penalties, or forfeitures due or accrued to us."

(*d*) Letters Patent, dated 21st February, 1879. "II. We do hereby authorise, empower, and command our Governor and Commander-in-Chief (hereinafter called the Governor) to do and execute all things that belong to his said office, according to the tenor of these our letters patent, and of such commissions as may be issued to him under our sign manual and signet, and according to such instructions as may from time to time be given to him under our sign manual and signet, or by our order in our Privy Council, or by us through one of our principal Secretaries of State, and to such laws as are now or shall hereafter be in force in the colony."

Commission, dated April 11, 1884—"II. And we do hereby authorise, empower, and command you to exercise and perform all and singular the powers and directions contained in our Letters Patent bearing date at Westminster, the 21st day of February, 1879, constituting the said office of Governor and Commander-in-Chief, according to such orders and instructions as our Governor and Commander-in-Chief hath already received, or as you may hereafter receive from us."

(*e*) Instructions, dated 21st February, 1879.—"VI. In the execution of the powers and authorities granted to the Governor by our said Letters Patent, he shall in all cases consult the Executive Council, excepting only in cases which are of such a nature that, in his judgment, our service would sustain material prejudice by consulting the said council thereupon, or when the matters to be decided are too unimportant to require their advice or too urgent to admit of their advice being given by the time within which it may be necessary for him to act in respect of any such matters. In all such urgent cases he shall at the earliest practicable period communicate to the said Council the measures which he may so have adopted, with the reasons thereof."

(*f*) Instructions, dated 21st February, 1879.—"VII. The Governor may act in the exercise of the powers and authorities granted to him by our said letters patent in opposition to the advice given to him by the members of the Executive Council if he shall in any case deem it right to do so, but in any such case he shall fully report the matter to us, by the first con.

venient opportunity, with the grounds and reasons of his action.

(*g*) Instructions, dated 21st February, 1879.—"XI. Whenever any offender shall have been condemned to suffer death by the sentence of any court, the Governor shall call upon the judge who presided at the trial to make to him a written report of the case of such offender, and shall cause such report to be taken into consideration at the first meeting thereafter which may be conveniently held of the Executive Council, and he may cause the said judge to be specially summoned to attend at such meeting, and to produce his notes thereat. The Governor shall not pardon or reprieve any such offender unless it shall appear to him expedient so to do, upon receiving the advice of the said Executive Council thereon; but in all such cases he is to decide either to extend or withhold a pardon or reprieve, according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise; entering nevertheless on the minutes of the said Executive Council a minute of his reasons at length, in case he should decide any such question in opposition to the judgment of the majority of the members thereof."

(*h*) Instructions, dated 21st February, 1879:—"13. All commissions granted by the Governor to any persons to be judges, justices of the peace, or other officers, &c., shall, unless otherwise provided by law, be granted during pleasure only."

(*i*) Letters Patent, dated 21st February, 1879:—"9 . . . . Provided always that the Governor shall in no case, except where the offence has been of a political nature unaccompanied by any other grave crime, make it a condition of any pardon or remission of sentence that the offender shall absent himself or be removed from the colony."

(*k*) An address to the Governor of Victoria (Sir Henry Manners-Sutton) was moved by Sir James McCulloch and adopted by the Legislative Assembly on June 4, 1868, with reference to a despatch of the Duke of Buckingham (the Secretary of State for the Colonies) to the Governor, dated January 1, 1868. The following passage occurs in the address.—"Our attention has been directed to an official communication from the Secretary of State for the Colonies, published by your Excellency's authority, in which the Secretary of State on the part of Her Majesty's Imperial Government, suggests or directs that your Excellency should not recommend the vote to Lady Darling to the Legislative Assembly except on a clear understanding that the grant would be brought before another branch of the Legislature in a particular form. Entertaining, as your Excellency is aware we do, feelings of profound and devoted loyalty to Her Majesty, and of attachment to the Queen's supremacy over this portion of her dominions, we are constrained to inform your Excellency that we regard this communication from Her Majesty's Imperial advisers as a violation of the constitutional rights of the Legislative Assembly, and as a dangerous infringement of the fundamental principles of that system of responsible government which has been secured to the people of Victoria by an act of the Imperial Parliament. We inform your Excellency that no understanding upon this subject will be entered into with your Excellency by us or by our authority, and that we reserve for free discussion and final settlement within this chamber the question of the form of the grant to Lady Darling and of all our other grants to the Crown."

The following resolution was passed by the Legislative Assembly on December 22, 1869. See Parliamentary debates, vol. 9, page 2670-1. "That the official communication of advice, suggestions, or instructions by the Secretary of State for the Colonies to Her Majesty's representative in Victoria on any subject whatever connected with the administration of the local government, except the giving or the withholding of the Royal assent to, or the reservation of bills passed by the two Houses of the Victorian Parliament, is a practice not sanctioned by law, derogatory to independence of the Queen's representative, and a violation both of the principle of responsible government, and of the constitutional rights of the people of this colony." It does not appear that any notice was taken by the Imperial Government of either of these protests. The illegal claim of the Imperial Government referred to in the address has never been withdrawn. The practice condemned in the resolution remains unaltered.

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alone, I think it must be conceded that they have no existence.

That some powers of self-government were intended to be created and have been created by the Constitution Act, has never been questioned. That these powers, apart from the powers of legislation, have operation and effect by means of the responsibiltty to the Parliament of Victoria of Ministers or servants of the Crown for the exercise of the powers of the Crown in Victoria, is a further proposition that has never come within the range of controversy legal or political. What is the extent of those powers, and what are the limits assigned to them by the Constitution Act? What are the powers vested by the Constitution Act in the representative of the Crown in Victoria for the exercise of which Ministers of the Crown are responsible to the Parliament of Victoria? Are those powers together with that responsibility limited to some only of the acts of government necessary for the administration of law, and of the domestic affairs of the people of Victoria? Or do those powers with consequent responsibility extend to all such necessary acts of government? Has the Constitution Act created a partial system of responsible Government only, or has it created a complete organic system of responsible Government co-extensive as regards all the functions of administration of affairs by Government, with the large powers of control and supervision which the Parliament of Victoria possesses, in addition to its powers (Section 1) "to make laws in and for Victoria in all cases whatsoever"? We have now to consider what is the true answer to give to these momentous questions. I believe that that answer may possibly depend upon the extent which may be permitted to the field of judicial vision. If we are bound to confine our inspection to the Constitution Act and the Constitution Statute alone, the answer possibly may be, that the Legislature has created powers and responsibilities for their exercise in certain cases only, limited in number and so far disconnected with one another as to furnish ground for doubts whether we can safely conclude that the Legislature intended to establish in Victoria a general system of responsible government. But we are bound, in my opinion, in trying to arrive at the meaning of these acts, and at an exact conception of their scope and objects, to consider the history and external circumstances which led to their enactment, and for that purpose to consult any authentic public or historical documents that may suggest a key to their true sense. The general rule that the Parliamentary history of an enactment is not admissible to explain its meaning, has been not unfrequently departed from in cases where the framer of a bill is known to have had special qualifications for his task. And there is authority for believing that English judges of the present day might in such a case not refrain from consulting the authorised re-

port of a speech in Parliament, even though they should be reluctant to admit it if presented for their consideration in argument in court. (See per Bramwell L.J. in *The Queen* v. *Bishop of Oxford*, 4 Q.B.D. at p. 550.) In the present case I think that, while we are bound to consult the few available public documents, and to regard the rules and practice of the Imperial Parliament so far as these have been embodied in the Constitution Act, we are not forbidden to look at the authorised and authentic report of the words of the distinguished author of the bill during the discussion in the Legislative Council on the second reading. And if, with the light thrown upon it from all these sources, we can regard the Constitution Act from the point of view from which its framers regarded it, I believe that we shall be led to the conclusion, that it was the intention of the Legislative Council to provide a complete system of responsible government in and for Victoria, and that that intention was carried into full legislative effect with the knowledge and approval and at the instance of the Imperial Government by the Constitutional Statute passed by the Imperial Parliament.

The form of both the Constitutional Statute and the Constitution Act, and the title and preamble, and the subsequent provisions of the Constitution Act, present on their face peculiarities which require explanation. Without some explanation, I believe that the real and full meaning and the true intention of the Legislative Council in passing the Constitution Act cannot be surely ascertained or confidently determined. The means of satisfactory explanation are greatly deficient. The measure was one that was to have a supreme and enduring influence upon the whole future of Victoria. To adopt the words used by Mr. Robert Lowe, a competent observer in the House of Commons, it was a bill "upon which would ultimately depend the destinies of the noblest dependency of the British Crown." But the obscure and apparently disjointed clauses of the bill itself, pregnant though they appear to be with deep but suppressed meaning, are almost the only authoritative source from which a part and a part only of the general design of the framers of this the national charter of Victoria, can be ascertained. "*Incuriosi suorum*" "heedless of their own labours," is a descriptive term that must be applied, not in the original reproachful sense, but in one full of regret, to the pioneers of Victorian legislation. They were so fully engaged in the great work of laying the foundations of law for a nation that had been suddenly called into existence, that they seem to have been unaware of the far-reaching consequences of their chief act of legislation, and to have made no effort to commemorate it, or to commend their work by any enduring record to the understanding of the people of Victoria in the future. The community at the time was apathetic, and almost wholly uninformed on all political subjects. In this place, and by the members of the profession of the law, it is not, and I hope it never will be forgotton, that the foremost *longo intervallo*, of the pioneers of Victorian legislation foremost in capacity, in public spirit, and in unselfish devotion to exacting duties and to unremitting and stupendous labours, was he who afterwards as Chief Justice of this court administered for 29 years the general body of Victorian laws most of which he had himself designed, prepared, and carried into legislative effect. The fact that Mr. Stawell drafted the Constitution Bill and carried it through the Legislative Council is a fact of which I feel that I am at liberty to take cognisance, and it is a fact which imposes on me, and on every judge who may with me allow himself to notice it, a special duty to seek diligently until we find that of which the name of its author guarantees the existence, namely a rational and consistent meaning and purpose in the whole and in all parts of the measure. The title of "The Constitution Act" is ambiguous. "The Constitution "proposed to be established may mean a constitution of the Houses of Legislature or a constitution of a system of government, or it may include both those meanings. The preamble also is obscure. It recites in terms from 13 and 14 Vict., c. 59, sec. 32, the authority which gave the Legislative Council jurisdiction to pass the act. It then proceeds to recite that it is expedient to establish separate Legislative Houses, "and to vest in them as well the powers and functions of the Legislative Council now subsisting (so much had been authorised by the recited act) "as the other and additional powers and functions hereinafter mentioned." The district of Port Phillip was separated from New South Wales, and was erected into a separate colony by the recited act 13 and 14 Vict., c. 59, which was passed on August 5 1850. The powers and functions of the Legislative Council created for Victoria by that act, and as the Legislative Councils authorised by the act to be created in Van Diemen's Land South Australia, and Western Australia, extended to the making of laws for the peace, welfare, and good government of those colonies respectively. They did not intend to allow of interference by the Legislative Council in any manner with the sale or other appropriation of lands belonging to the Crown or of the revenue thence arising (Section 14.) By this act large powers of self-government, restricted, however, by limits placed on the legislative and appropriating functions of the Legislative Council, were conferred on all these colonies. The act itself suggested by the recited section 32 an enlargement of those powers for all Australian colonies, including New South Wales. The act was regarded by the Imperial Government as only the foundation "upon which might gradually be raised a system of Government founded on the same principles as those under which the British Empire has risen to greatness and power" (*l*) Accordingly, communications were soon opened between the Imperial Government and the Government of New South Wales respecting the terms upon which the larger powers of self-government should be conceded to that and to the other Australian Colonies. The principal term claimed by

(*l*) See despatches of Earl Grey to Sir Charles Fitzroy, dated August 30, 1850.

New South Wales was assented to by one Secretary of State for the colonies, and was "cordially adopted" by another Secretary of State, the successor in office of the first. It was, that in return for a civil list to be granted by one colony to Her Majesty, the administration of the waste lands of the Crown and the entire management of all its revenues should be surrendered to the colonial Legislature (m). "The same concession, on the same terms," was offered by the Imperial Government to Victoria, "with no hesitation" (n). The offer was readily accepted by Victoria, and "the additional powers and functions" thus agreed upon were proposed to be enacted by two clauses in the Constitution Bill, corresponding with sections 54 and 55 of the Constitution Act. By the first of these clauses it was provided that it should be lawful for the Legislature of Victoria to make laws for regulating the sale, letting, disposal, and occupation of the waste lands of the Crown within the colony, and of all mines and minerals therein. By the second clause it was provided that all the consolidated revenue arising from taxes, duties, rates, and imposts levied by virtue of an act of the Legislature, and from the disposal of the waste lands of the Crown under any such act made in pursuance of the authority therein contained, should be subject to be appropriated to such specific purposes as by any act of the Legislature should be provided in that behalf. It was beyond the power of the Legislative Council to pass, or of the Queen to assent to, a bill containing either of these clauses. This fact was known to the Legislative Council, and the bill was admitted by the Attorney General to be one beyond its power to pass, It was necessary that an Imperial Act should be passed repealing existing laws relating to the waste lands of the Crown, before the Constitution Bill could become law. This was done, the Imperial Government having first altered some of the other provisions of the bill relating to the reservation of and assent to bills, by the Constitution Statute 18 and 19 Vict., c. 55, passed on July 16, 1855, by which Her Majesty was enabled "to assent to the Bill as amended of the Legislature of Victoria to establish a constitution in and for the colony of Victoria." The Constitution Act containing these new powers and functions gave plenary powers of self-government, by legislation to the two houses of the Victorian Legislature. The increased powers of the Legislature under the Act led to and necessitated the far larger change introduced by the same act into the system of government in Victoria, by the application to the enlarged functions of government of the new principle of responsibility.

It is due to the framers of the Constitution Act that we should remember the difficulties of the task they undertook. That task was to put into written words the unwritten law of the English constitution. The English constitution consists, as regards some of its functions that are in constant and more active operation, of practice established by long use and precedents founded on principles that are in many instances unsettled or disputed. Of the difficulty that must present itself to draftsman's mind on the side of the law of legislature from this cause the theoretical dispute still existing between the House of Commons and the House of Lordsas to the right of control of taxation and finances is a striking illustration. A different and an additional difficulty would present itself in the attempt to give legal expression to the actual law of the English constitution with respect to the principles of government in England. The English constitution does not recognise an existing and by far the most powerful factor in the administration by government of national affairs. The Privy Council of Her Majesty is the only advising body of the Crown known to the law. The Prime Minister, without whose authority the Privy Council cannot in fact be convened, is not a person known to the law. The Cabinet or acting committee of the Privy Council of the Sovereign and the responsibility of that body to Parliament are unrecognised facts. The framers of the Constitution Act may have thought this latter difficulty quite insurmountable. They adopted the curious and very hazardous expedient of attempting to enact in a written law by means of allusion's suggesting inferences rather than by express enacting words, the provisions not only unwritten but unrecognised by English law which regulate and determine the formation and action and the conditions of existence of Government in England. Thus we find in the Constitution Act that mention is frequently made of the Executive Council, though nothing is said about its constitution. The Cabinet is not once mentioned. The words "responsible officers" occur once in a schedule (schedule D, part 7). The words "responsible officers" might be detected in the marginal notes, but we are bound on the present inquiry to bandage our eyes, and not to see them. The object of establishing responsible government, which we might expect to find set forth in the preamble, is not there or anywhere stated. The nature of responsible Government is nowhere described. The extent of its application is nowhere expressly declared. That it was the intention of the Legislative Council to establish by law a complete system of responsible government as an essential organic part of the self-governing scheme of the Victorian constitution is a fact about which an historic doubt cannot be entertained. Mr. Stawell, the Attorney-General, and draftsman of the bill, addressing the Legislative Council on the second reading of the bill, said, "I take it in the present case that the main principles involved in this bill are simply these—Two Chambers, both elective, and a responsible Government" (p). The system itself has

(m) See despatch of Sir John Packington to Sir Charles Fitzroy, dated December 15, 1852; and despatch of the Duke of Newcastle, to Sir Charles Fitzroy, dated January 18, 1853.

(n) See despatch of Sir John Packington, to Lieutenant Governor Latrobe, dated December 15, 1852,

(o) See debate in the Legislative Council on the second reading of the new Constitution Bill, by Geo. H. F. Webb, assistant shorthand writer to the Council, page 66.

(p) See debate on the second reading of the new Constitution Bill, by Geo. H. F. Webb, assistant shorthand writer to the Council, page 68 and 69.

been in full, though obstructed operation, in Victoria for all but the third part of a century. Nevertheless, we must now give answer to the question demanded f us, and say whether that intention has been expressed in the Constitution Act, or whether the national life and history of Victoria from the first has not been based upon an illusion. In order to answer this question, we must examine the terms of the Constitution Act itself. Powers and functions of various kinds are created in the Governor by 15 sections of the act. See sections 6, 8, 28, 32, 34, 35, 37, 38, 49, 51, 53, 57, 58. and 59. One of these powers is expressly vested in the Governor alone—namely, "the appointment of the officers liable to retire from office on political grounds," section 37. The officers here mentioned are clearly responsible officers or Ministers. The means by which their responsibility to Parliament is secured are provided for in section 18, which requires that four at least of their number shall be members of the Council or Assembly. The officers filling the same offices are after the coming of the act into operation, or whose offices may be abolished under the power given to the Governor in section 48, are described in Schedule D, part 7. as "persons who may accept responsible offices, and retire or be released therefrom on political grounds." These provisions must plainly, in my opinion, though indirectly, give adequate expression to an intention of the Legislative Council that the principle of responsible government should be established by law. In contrast with this power of appointment of responsible officers, which is vested in the Governor "alone," all other powers and functions are vested either in the "Governor" or in the "Governor and Executive Council" (sections 49, 51, and 53), or in "the Governor with the advice of the Executive Council" (section 37). The provisions in these last-mentioned sections appear to apply to cases where, in addition to the advice, assistance, and approval of the responsible Ministers, the nature of the power to be exercised seems to require that that exercise should be formally recorded or publicly announced. There is no indication in the act that it was designed to create a single power or function in the Governor except the power of appointing his Ministers, as a personal power to be exercised on his own individual judgment or discretion, or otherwise than in accordance with the advice of those whom he selects to advise and carry into act and operation the constitutional exercise of the powers given to him by the statute law as the appointee and representative of the Crown. The Imperial Government has never, I believe even in the boldest of its attempts to interfere illegally with the Victorian constitution, suggested that the Governor ought to exercise any of the statutory powers without receiving the advice of Her Majesty's Government for Victoria. It has only asserted for itself the right to disregard that advice and to order the Governor as its officer to act in defiance of it (q). I think that the rule of responsibility applies to everyone (if to any) of the powers of the Crown created by statute in the Crown's representative, the Governor, and that none of them can be lawfully exercised except through and by the advice, or with the knowledge and approval, of the responsible Ministers appointed by the Governor. What are those powers? Some of them are merely formal, and their exercise and the approval of Ministers would ordinarily be a matter of course. (See sections 8 and 32.) Others are of a very different nature. Thus the appointment to public offices (section 37), including the general control of the public service, is a power not only of the highest importance, but of a very large scope. Again the power of convening and proroguing Parliament and of dissolving the Legislative Assembly (section 28) is one of large significance, and the exercise of it, undisturbed by any external influence, by the Ministers whom the Governor is pleased to retain in the service of the Crown as his advisers, is a matter of moment to the whole community, as well as to political parties and the movement of opinion in Parliament. Sections 57 and 58 indicate, in my opinion, more clearly than all the others the intended scope and the legal and actual extent of the principle of responsible government established by the Constitution Act. It is from the powers of the Crown, express and necessarily to be implied from these sections, as well as from the powers of control over the public service granted by section 37, that all the ordinary general functions of responsible government spring. From those powers the legal existence and the rightful exercise of those functions may, and in my opinion must, be inferred. It has been seen that the Legislature obtained by the act not only the right to dispose by legislation of the waste lands of the Crown, but also the control, for the use and benefit of the people of Victoria, by means of appropriation for specific purposes, of all the consolidated revenues derived from that and all other sources. This power covers directly and indirectly the whole field of Parliamentary action outside the field of general legislation. Section 57, adopting a rule of the House of Commons respecting its grants of money for the public service gives to the Crown, in the person of the Governor, powers equally extensive in their field of operation, and theoretically even greater than those which either or both Houses of Parliament can claim in theory over the sources and the application of the public revenues. By this section the Legislative Assembly is prevented from making a grant of the smallest amount to the Crown or of imposing a burden of the lightest tax on the subject until the Governor by message recommends the Legislative Assembly to do it. By section 58 the revenue appropriated by an act of the Legislature is prevented from being issued and applied to the purposes for which it has been appropiated until a warrant under the hand of the Governor authorising the issue has been directed to the ublic Treasurer. In both

(q) See despatch of the Duke of Buckingham to Sir Henry Manners-Sutton, Governor of Victoria, dated January 1, 1868.

cases in the sending of the message and in the signing of the warrant, the Governor is guided by the advice of his responsible advisers. These express powers given to the Crown are in theory of great magnitude. They devolve in theory and in fact upon the Government peculiar and most important functions. The Government of Victoria, like the Government of England, in this way has the duty cast upon it of determining by an initial and provisional appropriation to what purpose the public revenues shall be applied by what taxes they shall be raised or increased and at what times and in what manner after they have been appropriated by an act of the Legislature, they shall be issued and applied. In the exercise of these functions the Government of Victoria, like the Government of England, has to consider and determine beforehand what provisions must be made, and what acts must be done for the proper administration of law and the prudent conduct of public affairs, and generally for the peace, the security, the safety, and the welfare of the people. We violate no rule of legal construction, in my opinion, in holding that the Government of Victoria possesses by virtue of the Constitution Act, in the exercise of this the most proper function of a Government constituted as ours is, all the powers reasonably necessary for the proper exercise of this function. The rule of interpretation relied on by the plaintiff, *expressio unius alterius exclusio*, is of limited application. It is not to be applied in construing any instrument where the general intention of the instrument appears to forbid its application. In cases where it is properly applied, it does not operate to exclude powers that must be reasonably implied from the very words of the instrument by which express powers are created. (See per Lord Selborne, in *Barton v. Taylor*, 11 App. Cas., at p 207 and *Price v. Great Western Railway Company*, 16 M. and W., p. 244.) The common law rule, *Quando lex aliquid alicui concedit concedere videtur. et illud sine quo res ipsa esse non potest,*" on the other hand, is a rule which is founded on necessity, and is therefore of universal application. It is limited only by the necessity in which it has its origin. This rule justifies us, in my opinion, in holding that the Government of Victoria, as constituted by the Constitution Act, possesses by virtue of that law the power to do any act which it would be competent for the Legislature of Victoria to sanction, and which ordinarily is or may under special circumstance at any time become, reasonably necessary to its existence as a body constituted by law, or to the proper exercise of the functions which it is intended to execute. (See *Doyle v. Falconer*, L.R., 1 P.C., p. 328 ; *Barton v. Taylor*, 11 App. Cas., p. 197). The question whether the power to do a particular act could ordinarily be, or might under special circumstances become, reasonably necessary for the Government to possess and exercise, would, I think, present a question of law to be determined by the Court. The question whether the power to do such act is in fact, or has become reasonably necessary to exercise, must always be determined by Her Majesty's Government, who are responsible, not to this Court, but to Parliament, for the exercise of the power as well as for the mode in which it has been exercised.

I will sum up the conclusions in which my mind abides after a careful re-examination of the vitally important questions which have been brought under our notice in the second division of this case. And I will first acknowledge that the Court is much indebted to the learned counsel on both sides, who have argued a case full of difficulties, and involved in great obscurity, with distinguished ability, and have given us the results of their very extensive legal researches. I am of opinion, first, that the Constitution Act, as amended and limited by the Constitution Statute is the only source and origin of the constitutional rights of self government of the people of Victoria ; second, that a constitution, or complete system of government, as well as a constitution of the Houses of Legislature, was the design present to the minds of the framers of the Constitution Act, and that that design has found adequate, though obscure, legal expression in that act ; third, that the two bodies created by the Constitution Act, the Government and the Parliament of Victoria, have been invested with co-ordinate and interrellated, but distinct functions, and are designed on the model of the Government and Parliament of Great Britain to aid each other in establishing and maintaining plenary rights of self government in internal affairs for the people of Victoria ; fourth, that the Executive Government of Victoria, consisting of Ministers of the Crown, are responsible to the Parliament of Victoria for the exercise of all the powers vested by the Constitution Act in the Governor as the representative of the Crown in Victoria, and that they and they alone have the right to influence, guide, and control him in the exercise of his constitutional powers, created by the Constitution Act ; fifth, that the Executive Government of Victoria possesses and exercises necessary functions under and by virtue of the Constitution Act, similar to and co-extensive, as regards the internal affairs of Victoria, with the functions possessed and exercised by the Imperial Government with regard to the external affairs of Great Britain. Sixth—That the Executive Government of Victoria in the exercise of the statutory powers of the Governor express and implied and in the exercise of its own functions, has a legal right and duty, subject to the approval of Parliament, and so far as may be consistent with the statute law and the provisions of the treaties binding the Crown, the Government, and the Legislature in Victoria to do all acts and to make all provisions that can be necessary, and that are in its opinion necessary and expedient for the reasonable and proper administration of law, and the conduct of public affairs, and for the security, safety, or welfare of the people of Victoria.

It now only remains to consider whether her Majesty's Government for Victoria had the legal right to refuse to permit the plaintiff to land in Victoria, and to prevent and hinder him from landing. In the view I take of the legal and constitutional powers and

functions of the responsible Ministers of the Crown in Victoria, I think that this question should be answered in the affirmative. The right to exclude alien foreigners is a right that must be considered to be inherent in the constituted government of every independent state, and also, I think, in that of quasi-independent state like Victoria. The exercise of this right is not forbidden to us by any rule of international law. If it were, it would have to be admitted that an act in contravention of such a rule, and constituting a cause of war, between the parent state of Great Britain and another independent state would be an act beyond the powers of the Government of this or any other dependency of the British Crown. It is not alleged in the pleadings in this case, nor has it been suggested in argument that the exercise of the right to exclude Chinese alien foreigners as a violation of the provisions of any of the treaties existing between Great Britain and China. It has been contended, but in my opinion unsuccessfully, that the exclusion of the plaintiff from Victoria by the act of Her Majesty's Government is a violation of a statutory contract right of the plaintiff given to him by the provisions of the Chinese Immigrants' Statute 1865, and the Chinese Act 1881. I have had the advantage of reading the judgment of my brother Kerferd I concur with the views he entertains upon this part of the case, and I desire, with his permission, to adopt his reasons as a portion of my own judgment. It appears to me to be beyond doubt that the exercise by the Government of Victoria of the right to exclude alien foreigners in an act that may be necessary to be done in a variety of possible cases by the Government of Victoria for the security, safety, peace, or welfare of the people of Victoria. The facts disclosed in this case and the further fact of the proximity of Victoria to the French convict settlement of New Caledonia, suggest that it is highly probable that it may be necessary in the existing circumstances of the present day to exercise this power in Victoria at any moment. The proof of the existence of a legal right to do the act complained of by the plaintiff is completed, in my opinion, by the allegation that Her Majesty's Government for Victoria, in the discharge of its constitutional function—a function I will repeat the exercise of which this Court has no jurisdiction to review or to question—did in fact form the opinion and determination that it was necessary for the public peace that no further Chinese other than British subjects should be permitted to land in Victoria.

My decision is in favour of the defendant upon the questions of law raised on the pleadings which constitute in my opinion a good defence to this action on the merits, and I am consequently of opinion that judgment in the action ought to be entered for the defendant, with costs to be taxed. I have the misfortune—my sense of which I could not adequately express in words—to differ in opinion as to a part of this case from the majority of my brother judges. The decision of the Full Court is in favour of the plaintiff, and judgment will accordingly be entered for the plaintiff, with damages, if any, to be assessed, and costs to be taxed, as provided in the order.

Kerferd J.—The short question we have to consider is whether paragraph 4 of the defence is an answer to the plaintiff's claim. Paragraph 4 may be conveniently divided into two parts, each of which raises a separate defence—the first part dealing with the statute law on our statute book relating to the Chinese, and the second part involving the consideration of the constitutional powers conferred upon the Government of Victoria. Dealing first with the statutable provisions relating to the Chinese, it was admitted for the purpose of the argument that the master of the British ship Afghan brought 268 Chinese to the colony, that that number was in excess of the tonnage allowance under section 2 of the Chinese Act of 1881, No. 723, and also that the master tendered, on behalf of the plaintiff, to the defendant as collector of Customs the sum of £10 for each and every of such 268 Chinese alleged to be payable under the provisions of section 3 of the said recited act, which the defendant refused to accept under the circumstances mentioned in the plea. The plaintiff complained that he suffered wrong in being deprived of his statutory right, as he said, of being allowed to land in Victoria on payment of the £10, and therefore claimed damages. It was contended for the plaintiff that he could not be said to be illegally in the territory when he was willing to pay the £10; that the law as to the number of Chinese that were allowed to come in any vessel only affected the master of the vessel; that no matter how the plaintiff got here, when he was ready to pay the poll-tax it ought to have been accepted; and finally, that the Chinese Act of 1881 did not prohibit and say that Chinamen shall not come into the colony in greater numbers than one for every one hundred tons of the ship's register, but that if a ship came into the colony with a greater number than was therein specified, the captain rendered himself liable to a penalty. It was further contended on behalf of the plaintiff that Section 3, which provides—"Before any immigrant arriving from parts beyond Victoria shall be permitted to land from any vessel, at any port or place in Victoria and before making any entry at the Customs, the master of the vessel by which such immigrant shall so arrive shall pay to the collector or other principal officer of Customs the sum of £10 for every such immigrant, &c.," gave to every Chinese who thought proper to come to this country a right to land upon payment of the sum of £10. The answer to this part of the case is, in my opinion, to be found in the proper construction to be placed upon the Chinese Act of 1881, No. 723, which appears in our statutes under the heading of "Chinese Immigration Restriction." If Section 3 could be taken by itself and construed as a separate legislative enactment dealing with the circumstances under which the Chinese should be permitted to land in Victoria, there

might be some force in the contention of the learned counsel for the plaintiff that he had a right to land upon satisfying the conditions of that section. I would say that the act must be construed as a whole, the same as any other written instrument would be, and that we must ascertain from its provisions what was the intention of the Legislature in passing it. The provisions of the Chinese Act 1881, which is to be read and construed with the Chinese Immigrants Statute 1865, will, I think, show that it was the design of the Legislature to impose such restrictions upon Chinese coming into Victoria by sea as to prevent the possibility of their coming in large numbers at any one time, and to prevent what might be called a "Chinese immigration" by restricting the number of Chinese that can come in any vessel to such an insignificant number as not to make it worth the while of any vessel carrying passengers only to bring them. Section 2 provides—"If any vessel having on board a greater number of immigrants (within the meaning of the Act, No. 259) than in the the proportion of one such immigrant to 100 tons of the tonnage of such vessel shall arrive at any time in any port of Victoria, the owner, master, or charterer of such vessel shall be liable on conviction to a penalty of £100 for each immigrant so carried in excess of the foregoing limitation." Section 8 provides—"Any vessel on board which immigrants shall be transhipped from another vessel, and be brought to any port or place in the colony, shall be deemed to be a vessel, bringing immigrants into the said colony from parts beyond the said colony, and shall be subject to all the requirements and provisions of this Act, and all immigrants so transhipped and brought to such port or place, shall be deemed to be immigrants arriving from parts beyond Victoria." Section 8 was evidently framed by the Legislature with the intention of guarding against any evasion of Section 2 being attempted by transhipping Chinese passengers in Australian waters, because the vessel into which they are so transhipped is to be deemed a vessel bringing immigrants into the said colony from parts beyond the said colony, and it is to be subject to all the requirements and provisions of the act. Sections 5, 6, and 7 may be looked at as also showing that the legislature intended that the stringent provisions of the act should not be evaded, and therefore made provision by these sections for exemptions in certain cases. For example, Chinese who are British subjects are exempted. Chinese officials accredited at the colony by the Government of China are exempted. The crew of any Chinese vessel are permitted to go on shore in performance of their duties in connection with such vessel, but if one of them were to go on shore except in performance of such duties he would be liable to a penalty of £20. It is an ordinary rule of construction that if authority is given expressly, though by affirmative words, upon a defined condition, the expression of that condition excludes the doing of the act authorised under other circumstances than those defined, *expressio unius est exclusio alterius, per* Willes, J. (*See North Stafford Steel Company v. Ward C. R. 3 Ex 177*, and *Broom's Legal Maxims 5th Ed. 653*). I would say that the proper construction to be placed upon the Chinese statutes is that Chinese coming into this country must come in the manner prescribed by the statutes, and that everything in respect of which a penalty is imposed by statute must be taken to be a thing forbidden, though it is not expressly prohibited by the statute. If the Chinese do not ceme into Victoria in the way prescribed, they are prohibited from coming here by the act. A good deal of argument was addressed to the Court that it would be placing a harsh construction upon the statute to make the immigrants liable for the misconduct of the master in bringing them here. The master of the ship is constituted by the Chinese Act 1881, section 3, the agent of the immigrants to pay the poll tax, and what is very significant with reference to these proceedings, he must do this "before making any entry at the Customs." This provision would indicate that it was the intention of the Legislature that the master of the ship should be met at the threshold, and, if he could not satisfy the Customs authorities that he had complied with the provisions of the Chinese Act 1881, he should not be permitted to enter his ship as being in port. It will be found that this provision fits in with the Customs Act 1883, sections 66 and 71, requiring the master of every ship to report his vessel in port Both acts ensure that the Customs authorities shall be informed of the condition of the ship before she is allowed to use the port for landing her passengers and cargo. Can the Chinese immigrants dissever themselves from the master of the ship so as to be able to disavow his fraudulent acts and yet take the benefit of those acts in bringing them here? The master in bringing the passengers here, comes in their service to land them here, and he does so confessedly on the facts in this case in fraud of the Chinese Act 1881. I am not aware of any authority for the proposition that a person may take the benefit of a fraudulent act committed in his service even although it be without his knowledge or his authority. In the case of a ship running a blockade, where the owners of cargo were entirely innocent and had no knowledge of the intention of the master to run the risk. It was held that the owners of the cargo were concluded by the illegal act of the master, although it might be done contrary to their wishes and without their privity, yet as it was done in the service of the cargo the owners of the cargo could not claim to be exempt from the illegal act of the master of the ship (see *Baltazzi v. Ryder*, 12 Moore P.C.C. 168). Carriers of passengers stand no doubt on a different footing from carriers of Goods as to their right under their respective contracts, but the legal principal that a man cannot take advantage of a fraud committed in his service would apply in both cases. The principle of public policy is this—*ex dolo malo non oritur actio*; no Court will lend its aid to a man who founds his

cause of action upon an immoral or an illegal act. If from the plaintiff's own stating or otherwise the cause of action appear to arise *ex turpi causâ* or the transgression of a positive law of this country, there the Court says he has no right to be assisted." (*Broom's Legal Maxims*, page 73 *5th Ed.*) Fraud vitiates everything. In *Foster v. Mackinnon*, which was an action on a bill of Exchange, the plaintiff was the indorsee and the holder for value before maturity and without notice of any fraud. On the finding of the jury that the bill of exchange had been obtained from the defendant by fraud, the plaintiff though perfectly innocent could not recover. (L.R. 4 C.P., 704.) The plaintiff founds his claim upon the fact that he is here already and is willing to pay his £10, and he says it is immaterial that he was brought here by the fraudulent act of the Master of the ship. I am of opinion that he cannot succeed.

I should have been content to rest my judgment on the first part of the fourth plea, and say that the intention of the Legislature in passing the statutes was to prohibit the Chinese from coming into Victoria except in the manners prescribed by the act, and that the fraudulent act of the master of the Afghan in bringing Chinese into the port of Melbourne otherwise than in the way provided for by the Act would give no right of action to any Chinese on board the ship, on the ground that he was not permitted to land. But it is possible that the judgment of this Court may not be accepted by the parties. I therefore feel it to be my duty to express an opinion on the other branch of this case. It was stated by the learned counsel for the plaintiff that in dealing with this case they were treading on what was an unknown path to most of them. I am not aware of any decided cases upon the powers conferred under the system of responsible government granted to the self-governing colonies, saving those of *Dill* v. *Murphy* (1 Moore P.C.C., N.S., 487), and *Taylor*, v. *Barton* (11 Ap. Cases P.C., 197). The precise question now under consideration, however, did not arise in those cases, and as far as I have been enabled to search, there is no judicial decision on the points raised by the second part of the fourth plea. The opinion of learned text-writers were cited during the able arguments of counsel on both sides; but I would say that the extracts we were favoured with, valuable and weighty as they are, do not assist us very much in arriving at a conclusion upon the issue we have to determine—namely, what are the constitutional powers conferred upon the Government of Victoria? The second part of the fourth plea briefly sets up, as an answer to the plaintiff's claim, that the act of the defendant in prohibiting the plaintiff from landing was an act of state done by him under the authority of a responsible Minister of the Crown for the colony of Victoria. And the defendant further says that his said acts in so refusing to permit the said plaintiff to land in Victoria were by the said Government ratified and approved of as being acts of state policy. I understand that it is the substance of this plea, and not the technical form of it (which may be amended) that we have to consider. The Crown during the argument relied upon the plea being justified on the ground that it was an act of state policy, or an act done under the exercise of the Royal prerogative. Within the British dominions there are a number of states, or colonies, each having and exercising within its own territorial limits, and with regard to its own internal affairs, sovereign power, and being for all such purposes an independent governing body. But any act committed by any one of such states or colonies affecting a foreign power would be rightly regarded by such foreign power as an act of the British nation, and if the act were a *casus belli* it would have to be defended by the British nation. I do not think that the Government of Victoria can justify the act done with regard to the plaintiff as an act of state policy, unless it had been previously authorised by the Queen upon the advice of Her Imperial advisers, or ratified by such authority. An act of state policy means an act done by the British nation to an alien who would have no cause of action in any court within the British dominions in respect of such act. The plea of "act or state policy" ousts the jurisdiction of the Court when pleaded by competent authority. It was not contended that the act complained of in the statement of claim was so authorised or ratified. I am therefore of opinion that the plea that the act was an act of state policy is not any answer to the action. With regard to the second ground, that it was an act done under the authority of the Royal prerogative right of the Crown to exclude aliens, the question for our decision was narrowed down in the argument to a claim on behalf of the Crown that the Constitution Act, or the powers derived under it, must be interpreted as conferring all the prerogatives and powers necessary for the administration of the law and conduct of public affairs in this colony, including the right to exclude aliens. On the other hand, the plaintiff denies that any prerogative other than those expressly specified in the Constitution Act 19 Vic. and the Governor's commission can be exercised here by responsible Ministers of the Crown. The plaintiff further denies the existence of the prerogative to exclude aliens, and says that if it does exist it has not been extended to Victoria. The issue lies in a small compass, and the determination of it must be found in an examination of the powers contained in the constitution under which Victoria is governed. The Court takes judicial notice of the powers contained in the Constitution Act 19 Vic., and in all acts of the Parliament of Victoria, amending the same. I think it will also take judicial notice of the fact that Parliament is constituted by three branches of the Legislature—the Queen, the Legislative Council, and the Legislative Assembly—that the Governor represents the Queen, and in that capacity is the head of the Executive Government—and that Ministers of the Crown forming the Executive are

responsible to Parliament. The Court will also take judicial notice of "the law of Nations," "the law and custom of Parliament, "the privileges and course of proceedings of each branch of the Legislature," and that the privileges, immunities, and powers of both the Legislative Council and the Legislative Assembly have been defined to be powers held and enjoyed by the Commons House of Parliament of Great Britain and Ireland not inconsistent with the provisions of the Constitution Act. (See Act No. 1, vol. 3, Vic. Statutes, p. 2,395, and *Dill v. Murphy and Moore*, P.C.C., N.S., 487.) The constitution of Victoria was created by and under the authority of the Act 18 and 19 Vic. C. 55. The schedule to that act is printed in our statutes as 19 Vic., and section 60 provides that the Legislature of Victoria, as constituted by that Act, shall have full power and authority from time to time by any act or acts to repeal, alter, or vary all or any of the provisions of the said act, and to substitute others in lieu thereof. A learned writer has described, and I think accurately the Parliament of Victoria as being a subordinate yet a legislative and constituent Assembly, having power to completely change the constitution contained in the Act 19 Vic. "it is a 'subordinate' Assembly, because its powers are limited by the legislation of the Imperial Parliament; it is a constituent Assembly since it can change the articles of the Victorian constitution, (*Dicey's Law of the Constitution*, 2nd Ed., pp. 101 and 102.) Again, at page 103, the same learned author says, "The colonial Legislature, in short, are within there own sphere copies of the Imperial Parliament. They are within their own sphere Sovereign bodies, but their freedom of action is controlled by their subordination to the Parliament of Great Britain.*" The power conferred by section 60 has been largely available of by the Parliament of Victoria. The Act 19 Vic. contained originally 63 sections. Of these 18 sections have been wholly repealed. On the other hand, a number of acts moulding the constitution, so as to give full effect to responsible government, have been passed by our Parliament under the powers of the Act 19 Vic. One act I have referred to, the Act 1, declaring the privileges, immunities, and powers of he Legislative Council and the Legislative Assembly respectively to be those held, enjoyed, and exercised by the Common House of Parliament of Great Britain not inconsistant with the provisions of the Constitution Act. Another act of great importance is the Officials in Parliament Act 1859, limiting the number of responsible Ministers who may sit and vote in Parliament, and dealing with other matters. Since the Constitution Act 19 Vic. came into operation 33 years have nearly run their course, and during that time 13 Parliaments have been created and some 20 or more responsible Ministers have been appointed. It is general knowledge that during that time most serious questions have arisen involving the consideration of the constitutional powers conferred by our constitution upon the several branches of the Legislature. These questions have from time to time been determined by the unwritten law of Parliament, the *lex et consuetudo Parliamenti*. Again, the administrative acts of responsible Ministers (in the exercise of those discretionary powers of Government resting in the Royal prerogative) have been frequently challenged with respect to such acts, and Ministers have had to stand or fall by the decision of Parliament thereon. I think it will be obvious from this brief consideration of the constitutional powers which have been and are now actually exercised in Victoria that the constitution under which Victoria is governed rests on a wider basis than the actual terms of the Constitution Act Vic. 19 would appear to indicate. If the plaintiff's contention were a sound one it would follow that the prerogatives forming part of the common law, which are separate from those in connection with the Legislature, and which before and since the inauguration of responsible government have been enforced by this Court have been so enforced illegally. For if the Crown is restricted to the use of those prerogatives mentioned in the Constitution Act and the Governor's commission then all other prerogatives must be deemed to be excluded. I can find no authority in support of such a contention, but I think there is some authority the other way. "No distinction can be drawn between the rights of the Crown as regards prerogatives in this country and in the colonies wherever Her Majesty's dominions extend." (*In re Bateman's Trust*, L.R. 15, Eq 355. See also *In re Oriental Bank Corporation Exparte the Crown*, 28 Ch. D.: p. 649.) Assuming the decisions in these cases to be good law, and that the prerogatives forming part of the common law, applicable to the circumstances of this colony, were in force here before the passing of the Constitutien Act, that act must have contained express words before these prerogatives could be taken away. (See *Weymouth v. Nugent*, 3 *Moore P.C.C., N.S.*, 115; *Attorney-General v. Constable L.R.*, 4 *Ex. D.*, 174; and *Chitty's Prerogative* p. 43.) It is one of the prerogatives of the Crown that it is never bound unless named in a statute. The maxim *Expressio unius est exclusio alterius*, relied upon to support the plaintiff's contention is not of universal application, but depends upon the intention as discoverable upon the face of the instrument. (See *Saunders v. Evans*, 6 H.L., cases 729). Now, what was the intention of the Imperial Parliament in passing the Act 18 and 19 Vic., C. 55, of which our act 19 Vic. formed the schedule? Clearly to grant to the people of Victoria responsible government. A glance at the Act 19 Vic. will show that its provisions were intended to enable the Parliament called into existence to work out the necessary machinery for the purpose of giving full effect to the operation of responsible government, and that it was not intended thereby to restrict the Government to the use of the prerogatives mentioned, because there are prerogatives not mentioned which are absolutely essential to give life to responsible government. The plaintiff's contention limiting the prerogatives in

force in Victoria to those specified in the Constitution Act 19 Vic., and the Governor's commission, namely, the convocation, prorogation, and dissolution of the Assembly, the right to the royal minerals, the power to appoint courts, and the prerogative of mercy, cannot in my opinion be sustained. The system of responsible government would be utterly unworkable without the discretionary prerogative powers vested in the Crown, and which are not provided for by any statute. I shall not attempt to describe what are termed the Parliamentary prerogatives. Sir J. Erskine May in his ninth edition, page 6, says, "The prerogatives of the Crown in connection with the Legislature are of paramount importance and dignity."

I would say that all the prerogatives necessary for the safety and protection of the people, the administration of the law, and the conduct of public affairs in and for Victoria, under our system of responsible government, have passed as an incident to the grant of self-government, without which the grant itself would be of no effect, and may be exercised by the representative of the Crown on the advice of responsible Ministers. There are prerogatives of the Crown creating a right and duty of which the law must take cognisance, although the law does not enforce the performance of them. (See per Fry, J., in *Attorney-General* v. *Tomline*, 12 Ch. Div. 232.) It was held in that case that there existed in the Crown the right and duty as part of the prerogative of the Crown to preserve the realm from the inroads of the sea. The prerogative right to exclude aliens is one which the law must take cognisance of, although the law could not enforce the performance of the duty to protect the people of this country from an influx of aliens. It was contended that the prerogative right to exclude aliens is part of the prerogative of war and peace. I do not think that it is, and I think that it will be found that the right to exclude aliens has been exercised by other nations of the world who have not been at war with the country whose subject has been expelled or excluded by them. It was also contended that this prerogative had been lost by desuetude. Some prerogatives, no doubt, have become obsolete by disuse, but those prerogatives have been where the Crown exercised power which had been surrendered to or acquired by Parliament. The prerogative of excluding aliens is a power in the Crown for and the protection of the people from foreign aggression, stands on a totally different footing from those prerogatives used in the internal government of the kingdom which may have been taken away by Parliament or lost by desuetude. It was argued that by the passing of the Chinese acts the prerogatives of excluding them altogether had been taken away. I doubt whether that would be so if the Chinese had come in conformity with the Chinese Acts, the Crown not being named therein. I am perfectly clear that it is not so when they come in fraud of those acts. I have said that the Court will take judicial notice of the law of nations. Self-preservation is the first law of nations, as it is of individuals. I do not desire to refer to the opinions of learned text-writers on international law cited during the argument, but it seems beyond all question that every nation may exercise the right of excluding aliens, without giving offence to the country to which those aliens belong. As between nation and nation, it appears to me that the Government of Victoria has kept well within the rights of the British nation in excluding the Chinese, subject, of course, to any treaty obligation of which no mention was made. The question as to whether the Government of Victoria can exercise such a power is a matter between this colony and the mother country. From an international point of view the act of the Government of Victoria would be the act of the nation, and one for which the nation would have to bear any responsibility attached thereto; for example, the Shenandoah case. The Government for the time being is responsible for the peace, safety, and well-being of the community. So long as their acts are within the authority of law this Court is not concerned as to the grounds of justification for the steps taken by them. This is a matter for Parliament. I would say that the Crown of Victoria upon the advice of responsible Ministers, if they had reasonable grounds to apprehend that this country was likely to be overrun by the influx of a large number of aliens who were coming here, not for the purpose of passing through the country, but to

* The problem, which perplexed the minds of statesmen 40 years ago, of whether it would be possible to transplant a copy of the British Constitution in such of the dependencies of the empire as had outgrown the form of government which obtains in Crown colonies, must, I think, so far as Victoria is concerned, be considered as having been successfully solved. I do not think that it can be denied that we have here in Victoria responsible Government as fully as it obtains in the mother country. The Legislative Assembly of Victoria is an exact copy of the British House of Commons save as to the number of members, divisions being taken in lobbies, and the cloture standing orders. The same prerogatives are used and exercised by the Crown with regard to the proceedings in both the House of Commons and the Legislative Assembly. There is not a ceremony, procedure or form, from the opening of Parliament down to a junior clerk tying and docketing a bundle of papers when attending a select committee, in which ceremony, procedure, or form are not identical in both Houses; nor is there a privilege used, held, or enjoyed by the House of Commons which is not used, held, or enjoyed by the Legislative Assembly, modified, if at all, only to the extent necessary by the altered conditions under which they are brought into operation. Ministers of the Crown in the Legislative Assembly, when Parliament is in session, have that 'bad half hour' when questions are put, the same as Ministers of the Crown in the House of Commons. The pulse of national life beats vigorously. Information is sought, and the policy of the Government obtained with regard to every question that affects the welfare of the people. No matter which touches the people is too great for the attention of the House, and no matter is too small for its consideration if a wrong has to be righted. The Imperial Parliament is the supreme authority throughout the empire. The Victorian Parliament is the supreme authority in and for Victoria, subject only to the legislative powers of the Imperial Parliament.

settle here, and who might in course of time outnumber and dominate over the people who have made this country what it is, or who might disturb the peace of the country by coming here, have the power to exclude such persons and prevent them from landing here. With regard to the contention that the prerogatives of the Crown could only be exercised on the personal authority of the Queen, the constitutional usage which has now become a part of our constitutional law, is that the Royal prerogatives with one exception, as far as I remember, namely the right of Her Majesty to dismiss her Ministers from office, which the incoming Ministry must defend and be responsible for, can only be exercised upon the advice of the responsible advisers of the Crown, and any attempt to exercise those powers by the Queen, or by her representative without advice, would involve the resignation of her Ministers. We cannot learn, and have no right to ask in this court, whether any advice, or what advice, has been tendered to Her Majesty. She is the head of the Government here, and the presumption would be that whenever the discretionary powers of the Crown, resting in the Royal prerogative, have been exercised for the safety and protection of the people, and for the good government of the country, and her responsible advisers continue in her service, that the prerogative has been properly exercised. The constitutional effect of this change in the manner of exercising the prerogative is to transfer the power of the prerogative from the Crown to the people, as represented by the Commons in Parliament to whom Ministers, upon whose authority it is exercised are responsible. I am, therefore, of opinion that the second part of the plea, if amended as suggested, would also be an answer to this action.

WILLIAMS, J. said—Having regard to what is stated in the judgment of the Chief Justice, it is quite unnecessary for me to notice the nature of the pleadings in this action, further than to observe that the fourth paragraph of the defence raises two defences. 1. (which I place first merely for the sake of convenience, and in order to dispose of it) That the wrongful act complained of was done by the defendant to an alien, and was adopted by the responsible advisers of the Crown in and for the colony of Victoria; thus, it is alleged, converted into an act of state. 2. That the right or power to exclude aliens from the territory of Victoria is vested in the Governor of Victoria, to be exercised by him under and in accordance with the advice of his responsible Ministers; that in this case, his responsible Ministers exercised the power so vested, and that the sanction or concurrence of the Governor to or with the exercise of that power is to be presumed from the fact that he has continued the Ministers who so exercised it in office as his responsible advisers. Upon this second line of defence it is important to note that the Attorney-General at the outset of his argument admitted that he relied upon no sanction, concurrence or assent of the Governor other than that to be inferred from his continuance in office. These being the two lines of defence, I will, for the sake of convenience, deal first with that which may be shortly called the act of state defence. The answer to this is simply, that that which called and relied on in the present case as an act of state is no act of state at all. A wrongful act done to an alien, if ratified by the Sovereign power, would undoubtedly become thereby an act of state, for which the alien could not seek redress in the municipal courts of the Sovereign power. But this colony is not a Sovereign power, as far as we are concerned, the Imperial Government alone occupies that position. Nor is the Sovereign power vested in the Governor of this colony; and to render the act complained of an act of state, either the ratification of Her Majesty's Imperial advisers would be required, or, if the sovereign power were vested in the Governor, the ratification of the Governor This principle is clearly established by the judgment of the Privy Council in the case of *The Secretary of State for India v. Kamachee Boye*, 13 Moore P. C., p. 22. The result of the judgment in that case is stated at page 86 in these words—"The result in their lordship's opinion, is that the property now claimed by the respondent has been seized by the British Government acting as a sovereign power through its delegate the East India Company, and that the act so done, with its consequences is an act of state, over which the Supreme Court has no jurisdiction" (the important fact in that case being the fact that the East India Company was the delegate of the sovereign power). Even more forcibly and clearly is the same principle established by the judgment of Mr. Baron Parke, 3 Knapp at p.p. 343 344 cited approved of and acted upon by the Privy Council in the case of *Musgrave v. Pullido* 5 Appeal Cases. p.p. 109 110. If the Governor of this Colony has the sovereign power vested in him it is clear that outside his commission there is nothing else which so vests it. But there is no such delegation or anything approaching to it contained in his commission. The Governor of this colony is clearly not a viceroy, as is commonly supposed and the term vice-regal is inappropiate to the position he occupies. He is merely an officer of the Imperial Government with a limited authority from the Crown and his assumption of an act of sovereign power out of the limits of the authority so given to him is purely void, and the courts of the Colony over which he presided could give it no legal effect."—*Musgrave v. Pullida*, at page 110. No person or body of persons in this colony is the *alter ego* of the sovereign, to no person or body of persons, has there been a delegation by the Sovereign of the whole Royal power; and as this colony is manifestly not a sovereign power, but is only the colony or dependency of a sovereign power, no function or ratification can be exercised here which would have the effect of merging in an act of state the wrongful act of a subject to an alien, and so barring the alien from seeking redress in our courts of justice The cases I have referred to are. I think, sufficient to dispose of this branch of the defence, and it now re-

mains to consider the other, and by far the more important. Have we in this colony the right or power to exclude aliens from our territory? Is that power vested by law in the Governor, of this colony, so as to be exercisable by his responsible advisers? I limit the question purposely in this way, for it is not pretended either that any such power is vested in the Governor by his commission, or that, however it may have been vested, it has been exercised in any other way than through his responsible advisers. Upon this second line of defence lengthy and elaborate argument has been addressed to the Court, chiefly upon the points—1. As to whether the prerogative or right to exclude aliens ever existed in England. 2. Whether, if it ever existed, it has not fallen into disuse. 3. As to the effect of non-user. 4. As to whether the legislation as regards Chinese in force in this colony does not give members of that particular nationality a statutory right to enter the colony upon compliance with the statutory condition. All these questions are no doubt full of interest, and elaborate treatises might be written upon them; but I do not desire to decide more than is necessary, and if a decision upon one, and that the most important and substantial, point in the case, decides this portion of the defence in favour of the plaintiff, it is manifestly unnecessary to express an opinion upon any other point, however interesting the expression of an opinion upon that other point might be. I will assume, therefore, without offering any opinion thereupon, that the prerogative, or right referred to, did and does exist in England, that it has not there fallen into disuse, or, that if it has, such non-user does not affect or prevent its exercise there; but making all these assumptions in favour of the defendant and against the plaintiff, none of them affect the main and substantial questions in the case, and the only question with which I am concerned, and that is this, whether under any law in force in Victoria the Governor, or the Governor with the advice of his Ministry, or Ministers, has or have the power expressly or impliedly to exclude aliens from our territory. Just as in regard to that branch of the defence which I have dealt with first, we find no trace of a delegation of the sovereign power to the Governor in his commission, so, by the same instrument, is there nothing approaching to a power to exclude aliens vested in that officer. If it exists, therefore, here at all, it must be by virtue of some law in force in Victoria; and unless it be by virtue of our Constitution Act, there is no other law under which it can be contended that we get such a power either expressly or by implication. Then, again, it has not been pretended or is it pretended, either upon the pleadings or in argument, that the Governor has exercised this alleged power personally or by virtue of any authority, the exercise of which is vested in him personally; but the position taken is that the power claimed has in this case been exercised by Ministers with the sanction and concurrence of the Governor, signified by their continuance in office. Therefore the one and only necessary point to be considered is this—Is the power claimed vested by any law in force in Victoria in the Governor, and is that power, if so vested, to be exercised through his Ministers? If I come to the conclusion that no such power exists in Victoria, then it is manifestly not only unnecessary for me to consider the other points to which I have referred, but also the point whether Chinese who comply with the statutory conditions have or have not, a statutory right to be admitted into our territory.

I confess I have come to the conclusion at which I have arrived with great reluctance. I fully recognise the importance of our decision, and of its possible effect upon the future of this colony. I do not hesitate to say that if the conclusion at which I have arrived be a right one, we have no legal means of preventing cargoes of alien convicts, if they were sent here to-morrow, from landing on and polluting our shores I have for years, in common with, I believe, very many others, been under the delusion (as I must term it) that we enjoyed in this colony responsible government in the proper sense of the term. I awake to find, as far as my opinion goes, that we are merely an instalment of responsible government. It would have given me sincere satisfaction to have been enabled, in pronouncing my judgment, to have expressed my concurrence with the Chief Justice upon this point; but I have felt myself forced as a lawyer, construing our law as a lawyer, to differ from him on this most important question—namely, as to what is the system of responsible government which we have had granted to us in Victoria, or, to put it more correctly, does the system of responsible government granted to us, be its measure full or scanty, include the power or right to prevent aliens from landing on our territories? The answer to this question must depend on the construction placed upon our Constitution Act. As I understand the judgment of the Chief Justice, he holds that under that act, so far as regards our internal affairs, and only so far as they are concerned, we have had granted to us a full and complete system or measure of responsible government. In this he holds to be included the right to prevent aliens landing on our shores, inasmuch as, in his opinion, the exercise of that right relates to the management of our internal affairs, and is a right which it may be necessary to exercise for the preservation of our own territory. I do not at the outset think that it is clear that the right claimed to exclude aliens is not one which affects and concerns imperial interests—in other words, I do not think it is clear that it relates solely to our own internal affairs and interests; but passing that by with an expression of doubt, undetermined for the present, I do not think we have the right or power claimed. The Governor, either with or without the advice of Ministers, has, as we have seen, no such authority conveyed to him by his commission. Then in what law or instrument is the power alleged to be contained? All, as I understand, are agreed that if it exists anywhere it exists in the Constitution Act,

and that if it exists, it exists within the limitation to which I have just referred. Whether, therefore, we affirm that the power exists, or deny its existence, it is to a consideration of what has passed to us under the Constitution Act that we are driven. I do not hesitate to say that the phraseology of the act is so vague and obscure in parts as to create grave doubts as to its meaning where no doubt need have existed, and that a study of it leaves the impression upon one's mind that those who framed it from the colonial point of view were fearful of expressing too plainly either what were the privileges and rights sought and thought to be obtained by it, or, on the other hand, from the Imperial point of view, of stating too bluntly what rights and privileges it was intended should not pass to the colony under it.

Passing now to an examination of the Constitution Act, what principles of construction should we apply, and applying these principles, what privileges and rights, generally and briefly, pass to this colony under it? If the object of the act was to create a system of responsible government in Victoria, and if a system of responsible government was created by the act, there can be no doubt that to the construction of the act we should apply the principles—1. That the grant of that system, whatever it may amount to, carries with it a grant of all such powers as are necessary to the existence of that system, and to the proper exercise of the functions inherent in or incident to that system. (*Barton v. Taylor*, 11 Appeal Cases, p. 203.) And 2. That whenever a law grants anything, it impliedly also grants that without which the thing granted could not exist (*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ispa esse non potest.*) (*Barton v. Taylor*, p. 207.) Further, that to the construction of such an act as the one now in question we should apply with caution another equally well-known maxim —*Expressio unius exclusio alterius*. Now, to begin with, looking merely at the Act itself (which, in construing this or any other Act of Parliament, is the legitimate course) and not at despatches or speeches in the Imperial or any other Parliament (which for the purpose of giving a legal construction to legislation are, in my opinion, clearly valueless,) it is, at least, open to doubt, whether it was the primary object of the Act to create even a system of responsible government in Victoria. If that was its primary object, then it is very singular that there is no mention whatever of so high or important an object in the preamble, though there is express mention of another and certainly not more important object—"Whereas it is expedient to establish in the said colony separate legislative Houses, and to vest in them as well the powers and functions of the Legislative Council now subsisting as the other and additional powers and functions hereafter mentioned." I take leave, therefore, at the outset to doubt whether, keeping strictly within the four corners of the Act, it was its primary object to created system of responsible government. I think its primary object and intention was to do that which is stated in the preamble. But even if this be so, it may well be that, irrespective altogether of the preamble, the operative part of the Act creates a system of responsible government. If it does, then the principles or canons of construction to which I have referred apply to the existence and working of the system so created, but no further. In other words, I am only at liberty to regard as incorporated in the Act, though not expressed, all such powers as may be necessary to the existence and working of that system, and without which the system so created could have no vitality. But there may be infinite varieties and infinite degrees of responsible government; and powers which may well be necessary to the existence, or working, or vitality of one system may not be so as to another. We therefore find ourselves continually and on all sides driven back to this central point. What is the measure of government which has passed to us under our deed of grant (if I may so call it)? With what limitations is it surrounded? What powers are conveyed to us, and what not? I am of opinion that a system, or a measure, of responsible government is created by the Act. This, I think, may fairly be inferred from the somewhat loosely-worded provision in the latter part of section 37, "With the exception of the appointments of the officers liable to retire from office on political grounds, which appointments shall be vested in the Governor alone." This evidently relates to the appointment of Ministers of the Crown in and for the colony of Victoria, or, in other words, to the appointment of the Governor's responsible advisers. But to say that an isolated expression of this kind gives to this colony the same rights and powers in regard to all colonial and local affairs, and applicable thereto, as the British Government possesses in regard to the affairs of Great Britain, is the enunciation of a proposition, which is not only startling, but positively unintelligible to me. We have certain powers, privileges, and rights expressly granted to us by the act; and mindful of the principles of construction applicable to an act of this description, those powers, privileges, and rights, so expressly granted, carry with them all such other implied powers as are necessary to the existence, enjoyment, and use of those powers, rights, and privileges. But, as a lawyer, I protest against abusing these grand and beneficial principles to the extent of using them to create and call into existence a primary power, or to supplement, or aid, that which has no existence. Under the Constitution Act we are first authorised to establish two Legislative Houses instead of one (section 1); that being, as I would again observe, the primary object of the act as expressed in the preamble: and also by the same section, power is given to both Houses to make laws conjointly in and for Victoria, subject to Her Majesty's assent. Then by section 28 the Governor (this expression by section 62 meaning the person for the time being lawfully administering the government of Victoria, the word "alone" and the words "with the advice of the

Executive Council," both of which expressions are found in another part of the act, being omitted) is to convoke and prorogue both the Council and Assembly, and to dissolve the Assembly. By section 35 power is given to the Legislature of Victoria to define its privileges, powers, and immunities within a certain limit. By section 36 it shall be lawful for the Governor to send back to the Council or Assembly for consideration any amendment which he may desire to be made in any bill presented to him for Her Majesty's assent. Then comes section 37, by which power is given to "the Governor, with the advice of his Executive Council," to appoint to public offices, excepting Ministers or the Crown, whose appointments are vested in the "Governor alone." By section 43 power is given to impose and levy duties of Customs. Then come sections relating to the handing over all revenues of the Crown to the colony, and to the charging such revenues with payment of the civil list, &c. By section 54 power is given to Parliament to make laws for regulating the sale, disposal, letting, and occupation of waste lands of the Crown, and of all mines and minerals therein. By section 55 power to appropriate the consolidated revenue. Then come the well-known and much-debated sections 56 and 57, by which it is provided that all bills for appropriating any part of the revenue, and for imposing any duty, rate, tax, rent, return, or impost, shall originate in the Assembly, and may be rejected, but not altered, by the Council, and that no such bill shall be originated in the Assembly which shall not have been *first* recommended by a message of "the Governor" to the Assembly. By section 60 power is given to Parliament to repeal, alter, or vary the act subject to certain limitations and conditions, and by section 61 power is given to the Legislature to alter the Electoral Act. I have now, I think, generally and briefly enumerated nearly all, if not all, the powers, rights, and privileges which are expressed as passing under the Constitution Act, and I at once admit that all other powers which, though not expressed, are necessary to the existence, working or functional life of the express powers, pass with them, but none others. Now, how can it be said that the power or right to exclude aliens from our territory is, in any sense, necessary to the exercise, enjoyment, or use of any of the powers, rights, or privileges expressed to be granted? It might be urged with far greater force that the exercise of the prerogative of mercy is appurtenant, or incident to, or inherent in the powers vested by the Constitution Act, and yet I venture to think that the exercise of the prerogative of mercy does not pass to us under *that* act. Whether it was purposely withheld or not is another matter. But in my opinion we have it not, as a part of our system of government, so far as the Constitution Act is concerned; and except in so far as this power can be exercised here by virtue of sections 318 and 319 of the Criminal Law and Practice Statute 1864, and under the Governor's instructions in every case calling for its exercise, resource must be had to the Sovereign through the Sovereign's Imperial advisers. But, as it so happens, this prerogative may be exercised here, not by any law in force in Victoria, except in so far as it may be exercised by virtue of sections 318 and 319 of the Criminal Law and Practice Statute, but by the instructions to the Governor as an Imperial officer. In the same way as I have directed attention to the expressions in the Constitution Act, "the Governor," "the Governor alone," "the Governor with the advice of his Executive Council," and to the interpretation section (62) I desire here to call attention to the peculiar and significant phraseology used in sections 318 and 319 of the Criminal Law and Practice Statute. By section 318 "the Governor" may grant a conditional remission of sentence, and "the Governor in Council" may make rules for the mitigation or remission, conditional or otherwise, of sentences as an incentive to good conduct while undergoing sentence. By section 319 "the Governor" may extend mercy conditionally to an offender under sentence of death. The Governor's instructions upon this point read as follows :— 'The Governor shall not pardon or reprieve any such offender (an offender under sentence of death) unless it shall appear to him expedient so to do upon receiving the advice of the Executive Council. But in all cases he has to decide either to extend or to withold a pardon or reprieve according to his own deliberate judgment, whether the members of the Executive Council concur therein or otherwise. It would appear, therefore, that there is a portion of the prerogative of mercy vested in the Governor and not in the Governor in Council by the Criminal Law and Practice Statute, and that there is an authority given to the Governor as an Imperial agent of his Imperial principal, by the instructions as to its further and fuller exercise. But there is no mention whatever of the exercise of such a power in the Constitution Act, and unless it can be dragged into the Constitution Act by one or other of the two principles to which I have already referred, it is not contained in that act at all. For the reasons I have previously stated, this power cannot be created by calling in aid those principles, and if this power—the power to extend mercy—cannot be so created, most assuredly the power claimed to exclude aliens cannot. But the third maxim to which I have referred, and which I have suggested should be used with caution in construing an act of this description *Expressio unius exclusio alterius*, cannot and should not be discarded in the consideration of the question as to whether we get, under the Constitution Act, either the one or the other of the powers to which I have referred. The act is absolutely silent as to a conveyance or grant of either of those powers, and yet it does convey to us in express terms powers of certainly no greater magnitude. I have already enumerated what those powers, rights, and privileges are; but as somewhat *ejusdem generis* with those I have mentioned as not passing, I may mention that the power to convoke, prorogue, and dissolve Parliament (section 28), and the power to alienate Crown lands and Crown minerals

(section 54). These form the subject of express grant, and, of course, any powers or rights necessary to the exercise of those powers pass with the grant of them; but, as regards the power of excluding aliens and of extending mercy, there is not even the faintest suggestion in the act. Therefore, for this and for other reasons to which I have referred, I arrive at the conclusion that under the Constitution Act we do not possess the power which forms the principal subject matter of the defence now under consideration. It is a power which possibly may have been withheld for the reason that its exercise here might cause complications between the Imperial Government and other nationalities. Being withheld it leaves us in this most unpleasant and invidious position, that we are at present without the legal means of preventing the scum or desperadoes of alien nationalities from landing on our territory whenever it may suit them to come here. For the reason I have given, judgment, in my opinion, should upon this argument be entered for the plaintiff.

HOLROYD, J.—In this case we have to decide the questions of law raised by the pleadings, which are contained in the fourth paragraph of the defence, and in a condensed form may be reduced to two—namely, first, whether, under the circumstances set forth in that paragraph, Her Majesty's Ministers for Victoria could on behalf of Her Majesty lawfully exercise a right to exclude the plaintiff, an alien friend, from Victoria, as a part of the Royal prerogative; and, secondly, whether the act of preventing the plaintiff from landing in Victoria under those circumstances was an act of state policy, lawfully ratified by Her Majesty's Ministers for Victoria on behalf of Her Majesty, or, shortly, an act of state.

Each of these questions, it is obvious, may involve the discussion of several propositions. The fact of the plaintiff having arrived in Victorian waters on board a vessel which carried immigrants in excess of the proper number has only been introduced into the defence as a circumstance on which to found an argument in discussing those propositions.

Now, as to the first question, nobody has disputed the Attorney-General's proposition that by international law every nation has the right of excluding foreigners from its territory, as well friends as enemies. But what we have here in the first place to consider is by whom, according to English law, that right may be exercised as regards alien friends in the mother country, whether by the Crown or by Parliament. On this point the result of all the precedents and historical passages that have been cited to us may be very briefly summarised. The power to exclude aliens in times of peace, both by forbidding them to enter and by compelling them to depart the realm, has been claimed for the Crown as part of its prerogative down to quite modern times. Between the Conquest and the end of the sixteenth century, as we are informed by learned writers, it was exercised not unfrequently; although only one well authenticated instance was mentioned to us, the expulsion of the Jews by King Edward the First, a somewhat unfortunate instance, considering the feelings by which the whole population, from the highest to the lowest, were then animated towards the Jews. On the other hand it appears that since the reign of Queen Elizabeth the power has never been exercised by the Sovereign without the sanction of Parliament, unless the case of *Re Adam* 1 Moo P.C. 460 furnishes a solitary exception to my statement. In that case Mr. Adam, an alien friend, had been banished from the island of Mauritius by order of the Governor-in-Council under instructions from the British Government, and it was held by the judicial committee of the Privy Council that by the law of the island an alien friend could be removed from the island by the Executive Government at its pleasure without having been convicted of any offence, unless he had procured the permission of the Government to establish his domicile there. The judgment of the Privy Council proceeded, to use the words of Lord Brougham, "upon the peculiar provision of the French law," which prevailed in the island; and would have been just the reverse if English law had prevailed there. According to the law of France, as it then stood in the island, the Executive Government had power to remove any alien not domiciled by its authority; and for this reason it was resolved that Mr. Adam could be lawfully deported. He was not removed by force, but went away under pain of being forcibly deported, which was the same thing. French prerogative, however, was not English prerogative; and the case of *Re Adam* furnishes no precedent for ascribing to an English sovereign a power which had been inherent in the Crown of France, and was still existent in the Mauritius, as governed by French law. The judgment, in my opinion, points to a directly opposite conclusion. To put it in another form, the offence, which the foreigner had committed, by entering the island illegally, could by the French law of the island be punished by the Sovereign, or his delegate, by deporting the foreigner. But, according to English law, no resident in the United Kingdom, whether native or foreigner, can be deported at the arbitrary will of the executive for any offence alleged against him. For any offence he must be tried, and, if convicted, punished as the law prescribes.

That the power of excluding alien friends ever existed as a part of the prerogative has been vehemently denied by statesmen and jurists of high authority, quite as illustrious as the advocates for its existence. To one class of foreigners—namely, merchants—both in the Magna Charta of King John, and in that of the first year of Henry the Third (A.D. 1215 and 1216), free right of ingress and egress and of abiding and travelling from place to place in England, except in time of war, is accorded as one of the ancient and lawful usages of the realm. Probably this class of aliens was specially mentioned, as

the only one that specially needed protection, foreign merchants having suffered so much from King John's exactions; but that is only conjecture. In the charter of the following year a reservation is introduced, which rather countenances the authority of the sovereign to deprive even merchants on occasion of the benefit of this old and excellent usage. The merchants are declared free to come and go *nisi publice ante prohibiti fuerint* (unless they shall have been publicly prohibited beforehand). On a question of this kind I attach comparatively little importance to what was done or said before the close of the sixteenth century. Up to that time constitutional usage was quite uncrystallised; in fact it had hardly begun to settle. Before then hundreds of precedents might be found, stretches of Royal authority unchanged at the time, for acts which were afterwards discovered to be gross infringements of the privileges of Parliament or of the liberties of the people. But I am very much impressed with the fact that for nearly three centuries no British Sovereign has attempted to exercise the right of expelling aliens, or of preventing their intrusion in time of peace by virtue of his prerogative, and no British Minister, not even the strongest advocate in theory for the plentitude of the Royal authority, has ventured in this matter to reduce his theory into practice. Whenever it has been found necessary to take measures of precaution with respect to aliens resident in the country, or expected to arrive, a temporary Act of Parliament has been passed for the purpose. The Acts of 33 Geo. 3 Chap 4, and 56 Geo. 3, Chap. 86, to which allusion has been made, are examples; and the Act 11 and 12 Vict., Chap. 20, is another example. The Attorney-General argued that these two statutes of George the Third recognised the right ot the Sovereign to exclude alien friends, and he referred particularly to the 7th Section of the Act 33 Geo. 3 Chap. 4, contrasting it with Section 18. Section 7 abbreviated enacts that whenever His Majesty shall think fit for the safety of the kingdom to direct that aliens other than merchants shall not be landed in the kingdom or only landed at prescribed places, the master of any ship disobeying His Majesty's orders shall forfeit £50 for every alien landed in contravention of it. Section 18, abbreviated, enacts that it shall be lawful for His Majesty to direct aliens, with certain specified exceptions, when resident in the country, to reside in each district as his Majesty shall think proper. The suggested contrast rests in this, that in the one case disobedience to the direction of His Majesty is made punishable, and in the other that His Majesty is empowered to direct. Section 15, which contains, with respect to ordering the departure of aliens, provisions similar to those of section 7 with respect to prohibiting their intrusion, supports the Attorney-General's argument. The enactments of sections 7 and 15 are so framed that they would have been equally efficacious, even though without them His Majesty could not lawfully have directed that any alien should be kept out or expelled, but I believe, nevertheless, that the statesmen under whose auspices the Alien Acts of George III. were passed did intend to recognise, so far as they could without distinctly affirming it, the prerogative of the Crown to exclude aliens from the United Kingdom, and that was the last that could have been expected from their openly expressed opinions. If, however, the Acts of George III. recognise this power in the Crown, the Act chap. 20 of 11 and 12 Victoria does not, but the reverse. The first section of that statute authorises a Secretary of State of Great Britain, or the Lord Lieutenant of Ireland, if he thinks it expedient on certain information supplied to him, to direct, by order under his hand, that any alien, with the exceptions mentioned in section 6, shall depart the realm within a limited time, and the Act then proceeds to provide means for enforcing the order. If the Crown had been supposed to possess the right claimed for it, either as to aliens in general or as to aliens other than merchants, the power conferred by the first section of 11 and 12 Vict., chap. 20, would have been wholly or partially unnecessary, and the section would have been framed in more guarded language, so as not to invade the prerogative. Upon the whole, I think that the right of excluding alien friends from the United Kingdom is now vested in the Parliament of the United Kingdom, and not in the Sovereign alone. I cannot say that, as a part of the prerogative, it has fallen into desuetude, for that would imply that it once legally existed as such; but leaving its legal existence open to question, constitutional usage, hardening with time, has excluded it from the prerogative. Just the same thing was decided by the House of Lords when Sir James Parke was created a life peer by the title of Baron Wensleydale. It was established beyond dispute that the Sovereign had in former times created life peers, who, by virtue of their creation, assumed to sit and sat in the House of Lords. But it was nevertheless, resolved that although the Crown could still create life peers, it could not entitle any person ennobled to sit in a Chamber of hereditary legislators, which, by constitutional usage extending over four centuries, the House of Lords had become. Suppose now, to adopt the language of the Attorney-General that the sovereign right which every nation possesses to interfere with foreigners entering its dominions is under the English constitution vested in the Queen, he then contends that, as regards local affairs, this branch of the prerogative is exercisable by the Queen's Ministers for Victoria, and he works out his conception in this way. The Queen's prerogative, he says, is active all over her empire. Personally, she cannot exercise this branch of it anywhere. *Ergo*, it must be exercised on her behalf in or for Victoria, either by her Ministers for Imperial affairs or by her Ministers for Victoria. But responsible government has been established in Victoria, with Ministers responsible as to all local affairs; and thence it results that the right to advise the Queen as to such affairs has been taken away from the Imperial advisers of the Crown (that is, from Her Majesty's Ministers in the United Kingdom), and has been transferred by law to her

Ministers in and for Victoria. The exclusion of foreigners from Victoria, although it may involve Imperial consequences, is a local affair, inasmuch as the power to exclude them is necessary for the good government of the colony. The Queen must, therefore, exercise this part of the prerogative through her responsible Ministers in the colony, either apart from the Governor or by the Governor as the local repository of it. It must be assumed that the Queen or the Governor, as the case may require, has assented to what has been ordered by Her Majesty's Ministers for the colony on her behalf, inasmuch as they have not been dismissed from office. I have pieced together different portions of the Attorney-General's address, but I think I have rendered his argument faithfully, and as nearly as possible in his own words. Speaking with great respect, the argument appears to me very subtle, but unsound.

At the outset we must not be misled by abstract terms. No such things as responsible government has been bestowed upon the colony by name; and it could not be so bestowed. There is no cut and dried institution called responsible Government, identical in all countries where it exists. Whatever measure of self-government has been imported to the colony we must search for it in the statute law, and collect and consolidate it as best we may. Nobody can have studied the development of self-government in the Australian colonies without having observed the tentative and cautious manner in which British statesmen have proceeded in *their* arduous task. The impulse which has warmed them into action has always been supplied from the colonies themselves. But we must not forget this, that it is the Parliament of the United Kingdom, guided by the statesmen of the mother country, that has granted to this colony the whole measure of self-government which it possesses. It was the Parliament of the United Kingdom which authorised Her Majesty to give the Royal assent to the Constitution Act, and it is the intention of the Parliament of the United Kingdom, as disclosed in the Constitution Act of which it approved, that we must set ourselves to discover. By the laws which the Constitution Act preserved in force, and by others which have since been passed by the Legislature of this colony and assented to by the Crown, the Governor has been authorised or commanded, either alone or more usually with the advice of his Executive Council, to discharge a great number of duties, involving a wide administrative control. Admitting that all the incidents to that administrative control, by which I mean everything that is necessary for the use of the specific powers and faculties conferred may be implied as given in with them, we are still driven back to the starting point. What are all those specific powers and faculties? The power of excluding aliens is not one of them.

By the Constitution Act itself, certain powers are conferred upon the Governor similar to some of those which, in the United Kingdom, the Queen enjoys as her exclusive privilege, notably that of poroguing the Council and Assembly, and dissolving the Assembly; that of appointing any officers liable to retire on political grounds, and that of appointing, with the advice of the Executive Council, all other public officers under the Government of Victoria. Powers of this class having been bestowed in express terms, we ought to presume, according to the ordinary rule of construction, that no others of the same class were intended to pass. The rule is not one of universal application, but in the present instance it should be rigidly applied, inasmuch as it is still a fundamental maxim that the Crown is not bound by any statute unless expressly therein named, and as a corollary, the Royal prerogative cannot be touched, except in so far as therein expressed. It is moreover conceded that the exclusion of aliens is not a local affair in its consequences, which might affect the whole Empire; and that circumstances furnishes an additional reason for not implying an intention on the part of the home Parliament to vest in the Governor a power which his advisers here might recommend him to execute in a manner detrimental to Imperial interests. Except in so far as his position has been altered by positive enactment of the home Parliament, or by some statute passed here and assented to by Her Majesty, the Governor himself is the servant of the Crown, tied down by his commission and instructions. It is not pretended that he has been permitted by either to shut out or to remove aliens; and if no such authority has been distinctly vested in him by statute or delegated to him by the Queen, we may safely conclude that he does not possess it.

But then it has been argued, as I have already stated, that if the right of excluding alien friends from Victoria as part of the prerogative still resides in Her Majesty, and has not been vested in or delegated to the Governor, Her Majesty's Ministers for this colony, passing by the Governor, can exercise it directly on her behalf, and must be deemed to have exercised it with her sanction, unless they are dismissed. I have not the slightest hesitation in denying this proposition. What is claimed by the Attorney-General for the Ministers of the Crown in Victoria, not in terms, but in substance, is this, that, if the prerogative as to excluding alien friends still exists, they can exercise it as regards this colony at their uncontrolled discretion. Even were they on the spot able practically to consult with the Queen in person, and so advise her, which they are not, yet, as she cannot dismiss them and appoint others, it would be perfectly immaterial whether she approved of what they did or not. The constitutional fiction, that Her Majesty approves of what her Ministers have done because she does not dismiss them, cannot be applied in this case.

The practical application of the Attorney-General's theory might lead to some curious results. The main purpose of the Constitution Act, as it is to be gathered from intrinsic evidence, was to constitute, in lieu of the Legislative Council then subsisting under the Act 13

and 14 Vic. C. 59, by which the district of Port Phillip had been erected into a separate colony, separate Legislative Houses with enlarged authority and functions. The preamble recites that purpose and no other. By the Constitution Act the Governor is not compelled to assent to any bill on Her Majesty's behalf, and any bill to which he gives his assent may within a limited time be disallowed by Her Majesty. Her veto cannot be contested, and when she asserts it she acts by the advice of her responsible Ministers at home. (See 5 and 6 Vic., C 76, s.s., 31, 32, 33 and 40 ; 7 and 8 Vic., C. 74, S. 7 ; 13 and 14 Vic., C. 59, SS. 12 and 32 ; 18 and 19 Vic., C. 55, S. 3.) As to the classes of bills to which the Governor can only assent provisionally, their operation being suspended until the signification of Her Majesty's pleasure thereon, or to which he must absolutely refuse the Royal assent, he must be guided by the instructions which he receives from the home Government. By his instructions the Governor is now explicitly prohibited from assenting to any bill inconsistent with obligations imposed upon Her Majesty by treaty. Up to the present time the Legislature of this colony never could and cannot now, pass into law any bill inconsistent with obligations imposed upon Her Majesty by treaty ; for the Governor cannot lawfully assent in Her Majesty's name to any such bill until his instructions are altered. I am speaking generally, and quite without reference to the treaties of Nanking and Tien-sing, of which I possess no copy, and I do not know what obligations are imposed upon Her Majesty by either of those treaties. But supposing any treaty now to subsist between the Crown and any any foreign state, whereby Her Majesty is obliged to permit the subjects of such state in time of peace, to enter Victoria, upon due observance of any conditions imposed upon their entry by any statute having legal force in Victoria, that treaty cannot be violated by colonial legislation. If ministers here can dispense with the Governor and act directly on Her Majesty's behalf, and in fact against her will they can, without resorting to legislation lawfully break in her name a treaty which the colonial Parliament has been restrained from breaking.

I come now to the second question, whether the defendant's act in preventing the plaintiff from landing was an act of state. It is admitted of course that his act was approved of by the Minister of Customs and his colleagues. The second question is quite distinct from the first, although partly depending on similar arguments. An act of state, according to Mr. Justice Stephen's definition, is some act injurious (by which I understand him to mean " hurtful," and not necessary " wrongful") to the person or property of some one who is not at the time a subject of Her Majesty and which has been done by a representative of her Majesty's authority, civil or military, and has been sanctioned by Her Majesty either by prior command or by subsequent ratification. If an action is brought by a foreigner in an English court for an alleged wrong, and it is proved that the act complained of is an act of state, the Court is deprived of jurisdiction to inquire into its legality, although the same act if done to a British subject, might have given him a clear right of action. It is disputable whether an act of this description can be committed within her Majesty's dominions. Mr. Justice Stephen thinks that it can. But at any rate it is essential to its character that it should be committed against one who is not at the time a British subject ; and that it should be sanctioned by Her Majesty as head of the state, representing it in its relations with foreign powers. The Attorney-General contended that the exclusion of aliens from Victoria was a local matter, that her Majesty's Ministers for the colony were entitled to advise Her Majesty with regard to local matters, and that, as they had sanctioned the act, she must be supposed to have known of it and sanctioned it also. But from its very nature an act of state, in whatever place it may be done, must be an act of imperial concern, of which the immediate consequences may fall upon the whole empire. The wrong having been sanctioned by the Sovereign, or by the body in whom resides the supreme authority with regard to international relations, has been done by the state itself, and can only be redressed by war if the state declines to afford satisfaction. With respect to such an act, Her Majesty's home Ministers alone can advise Her ; Her Ministers for Victoria cannot directly, or indirectly ; and necessarily therefore their knowledge cannot be accepted as her knowledge, nor their sanction as her sanction. How can her Majesty sanction an act of state for Victoria and repudiate it for the rest of the empire; and if she cannot repudiate it for the rest of the empire, how can it be called local to Victoria ! Victoria is not a state by herself ; she is only a component part of a great empire.

Before quitting this branch of the subject, I would advert to the case of *Buron v. Denman* (2 Exh. 167,) cited as establishing as a conclusion of law that when the knowledge of Ministers is proved the knowledge of the Crown must be assumed. The action was tried at the bar, and Parke, B., summing up for the Court, told the jury that if the Crown, with the knowledge of what had been done, ratified the defendant's Act by the Secretary of State, or the Lords of the Admiralty, the action could not be maintained. From his summing up as reported, but which may have been abridged in the report, he must, as it appears to me to have directed the jury not that they were obliged but that they were at liberty to infer the Crown's knowledge of the Act from the evidence of its having been known to and proved by, two Secretaries of State and the Lords of the Admiralty, who, in the due discharge of their duty, would communicate it to the Sovereign ;

and the jury found that the Crown knew of the Act. If the effect of the summing up in *Buron v. Denman* is what I understand it to be, then, notwithstanding that the knowledge of Ministers has been conclusively proved, or has been admitted, evidence might be received to show that the Crown did not, in fact, possess that knowledge. It is not, therefore, a conclusion of law that her Ministers' ratification is Her Majesty's ratification. It is only a presumption, liable to be rebutted.

My judgment in this case is not affected by the legality or the illegality of the presence of the plaintiff in the port of Melbourne. But as the point has been debated and the judgment of others may be affected by it, I desire to express my views upon the construction of the Chinese Act 1881. There can be no mistake about the object of the Legislature in passing that act. They desired to diminish the influx of Chinese immigrants into this colony; and this object they endeavored to accomplish in two ways. In the first place, they limited the number of Chinese that might be carried on board any vessel into any port in Victoria in proportion to the tonnage of the vessel, allowing one immigrant only to every 100 tons. Secondly, they imposed on all Chinese immigrants arriving in any vessel from parts beyond Victoria, and desiring to land at any port or place in the colony, a poll-tax of £10, to be paid by the master of the vessel to the proper officer of customs before permitting the immigrants to land, or making any entry at the Customs. Breaches of both these enactments are punishable in the manner which the act prescribes; but there is a significant and designed distinction between the two in respect of the persons on whom the liability for a breach is cast. The master of any vessel permitting any immigrant to land or escape from his vessel at any port in Victoria before payment of the poll-tax, is liable to a penalty of £50 for each offence, in addition to the amount of the tax. Any immigrant attempting to evade the tax is liable to a penalty of £10, or in default to 12 months' imprisonment, unless the penalty be sooner paid. On the other hand, for every immigrant imported in excess of the tonnage limitation the owner, master, or charterer of the vessel is liable to a penalty of £100: but the immigrant, who is powerless to prevent either master, or charterer from violating the law, is not liable to any penalty. The master who permits a Chinaman to evade the poll-tax and the Chinaman who evades the tax are equally offenders against the law. When a master brings into port more immigrants than the law allows he is also an offender; but the Chinese immigrants in such a case are innocent passengers and not offenders. They are legally here as far as they are concerned, although they may have been illegally brought here by others. If the poll-tax be paid, or legally tendered (for legal tender when refused is equivalent to payment), the act permits the Chinese immigrant to land, and his landing is lawful, there being no other legal force, arising either out of prerogative or statute to restrain him. My judgment is for the plaintiff.

A'BECKETT J.—Having had the advantage of reading the judgment of my brother Holroyd, and agreeing with him that the right to exclude aliens is not exercisable in this country, and that their exclusion in the instance before us cannot be defended as an act of state, I think it unnecessary to repeat at length the reasons for coming to these conclusions, or to refer in detail to the acts of Parliament and other documents already noticed, by which they are supported. I confine my judgment to these two points, as they are sufficient for the decision of the case, and I will briefly state the grounds on which I proceed.

Assuming that the right to exclude aliens subsidised in England, as part of the Royal prerogative, when our Constitution Act was passed, I can find nothing in the Act, or in the system of government which it originated, authorising the exercise of this right by the advice of Ministers in Victoria. It was argued that the authority must be given, because responsible government was given, as if the phrase "responsible government" had a definite comprehensive meaning, necessarily including the power in question. The phrase has to my mind no such force. Responsibility may attach to persons having powers strictly limited, and its existence does not indicate the extent of the authority from which it arises. For this we must look to the terms in which the authority was conferred. That is to say, to the act of Parliament establishing the system and to the documents delegating powers to the Governor who administers it to ascertain whether, by express words or necessary implication, the right to exclude aliens has been given.

This is a question of legal construction, in which we cannot be assisted by the speeches or despatches of statesmen, and, considered in this aspect, there seems to me to be little difficulty in answering it in the negative. The power is not expressly delegated, and the delegation of a power which might seriously disturb foreign relations, with which we were not intended to interfere, cannot reasonably be inferred. Treating this right of exclusion as a branch of the prerogative unless it has been delegated to the representative of the Crown in Victoria, it is a matter on which it would be useless for Ministers in Victoria to tender him advice, and they cannot advise Her Majesty directly as to its exercise. Certainly they cannot exercise the prerogative for themselves. The implication of assent by the Crown from their continuance in office can only arise as to the facts which Ministers can lawfully do as such. If they assume to exercise powers which are not vested in them, there can be no legal implication of Royal assent. If Ministers, for instance, had engaged the Victorian navy in a war of their own making, the Court would

not assume assent to this war by the Queen or by the Governor from the fact that they continued in office.

The conclusion that the Government of Victoria has not the right to exclude friendly aliens in times of peace seems to me to dispose of the defence that the act complained of was an act of state, and therefore not actionable by an alien on the grounds set forth in the case of *Buron v. Denman*. An act of state must be something which is competent for the state to do. In the case of a sovereign state, no question as to its competence can arise, but it is otherwise with a Government entrusted with only very limited powers, such as our own, and we have to consider whether the thing done was within its powers. If something done within its powers inflicted injury upon an alien, its being an act of state might debar him from redress in our court, although conditions to the proper doing of the thing had not been observed, but where the Court sees that the thing done was not within the powers of the Government under any conditions, it cannot be regarded as an act of state.

For these reasons I think the plaintiff entitled to judgment.

WRENFORDSLEY, J.—Following the five judgments which have just been given by their Honours, I propose to confine the observations which I am left to make to the two questions of constitutional law which appear to me to form the only grounds for a decision in this case

It was admitted at the bar that the acts complained of had not been ratified by any order of council or by any sanction of the Governor. In considering the effect of this plea, it is required that we should ascertain what is the actual status of the Government of Victoria. It has been submitted on the part of the defendant that the acts in question were done by Her Majesty's responsible Ministers for Victoria, and that the prerogative right, now vested in the Crown, to keep out aliens, applies. It is not necessary to discuss the question raised on behalf of the plaintiff, that if such a prerogative right was at any time vested in the Crown it has become obsolete. Speaking for myself, I am of opinion that the prerogative right of the Crown to keep out aliens does exist, although its exercise may, by the custom or legislative action of modern times, be subject to the control of Imperial Ministerial responsibility.

I now proceed to consider to what extent the general prerogative rights of the Crown have been either granted or lessened by the act of constitution. I am not aware of any authority to the effect that in a settled colony like Victoria the act of constitution carries with it powers outside or beyond the exact terms of the grant itself.

Victoria is a colony by settlement, and it is common knowledge that the settlers brought with them so much of the law of England as could be made applicable to local conditions.

In respect of all further privileges there is ample authority for saying that we must see what are the privileges bestowed by the grant or charter of Government.

The Imperial Act 18 and 19 Vict., cap. 55, enabled Her Majesty to assent to a bill amended by the Legislature of Victoria to establish a constitution in and for the colony of Victoria. The preamble refers to the 13 and 14 Victoria, cap. 59, which was an act for the better government of Her Majesty's Australian colonies By that act Victoria became for the first time a separate colony. The preamble states that it was expedient that the district of Port Phillip, now part of the colony of New South Wales, should be elected into a separate colony, and that further provision should be made for the Government of Her Majesty's Australian colonies. The act of constitution is the local act of 19 Vict. It was assented to by Her Majesty in Council (pursuant to the provisions of the Imperial Statute 18 and 19 Vict., cap. 55) on the 21st July, 1855, and came into operation on the 23rd November, 1855. It was included in the Imperial Act as Schedule 1.

The Imperial Act was accompanied by a despatch from Lord John Russell, who was then Secretary of State for Colonies, dated 20th July, 1855; and although the Act of Constitution to which he refers must be held to speak for itself, it is nevertheless useful to see what opinion was then expressed by that very constitutional Minister when, as the head of the Colonial Office department, he assisted as a Secretary of State to give this colony a separate and constitutional existence. "No alteration," he says, has been made in any of the provisions, which are simply of a local character. He adds—"It has been the conviction of Parliament that the Legislature must itself be trusted for all the details of local representation. But the responsibility for its introduction will rest, as it ought to do, with the members of the Council, by whom it was in all substantial points prepared and discussed." The Secretary of State then proceeds to deal separately with the proposals which appear to refer to the rights of the Crown. "But those portions of the provincial enactment which controlled and regulated the future power of the Crown as to the reservation and disallowance of colonial acts, and as to the instructions to be given to Governors respecting them, have been omitted by Parliament. These portions were clearly not of a local character, but

regarded the connection of the colony with the body of the empire." These are very marked words. In the first place he speaks of the provincial enactment, as distinguished from an act of the Imperial Parliament; next he refers to the instructions to be given to Governors, and then he points to the connection of the colony with the body of the empire. I do not see how that connection, at all events in respect of external relations, could be maintained without a strict reservation of all Imperial or Crown rights.

The despatch included an intimation to the effect that the Governor would receive a fresh commission and instructions amended in certain particulars, which the system of Government then introduced rendered it necessary to change. I have endeavoured to consider very carefully the several powers and provisions conferred by the Act of Constitution, and fail to see that they go further than to provide for a perfect scheme for local Government, limited to its internal relations. When I say a perfect scheme, I mean a system of responsible self-government, complete within itself so far as representative institutions of a popular character can be said to be perfect. All the privileges of Parliament were to be defined, and all enabling powers incident to such a form of Government were conferred. I do not see, however, that by any rule of construction the rights so given can be extended. On the contrary, the responsibility which was to be attached to the formation of the body which was to represent the executive power applicable to such a form of legislature was left to the Responsible Council for the time being, and such a responsibility and such a power could not have included a discretion to deal with the external relations of the newly formed community. It seems to me that the then existing circumstances of the colony precluded the exercise of such an extraordinary power. Seeing that the developement of such a grant of local government must have required at the time that protection from all foreign influences which could only be obtained by the due reservation of prerogative rights.

It seems to me that the proper construction of the Act of Constitution is still further assisted by a reference to the amended instructions which have been issued to the Governor, and I refer more particularly to those which are now in force in this colony. But before I refer to the exact terms of the instructions I wish to point out what is the legal *status* of a Governor in a court of law. We must be careful not to confound what may be an expression of popular courtesy with a legal definition. Lord Brougham in, *Hill* v. *Bigge* 3 Moore P.C. 465, and which is cited in the comparatively recent case of *Musgrave* v. *Pullido*, says :—"If it is said that the Governor of a colony is *quasi* Sovereign, the answer is that he does not even represent the Sovereign generally, having only the functions delegated to him by the terms of his commission, and being only the officer to execute the specific powers with which that commission clothes him."

In order to meet an observation made in the course of the argument, I would add that, for the purpose of this decision I deem a Governor to be an officer acting under express power from the Crown, and certainly, in the case of a colony possessing representative institutions, he only represents the prerogative of the Crown in respect of those instances which are directly included in the terms of his commission, and I do not find any enabling words in the Commission to justify any other conclusion. He is an accountable officer, to act according to such instructions as may from time to time be given to him. By paragraph 7, he may act in opposition to the Executive Council, but subject to the obligation of reporting the grounds for so doing. Paragraph 9 is the most applicable to this case, for he is not to give assent to any bill the provisions of which shall appear inconsistent with obligations imposed on the Crown by treaty; nor any bill of any extraordinary nature and importance, whereby the prerogative, or the rights of property of Her Majesty's subjects not residing in the colony, or the trade and shipping of the United Kingdom and its dependencies may be prejudiced. Then follows the power to use or exercise the prerogative right to pardon under the conditions which are mentioned. These expressions and exceptions suggest, as it seems to me, a clear and intended reservation of the rights of the Crown; and certainly with respect to all external relations the power vested in the Crown is strictly preserved. If this view is incorrect, then I fail to see the substituted authority in which the prerogative right which is contended for in this case is vested. As I have already intimated, I do not think it exists in Her Majesty's Ministers in this colony under any form of grant conferred by the Act of Constitution; nor can it be said to exist in the Governor, who, as I have said, is an officer duly appointed by the Crown, and on whom rests the obligation of reporting to the Secretary of State any breach which may occur, either of his instructions or in the exercise of the Act of Constitution. This view is well supported by authority. Mr. Chitty, in his work on the prerogatve, at page 34, says :—"The Governor is substantially a mere servant of the Crown, appointed by commission under the Great Seal. The criterion for his rules of conduct are the King's instructions under the sign manual." And so, with respect to the status of the colony, the same authority, at page 32, proceeds to say :—"In every question therefore which arises between the king and the colonies respecting the prerogative, the first consideration is the charter granted to the inhabitants. If that be silent it cannot be doubted but that the king's prerogatives in the colony are precisely those prerogatives which he may exercise in the mother country." In the case of the Lord Bishop

of Natal (3 *Moore P.C.* 148) Lord Westbury as Lord Chancellor, said :—"After a colony or settlement has received legislative institutions, the Crown (subject to the special provisions of any act of Parliament) stands in the same relation to that colony or settlement as it does to the United Kingdom." Dwarris is an authority on this subject. He says (*page* 909) :—"Comparatively few of the statutes passed in the colonies receive the direct confirmation of the king. It is clearly understood that so long as the prerogative is not exercised the act continues in force under the qualified assent which is given by the Governor in the colony on behalf of the king.

I arrive therefore at the conclusion that the *status* of this colony is of a much more limited character than is suggested by the words of the plea. In describing it I adopt the language of Baron Parke, (*Keilley v. Carson 7 Jur*). That case had reference to the powers of a House of Assembly in a settled colony, and in the course of his judgment he said :—They are a local legislature with every power reasonably necessary for the proper exercise of their functions and duties, but they have not the same exclusive privileges which the ancient law of England had annexed to the House of Parliament." And here I wish to repeat a question which I put once before during the progress of the arguments in this case. Let it be assumed that the Government of Victoria, in the exercise of the prerogative right which is claimed did some act which ultimately proved to be against the comity of nations, and that the Imperial Government had to deal with it with diplomatic usage, and that an indemnity had to be paid, who would pay it, this colony or the Imperial Parliament? I confess I see great difficulty of a practical nature if the Government of this colony is to be held free to act in respect of the high prerogative power which is claimed, or to be at liberty, as a delegate of the Imperial Government, within the meaning of the case of the *Secretary of State in Council for India* v. *Kamachee Boye Sahaba* (13 Moore, P.C. 22) to pledge the Imperial Government to obligations of an international character. It seems to me, however, that notwithstanding this view there does exist in this colony a form of Government consistent with a full grant of representative institutions, limited, no doubt in the application of prerogative rights, but possessing ample power with respect to all internal administration. I think it passes the *droit public enterne*, and I use the expression in order to distinguish its legislative powers from the *droit public externe*. In other words, this colony did not, as a state, receive any recognition from the Imperial Government, with respect to its existing connection with the mother state, but I think that for the purpose of all necessary intercourse with other countries, the rights of the Crown have been sufficiently reserved. In saying this I express no opinion with respect to the fitness of this limited view of its constitution and Government to the obligations which may arise from the emergencies which are incident to all forms of government.

I now wish to refer, very briefly, to the further question which has been raised by this plea, to the effect that the acts done amounted in law to an act of state. In the much altered condition of this colony since the Act of constitution I can well understand that circumstances might at any time justify the exceptional action which is involved in an act of state. Mr. Justice Stephen, in his work on the criminal law in England, thus defines an act of state :—"It is an act injurious to the person, or to the property of some person who is not at the time of that act a subject of Her Majesty, which is done by any representative of Her Majesty's authority, civil, or military, and is either sanctioned or ratified by Her Majesty." In view of the exceptional circumstances of this case, as set out in the plea, it may be that authority might be found to justify the action of the local Government, supposing that the act of the Government was a matter still existing for ratification by the Crown. I can understand many acts consistent with colonial policy, which, although in a sense hostile to a foreign power, would nevertheless not be acts involving questions of peace or war. In saying this I refer to acts done against ill-doers as a class, and not to acts done as against a friendly state. I apprehend, it would in such a case rest with that state to put its own interpretation on the meaning of the act complained of, as also to assert its own rights. And, with reference to the present case, such a state would doubtless take into consideration representations of a diplomatic character which would have for their object to show the exceptional position of this colony, its vastness and material prosperity, its distance from the parent state, its isolation from European concerns, and the remote application of Imperial treaties to its external relations. I can imagine circumstances happening when such representations would be useful to this colony, but I am of opinion that they could only be made by the Imperial Government. I need not, however, pursue this subject further, because the act in question has not been in any sense ratified or confirmed by any competent authority, and it follows that, in my opinion, the plea, so far as it seeks to raise the constitutional question, has not been sustained.

Judgment for plaintiff with damages, if any, to be assessed, and costs to be taxed.

Solicitors for plaintiff, *Cleverdon and Westley* ; for defendant, *The Crown Solicitor.*