Federal Parliament Hansard 1902

Mr ALFRED DEAKIN:– I move -

That this Bill be now read a second time.

The measure which I have -the honour to submit involves a somewhat abrupt passage from the class of business in which honorable members have been for some time engaged. We have been long immersed in the consideration of a mass of details, and apparently endless particulars, relating to the industrial and commercial life of the States. The issues presented to us were necessarily debated in a somewhat feverish spirit of partisanship. We are now asked to make a sudden transition to an entirely different realm, to the consideration of matters wholly of principle. Though many of the clauses of this Bill will be carefully scanned, and must be deliberately considered, it is now submitted as a whole upon the ground that it represents a fulfilment of the purposes of the Constitution, is to be measured by this high standard, and judged not so much by its several details as by its ultimate results. The many items with which we lately dealt were those immediately and directly affecting the present, though they naturally have a continuing operation. The proposal now submitted is one which also will have its immediate effect, but whose full scope and significance must be sought in the future. It is one of the constructive proposals outlined in the Constitution, needing to be regarded in its perspective, and in the light of its relations to the other great agencies created by that Imperial Act and studied by aid of the analogies furnished by somewhat similar bodies elsewhere. May I, then, trust that this measure will be considered, as it appropriately might be, in a judicial spirit, approached with an entire absence of party feeling; weighed without any considerations of personal antagonism, and, decided without calling into play those pecuniary interests so directly touched by the matters lately before the House ? Under the circumstances the House will, I trust, excuse any trespass on its indulgence, even if it take the shape of repetitions, in order that, without being unduly technical, I may endeavour to convey an appreciation of this measure as it .presents itself to me. The Bill is one that needs explanation. It is based upon positive provisions in the Constitution, with which it requires to be read, and, even when taken together with those provisions, provides means rather than ends, and calls for consideration, not only of the proposals as submitted, but also of the objects sought to be attained by them. This might be termed in most of its features a machinery measure, and as such, might receive scant justice at the hands of its critics, unless the functions it has to fulfil are taken into account. At present it is no doubt as attractive to the ordinary member as would be the plans and specifications for an important edifice, and would convey to the layman about as small and insufficient an idea of that which is really to result from the carrying out of the propositions here embodied. **This is in a sense a formal sketch of the institution sought to be established.** It would be my duty to deal with it in the customary fashion - that is to say, by a somewhat close exposition of each of its particular features from the first clause to the last - had it not been made abundantly plain already that it is not so much any particular propositions included in this Bill, which have first to be discussed as the fundamental issue, whether this Parliament is called upon at this time to establish a High Court, and, if so called upon, whether the means proposed are adequate, and not excessive. Judging from the press criticism which the Bill has received, there is a disposition to regard this court - tills all-important portion of the Federal Constitution - as what has been termed “a splendid luxury.” The first thing,

therefore, on which honorable members will require to be satisfied is that it is an absolutely essential portion of the Constitution under which we live - that it is charged with the highest responsibilities to the people of this continent - that its operations in the present and in the future are of the most direct and material interest to every class of the community. The question of expense must be taken into account, and I trust that every proposal to which the House assents will be approved only after honorable members have been convinced that it can be justified on the grounds of true economy - not that of the penny wise and pound foolish order, but that which, having a due regard to the interest affected and the work to be done, measures cost by performance. The study of economy is one of the duties of members of the House, and there will be no attempt to pass it by, but an endeavour to show that this scheme is in the truest sense economical, taking into account the power and possibilities of this institution. May I, at the outset, endeavour to remove one of the gravest of misapprehensions - that this measure, because of its superficial appearance, is merely a lawyer's measure, and of interest to lawyers only. As it deals with legal forms and legal procedure, it is necessarily in that sense a lawyer's measure, and professional criticism is invited, and will be welcome in regard to every single detail. In that connexion, members of the learned profession will find ample scope and verge enough for all their labours. But, so far from its- being merely a lawyer's measure, the criticism directed against it in this morning's newspapers appears to emanate solely from members of that profession, and as it is almost wholly hostile, honorable members have a preliminary and practical assurance that this is not a proposal made solely in the interests of the profession. The Bill must be legal, because of the subject matter with which it deals, because it springs from a Constitution which, in one of its aspects, is simply a legal instrument, and depends on legal construction**. But in its substance, in its influence, in its true character, this is not not merely a legal measure. It is a fundamental proposition for a structural creation which is the necessary and essential complement of a federal Constitution. As such it affects the whole of -the citizens of this community ; as such it touches every class ; as such it affects every calling. Indeed, although it relates to legal machinery, the purposes to be served by that machinery are but in a fractional sense legal, are in the main general, and in a very particular sense political - affecting directly not only the businesses and bosoms of our population, but also the representatives of the people in both Chambers of this Parliament; affecting directly the Executive of this country; affecting, in fact, every portion of that Constitution of which this court is created to be the guardian.**

This Bill will be followed by another almost wholly mechanical in character - the Bill for procedure which honorable members see on the notice-paper, supplying the necessary setting for the courts now proposed to be created,' and suitably providing for the transaction of their business, that is if the House should see fit to give its assent to this Bill. These two measures, no doubt, will be found capable of improvement, and any suggestions for their improvement will receive most favorable consideration. But this Bill requires to be dealt with as a whole, to be considered as practically embodying a single proposition, for the creation of a national court. To put this view, forced upon me, in a sense, by the apparent attitude of public opinion, it may be necessary to repeat many of the truisms of our federal debates, to recall those constitutional doctrines upon which great stress was laid at the Convention, and in the referendum campaigns throughout Australia. It was not then, any more

than it is now, truly, a question of details. What was submitted to the public of Australia then was the establishment of a High Court as an integral part of a federal Constitution. Though there are other considerations and other functions of this court of the highest importance with the most far-reaching influence, yet after all it is in that respect it must still be regarded, in order that the criticisms offered both upon the creation of the court, and upon the scale on which it, is sought to be established, are to be understood. In its other relations - that is to say, apart from those Constitutional operations - the Bill is of the utmost importance. **It will complete so radical a reform of the legal relations of the people of these States to each other that it might fairly be termed a revolution. At the same time it is a revolution accomplished not by destruction, but by construction, not by the taking away to any considerable extent of powers that exist, but by their being focussed in a new centre from which they may be radiated to the greater advantage of the whole of this community.** May I ask honorable members, in order to grasp the position of this High Court, to ask themselves what is the exact change accomplished by the Commonwealth Act ? Before it was passed we had these self-governing colonies under the Crown transacting the whole of their political business ; and fulfilling most of the needs of their inhabitants, subject only to the supervision of the Imperial Parliament and its executive. The self -governing powers of the Legislatures of the States remain somewhat curtailed, it is true, and the control of the Imperial Government and Executive remains also somewhat diminished. Both the Imperial Parliament and the Crown have made what may be considered a surrender, as the Governments of the various States have made a surrender, in order to equip a new power intermediate between the Imperial authority and the self-governing States, collecting within itself the interests, and accomplishing the purposes, of the whole of Australia. This is the constitutional change which has been effected by the Commonwealth Act. The creation of the High Court, in its sphere, marks a precisely parallel change. We have had the courts of the States dealing with all the issues submitted to them by the people of their respective States, and the appeal from those courts to the judicial committee of the Privy Council. **We shall still have all these under this measure, but the Privy Council on its side has made a surrender, and the courts of the States on their side have also made a surrender, and . between the two we have interposed this third and intermediate body, the High Court, to which the judicial interests of Australia are committed, in the same way as their political interests are committed to this Parliament - that is, by the Constitution itself. This judiciary holds, therefore, in the sphere of law, precisely the same position, and exhibits precisely the same transformation as does the creation of the Commonwealth in the purely political world.** This is the first consideration pointing to the power and quality of this court, which should give pause to those who think that its creation is a matter of such slight importance that it can well be postponed or disregarded. The High Court, in its sphere, and the Parliament, in its sphere, are both expressions of the union of the Australian people. That union cannot be completed on the judicial side without the establishment of this court, any more than on the political side it ‘ ‘could have been completed, or even commenced, without this Parliament. The federal functions have been divided broadly into two classes. Already the States have, once and for all, parted with, and handed over to the Commonwealth, the sole control of the Customs, the Defences, and the Post Office and Telegraph department.

These are now federal departments, to which there will no longer be any analogy in the departments of the States. But there are also State departments relating to lands, mines, railways, and other matters, wholly belonging to the States, over which the Federal Government has no control, and to which it has as yet no parallel amongst its departments. The federal judiciary falls into neither of these classes. It is not to be a distinct and separate federal creation any more than it is to remain solely in the States. On the contrary, the judiciary will form one department in which the States and the Commonwealth will continue to have concurrent powers, the one co-operating with and assisting the other. **It is into an already existing judicial system that this High Court now makes its entrance, not by destruction of the State courts, but based upon them, and under this measure, vesting them with federal jurisdiction that they do not at present enjoy.** Nor does this measure oust the appeal to the Privy Council. It, gives us a new court, strictly Australian and national, created for Australian and national purposes, and introduced into that judicial system, whose beginnings are in the minor courts of the States, and whose crown is to be found in the judicial committee of the Privy Council of Great Britain. Of this system it is to continue a part. If this measure were one merely for the creation of a new court, it would be of great importance**, because the character of the channels through which justice flows can never be a subject of indifference to any class affected by them - and all classes are so affected.** If it were proposed merely to add a new court to those at present in existence, its creation would be a matter for the greatest reflection, and might mark no inconsiderable stage in the development of these communities. But the point I am anxious to impress upon honorable members, before they take into consideration the particular criticisms that have been offered with regard to this measure, is that this court has a quite special and distinct and higher importance of its own**. Owing to the federal Constitution introduced by the Commonwealth Act, a new state of affairs has been brought about, in which this court, in the exercise of its ordinary jurisdiction, is given a most potent voice. It will define and determine the powers of the Commonwealth itself, the powers of the States, which subsist within it, and the validity of the legislation flowing from them.** All these have to be defined by this new court. Its first and highest functions as an Australian court - not its first in point of time, but its first in point of importance - will be exercised in unfolding the Constitution itself. That Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered ; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us. Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation. Our Constitution must depend largely for the exact form and shape which it will hereafter take upon the interpretations accorded to its various provisions. This court is created to undertake that interpretation. In addition, the Constitution involves a series of compacts - compacts between the different States, studious of the interests of their own people, compacts which affect the present and future privileges of the people, compacts which affect the Treasuries of the States, and compacts which relate to the kinds of legislation to be undertaken by the Commomwealth. These compacts between State and State, and between the Commonwealth and its people as a whole, dealing with all classes and interests, are to be interpreted and safeguarded by this court. Further than that, how many of us

yet realize - though probably honorable members of this House are beginning to realize - the complex character of every federal system, and the specially complex character of that created by our Federal Act. How many realize that, because of the general language employed, the division between the powers of the Commonwealth, and those of the Imperial Parliament and Executive, is, as yet, vaguely defined. There is a large area of disputable territory, which has yet to be marked, either to our relative gain or relative loss of power and authority. On the side of the States - the opposite side - we find ourselves confronted with six important self-governing bodies. The boundary line between our territory and theirs is as .yet equally unmarked, and upon many points is equally difficult to determine. The drawing of the line distinctly between one sphere and the other, will depend more upon this court, than upon any other court within the Empire. We have read with interest, and have sometimes watched with concern, the work done by the various delimitation commissions appointed by the great powers, whose task it has been to follow through the swamps and forests of Africa, or along the high steppes and mountains of central Asia, the delimitations of frontiers. A line is drawn between New South Wales and Victoria, from the source of the Murray in a geometrical line to the sea, traced by a cleared track, so that people may have no doubt as to the position of the boundary. The tasks these commissions had to perform, whilst beset with objective difficulties, were as nothing compared with the intricate .task which awaits the High Court of Australia**. It has to lay down as between this Commonwealth and the Empire, and between the Commonwealth and the States of which it is composed, boundary lines which may be equally plain for every man to see, and within which our citizens may transact their business in security, without- the hazard of finding themselves within the domain of some power upon whose legislative authority they did not -calculate, lt seems to me essential that this count should be in every sense of the term Australian.** The proposition has been made that we should depend for a time, at all events, upon the courts of the States, instead of having a court which shall be able to draw its members from every State ; that we should accept judicial bodies, honorable and dignified, but limited in their jurisdiction, within certain boundaries, and- at present without authority to go beyond them, instead of creating a tribunal upon which several of the States can be represented by their best men, and which would be Australian in character as well as in scope. The High Court ought to be a federal tribunal, because Without derogation from the ability displayed upon the benches by the State Judges - in regard to which no word shall certainly fall from me - their work has been performed under circumstances which have rarely involved constitutional. appeals. It is also suggested that the State Judges throughout Australia should have power to deal with the issues arising within their several .jurisdictions, no matter how complex they may be, or how fateful their decisions may be to the other- States whose Judges are not consulted. We are asked to accept a definition of Australian interests in the first case from courts which it is no reflection to term provincial. We are to be satisfied with preliminary hearings that may result variously in different States, and to finally trust to the judicial committee of the Privy Council over-sea. The Privy Council have hitherto had to deal with only one federation - that of Canada - and one thing we require to guard against is that our Constitution shall not be interpreted as if it were a copy of the Canadian Constitution. This it is very far from being. We have to realize that it will be necessary for us in the first instance to feel our way. Even the Privy Council, which, as lately constituted, is deserving of every respect, should not be asked to undertake the task of considering some of the momentous issues shortly to be submitted to it until they have been dealt with from

the Australian aspect before a strictly Australian Court. Before we put so much in peril as would' be involved in the remission of these issues to any distant tribunal, we should take care that they have been submitted to a bench in which we have confidence, before which the Australian, and not merely the local, view has been thoroughly stated, and before which the many distinctions of our Constitution from the Canadian and that of the United States have been clearly brought to mind. Then we -shall feel very much less apprehension if any matter be subsequently remitted to the Privy Council than we could justifiably experience, especially in the earlier years of our history - and it is with these that we are now called upon to deal - if it were remitted in an imperfect shape. What are the three fundamental conditions to any federation authoritatively laid down *1* The first is the existence of a supreme Constitution ; the next is a distribution of powers under that Constitution ; and the third is an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers. These are the three acknowledged characteristics and fundamental principles of every federation, and if honorable members look at them for a moment, they will see that the first and second absolutely depend for their effect upon the third. The Constitution is to be the supreme law, but it is the High Court which is to determine how Ear and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others - the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the " keystone of the federal arch." " The legislature," as Marshall puts it, " makes, the executive- executes, and the judiciary declares the law." "What the legislature may make, and what the executive may do, the judiciary in the last resort declares ; so that the ties which unite the judiciary to the legislature - the Australian High Court to the Australian Parliament - are those of mutual association and dependence in the accomplishment of a common task. The High Court exists to protect the Constitution against assaults. It exists because our Constitution, although an Imperial Act, has a dual parentage. It proceeds from the people of the whole continent. It is one of the institutions which the people of Australia, when they accepted the Constitution, required to be established for the purpose of insuring that there should not be a departure from the bond into which they thereby entered for themselves and for posterity. This Constitution is not the creation of our State Parliaments only, neither is it the creation of the Imperial Parliament only. It draws its authority directly from the electors of the Commonwealth, .and it is as their chosen and declared agent that the High Court finds its place in the Constitution which they accepted. To put this part of the case in a nutshell, I would say that our written Constitution, large and elastic as it is, is necessarily limited by the ideas and circumstances which obtained in the year 1900. It was necessarily precise in parts, as well as vague in other parts. That Constitution remains verbally unalterable except by the process of amendment. Amendment is not nearly so difficult in our case as it is in the United States, but still it remains difficult. As honorable members are aware, scarcely any amendments have been made in the Constitution of the United States without a violent national convulsion. Of amendments of the Constitution in the ordinary constitutional fashion there are practically none. At this very moment there are before the Congress sitting at Washington no less than 44 Bills for amending the Federal Constitution, and it is the confident opinion of those who have watched the course of American legislation that not one of themis likely to become law owing to the complicated

assents they have to secure. Under these circumstances, the Americans have found themselves with a Constitution which might have been a dead letter, and must have been a heavy burden, but for the fact that they had created a Supreme Court capable of interpreting it, a court which had the courage to take that instrument, drawn in the eighteenth century, and read it in the light of the nineteenth century, so as to relieve the intolerable pressure that was being put upon it by the changed circumstances of the time. It is not too much to say that, but for the work done in this direction by the Supreme Court of the United States, we might not to-day see it as it is, still the revered bond of union of , 70,000,000 or 80,000,000 of free people. Precisely the. same situation must arise in Australia, for although it be much easier to amend our Constitution, it is yet a comparatively costly and difficult task and one which will be attempted only in grave emergencies. In the meantime, the statute stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary the High Court of Australia or Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.

Mr Conroy:

– But we cannot read into the Constitution something which is not there.

Mr DEAKIN:

– Perfectly true. Yet if he takes the doctrine of implied powers as developed by the Supreme Court of the United States, I will undertake to say that the ablest of its earliest lawyers - even Hamilton or Madison - could not have discovered the faintest evidence of the existence of a power which now authorises many of the greatest operations of- its Government, and which has been of incalculable advantage to the United States. Why *1* Because the law, when in the hands of men like Marshall or those trained in his school, -or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of the time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia. I do not propose to detain the House further upon these general considerations, except to say that in regard to my own allusions, or the marginal notes to this Bill, I hope honorable members will not press references or analogies too closely. There is a warning note at the very commencement of the measure that the references given are to more or less analogous provisions, and in any remarks which I have made, or may make, in regard to the courts of Canada, or the United States, honorable members will understand that they are made with many admitted reservations. Though they are useful analogies, they can easily be pushed too far, and for any body to mistake our Constitution for a copy of either the United States or the Canadian Constitutions would be to commit a grave and irreparable error. It resembles each, and yet it stands apart from both. The fact that we have blended in our Constitution some of

the provisions which exist in the United States, with others which exist in the Canadian, Constitution, of itself suffices to transform both, and as we have also introduced elements whose existence is more express in the Constitution of the mother country, we have again transformed them. As a matter of fact, although if we take this Constitution in its construction, brick by brick, we shall find many which bear the stamp of the United States, many which bear the stamp of Canada, others which bear the stamp of Switzerland, and still others which bear the stamp of the United Kingdom - the parent State - yet when they are united in an edifice built upon a different design, they lose in a great measure their former characteristics. This Constitution and this court are original structures in the true sense of the word. The courts of the countries I have mentioned, and their Constitutions, throw light upon our courts' and Constitution, but still ours need to be interpreted from the first line to the last as distinctly independent. No one provision can be taken apart from the rest now that they have been blended together. They are co-operative necessarily, but have undergone changes such as one finds in chemistry. Each borrowed atom included in the whole suffers a sea-change into something which it was not in the original Constitution from which it is taken. As professional men know, it is a grievous error to suppose, that in reading the Constitution, when we find a clause which comes from the United States, we have simply to look at United States decisions ; that when we find a phrase from the Canada Constitution, we have but to look at the Canadian decisions ; or that when we find something from the English Constitution, we have only to turn to our English constitutional law, and each of these points is settled. The Constitution must be read as a whole. All these elements are united in it ; but all are transformed, and none can be said to have the precise effect which it has in the place from which it is taken until the whole is considered as a whole. That must be donn in order to give consistent force and effect to every phrase, clause, line, and word. In these circumstances, when the new is old, and the old is new, the duty of interpreting the Constitution which devolves upon the High Court is no sinecure. It is a task which will tax the best brains that Australia can produce, and the object of this Bill is that the best brains that Australia possesses in this direction shall be devoted to ib. **Mr. Bryce** has remarked that no part of the United States Constitution is more misunderstood, especially by foreigners, than that relating to the judiciary. Judging by current criticism the same appears to be true of the place of the judiciary in our own Commonwealth. The words " judicial power " which honorable members will find at the very outset of the chapter of our Constitution which deals with the judicature are taken, it is true, directly from' the United States, Constitution, but under the United States Constitution these words are practically defined. In the Constitution of the Commonwealth there is no such definition. It does not follow, therefore, that the limit of the "judicial power" of the United States is necessarily the limit of the " judicial power "here; as these words are used in the Constitution of the Commonwealth, their ambit may be much greater. Again the Supreme Court of the United States, as honorable members know, has no relation, except in federal matters, with the courts of the States. These stand apart independently, and arrive possibly at different conclusions on points of law. The High Court as created under our Constitution, on the contrary, while possessing all the federal jurisdiction of the Supreme Court of the United States, is at the same time definitely arid permanently linked with all the courts of the States. It becomes the centre and crown of the whole set of State judicial systems, as well as the centre and crown of federal jurisdiction.

Mr Conroy:

– Being an appellate court.

Mr DEAKIN:

– Yes. In these circumstances, although the Supreme Court of the United States is the nearest tribunal to our own, there are extremely wide differences. What the United States court has been to the United States was foreseen and provided for in its Constitution. In the preamble to that Constitution the establishment of justice throughout the United States of America was placed in its very forefront as one of the very purposes for which it was created. It was not necessary that those words should occur in the preamble to our Constitution, but our purpose was precisely the same. Why do those words occur, and why was that court created in the United States Constitution ? Because the previous confederation, without such a court, had collapsed ignominiously, one of the chief causes of its failure being that there was no national court in existence. Our position is not precisely the same, because we have always over all State courts the judicial committee of the Privy Council. But the necessity which arose in America for the creation of an American court points the finger directly to the necessity which will obviously and necessarily - although, perhaps, not so manifestly - arise in Australia for the creation of an Australian court. The special political function of the Supreme Court of the United States is that of pronouncing upon the validity of legislation - the function of determining whether an Act comes within the powers of Congress or is reserved to the State legislatures. That is a power which to foreigners appears almost inexplicable - so strange is it to their experience that any judicial body should have so- vast a power. To us, as to our Canadian kinsman, and the founders of the American Republic, there is no such surprise. In the old colony days, before the American Constitution was established, the State courts were accustomed to pronounce upon their own statutes, and to determine whetheror not they conflicted with the Royal chartersunder which those colonies existed. So in Canada, since the establishment of the Union, without any obvious extension of authority, the supreme and local courts of that country have freely pronounced upon the validity of provincial acts, or upon thoseof the Dominion Parliament. In the discharge of their ordinary duties as courts, of the Empire these tribunals have setaside legislation which it was beyond the authority of either the greater or the lesserParliaments to pass. We had precisely similar experiences in these States, when they were colonies. We have seen Actsrejected or set aside because they conflicted with the Constitutions of these colonies. There was, therefore, neither to us nor to our American or Canadian kinsmen, anything startling in the exercise of this power, one of the most important intrusted to our High Court, and which in a degree will attach to every one of our courts. But while that is to be admitted by way of premise, honorable members will realize, I hope, that the creation of a federal State in Australia has transformed the situation, to such an extent, that what was an almost disused power exercised with extreme rarity, and on few points of importance, will under our changed circumstances, become one of the most transcendent within the whole range of the Constitution. What laws have we in existence in this Empire of which we are a part *t* We have five separate sets and systems of law to which the High Court and its subsidiary courts will be called upon to give a separate and varied authority. We have, in the first place, such Imperial legislation as is expressly applied to us, or as may be expressly applied to us ; and the question of the limits within which they may be applied, promises some very interesting discussions in the future. Then there is the Commonwealth Constitution, which is itself an Imperial Act, but an Imperial Act of a remarkable and exceptional

character. It is exceptional, first of all, because it is a Constitution, and secondly, because it carries with it not only the assent of the Parliament of Great Britain .but the preliminary assent .of the people of Australia. Under the Commonwealth Constitution in the third place we find Commonwealth legislation, which, within the limits of the Constitution, takes priority over all other local legislation. In the fourth place we find the Constitutions of the States, as they are, or as they may become. Although standing on the same legal footing as other Imperial Acts, they, too, have a very different authority constitutionally. As constitutional . Acts they stand above the legislation of the States, which represent the fifth class of legislation. Thus we have five gradations of legislative authority and power**. We have Commonwealth legislation and State legislation proceeding in an endless" stream, with possibilities of Imperial legislation - three classes of law constantly changing in character - and the other two classes, the Commonwealth and "the State Constitutions, requiring interpretation and re-interpretation. The old power, formerly in existence, of determining upon the validity of a law of these colonies, by contrasting it with the Constitution which the colony had derived from the mother country, was really exercised on such settled lines, that it was all but dormant while the States were severally apart from each other, with few and costly legal relations between their citizens, and few opportunities for their legislation to clash either with the Constitution of the mother country or their own Constitutions. But with the existence of these five classes of legislation, the High Court must now and for many years continue to be an actively and constantly operating power.** The work before us, which I have already described as that of delimitation, now emerges in an entirely fresh way, and carries with it serious responsibilities. Consequently this power, although it is the same power as of old, will find a fruitful, and, for a long time, a steadily widening field within which to operate. **The decisions, of the Court will be of the utmost importance to this House, and the Senate associated with it, to the Executive Government of the Commonwealth, and to the people of the Commonwealth, whose powers, privileges, rights and liberties are to be yet strictly defined.** Previously the condition of the States in this regard may be termed one of single-blessedness, with few relations and responsibilities. Now we have entered into an indissoluble relation of a most complex character, carrying with it the gravest obligations, and requiring the most serious guarantees. We have passed from the simple state of comparatively self-governing independence under the Crown to a state still under the Crown, in which complex federal machinery is required to be brought into play, not by our choice but by the very necessity of the situation. It is impossible to create a federation without having divisions and distributions of powers, without having different organs of government possibly in conflict. Therefore, from the necessities of federation, and as one of the inevitable consequences from which we cannot escape, we find ourselves in a new situation of comparative peril and serious responsibility**. Hence we must necessarily have an Australian court for the determination of principles which shall be common to the whole Continent, based upon a survey of the requirements of the whole people. If the legislative and executive powers of the States, the Commonwealth, and the Imperial Governments are to be judicially restrained each to its own sphere, we have before us a difficult task. Does anyone wonder, under the circumstances, that we find in the Constitution a special chapter devoted to the establishment of a High Court, and that ten sections, numbered 71 to 80, like ten fingers,**

sustain in their grasp the judicial power, and, in a sense, the legislative and executive power of the Commonwealth ? It is no common creation. Bearing in mind the cautions already given, let us consider for a moment the difference between the High Court provided for in our Constitution and the Supreme Court of Canada. In the first *place,* the establishment of the Supreme Court of Canada was optional. All that was inserted in - the Canadian Constitution was a simple power to create a court of appeal. In Canada the

Executive Government exercises a veto over provincial legislation.

Mr Conroy:

– At the present time that is so.

Mr DEAKIN:

– It has always done so, and still does so. No such power is vested in the Federal Executive under our Constitution. If our Federal Executive had the power to negative State Acts at its pleasure, there would be far less need than there is for the establishment of a High Court. It was perhaps because in Canada the task of keeping the provinces within their bounds was intrusted to the Federal Government, that its Supreme Court occupies a relatively less exalted and responsible position than will be occupied by our High Court. **In the British North America Act there are but six sections devoted to the judiciary, and five of them are taken up with details which are disposed of in section 72 of our Constitution.** So that, practically, the Supreme Court of Canada is the creation of one section, which provides for the establishment of a court of appeal, whereas our High Court is built up in a number of carefully drawn sections, in which the range of its jurisdiction is clearly defined. It has been said with great truth, comparing the Canadian Court with the Supreme Court of the United States, that the Privy Council is the Supreme Court of Canada. Of course, the Supreme Court of Canada, like our own High Court, can determine the validity of laws just as does the Privy Council. But the Privy Council is a body of heterogeneous jurisdiction, administering many different systems of laws, and if it be the Supreme Court of Canada, there is in this respect, at all events, a close analogy between it and our High Court**. In its administration of a single system of law in a single area our court more closely resembles the House of Lords. In the United States the same relation between State Courts and the Supreme Court exists in matters of federal jurisdiction as will be established by this Bill between our State Courts and the High Court.** In addition, our High Court will be endowed with a vastly wider appellate jurisdiction for all causes which come before the courts of the States. Our High Court will hold a relation in regard to the State Courts closely resembling that of the Supreme Court of Canada, where the two bodies are even more blended, owing to the power of appointing the Judges being so largely vested in the Federal Government. What, in my judgment, may be termed a defect in the Canadian system persists in. our own, and that is the possibility of an alternative appeal either to the local Supreme Court or direct to the Privy Council. Far greater unity would be imparted if all appeals had, in the first instance, to be made to the highest court in the Dominion, as I trust at some future date all appeals throughout Australia will be made in the first instance to our High Court. Under our Constitution and under this Bill no new barrier is raised between the High Court and the State courts. On the contrary, they are united as closely as possible. I see no reason why, in the future, the natural development of our judicial system should not make that unity

more pronounced, and the gradation more perfect. They constitute parts of one judicial system, and may readily be brought into complete harmony, though this is a merely speculative issue, to which I shall not do more than allude. The Bill which I am now more closely approaching makes no alteration in the relation established under the Constitution between our High Court and the Court of Final Appeal - the judicial committee of the Privy Council. Under section 74 of the Constitution, this Parliament has power to make laws limiting the matters in which leave may be asked to appeal to the Privy Council. That power is not exercised in the Bill**. I shall presently call attention to one important change consequent upon the endowment of our State courts with federal jurisdiction, but, subject to one or two matters of that kind, the State courts are left in practically the same position as they occupied before.** Of course honorable members are aware that it is not within our competency to undertake to alter the State courts. They are absolutely independent of us." Their strength and jurisdiction, apart from their federal' jurisdiction, depends, not upon us, but upon the State Parliaments, under the Crown. There are no changes other than those presently noticed, occasioned either on the Imperial side or on the side of the State courts; **We have done all that the Constitution empowers us to do to increase the usefulness of the State courts, and to remove the barriers which previously separated them, but which under federation became an anomaly. Section 51 of the Constitution enables us to legislate in regard to -**

The service and execution throughout the Commonwealth of the civil and criminal processes and the judgment of the courts of the States.

We .have so legislated. It also empowers' us to provide for -

The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

We have so provided. So far as the Constitution permits us, we have increased the ambit and usefulness of the State courts. But we have gone further. By the Customs Act, the Excise Act, the Immigration Restriction Act, the Pacific Island Labourers Act, and other measures, we have conferred federal jurisdiction upon State courts, and we have passed a short measure to make it perfectly clear that in **all minor matters the State courts are endowed with federal jurisdiction within limits there laid down.** Therefore, so far from having failed to utilize the State courts, we are utilizing them to the full extent of our power. In the first session of this Parliament, we have passed measures conferring upon them practical^ all the authority which the Constitution enables us to grant.. We have reason to be proud of the learning, the capacity, and the integrity which have been exhibited by the Judges of the various State benches. **The community relies upon them.** We are proud that upon comparatively few occasions have their deliberate judgments been reversed or varied by the court of final appeal. Whether the State courts will in the future be maintained at their present strength is not for us to consider, because the question is not one which we can solve. That will be a matter for the States. But the passing of this Bill introduces into the judicial realm a new body of exceptionally high character. **If the members of the High Court, as we have every reason to suppose they will be, are the best men that Australia can produce, it is inevitable that the court will draw to itself, naturally and without coercion, a considerable share of the litigation which has hitherto flowed to the Supreme Courts**

of the States. There may remain a sufficiency of business for the State courts for some time to come, owing to the growth of population and the increase of prosperity; but it cannot be denied that the business which will be done by the High Court will assist to relieve not only the State courts, but the Privy Council.

Mr JOSEPH COOK:
PARRAMATTA, NEW SOUTH WALES · FT; ANTI-SOC from 1906; LP from 1910; NAT from 1917

– Then the High Court will largely make its own work !

Mr DEAKIN:

– It will not make its own work, though it will make its own way. The work which, under other circumstances, would be done by the Supreme Court, will be done by the High Court. **The High Court will not be able to make business for itself. What makes business for it is the establishment of the 'federal Constitution. The existence of the Federal Constitution is already sending into our State courts business which they otherwise would not have had, and that will continue; but if a High Court of supreme ability and standing is created, not only will federal business be transacted by it, but, as it will be able to take State business as well, a number of litigants will prefer to go direct to it, instead of to the State courts.** There are, I submit, three principal questions to be asked regarding the Rill The first - Is it within the Constitution ? I reply that it is ; though upon certain points that may be a question I submit that it must be answered in the affirmative. Next, does the Bill provide for the exercise of all the powers which the Constitution commits to the High Court? The answer is: .that it does ; it proposes to take the fullest advantage of all those powers. The last question is, does it create all the courts which the Constitution authorizes this Parliament to create? and the answer is "No." In the 71st section of the Constitution, this Parliament is authorized to create, not only a High Court, but such other federal courts as it chooses, and no such courts are proposed under this Bill. It is proposed to take advantage of the third power to invest State courts with federal jurisdiction, but the only new court is the High Court. One suggestion so far favored is that we should establish no High Court at all, and be content with the old State system, and the old appeal from the State courts to the Privy Council. This amounts to an endeavour to conduct a federal system upon purely provincial lines, which must inevitably fail. An alternative is that a " scratch court," so to speak, should be constituted from time to time of the Chief Justices of the States. I say " scratch court," because the proposal is, not that the same Judges should always sit, because obviously, with six States and their business to be first considered, they could not all regularly attend - some are to attend at one time, others at another. Their coming is not to depend upon the importance of the business before the court, it is not to depend upon the federal issue submitted, but it is to depend upon the consent of the State Legislatures and the convenience of State administrations. That is what, without disrespect, I call a "scratch court." To a court constituted of Chief Justices there is also a preliminary difficulty. In several instances the Chief Justice is LieutenantGovernor of his State', and exercises from time to time the duties of the head of the State, even while he continues to act as Chief Justice. I do not know whether the community as a whole, with the highest respect and regard for these gentlemen, would feel that they were placed in a proper po'sition if, while they were Lieutenant-Governors of particular States, they were to sit upon cases determining the powers of those States in regard to the Federal Parliament. It would be held, if

they decided against their States, that they did so in order to avoid the appearance of favoritism, and if they decided for their States, that they had succumbed to provincial interests. In either event their position would scarcely be tenable. If they are not Lieutenant-Governors of States they are men required to put the interests of the State which pays them first in the matter of the time they allot to the discharge of business. They could only make themselves available for federal business when their duties permitted. Having in view the problems already submitted to our courts, and awaiting decision regarding the future of this Commonwealth, it appears to me to be wholly unsatisfactory to say that the Federal Parliament, with all its powers - not its powers as a Parliament apart from other bodies, but the powers which it has to hold and exercise in the interests of its constituents - and the interests of the whole of the people of Australia are to be committed from time to time to courts constituted at the convenience and pleasure of the States, out of a shifting body of Judges. At all events in the chief States of the union, they must sacrifice their State business if they undertake federal business. What saving is there on the ground of economy, if we are to accept State Judges to do federal work, with a certainty that, in States like New South Wales, this must lead to the appointment of extra acting or permanent Judges to keep up with the State business? They must be paid for by the Commonwealth. It is true that those States whose Judges are fully occupied would be the only ones in which extra expenditure would be required ; but would it be a satisfactory position for the Federal Government to pay the salaries of the new State Judges undertaking the business of the State Judges who had left for a federal court ? Under those circumstances, is it more advantageous and proper for the Federal Government to pay the salaries of some State Judges to do State business, in order that it may borrow other State Judges to do federal business ? In a State like New South Wales, where the business of the court is congested - according to certain recent statements. made in them - no Judge could be spared without the appointment of another to take his place. If the Federal Government is to pay any one to undertake judicial duties, surely it would prefer to pay Judges of its own choice to undertake that work ? The judgments of our own courts stand well, even when subjected to test at home, but they have not yet involved many delicate constitutional questions. In fact, I can recall constitutional cases dealt with in Australia by very able State benches, in an extremely unsatisfactory manner to a great number of the profession, and of the people of their States. Then again, although the judicial committee of the Privy Council as regards Canada, has given great satisfaction in its interpretation of the British North America Act, it has gradually established a line of interpretation in regard to that Act which is at present a safeguard to the Dominion Parliament and its powers. Putting aside the fact that the Canadian Constitution is a much less emphatic departure from the British Constitution than is the Constitution of the Commonwealth of Australia, where, instead of subordinating its provinces to itself, we have left them as relatively independent as are the States under the United States Constitution**. The people of Australia gave to this Parliament, as its first trustees, the duty to preserve their privileges, all that were granted to them by this charter. Are we then in the first session of our Parliament to say - "We are willing to place your rights and powers between the upper millstone of the Privy Council and the lower millstone of provincial courts ? " Who but ourselves will be held responsible if distinctively federal rights and privileges emerge, ground to impalpable powder ? We should be false to the task imposed upon us. This is no optional court of the Canadian fashion, but a court which, under a mandate of the Constitution, is required to be established. As it presents itself to my**

mind, the plain reading of that mandate is that it shall be created at once. The language of the Constitution is that -

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court.

Not in State Courts, not in a combination of State Judges, not in the Privy Council even, but in a Federal Supreme Court, " to be called the High Court of Australia." That is the absolute behest of the Constitution ; it is a command, which we can neither neglect nor ignore without failing in our legislative duty. The people of Australia accepted the Constitution with that mandate, which I never heard challenged on any platform.

Mr Poynton:

– How many understood that part of it ?

Mr DEAKIN:

– I do not understand the honorable member's question to convey a reflection on the electors of Australia, but to inquire how far electors distinguished that particular proposal.

Mr Poynton:

– That had to be the first thing done by the Federal Parliament.

Mr DEAKIN:

– I do not think I ever stood upon a platform upon which I did not explain or hear explained by another speaker, the position which the High Court was to hold**. This court was to be in one sense the custodian of the Constitution and a guarantee to the people, especially of States that were not to send a large number of representatives to this House. The first guarantee given to them was equal representation in the Senate, and the second guarantee, which weighed, to my knowledge, with thousands of them, was the impartial independent tribunal to interpret the Constitution.** The people sanctioned it, and protected it against encroachments from State Parliaments or Executives, or from its sacrifice by the Federal Parliaments or their Executive. This Bill is grafted upon those provisions in the Constitution. Were it not for the express terms in which the judiciary is dealt with there much more would appear in this Bill. If honorable members will look at the chapter on the judicature they will find in section 71 **that the High Court shall consist of not less than three Justices.** Section 72 grants the usual guarantees to the Justices, to place them beyond the reach of improper influences. Section 73 provides for this court a complete and ample appellate jurisdiction over all the business of the State Courts. Honorable members will realize that though a Federal Court, it is not limited to matters of federal jurisdiction**. The simplest suit between any two persons in this continent about any matter whatever, may, subject to certain limitations imposed in this Bill, be brought to the High Court.**

Mr McDonald:

– Presuming they have sufficient money to take it there.

Mr DEAKIN:

– That applies to every court. The entire business which is now transacted, and all the business which can be transacted by the State courts of Australia, can be brought to the High Court on appeal. In this respect the conditions will differ materially from those which apply to the Supreme Court of the United States. Section 74 deals with appeals to the Privy Council. Constitutional appeals are to be finally and absolutely decided by the High Court unless the court itself sees fit to refer them to the Privy Council. This is a larger power than exists in Canada, in whose Constitution there is no hint of any such special authority, indeed the High Court will be the only body in the outer empire intrusted with the performance of this high duty and this special responsibility. In section 75 this Parliament is constrained. Here the original jurisdiction of the High Court is provided for, and even Parliament is not to be allowed to reduce it. Section 76 provides that jurisdiction in four very important matters may be conferred upon the High Court by this Parliament, and this Bill proposes to confer it. Section 77 confers an authority far wider than may appear to a cursory reader - to define the jurisdiction of the federal courts, and the extent to which the jurisdiction of the federal courts shall be exclusive, also conferring power to invest any of the State courts with federal jurisdiction. As will be seen in the sequel, these are very great powers, and they are to be exercised under this. Bill. In the next section, power is given to enable proceedings to be taken against the Commonwealth Government, and" the following section enables the Parliament to fix the quorum of Judges, whilst section 80 deals with trials by jury. Honorable members will see that in the Constitution, there is, so to speak, a small judiciary Act already passed. It is part of the Imperial Act, and is binding upon us. It expresses the will of the people, and declares not only that this court shall be established, but determines generally its jurisdiction, and many other matters in regard to it. Further, in express words it points to many particulars in which this Parliament is required to assume responsibility. Under section 71, we are required to determine the number of Judges - more than three - **by section 72 we can make certain provisions with regard to their tenure of office ;** in section 73 we have not only, an appellate jurisdiction, but a restriction upon the power of Parliament to limit it. In section 74 we have power to limit appeals to the Privy Council. In section 75 we have the original jurisdiction fixed ; and in section 76 the optional jurisdiction of the High Court. **Under section 77 we are prevented from limiting the jurisdiction of the High Court, whose Judges are accorded an exceptional position. We can define the jurisdiction of any federal court other than the High Court.** Again, by section 80 this Parliament cannot, without an amendment of the Constitution, enable an indictable offence to be tried without a jury, or to be tried outside the State in which the offence was committed. Thus we have laid down by the Constitution the main lines of construction for our judiciary, and have indicated to us the way in which this Parliament is called upon to complete the work. Before directing special attention to a few clauses of this Bill, may I be permitted to express the acknowledgments which are due to several gentlemen, and particularly to one, who have lent invaluable assistance in the preparation of this measure. It has been drafted for some twelve months, and I am under a debt which cannot be over-estimated to the Chief Justice of Queensland, **Sir Samuel** Griffith, not only for the use which we have made of the statutory -work he has done in that State, but for the unstinted generosity with which he has supplied original drafts, criticisms, and suggestions for the shaping of this measure. After it was put into form, I thought it right to. submit it to the chairman of the Judiciary Committee of the last Federal Convention, **Senator Sir Josiah** Symon, to whom also I am under a great obligation for criticisms and suggestions. Finally, I submitted it to the chairman of

the Judiciary Committee of the Convention which was held in 1891, **Mr. Justice** Clark, of Tasmania, who in the same way was good enough to read it with a critical eye. No one of these gentlemen, not even **Sir Samuel** Griffith, can be held to blame for any provision in this measure as it now appears. Many alterations have been made in detail, and some in principle, so that the Ministry, and the Ministry alone, are responsible for the form in which it now stands. Neither of the professional critics who have helped us would probably approve of all the contents of this Bill - or perhaps of the Bill as a whole. I mention their names, not with a view to commend it to the consideration of honorable members, but in order to discharge the grave obligation under which I lie to men of such learning and experience for their great assistance. For the Bill as it stands we take the whole and sole responsibility. Every weakness in it is no doubt due to some of the alterations I myself have made. I am anxious, without undue delay, to recommend it to the lay members of the House. From my professional brethren I shall ask and expect the closest criticism - and have already invited it. .1 wish, however, to remove any apprehension that other honorable members may feel when they turn over the 22 pages of the Bill, and hastily scan its 80 clauses. I wish to tell those who shrink' from the task of endeavouring to assimilate those 80 clauses, added to the ten sections of the Constitution relating to the judiciary, that if they will give a cursory glance at the Constitution they may 'drop 60 of these clauses' for the present, and find in the remaining score most of them easily intelligible, the gist of the measure. For instance, honorable members will, I am sure, turn with interest to clause 3, which provides that the High Court shall be constituted of the Chief J Justice and four other Justices. That was the proposal adopted by the Convention in 1891, and if it were justified by the condition of legal business, *by* the population and litigation of Australia then, it is doubly justified to-day. The next provisions of importance are to be found in clauses 9 to 11. They provide that until the principal seat of the High Court is fixed at the seat of the Government, it shall sit at such places as the Governor-General shall from time to time appoint. Provision is also made for the establishment of registries in each State-one at least at its capital - and that the sittings of the High Court shall be held from time to time at the principal seat of the court, and at each of the places at which there is a district registry. Then honorable members may pass on to the sixteenth clause, which enables a Judge of the Supreme Court of a State to be appointed to act as a Judge of the High Court sitting in Chambers. This will qualify him to deal with those many necessary preliminary and intermediate steps which are usually taken on interlocutory applications, without waiting for the attendance of a High Court Judge. In clause 23, all the jurisdiction which, under section 76 of the Constitution, can be conferred on the High Court is so conferred. Clauses 27 and 28 deal with appeals in one case from the Federal courts, and in the other from the State courts, whilst clauses 29 to 31 fix the number of Judges to constitute courts for dealing with particular classes of cases. By clause 32 honorable members will notice that every Judge of the High Court is prohibited from sitting upon appeals from his own judgment. They will find in clauses 35 and 36, perhaps, the most important provisions in the measure. These not only confer federal jurisdiction upon State courts, but define the jurisdiction which is exclusively in the High Court, and cannot be exercised by the State courts. Clause 37 provides for appeals in matters of federal jurisdiction. Clauses 38 to 41 are valuable, because they enable suitors to have their cases removed from the State courts under certain circumstances as a right, and, under other circumstances, only if they are able to show sufficient cause to the High Court to justify such a transfer. This is a power of importance, although of far less moment in our judiciary than it is in the United States. Our general power of appeal

in all matters from the State courts to the High Court would enable us to look without alarm upon the decision of Federal issues, or mixed Federal and State issues, by the State courts. There might be no necessity to remove a cause while an appeal, in any case, lies with the High Court. Clauses 48 and 49 provide for the salaries and pensions of the Judges of the High Court. I may now assume that I have directed the attention of honorable members to nearly every provision of special interest in the Bill. The principal provisions are contained in these twenty clauses, which should not present any great difficulties, and if printed in black letter, as they appropriately might be, would not alarm even laymembers. They may be further reduced to seven clauses out of these upon which the attention of honorable members may be focussed.

Mr O'Malley:

– The The Chief Justice of America receives only £2,000.

Mr DEAKIN:

-The honorable member has heard of no proposal from me to reduce that amount. The seven clauses to which I have called attention, are clause 23, which relates to the conferring of original jurisdiction ; clause 27, which deals with appeals from Justices of the High Court; clause 28, dealing with appeals from the State courts ; clause 35, which relates to the judicial power of the Commonwealth ; clause 36, having reference to State courts invested with federal jurisdiction ; clause 38, relating to the removal of cases as of right ; and clause 41, to removal by order. I think that these seven clauses might be printed in gold letters to convey, not only an idea of their relative importance to the rest of the measure, but because honorable members would then see that if they had mastered the few very vital and important considerations which are involved in those clauses, they would have a very adequate idea of the actual scope and intention of this Bill. In fact, if I may be as figurative as the honorable member for Tasmania, **Mr. O'Malley,** I should say that out of the ten sections in the Constitution to which I have referred, the first seven are the seven branches of the candlestick of the Commonwealth law, by the light of which this Bill may be seen to fulfil the expectations of the people who accepted that great measure. Perhaps I can still more simplify the task for our weaker brethren, if I summarize in a few words the actual scope of federal jurisdiction. Matters within that jurisdiction may be dealt with under this Bill either by Federal courts or by State courts invested with federal jurisdiction. In some matters the jurisdiction of Federal courts is exclusive. In all other matters the States are invested with a concurrent jurisdiction, although such matters may be removed to the High 'Court upon appeal or by order. When the Bill comes to deal with the State courts it first makes the jurisdiction exclusive! y federal, and, so far as they now enjoy such jurisdiction, may be said to deprive them of it. The same clause then invests the State courts with the jurisdiction part of which may be said to have been withdrawn. This makes it perfectly clear that federal jurisdiction is vested in those courts subject to a condition which will presently appear. The jurisdiction of the Federal courts is exclusive in the matters mentioned in clause 36, paragraphs *(a)* to (/). In suits which cannot be removed from the State courts, as of right, the appeal must be heard by State courts. In other matters, the State courts can exercise federal jurisdiction only as courts of first instance, and any appeal from them must go to the High Court. Finally, in all cases of federal jurisdiction, appeals from the Supreme Court go to the High Court. I need not dwell Upon the fact that certain inferior State courts are treated as courts of first instance, even when one inferior court is dealing with a case on appeal from another

inferior court. In regard to removals, they are either as of right or by order of the High Court. Removal, as of right, may be made on application of the defendant in all suits involving matters of federal jurisdiction, except where the only ground of federal jurisdiction is that the suit relates to a matter of Admiralty or maritime jurisdiction, or to a dispute between residents of different States, or between one State and the resident of another State. The removal cannot be made from the State court by a defendant resident in the State in which the case is being tried, then or where the suit, not being a matter of Admiralty or maritime jurisdiction, relates solely to the possession or administration of property in a State. These provisions, honorable members will see, are intended to render it unnecessary to have cases removed from State courts in those matters which need to be dealt with either with special promptness - as in the case of Admiralty or maritime jurisdiction, where, perhaps, a ship has to be detained - or in cases where the defendant's interests - the property being in his own State **- are sufficiently protected by the fact that his State court is the tribunal before which it will be tried.** Of course, any case, civil or criminal, involving a matter of federal jurisdiction, may be removed to the High Court on the application of any party for cause shown or upon the application of the Federal AttorneyGeneral, if he considers the matter one of such grave importance that in the interests of the State and of the parties themselves, it is desirable that it be at once removed to the High Court. With these safeguards, the restrictions proposed upon the jurisdiction conferred are made in the interests of litigants and to provide that the courts of the States shall be capable of being used in all possible disputes, when the circumstances to which I have just alluded exist.

Sir John Quick:

– What is the original exclusive jurisdiction of the High Court *1*

Mr DEAKIN:

– It is a little less than that included in section 75 of the Constitution. The original jurisdiction contained in section 75 is made exclusive, except in regard to some of those matters set forth in sub-section (4). Matters between residents of different States, or between a State and a resident of another State, are omitted. All the remainder of the original jurisdiction conferred under section "75 of the Constitution belongs only to the High Court. That is the only exclusive jurisdiction proposed in the Bill. Honorable members will perceive that the few matters which are to be tried in the High Court are practically those which are specially singled out in the Constitution itself. **They are matters arising under any treaty, clearly of federal and not of State concern ;** matters affecting consuls or other representatives of other countries as such, also a strictly federal matter ; suits between the Commonwealth, or any person suing or being sued on behalf of the Commonwealth, and. a State or any person suing or being sued on behalf of a State. In addition paragraph (e) of clause 36 gives the High Court exclusive jurisdiction in suits against the Commonwealth, or against any person being sued on behalf of the Commonwealth ; and paragraph *(f)* confers similar jurisdiction in regard to matters in which a writ or order is sought to be obtained against an officer of the Commonwealth, in respect of some act done by . him in the execution of his duty. Paragraph (c) gives exclusive jurisdiction to the High Court in suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State. The House will therefore see that the' only exclusive jurisdiction of the High Court relates to treaties,

consuls, officers of the Commonwealth, suits against the Commonwealth, or suits by States, all of which matters are obviously not to be dealt with in the same federal fashion by any State court. **Of course, cases under these classes will occur very rarely, but when they do occur they can be dealt with only by the High Court.** Wherever it is possible to confer upon the State courts original jurisdiction .we have done so. Section 76 of the Constitution gives us four optional classes of original jurisdiction. That is to say, it proAndes that all cases arising under the Constitution or under any laws made by this Parliament, and all cases of admiralty and maritime jurisdiction, or relating to subject matters claimed under the laws of. different States, may be part of the original jurisdiction of the High Court. This Bill makes them part of the original jurisdiction of the High Court, but it enables them to be dealt with, as also certain matters arising out of section 75 of the Constitution, by the State courts. The whole sweep of the original jurisdiction of the High Court is vested in the Federal Courts, with the few special exemptions which I have named.

Mr O'Malley:

– I - If a Tasmanian has a claim against a Victorian, he can sue him in the State court instead of in the High Court?

Mr DEAKIN:

– He can sue him where he likes. I am about to ask the House to briefly consider the High Court in three aspects. First, as the head of all the State systems, whether in regard to the jurisdiction which they at present enjoy, or that about to be granted to them; secondly, as the federal judiciary dealing with purely federal business ; and thirdly, as the exponent of the Constitution. If honorable members look at clause 28 of the Bill, they will note that the appellate jurisdiction given to the High Court under section 73 of the Constitution is here made subject to certain limitations. That is to say, before an appeal can be made from a State court to the High Court, it must be shown that it relates to a matter involving, at least, £300, unless special leave is given by the High Court, when there is no such restriction**. If an important principle is involved an appeal will lie for threepence.** In addition to that, having in view the power possessed by the Federal Parliament to legislate on certain special issues, we have introduced an entirely new qualification for appeals which does not exist under any Orders in Council relating to appeals from the State courts to the Privy Council. It is a qualification which does not exist in any form in any State, or in fact, so far as I know, anywhere else**. An appeal will be received in any case which involves the status of any person under the federal laws relating to aliens, marriage, divorce, bankruptcy, or insolvency - all matters of federal legislation**. Without regard to any sum of money being involved, and without even requiring special leave to be granted, any matter relating to these various classes will be appealable to the High Court. That marks a step in liberality beyond anything of which I am aware. An appeal will also lie in criminal matters on questions of law to the -High Court. Such an appeal lies on writ of error, when questions of law are involved, to the Supreme Court of the United States. Under a provincial Act in Canada of doubtful validity, appeals to the Privy Council in criminal matters are forbidden. Ours, therefore, will be a national court of appeal. **All civil and criminal cases - even the decision of a single Judge - will be directly appealable to the High. Court if the litigant has reason to believe that he will obtain a more stable judgment than he would from his own State**

tribunal. It will be wholly a National Court of Appeal, from which nothing whatever will be excluded. Although it is here proposed, and can only be proposed, that all Australian litigation should find its appeal in the High Court, very high legal authorities in the sister colony of New Zealand have suggested that it would be regarded as an advantage if the opportunity for appeal from the decisions of the courts of that colony were allowed to our High Court, if litigants come to prefer it, in addition to the right of appeal to the Privy Council in England. It seems to me that if ever that proposition is officially and authoritatively made an attentive and sympathetic ear should be lent to it by this Parliament. If the High Court established, is the body foreshadowed in this Bill - if it does not consist merely of a chance gathering of State Judges, but is a permanent body which, by its members and learning, wins respect, and challenges comparison even with the great tribunals of the mother country - we may hope to draw legal business -not only from our own States, but from that sister colony before it becomes - if ever it should happily become - a member of our union. The High Court will be an appellate tribunal for all cases judicable in the State Courts, and for all cases judicable in the Federal Courts. Its power of appeal covers the whole vast range of possible litigation in Australia. Nothing Federal or State is excluded from it. It. will be capable of entertaining appeals on questions of law, even from the Inter-State Commission when that body shall have been created. I shall not repeat the contrast drawn already by anticipation between a body clothed with this vast appellate jurisdiction, and the United States Court, limited only to matters of Federal jurisdiction, or with the Canadian Court, which has not the special character of being a Court of final appeal on special constitutional questions. Nothing in this Bill affects the present right of appeal to the Privy Council. We may expect hereafter that in spite of the recent refusal to unite the two tribunals which at present exist in Great Britain, the one finally determining all Colonial and Imperial matters outside the United Kingdom, while the. other - the judicial division of the House of Lords - is the highest Court of Appeal to the people of the United Kingdom-

Sir Edward Braddon:

– The people of the Empire.

Mr DEAKIN:

– The people of the United Kingdom only. No appeal lies from the residents of the outer Empire to the judicial division of the House of Lords. They can, appeal only to the judicial committee of the Privy Council, a different although highly dignified body. When the sense of the equality of British citizenship has been borne home to the officially legal mind in England as it has been borne home already to political minds here and there, we shall probably .find these two tribunals united in one single Imperial Court of Appeal ; where the citizens within the United Kingdom and the citizens of the Empire without it will, alike obtain the final determination of important principles. Even distinguished members of the Privy Council and its critics in both the Commons and the Lords imply that this court, fully burdened with business, has no desire to see appeals from the courts of the Empire multiplied. It desires the growth in all parts of the Empire, of local courts themselves competent to undertake and. fulfil all the tasks cast upon judicial bodies, retaining only an appeal which shall preserve an unity of legal interpretation and which shall also preserve that sentiment of unity - far stronger than the necessity for similarity of interpretation - throughout the Empire - which is strong in every one of its fractions.

When that single tribunal shall have been established, and I think we may speak of it as no remote possibility, there will be still less desire that courts of the mother country, 10,000 miles away, dealing with cases arising under so many different systems of law - the Dutch quasi Roman law, .which obtains at the Cape, Indian law, and the French law, maintained in Canada - should be further burdened. There will be a desire that appeals, at all events from courts following the English system of jurisprudence, should not be multiplied ; that as far as possible, we should become self-judicable, so to speak, and capable of dealing finally with almost the whole of our litigation within our own borders. With a single Imperial court, that will be more the ideal than it is to-day, although already aspired to by legal authorities of the highest standing. In these circumstances, we must feel the responsibility that lies upon us of preparing to meet the duties which will yet be cast upon us in greater measure. There is no desire to draw the decisions of - all, or anything like the decision of all, our chief cases to the centre of the Empire. The ambition is to preserve a system of unity of interpretation, and under it to encourage our oversea courts to administer justice to their constituents, without appeal to London.

Mr Crouch:

– Then why was there not some limit under section 74

Mr DEAKIN:

– Because in this measure we are already proposing what some critics deem too great a demand. It is necessary also that we should settle' the nature of our court, both as to the number of its judges and the character of those constituting it, before we can present our strongest case to His Majesty for any limitation of Privy Council appeals. When in England in 1900, being for a time in close touch with legal members of the Government, as well as of the Opposition, it seemed to me that so far. from waiting for such a legislative limitation of appeal from the Commonwealth, they were willing, and even anxious, to facilitate the reduction of the number of appeals, and looked forward to the time when leave to appeal would be less frequently granted than at present. If it be necessary to legislate hereafter, we shall know our court and Constitution better. In the meantime, the trend of legal and ministerial opinion at home lies in the direction of encouraging us to undertake all our own legal business for which we can provide fit tribunals. To return a moment to my rude comparison between the High Court of Australia and the Canadian Court. I should have remarked that its Supreme Court possesses one function which does not attach to our own High Court. It is capable of being consulted, and is required to give a formal opinion upon cases submitted to it by the Executive Government. Without admitting that this is an extension of judicial power–

Mr Watson:

– It would save a great deal of law expenses.

Mr DEAKIN:

– It appears to do so, because it gives in advance of any actual concrete test, judicial authority for what it is worth upon some abstract opinion - a course which, like all short cuts, may in many cases prove to have been the longest way round. I do not think this power adds materially to the status of the court, although I ought to mention it, while pointing out on the other hand that to distinguish the respective spheres of the Dominion and Provinces in Canada is a much simpler matter than the

delimitation of the powers of the Commonwealth and the States in Australia. Not only is there a federal veto upon provincial legislation in Canada, but there the provinces are reduced to the specific powers with which they are invested by the British North America Act. The unspecified margin of authority in every case lies on the side of the Dominion, and thus the advantage in every case lies on the side of the Dominion. This renders the path of its Supreme Court clear. Here the question will be much more critical to us. There is a greater responsibility upon our court since the responsibility, in our case, is cast upon us of showing the specific authority for our every claim, while the undefined powers and potencies all remain vested in the States. Not only will the task of our Courts be more difficult, but its findings will be matter of much more serious concern to the citizens and Parliament of the Commonwealth. Interpretation of the Constitution in our case is beset with much greater federal perils. Therefore, taking it as a whole, the High Court, as we propose to establish it, should compare more closely with the Supreme Court of the United States than with the Supreme Court of Canada. It will in the future rank with them as an agency of federal development and an exponent of federal relations of an entirely new type. Finally, let me draw attention to the High Court as the exponent of the Constitution. Here interesting problems beset us. The British North America Act, like our Constitution, is an Imperial Act. Although all Acts of the Imperial Parliament stand legally upon the Same footing, it is more and more admitted that, constitutionally, there is a wide distinction between measures such as the British North America Act and our Constitution, which are the fundamental law of great self-governing communities and ordinary measures in regard to minor and formal matters of trifling concern which appear upon the statute-books side by side with them. The constitutional practice of the last half century probably justifies the assertion that when a Constitution has been granted by the Imperial Parliament to a selfgoverning member of the Empire, the Imperial Parliament will not seek to amend it, except in accordance with the wishes of the people to whom it applies. That constitutional practice is strengthening every day. The British North America Act does not contain within itself any power of amendment. When it requires alteration - and it has been amended upon a number of occasions - the Canadian Parliament requests the intervention of the Imperial Parliament, which thereupon passes an Act for the purpose. Only in that way, though wholly at the request and with the consent of the people of Canada, is the Canadian Constitution developing. It is hot too great a claim to say that there is no prospect of interference on the part of the Imperial Government with the Constitution of the Dominion of Canada, unless at the request of its people. Such a request need never be made by the people of this Commonwealth, because our Constitution includes a power of amendment. One of its features which most struck its critics at home, and most amazed foreigners abroad was the fact that the Imperial Parliament had so lavish and absolute a trust in the people of this

Commonwealth, that it had under its own hand and seal endowed them with the power and the means of amending their Constitution, although that Constitution is in itself an Imperial Act. There is yet a further consideration. The Commonwealth Constitution stands apart from all other measures upon the statute-book of the Imperial Parliament, and, so far as I know, upon any statute-book. Certainly no Act of the United States or of Canada can show an equivalent authority to that under which our Constitution was drawn and passed. Its preamble sets out in simple terms the statement of a fact whose transcendent importance has yet to be understood and exhausted.

The people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established.

For the first time in British history the special and express sanction of the people appears in the preamble of an Imperial Act in addition to the sanction given by the Imperial Parliament and by the Crown. That of itself is sufficient to distinguish our Constitution from every other Act upon the Imperial statute-book, including the British North America Act. It is desirable and necessary that these distinctions should be drawn. They will hereafter require to be interpreted in support of special sections or of the whole of the Constitution. The wording and the character of our Constitution, coupled with the power of amendment contained within it, and the peculiar sanction given in its preamble, make it more essentially and absolutely a charter of entire self-government than any other Act to which the British Parliament has assented. All parts of that Constitution, as they have received the same sanction, merit our most careful consideration, and I submit that, as the Constitution requires the establishment of a High Court, it behoves this Parliament to provide for its establishment. The Judiciary Bill is necessary, because without the machinery which it contains, the High Court could neither be actually constituted nor proceed to employ the authority intrusted to it. The sketch which the. Constitution gives of the powers of the High Court justifies us in bringing forward the Judiciary Bill as an essential complement of the Constitution, and its necessary corollary. Without Chapter 3, the Constitution might not have been accepted in some of the States. If it be admitted that the provisions for the establishment of the High Court are among the most conspicuous features of the Constitution, and that the task of interpretation is as responsible and fruitful as I claim it to be, it is surely not too much to contend that it is possible to fulfil our obligations to those who voted in such immense majorities for the acceptance of the Constitution, only by creating a High Court at the first opportunity. If it is created as proposed in the Bill, there will be a field wide and opportunities plentiful enough to enable it to take its stand beside any judicial tribunal in the world. The august and impressive Supreme Court of the United States ; that historic and picturesque body, the Judicial Committee of the Privy Council, the cream of English law and learning which is to be found in the judicial division of the House of Lords - majestic as these are - may not, and should not long, overshadow the High Court, which will interpret the Constitution and the legislation of the Commonwealth, and of the federated States. The people did not err in giving the High Court the prominence which it has in the Constitution. May I quote the words of the greatest political philosopher of our nation - Burke - who, with marvellous prescience and foresight into constitutional principle, said that -

Whatever is supreme in the State .... ought to give a security to its justice against its power. It ought to make its judicature, as it were, something exterior to the State.

If those words apply, as he applied them, to a unitary system of government, how much more do they apply to the Federal Governments which have grown up since his day? We are thus face to face with the practical suggestions which have been made by some who are hostile to this Bill. They say - “Even if we admit that a High Court must be established, and that it will not do to constitute it of the chance gatherings of State Judges,or even of Chief Justices, surely, as the Constitution suggests three Judges as a minimum, it would be possible to accept them instead of the five provided for in

the Bill." Are they then giving that security to justice demanded by Burke ? Are they realizing what federal judicial responsibilities must be? The well-known constitutional authority, *Dicey,* says -

From the fact that the judicial bench supports under Federal Constitutions the whole stress of the Constitution, .a special danger arises lest the judiciary should be unequal to the burden laid upon them.

Let me remind honorable members how much remains for the judiciary when Parliament has done all that it can. Our Acts take shape after much contention, and, as **Mr. Bryce** has lately shown, under circumstances most unfavorable to the placing upon the statute-book of the few, clear, short declarations of principle, and well - arranged subsidiary matters which, from the jurist's point of view, should constitute a law. We take our piece of legislation, as it comes hot from the fierce oven of parliamentary debate, and pass it on as quickly as possible, lest it burn our fingers, or be consumed to ashes. In spite of the possible assistance to be derived in the future from a revising legal committee, and the possibilities of partial codifications with a view to the simplification of federal law, we can hope for little improvement in the early future either in the form or lucidity of our laws. So long as legislation is as it is to-day, the product of the clash of parties, and of the struggles between two Houses, and involves the necessity of carrying public opinion with us by drafting devices, Bills must be placed upon the statute-book in confused and imperfect shape, and will require to be deciphered and construed by men specially trained to that work. They must be construed and harmonized before they are enforced, and it is to the enforcement of its laws that every Legislature looks in their preparation. We cannot separate ourselves, if we would, from the judiciary with which it is our lot to work. Members of this Parliament will shortly learn, when the validity of the Acts they have passed are 'being challenged, how inseparable the judiciary is from the Legislature and Executive, how close and intimate though perfectly independent. It is by its assistance, alone that we can expect that highly artificial and complex creation - a federal system - to proceed with all its powers and institutions safety, retained in their respective orbits of action. The stress of the Constitution, as **Mr. Dicey** says, is in a Federal Government cast upon the judiciary. Are we satisfied to have the stress of the Commonwealth Constitution cast upon three men alone, even if they are the most eminent whom Australia possesses ? The same argument of course may be put against five or any other number, but the fact is that with three Judges it only needs to constitute a majority, a majority of one.

Mr Conroy:

– With a bench of five Judges the majority is three to two, so that the same thing applies.

Mr DEAKIN:

– Experience of benches shows that the one more mind has often been of immense importance. The last two vital cases decided by the Supreme Court of the United States - the Porto Rico cases - were each decided 'by the vote of one Judge, and, if I remember right, the great Legal Tender cases were also decided by one vote. A number of cases, even with a large bench, must be decided by a majority of one. It is a question of the number of the court. A majority of three is the lowest to which we can safely intrust the decisions on such constitutional issues as will shortly be submitted to them. There is some strength also in numbers, in regard to the

resistance that a court may have to display to the powers with which it is associated. Weak men, who seek immediate ease for the gaining of a temporary popularity, often do more mischief on the judicial bench than in other spheres of active life. In their hands any written Constitution might easily be forged into a series ‘ of fetters in which this Federal Parliament would move with difficulty and loss for all time, until the great effort of shaking them off by means of an amendment of the Constitution was resorted to.

Mr Conroy:

– And keep the right of appeal to the Privy Council.

Mr DEAKIN:

– I think it should be the object of Australians to create an Australian court in numbers and learning so satisfactory to the people of Australia that appeals from it should be of the rarest description. I do not find that the attraction of the Privy Council, even last year, possessed any special strength in Australia. Some dozen or fifteen cases were remitted to London - certainly not more than a score at the outside. I undertake to say that three-parts of those appeals, if they are like the ordinary Privy Council cases, contain no new question of important principle ; but cont:un matters which might as well, if not better, be decided by an Australian court. At present I am only arguing for the creation of such a court as by its numbers and wisdom shall give confidence to litigants in Australia. Create a court of only three, and every litigant will .say - “Contrast even the best three men, of whom only two may be in agreement in this case with the number usually sitting as the Judicial Committee of the Privy Council in London, and we have here the weaker court.” A court of only three Judges would help to induce litigants and suitors to go to the other side of the world in order to obtain a stronger Bench. Give them here a strong Bench of sufficiently eminent men, and they will be content to remain. **The High Court is not the creation of this Bill, but really of the Constitution. That Constitution is federal, and federalism means litigation. A federal system is impossible apart from appeals to the arbiter that it creates to determine between the different bodies and institutions which are bound together by the very nature of the Federal Government**. It is because under a federal system questions are often settled by litigation instead of by legislation, because the procedure to amend the Constitution involves so much time and expense - it is because this new legal situation is forced upon us that we . are faced with this Bill. *We* are not going out of our way to meet it. We are not creating the High Court with a view to the business which may come. We are creating it with a view to the difficulties already existing around us - because of differences of opinion honestly entertained between the States and the Federal Government as to the respective spheres of their power and influence. The American Constitution - written Constitution as it is - is admitted to have been a growth. To a very large extent, it rests on what is called Judge made law, that is to say, interpretation by the courts. Of course, a great part of the English Constitution consists of Judge-made law. Many of our most fundamental principles and liberties are founded directly upon judicial decisions. Now for an illustration or two. The United States, when they commenced their career, had not as many people as are now living in Australia, and they were not scattered over so large an area. They were not rich except in resources. They created at once a Court consisting of six Judges.

Mr Higgins:

– They had no alternative, they had lost the Privy Council.

Mr DEAKIN:

– Why were they not content with a court of three Judges?

Mr Higgins:

– That is not the question.

Mr DEAKIN:

– That is one question.

Mr Higgins:

– I should rot be in favour of having three Judges if we are to have a High Court at all.

Mr DEAKIN:

– My honorable and learned friend's experience supports me there. The United States when they united were extremely economical. Owing to difficulties of communication their commercial relations were much less close than ours, and their legal business was not a fraction of that which our court will possess from the very outset. Yet they created a court of six Judges. In the United States Supreme Court to-day it takes six Judges to pronounce a judgment. Of course, they have far more Judges now. They have nine Chief Judges, 55 federal Judges on circuit, 78 Judges with federal jurisdiction, and battalions of State Judges, besides.

Mr Wilks:

– They pay very small salaries, though.

Mr DEAKIN:

– In the Supreme Court, because, as is notorious, they secure the services of those men who have achieved an independence by their labours at the bar. If honorable members are willing to introduce the same condition of things here, that is perfectly open to them. But in this country it has been our practice not to wait until a man had achieved financial independence before offering him a seat on the bench. Our one consideration has been, is he competent for the position, and can he render good service to the public? If so, we have not hesitated to appoint him. At the establishment of the Canadian Dominion, Canada was less populous and less rich than Australia, its area was relatively no greater, the business which its Supreme Court had to do was not more ; but nevertheless they, too, commenced with a court of six Judges. My honorable friends have been interjecting that the United States had lost the Privy Council. Canada did not lose the Privy Council. Its court had really a much narrower area of contentious dispute. The federal executive could veto provincial laws, and the provinces were bound down, while the Dominion was not. In our Constitution the Commonwealth is bound down, but the States are not. and we have no power of vetoing State legislation. The constitutional necessity for establishing a court here is tenfold as great as it was in Canada. Canada is economical, yet it commenced with six Judges. It has to-day, not only six Judges, but 44 other

Judges of federal courts besides a regiment of Judges of provincial courts, although its population is even now little greater than ours. Take into account the merefact of area. When I speak of a High Court I mean a High Court for the people of Australia. I

do not mean a High Court that is to sit at the federal capital alone, or at a State capital never to be seen outside it, and only known to the people of the States by report and hearsay. I mean a court whose Judges will undertake circuits, and be able to visit every State in the Union. If we have a federal court at all it must be a court sitting at State capitals, and, if possible, in other parts of the States, in order that the whole continent may be brought within touch. That is what the United States did. The six first Judges of their Supreme Court undertook the circuits themselves. They have long ago abandoned that practice because of the growth of business, but at the establishment of the union they not only commenced with six Judges, but they did what we propose to do with only five J udges - asked them to undertake circuits in the several States, so that the High Court shall be a reality to every State in the Union, and not merely a name. If we have a court of three Judges, and it is necessary for them to act as a court of appeal even from State courts, they must often sit in one place. They can not, like **Sir Boyle** Roche's bird, be in any other places at the same time. The proposal to create a High Court of three Judges means three Judges nailed down to one locality, and dealing there with such appeals from State courts as litigants think fit to send them. Although such appeals will be made always from benches of three Judges - sometimes from a bench of four Judges - and in special cases, as I have known, from a bench of six Judges.Who will appeal from a bench of six State Judges to a bench of three Federal Judges in some particular part of the Union? If honorable members grant a court at all, as my honorable and learned friend interjected, five is the lowest number of Judges who will be able to despatch judicial duties in the different States, so as to allow federal litigants to have their business speedily and cheaply dealt with, besides sitting together at certain periods as courts of appeal.

Mr Watson:

– Then they will sit singly at times?

Mr DEAKIN:

– Yes. The honorable member will observe that in clause 12 -

The jurisdiction of the High Court may, except as otherwise prescribed by Part 5, be exercised by any one or more Judges sitting in open court, and subject to the appeals.

Mr JOSEPH COOK:
PARRAMATTA, NEW SOUTH WALES · FT; ANTI-SOC from 1906; LP from 1910; NAT from 1917

– Would that same J udge sit on appeal?

Mr DEAKIN:

– No ; by a later clause a Judge is unable to sit on an appeal from himself. If we are to have a court of three Judges only, that restriction must be struck out, or else honorable members must be content to let two Judges sit on an appeal from the third Judge. It would be very difficult to undertake any circuits at all with three Judges, except, perhaps, in Victoria and New South Wales. Is that the sort of equipment that would enable the High Court of Australia to occupy a proper position in the eyes of the public, or induce the people to receive its judgments with the respect they should deserve? Although five J udges are to be appointed, any one J udge may try cases, and with a Bench of five there will be four Judges to whom an appeal can be made from the decision of a single Judge. Honorable members will now see that five

Judges is the lowest possible number that will permit of their going on circuit in the different States, and will furnish a sufficient number to act as a Court of Appeal from the State courts and from the judgments given by a single High Court Judge. In our proposal we are more modest than either Canada or the United States, so far as the number of Judges is concerned.

Mr Cameron:

– Supposing that a case involving a constitutional point were to arise in Tasmania, would that be tried in the first instance by one Judge of the High Court ?

Mr DEAKIN:

– It could be. Cases involving constitutional questions may arise in any court. It is conceivable that a case, involving a constitutional point, might originate in a police court in Tasmania. It would probably come before a Judge of the High Court on circuit in Tasmania, and there would be an appeal from him to the High Court, and then to the Privy Council, if it were thought necessary. Not only are five Judges required to enable the States to be visited, but to allow of a proper quorum being fixed in every case. We propose to fix the quorum of Judges for the trial of appeals from the State courts at four. We do that because the State courts almost invariably consist of three J udges, and occasionally of more, and consequently it is necessary to have four Judges of the Federal Court of Appeal . The concurrence of th ree J udges will be necessary before a judgment is reversed or set aside. In the case of appeals from a Justice of the High Court, of a Judge of the Supreme Court of the State exercising federal jurisdiction, or of the Inter-State Commission, three Justices of the High Court are to sit on appeal. Appeals from the lower courts may be determined by two Judges. The power given to the High Court to refer matters to the Privy Council is to be exercised only upon the concurrence of three Judges - that is to say, three of the Judges must agree before the federal jurisdiction is parted with. Applications for leave or special leave to appeal to the High Court from the judgment of the Supreme Court of a State, or of any court of a State from which an appeal now lies to the Privy Council, are to be determined by not less than three J udges. It is further provided that no Judge is to be allowed to take part in dealing with any appeal from his own judgment. It is, therefore, necessary, under all these circumstances, that we should have not less than five Judges. Now, I desire to say a word or two with regard to the salaries proposed to be paid. The standard in both the United States and Canada is much lower than we propose to adopt ; but even our separate States pay larger sums to their Judges than Canada or the United States. In Victoria, New South Wales, and Queensland they pay to their Chief Justices as high a salary as we propose for the Chief Justice of the High Court.

Mr McDonald:

– Do not mention the way in which that high salary was fixed in Queensland. .

Mr DEAKIN:

– The salaries of the Chief Justices of New South Wales, Victoria, and Queensland are fixed at £3,500. In every country it is necessary to adopt the scale of living and payment that is generally recognised; and we are proposing to pay the Chief Justice of the whole of Australia only the same salary as is already paid in three of the single States. We are proposing to pay to the Judges only the same salary as is paid to the occupants of the Supreme Court benches of Victoria and New South Wales, although

the Judges of the High Court in each case have to perform judicial functions for the whole Commonwealth. So far as

Victoria is concerned, a reduction in the salaries of her Judges has been proposed for the future ; but this decision has been arrived at largely in view of the establishment of the Federal High Court. In South Australia the Chief Justice gets £2,000 a year ; in Western Australia, £1,700, and in Tasmania, £1,500 ; but if we consider the business proposed to be done in the High Court as compared with that transacted in any of the States, I think we shall realize that the payment here proposed to be made is not at all out of proportion with what is being done in the most economical of the States. Unless we pay reasonably high salaries, we cannot expect to create such a tribunal as we all desire to see. If we pay less than is being given by the various States in order to bring ourselves down to the American standard, the States, instead of the Federal Government will secure the pick of the Australian bars, and the Federal Court will occupy an inferior standing in the public eye to those courts whose judgments it will be called upon to review.

Mr Conroy:

– You would not be able to get the men of the necessary standing.

Mr DEAKIN:

– No; unless they were capable of making the necessary sacrifices of salary for the honour and dignity attaching to the position. Even in that case we could not altogether escape the tendency of the people to look, at these matters from a pecuniary stand-point. They would probably assign to our High Court Judges a position inferior to that occupied by the State Judges drawing higher salaries. With regard to our capacity to create a court for ourselves, I propose to read a few words from the remarks which that distinguished historian and jurist, **Mr. Bryce,** made during the discussion which took place on the Commonwealth Bill in the Imperial Parliament. **Mr. Bryce,** speaking, as he did, with intimate knowledge of the United States judiciary, said -

Australia has now a population of nearly 4,000,000. When the Supreme Court of the United States entered upon its functions at the end of the last century, and when, in particular, Chief Justice Jay was succeeded in 1800 by the great Chief Justice Marshal, one of the first constitutional jurists of modern times, or, indeed, of any times, the population of the United States was almost exactly the same as the population of the Australian colonies now. Yet it was found possible, from that population of 4,000,000, to secure a court which was in every way worthy of the momentous functions that devolved upon it, and which, from that time until now, has succeeded in giving the fullest satisfaction, so far, at least, as learning and ability and purity are concerned, to the people of the American Republic. Why should we nob hope that the Australian population, of our own blood and trained under our own traditions, should be capable of furnishing Judges for the Federal High Court of Australia, who wiE be equal in their capacity, and in the spirit which will animate them, to those whom America was able to find with a population no larger a century ago ?

I quote this passage, because it ill-beseemed an Australian to speak in such terms of appreciation - although I cordially re-echo them - as that distinguished critic employs.

Mr Higgins:

– He was only expressing, a hope.

Mr DEAKIN:

-Mr. Bryce's statements are based upon his knowledge of the British people, and upon the history of the American Supreme Court. They justify him in assuming that when men like Marshall were to be found in America capable of bearing the great burden of the United States judiciary, we shall not fail to find men who will establish our High Court upon a sure foundation, and fulfil their functions with the same high ability and beneficial results. Our High Court will have even larger responsibilties than those which attach to the United States courts, because there are certain restrictions placed upon the United States Legislature. Congress has no powers in regard to *ex pout facto* legislation, or to interfere with vested interests. No such restrictions exist here, and the burden cast upon our High Court is therefore so much the greater. I might remark that the proposal to constitute what I have heard termed a "scratch " Court of Chief Justices was specifically considered *at* the last Convention which framed our Constitution, and after full debate was absolutely rejected.

Mr A McLEAN:
GIPPSLAND, VICTORIA · PROT

– Did the Convention give full consideration to the question of the number of Judges *1*

Mr DEAKIN:

– Yes. It altered the minimum fixed in 1891 to three, but, if my memory serves me, that decision was arrived at by a small majority and, even then, on the ground that after all we were only fixing a minimum, and that the Federal Parliament, which would be better informed as to the needs of the time, and better able to judge, could appoint as many more as it thought necessary. Consider the small extent of the saving that can be effected by the reduction of the number of Judges. We propose to spend £15,500 per annum upon salaries for the Judges. Of course, in addition to that, there will be the cost incurred in their travelling from State to State. Then, necessarily, we shall have to appoint court officers - a registrar, a marshal, and deputy marshals, the latter taking the place of the sheriffs in the States. Practically it is admitted by the great majority that there must be a High Court of some kind.

Mr Watson:

– Some day.

Mr DEAKIN:

– No, now. I am arguing first against those who contend that we should have only three Judges, and wish to point out that the total saving effected by dispensing with-two J Judges would be perhaps £6,000 per annum. This reduction would deprive the Court of its proper majority, and impose many disabilities upon it. The saving would not represent the whole of the salaries of two High Court Judges, because, if we accepted the services of State Judges, we should have to pay them something over their travelling expenses. In many cases we should have to pay the salary of a State Judge in order that he might be spared to undertake federal duties. On the Estimates we have provided for £3,000 to cover the salaries of the marshals, registrars, and other court officers, and contingencies for six months, or at the rate of £6,000 per

annum. If we set down the sum at £7,000, that will cover the salary of the Crown Solicitor as well.

Mr Watson:

– How many marshals are proposed ?

Mr DEAKIN:

– We propose to have one marshal, and probably a deputy marshal, for each State. In all these matters it is intended, to commence in a tentative fashion. I do not think it will be necessary to have men wholly devoted to the duties of marshal for the first few years. Probably, for a small honorarium we shall be able to ob1 tain officers in the different States who will undertake those duties for some years to come. The same remark is applicable to the regisstrars. Honorable members know that at the present time we are fortunate enough to be able to secure the services of the law offices in the different States to undertake our legal business. We are transacting the whole of the legal business of the Commonwealth through the offices of the various Crown Solicitors in a very economical way.

Our proposal is to establish the High Court upon similar lines. I believe that for the first few years we should be able to get State officers to perform the duties of registrars and marshals. Consequently, the outlay should be very small.

Mr McDonald:

– Will that be owing to insufficient work ?

Mr DEAKIN:

– There would, perhaps, be insufficient federal work to warrant us in constituting special offices in each State until we know more of the business to be done.

Mr McDonald:

– Would not that remark apply to the Judges as well ?

Mr DEAKIN:

– No; the Federal Judges will be required to go on circuit and to hear all cases of appeal as well as to transact all the business created under the Commonwealth. I will undertake to say that the five Justices it is proposed to appoint will find ample work from the first. Already I have had communications from private litigants inquiring the date of the appointment of the High Court, as appeals which would otherwise go to the Privy Council are being held back pending the establishment of this tribunal. These litigants prefer that their cases should be tried by an Australian court. To spare two Judges really means little or no saving, and to have no Federal Judges and trust entirely to the States can only save us little more. We cannot have State courts doing all our work without some payments to them and some staff. In this connexion might I ask if honorable members realize how much is involved already? In almost every State of the Union litigation involving federal issues has been commenced. It is now proceeding in Western Australia, Queensland, and New South Wales, and will be proceeding in Victoria within a few days. I am also in receipt of a communication from the Attorney-General of a State informing me that his State intends to commence a suit against the Commonwealth on one of the most serious issues next week. Have honorable members noticed how our Customs Act, our Excise Act,

andour Immigration Restriction Act have been challenged? I understand also that the Pacific Island Labourers Act is to be attacked as soon as the High Court is appointed.

Mr Conroy:

– That shows how badly it is drawn.

Mr DEAKIN:

– It shows very little, sense of the situation of a new Federal Constitution to make such an interjection. If ‘ the honorable and learned member gave the matter a moment’s consideration he would see that if the pen of angels had drawn these measures the same results would have followed. They would have been challenged. It is not the form but the substance of the Acts at which this litigation is aimed. It is novel to the great body of the people of the various States. They have not yet realized the federal situation, consequently it need not occasion the slightest surprise if every principal Act on our statute-book, and the’ Constitution itself, is being made the subject of litigation. Clearly there is work enough accumulating now to occupy five Judges for a considerable period. What is the saving which would be effected by delay in the establishment of the proposed tribunal? Honorable members will notice that we put down only the sum of £6,000 per year to provide for all its officers, say £7,000, including the salary of the Crown Solicitor. That, added to the £15,000 paid as salaries to the Judges, after allowing for their travelling expenses, associates,&c, will bring the amount up to £30,000 as a maximum. Yet we spend three-quarters of a million sterling upon war ? Can we afford three- quarters of a million for war, and not £30,000 for justice? What increased expenditure does the decision which was recently arrived at in regard to the lowest-paid officers of the public service represent? In the Postal department alone it means an increased outlay of £40,000 or £50,000 per year. If it were assented to in its full form, it would perhaps mean another £40,000 annually over the whole service, so that the total sum would represent three times as much as the expenditure for creating the High Court of Australia, in order that all the citizens of the Commonwealth may share in the judicial as well as the political rights conferred upon them. If we measure the consequences to this Commonwealth of a single mistaken judicial decision, we swallow up the amount represented by the salaries of the officers of the High Court for many years. If we drive the people to a referendum to secure an amendment of the Constitution as the only way of obtaining that elasticity which might have been derived from the judgments of such a tribunal, it will at once involve the outlay consequent upon the establishment of the High Court several times over.

Mr McDonald:

– Is the AttorneyGeneral opposed to the referendum ?

Mr DEAKIN:

– Certainly not ; but I am pointing out that by the interpretation of the Constitution by competent courts, we may secure decisions which will render it unnecessary to amend, except for specific changes. Every important epoch in American history has been preceded or accompanied by a leading decision in the United States Court. Every great advance made has been in company with the Supreme Court. Our own Court was contemplated by the Constitution, is necessary for its proper working, and was shaped by such precedents. When that great practical statesman and warrior of

the eighteenth century, George Washington, constituted at the earliest possible moment the United States Court, he, as President, wrote the J udges a letter of which the following is a portion : -

I have always been persuaded that the stability and success of the national Government, and consequently the happiness of the people of the United States, would depend in a considerable degree upon the interpretation of its laws. In my opinion therefore it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.

Within a few years that Court, which was perfect in its formation, was giving decisions which effected as much in the development of that nation as a large and liberal amendment of the Constitution could have accomplished. Within a few years, under the hand of Marshall, the great fabric which we behold to-day was firmly reared upon an indestructible basis. Looking, back upon its career, a constitutional commentator, **Mr. Justice** Black, says -

The orderly and successful working of Government, or even its very existence, depends upon the fixed and harmonious interpretation of the organic law, and of the statutes passed in pursuance of it.

Are we to ignore these lessons ? It is not only lawyers who will live by this law, this Constitution of ours, or by its interpretation in our Courts. **The reign of law, though invisible, really surrounds us at every stage in our lives, from the cradle to the grave. Without it no such development, no such progress as we have witnessed in social life would have been possible.**

Of course we speak lightly, and oftentimes severely, of individual members of the legal profession. We recognise the abuses that have grown around our various institutions for the administration of justice. But admitting all these inevitable perversions, it is impossible for us to forget our debt to similar institutions. It is not for men of knowledge, or of our country, to look with a slighting and indifferent regard upon proposals to extend the area within which law operates**. The fundamental choice still remains between war and law, between violence and reason, between force and justice. My honorable friends, the members of the labour party, are of late years proving their appreciation of its possibilities in their own sphere by seeking as a substitute for industrial wars, or strikes, a tribunal of arbitration before which the differences which exist between employers and employed may come up for judgment.** We do not now see the old tendency of doubt and suspicion towards such extensions of the realm of law. The liberal party all the world over are being helped to a better realization of the possibilities of peaceful advance, which are afforded by the statute-book, and the necessary concomitant of the statutebook - courts capable of interpreting it - and seeing that its behests are enforced. The marvellous Empire of Imperial Rome has passed away, leaving its treasures and achievements, merely dust or records, but it also left behind it that imperishable system of Roman law, which to-day lives in continental as well as to a large degree in Scotch law. To-day the British Empire is at the meridian of its splendour, and not at its decline, but even its territories are not large enough to contain its system of jurisprudence. This has overflowed across the Atlantic. It is firmly established in these southern seas. Whatever may be the fortunes of the British Empire as a political entity, the fate of its jurisprudence is as stable, and its future will be as

permanent as that of Roman law. It will be the task of the High Court to administer and expand that law in accordance with the necessities of these young States and their Union. Behind it lies what is more important even than the law itself - that which was its seed and fruit - the law - abiding instincts of our people**. A greater demand than ever is now to be made upon this essential quality of good citizenship in Australia. The Federal Government, with all its complex interrelations and co-operations, demands a lawabiding people. No other can make it a success.** We cannot omit a tribunal on a national scale and with national ideals. It demands practically-minded interpreters of the Constitution, not only on the bench but in Parliament. A distinguished philosophical writer, **Dr. Burgess,** has not . hesitated to claim that the real secret of the success of the development of the United States is to be found in the fact that its "fathers" were led by lawyers as eminent as Hamilton and Madison when the foundations of its Constitution were laid, and that since then it has been under the guidance of eminent members of the legal profession of both parties and upon its bench that its development has followed one consistent course. Above and beyond these we have the greatest name of all, the name of Abraham Lincoln, a hero and a liberal as well as a lawyer. The achievements of the United States under a federal form of Government have been possible because of the law-abiding characteristics of its people, and it is to this that we ourselves must trust in the future for the safe, harmonious, and fruitful working of our Constitution. Federation is legalism**. Yet it was not the first field of legal conquest. Even in the mother country the struggle against priestly and kingly tyranny began in the law courts ; and it was led by legal minds.** The case which John Hampden resisted for 20s. of ship money, marked the beginning of that great revolution which permanently transferred at last all power to the hands of the nation, **Magna Charta and the Bill of Rights are legal documents like our Constitution.** They express the strength and character of the people, and remain with us the proudest of monuments and the richest of heritages. I trust then that this Bill will be considered in the light of history, and of federal principles, that it will be regarded as **a fulfilment of the Constitution; that we shall create in it a tribunal worthy of the people for whom it will act, and of their forefathers whose practical genius has been demonstrated in their capacity to adapt their institutions and forms of government so as to fulfil the' will of the people, and, while giving that will the fullest and freest course, impart to it the solemn sanction of the law.**

Sir WILLIAM McMILLAN:
Wentworth

– In moving -

That the debate be adjourned.

I may be allowed to say how much we recognise the great ability and eloquence of the Attorney-General. A more comprehensive speech than that which he has just delivered, both in regard to the principles and details of a great Bill, has not been heard in this House. It is an honour to be the first Attorney-General of the Commonwealth, and, although I doubt whether, this session will see the completion of this legislation, it will be a still further honour to my honorable and learned friend if over the Bill, which is the foundation of Commonwealth law, his name is inscribed.

Mr DEAKIN:

– I thank the House for its attention, and apologize for the undue length of my speech.