 CHAPTER 9

IMPLICATION AND INFERENCE

Where a court in interpreting a constitution is unable to find in it an express power capable of being interpreted so as to achieve a desired result in the solution of a problem before it, it will frequently declare the required power to exist by necessary implication. The exercise of powers already expressed in the constitution may similarly be restricted by the implying in of appropriate limitations and prohibitions. The "necessity" of such implications and the "appropriateness" of such prohibitions are matters of practical policy, the applicability of which may frequently cause controversy from one era of judicial interpretation to another, and from one legal system to another.

Some of the most basic principles of a constitutional system of government may have no more specific foundation than inference or implication, even where the constitution is a written one. For example, the principle of responsible parliamentary government in Australia and Canada exists on such a basis, and in the United States irresistible inference is the foundation of Chief Justice Marshall's vindication of the principle of judicial review in Marbury v. Madison.¹

Again, the nature of the field of operation of one constitutional power may impliedly limit the field of operation of some other constitutional power. In the United States for example, the Supreme Court in Freeman v. Hewit ² reiterated "the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." In Australia, the power of the Commonwealth, under Section 51(vi) of

¹ 1 Cranch 137 (1803).
² 329 U.S. 249, 252 (1946).
the Constitution, to provide for national defence is, where used to acquire property compulsorily, impliedly limited by Section 51(xxxi), which gives the Commonwealth power to acquire property but only on "just terms." ³ In Canada, in *Citizens Insurance Co. v. Parsons*,⁴ Sir Montague Smith declared for the Privy Council that: "It becomes obvious, as soon as an attempt is made to construe the general terms in which the classes of subjects in sects. 91 and 92 are described, that both sections and the other parts of the Act [sc. the *British North America Act* 1867] must be looked at to ascertain whether language of a general nature must not by necessary implication or reasonable intendment be modified and limited." The effect of this implication on subsequent judicial interpretation of the Dominion trade and commerce power has been discussed in preceding chapters, and to this need only be added an instance of how one implication leads to another — that of Viscount Haldane, (whose expansion of the Montague Smith implications contributed so substantially ⁵ to the emasculation not only of the Dominion’s trade and commerce power but also of its "peace order and good government power"), finding himself obliged, in *Fort Frances Pulp & Power Co. v. Manitoba Free Press*,⁶ "to invent an implied power in the event of an emergency" ⁷ so as to sustain the continuation into peace-time of war-time measures controlling the price and supply of newsprint in Canada.

In a federal system of government, the most notable example of controversy over prohibitions to be found not expressly but impliedly in the constitution centres around the doctrine of "intergovernmental immunities."

The nub of the problem here is admirably, albeit unintentionally,