HIGH COURT OF AUSTRALIA

South Australia

Vs.

Commonwealth

(Latham C.J., Rich, Starke, McTiernan and Williams JJ.**)**

23 July 1942

Latham C.J.

The States of South Australia, Victoria, Queensland and Western Australia and their respective Attorney-Generals sue the Commonwealth and Joseph Benedict Chifley, the Treasurer of the Commonwealth, for a declaration that certain Acts passed by the Commonwealth Parliament are invalid, and for an injunction restraining the Treasurer and other Ministers of State and Commonwealth officers from putting the Acts into operation. Applications, supported by affidavits, were made for an interlocutory injunction. Pleadings have been delivered in which, in addition to raising defences, the defendants have demurred to the statements of claim upon the ground that the challenged Acts are within the constitutional powers of the Parliament of the Commonwealth. It was ordered that the cases be argued before the Full Court. All parties have consented that the applications for interlocutory injunctions should be treated as the trials of the actions.

The challenged Acts are the following:—*States Grants (Income Tax Reimbursement) Act 1942* No. 20; *Income Tax (War-time Arrangements) Act 1942* No. 21; *Income Tax Assessment Act 1942* No. 22; *Income Tax Act 1942* No. 23.

The plaintiffs contend that these Acts constitute a scheme for the purpose of compelling the States to abandon their constitutional right to impose taxation on incomes. The compulsion is brought about by the imposition of a Commonwealth income tax at very high rates, rising to 18s. in the pound upon that part of any income which exceeds £4,000. This Act, it is said, makes it practically impossible for any State to impose a State tax upon income. The amount which, it is contemplated, will be collected under the Commonwealth *Income Tax Act* (No. 23) is admitted to be approximately equal to the total of the amounts which would have been raised by the Commonwealth and the several States from income tax under the Commonwealth and State Acts which were in operation up to 30th June last. The result of this Act is that the States, being practically unable to tax incomes, will lose (taking the average) 63 per cent of their total tax revenue. The States which have imposed high income taxes, such as Queensland and New South Wales, will lose 67 to 68 per cent of their total taxation revenue (taken on receipts during the year ending on 30th June 1941), and the States which have imposed relatively lower income taxes will lose a smaller proportion of such revenue—Victoria 53 per cent and Tasmania about 47 per cent. Thus, it is urged, the Commonwealth *Income Tax Act* places the States in a helpless financial position.

The Commonwealth Parliament then, it is said, purports to redress the position which it has created by offering grants of money to the States by the *States Grants (Income Tax Reimbursement) Act*, No. 20. This Act is to continue until the last day of the first financial year after the war (sec. 8). The annual grants are made to each State upon condition of that State not imposing any tax upon

incomes in each relevant year (sec. 4). The grants are shown by the title of the Act to be reimbursements in respect of income-tax revenue lost by the States. The amounts have been fixed by taking the average collections of tax by each State during the years 1939-1940 and 1940-1941. Provision is made (secs. 4 and 5) for adjustments in respect of arrears of tax which may be collected by States under past income-tax Acts.

It is objected that these Acts constitute an attack by the Commonwealth Parliament upon the constitutional power and function of the States to legislate for the imposition of income tax; that taxation is not only a normal, but an essential activity of government; that the Commonwealth Parliament has no power to impede, weaken or destroy that activity; and that the Acts are therefore invalid.

Other objections are that the Acts involve discrimination contrary to sec. 51 (ii.) of the *Constitution*, and preference contrary to sec. 99, and that the *Grants Act* is, by reason of the condition of abstinence from imposing income tax attached to the grants, not a valid exercise of the power conferred by sec. 96 of the *Constitution* to give financial assistance to States. These objections are, it is contended, supported and reinforced by a consideration of the other two Acts which are challenged. They are relied upon to demonstrate the reality of the "scheme," and, it is argued, they fall with the scheme. But they are also the subject of further specific objections which, it is said, show their invalidity, even if the Acts are not regarded together as constituting a single scheme.

The *Income Tax (War-time Arrangements) Act 1942* No. 21 is prefaced by a preamble which recites that the Act is enacted with a view to the public safety and defence of the Commonwealth and for the more effective prosecution of the war in which His Majesty is engaged. Sec. 4 provides that the Treasurer may by notice in writing addressed to any State Treasurer bring about the temporary transfer to the Public Service of the Commonwealth of any specified officers of the State service who have been engaged in duties which, in the opinion of the Treasurer, are connected with the assessment or collection of taxes upon incomes. A recommendation from the Commonwealth Public Service Board is required, and the Treasurer must in the notice state that the taking over of the officers is, in his opinion, necessary for certain purposes connected with the war or otherwise for the defence of the Commonwealth (sec. 4). Other sections provide for the retransfer of officers after the Act ceases to operate, for the preservation of the rights of officers, for the control of them while serving the Commonwealth, retirement, and superannuation rights. Sec. 11 is intended to enable the Commonwealth, upon the Treasurer giving to the State Treasurer a notice similar to that already mentioned, to acquire the possession and the use of "any office accommodation, furniture and equipment specified in the notice." Sub-sec. 2 of sec. 11 provides that the compensation for such possession and use shall be as agreed between the Commonwealth and the States or as determined by arbitration. Sec. 13 provides for the transfer to the Commonwealth, as from the commencement of the Act, of all returns and records relating wholly or in part to the assessment or collection of Commonwealth income tax which are in the possession of a State. Sec. 14 is a penalty section. The Act is to continue in operation during the same period as that prescribed for Act No. 20.

The plaintiffs object that this Act cannot be justified under any heading of Commonwealth legislative power, and that it is a direct and deliberate attack upon the essential activities of the States by depriving them of their income tax departments—officers, offices equipment and records, for most of the records relate to State income tax as well as to Commonwealth income tax.

Finally, sec. 31 of the *Income Tax Assessment Act 1942* No. 22 is challenged. It is at least intended to give priority to the Commonwealth over the States in respect of payment of income tax. The

plaintiffs contend that, upon the true construction of the section, it does more than that, and that it makes it an offence hereafter to pay any State income tax. It is argued that the Commonwealth cannot give itself priority, and, *a fortiori*, cannot make it an offence to pay State income tax lawfully imposed.

These two latter Acts, it is contended, carry out the scheme which is really sufficiently apparent in the *Tax Act* and the *Grants Act*—a scheme to force the States, against their will, out of the income-tax tax field and therefore to interfere with the powers and functions of State Parliaments in legislation and of State Governments in administering the various services of the States for which taxation revenue—determined in both quantity and quality by State Parliaments—is indispensable.

The defendants contend that the four Acts are each valid; that to describe them as a "scheme" is merely to use a dyslogistic description which has no legal significance; that, even if they are considered as constituting a scheme, they are nevertheless valid; and that they are properly enacted under powers specifically conferred upon the Commonwealth Parliament by the Constitution (sec. 51 (ii.)—taxation, sec. 51 (vi.)—defence, and sec. 96—financial assistance to States).

The foregoing summary does not mention all the points which have been argued or all the questions which have been raised—they must be dealt with in due course—but it is sufficient to indicate the nature and importance of the legal problem which is submitted to this Court.

Nature of the Problem.—The problem for the Court is a legal problem which is unknown in countries with a unitary form of government and a supreme legislature. It arises only when legislative powers are divided between legislatures, so that the powers of a law-making agency are limited. That is the case in Australia, where the Commonwealth Parliament, unlike the Parliament at Westminster, depends for its existence and for its powers on a written Constitution. The Constitution says that the Commonwealth Parliament shall have power to make laws with respect to certain subjects (e.g., sec. 51 and other sections such as secs. 73, 77, 78, 79, 96, 122), that it shall have exclusive power to make laws with respect to certain other subjects (secs. 52 and 90), and that it shall not make certain laws at all (e.g., the limitations expressed in secs. 51 (ii.) and (iii.), 92, 99, 114, 116, 117). The Constitution of each State continues, subject to the Commonwealth Constitution (sec. 106), and the State Parliaments continue to possess all their powers not exclusively given to the Commonwealth Parliament by the Constitution or withdrawn from them by the Constitution (sec. 107). If either the Commonwealth Parliament or a State Parliament attempts to make a law which is not within its powers, the attempt fails, because the alleged law is unauthorized and is not a law at all. When both the Commonwealth Parliament and a State Parliament have power to make laws then, in case of inconsistency, the Commonwealth law prevails and the State law, to the extent of the inconsistency, is invalid (sec. 109).

Common expressions, such as: "The courts have declared a statute invalid," sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour—but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it—and thereafter invalid. If it is beyond power it is invalid *ab initio*.

Thus the controversy before the Court is a legal controversy, not a political controversy. It is not for this or any court to prescribe policy or to seek to give effect to any views or opinions upon policy. We have nothing to do with the wisdom or expediency of legislation. Such questions are for

Parliaments and the people. It has been argued that the Acts now in question discriminate, in breach of sec. 51 (ii.) of the *Constitution*, between States. The Court must consider and deal with such a legal contention. But the Court is not authorized to consider whether the Acts are fair and just as between States—whether some States are being forced, by a political combination against them, to pay an undue share of Commonwealth expenditure or to provide money which other States ought fairly to provide. These are arguments to be used in Parliament and before the people. They raise questions of policy which it is not for the Court to determine or even to consider.

Evidence.—There is no material dispute as to facts. The affidavits which have been filed differ in the opinions which are expressed by the deponents rather than in the facts stated. The affidavits are important only in so far as they show the state of facts to which the various Acts apply. Most of the facts mentioned in the affidavits can be ascertained by reference to statutes of the Commonwealth and the States containing provisions as to taxation and estimates or records of revenue and expenditure. These facts are conveniently summarized in the affidavits, and there is no dispute as to them. Neither is there any dispute as to the intention of the defendants to put the Acts, alleged to be invalid, into operation. That fact is the foundation of the plaintiffs' actions.

Admissibility of Evidence.—In order to establish the reality of the "scheme" in pursuance of which the Acts are alleged to have been enacted, the plaintiffs sought to put in evidence the report of a Committee on Uniform Taxation and speeches made by the defendant Treasurer in Parliament when moving the second reading of the Bills for the four Acts. This evidence was rejected. The words of a statute, when applied to the state of facts with which the statute deals, speak for themselves. They express the intention of Parliament. A statute may be based upon the report of a committee or of many committees, or upon cabinet memoranda, or upon a resolution of a political party or of a public meeting, or upon an article in a newspaper. The intention of Parliament as expressed in the statute cannot be modified or controlled in a court by reference to any such material. If a statute refers to such material the case is different (*Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[1]; and on appeal[2]). On the general question of the admissibility of reports of commissions &c., see *Salkeld v. Johnson*[3]; *R. v. West Riding of Yorkshire County Council*[4]; *Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue*[5]. The practice as to admitting such evidence is the same in the United States, except that the procedure of Congress in relation to the reports of Congressional Committees has led to the admission in evidence of these reports, but only where the language of an Act is doubtful or obscure (*Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. 1, pp. 57 et seq.; *Railroad Commission of Wisconsin v. Chicago B. & Q. R. Co.*[6]).

Reports of speeches in Parliament are also irrelevant and inadmissible. There are two Houses of Parliament in the Commonwealth. They consist of one hundred and ten voting members belonging to different parties or to no parties. Members of Parliament frequently have differing opinions, not only as to the merits and real objects of Bills presented, but as to their meaning. Neither the validity nor the interpretation of a statute passed by Parliament can be allowed to depend upon what members, whether Ministers or not, choose to say in parliamentary debate. The Court takes the words of Parliament itself, formally enacted in the statute, as expressing the intention of Parliament (*Richards v. McBride*[7]; *R. v. Comptroller-General of Patents*[8]; *Sydney Municipal Council v. The Commonwealth*[9]; *Administrator-General of Bengal v. Prem Lal Mullick*[10]). Possibly the case may be different if the bona fides of Parliament or of the Crown in Parliament can be (*Joseph v. Colonial Treasurer (N.S.W.)*[11]) and is challenged: See the cases referred to in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[12]. An interesting example of the irrelevance to the question of the validity of a statute of the motives, objects or intentions of the

members of a legislature is to be found in *Fletcher v. Peck*[13], where it was alleged that members had been bribed and that the legislature was corrupt. In the present case no question of bona fides arises.

The Acts as a Scheme.—In the first place it is contended by the plaintiffs that the Acts together constitute a "scheme" directed towards an unlawful object, namely, the exclusion of State Parliaments from the sphere of legislation upon income tax. Reference is made to *Attorney-General for Alberta v. Attorney-General for Canada*[14], and to *Deputy Commissioner of Taxation v. Moran*[15]. The contention that an Act which does not refer to or incorporate any other Act, and which when considered by itself is not invalid, may be held to be invalid by reason of the enactment of other Acts, whether valid or invalid, meets many difficulties. Parliament, when it passes an Act, either has power to pass that Act or has not power to pass that Act. In the former case it is plain that the enactment of other valid legislation cannot affect the validity of the first-mentioned Act if that Act is left unchanged. The enactment of other legislation which is shown to be invalid equally cannot have any effect upon the first-mentioned valid Act, because the other legislative action is completely nugatory and the valid Act simply remains valid.

It is not necessary, however, in the present case to examine these questions. The *Tax Act* imposes a tax at rates such that there is left little practical room for State income tax. The *Grants Act* shows the intention of the Commonwealth Parliament that the Parliaments of the States should cease to tax income. The *War-time Arrangements Act* shows the intention of the Commonwealth Parliament that the Commonwealth should take over the officers and the physical means which are necessary for administering any system of State taxation upon income. As soon as a State which refused to abandon income tax formed a department to collect the tax the Commonwealth could take it over. Sec. 31 of the *Income Tax Assessment Act* is manifestly designed to make sure that the Government collects Commonwealth income tax, whatever may happen to any claim of a State for income tax, but it is independent of the general "scheme" of excluding the States altogether from the income-tax field. The intention to get rid of State income tax and of State income tax departments is clear in the case of the three first-mentioned Acts, and if such an intention is fatal to the validity of Commonwealth legislation it is not necessary to allege or prove any "scheme." Accordingly, in the present case full weight can be given to the plaintiffs' case without any reference to any "scheme." The defendants do not seek to conceal the scheme: they assert it and justify it. There is here no question of any pretence of doing one thing under the guise of doing another. The legislation which is attacked is not colourable—it admits its character upon its face.

The Tax Act.—The *Income Tax Act* is in its terms an ordinary tax Act, except that it imposes a very high rate of tax. It may be assumed, in favour of the plaintiffs, that the rates of tax which are imposed make it politically impossible for the States to impose further income tax. But it is not possible for the Court to impose limitations upon the Parliament as to the rate of tax which it proposes to impose upon the people. There is no legal principle according to which a tax of 10s. in the pound should be held to be valid, but a tax of 11s. or 15s. or 18s. or 20s. should be held to be invalid. Indeed, it was not disputed by the plaintiffs that, if the *Tax Act* had been passed without the *Grants Act*, it would have been unchallengeable, whatever the result might have been in making it impossible for a State to impose or collect income tax.

But it is said that if the object of the *Tax Act* is to accomplish indirectly what the Commonwealth Parliament cannot do directly, the Act is invalid. The object is not only to collect revenue and to make grants to the States, but to prevent the States imposing taxation upon incomes. This, as has been said, appears to be obvious enough. But the validity of legislation is not to be determined by

the motives or the "ultimate end" of a statute. In *R. v. Barger*[16] there was an acute difference of opinion as to the true nature of the legislation there in question. But all the justices agreed that, when a legislative power was granted, neither the indirect effect of its exercise nor the motive or object of the legislature in exercising it were relevant to the question of the validity of its exercise in a particular case: See *Barger's Case* (majority judgment[17]; per *Isaacs* J.[18]; per *Higgins* J.[19]); *Radio Corporation Pty. Ltd. v. The Commonwealth*[20].

The *Tax Act* is a law with respect to taxation. It simply exacts from citizens a contribution to the public revenue. It contains no provisions relating to any other matter. The argument which was successful in *Barger's Case*[21] (that what professed to be a *Tax Act* was shown by its own terms not really to be such an Act) is not available here. The Act is merely and simply an Act imposing taxation upon incomes. The Commonwealth power to legislate is subject to certain limitations. There must be no discrimination between States or parts of States (*Constitution*, sec. 51 (ii.)), the requirements of sec. 55 must be satisfied: See also secs. 92, 99, 114 and 117. It is clear that the *Tax Act* does not infringe any of these provisions. It is argued that the Commonwealth cannot use its taxing power so as to prevent the States exercising their taxing power. It may be conceded that the Commonwealth Parliament has no power to prohibit a State exercising its taxing power. But there is no such prohibition in this *Tax Act*. As already stated, there is no sure foothold for an argument that the Commonwealth Parliament cannot impose so high a tax in relation to a particular subject matter that there is no room for any additional State impost. This argument was not put by the plaintiffs.

The Commonwealth will raise by the *Tax Act* an amount approximately equivalent to that which would be raised by Commonwealth and State income-tax legislation as formerly operative. The Commonwealth proposes, under the *Grants Act*, to reimburse the States for lost income tax by paying to them the sums set out in the schedule to the Act, amounting to £33,489,000. Upon the basis of these facts it is argued for the plaintiffs that the *Tax Act* really raises money for State purposes and not for Commonwealth purposes—to which the power conferred by sec. 51 (ii.) of the *Constitution* is limited: See *Sydney Municipal Council v. The Commonwealth*[22]. But the reply to the plaintiffs' argument is that the Constitution plainly permits the Commonwealth to raise money in order to pay it over to or for the States: See secs. 87, 89, 93, 94, 96, 105, 105A. Payment of money to the States is clearly a possible and proper Commonwealth purpose.

Another argument for the plaintiffs is that the Commonwealth Parliament by its *Tax Act* excludes the States from necessary sources of revenue, and so itself creates the need for assistance which it then purports to relieve by financial grants. It is urged that such grants do not fall within sec. 96 of the *Constitution*. But the need for financial assistance to States not infrequently results from Commonwealth policy as expressed in Commonwealth laws (*Deputy Federal Commissioner of Taxation (N.S.W.) v. W. A. Moran Pty. Ltd.*[23]; same case on appeal[24]). Thus the mere fact that a Commonwealth law creates a "need" in a State does not prevent the Commonwealth Parliament from relieving the need by granting financial assistance to a State under sec. 96.

It is further argued for the plaintiffs that the object of the *Tax Act*, at least to the extent of an amount of £33,489,000 of the revenue to be raised thereby, is to raise money to meet the payment of that amount under the *Grants Act*; that the *Grants Act* is invalid for reasons which will be referred to later; that therefore the *Tax Act* is designed to raise money for an unconstitutional purpose and accordingly is invalid. I assume for the purpose of considering this argument that the *Grants Act* is for some reason invalid.

In fact the money raised by the *Tax Act* is not earmarked in any way. It is doubtful whether

Commonwealth revenue can be earmarked except at the point of expenditure (i.e., not as revenue) by an appropriation Act—and there is no appropriation section in the *Tax Act*. The Constitution, sec. 81, provides: "All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution." Sec. 83 provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Separate constitutional provisions apply to appropriation Acts (secs. 54 and 56) and to laws imposing taxation (sec. 55). Sec. 54 provides that: "The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation." Sec. 55 provides that: "Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect."

Thus no provision imposing taxation can be included in an appropriation Act and no appropriation of money can be made by any Act imposing taxation. All taxation moneys must pass into the Consolidated Revenue Fund (sec. 81), where their identity is lost, and whence they can be taken only by an appropriation Act. An appropriation Act could provide that a sum measured by the receipts under a particular tax Act should be applied to a particular purpose, but this would mean only that the sum so fixed would be taken out of the general consolidated revenue. Thus there can be no earmarking in the ordinary sense of any Commonwealth revenue.

In this case, however, no attempt has been made to provide that any moneys received under the *Tax Act* shall be applied towards meeting the payments under the *Grants Act*. Neither Act contains any such provision. The appropriation made by the *Grants Act* is made out of the Consolidated Revenue Fund (*Grants Act*, sec. 7).

It is not necessary in this case to consider the general question whether the Commonwealth appropriation power is limited so that some appropriations would be invalid, not because of an infringement of sec. 54 of the *Constitution*, but because they were applicable to some unauthorized object. But, even if it can be assumed that an appropriation can be invalid (as here contended with reference to the *Grants Act*), such invalidity cannot reflect back upon any tax Act so as to make it invalid. Commonwealth Government receipts consist of proceeds of taxation and loans and of payments for services, and they all go into one fund (Constitution, sec. 81). Suppose the Commonwealth Government were, under invalid legislation, or without any pretended legislative justification, to make a payment of one million pounds or one thousand pounds to a person who had no right to receive it. Can it be contended that because the payment might have been made out of receipts from income tax that therefore the income-tax laws of the Commonwealth are invalid? The argument might with equal force be applied to the customs tariff, or the *Estate Duties Act*, or the *Land Tax Act*, or to any Act which brings in the money some of which has been or may have been unlawfully expended. It is impossible to accept a contention the necessary result of which, if logically applied, would be that any unauthorized expenditure of Commonwealth money would invalidate all the Acts under or by virtue of which moneys come into the consolidated revenue. Thus the objections made to the *Tax Act* specifically must be held to fail.

The Grants Act.—It is now necessary to deal with the far-reaching and fundamental general objection which is made to the *Tax Act* considered in association with the other Acts, but which is particularly directed against the *Grants Act*.

This objection is based upon the following principle which, it is argued, applies to all

Commonwealth legislative powers, namely—the Commonwealth cannot direct its legislative powers towards destroying or weakening the constitutional functions or capacities of a State. (A corresponding rule should, it is said, be applied in favour of the Commonwealth as against the States.) In another form the principle is said to be that the Commonwealth cannot use its legislative powers to destroy either "the essential governmental functions" or "the normal activities" of a State.

Before considering sec. 4, which is the main provision of the *Grants Act*, reference may be made to an objection to the validity of sec. 6. This section enables the Treasurer of the Commonwealth, subject to a maximum limit to be stated in a recommendation of the Commonwealth Grants Commission, to increase the grants to the States. It is objected by the plaintiffs that this provision is not a valid exercise of the power given to the Commonwealth Parliament to grant financial assistance to States under sec. 96 of the *Constitution*, because it involves an unconstitutional delegation to the Treasurer of legislative power. This objection, however, is answered by *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[25].

The principal provision of the *Grants Act* is sec. 4, which is in the following terms: "In every financial year during which this Act is in operation in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in the Schedule to this Act against the name of that State, less an amount equal to any arrears of tax collected by or on behalf of that State during that financial year."

Upon this provision the following preliminary comments may be made:—

(*a*)

The Act does not purport to repeal State income-tax legislation. The Commonwealth Parliament cannot do this. It cannot repeal an Act which it has no power to enact: See *Attorney-General for Ontario v. Attorney-General for the Dominion*[26]; *Great West Saddlery Co. v. The King*[27]. Plainly the Commonwealth Parliament could not enact separate income-tax Acts for separate States. Nor can it repeal such Acts enacted by the States.

(*b*)

The *Grants Act* does not require, in order that a State should qualify for a grant, that the State—or rather the State Parliament—should abdicate, or purport to abdicate, its power to impose taxes upon incomes. A State Parliament could not bind itself or its successors not to legislate upon a particular subject matter, not even, I should think, by referring a matter to the Commonwealth Parliament under sec. 51 (xxxvii.) of the *Constitution*—but no decision upon that provision is called for in the present case. The grant becomes payable if the Treasurer is satisfied that a State has not in fact imposed a tax upon incomes in any particular year during the operation of the Acts.

(*c*)

The Act does not purport to deprive the State Parliament of the power to impose an income tax. The Commonwealth Parliament cannot deprive any State of that power: see Constitution, secs. 106, 107. Notwithstanding the *Grants Act* a State Parliament could at any time impose an income tax. The State would then not benefit by a grant under the Act, but there is nothing in the *Grants Act* which could make the State income-tax legislation invalid.

(*d*)

The *Grants Act* offers an inducement to the State Parliaments not to exercise a power the continued existence of which is recognized—the power to impose income tax. The States may or may not yield to this inducement, but there is no legal compulsion to yield.

The Commonwealth may properly induce a State to exercise its powers (e.g. the power to make roads: See *Victoria v. The Commonwealth*[28]) by offering a money grant. So also the Commonwealth may properly induce a State by the same means to abstain from exercising its powers. For example, the Commonwealth might wish to exercise the powers given by the Constitution, sec. 51 (xiii.) and (xiv.) to legislate with respect to banking, other than State banking, and insurance, other than State insurance. The Commonwealth might wish to set up some Federal system of banking or insurance without any State competition. If the States were deriving revenue from State banking or State insurance, they might be prepared to retire from such activities upon receiving what they regarded as adequate compensation. The Commonwealth could properly, under Commonwealth legislation, make grants to the States upon condition of them so retiring. The States could not abdicate their powers by binding themselves not to re-enter the vacated field, but if the Commonwealth, aware of this possibility, was prepared to pay money to a State which in fact gave up its system of State banking or insurance, there could be no objection on this ground to the validity of the Commonwealth law which authorized the payment.

But the position is radically different, it is urged, if the so-called inducement practically amounts to coercion. Admittedly the Commonwealth Parliament could not pass a law compelling a State to surrender the power to tax incomes or prohibiting the exercise of that power by a State. Equally, it is said, the Commonwealth cannot lawfully make an offer of money to a State which, under the conditions which actually exist, the State cannot, on political or economic grounds, really refuse.

This identification of a very attractive inducement with legal compulsion is not convincing. Action may be brought about by temptation—by offering a reward—or by compulsion. But temptation is not compulsion. A person whose hand is physically propelled by another person against his will so that it strikes a blow is not guilty of assault. But it would be no defence to allege that he really could not help striking the blow because he was offered £1,000 for doing it.

This question has been considered in the Supreme Court of the United States of America: See *Massachusetts v. Mellon*[29], where it was held that a Federal statute making money available to States which were willing to co-operate with Congress in reducing maternal and infant mortality imposed no obligation, but simply extended "an option which the State is free to accept or reject." On the other hand, in *United States v. Butler* (*The Hoosac Mills Case*, a New Deal case)[30] it was said that an offer to a farmer the refusal of which may involve financial ruin to him amounts to coercion—"coercion by economic pressure. The asserted power of choice is illusory." *Stone* J., dissenting with *Brandeis* and *Cardozo* JJ., took a contrary view: "Threat of loss, not hope of gain, is the essence of economic coercion"[31]. A somewhat similar question, but in a different form, arose in *Carter v. Carter Coal Co.*[32], where the majority took the view that an offer of exemption from a penalty amounted to compulsion. The authority of the latter two cases is, however, greatly diminished, if not destroyed, by the more recent case of *Steward Machine Co. v. Davis*[33]. A Federal law provided for a rebate to taxpayers of up to 90 per cent of a Federal tax if the taxpayer contributed to a State unemployment scheme approved by the Secretary of the Federal Treasury. It

was urged that this was an unconstitutional attempt to coerce the States into enacting unemployment legislation approved by the Federal Government—that Government itself having no power to legislate upon the subject of unemployment. The contention was rejected. It was said:—"Every rebate ... is in some measure a temptation. But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties"[34]. *Sutherland* J. (dissenting) agreed in this view:—"I agree that the States are not coerced by the Federal legislation into adopting unemployment legislation. The provisions of the Federal law may operate to induce the State to pass an employment law if it regards such action to be in its interest. But that is not coercion"[35]. Thus the now prevailing opinion of the Supreme Court of the United States is in accord with the view which has been stated above. The *Grants Act* does not compel the States to abandon their legislative power to impose a tax upon incomes. States which do not abstain from imposing income tax cannot be said to be acting unlawfully. There is no command that they shall not impose such a tax.

State Functions and Capacities.—It is clear, however, that the *Grants Act* is intended to bring about the result that the State shall not impose such a tax. The Act therefore must meet the challenge of the plaintiffs that the Commonwealth cannot direct its legislative powers against the constitutional functions or capacities—against the essential functions or the normal activities—of a State.

This statement reminds one who has followed the development of Australian constitutional law of "the rule in D'Emden v. Pedder1(1904) [1904] HCA 1; 1 C.L.R. 91.", which was stated in the following terms: "When a State attempts to give to its legislative or executive authority an operation which, if valid, would fetter, control, or interfere with, the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative"[37]. A corresponding rule was held to apply against the Commonwealth in favour of the States in the *Railway Servants' Case*[38].

Thus the doctrine of the reciprocal immunity of Federal and State instrumentalities was introduced. The latter case was overruled in the *Engineers' Case*[39], and the exercise of Commonwealth legislative powers was held not to be subject to any implied prohibition prescribing non-interference with State instrumentalities, though, as pointed out in the *Engineers' Case*[40], and again in *West v. Commissioner of Taxation (N.S.W.)*[41] (per *Dixon* J.[42]; per *Evatt* J.[43]), the nature of the State power or Commonwealth power concerned must be considered in each case. In the *Engineers' Case*[44] the rule in *D'Emden v. Pedder*[45], distinctly stated as a limitation upon the exercise of the powers of the States only, was held to be sound on the basis of sec. 109 of the *Constitution*, which provides that: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

Questions relating to the non-statutory prerogative were left open in the *Engineers' Case*[46]. No question affecting such prerogative arises in the present case.

It is argued for the plaintiffs that the authorities as they now stand leave it open to the Court to hold that, while there is no general principle of exemption of State instrumentalities from the exercise of Federal power, the Federal nature of the Constitution, involving as it does the continued existence of the States, does involve the principle that the Commonwealth cannot use its legislative powers to destroy or weaken the constitutional functions or capacities or to control the normal activities of the States. It will be convenient to quote certain passages from cases upon which the plaintiffs rely which will show the plaintiffs' contention in its full strength.

R. v. Barger.

"It is an inherent consequence of the division of powers between governmental authorities that neither authority is to hamper or impede the other in the exercise of their respective powers" (*R. v. Barger*[47], per *Isaacs* J.). It should be observed, however, that this statement is completed by the following important addition:—"But that doctrine has no relation to the extent of the powers themselves; it assumes the delimitation aliunde. It is contrary to reason to shorten the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residue"[48]. This proposition anticipates the decision in the *Engineers' Case*[49] that express Commonwealth powers cannot be limited by reserved State powers.

Pirrie v. McFarlane.

"I can find" (in certain Canadian cases) "no principle governing this case, unless it be the natural and fundamental principle that, where by the one Constitution separate and exclusive governmental powers have been allotted to two distinct organisms, neither is intended, in the absence of distinct provision to the contrary, to destroy or weaken the capacity or functions expressly conferred on the other. Such attempted destruction or weakening is prima facie outside the respective grants of power" (*Pirrie v. McFarlane*[50], per *Isaacs* J., quoted by *Dixon* J. in *West v. Commissioner of Taxation (N.S.W.)*[51]). In this passage emphasis is placed upon the grant of exclusive powers to both Dominion and Provinces—a feature which is absent from the Commonwealth Constitution.

West v. Commissioner of Taxation.

"It must at least be implied in the Constitution, as an instrument of Federal Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward the destruction of the normal activities of the Commonwealth or States. Such a principle is not inconsistent with the rejection by the Engineers' Case1(1920) [1920] HCA 54; 28 C.L.R. 129. of the earlier doctrine of immunity of instrumentalities" (per *Evatt* J. in *West v. Commissioner of Taxation (N.S.W.)*[53]).

"It is quite erroneous to regard the Engineers' Case1(1920) [1920] HCA 54; 28 C.L.R. 129. as having established a new and valid constitutional principle, under which, either by direct declaration as to the termination of specified State legislation, or as to the States' legislative power, or by indirectly creating conditions or qualities under Commonwealth legislation which will achieve the same objectives, the Commonwealth Parliament is enabled, by the exercise of its own legislative power, to rid itself of any State legislative interference or impediment. This constitutional principle or doctrine is a dangerous feature of the Engineers' Case1(1920) 28 C.L.R. 129. and any proposed application of it should be most carefully watched" (also per *Evatt* J. in the same case[56]).

Caron v. The King.

"In Great West Saddlery Co. v. The King4(1921) 2 A.C. 91. ... a general principle was laid down that no Provincial legislature could use its special powers as an indirect means of destroying powers given by the Parliament of Canada. By parity of reason the Parliament of Canada could not exercise its power of taxation so as to destroy the capacity of officials lawfully appointed by the Province" (*Caron v. The King*[58]).

James v. The Commonwealth.

"The powers of the States were left unaffected by the Constitution except in so far as the contrary was expressly provided; subject to that each State remained sovereign within its own sphere. The

powers of the State within those limits are as plenary as are the powers of the Commonwealth" (*James v. The Commonwealth*[59]).

The discussion of the question may begin with a consideration of the last-quoted passage. It is unnecessary in the present case—and probably unnecessary in any purely legal controversy—to consider in what sense a State which is part of a Federal Commonwealth under the British Crown can be said to be "a sovereign State": See *The Commonwealth v. New South Wales*[60], and *West v. Commissioner of Taxation (N.S.W.)*[61]. The legislative powers of the States depend upon their Constitutions, which, speaking generally, give power to legislate for the peace, order and good government of the States. There are certain limitations upon these powers:—(*a*) They must not be exercised to pass laws which are repugnant to applicable Imperial laws: See *Colonial Laws Validity Act 1865*, sec. 2. (*b*) Some powers (*Constitution*, sec. 107) which State Parliaments would otherwise possess have been exclusively vested in the Parliament of the Commonwealth (see, e.g., secs. 52, 90) or withdrawn from the Parliaments of the States (see, e.g., such prohibitions as are contained in secs. 92, 114, 115, 117). (*c*) Laws of the State which are inconsistent with laws of the Commonwealth are invalid to the extent of the inconsistency (sec. 109). Thus if both the Commonwealth Parliament and the State Parliaments have power to pass a law with respect to a certain subject—e.g., bankruptcy—the Commonwealth law prevails in the event of inconsistency. The powers of the States are, it is true, "plenary within their limits," but those limits may be determined in many matters by Commonwealth laws which may make State laws invalid.

The Commonwealth Parliament is limited in its legislation by the grants of power made by the Constitution and by the prohibitions contained in the Constitution, as well as by the *Colonial Laws Validity Act*, (the *Statute of Westminster 1931* not having been adopted by the Commonwealth). But no law which is within a Commonwealth power can be rendered invalid by any State law, though a State law which, apart from action by the Commonwealth Parliament, would be valid, may be invalid by reason of inconsistent provisions in a Commonwealth law (sec. 109).

In this case the plaintiffs do not rely on any express provision in the Commonwealth Constitution for the purpose of showing that the *Tax Act* and the *Grants Act*, as well as the other Acts considered together with them, are invalid. They rely upon the alleged implied prohibition as to non-interference by the Commonwealth with State constitutional functions, capacities or activities. They point to secs. 106 and 107 of the *Constitution*, which have already been quoted. These sections, however, do not confer any powers upon a State or upon a State Parliament. They preserve existing powers, but, as to State Constitutions (sec. 106) "subject to the" (Commonwealth) "Constitution," and, as to State legislative powers, (sec. 107) only after withdrawals and exclusions effected by the Constitution, and then subject to the effect of overriding Commonwealth laws where the Commonwealth Parliament has power to legislate (sec. 109). These provisions cannot be relied upon to limit by either express or implied prohibition any provision conferring powers upon the Commonwealth. They do make it clear that the Commonwealth possesses only the powers granted by the Constitution. But they do not limit the sphere or restrict the operation of the powers which are so granted.

The *Engineers' Case*[62] did not deny the existence of implied powers or prohibitions (see the report[63]). Should then the particular implication for which the plaintiffs contend be made upon some ground other than the express terms of secs. 106 and 107 of the *Constitution*?

In the first place it may be admitted that revenue is essential to the existence of any organized State, and that there cannot be either reliable or sufficient revenue without power of taxation. The power

of taxation may fairly be said to be an essential function of a State.

But this admission states a universal opinion. There is no universal or even general opinion as to what are the essential functions, capacities, powers, or activities of a State. Some would limit them to the administration of justice and police and necessary associated activities. There are those who object to State action in relation to health, education, and the development of natural resources. On the other hand, many would regard the provision of social services as an essential function of government. When Lord *Watson* said in *Coomber v. Justices of Berks*[64] that "the administration of justice, the maintenance of order, and the repression of crime are among the primary and inalienable functions of a constitutional government," he was not purporting to give an exhaustive definition of the functions of government. In a fully self-governing country where a parliament determines legislative policy and an executive government carries it out, any activity may become a function of government if parliament so determines. It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government, or to attempt the impossible task of distinguishing, within functions of government, between essential and non-essential or between normal or abnormal. There is no sure basis for such a distinction. Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere, and Australia has not come to that.

Thus the principle for which the plaintiffs contend must be applied, if at all, in protection of all that a State chooses to do, and it must mean that Commonwealth legislation cannot be directed to weaken or destroy any State function or activity whatsoever.

But it cannot be denied that Commonwealth legislation may be valid though it does in fact weaken or destroy, and even is intended to weaken or destroy, some State activity. Sec. 109 shows that this must be so in many cases. Commonwealth laws have in fact put an end to the existence of State Courts of Bankruptcy and State Patent, Trade Mark and Copyright Departments. The Commonwealth laws are not invalid on that account. They have produced the results stated just because they are valid.

It is true that the Commonwealth Parliament has no power to make laws with respect to the capacity and functions of a State Parliament. It has already been stated that the Commonwealth Parliament could not pass a law to prohibit a State Parliament from legislating in general or from legislating upon some particular subject matter. But this limit upon the power of the Commonwealth Parliament does not arise from any prohibition or limitation to be implied from the Constitution. It is simply the result of the absence of power in the Commonwealth Parliament to pass laws with respect to the functions or powers of State Parliaments. The Commonwealth Parliament cannot legislate with respect to any subject whatever unless a power to do so is conferred on it by the Constitution. No power such as that mentioned is given by the Constitution to the Parliament.

But the Acts in question are not laws with respect to State functions. They do not command or prohibit any action by the State or by the State Parliament.

Indirect Effects of Laws.—A law may produce an effect in relation to a subject matter without being a law with respect to that subject matter. Questions of motive and object are irrelevant to the question of the true nature of a law. The nature (or "substance" if that word is preferred) of a law is to be determined by what it does, not by the effect in relation to other matters of what the law does. A prohibition of import or a very high duty in a customs tariff may bring about the closing of business enterprises in a State. But the tariff is not a law with respect to those enterprises. Similarly

a State law may prohibit the carrying on of occupations with the result that they are necessarily abandoned, with perhaps great consequential loss to the Commonwealth in customs duties or income-tax receipts. But the State law does not for this reason become a law with respect to customs duties or income tax. The true nature of a law is to be ascertained by examining its terms and, speaking generally, ascertaining what it does in relation to duties, rights or powers which it creates, abolishes or regulates. The question may be put in these terms: "What does the law do in the way of changing or creating or destroying duties or rights or powers?" The consequential effects are irrelevant for this purpose. Even though an indirect consequence of an Act, which consequence could not be directly achieved by the legislature, is contemplated and desired by Parliament, that fact is not relevant to the validity of the Act (*R. v. Barger*[65]; *Osborne v. The Commonwealth*[66]; *Attorney-General for Queensland v. Attorney-General for the Commonwealth*[67]; *Sonzinsky v. United States*[68], and see note in the Lawyers' Edition[69]).

This principle should be remembered when it is said that a Parliament of limited powers cannot do indirectly what it cannot do directly. This proposition is of value when (as has not infrequently happened in Canada) it is contended that an Act is colourable in character in that, under the guise or pretence of doing something permitted, it is in reality doing something prohibited or beyond power. The relevant Canadian cases generally deal with the difficulties arising from the grant of exclusive powers to both Dominion and Provinces. The emphasis placed upon this point may be noted in *John Deere Plow Co. Ltd. v. Wharton*[70]; *Great West Saddlery Co. v. The King*[71]; *Attorney-General for Ontario v. Reciprocal Insurers*[72]. When the areas of such competing powers overlap, and the challenged law is, for example, both a law relating to insurance (Provincial power) and to crime (Dominion power), a court must make a choice as to the category to which the law should be assigned: See, e.g., *Attorney-General for Ontario v. Reciprocal Insurers*[73]; *In re Insurance Act of Canada*[74], where the decision against the Dominion was assisted by the fact that the Dominion Parliament has sought to give itself power by a palpably "false definition"—a provision that a company should be deemed to "immigrate" into Canada if it sent to Canada a document appointing an agent there: see the report[75]. Upon this difficult question the Privy Council has ultimately decided to abstain from laying down any general principle, leaving the question of *ultra vires* to "be determined in each case as it arises, for no general test applicable to all cases can safely be laid down" (*Attorney-General for Alberta v. Attorney-General for Canada*[76]). The Commonwealth Constitution does not confer any exclusive powers upon the States. Subject to the Constitution the States are left with powers not given exclusively to the Commonwealth or withdrawn from the States (secs. 106, 107). Sec. 109 then gives to any Commonwealth law, whether made under an exclusive or under a concurrent power, overriding operation over any State law. Thus the difficulties of choosing between two heads of power, stated to be exclusive, but in fact overlapping, do not arise in Australia.

The problem, as explained in the *Engineers' Case*[77], is the different, though not always easy, problem of deciding whether a particular Commonwealth law falls within a head of Commonwealth power: if it does, it is immaterial that the States may also have power to legislate on the matter. If the law falls within the Commonwealth power, the law is valid and fully operative, notwithstanding any State law. *Barger's Case*[78] is an illustration of the difficulty of deciding whether a particular law really does fall within a granted power, but, as already pointed out, *Barger's Case*[79] in all the judgments rejects considerations of indirect consequences as being irrelevant material.

If the validity of a State law is in question, the Court has to decide whether the law is a law for the peace, order and good government of a State: if not (as if it purported to prohibit the Commonwealth Parliament from exercising its powers) it is invalid because beyond State power. If

not beyond State power for this reason, it may be repugnant to applicable Imperial law (*Colonial Laws Validity Act 1865*, sec. 2) or trench upon Commonwealth exclusive power, or be opposed to a prohibition in the Constitution (e.g., secs. 92, 114), or be inconsistent with a valid Federal law (sec. 109). In any of these cases it is invalid. In none of the instances mentioned can any consideration of indirect consequences be relevant.

When a power is defined by reference to purpose, other considerations arise (*Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[80]). So also if there were a prohibition against attaining a result by any method whatever. If, for example, the Commonwealth Constitution contained a provision that no Commonwealth law should by any means bring about the result of a discrimination between States, the indirect consequential effects of the law would have to be examined. But the Constitution contains no such provision. For example, taxation laws may not discriminate between States (sec. 51 (ii.)); laws of trade, commerce or revenue may not give preference to a State (sec. 99). These provisions affect only laws of the stated character. Thus there may be discrimination between States and preferences to States under sec. 96—grants to States—because that section is not subject to any limitation with respect to discrimination (*Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[81]).

Thus, although the Commonwealth Parliament cannot validly pass laws limiting the functions of State Parliaments—and *vice versa*—the *Tax Act* and the *Grants Act* are not invalid on that ground. They do not give any command or impose any prohibition with respect to the exercise of any State power, legislative or other. The *Tax Act* simply imposes Commonwealth taxation, and is authorized by sec. 51 (ii.) of the *Constitution*. The *Grants Act* authorizes payments to States which choose to abstain from imposing income tax, and is valid by reason of sec. 96 of the *Constitution*, unless it is bad as involving some prohibited discrimination or preference. It is now necessary to deal specifically with that objection.

Discrimination.—Sec. 96 provides that: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." Plainly under this provision financial assistance could be given to a single State only. Thus variation in amounts given to different States is permissible. The section contains no express or implied prohibition against any kind of discrimination: See references to *Moran's Case*[82]. Thus it is no objection to the *Grants Act* that States which abandon income tax are given a grant while those who retain income tax get nothing.

So also the indirect effect of varying grants upon the fortunes of taxpayers of different States is an irrelevant circumstance. The *Tax Act* itself is a general Act, applying to all persons in all States without discrimination. The States, not the taxpayers, receive varying amounts under the *Grants Act*. As taxpayers in some States will this year pay more in Commonwealth income tax than they did last year in both Commonwealth and State income tax, and taxpayers in other States will pay less than last year, it is said that the *Tax Act*, read with the *Grants Act*, discriminates between States. But a comparison of this year with last year or any past year is not to the point. If the Commonwealth had not enacted the challenged Acts, no-one can say what the Commonwealth or State rates of tax would have been this year. The question whether these facts unlawfully discriminate between States cannot be answered by any consideration of the actual position of taxpayers under past legislation (which was alterable by one Commonwealth and six State Parliaments severally) or by a speculation as to the taxation which would probably have been imposed by Commonwealth and States if the Acts in question had not been passed. Further, as

already pointed out, the proceeds of the *Tax Act* simply go into general consolidated revenue, together with the receipts from other taxes and other moneys, such as the revenue derived from the post office. Then a portion of this general fund is applied, to the extent of £33,489,000, in making grants to States, if the States are willing to accept them. There is no reduction of Commonwealth income tax to taxpayers in particular States.

It is true that in *Moran v. Deputy Commissioner of Taxation*[83] the Privy Council pronounced a warning that possibly (no decision was given on the question) a grant under sec. 96 might be used for the purpose of effecting discrimination in regard to taxation—"under the guise or pretence of assisting a State with money." It may be that, with a very misguided Parliament, such a case is perhaps conceivable. If the proceeds of a tax could be earmarked and if such proceeds were then distributed in whole or in part among the States upon a discriminatory basis the case apparently contemplated by the Privy Council would arise. Reference has however already been made to the difficulties which, under the Commonwealth Constitution, stand in the way of earmarking Commonwealth revenue in any respect. In the *Hoosac Mills Case*[84] the Supreme Court of the United States considered such a case as that suggested. The *Agricultural Adjustment Act* was there held invalid because the proceeds of a tax were identified with a purpose to which the Act was applied, that purpose being held to be an unlawful purpose. It was held to be unlawful because it involved an invasion by the Federal Government of the reserved powers of the States[85]. This decision depended upon the doctrine of immunity of State instrumentalities which, in Australia, was rejected in the *Engineers' Case*[86]—See the discussion of this case in *The Supreme Court and the National Will* by *Dean Alfange*, pp. 180 et seq. If the proceeds of a Commonwealth tax were as such devoted to some unlawful purpose, the case contemplated by the Privy Council might arise and it would be similar to the *Hoosac Mills Case*[87]. But it will not be easy to find a case where it can properly be held that an *appropriation Act* making grants to States is invalid because it involves an infringement of the provision that *Acts with respect to taxation* shall not discriminate between States or parts of States.

The *Tax Act* now under consideration does not so discriminate. It imposes the same tax at the same rates upon all persons in all States throughout Australia. It does not make any discrimination whatever between States—it does not even refer to any State. The Act is also a law of revenue, and therefore must not give preference to any State (sec. 99). The Act does not give preference to any State. The *Grants Act* is an Act dealing with expenditure—an appropriation Act. It does draw distinctions between States. There is no constitutional reason why it should not do so. There never has been and there cannot be uniformity in payments made by the Commonwealth in or to States or persons in States. Discrimination in expenditure between States is found in every Commonwealth budget and in many appropriation Acts. It has never been argued either that such differentiation should be avoided or that it could be avoided.

Conclusion as to Tax Act and Grants Act.—Thus the objections to the *Tax Act* and the *Grants Act* fail, whether those Acts are considered separately or as part of a scheme to bring about the abandonment by the States of the raising of revenue by taxation of incomes.

It is perhaps not out of place to point out that the scheme which the Commonwealth has applied to income tax of imposing rates so high as practically to exclude State taxation could be applied to other taxes so as to make the States almost completely dependent, financially and therefore generally, upon the Commonwealth. If the Commonwealth Parliament, in a grants Act, simply provided for the payment of moneys to States, without attaching any conditions whatever, none of the legislation could be challenged by any of the arguments submitted to the Court in these cases.

The amount of the grants could be determined in fact by the satisfaction of the Commonwealth with the policies, legislative or other, of the respective States, no reference being made to such matters in any Commonwealth statute. Thus, if the Commonwealth Parliament were prepared to pass such legislation, all State powers would be controlled by the Commonwealth—a result which would mean the end of the political independence of the States. Such a result cannot be prevented by any legal decision. The determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power or for the use of power to promote what are thought to be improper objects is to be found in the political arena and not in the Courts.

Income Tax (War-time Arrangements) Act 1942.—The provisions of this Act have already been stated. Under this Act, if it is valid, the Commonwealth can, during the war, and a stated period thereafter, take over all the personnel, present or future, of any State income tax department, with its office accommodation, present or future, and office equipment, present or future. Thus the operation of the Act would make the existence of such a department impossible.

Compensation for the possession and use of office accommodation, furniture and equipment is to be determined, in default of agreement, by an arbitrator appointed by the Governor-General (sec. 11 (3)). No provision is made for compensation in respect of returns and records (sec. 13). The Commonwealth Parliament has power to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws (Constitution, sec. 51 (xxxi.)). If this is the only power of the Parliament to legislate for the acquisition of property, it may be questioned whether the determination of compensation by an arbitrator appointed by the acquiring Commonwealth satisfies the requirement of just terms. The taking over of all returns and records, even with a right of access by the States (which is provided for by sec. 13), but without any compensation, might well be held not to be "on just terms." These questions, however, were not argued.

Commonwealth and State income taxes have been collected by a single staff in each State under agreements made between the Commonwealth and the States under the Commonwealth *Income Tax Collection Act 1923-1940*. The taxes have been collected by the Commonwealth in Western Australia, and in the other States by the States. The actual agreements are not before the Court. Sec. 12 of the *War-time Arrangements Act* provides that the agreements shall, notwithstanding any provisions contained in them, be suspended as from a date fixed by proclamation until the Act ceases to operate. No argument was heard as to the power of the Commonwealth Parliament to suspend these agreements. Probably they are political arrangements not creating legal obligations between the parties and are terminable at the will of either party. The effect of the application of the *War-time Arrangements Act* would be that the same staff or some of the same staff would continue to do the same work as if the Act had not been passed, but under Commonwealth control in all States instead of only in Western Australia. Any saving of manpower brought about by the simplification resulting from the abolition of future State income tax could be effected whether or not the *War-time Arrangements Act* was applied.

It is conceded that, under a general legislative provision, such as the *Defence Act* or reg. 4 of Statutory Rule No. 77 of 1942 (regulations under the *National Security Act 1939-1940*), the Commonwealth can in time of war, compel the services of any person (including State public servants) for any purpose connected with the defence of the country. But it is a different thing to select a particular class of persons as such and to compel their services only. For example, though under a defence Act the Commonwealth Government can call up citizens for service in the military

forces, it would be quite a different thing to pass a law imposing liability to service upon the residents of certain specified States only. Such a law would be prohibited by sec. 117 of the *Constitution*, which provides that: "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State."

So also the Commonwealth can and does compel the services of citizens in the army irrespective of their religious beliefs. But it could not legislate to apply compulsion only to persons who professed a particular religion (sec. 116). Thus there is a very real difference between general legislation and legislation limited to a particular class.

Apart from the defence power it would hardly be argued that the Commonwealth could, as it were, forcibly seize a State department, its personnel, accommodation and equipment, under a law specifically directed to this object. The reason for the invalidity of such a law would be that it was a law with respect to a State department—a matter not within Commonwealth legislative powers. The Commonwealth can, whenever it chooses, establish its own income tax department. The Commonwealth can hire employees even if they belong to a State service, it can take property even if it belongs to a State: but to do these things under general legislation is a very different thing from completely and specifically liquidating a State department and preventing it from being re-established. There is no Commonwealth power to legislate upon such a matter—unless the defence power (sec. 51 (vi.)) can be called in aid.

The defence power was widely interpreted and applied in *Farey v. Burvett*[88]. But that case shows that even this power has a limit—it is not sufficient to wave the flag as if that were a conclusive argument. The defence power itself is subject to the Constitution (sec. 51, introductory words). Both the extent of the power and the limitation to which it is subject appear from what was said in *Farey v. Burvett*[89]. *Griffith* C.J. said: "One test, however, must always be applied, namely: Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that the one cannot reasonably be regarded as affecting the other?"[90]. *Barton* J. said that if the particular provision was capable of assisting in defence, that was enough[91]. *Isaacs* J. said: "If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge, and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end"[92]. So, also, per *Higgins* J.: "It is not for this Court to decide that the Act does aid defence, or how it aids defence; it is enough that it is capable of being an Act to aid defence, enough that the statement of Parliament is not necessarily untrue"[93]. Unless there is to be no definition whatever of defence, so that the defence power is absolutely unlimited, there could be no wider definition or description than in the passages quoted. But the Commonwealth can support legislation under the power only if it can satisfy a court that there is *some* connection between the legislation in question and the defence of the country.

What connection is here suggested? The preamble to the Act states that with a view to the public safety and defence of the Commonwealth and of the States and for the more effectual prosecution of the war it is necessary and convenient to make the provisions contained in the Act. The Court should treat this expression of the view of Parliament with respect. In a doubtful case it might turn the scale, the presumption being in favour of the validity of Acts rather than of invalidity. But such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a

power to itself by attaching a label to a statute. Similar considerations apply to the provisions contained in secs. 4 and 11 that the Treasurer may use powers under the Act if in his opinion it is necessary for the defence of the Commonwealth &c. to do so.

It is contended for the Commonwealth that a single system of Commonwealth income tax in substitution for the twenty-three income taxes now operating (six of which, it may be observed, are Commonwealth taxes) will improve general efficiency by simplifying income-tax administration and by making less onerous the duties of citizens in making returns, and so releasing manpower at a time when manpower is urgently needed for the war. But the *War-time Arrangements Act* has no relation to these objectives. The attainment of them depends upon the effect of the *Tax Act* and the *Grants Act* in establishing a single system of income taxation. If, as is expected, the uniform system reduces the work to be done by civil servants, accountants and clerks in relation to income tax, the Commonwealth will have at its disposal under other legislation the services of any persons whom it chooses to call up. The saving of the unnecessary and useless work will be exactly the same whether or not the Commonwealth takes over the State departments, the Commonwealth itself determining in either case what work is unnecessary or useless.

The only other argument used to show a connection between this Act and defence was the suggestion that the Commonwealth could organize and administer an income tax department more efficiently than the States, and that superior Commonwealth management would prevent waste of manpower. This proposition cannot be assumed—and it has not been proved. Further, such an argument would justify the Commonwealth in taking over any State department whatever under the defence power upon the plea that Commonwealth management was always more efficient than State management. The Court cannot base any decision upon an assumption so obviously disputable.

My conclusion, therefore, is that Act No. 21, the *Income Tax (War-time Arrangements) Act 1942* is invalid, because it is beyond the powers of the Commonwealth Parliament.

Income Tax Assessment Act 1942, sec. 31.—The provision in this Act which is attacked by the plaintiffs is sec. 31, which inserts a new sec. 221 in the principal Act. Sub-sec. 1, par. a, is as follows:—"For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war—(a) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable." Par. b gives effect to Commonwealth priority in payment of income tax in bankruptcy and in the liquidation of a company, and provides a penalty for infringement of the section of one hundred pounds or six months' imprisonment or both, together with payment of up to double the amount of tax due. Sub-sec. 2 prescribes the duration of the Act as in the case of the *Grants Act*, sec. 16.

Two objections are raised by the plaintiffs to this provision. First, it is contended that the Commonwealth Parliament has no power to give priority to the obligation to pay Commonwealth income tax over a lawful obligation to pay State income tax. Secondly, it is contended that, upon its true construction, this section does more than give priority. It is argued that it prevents any payment whatever of any future State income tax as long as the section is in operation.

The first objection cannot be supported. It is true that *Dixon* J. in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[94] and *Evatt* J. in *West v. Commissioner of Taxation (N.S.W.)*[95] expressed opinions which may be called in aid of the view that the Commonwealth

cannot, by a law passed under the taxation power, give itself priority over the States. But the weight of authority is to the contrary effect: *The Commonwealth v. State of Queensland*[96] (per *Isaacs* and *Rich* JJ.[97]; per *Higgins* J.[98]; per *Gavan Duffy* and *Starke* JJ.[99]); *R. v. The Commonwealth Court of Conciliation and Arbitration*[100] (per *Isaacs* J.[101]; and per *Gavan Duffy*, *Rich* and *Starke* JJ.[102]); *West v. Commissioner of Taxation (N.S.W.)*[103] (per *Latham* C.J.[104]; per *Rich* J.[105]; per *Starke* J.[106]); and per *Evatt* J. in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[107]. Apart from these authorities the case of *In re Silver Brothers Ltd.*[108] is really conclusive on the matter. The Parliament of the Dominion of Canada has power to make laws in relation to—"The raising of money by any mode or system of taxation" (*British North America Act 1867*, sec. 91 (3)). Apart from the power to make laws with respect to bankruptcy (see the report[109]) the Privy Council held that a provision was valid which made the liability for a Dominion war revenue tax a first charge upon the assets of the taxpayer, and also enacted that such liability should rank for payment in priority to all other claims of whatsoever kind with a certain exception. It was said: "The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash; consequently the Dominion must prevail"[110]. This decision does not depend upon any special provisions of the Canadian Constitution. It is simply an interpretation of a power to make laws in relation to the subject of taxation. The decision is applicable to the Commonwealth Constitution. Thus the Commonwealth has power, by a properly framed law, to make Commonwealth taxation effective by giving priority to the liability to pay such taxation over the liability to pay State taxation. Accordingly the first objection fails.

The second objection depends upon the precise effect of the words of sec. 31. The defendants contend that they mean only that State income tax in respect of any year shall not be paid until Commonwealth income tax in respect of that year has been paid. The plaintiffs contend that, whatever may have been thought to be the effect of the section, it really provides that no State income tax can be paid for any year until Commonwealth income tax for that year and for future years has been paid. This result follows, it is said, from the fact that the *Tax Act* imposes tax on all future years of income (*Tax Act*, secs. 4, 7 (2)).

Sec. 31 provides that a taxpayer shall not pay State tax until he has paid some other Commonwealth tax. The State tax is described in the following words: "any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated." The *Tax Act* is an Act with which the *Assessment Act* is incorporated (*Tax Act*, sec. 3).

The Commonwealth tax which under penalty must be paid before the State tax, is "that last-mentioned tax," i.e., "a tax imposed by or under any Act with which this Act" (the *Assessment Act*) "is incorporated"—i.e., by the *Tax Act*.

The plaintiffs argue that as the *Tax Act* imposes tax for all future years, no State income tax can be paid on the income of any year until all future Commonwealth income taxes have been paid. Such an interpretation of the section should not be adopted unless no other interpretation is reasonably open. It is possible to construe the words "that last-mentioned tax" as referring only to Commonwealth tax upon the year of income previously mentioned. This construction produces a reasonable result and preserves the validity of the section. It should therefore be adopted.

In my opinion the declarations sought that the *Tax Act*, the *Grants Act* and sec. 31 of the *Assessment*

Act are invalid should not be made but a declaration should be made that the *War-time Arrangements Act* is invalid, and an injunction limited to that Act should be granted in each action as asked. The opinion of the majority of the Court is that none of the declarations or injunctions sought by the plaintiffs should be made or granted. The result therefore is that the actions should be dismissed. There will be no order as to costs.

Rich J.

I have had the privilege and advantage of reading the reasons which have been prepared by the Chief Justice. As I am in agreement with his Honour on all points but one, and substantially in agreement with his reasons save those concerned with the excepted point, no advantage, but rather disadvantage, would be produced by my publishing separately the reasons which have led me to arrive at the conclusions upon which we are in agreement. I confine myself, therefore, to stating my reasons for coming to the conclusion upon which I have the misfortune to disagree with the learned Chief Justice.

I agree with the view that the declarations sought that what have been described as the *Tax Act*, the *Grants Act*, and sec. 31 of the *Assessment Act* are invalid should not be made. I am of opinion, however, that the application for a declaration that the *War-time Arrangements Act* is invalid should also fail. The argument relating to this Act has centred chiefly upon the provisions of sec. 4. This provides, in effect, that the Treasurer may, at any time and from time to time, by notice addressed to the Treasurer of any State, cause any officers of the State service specified in the notice, who have been engaged in duties which, in the opinion of the Treasurer, are connected with the assessment or collection of taxes upon incomes, to be temporarily transferred to the Public Service of the Commonwealth. The Treasurer's powers in this respect are limited as to time by sec. 16, which provides that the Act shall continue in operation until the last day of the first financial year to commence after the date on which His Majesty ceases to be engaged in the present war, and no longer; and the temporary quality of the transfer is defined by sec. 5, which provides that, unless sooner retransferred, every transferred officer shall be retransferred to the State service immediately after the Act ceases to operate. The authority of the Parliament to entrust to the Treasurer the limited power contained in sec. 4 cannot be disputed (*Hodge v. The Queen*[111]; *In re The Initiative and Referendum Act*[112]; *British Coal Corporation v. The King*[113]; *Lloyd v. Wallach*[114]). The Act is expressed to be a war measure, created for the defence of the Commonwealth and the States and for the more effectual prosecution of the present war. The scope of the defence power was discussed by this Court in *Farey v. Burvett*[115], where *Isaacs* J., as he then was, in a passage which I quoted in *Andrews v. Howell*[116], said that in considering whether a measure is supportable as an exercise of the defence power "if the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge, and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end"[117]. Applying this test, and the test laid down by the other members of the Bench in that case, I am unable to see anything in sec. 4, whether it be read alone, or in relation to the rest of the provisions of the Act in which it occurs, or in relation to the group of statutes with which that Act is associated, which justifies the conclusion that it is a colourable and not a real exercise by Parliament of the defence power. It is notoriously essential, for the effective prosecution of such a war as is now being waged, a war in which the continued existence of the Commonwealth and its constituent States is at stake, that the whole resources of the nation, whether of men or of things, should be marshalled and concentrated upon war effort. If the Commonwealth is to wage war effectively, it must command

the sinews of war. The taxing of income is an important source from which the funds required for war purposes may be drawn; and the other Acts which have been brought in question show that the Commonwealth Parliament was determined to make unusually large drafts upon this source. In these circumstances, I see nothing sinister in a provision which enables the Commonwealth to take over from the State service and place under its own exclusive control for the period of the war, such of the officers employed in that service as it may specify, if those officers have been engaged on duties connected with the assessment or collection of taxes upon income, and are therefore, presumably, specially qualified to assist the Commonwealth by performing this essential service. Nor, if the section be read with an unjaundiced eye, do I see anything sinister, or anything suggesting that the section is intended to be used colourably and for the purpose of destroying each and every new State income tax office as and when it may be created, in the provision that the power may be exercised at any time and from time to time (although only during the period of the war). For aught I know, the view may be taken that State offices are overmanned, and therefore in all or some cases it may be proposed to specify in the first instance some only of the officers now employed in the State income tax offices, and to specify others afterwards if more are found necessary. Indeed, a military calamity, involving the destruction of a transferred building with its personnel, might make it necessary for the Commonwealth, in the interests of the war effort, to acquire the expert services even of a newly created office and specified members of a new staff which a State had brought into existence for its own civil purposes.

However this may be, I am of opinion that the powers conferred by sec. 4 are capable of being used for necessary purposes incidental to the defence of the Commonwealth. If at any time an attempt should be made to use them for what is suggested to be some other and unjustifiable purpose, the validity of the suggestion can be determined in proceedings to frustrate the attempt. It is unnecessary in order to dispose of the present matter to determine whether it would be competent for the Commonwealth Parliament, in exercise of the defence power, to exclude the States from a particular field of taxation altogether.

For these reasons I am of opinion that there is nothing in, or connected with, the provisions of sec. 4 which either calls for or warrants the conclusion by this Court that its enactment stands outside the defence power, or is a colourable as contrasted with a genuine exercise of that power.

As has been pointed out by the Chief Justice, the question whether any of the other provisions of the Act are obnoxious to placitum 51 (xxxi.) of the *Constitution* has not been argued and in these circumstances it would not be proper to rule upon the matter.

For the reasons which I have stated I am of opinion that the motion fails upon all points and that the declarations asked for should not be made or the injunction granted.

Starke J.

The States of Victoria, South Australia, Queensland, and Western Australia, and the Attorney-General of each State, have brought actions against the Commonwealth of Australia and its Treasurer claiming a declaration that the whole or some one or more or some part or parts of the *Income Tax Act 1942* (No. 23 of 1942), *Income Tax Assessment Act 1942* (No. 22 of 1942), *States Grants (Income Tax Reimbursement) Act 1942* (No. 20 of 1942), and *Income Tax (War-time Arrangements) Act 1942* (No. 21 of 1942) are or is *ultra vires* the Parliament of the Commonwealth and/or that the scheme of uniform taxation embodied in the said Acts is invalid, and also claiming ancillary relief.

The plaintiffs moved for interlocutory injunctions, but were ordered to deliver statements of claim, to which the defendants demurred and also pleaded. By consent it was ordered that the case be argued before the Full Court upon the notices of motion for interlocutory injunctions, the pleadings and various affidavits, subject to all proper objections, and on the matter coming on for hearing before the Court the parties agreed that the motions for injunctions should be treated as the trial of the actions and turned into motions for decrees. Actions in the form adopted in these cases have the sanction of decisions of this Court (*Attorney-General for N.S.W. v. Brewery Employees Union of N.S.W.*[118]; *The Commonwealth v. Queensland*[119]; *Tasmania v. Victoria*[120]), with which may be compared the decision of the Supreme Court of the United States of America in *Massachussetts v. Mellon*[121], and the rules collected by *Brandeis* J. in *Ashwander v. Tennessee Valley Authority*[122].

The Acts were challenged on the ground that they constituted a legislative scheme of taxation, the object and operation whereof was to constitute the Commonwealth the exclusive taxing authority in Australia in respect of income tax, and to prevent the States from exercising their constitutional powers in relation thereto. The Report of a Committee on Uniform Taxation, and also the speech of the Treasurer of the Commonwealth introducing into Parliament the Bills which became the Acts attacked in this case, were tendered in support of this allegation, and also in support of an allegation that the scheme effected discriminatory taxation between the States contrary to the provisions of the Constitution. But they were rejected. The intention, object, or purpose of a legislative body can only be legitimately ascertained from what it has chosen to enact either in express words or by reasonable and necessary intendment (*Salomon v. Salomon & Co.*[123]; *Assam Railways and Trading Co. v. Commissioners of Inland Revenue*[124]; *W. R. Moran Pty. Ltd. v. Deputy Commissioner of Taxation*[125]; *R. v. West Riding of Yorkshire County Council*[126]; *Sydney Municipal Council v. The Commonwealth*[127]). But the Court is not precluded from looking at the state and operation of the law when the legislation was passed (*Macmillan & Co. v. Dent*[128]), nor from considering matters illustrating the operation of that legislation. Evidence for these purposes was used and may be found in the affidavits filed by the parties and in tables comparing the taxation under the Commonwealth legislation with taxation then in force in both the Commonwealth and the States.

The *States Grants (Income Tax Reimbursement) Act* and the *Income Tax (War-time Arrangements) Act*, and the *Income Tax* and the *Assessment Acts* are numbered in sequence, which indicates the order in which the Bills for this legislation were presented to Parliament and passed into law, but nothing turns on this order. It is desirable, I think, to consider each Act separately before considering it together with other Acts as part of a scheme.

1. *The Tax and Assessment Acts* (No. 23 of 1942 and No. 22 of 1942).—Subject to the provisions of the *Constitution*, secs. 86-95, the Commonwealth and the States have concurrent taxing power. That power, within the limits of their several jurisdictions, is unlimited in its range both as to the kind of tax, the subject upon which it shall be imposed, and the amount of the tax, but so, in the case of the Commonwealth, as not to discriminate between States or parts of States, and so that the Commonwealth shall not by any law or regulation of revenue give preference to one State or any part thereof over another State or any part thereof (*Constitution*, secs. 51 (ii.) and 99). The *Tax* and *Assessment Acts* do not on their face contravene these provisions of the Constitution. The tax is graduated, rising steeply on the higher rates of income. But the Constitution only prohibits discrimination between the States or parts of States, or giving preference by any law or regulation of revenue to one State or any part thereof over another State or part thereof, and does not require equality of burden: See *Moran's Case*[129].

Next it was contended that the following provision of the *Assessment Act* is invalid:—"For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war—(a) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable" (Act No. 22 of 1942, sec. 31). It was said that the Commonwealth had no power to give itself priority in payment of its income taxes over the taxes of the States. But that contention, despite some dicta to the contrary, is precluded by the decision of this Court in *The Commonwealth v. Queensland*[130], and by the decision of the Judicial Committee in *In re Silver Brothers Ltd.*[131]. The taxing power gives the Commonwealth authority to make its taxation effective and to secure to it the full benefit thereof. In my opinion, there is no distinction in principle between the Commonwealth giving itself priority in the administration of assets in bankruptcy and in giving itself priority in payment of the personal obligations imposed by an income tax. The dicta above referred to may be found in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[132] and *West v. Commissioner of Taxation (N.S.W.)*[133], but the contrary view appears to have been expressed by the same justice in *Federal Commissioner of Taxation v. Farley*[134], and note *Graves v. New York*[135].

It was also contended that sec. 31 prohibits taxpayers from paying to the States any taxation whatever. If that were the proper construction of sec. 31 the Commonwealth would, I think, transcend its authority, but I cannot so construe the section. The tax imposed is for a financial year, that is, for the twelve months beginning on 1st July, but it is in every year assessed upon the year of income preceding the year of tax: See *Tax Act*, No. 23 of 1942, sec. 7; *Assessment Act 1936-1942*, secs. 17 and 6; *Acts Interpretation Act 1901-1937*, sec. 22. But there is nothing in sec. 31 which prohibits or precludes a taxpayer from paying State taxes so soon as his liability for Commonwealth income tax in any financial year has been discharged. The section prescribes priority of payment, and it operates to that extent and no further, both in law and in fact.

2. *The States Grants (Income Tax Reimbursement) Act 1942* (No. 20 of 1942).—By sec. 96 of the *Constitution* the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. This section does not prohibit discrimination or preference (*Victoria v. The Commonwealth*[136]; *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[137]).

The *States Grants Act* in sec. 4 provides: "In every financial year during which this Act is in operation in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in the Schedule." And there are other provisions for further assistance which may be found in the Act, but which it is unnecessary to detail. This device could be made effective, as well in time of war as in time of peace, to control State legislation, and the administration of State laws, and ultimately to control and supervise all State functions. The danger to the States is obvious enough, but this Court has nothing to do with political policies or remedies; its sole function is to determine whether the *States Grants Act*, in its present form, is warranted by the Constitution.

The government of Australia is a dual system based upon a separation of organs and of powers. The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers. Therefore it is beyond the power of either to abolish or destroy the other. The limited grant of powers to the Commonwealth cannot be exercised for ends inconsistent with the separate existence and self-government of the States, nor for ends

inconsistent with its limited grants (*R. v. Barger*[138]; *In re Insurance Act of Canada*[139]; *Attorney-General for Alberta v. Attorney-General for Canada*[140]).

The *States Grants Act*, it is said, leaves the States perfectly free to exercise their constitutional powers, though the exercise by the Commonwealth of its powers of taxation may render the exercise by the States of their powers difficult or impracticable from an economic standpoint, which it is the object of the *States Grants Act* to relieve: Cf. *Massachusetts v. Mellon*[141]; *Steward Machine Co. v. Davis*[142].

It cannot be doubted that the Commonwealth cannot expressly prohibit the States from exercising their powers of taxation, and that those powers cannot, subject to the provisions of the *Constitution*, sec. 51 (xxxviii.), be appropriated by the Commonwealth nor abdicated by the States. The question in this case comes back to this: What is the object and operation of the *States Grants Act*? It purports in sec. 4 to grant financial assistance to the States, but is it linked up with an object that is beyond the powers of the Commonwealth, namely, to control the exercise by the States of their powers to impose taxes upon income? The title of the Act itself is *States Grants (Income Tax Reimbursement) Act*. The amounts of the grants set forth in the schedule to the Act are, it is admitted in the pleadings, substantially the average of the amounts raised by each State by means of income tax in the financial years of each respective State ended 30th June 1940 and 30th June 1941. Further, the tax imposed under the Federal Act on the lower grades of income is moderate as compared with the tax imposed upon higher grades of income. Consequently it was open for the States to exploit this field of taxation, but if they do so the *Grants Act* deprives them of the financial assistance thereby provided.

In my opinion, the object of the Act is not merely to grant financial assistance to the States, but there is linked up in it an object and an end that is inconsistent with the limited grant of power given by sec. 96 to the Commonwealth, namely, making the Commonwealth the sole effective taxing authority in respect of incomes and compensating the States for the resulting loss in income tax. The argument that the *States Grants Act* leaves a free choice to the States, offers them an inducement but deprives them of and interferes with no constitutional power, is specious but unreal. And it does not meet the substance of the States' position that the condition of the Act relates to a matter in respect of which the Commonwealth has no constitutional power whatever, and yet by force of the condition and not as a consequence of the exercise of any power conferred upon the Commonwealth, the grant of assistance to the States is withdrawn unless they comply with its terms. The real object of the condition is that already stated, and it is in my judgment neither contemplated by nor sanctioned by the Constitution, and in particular by sec. 96 thereof. As I have said, all State legislation and functions might ultimately be so controlled and supervised. The possibility of the abuse of a power is not, however, an argument against the existence of a power. But if the extent of the power claimed by the Commonwealth leads to "results which it is impossible to believe ... the statute contemplated ... there is ... good reason for believing that the construction which leads to such results cannot be the true construction of the statute" (*The Queen v. Clarence*[143]). A legitimate use of the powers contained in sec. 96 may be found in the *Road Grants Case* (*Victoria v. The Commonwealth*[144]), where the Commonwealth and the State of Victoria entered into an agreement, the object of which was to aid the State in the construction and reconstruction of certain roads. Incidentally the making of roads would be an aid to trade and commerce, and possibly also to defence: See *Federal Aid Roads Act 1926* (No. 46 of 1926). No doubt means can be found to give the States financial assistance without crippling them in the exercise of their powers of self-government if the Commonwealth taxation creates economic difficulties for them. But I cannot agree that the provisions of sec. 96 enable the Commonwealth to condition that assistance upon the

States abdicating their powers of taxation or, which in substance is the same thing, not imposing taxes upon income. In my opinion, it follows that the *States Grants (Income Tax Reimbursement) Act 1942* is not within the power or authority of the Commonwealth Parliament.

3. *Income Tax (War-time Arrangements) Act 1942* (No. 21 of 1942).—By this Act officers of the State service who have been engaged on duties connected with the assessment or collection of income tax may be temporarily transferred to the Public Service of the Commonwealth, and are by force of a notice given pursuant to the Act transferred accordingly. Any officer may be retransferred to the State, which is obliged to reinstate that officer in a position in the State service upon such terms and conditions as are not less favourable than the terms, conditions, and rights to which he would have been entitled if the Act had not been passed, and his service as a transferred officer were service with the State. And where during the period of his transfer the transferred officer dies or resigns he is deemed to have been retransferred to the State service immediately prior to his death or the acceptance of his resignation, and all rights of pension, payment, and other benefits arising in respect of the officer's service shall be ascertained as if the Act had not been passed and his service as a transferred officer were service with the State. The liability of the transferred officer to contribute to any State fund established for the purpose of providing superannuation or other benefits is continued, but there are provisions for adjustments as between the Commonwealth and the States. Further, notice may be given to the States that the Commonwealth requires the possession and use of their office accommodation, furniture, and equipment specified in the notice, particularly or in general terms, and the Commonwealth then by force of the Act is given possession and exclusive use thereof accordingly. Provision is made for compensation to the State. And where any returns or records relating either wholly or partly to the assessment or collection of any tax imposed upon incomes by the Parliament of the Commonwealth are in the possession of a State those returns and records are from the commencement of the Act transferred to the possession of the Commonwealth provided that the States shall have access to, and may copy such returns and records as relate to the assessment or collection of any tax imposed upon incomes by or under any law of that State.

The taxation departments of the States, excepting Western Australia, had for some years, by arrangement with the Commonwealth, assessed and collected income tax on behalf of the Commonwealth. Many taxpayers made only one return in which there were two columns, one for particulars for State income-tax purposes, and the other for Commonwealth income-tax purposes. But taxpayers with income derived from more than one State sometimes made two or more returns, one to the Commonwealth, the other or others to the States. In the case of Western Australia the Commonwealth by arrangement with the State assessed and collected tax both for itself and the State. But except in the case of Western Australia the returns and records belong, I take it, to the States, and are exceedingly valuable, if not essential, for the purpose of collecting, assessing and checking income taxes.

It was faintly contended that the *Income Tax (War-time Arrangements) Act* was authorized by the taxation power conferred upon the Commonwealth under the Constitution, but the main argument in support of the Act was based upon the defence power, as was inevitable from the terms of the Act. The preamble recites that it is necessary or convenient to provide for the matter contained in the Act with a view to the public safety and defence of the Commonwealth and States and the more effectual prosecution of the war, and in secs. 4 and 11 the authorities there given are declared to be necessary for the efficient collection of revenue required for the prosecution of the war, for the effective use of manpower, or otherwise for the defence of the Commonwealth. But the defence power is subject to the Constitution just as are the other powers conferred by sec. 51 of the

Constitution.

The content of the defence power never changes, though war will, no doubt, enlarge the area of its operation (*Andrews v. Howell*[145]). But the defence power does not, any more than any other power contained in sec. 51, enable the Commonwealth to abolish or destroy the States. Nor can the Commonwealth exercise that power for ends inconsistent with the existence of the States or the exercise of their powers or their functions as self-governing bodies. The Commonwealth can marshal the manpower and resources of the Commonwealth for the purposes of war, and it is said that the *Income Tax (War-time Arrangements) Act* does no more. According to the argument the Act has a "close and substantial," a direct and not an indirect, a proximate and not a remote, relation to defence, and consequently is within the power. But such a standard is only one of degree and in the end becomes a rule of expedience: See *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*[146].

The Act, as already set forth, takes power to the Commonwealth at its discretion, to transfer to its service, and appropriate to its own purpose, all the officers, accommodation, and records of the States which constitute their departments of income tax. It preserves all the rights of such officers against the States. It enables the Commonwealth at its discretion to retransfer such officers to the States, and, in any case, when the Act ceases to operate the Act retransfers such officers to the States, and compels the States to reinstate the officers on terms not less favourable than they would have been entitled to had the Act not been passed. It also, on the resignation or death of any transferred officers, automatically retransfers them to the States and prescribes that all rights of pension and other benefits arising in respect of an officer's service shall be ascertained as if the Act had not been passed and his service as a transferred officer were service with the State. These powers are wholly inconsistent with the exercise by the States of their powers and of their functions as self-governing bodies. An important department—indeed an essential department—of the Executive Government of the States may be taken from them, and all its officers, accommodation, and records bodily transferred to the Commonwealth. And obligations are imposed upon the States by force of the Act in relation to the officers transferred. The Commonwealth assumes the right to regulate the relation of the States and the transferred officers, and thus to override any provision the States may consider necessary or expedient in the matter. And it may be noted that the income tax departments of the States are not among those departments transferred to the Commonwealth by force of the Constitution, and in respect of which it has exclusive power to legislate (*Constitution*, secs. 69 and 52 (ii.)).

The *Income Tax (War-time Arrangements) Act* is beyond the power conferred upon the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to defence, or any other power conferred by the Constitution. Perhaps I ought to refer to the *Engineers' Case* (*Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*)[147] and to *Andrews v. Howell*[148], which the Commonwealth relied upon during the argument. Prior to the decision of this Court in the *Engineers' Case*[149] the doctrine had been propounded of the immunity of the instrumentalities and agencies of government, both Federal and State, from interference by the other, an immunity based upon a prohibition implied from the structure of the Constitution. The *Engineers' Case*[150] overruled this doctrine, which was contrary to the decision of the Judicial Committee in *Webb v. Outtrim*[151], which had not been applied consistently in this Court, and which was attended with difficulty in the working of the Constitution. The substance of the decision is stated in the *Engineers' Case*[152]: "The doctrine of implied prohibition finds no place where the ordinary principles of construction are applied so as to discover in the actual terms of the instrument their expressed or necessarily implied meaning." The Court did not say that in

interpreting the Constitution no implications of any sort should be made, and the passage quoted makes that, I hope, sufficiently clear. Critics however arose; one of them, however, happily assures us that the decision was inevitable and a wise one however it was reached: See *West v. Commissioner of Taxation (N.S.W.)*[153]. And it is noteworthy that this doctrine of "implied prohibition" seems also recently (1939) to have been abandoned by the Supreme Court of the United States (*Graves v. New York*[154]). Some implications are necessary from the structure of the Constitution itself, but it is inevitable also, I should think, that these implications can only be defined by a gradual process of judicial decision. *Andrews v. Howell*[155] is irrelevant to the matter under review, but it illustrates the wide range of the defence power.

4. *Severability*.—The invalidity of the *States Grants (Income Tax Reimbursement) Act 1942* and the *Income Tax (War-time Arrangements) Act 1942* does not, however, also render invalid the *Income Tax Act 1942* nor the *Income Tax Assessment Act 1942*. These last-mentioned Acts are in themselves consistent, workable and effective, they deal with a subject matter within the power of the Commonwealth, and are not connected with nor dependent upon the validity of the other Acts as conditions, considerations or compensations. Moreover, the provisions of the *Acts Interpretation Act 1901-1937*, sec. 15A, can also be called in aid (*Roughley v. New South Wales*[156]; *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[157]).

5. *The Acts as part of a scheme*.—The Judicial Committee in *Moran's Case*[158] observed that "where there is admittedly a scheme of proposed legislation, it seems to be necessary when the pith and substance or the scope and effect of any one of the Acts is under consideration, to treat them together and to see how they interact. The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine." It was not disputed, I think, that the object of the Acts was to introduce into Australia a uniform income tax having priority over State taxes upon income, paying to the States, which retired from the field of income taxation, compensation substantially equal to the average of the amounts raised by that State by means of income tax in the financial years ended June 1940 and 1941. The States, however, insist that the scheme operates to destroy their constitutional powers to raise revenue by way of income tax; to discriminate in taxation between them; and to give preference by a law or regulation of revenue to those States which vacate the income-tax field over the States that do not vacate that field. But the scheme of legislation is, I think, unimportant unless the legislation is connected together and the provisions of the legislative Acts are dependent the one upon the other, which is not, as I think, the case here. Assume, however, that the *States Grants Act* be valid, does it, coupled with the *Taxation Acts*, discriminate between or prefer one State over another contrary to the provisions of the Constitution? The provisions of the Acts taken together operate, it is said, as a sort of rebate of taxation (*Attorney-General for British Columbia v. McDonald Murphy Lumber Co.*[159]) contrary to the provisions of the Constitution. *Moran's Case*[160] itself supplies an answer to the argument: See the report[161]. The grants of assistance, if valid, are for the purpose of compensating the States for the losses they would each sustain from the imposition of uniform taxation and preventing unfairness or injustice to the States. The taxation is applicable in all States and parts of States alike, but the losses sustained by the States by the operation of the *Tax Acts* are not alike, and are adjusted by the *Grants Act*.

In my judgment, the *States Grants (Income Tax Reimbursement) Act 1942* and the *Income Tax (War-time Arrangements) Act 1942* should be declared invalid, but otherwise the relief claimed in the several actions should be denied.

McTiernan J.

The question to be decided is whether four Acts which have been passed by the Commonwealth Parliament are within the powers vested in the Parliament by the *Commonwealth of Australia Constitution Act*. The Acts are the *Income Tax Act 1942*, the *Income Tax Assessment Act 1942*, the *States Grants (Income Tax Reimbursement) Act 1942* and the *Income Tax (War-time Arrangements) Act 1942*.

In my opinion these Acts are justified by the following provisions of the Constitution: The *Income Tax Act* and the *Income Tax Assessment Act* by sec. 51 (ii.), (vi.) and (xxxix.), the *States Grants Act* by sec. 96, sec. 51 (vi.) and (xxxix.), and the *War-time Arrangements Act* by sec. 51 (vi.) and (xxxix.).

Sec. 51 of the *Constitution* provides that the Parliament shall, "subject to this Constitution," have power to make laws for the peace, order and good government of the Commonwealth of Australia with respect to, among other things, "(ii.) Taxation; but so as not to discriminate between States or parts of States:" "(vi.) The naval and military defence of the Commonwealth and of the several States ...:" and "(xxxix.) Matters incidental to the execution of any power vested by this Constitution in the Parliament ... or in the Government of the Commonwealth."

Sec. 96 vests in the Parliament power to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

It is a settled principle of interpretation that the words "subject to this Constitution" mean subject to the provisions of the Constitution. They do not make any power vested in the Parliament by this section subject to any *a-priori* rules for reconciling State and national powers under a Federal system of government. It is also a settled principle that the powers vested in Parliament by the Constitution are, subject only to its provisions, plenary. Each is not less than a complete power to make laws with respect to the subject of the power.

The taxation power includes the power to impose income tax for the purposes of the Commonwealth. The Court assumes that an Act, which in substance imposes taxation, was passed by the Parliament for the purpose of raising revenue for the Commonwealth. There is no legal limitation to the amount of the rate of taxation which the Parliament may impose.

The nature and extent of the Commonwealth defence power is explained in *Farey v. Burvett*[162]. In that case *Griffith* C.J. said it "includes all acts of such a kind as may be done in the United Kingdom, either under the authority of Parliament or under the Royal Prerogative, for the purpose of the defence of the realm, except so far as they are prohibited by other provisions of the Constitution. ... It includes preparation for war in time of peace, and any such action in time of war as may conduce to the successful prosecution of the war and defeat of the enemy. This is the constant and invariable meaning of the term. It is obvious, however, that the question whether a particular legislative act is within it may fall to be determined upon very different considerations in time of war and time of peace. ... I agree generally with Mr. Mann's argument that the power to legislate with respect to defence extends to any law which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources, as, for instance, by the prohibition of trading with him or with persons associated with him. But this definition is not exhaustive. The control of finance or trade may be the most potent weapon of all. One test, however, must always be applied, namely: Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote

that one cannot reasonably be regarded as affecting the other?" (*Farey v. Burvett*[163], per *Griffith* C.J.).

The Chief Justice added: "The power to make laws with respect to defence is, of course, a paramount power, and if it comes into conflict with any reserved State rights the latter must give way"[164].

The nature and extent of the Commonwealth defence power were also explained by *Isaacs* J., as he then was, in *Farey v. Burvett*[165]. His Honour said that when war imperilling our existence had begun the limits of the defence power "then are bounded only by the requirements of self-preservation. It is complete in itself, and there can be no implied reservation of any State power to abridge the express grant of a power to the Commonwealth"[166]. His Honour added:—"As I read the Constitution, the Commonwealth, when charged with the duty of defending Commonwealth and States, is armed as a self-governing portion of the British Dominion with a legislative power to do in relation to national defence all that Parliament, as the legislative organ of the nation, may deem advisable to enact, in relation to the defence of Australia as a component part of the Empire, a power which is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself; and, if need be, it is a power to command, control, organize and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defence is not confined to operations on the battlefield or the deck of a man-of-war; its factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself; and, in this supreme crisis, we can no more sever the requirements and efforts of the civil population, whose liberties and possessions are at stake, from the movements of our soldiers and sailors, who are defending them, than we can cut away the roots of a living tree and bid it still live and bear fruit, deprived of the sustenance it needs"[167].

Higgins J. said in the same case: "What is the ambit of the power, not merely to make laws for the control of the forces, but to make laws (not for, but), with respect to naval and military defence, and to matters incidental to that power and the powers of the Government? All the subjects for legislation in sec. 51 are on the same logical level: there is no hierarchy in the powers, with the power as to defence on the top. But, from the nature of defence, the necessity for supreme national effort to preserve national existence, the power to legislate as to defence, although it shows itself on the same level as the other powers, has a deeper tap-root, far greater height of growth, wider branches, and overshadows all the other powers. Defence—naval and military defence—is primarily a matter of force, actual or potential; the whole force of the nation may be required; and for the purpose of bringing the whole force of the nation to bear, the policy of the States may have to be temporarily superseded, the law made under the Federal Constitution prevailing (sec. 109). The temporary suspension of the policy of a State may possibly help to prevent the total and permanent paralysis of the State's policy and functions, and of the State itself, under foreign invasion and domination. In Great Britain there is no limit to the legislative powers, and therefore there is no line of demarcation between Acts for defence and Acts for other purposes"[168].

This doctrine as to the nature and extent of the defence power was accepted and applied recently in the case of *Andrews v. Howell*[169].

Sec. 96 does not bind the Parliament to give equal grants to the States. A law granting financial assistance is not a law or a regulation of revenue under sec. 99. Sec. 96 leaves to the judgment of Parliament the question of deciding to what State or States it will grant financial assistance, the

amount of the grant, and the terms and conditions of the grant.

The *Income Tax Act 1942* imposes income tax and declares the rates of taxation: See *Constitution*, secs. 53 and 55. The *Income Tax Assessment Act 1942* provides for the assessment and levy of income tax. It is incorporated with the *Income Tax Act 1942* by sec. 3 of this Act. Each of these Acts is (apart from sec. 31 of the *Assessment Act* as to which a special question is raised) in real substance and effect a law with respect to Commonwealth income taxation. Neither law contains any provision which infringes any restriction imposed by the Constitution. The Acts do not, in the imposition of the tax or in the declaration of the rates of taxation or in any other way, discriminate between the States or parts of States.

The power of taxation (customs and excise excepted) is not by the Constitution exclusively invested in the Commonwealth Parliament nor withdrawn from any State. This power continues in the States. But any State law is subject to sec. 109 of the *Constitution*, which provides that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. There is no legal limitation on the amount of the rate of taxation which a State Parliament may impose. These Commonwealth and State powers of taxation have been described as concurrent powers. They are, more strictly, separate powers. A State Act and a Commonwealth Act have not been regarded as inconsistent, merely because each imposes tax on a taxpayer in respect of the same income. But a question of inconsistency which is resolved by sec. 109 in favour of the Commonwealth arises when the Commonwealth Parliament, by a valid law, commands the taxpayer to pay the Commonwealth tax before he pays the State tax. Sec. 31 of the *Income Tax Assessment Act* prohibits a taxpayer from paying State tax before he pays Commonwealth tax.

A question was raised whether, having regard to sec. 7 (2) of the *Income Tax Act 1942*, the effect of sec. 31 is to introduce a prohibition against the payment of State income tax. The question turns on the meaning of the words "that last-mentioned tax" in sec. 31. These words, in my opinion, refer to Commonwealth tax for a year of income in contradistinction to the State tax imposed in respect of that year. The meaning of the section is that the taxpayer is forbidden under the penalty of £100 or imprisonment for six months from paying State tax imposed for any year until he has paid the Commonwealth tax due by him for that year.

Sec. 31 is preceded by the recital showing that in enacting the section Parliament intended to exert the Commonwealth defence power. The recital is: "For the better securing ... of the revenue required for the efficient prosecution of the present war." The operation of the section is expressly limited to a period ending twelve months after the cessation of the war. Sec. 32 of the same Act provides that all the other amendments made by the Act shall continue in force in all subsequent years.

The *Income Tax (War-time Arrangements) Act* is also prefaced by a recital showing that Parliament regarded this Act as a defence measure. The recital is: "Whereas with a view to the public safety and defence of the Commonwealth and of the several States and for the more effectual prosecution of the war in which His Majesty is engaged, it is necessary or convenient to provide for the matters hereinafter set out."

The Court is not bound to declare a law, containing a recital such as either of those which have been quoted, a good law with respect to defence or matters incidental to the execution of the defence power. The position is examinable, but in a limited way. In *Farey v. Burvett*[170], *Griffith* C.J. said:—"So far as the attack is made upon the Act as distinct from the Regulation the Court is invited

to assume the function of determining whether the facts were at the time when the Act was passed such as to warrant the Parliament in exercising the defence power by passing it. Whether it was or was not authorized to do so must, so far as the authority depends upon facts, depend upon the facts as they appeared to it, of which we have not, and cannot have, any knowledge. In my opinion there is no principle, and there is certainly no precedent, which would justify a Court in entering upon such an inquiry, if upon any state of facts the exercise of the legislative power in the particular way adopted could be warranted. If it appeared on the face of the Act that it could not be substantially an exercise of the defence power different questions would arise. I am not prepared to say that it may not have some, and some important, influence upon the successful conduct of the war." And in the same case *Isaacs* J. said: "If the measure questioned may conceivably in such circumstances" (now the circumstances are a war of aggression against the Commonwealth, invasion of parts of its territories, and threatened invasion of the Commonwealth) "even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end"[171].

Reverting to sec. 31 of the *Income Tax Assessment Act*. This section gives the Commonwealth the prior right to a large part of the financial resources of the whole country. It is clearly a law which is incidental to defence, having regard to the present emergency. Parliament has rested the section on the defence power, and it is justified by that power. It is unnecessary then to decide whether the section is within the powers vested in the Parliament by sec. 51 (ii.) and (xxxix.).

The *Income Tax Assessment Act* denies to the taxpayer substantial deductions allowed by previous Commonwealth Acts, and the *Income Tax Act* increases the rates of taxation far above the previous rates. The consequence which will be likely to flow from these Acts is that a taxpayer will hardly be able to pay State income tax out of the residue of his income left after he has obeyed the command of sec. 31 to pay Commonwealth tax computed under the Commonwealth Acts. If the States are unable to administer their State taxation Acts, or to freely exercise their powers of taxation, this disability arises from the economic consequences of the Commonwealth Acts. But these economic consequences and the resulting practical disability of the States are irrelevant in deciding the question whether the Commonwealth legislation is within the legislative powers of the Commonwealth. These Acts are in substance and effect laws with respect to Commonwealth taxation and defence and matters incidental to the execution of these powers.

The States Grants (Income Tax Reimbursement) Act 1942.—This Act and the *Income Tax Act* were assented to on the same day. It is expressed to begin on 1st July 1942, and to continue until the last day of the first financial year beginning after the end of the war. This Act and the *Income Tax Acts* will operate simultaneously. The Act describes itself as: "An Act to make provision for the grant of financial assistance to States, and for other purposes." It is contended that this Act, which purports to be an execution by the Parliament of the power vested in it by sec. 96, and the *Income Tax Acts*, are only a colourable exercise by the Parliament of its powers because, as it is alleged, they are interdependent parts of a scheme or total law the substance and effect of which is to collect both Commonwealth and State taxation, to transfer a quota of the revenue collected to the States, and thereby prevent the States from exercising their powers of taxation. In my opinion it is impossible to draw these conclusions from the provisions of these Acts. Sec. 4 of the *States Grants (Income Tax Reimbursement) Act* provides that in every financial year during which this Act is in operation in respect of which the Commonwealth Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in

the schedule against the name of that State. The amount is the average amount raised by that State by means of income tax in the financial years ended 30th June 1940 and 1941, and the amount of tax which the *Income Tax Act 1942* is estimated to raise is approximately equal to the total amounts which would have been raised by the Commonwealth and the States from income tax payable under the existing State Acts and the previous Commonwealth Acts. Sec. 6 provides for the payment of additional financial assistance to any State if the Treasurer of the State is of the opinion that the payments under sec. 4 are insufficient to meet the revenue requirements of the State. Sec. 7 provides that payments in accordance with the Act shall be made out of the Consolidated Revenue Fund of the Commonwealth, which is appropriated accordingly by the Act.

It is clear from sec. 4 that the Commonwealth Parliament recognizes that the concurrent or separate State powers of taxation will continue. The Act is indeed based on that assumption. The assumption is a correct one. It is to be presumed that the Parliament fully appreciated that it might be inexpedient or impracticable for the States or any one or more of them to collect income tax for their own or its purposes after the increased Commonwealth demands were satisfied. If a State does not impose income tax, that would be only because the taxable capacity of its citizens would be practically exhausted by the payment of the Commonwealth taxation, which, by force of sec. 31 of the *Income Tax Assessment Act 1942*, takes priority on account of the supremacy accorded by the Constitution to Commonwealth law. In these circumstances the amount set against the name of the State and possibly a further amount is payable to the State out of the Commonwealth Consolidated Revenue Fund. The Act leaves to the Commonwealth Treasurer to ascertain whether the State has imposed income tax or not. It is a misunderstanding of the provisions of the Act to say that it requires the States to cease imposing income tax under penalty of forfeiting the amounts set against their names respectively: it is also a misunderstanding of the Act to say that the grant is offered upon condition that the States agree not to impose income tax. The Commonwealth Parliament is neither using a stick to beat the States nor offering a bunch of carrots. The Commonwealth Parliament has, in the exercise of its clear constitutional rights, tremendously increased the burden of Commonwealth taxation, and given priority to that burden. It has left the States free to decide whether they should impose an additional burden of taxation in any financial year. The Act provides that, if "the Treasurer is satisfied that a State has not imposed a tax upon incomes," the amount specified in the schedule is payable to that State. The payment is in truth and in fact made to relieve a disability arising from the incorporation of the State in the Commonwealth. The money is paid to reimburse the State for the loss of revenue which it has not been expedient to collect because of the circumstances flowing from the operation of valid Commonwealth law. The money is paid out of Commonwealth revenue. The Act is therefore in substance a law granting financial assistance to any State to which it becomes payable. It is a mistake to say that the *Income Tax Acts* and the *States Grants Act* are interdependent parts of a law for the collection and disbursement of taxation. The relation between the Acts is that the *States Grants Act* is consequential upon the *Income Tax Acts*. This is a legitimate relationship, and, indeed, entirely harmonious with the spirit of federalism.

It was said by the Judicial Committee in *Moran's Case*[172] that although a Commonwealth Act imposing taxation should contain no discriminatory provisions violating sec. 51 (ii.), yet, if it were followed by a Commonwealth appropriation Act "authorizing exemptions, abatements or refunds to taxpayers in a particular State" it would be impossible to separate the Acts in considering the effect of sec. 51 (ii.), "or to turn a blind eye to the real substance and effect of Acts passed by the Federal Parliament at or about the same time, if it appears clear from a consideration of all the Commonwealth Acts that the essence of the taxation is discriminatory"[173]. The conditions contemplated do not exist here. The *States Grants Act* is an appropriation Act, but it does not authorize exemptions, abatements, or refunds of tax to taxpayers in any States. The real substance

and effect of this Act is to grant financial assistance to the States. The real substance and effect of the *Income Tax Act* is to impose taxation.

Sec. 51 (ii.) empowers the Commonwealth Parliament to make laws with respect to taxation, "but so as not to discriminate between the States or parts of States." The argument that the Parliament has infringed this restriction is answered by the following statement from the judgment of the Judicial Committee in *Colonial Sugar Refining Company Limited v. Irving*[174]: "The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

According to the doctrine of *Farey v. Burvett*[175] the *States Grants Act* may possibly be justified as an exercise of the defence power, because it secures to the States for the period of the war a flow of financial assistance which aids the maintenance of services which are capable of aiding the successful prosecution of the war.

The Income Tax (War-time Arrangements) Act 1942.—This Act describes itself as: "An Act to make provision relating to the collection of taxes during the present war, and for other purposes." This Act was assented to on the same day as the other Acts. It is expressed to come into operation from then, 7th June 1942, and to continue in operation until the last day of the first financial year to commence after the end of the present war. The provisions of this Act have already been set out, and I shall not repeat them except to refer briefly to the provisions which are in sec. 4 with respect to the temporary transfer of officers.

If these provisions are valid, those relating to the transfer of office accommodation, furniture and records can be supported by the same reasoning. There may be separate but less general questions arising under other sections upon which it is unnecessary now to pass an opinion. In brief, this Act transfers temporarily to the Public Service of the Commonwealth from employment under the Crown in right of a State, officers who are engaged on duties which, in the opinion of the Commonwealth Treasurer, are connected with the assessment or collection of taxes upon incomes. The Act is not self-executing. In order to effect the transfer, it is necessary for the Treasurer to give a notice to the State Treasurer. The transfer is effected by the notice. It notifies this Minister that as from the date specified it is, in the opinion of the Commonwealth Treasurer, "necessary for the efficient collection of revenue required for the prosecution of the war, for the effective use of manpower or otherwise for the defence of the Commonwealth," that the officers specified in the notice should be temporarily transferred to the Public Service of the Commonwealth. The officers are transferred by force of the notice as from the date specified, and are retransferred by the Act to the State Service immediately after the Act ceases to operate, unless sooner transferred. The Act contains detailed provisions protecting the rights of transferred officers.

In *Farey v. Burvett*[176] the *War Precautions Act*, No. 10 of 1914, as amended by the Act No. 3 of 1916, was impeached. The attack went to so much of the Act as purported to authorize the Governor-General to make Regulations and Orders. The Act No. 3 of 1916 purported to authorize the Governor-General to make such Regulations *as he thought desirable* for the more effectual prosecution of the war, or the more effectual defence of the Commonwealth, "prescribing and regulating" a number of matters. The attack on the Act failed. *Griffith* C.J. said: "If the attack is transferred, as it must be, to the Regulation, that is, if it is treated as a denial of the desirability of making it at the time when it was made, the question, though not formally the same, is the same in substance. The Act expressly designates the Governor-General as the person to determine that

question of fact. How can this Court say that it will assume the function of revising his opinion? In this aspect of the case Lloyd v. Wallach1(1915) [1915] HCA 60; 20 C.L.R. 299., decided by the Court last year, is exactly in point, and is conclusive"[178]. The question arising under the present Act is whether the legislative powers of the Commonwealth extend to the enactment of the provisions in sec. 4. The preamble has already been quoted. Parliament has declared on the face of the Act that its provisions are "necessary and convenient" for the more effectual prosecution of the war. Referring to such a declaration on the face of the Act challenged in *Farey v. Burvett*[179], *Higgins* J. said:—"It is not for this Court to decide that the Act does aid defence or how it aids defence; it is enough that it is capable of being an Act to aid defence, enough that the statement of Parliament is not necessarily untrue. Appellants' counsel urge that it is for this Court to decide whether the military necessities now existing are sufficient to justify the Act—or, as finally stated, whether this Act is capable of being a defensive Act in the circumstances of the country. In my opinion, this is not our function"[180]. I agree with these views. The transfer of these officers to the Commonwealth Public Service which has the duty of collecting the revenue of the Commonwealth is capable of conducing to defence. The dependence of defence on revenue is an obvious truth. The transfer of these officers will provide the Commonwealth with a skilled staff, and enable it to collect its revenue promptly and efficiently: it will place the collection of the revenue in the hands of officers who will be temporarily under its own control. At present in five States Commonwealth income tax is being collected by State officers. This Act will enable the Commonwealth to dispose the officers collecting its revenue at whatever places in the Commonwealth it thinks fit. It could not do this if the officers were not transferred to the Commonwealth Service. These are some of the considerations which point to the possibility at least of a relation between the provisions of sec. 4 and defence. In my opinion these provisions are within the powers vested in the Parliament to make laws with respect to defence and matters incidental to the execution of this power. It follows that sec. 4 and the provisions relating to the transfer of office accommodation, furniture, equipment and records operate with the full force of their words as valid Commonwealth laws. There is no special provision in the Constitution exempting the States or State officers from the operation of Commonwealth legislation under sec. 51 (vi.), that is, the defence power. The reasoning of the Court in the *Engineers' Case*[181] applies to sec. 51 (vi.). There the Court was dealing with the question whether Commonwealth legislation under sec. 51 (xxxv.)—"industrial disputes"—bound the Crown in right of a State when party to an industrial dispute. The Court said:—"Sec. 51 (xxxv.) is in terms so general that it extends to all industrial disputes in fact extending beyond the limits of any one State, no exception being expressed as to industrial disputes in which States are concerned; but subject to any special provision to the contrary elsewhere in the Constitution. The respondents suggest only sec. 107 as containing by implication a provision to the contrary. The answer is that sec. 107 contains nothing which in any way either cuts down the meaning of the expression industrial disputes in sec. 51 (xxxv.) or exempts the Crown in right of a State, when party to an industrial dispute in fact, from the operation of Commonwealth legislation under sec. 51 (xxxv.). Sec. 107 continues the previously existing powers of every State Parliament to legislate with respect to (a) State exclusive powers and (b) State powers which are concurrent with Commonwealth powers. But it is a fundamental and fatal error to read sec. 107 as reserving any power from the Commonwealth that falls fairly within the explicit terms of an express grant in sec. 51, as that grant is reasonably construed, unless that reservation is as explicitly stated"[182]. Sec. 107 does not cut down the natural meaning or general operation of sec. 51 (vi.). The assumption that has to be adopted is that in the present emergency the transfer of officers experienced in the assessment or collection of tax from the State to the Commonwealth service for the duration of the war is capable of conducing to defence. It follows that the *Income Tax (War-time Arrangements) Act* is a law with respect to defence, and binding on those officers and on the States. The Act is in substance and

effect a law of defence, and with respect to matters incidental to the execution of that power. There is nothing in its provisions to support the contention that it is part of a legislative scheme which is in excess of the powers of the Commonwealth Parliament. The Act does not take away from the States their constitutional powers of taxation nor purport to do so. It is nothing to the point to mention the difficulties and trouble which the States may have in engaging other persons to take the place of the officers who are transferred to the Commonwealth service or to replace the material things taken over by the Commonwealth.

I agree that the Treasurer's speech is inadmissible in this action. It would be contrary to well-settled principle for the Court to embark on an inquiry into the motives or purposes which the Parliament had for passing these Acts, or the Minister had for introducing the Bills proposing them. The only question to be decided is a question of power. Did the Parliament have power under the Constitution to pass the Acts? In my opinion that question should be answered in favour of the defendants, and there should be judgment for them in each case.

Williams J.

In these actions four States, South Australia, Victoria, Queensland and Western Australia, and their respective Attorney-Generals, have each sued the Commonwealth of Australia and its Treasurer claiming a declaration that the whole or some one or more of the following Acts, the *States Grants (Income Tax Reimbursement) Act*, No. 20 of 1942, the *Income Tax (War-time Arrangements) Act*, No. 21 of 1942, the *Income Tax Assessment Act*, No. 22 of 1942, and the *Income Tax Act*, No. 23 of 1942, or some part or parts thereof, are or is *ultra vires* the Parliament of the Commonwealth and are or is unconstitutional and invalid and the scheme of uniform taxation embodied in these Acts is unconstitutional and invalid.

The surrounding circumstances under which the four Acts were passed can be shortly stated as follows:—

Since 1915 the Commonwealth and the States have each been levying income taxes, with the result that, during the financial year commencing on 1st July 1941, there were in the Commonwealth and the several States some twenty-three taxes on income, many of them differing not only in the rate but also in the basis of assessment. Since the outbreak of war, the Commonwealth Parliament has been increasing the rates of Federal income tax, particularly on the higher incomes, to an unprecedented extent. Most taxpayers who have to pay Commonwealth income tax have also to pay income tax in at least one of the States. As the incidence of taxation varies considerably in the States, the Commonwealth Government has not been able to use for its own purposes what it considers to be the full taxable capacity of many taxpayers in a less highly taxed State without imposing an unsupportable burden on a taxpayer at the same income-tax level in a more highly taxed State, by reason of the aggregate of Commonwealth and State taxes. In some cases the combined rates of these taxes for the above financial year exceeded twenty shillings in the pound. The taxable capacity of the community has been rising, largely from the defence expenditure of the Commonwealth. The States, in addition to increased receipts from their railways, have been relieved from expenditure on unemployment, which has greatly decreased, and the Commonwealth has assumed responsibility for child endowment and widows' pensions.

The Commonwealth Government considers that, as the financial responsibilities of the States have diminished, whilst its own expenditure has increased enormously, the only amount of revenue previously derived from income tax which can be made available to the States during the further

continuance of the war, without prejudice to its own growing requirements, will be an amount in the case of each State approximately equal to the average of the amounts raised by that State by means of income tax in the financial years commencing 1st July 1939 and 1st July 1940. The amounts payable to each State on this basis are those which appear in the schedule to the *Grants Act*. The Commonwealth Government also considers there is a serious waste of manpower involved in the administration of twenty-three different taxes by the taxation departments, and in taxpayers having to comply with several Acts, many of which require the payment of the tax in instalments by deductions from wages and dividends. In these circumstances the four Acts were passed, all being assented to on 7th June 1942.

The *Grants Act* came into operation on 1st July 1942, while the other three Acts came into operation on the day they received the Royal Assent. The *Grants Act* and the *War-time Arrangements Act* each contain a concluding section that they shall continue in operation until the last day of the first financial year to commence after the date on which His Majesty ceases to be engaged in the present war, and no longer. The preamble to the *War-time Arrangements Act* states that it is necessary or convenient to provide for the matters set out in the Act with a view to the public safety and defence of the Commonwealth and the several States and for the more effectual prosecution of the war in which His Majesty is engaged.

By sec. 4 of the *Grants Act* it is provided that, in every financial year during which the Act is in operation in respect of which the Commonwealth Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in the schedule to the Act against the name of that State, less an amount equal to any arrears of tax collected by or on behalf of that State during that financial year.

Sec. 31 of the *Assessment Act* provides (so far as material) that, for the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war, a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable. Sec. 32 provides that the amendments effected by the Act, other than that effected by sec. 31, shall apply to all assessments for the financial year beginning on 1st July 1942 and all subsequent years.

The *Tax Act*, sec. 7, provides that the tax imposed by the Act shall be levied and paid for the financial year beginning on 1st July 1942, and that, until the commencement of the Act for the levying and payment of income tax for the financial year beginning on 1st July 1943, the Act shall also apply for all financial years subsequent to that beginning on 1st July 1942.

Several decisions of the Privy Council, including *Attorney-General for Ontario v. Reciprocal Insurers*[183], *In re Insurance Act of Canada*[184], *Attorney-General for Alberta v. Attorney-General for Canada*[185], *W. R. Moran Pty. Ltd. v. Deputy Commissioner of Taxation (N.S.W.)*[186], and the decision of this Court in *R. v. Barger*[187], establish that, when the question for determination is whether an Act of Parliament infringes some overriding constitutional provision, the Court must examine the substance and purpose of the Act in order to discover what it is the legislature is really doing. Where there are several Acts having, as in the present case, a clear interaction, the Court is entitled to investigate the substance and purpose of each Act in the light of the knowledge disclosed by them all.

The *Tax Act* is an Act which levies an income tax estimated to produce £145,000,000. The rates rise steeply, reaching 18s. in the pound at £2,100 on income from property, and 16s. 6d. in the pound at £2,500 and 18s. in the pound at £4,000 on income from personal exertion. As the Act imposes the same rates of tax on all incomes which it taxes, it does not discriminate between States or parts of States considered as geographical entities, and therefore complies with sec. 51 (ii.) of the *Constitution* (*Cameron v. Deputy Federal Commissioner of Taxation (Tas.)*[188]). It deals with one subject of taxation only, and so conforms to sec. 55 of the *Constitution*. The States admit that if the Commonwealth Parliament had passed the *Tax Act* alone, this would have had the practical economic effect of driving the States out of this field of taxation at least in the case of the higher incomes, if they do not desire to bankrupt many of their citizens, leaving them at most with a limited field amongst the lower incomes capable of actual exploitation. They contend, however, that but for the *Grants Act*, by which the Commonwealth proposes to reimburse the States for the loss of income tax to the extent of £33,489,000, the Parliament could have imposed lower rates sufficient to raise a total amount reduced by this sum, in which event a taxable margin would have been left out of which the States could raise a sufficient sum by way of income tax for their own purposes without exceeding the financial capacity of their citizens. But to draw such a conclusion would be pure surmise. If the *Grants Act* is valid, such assistance would be a Federal purpose under sec. 96 of the *Constitution*. None of the Acts provide for any rebates, if the States refuse the grants. The whole £145,000,000 is called up finally in any event. It is all payable, like other revenue of the Commonwealth, into the Consolidated Revenue Fund. No part of it is earmarked to pay the grants. At a time when the Commonwealth is floating frequent loans to enable it to meet its commitments, it is idle to suggest that the whole of the tax is not required for Federal purposes. The *Tax Act* is, in my opinion, an unexceptionable, if to many people a somewhat painful, exercise of the power to tax.

It was strongly urged that the condition in sec. 4 of the *Grants Act* is unlawful because it requires a State to surrender its sovereign rights to levy income tax in order to qualify for a grant. Sec. 96 of the *Constitution* authorizes the Commonwealth Parliament to grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. The grants to each State are not made conditional upon acceptance by all the States. A separate offer is made to each State. The offer is made upon an annual basis, so that if a State which accepts a grant the first year finds it an insufficient reimbursement it will be able to refuse the grant in subsequent years. There is no illegal interference with the sovereignty of the States, because the matter of levying or not levying their own income tax is left entirely to the discretion of their own Parliaments. An analogous case would be where the Commonwealth Parliament offered a State assistance on condition it ceased to carry on the mining of a profitable ore, which the Commonwealth thought it was inadvisable to exhaust in the national interest, the Commonwealth offering the State assistance under sec. 96 to offset the loss of revenue it would suffer by doing so. The present case may be summed up as follows. The Parliament, when the Commonwealth is in imminent danger, considers that it is not in the national interest for the States to levy income tax. But it recognizes that, if they co-operate by agreeing not to do so, they will require financial assistance to reimburse them for their loss of revenue. So it makes its offer of assistance dependent on their co-operation. The condition is one which is capable of aiding in the defence of the realm. Sec. 5 offers an inducement to the States to collect their arrears of tax in respect of the financial years up to and including that of 1st July 1941. It is a fair and equitable provision, as it gives to all States ultimately the benefit of all the taxes they levied prior to the *Tax Act* coming into force. Faint objection was taken to sec. 6 of the Act on the ground that Parliament and not the Treasurer must fix the amount of a grant; but, as *Latham* C.J. pointed out in *Deputy Federal Commissioner of Taxation (N.S.W.) v. W. R. Moran Pty. Ltd.*[189], where several authorities are cited: "It is too late now to argue that terms and conditions determined by a Minister

under such legislation are not determined by the Parliament." The allotments to the State are not made on any ratable basis, but sec. 96 does not prohibit discrimination, and grants may be made to one State and not to others and between the States on an unequal basis. Under the circumstances the *Grants Act* is, in my opinion, a valid exercise by the Parliament of its powers under sec. 96.

Although the language of sec. 31 of the *Assessment Act* is not as clear as it might be, I agree with Mr. *Ham* that it means Commonwealth income tax on the income of any year of income must be paid in priority to the State tax for that year of income, so that, once the Commonwealth tax for any financial year has been paid, the section does not prevent a taxpayer from then paying his State tax for that financial year. Counsel for the States contended that, as both the Commonwealth and State Parliaments are entitled by the exercise of their sovereign rights to impose income tax, there can be no inconsistency between the two impositions, each of which operates concurrently but independently of the other, so that it is not an exercise of the taxing power or incidental thereto for the Commonwealth to provide that its tax shall be paid in priority to that of a State. But the Privy Council in *In re Silver Bros. Ltd.*[190], and the majority of the Justices of this Court in *Federal Commissioner of Taxation v. Official Liquidator of E. O. Farley Ltd.*[191], appear to me to have considered, I would respectfully say correctly, that it is possible for the Canadian and Australian national Parliaments respectively, by aptly framed legislation, to give priority to their taxation statutes over those of the Provinces in the case of Canada and of the States in the case of Australia, where they come into conflict in the same field in the sense that a taxpayer who has to pay the two exactions is unlikely to be able to meet them both in full. In *In re Silver Bros. Ltd.*[192] Viscount Dunedin said: "The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash; consequently the Dominion must prevail." After pointing out, quite rightly, that each of these decisions relates to the liquidation of a company, counsel for the States contended in the alternative that, even if the Commonwealth can make its tax a prior charge upon a taxpayer's assets, it would still not be incidental to the taxation power to prevent a taxpayer from paying his debts, including a State assessment, as they become due. It would be impossible to make an income tax a fixed charge on a taxpayer's assets generally, some of which he is acquiring and disposing of from day to day, while many taxpayers would not possess particular assets of an appropriate nature to be charged specifically. Grave difficulties would be encountered in evolving and heavy expense incurred in administering a system of fixed charges. The only practical way, therefore, to prefer the Commonwealth debt would be to provide that it should be paid in priority to the State debt. To do this would not be to manufacture inconsistency between Federal and State laws. It would be a means of aiding the effective operation of the power comparable to the right of the Commonwealth under the borrowing power, sec. 51 (iv.), to make its loans attractive to investors by freeing them from State taxation (*The Commonwealth v. Queensland*[193]). It would be strange if the Commonwealth could protect interest on its loans from State taxes, but could not take effective measures against the States to ensure the getting in of revenue required to pay the interest. The section is, in my opinion, a valid exercise of power.

Under arrangements made with the States pursuant to the *Income Tax Collection Act 1923* the Commonwealth in Western Australia is at present collecting its own income tax and the income tax of that State through its own income tax department, while, in the other States, the State income tax departments are collecting their own income tax and that of the Commonwealth. The affidavits filed on behalf of the States show that they each maintain a department for the collection of State income taxes, in which a large staff is employed consisting of officers the senior members of whom have spent many years in the department and thereby acquired a specialized knowledge of the administration of the State's income tax Acts. Each department uses for the purposes of its work

large numbers of typewriters, adding machines and other mechanical equipment. They are housed in extensive offices in their respective capital cities, and, in the present conditions, it would be impossible or impracticable to replace their personnel or equipment or to find other suitable premises for their accommodation.

The *Arrangements Act* provides for the suspension of the existing arrangements with the States for the assessment and collection of income tax, and the assessment and collection of the tax imposed by the *Tax Act* in all States by the Commonwealth from a date fixed by proclamation until the Act ceases to operate; for the compulsory temporary transfer of officers employed by the States in assessing and collecting income tax to the Public Service of the Commonwealth and their subsequent retransfer to the States; for the compulsory temporary use by the Commonwealth of any office accommodation, furniture and equipment owned by a State; and for the compulsory permanent acquisition by the Commonwealth of any records in the possession of a State relating to the assessment and collection of Commonwealth income tax. The Act applies to all State servants, permanent or temporary. The transfer to the Commonwealth Public Service is effected by the Treasurer of the Commonwealth addressing a notice in writing to the Treasurer of a State. The transfer can be called for if, in the opinion of the Treasurer of the Commonwealth, it is necessary for the efficient collection of revenue required for the prosecution of the war, for the effective use of manpower, or otherwise for the defence of the Commonwealth. The rights conferred upon the Treasurer of the Commonwealth with respect to the office accommodation, furniture and equipment of the States are also very extensive. He can demand the temporary possession and exclusive use of this property for the Commonwealth when it is required for the efficient collection of revenue, for the effective use of manpower, or otherwise for the defence of the Commonwealth. The Act provides that, in default of agreement between the parties, compensation for the possession and use of such property and the obligations of the Commonwealth with respect to keeping it in good order and repair and otherwise shall be determined by an arbitrator appointed by the Governor-General. No compensation is provided for the acquisition of the returns and records, but the States are given the right to have access to and inspect those which relate to the assessment or collection of any tax imposed upon income by or under any law of the State. No argument was addressed to the Court whether the entry into the possession and use of the office accommodation, furniture and equipment or the transfer of the returns and records would be an acquisition by the Commonwealth of State property within the meaning of sec. 51 (xxxi.); or whether, if it is, provision for an arbitration by an arbitrator appointed by the Federal Executive Council and therefore in effect by one of the parties is a compliance with the placitum; or whether a right given to a State, from whom the returns or records are acquired, to have access to and to inspect them is a fair equivalent for their value; so I shall not express any opinion on these points. It is obvious from the framework of the Act as a whole that it is sought to justify its constitutional validity as an exercise of the defence power. In what Mr. *Ham* described as the piping times of peace there could be no question, I should imagine, that the collection of taxes would be incidental to the execution of the taxation and not the defence power. The defence power does not become in time of war a paramount power (*Andrews v. Howell*[194], per *Starke* J.), but, as *Dixon* J. pointed out in the same case[195], though its meaning does not change, "its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law." In *Farey v. Burvett*[196] *Isaacs* J. said: (It is) "a power which is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself; and, if need be, it is a power to command, control, organize and regulate, for the purpose of guarding against that peril the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defence is not confined to operations on the battlefield or the deck of a man-of-war; its

factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself." The necessary steps to meet the peril depend so greatly upon the knowledge of the Parliament and the Executive it controls that the Court, in determining whether a particular Act is within the ambit of the power, is only concerned to see that its provisions are such as to be capable even incidentally of aiding the effectuation of the power. After that the Court must stay its hand, for "no authority other than the central Government is in a position to deal with the problem which is essentially one of statesmanship" (per Viscount *Haldane* when delivering the judgment of the Privy Council in *Fort Francis Pulp and Power Co. v. Manitoba Free Press Co.*[197]).

In *Amalgamated Society of Engineers v. Adelaide Steamship Co. Ltd.*[198], *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ., in their joint judgment, said:—"It is undoubted that those who maintain the authority of the Commonwealth Parliament to pass a certain law should be able to point to some enumerated power containing the requisite authority. But we also hold that, where the affirmative terms of a stated power would justify an enactment, it rests upon those who rely on some limitation or restriction upon the power, to indicate it in the Constitution"[199].

It was there held that States and their agencies, when parties to industrial disputes in fact, are subject to Commonwealth legislation under placitum xxxv. of sec. 51 of the *Constitution*, if such legislation on its true construction applies to them. This is because, when States become merchants and traders and engage in industrial activities which the general public may carry on, the subject matter of the power conferred on the Parliament by this placitum is such as to embrace States acting in such a capacity as well as individuals within its scope.

Applying the principles laid down in the *Engineers' Case*[200], there can be no doubt, in my opinion, that States, like individuals, are within the ambit of the defence power, so that, where it is incidental to the execution of the power to take some action to meet an emergency which affects rights which in normal times are within the domain exclusively reserved to the States by the Constitution, the Commonwealth Parliament can do so. In *Farey v. Burvett*[201] legislation under the power was held to be valid, although relating to a subject matter, i.e., the price of bread, which in times of peace would have been only within the powers of the States. Any attempt at State legislation on this subject which came into collision with the Federal Act would have been to that extent void under sec. 109 of the *Constitution*. But in times of peace the State legislation would have been valid and the Commonwealth legislation invalid. In mobilizing the resources of the nation under the defence power, the Parliament has the same right to call for the services of those employed by the States as of those employed by private employers, and the same power to enter into possession of property owned by the States as in the case of property privately owned. If the real substance and purpose of a statute is incidental to defence, then, however seriously its operation may hinder the carrying on of the government of a State, this would simply be the indirect result of the lawful action of the Commonwealth undertaken to meet the national emergency. It is one thing for the Commonwealth Parliament to attempt directly to prevent a State exercising its legislative, judicial, or executive functions, which would be an illegal interference with the prerogative rights of the State, and quite another thing to claim the services of a body of individuals employed by or the possession of property owned by a State where the employees and property are organized, as they are here, so as to possess some special attribute capable of advancing the total war effort. But legislation which appears to discriminate against a State by the mass transfer of its public officers in one department and the exclusive acquisition of its property must be carefully scrutinized to see that its real substance and purpose is to assist defence and not under colour of such a purpose to intermeddle in the sovereignty of a State. The affidavits filed on behalf of the States themselves

show that the collection of the new tax would be gravely impeded if the Commonwealth had to organize a new department in every State except Western Australia. It was suggested that the existing arrangements, which have worked satisfactorily since 1923, should be allowed to continue. Their provisions are not before us, but it appears that they would have to be at least revised because, if the Commonwealth is to become during the war the sole income-tax authority, the expense which is now shared between the Commonwealth and the States will become the sole burden of the Commonwealth. The only reason Mr. *Ham* gave for the Commonwealth requiring a transfer of the officers and accommodation was that, as the tax was being collected on behalf of the Commonwealth, it ought to have control of its own affairs. It is not for us to weigh the merits of this reason. The question whether the Commonwealth should have direct control or should have to rely upon an agent to perform this important work is one of policy which must be decided by the Government and not by the Court. It is clear that an Act to enable the Treasurer to get in expeditiously the sinews of war to the extent of £145,000,000 can assist in the prosecution of the war, and is, therefore, incidental to the execution of the power of defence. If the Commonwealth could call up all officers by some form of legislation, and this must, I think, be conceded, it is a matter of convenience and not of substance that the Act provides for the Treasurer of the Commonwealth giving the notice to the Treasurer of a State instead of to each officer personally.

Secs. 5-10 of the Act contain provisions with respect to the pay of transferred officers whilst in the service of the Commonwealth and their rights on death, retirement, or at the conclusion of their service with the Commonwealth. Whilst they are employed by the Commonwealth they are to receive the same pay from the Commonwealth as, but for the transfer, they would have received from the State. Upon retirement they are retransferred to the State and become entitled to the same pension and other benefits they would have received if they had not been transferred. The sections provide for the continuation of payments to superannuation funds by the officers themselves, and the Commonwealth making the same payments as a State would have made if they had been serving the State. The Commonwealth also contributes to pensions or other payments which dependents of officers who die become entitled to receive from the State, the respective obligations of the Commonwealth and the State being adjusted on the basis of the officers' length of service with the Commonwealth and the State. A transferred officer is deemed to be an officer of the State for the purpose of promotion or transfer from a temporary to a permanent position. The purpose of the sections is to provide a scheme to prevent officers suffering from the temporary transfer, the Commonwealth taking over a fair share of the burdens of any emoluments which would have accrued from long service if their employment by the State had been continuous. In America it has been held that, under the commerce power, Congress can legislate to prevent any person engaging in unfair labour practices which affect commerce. The *National Labor Relations Act 1935*, after defining unfair labour practices, by sec. 10 (c) authorized a Board to require the reinstatement of employees who had been discharged for engaging in trade union activities which the Act authorized them to engage in against the wishes of their employers. The Supreme Court held the provision to be valid. It did not interfere with the contractual relationship of the parties except to the extent necessary to give effect to the policy of the Act (*National Labor Relations Board v. Jones & Laughlin Steel Corporation*[202]). So, under the defence power, the Commonwealth can, in my opinion, legislate with respect to the reinstatement of citizens called up for some national duty, to prevent them being prejudiced in their civil employment when their services are no longer required for this purpose. The present Act purports to do nothing more. It does not deprive the States of any rights the States would have against the officers on the basis that they had not been transferred. The States can legislate as freely as before to affect any existing rights of public servants with respect to pay, contributions to superannuation funds, amounts of pensions, and so on, and the officers

transferred to the Commonwealth will be bound by all such legislation. If the Commonwealth Parliament can pass legislation making awards binding on the States under the conciliation and arbitration power, it would be a strange result if, under the defence power, it cannot legislate with respect to the reinstatement of men employed by a State and called up by the Commonwealth for national service in the same way as it can legislate for this purpose with respect to private employers. It is suggested that the powers conferred on the Treasurer are in terms wide enough to enable him to call up any officers whom a State, in order to collect arrears of or to levy its own income tax, might engage from time to time to replace those who had been transferred, and to take possession of any new office accommodation they might commence to use for this purpose; but the Treasurer can only call up officers, on the recommendation of the Public Service Board, if they are required in the Public Service of the Commonwealth for one of the three purposes mentioned; and it is preposterous to believe that the Public Service Board and the Treasurer would conspire together to call them up when they were not required, and thereby deliberately overstaff the Commonwealth Public Service at the expense of the taxpayers in order to deprive a State of their services. To do so would be to make a colourable use of the power which could be restrained by the Court. The *Grants Act*, sec. 4, contemplates that existing arrears of State income tax will be collected, if necessary, by the Commonwealth, and it is to the advantage of both the Commonwealth and the States that they should be got in.

The *Arrangements Act* is, in my opinion, a valid exercise of the defence power. As it is with considerable diffidence that I have reached a different conclusion from that arrived at by the Chief Justice and my brother *Starke* with respect to the validity of this Act, I desire to say that, even I considered the Act invalid, this would not affect the validity of the *Tax Act*, the *Grants Act*, or sec. 31 of the *Assessment Act*.

The States also allege that the effect of the Acts regarded as a single legislative scheme is to spread the burden of existing Commonwealth and State income taxes over the taxpayers of the Commonwealth as such and thereby to effect a discrimination between the States and the taxpayers of each State as such by reference to the varying rates of income tax at present in force therein. It is sufficient to say with respect to this contention that, although admittedly taxpayers in the different States previously paid income tax to a State and the Commonwealth at varying aggregate rates, this was due to the difference in the taxation laws of the States and not to the law of the Commonwealth (*Colonial Sugar Refining Co. Ltd. v. Irving*[203]). Taxpayers in the States who paid State income tax at lower rates than those in the other States will now have to pay more to the Commonwealth in comparison, but any attempt by the Commonwealth to make rebates to adjust this position would bring about a result in conflict with the prohibition against discrimination contained in sec. 51 (ii.) of the *Constitution*.

In my opinion, the actions should be dismissed.

Actions dismissed.

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Solicitor for the defendants, H. F. E. Whitlam, Crown Solicitor for the Commonwealth.

[1] [1939] HCA 27; (1939) 61 C.L.R. 735, at p. 754.

[2] (1940) A.C. 838, at p. 849 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at p. 341.

[3] [1846] EngR 451; (1846) 2 C.B. 749, at p. 757 [135 E.R. 1141, at p. 1144] [1848] EngR 498; ; (1848) 2 Ex. 256, at p. 273 [154 E.R. 487, at p. 495].

[4] (1906) 2 K.B. 676, at p. 716.

[5] (1935) A.C. 445.

[6] [1922] USSC 35; (1922) 257 U.S. 563, at p. 589 [66 Law. Ed. 371, at p. 383].

[7] (1881) 8 Q.B.D. 119, at p. 123.

[8] (1899) 1 Q.B. 909, at p. 917.

[9] [1904] HCA 50; (1904) 1 C.L.R. 208, at p. 213.

[10] (1895) L.R. 22 Ind. App. 107, at p. 118.

[11] [1918] HCA 30; (1918) 25 C.L.R. 32, at p. 43.

[12] [1939] HCA 27; (1939) 61 C.L.R. 735, at pp. 793 et seq.

[13] [1810] USSC 10; (1809) 6 Cranch 87 [3 Law. Ed. 86].

[14] (1939) A.C. 117.

[15] (1940) A.C. 838, at p. 849 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at p. 341.

[16] [1908] HCA 43; (1908) 6 C.L.R. 41.

[17] (1908) 6 C.L.R., at pp. 66, 67.

[18] (1908) 6 C.L.R., at pp. 89, 90.

[19] (1908) 6 C.L.R., at p. 118.

[20] [1938] HCA 9; (1938) 59 C.L.R. 170, at pp. 179, 180, 185.

[21] [1908] HCA 43; (1908) 6 C.L.R. 41.

[22] [1904] HCA 50; (1904) 1 C.L.R. 208, at p. 232.

[23] [1939] HCA 27; (1939) 61 C.L.R. 735, at pp. 763, 764.

[24] (1940) A.C. 838, at pp. 856, 857 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at pp. 347, 348.

[25] [1939] HCA 27; (1939) 61 C.L.R. 735, at p. 763.

[26] (1896) A.C. 348, at p. 366.

[27] (1921) 2 A.C. 91, at p. 117.

[28] [1926] HCA 48; (1926) 38 C.L.R. 399.

[29] [1923] USSC 152; (1923) 262 U.S. 447, at p. 480 [67 Law. Ed. 1078, at p. 1082].

[30] [1936] USSC 11; (1936) 297 U.S. 1, at pp. 70, 71 [80 Law. Ed. 477, at pp. 490, 491].

[31] (1936) 297 U.S., at p. 81 [80 Law. Ed., at p. 496].

[32] [1936] USSC 93; (1936) 298 U.S. 238: see pp. 310 et seq. [80 Law. Ed. 1160: see pp. 1188 et seq.].

[33] [1937] USSC 109; (1937) 301 U.S. 548 [81 Law. Ed. 1279].

[34] (1937) 301 U.S., at p. 589 [81 Law. Ed., at p. 1292].

[35] (1937) 301 U.S., at p. 610 [81 Law. Ed., at p. 1303].

[36] [1904] HCA 1; (1904) 1 C.L.R. 91.

[37] (1904) 1 C.L.R., at p. 111.

[38] [1906] HCA 94; (1906) 4 C.L.R. 488.

[39] [1920] HCA 54; (1920) 28 C.L.R. 129.

[40] (1920) 28 C.L.R., at p. 143.

[41] [1937] HCA 26; (1937) 56 C.L.R. 657.

[42] (1937) 56 C.L.R., at pp. 681, 682.

[43] (1937) 56 C.L.R., at pp. 698, 701, 702.

[44] [1920] HCA 54; (1920) 28 C.L.R. 129.

[45] [1904] HCA 1; (1904) 1 C.L.R. 91.

[46] [1920] HCA 54; (1920) 28 C.L.R. 129, at p. 143.

[47] [1908] HCA 43; (1908) 6 C.L.R. 41, at p. 84.

[48] (1905) 6 C.L.R., at p. 84.

[49] [1920] HCA 54; (1920) 28 C.L.R. 129.

[50] [1925] HCA 30; (1925) 36 C.L.R. 170, at p. 191.

[51] [1937] HCA 26; (1937) 56 C.L.R. 657, at pp. 681, 682.

[52] [1920] HCA 54; (1920) 28 C.L.R. 129.

[53] (1937) 56 C.L.R., at p. 687.

[54] [1920] HCA 54; (1920) 28 C.L.R. 129.

[55] [1920] HCA 54; (1920) 28 C.L.R. 129.

[56] (1937) 56 C.L.R., at pp. 701, 702.

[57] (1921) 2 A.C. 91.

[58] (1924) A.C. 999, at p. 1006.

[59] [1936] UKPCHCA 4; (1936) A.C. 578, at p. 611; 55 C.L.R. 1, at p. 41.

[60] [1923] HCA 23; (1923) 32 C.L.R. 200, at pp. 210, 218.

[61] (1937) 56 C.L.R., at pp. 687, 688.

[62] [1920] HCA 54; (1920) 28 C.L.R. 129.

[63] [1920] HCA 54; (1920) 28 C.L.R. 129, at p. 155.

[64] (1883) 9 App. Cas. 61, at p. 74.

[65] [1908] HCA 43; (1908) 6 C.L.R. 41, at pp. 66, 67.

[66] [1911] HCA 19; (1911) 12 C.L.R. 321, at p. 335.

[67] [1915] HCA 39; (1915) 20 C.L.R. 148, at pp. 173, 174.

[68] [1937] USSC 68; (1937) 300 U.S. 506 [81 Law Ed. 772].

[69] (1937) 81 Law. Ed., at pp. 776 et seq.

[70] (1915) A.C. 330, at pp. 337, 338.

[71] (1921) 2 A.C. 91, at pp. 99, 100.

[72] (1924) A.C. 328, at p. 342.

[73] (1924) A.C. 328.

[74] (1932) A.C. 41.

[75] (1932) A.C., at pp. 48, 51, 52.

[76] (1939) A.C. 117, at p. 129.

[77] [1920] HCA 54; (1920) 28 C.L.R. 129.

[78] [1908] HCA 43; (1908) 6 C.L.R. 41.

[79] [1908] HCA 43; (1908) 6 C.L.R. 41.

[80] [1939] HCA 27; (1939) 61 C.L.R. 735, at pp. 759, 760.

[81] (1939) 61 C.L.R., at pp. 762 et seq.; (1940) A.C. 838, at pp. 857, 858 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at pp. 348, 349.

[82] (1939) 61 C.L.R., at pp. 762 et seq.; (1940) A.C. 838, at pp. 857, 858 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at pp. 348, 349.

[83] (1940) A.C. 838, at p. 858 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at p. 350.

[84] [1936] USSC 11; (1936) 297 U.S. 1 [80 Law. Ed. 477].

[85] (1936) 297 U.S., at p. 68 [80 Law. Ed., at p. 489].

[86] [1920] HCA 54; (1920) 28 C.L.R. 129.

[87] [1936] USSC 11; (1936) 297 U.S. 1 [80 Law. Ed. 477].

[88] [1916] HCA 36; (1916) 21 C.L.R. 433.

[89] [1916] HCA 36; (1916) 21 C.L.R. 433.

[90] (1916) 21 C.L.R., at p. 441.

[91] (1916) 21 C.L.R., at p. 449.

[92] (1916) 21 C.L.R., at pp. 455, 456.

[93] (1916) 21 C.L.R., at p. 460.

[94] [1940] HCA 13; (1940) 63 C.L.R. 278, at pp. 316, 317.

[95] [1937] HCA 26; (1937) 56 C.L.R. 657, at pp. 704-706.

[96] [1920] HCA 79; (1920) 29 C.L.R. 1.

[97] (1920) 29 C.L.R., at p. 21.

[98] (1920) 29 C.L.R., at pp. 26, 27.

[99] (1920) 29 C.L.R., at p. 28.

[100] [1926] HCA 51; (1936) 38 C.L.R. 563.

[101] (1936) 38 C.L.R., at p. 570.

[102] (1936) 38 C.L.R., at p. 580.

[103] [1937] HCA 26; (1937) 56 C.L.R. 657.

[104] (1937) 56 C.L.R., at p. 670.

[105] (1937) 56 C.L.R., at p. 675.

[106] (1937) 56 C.L.R., at p. 677.

[107] [1940] HCA 13; (1940) 63 C.L.R. 278, at pp. 324, 325.

[108] (1932) A.C. 514.

[109] (1932) A.C., at p. 521.

[110] (1932) A.C., at p. 521.

[111] (1883) 9 App. Cas. 117, at p. 132.

[112] (1919) A.C. 935, at p. 945.

[113] (1935) A.C. 500, at p. 519.

[114] [1915] HCA 60; (1915) 20 C.L.R. 299, at p. 310.

[115] [1916] HCA 36; (1916) 21 C.L.R. 433.

[116] [1941] HCA 20; (1941) 65 C.L.R. 255, at p. 263.

[117] (1916) 21 C.L.R., at pp. 455, 456.

[118] [1908] HCA 94; (1908) 6 C.L.R. 469.

[119] [1920] HCA 79; (1920) 29 C.L.R. 1.

[120] [1935] HCA 4; (1935) 52 C.L.R. 157.

[121] (1923) 262 U.S., at p. 447 [67 Law. Ed., at p. 1078].

[122] [1936] USSC 36; (1936) 297 U.S. 288, at pp. 346-348 [80 Law. Ed. 688, at pp. 710-712].

[123] (1897) A.C. 22, at p. 38.

[124] (1935) A.C. 445, at pp. 457, 458.

[125] (1940) A.C. 838, at p. 849 [1940] UKPCHCA 3; ; 63 C.L.R. 338, at p. 341.

[126] (1906) 2 K.B. 676.

[127] [1904] HCA 50; (1904) 1 C.L.R. 208, at p. 213.

[128] (1907) 1 Ch. 107, at p. 120.

[129] (1940) A.C., at p. 857; 63 C.L.R., at p. 349.

[130] [1920] HCA 79; (1920) 29 C.L.R. 1.

[131] (1932) A.C. 514.

[132] [1940] HCA 13; (1940) 63 C.L.R. 278, at pp. 312 et seq.

[133] [1937] HCA 26; (1937) 56 C.L.R. 657, at pp. 702-706, 709, 710.

[134] (1940) 63 C.L.R., at pp. 324-326.

[135] [1939] USSC 60; (1939) 306 U.S. 466, at pp. 478, 479, 492 [83 Law. Ed. 927, at pp. 931, 932, 940].

[136] [1926] HCA 48; (1928) 38 C.L.R. 399.

[137] (1939) 61 C.L.R., at pp. 763, 764, 771, 772; (1940) A.C., at p. 857; 63 C.L.R., at p. 349.

[138] [1908] HCA 43; (1908) 6 C.L.R. 41.

[139] (1932) A.C., at p. 52.

[140] (1939) A.C. 117.

[141] (1923) 262 U.S., at p. 483 [67 Law. Ed., at p. 1083].

[142] (1937) 301 U.S., at pp. 589, 590 [81 Law. Ed., at pp. 1292, 1293].

[143] (1888) 22 Q.B.D. 23, at p. 65.

[144] [1926] HCA 48; (1926) 38 C.L.R. 399.

[145] [1941] HCA 20; (1941) 65 C.L.R. 255, at pp. 272-278.

[146] [1938] USSC 83; (1938) 303 U.S. 453, at pp. 466, 467 [82 Law. Ed. 954, at pp. 960, 961].

[147] [1920] HCA 54; (1920) 28 C.L.R. 129.

[148] [1941] HCA 20; (1941) 65 C.L.R. 255.

[149] [1920] HCA 54; (1920) 28 C.L.R. 129.

[150] [1920] HCA 54; (1920) 28 C.L.R. 129.

[151] [1906] UKPCHCA 4; (1907) A.C. 81; 4 C.L.R. 356.

[152] (1920) 28 C.L.R., at p. 155.

[153] [1937] HCA 26; (1937) 56 C.L.R. 657, at pp. 697, 698, 701.

[154] [1939] USSC 60; (1939) 306 U.S. 466 [83 Law. Ed. 927].

[155] [1941] HCA 20; (1940) 65 C.L.R. 255.

[156] (1928) 42 C.L.R., at pp. 206, 207.

[157] (1939) 61 C.L.R., at pp. 772, 773.

[158] (1940) A.C., at p. 849; 63 C.L.R. at p. 341.

[159] (1930) A.C. 357.

[160] [1940] UKPCHCA 3; (1940) A.C. 838; 63 C.L.R. 338.

[161] (1940) A.C., at pp. 856-858; 63 C.L.R., at pp. 347-349.

[162] [1916] HCA 36; (1916) 21 C.L.R. 433.

[163] (1916) 21 C.L.R., at pp. 440, 441.

[164] (1916) 21 C.L.R., at p. 441.

[165] [1916] HCA 36; (1916) 21 C.L.R. 433.

[166] (1916) 21 C.L.R., at pp. 453, 454.

[167] (1916) 21 C.L.R., at p. 455.

[168] (1916) 21 C.L.R., at pp. 457, 458.

[169] [1941] HCA 20; (1941) 65 C.L.R. 255.

[170] (1916) 21 C.L.R., at p. 443.

[171] (1916) 21 C.L.R., at pp. 455, 456.

[172] [1940] UKPCHCA 3; (1940) A.C. 838; 63 C.L.R. 338.

[173] (1940) A.C., at p. 854; 63 C.L.R., at pp. 345, 346.

[174] (1906) A.C., at p. 367.

[175] (1916) 21 C.L.R. 43.

[176] [1916] HCA 36; (1916) 21 C.L.R. 433.

[177] [1915] HCA 60; (1915) 20 C.L.R. 299.

[178] (1916) 21 C.L.R., at pp. 443, 444.

[179] [1916] HCA 36; (1916) 21 C.L.R. 433.

[180] (1916) 21 C.L.R., at p. 460.

[181] [1920] HCA 54; (1920) 28 C.L.R. 129.

[182] (1920) 28 C.L.R., at p. 154.

[183] (1924) A.C. 328.

[184] (1932) A.C. 41.

[185] (1939) A.C. 117.

[186] [1940] UKPCHCA 3; (1940) A.C. 838; 63 C.L.R. 338.

[187] [1908] HCA 43; (1908) 6 C.L.R. 41.

[188] [1923] HCA 4; (1923) 32 C.L.R. 68.

[189] [1939] HCA 27; (1939) 61 C.L.R. 735, at p. 763.

[190] (1932) A.C. 514.

[191] [1940] HCA 13; (1940) 63 C.L.R. 278.

[192] (1932) A.C., at p. 521.

[193] [1920] HCA 79; (1920) 29 C.L.R. 1.

[194] (1941) 65 C.L.R., at p. 268.

[195] (1941) 65 C.L.R., at p. 278.

[196] [1916] HCA 36; (1916) 21 C.L.R. 433, at p. 455.

[197] (1923) A.C. 695, at p. 706.

[198] [1920] HCA 54; (1920) 28 C.L.R. 129.

[199] (1920) 28 C.L.R., at p. 154.

[200] [1920] HCA 54; (1920) 28 C.L.R. 129.

[201] [1916] HCA 36; (1916) 21 C.L.R. 433.

[202] [1937] USSC 80; (1937) 301 U.S. 1, at pp. 45-48 [81 Law. Ed. 893, at pp. 916-918].

[203] (1906) A.C. 360.

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