policy itself, what would be its effect? As already pointed out the expressed terms of the policy of re-assurance are in almost every respect different from the terms of the original policy. It would be contrary to all sound canons of construction to reject or modify the expressed terms of the policy in order that it might be made to conform to the general words of the clause in question. Such clause would almost necessarily be construed as if it were prefaced with the words "except as herein otherwise provided." It would be only less difficult to maintain that the effect of the clause was to introduce into the policy of re-insurance provisions relating to (*a*) application of surrender value towards payment of premiums in arrear, or (*b*) forfeiture of premiums already paid, if the basic conditions of the contract were not fulfilled, or (*c*) the allowance of days of grace. But it is enough to say that the incorporation in the policy of the clause in question cannot be allowed to contradict the express provisions of the policy. And yet this is in reality exactly what the respondent Association contends for and exactly what has been allowed in the High Court of Australia and the Full Court of Victoria. The somewhat ambiguous words "by whom in the event of claim settlement will be made" are construed as meaning that if the respondent Association acting reasonably and in good faith admit, and settle, its own liability under the original policy, the appellant Society is bound by such admission and settlement, and is liable under its own independent contract of re-insurance, notwithstanding the fact that according to the express terms of such contract, no liability has in fact arisen. Sir *Samuel Griffith* C.J. appears to have been fully aware of the difficulty involved in so construing and giving effect to the words in question, and he endeavours to meet this difficulty in the following way:—In his opinion although the *primâ facie* meaning of the clause which makes the statements which the jury found to be false the basis of the contract, is to make the liability of the appellant Society conditional on the truth of such statements, yet this *primâ facie* meaning is controlled by the incorporation in the policy of the clause contained in the document of 2nd January 1908. In reality, he says, it is not the truth of the statements which is made the basis of the contract but the fact that the statements were made, so that there is no contradiction

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of any express term of the contract in giving to the incorporated clause the effect for which the respondent Association contends. The policy is no longer an independent contract but a contract of indemnity, in which it would be quite reasonable to insert a provision making any *bonâ fide* settlement effected by the respondent Association binding on the appellant Society. Their Lordships do not dissent from the proposition that if the clause of the policy, which defines the basis of the contract, could be so construed, the difficulty would be considerably diminished if not altogether obviated. But in their opinion it is impossible to hold that the perfectly clear provision as to the basic conditions, and indeed the whole tenor of the contract, should be so profoundly altered by the terms of a clause which is incorporated by reference, which is in itself ambiguous, and which may have been inserted with a totally different intention, as, for example, in order to make an agreement between the respondent Association and the legal personal representative of the deceased as to the amount due when the liability was undisputed, binding on the appellant Society, or in order to preclude interference by the appellant Society between the respondent Society and its own customer.

In their Lordships' opinion, having regard to the facts found by the jury, the appellant Society is not and never was liable on the policy of re-insurance, and they will therefore humbly advise His Majesty that the appeal should be allowed, that the orders of the High Court and of the Full Court of Victoria should be discharged, and the judgment of the Chief Justice of Victoria should be restored, and that the respondent Association ought to pay the costs of this appeal and the costs in the Courts below.

[HIGH COURT OF AUSTRALIA.]

WATERHOUSE AND ANOTHER . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX, SOUTH AUSTRALIA } RESPONDENT.

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MELBOURNE, *March* 16, 17, 24.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Power of taxation—Subject of taxation—Joint owners—Transfers between husband and wife—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 55, 107—*Land Tax Act* 1910 (*No.* 21 *of* 1910), *sec.* 2—*Land Tax Assessment Act* 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 36.

Sec. 36 (2) of the *Land Tax Assessment Act* 1910-1911 is invalid as being beyond the power of the Parliament of the Commonwealth to enact.

CASE stated for the opinion of the Court.

On an appeal by Arthur Waterhouse and Laura Emily Waterhouse from an assessment of them for land tax as on 30th June 1911, *Barton* J. stated the following case :—

"The appellants Arthur Waterhouse and Laura Emily Waterhouse are husband and wife, and each of them was the owner of land. On 24th May 1911 the male appellant transferred certain of his land to the female appellant, who still had land of her own, for a consideration stated in the transfer as £13,000, of which £8,000 was to be paid in cash and was so paid, £5,000 remaining to be paid and bearing interest at 4 per cent. from the date of the transfer. At the date of assessment Mrs. Waterhouse had, as both the appellants allege and the respondent does not deny, paid £600 towards the said balance of £5,000. It is not disputed that the transfer was intended to pass and did pass the property in the land. One object of the

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parties was to reduce the amount of tax to which the transferor's land as a whole was liable.

"On 8th July 1912 the Deputy Commissioner of Land Tax for South Australia notified the appellants that in pursuance of the *Land Tax Assessment Act* 1910-1911 and the *Land Tax Act* 1910 they had been assessed as joint owners at 30th June 1911 of all the land owned by either of them as follows:—

Unimproved value	£56,276 0 0
Less statutory deduction	£5,000 0 0
	£51,276 0 0
Amount of tax—total due	£578 16 3

"The Deputy Commissioner made the assessment on the ground that he was not satisfied that the transfer was not for the purpose of evading land tax.

"The appellants appealed against that assessment, transmitting their objections to the High Court for determination, and on the hearing of that appeal before me the following questions have arisen which in my opinion are questions of law, and accordingly I state them for the opinion of the High Court:—

"(1) Whether sec. 36 (2) of the *Land Tax Assessment Act* is beyond the legislative powers of the Commonwealth and invalid for the following reasons:—

"(*a*) It purports to impose land tax on persons who have no interest whatever in the land in respect of which the provision seeks to render them liable.

"(*b*) That the sub-section is a penal and not a taxing provision, and the penalty falls on persons who do not hold the land in respect of which it is imposed.

"(*c*) That the penalties sought to be imposed on the transferor and transferee respectively are not within the implied or incidental powers of the Parliament of the Commonwealth.

"(*d*) That the section violates the Constitution by placing the judicial power in respect of such tax or penalty in the hands of an executive or administrative officer.

"(2) Whether sec. 36 (2) is of no effect, seeing that if it imposes

a penalty as distinct from a tax the *Land Tax Assessment Act* does not deal with taxation alone.

"(3) Whether the transfer in question, having regard to its object as above stated, is within sec. 36 (2) whatever be the motive of the transfer.

"(4) (*a*) Whether there is any appeal against the decision of the Commissioner in cases under sec. 36 (2).

"(*b*) Whether the Commissioner's decision that he is not satisfied that the transfer was not for the purpose of evading land tax can be the subject of an appeal."

McArthur K.C. (with him *Schutt*), for the appellants. Sec. 36 (2) of the *Land Tax Assessment Act* 1910-1911 is invalid as being an attempt to impose land tax upon persons who may have no interest in land: *Morgan* v. *Deputy Federal Commissioner of Land Tax, N.S.W.* (1). If the enactment were aimed at sham transfers, then the wife to whom a sham transfer was made would get no interest in the land, and yet the provision would be an attempt to tax her in respect of not only that, but also all other land of her husband, in none of which she had any interest. If the sub-section applies to real transfers, then the husband is made liable to tax in respect of land in which he has no interest. If the sub-section is regarded as imposing a tax it is not a land tax, and sec. 55 of the Constitution would apply. See *Osborne* v. *The Commonwealth* (2). If the sub-section is not to be regarded as imposing a tax by the name of a land tax upon persons not interested in land, it either imposes a tax upon a transfer of land or imposes a penalty upon a transfer of land, or it attempts to interfere with the free transfer of land between husband and wife. But the Parliament of the Commonwealth has not been given power to deal with any of those matters. To impose a penalty of this kind is not reasonably incidental to the power to impose a land tax. The penalty falls upon persons who do not hold any interest in the land. [He also referred to *Simms* v. *Registrar of Probates* (3); *Bullivant* v. *Attorney-General for Victoria* (4); *Payne* v. *The King* (5).]

(1) 15 C.L.R., 661, at pp. 665, 668.
(2) 12 C.L.R., 321.
(3) (1900) A.C., 323.
(4) (1901) A.C., 196.
(5) (1902) A.C., 552.

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McLachlan, for the respondent. Sec. 36 (2) is a provision dealing with, but not imposing, land tax, and is incidental to the imposition of land tax in that it is intended to prevent evasion of the tax. The obligation imposed by it would be upon the land, although the hand to pay it might be that of a person not interested in the land. A general provision making a husband and wife joint owners of all the land of either of them would be valid; so also a provision making a husband and wife severally liable for the land tax of either of them. [He referred to *Income Tax Act* 1842 (5 & 6 Vict. c. 35), sec. 45; *Finance Act* 1897 (60 & 61 Vict. c. 24), sec. 5; *Finance* (1909-10) *Act* 1910 (10 Edw. VII. c. 8), sec. 72 (6); *Revenue Act* 1911 (1 Geo. V. c. 2), sec. 11.] Under those Acts it is recognized that a section of this kind is incidental to a taxation Act. The validity of a tax is to be judged not by the persons through whom it is exacted but by the ultimate subject matter upon which it is imposed. In this case it is from the land that this tax is ultimately recoverable. Sec. 36 (2) does not "impose" taxation, and therefore is not within sec. 55 of the Constitution. See *Stephens* v. *Abrahams* (1). Under the Constitution the Parliament of the Commonwealth has a discretion as to the means by which the powers conferred may be carried into effect. Regarding this section as imposing a penalty, it is not for this Court to say whether that penalty is reasonable or not. The Parliament may say how the quantum of the penalty shall be determined.

[ISAACS J. referred to *R.* v. *Barger* (2).]

The penalty is imposed upon the parties to the transaction. [Counsel also referred to *Willoughby on the Constitution of the United States*, vol. II., p. 1277.]

Schutt, in reply.

Cur. adv. vult.

The following judgments were read:—

March 24.

GRIFFITH C.J. This is an appeal by the appellants, who are husband and wife, from an assessment made against them as joint owners of all the land owned by either of them under the powers

(1) 29 V.L.R., 229; 24 A.L.T., 216. (2) 6 C.L.R., 41, at p. 67.

purporting to be conferred by sec. 36 (2) of the *Land Tax Assessment Act* No. 22 of 1910. That section provides as follows:—

"(2) Where—

"(*a*) a husband has directly or indirectly transferred land to or in trust for his wife, or

"(*b*) a wife has directly or indirectly transferred land to or in trust for her husband,

(they not being judicially separated), the husband and wife shall, unless the Commissioner is satisfied that the transfer was not for the purpose of evading land tax, be deemed to be joint owners of all the land owned by either of them:

"Provided that this sub-section shall not apply to settlements made before the thirtieth day of September, one thousand nine hundred and ten."

In May 1911 Mr. Waterhouse transferred a piece of land to his wife, who was already the owner of other land, for the consideration of £13,000, of which £8,000 was paid to him in cash from the wife's money. The Deputy Commissioner seeks to apply the provisions of sec. 36 on the ground that he is not satisfied that transfer was not made for the purpose of evading land tax.

The appellants contend that the section is invalid as not being within the powers conferred upon the Parliament by the Constitution. It is objected that the section, if valid, operates not as imposing land tax but as imposing a liability upon one person to pay another's debt, and that such an imposition is not within the powers of the Parliament enumerated in the Constitution. Even if it be conceded that Parliament may under the general power of "taxation" impose a pecuniary liability upon any person for any cause it thinks fit, irrespective of the ownership of property, then, it is said, the subject of taxation in such a case is the person taxed, and not property or its ownership. So, in the present case, it is said, the subject matter of taxation of a wife in respect of her husband's property or of a husband in respect of a wife's property is not the same subject matter as the taxation of land. If, then, sec. 36 (2) imposes taxation, the *Land Tax Act* itself, No. 21 of 1910, which incorporates No. 22, would be invalid as contravening the second provision of sec. 55 of the Constitution which provides that laws imposing taxation, except laws

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imposing duties of customs and excise, shall deal with one subject of taxation only. This point was directly taken in *Osborne* v. *The Commonwealth* (1), but was overruled. Referring to the argument based on secs. 36 and 40, I said (2)—I think with the concurrence of all members of the Court—"In the case of each of those sections the provision, if valid, may render a person liable, directly or indirectly, for land tax upon land in which he has no estate legal or equitable. But whether that provision is valid or not, the subject matter of taxation is still land. The utmost effect is that an ineffectual attempt is made to strike a man who cannot be struck."

The provision now attacked cannot, therefore, be supported on the ground that it is within the general power to impose taxation in respect of subject matters other than land.

It was contended for the Commissioner that husband and wife are in law and in fact one person, and that the Parliament, acting on this view, can impose on either an obligation to pay taxes due by the other. The fundamental proposition is contrary to the fact, and no argument can be based on it.

In considering the question of the validity of a federal Act the Court has regard to the substance of the matter. In my judgment sec. 36 is in substance an attempt to impose a pecuniary liability as a consequence of a transfer of land by a husband to his wife, or by a wife to her husband, which is *pro tanto* imposing a restraint upon such dealings, and the question is whether the Parliament has power to do so. The relations of husband and wife, and the conditions of the transfer of land, as well between them as between them and other persons, are matters which, by the Constitution, are left to the States, and with which the Parliament has no authority to interfere.

It was next sought to support the section as a provision incidental to the collection of land tax, that is, incidental to the prevention of evasion of the tax—in other words, that it is in the nature of a penalty. But the penalty or obligation is not made dependent upon any evasion or attempted evasion of the Act, but upon the mere fact of transfer, which is a lawful act, and which the Parliament has no power to declare unlawful. The fact that

(1) 12 C.L.R., 321.

(2) 12 C.L.R., 321, at p 340.

the Commissioner has a dispensing power does not alter the plain construction of the words. It is hardly necessary to point out that a *bonâ fide* alienation of land for the purpose of escaping the liability to taxation incident to its ownership is not an evasion of land tax. This argument, therefore, does not help the respondent.

There is a second fatal objection to the validity of sec. 36. The first part of sec. 55 of the Constitution enacts 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." The two Acts Nos. 21 and 22 are, together, an Act imposing taxation. Sec. 36, as we held in *Osborne's Case* (1), is not a provision imposing taxation upon land, but a provision that persons not the owners of land shall be liable to pay land tax imposed upon owners, which is a provision dealing with a matter other than taxation, and is therefore of no effect.

Even apart from sec. 55 of the Constitution it is not, in my judgment, within the competence of Parliament, having imposed a tax upon the owners of land, to declare that persons who are not in any sense owners shall be deemed to be owners for the purpose of payment of the tax. I cannot find in the Constitution any power to declare that the true shall be regarded as false, or the false regarded as true, except for the limited purpose of definition of a word or phrase which the Parliament uses in dealing with a subject matter wholly within its competence.

For both these reasons I am of opinion that sec. 36 is invalid.

It is not necessary to answer the other questions submitted in the case.

BARTON J. In the case of *Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (2), generally known as the *Sugar Commission Case*, the Judicial Committee of the Privy Council, in discussing the Royal Commissions Acts of the Commonwealth, pointed out that the question was whether they were within the powers transferred by the Constitution to the new central Parliament, for if such powers were not so transferred they remained exclusively vested

(1) 12 C.L.R., 321.

(2) (1914) A.C., 237; 17 C.L.R., 644.

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in the States. This, they said, resulted from the broad principle laid down in sec. 51, but they also quoted sec. 107. They thought it clear that the powers which the Royal Commissions Acts (the terms of which are now of common knowledge) affected to exercise of imposing, under penalties, new duties on the subjects or people residing within the individual States, were before federation vested in the legislatures of these States. Then comes this passage: "If so, the burden rests on those who affirm that the capacity to pass these Acts was put within the powers of the Commonwealth Parliament." Their Lordships did not think the burden had been discharged in argument, and on this principle the Acts were held invalid.

The same principle applies when it is an individual section which is challenged, whether it be severable, if *ultra vires*, from the rest of the Act in which it occurs, or not.

That the capacity to pass sec. 36 (2) is a valid exercise of the legislative powers of the Commonwealth is therefore a proposition that it lies upon the respondent in this appeal to establish.

If sec. 36 (2) of the *Land Tax Assessment Act* is invalid, it is unnecessary to answer other questions raised in the case stated, as the extent to which it may affect the parties becomes immaterial unless it has some binding force. But the effect of the enactment that the husband and wife shall be deemed to be joint owners in a certain event can only be shown by reference to sec. 38, which, so far as it is material to this case, may be shortly stated as providing by sub-sec. 1 that "joint owners of land shall be assessed and liable for land tax in accordance with the provisions of" that section, and by sub-sec. 2 that they shall be jointly assessed and liable "in respect of the land" as if it were owned by a single person.

The first duty of the Court is to construe sec. 36 (2) by its actual terms, having in view the fact that when it enacts that the husband and wife shall in the circumstances stated be deemed to be joint owners, the consequence plainly intended is that they "shall be assessed and liable for land tax in accordance with the provisions" of sec. 38. There cannot be a doubt, therefore, that the intention of sec. 36 (2) is that the parties to the transfer shall be assessed as if they were in truth joint owners, with the result

that they are to pay land tax as such. We are not concerned with motives. Parliament appears from the words to have had no other sort of impost or obligation in sight. If it could not subject the husband and wife to land tax by reason of the transfer (failing dispensation by the Commissioner), it used no words which indicate that it meant to subject them to any other charge. The legislature, if we attribute to it, as we should, the belief that it was acting within its powers, must have been of opinion that the persons concerned could be validly brought within the area of land taxation by this statutory fiction. If its estimate of its powers was a mistaken one, that affords no reason to construe the provision as if it meant something different from a statement of intention as clear as words can make it. To control that meaning, some context at least as clear as the provision impeached would have to be found; but there is no such context, nor even any in virtue of which a different interpretation can reasonably be suggested.

The result, then, of such a transfer as is mentioned in the section is to be a land tax, which is to fall upon the parties to the transfer as if each owned all the other person's land as well as his or her own. It is true that the Commissioner has power to exempt them from the consequences if he is satisfied that the purpose was not to evade the tax, but this is not to say that the clause means to make the parties immune from the tax if the transaction is an innocent one. Innocence is no safeguard, and the liability automatically ensues unless the Commissioner intervenes, and in the absence of such intervention it must follow a transfer which is entirely lawful. For where the object of the transaction is, as in this case, "to reduce the amount of tax" to which the transferor's land as a whole would be liable in his or her hands, there is not an illegal evasion of land tax, nor in any sense an illegal act (*Payne* v. *The King* (1); *Simms* v. *Registrar of Probates* (2)).

Attributing to Parliament, then, a knowledge of the course of legal decision in the ultimate Court of appeal, it intended to tax the parties to an innocent transaction unless the Commissioner intervened. The provision must be considered, first in its rela-

(1) (1902) A.C., 552. (2) (1900) A.C., 323.

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tion to sec. 55 of the Constitution, and next in its relation to the extent of the legislative powers granted to the Commonwealth.

Taking it as established that sec. 36 (2) purports to impose a tax, the Assessment Act may still be regarded as dealing only with "the imposition of taxation," for its machinery provisions would not give it another character: *Osborne* v. *The Commonwealth* (1). But the *Land Tax Act* incorporates the Assessment Act (*ibid.*). Even so, the position would not be different. The second paragraph does not stand in the way. The subject matter of taxation in sec. 36 is "still land, and only land," as we said of it in the case just cited. Neither of these Acts, therefore, can be said to offend against the second paragraph of sec. 55. But that does not end the matter. Sec. 36, no doubt, is an attempt to bring certain persons, in a certain event, within the area of taxation. Still, if an effective tax at all, it would be a land tax. But to be effective as a land tax it must be imposed in respect of actual ownership. See *Morgan* v. *Deputy Federal Commissioner of Land Tax, N.S.W.* (2). Sec. 10 of the Assessment Act makes it clear that the tax imposed by the other Act is to be "levied and paid upon the unimproved value of all lands . . . which are owned by taxpayers" and not exempted. The *raison d'être* of the tax is the ownership of land. But the section is an attempt to impose the tax on persons who are not owners by saying they shall be "deemed to be" owners. To say that a person shall be deemed to be the owner of land does not vest the ownership in him. The legislature may, no doubt, have mistakenly thought that it did, and that the provision was therefore consistent with sec. 10. The attempted tax, then, fails as a tax because it lacks the one essential condition. But, not being a land tax, it plainly intends, even if the motive be the keeping up of the revenue, to restrict the transfer of land in certain cases. This the Commonwealth has no constitutional power to do. In that aspect the provision is invalid.

It was suggested in support of the clause that it might be read as an attempt to impose on one person a mere pecuniary obligation, not being a tax, dependent on the act of another. First, I do not think the words are fairly open to that construction.

(1) 12 C.L.R., 321.

(2) 15 C.L.R., 661.

Secondly, there are two clear objections to the construction, if open. It would render the clause an attempt to exercise a power not given to the Commonwealth, and, in addition, the legislation would in this respect not be dealing with taxation only, and the provision would be of no effect (sec. 55 (1)).

Then it was suggested that the clause merely intended to impose a penalty. There, again, I answer that it does not say so. But if it did, then it would be an attempt to penalize, and therefore to prohibit, certain transfers of land, and these again it is not within the legislative competence of the Commonwealth to forbid.

The endeavour to justify the provision as incidental to the power of taxation granted by sec. 51 (ii.) was, of course, hopeless, and I do not discuss it.

My answer to question 1 is in the affirmative.

In view of this result the other questions need no answer.

ISAACS J. The question is whether sec. 36 (2) of the *Land Tax Assessment Act* 1910-1911 is valid or invalid. In my opinion it is invalid, for the reason I am about to state.

In *Osborne's Case* (1) it was held that the Act No. 22 did not impose taxation within the meaning of sec. 55 of the Constitution. As to sec. 36 itself I observed (2), it "is said to be invalid as taxing a person in respect of land in which he has no interest. But it is not a tax primarily considered." That was sufficient for the purpose of the case. I went on to add: "It is a penalty for doing what is intended to evade the Act, because, if the parties can satisfy the Commissioner there was no such intention, the section has no application." That is quite true in a broad sense. There is a penalty attached to the act indicated, but it is not a penalty in the strict sense of a fine or money punishment.

If the purport of the section were to impose *a new pecuniary obligation*, by deliberately making a husband pay a tax in respect of land which is assumed not to belong to him but to his wife alone, or as to a wife in respect of what is assumedly her husband's land, I should think that was new taxation. It would be immaterial that the tax was payable as the consequence of or contingent

(1) 12 C.L.R., 321. (2) 12 C.L.R., 321, at p. 370.

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upon a stated event. And such an imposition could not be called a land tax. It would not be a land tax as that term is ordinarily understood, and to call it so, would be in the words of the Judicial Committee in *Bank of Toronto* v. *Lambe* (1), when speaking of another tax, to "run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature." If such a *new* obligation were imposed either directly, or contingently, I should consider it a personal tax, or a land transfer tax, but not a land tax; and this would, in my opinion, at once bring the Assessment Act within sec. 55 (2), with disastrous effect.

Now, as I read the section, critically, as it must now be read, and with the caution required to guard against unnecessary invalidity (*Osborne's Case* (2)), I am of opinion it is intended as an evidentiary section of a conclusive character. The legislature had palpably no design of imposing any tax but a land tax; that tax was imposed by Act 21 and had direct reference to the owner; No. 22 defines the owner (sec. 3), and the owner is the person to pay (sec. 11). The owner is to be reached directly or indirectly. I should require express words to indicate a change of that intention, even if *Osborne's Case* (3) had not already decided it.

So as to penalty in the strict sense it is definitely laid down by the Judicial Committee in *The "Gauntlet"* (4) that a person charged with an alleged offence has a right to say that the thing charged though within the words is not within the spirit of the enactment.

There are strong considerations why I do not think it was ever intended by sec. 36 to regard the mere transfer of husband to wife, or wife to husband, as an offence defeasible on getting the favourable opinion of the Commissioner. The first is that the consequence of the act of transfer, a perfectly innocent act, and not attempted to be invalidated by the section, attaches not merely to the land included in the transfer, but to all land included or not, which is owned by both transferor and transferee in severalty. The next is that sec. 70 directly deals with the question of penalty for wilfully attempted evasion, and, together

(1) 12 A.C., 575, at p. 582.
(2) 12 C.L.R., 321, at p. 364.
(3) 12 C.L.R., 321.
(4) L.R. 4 P.C., 184, at p. 191.

with sec. 73, touches both parties. The penalty is pecuniary, or is forfeiture of the land concerned. But it is in the highest degree unlikely that the further supposed penalty should have been so intended, and intended to extend to all land held in severalty by either party, while exempting land in fact held by them jointly,—and this for mere failure to satisfy the Commissioner. Express words would be necessary to convince me to the contrary. In my opinion, if the legislature had expressly said that sec. 36 was not intended either as a new tax or as a pecuniary penalty by way of new tax, the position would not be plainer.

The view I take of the section is this. It was intended as an incidental provision—incidental, that is, to the land tax already enacted by Act No. 21. The legislature, I gather, intended to make a provision to safeguard it by ensuring that land really owned jointly by husband and wife, though nominally standing in the separate name of either, should be taxed jointly according to the fact. And, recognizing the difficulty of establishing the reality, an arbitrary rule of evidence was devised, namely, that if a husband or wife were found transferring land to the other, or in trust for the other, that should be conclusive evidence that all the land nominally held in severalty was really held jointly and subject to the tax already imposed.

No doubt the legislature has always enormous incidental powers of enacting evidentiary provisions. The federal Parliament has, in relation to the subjects with which it deals, equal powers, in this respect, with any other legislature, provided the matter is really incidental to the main power. The matter has been reasoned out in several American cases, and I think the reasoning satisfactory: See *The Thomas and Henry* (1), *per Marshall* C.J., and *Li Sing* v. *United States* (2), where many authorities are collected.

The use of the word "deemed" is a common legislative expedient to safeguard and enforce enactments, by making certain facts conclusive evidence. A number of instances are collected in *Taylor on Evidence*, 10th ed., p. 73 and following pages.

In this case—as by the proper construction of the Statute, the

(1) 1 Brock., 367. (2) 180 U.S., 486.