[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR QUEENSLAND (AT THE RELATION OF GOLDSBROUGH, MORT & COMPANY LIMITED) AND ANOTHER . . . . } PLAINTIFFS;

AND

THE ATTORNEY-GENERAL FOR THE COMMONWEALTH AND ANOTHER . } DEFENDANTS.

H. C. OF A. 1915.

MELBOURNE, *May* 31; *June* 1, 2, 3, 15.

Griffith C.J., Isaacs, Higgins, Gavan Duffy, Powers and Rich JJ.

Land Tax—Power of taxation—Subject of taxation—Leasehold estates in Crown lands—Validity of Statutes—Repugnancy to Imperial Statutes—Tax upon State property—Tax upon State instrumentality—Statute dealing with more than one subject of taxation—Taxation of shareholders of companies—Declaratory order—Basis for determining unimproved value of leases of Crown lands—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (II.), (XXXIX.), 55, 107, 114—*Land Tax Assessment Act* 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 11, 27, 28, 29, 36, 39, 40, 48, 56—*Colonial Laws Validity Act* 1865 (28 & 29 *Vict. c.* 63), *sec.* 2—*New South Wales Constitution Act* 1855 (18 & 19 *Vict. c.* 54) *secs.* I., II.; *Schedule* 1, *secs.* 1, 43, 58.

The *Land Tax Assessment Act* 1910-1914, in so far as it purports by sec. 29 to impose land tax upon leasehold estates in Crown lands, is not invalid (1) under the *Colonial Laws Validity Act* 1865, as being repugnant to the Imperial Acts which confer upon the Legislatures of the several States powers of legislation with respect to waste lands of the Crown in those States respectively; (2) under sec. 114 of the Constitution, as imposing a tax upon State property; (3) as being not a law imposing taxation, but a law as to the control and management of Crown lands in the several States; or (4) as infringing the rule laid down in *D'Emden* v. *Pedder*, 1 C.L.R., 91, at p. 111.

Nor is the Act, in so far as it purports by sec. 39 to impose taxation upon shareholders of companies in respect of land owned by the companies, invalid as not being land taxation.

Morgan v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*), 15 C.L.R., 661, followed.

Semble, *per Higgins* J., no colonial Act can be "repugnant" to an Act of the British Parliament within the meaning of sec. 2 of the *Colonial Laws Validity Act*, unless it involve, either directly or ultimately, a contradictory proposition—probably, contradictory duties or contradictory rights.

The Court refused to make a declaratory order as to the validity or invalidity of the provisions of secs. 48 and 56 of the *Land Tax Assessment Act* 1910-1914 as applying to Crown lands in the absence of any allegation that a case had arisen in which it was proposed to enforce those provisions, or as to the basis of the assessment of the unimproved value of the lessees' interests in Crown leases, inasmuch as such a question may be raised by way of appeal from an assessment when made.

DEMURRER.

An action was brought in the High Court by the Attorney-General for the State of Queensland, at the relation of Goldsbrough, Mort & Co. Ltd., and by Goldsbrough, Mort & Co. Ltd. against the Attorney-General for the Commonwealth and the Commissioner of Land Tax for the Commonwealth, in which the statement of claim was as follows:—

1. The plaintiffs Goldsbrough, Mort & Co. Ltd. are a company duly incorporated and registered under the laws of the State of Victoria. They own freehold lands in the States of Queensland, New South Wales and Victoria respectively, the aggregate unimproved value whereof considerably exceeds the sum of £80,000; and they are the owners of pastoral leasehold estates in the States of Queensland and New South Wales respectively under the laws of such States respectively relating to the alienation and occupation of Crown lands, as well as other pastoral lands held on varying terms of tenure from the Crown under the laws of the State of New South Wales relating to the alienation and occupation of Crown lands, namely, leases of lands in New South Wales held under the provisions of the Western Lands Acts of New South Wales No. 70 of 1901 and No. 38 of 1905, and also conditional leases, improvement leases, scrub leases and special leases held under the relevant provisions of the *Crown Lands Consolidation Act* 1913. They also own shares in certain companies duly incorporated under the laws of New South Wales and Victoria respectively, which companies own

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

lands in fee simple and also Crown leaseholds in such States respectively. They are also mortgagees of considerable quantities of similar freehold and leasehold lands in the said States respectively, from numerous constituents or clients, on whose behalf they from time to time act in connection with the assessment and payment of land tax.

2. Some of the said leaseholds held by the plaintiffs Goldsbrough, Mort & Co. Ltd. are pastoral leaseholds for terms exceeding ten years held under the provisions of certain Land Acts of the State of Queensland by which (*inter alia*) it is provided that, where the term of the holding exceeds ten years, such term shall be divided into periods, and that the rent payable for each succeeding period shall be determined by the Land Court constituted by such Acts, and that the Court in determining the rent for any such period shall have regard (*inter alia*) to all matters which in the opinion of the Court affect the rental value of the land. And some of the said leaseholds held by the said plaintiffs are leaseholds of lands upon which natural advantages have since the rent was fixed for a term of years been discovered by reason of improvements made by the lessee whereby the market value of the leasehold of such lands has been enhanced.

3. There were at the time when the *Land Tax Act* 1910 and the *Land Tax Assessment Act* 1910 were passed by the Parliament of the Commonwealth of Australia, and there now are, in each and every State of the Commonwealth, a large quantity of lands wholly unalienated from the Crown and not let on lease by the Crown but available for alienation or leasing, and a large quantity of lands not wholly alienated in fee simple but only partly or conditionally alienated or in course of alienation in fee simple, and a large quantity of land let on lease by the Crown, all such transactions taking place under Acts of the Legislatures of the respective States.

4. The plaintiffs will contend that the purported imposition of taxation by the *Land Tax Act* 1910-1914 with which were incorporated the provisions of the *Land Tax Assessment Act* 1910-1914, whether on the owners of Crown leasehold estates or on the owners of any lands for estates of freehold, which lands

were at the date of the passing of the *Land Tax Act* 1910 part of the Crown or waste lands in any State, is invalid upon the grounds:—

(*a*) That such taxation is repugnant to certain Imperial Statutes, Letters Patent and Order in Council, and is therefore invalid under the provisions of the *Colonial Laws Validity Act* 1865. (Particulars:—Imperial Statutes 18 & 19 Vict. c. 54; 18 & 19 Vict. c. 55; 18 & 19 Vict. c. 56; 24 & 25 Vict. c. 44; 53 & 54 Vict. c. 26; Letters Patent issued by Her Majesty the late Queen Victoria on 6th June 1859 erecting part of New South Wales into a Colony under the name of Queensland; Order in Council dated 6th June 1859 providing that the Legislature of the Colony of Queensland might make laws for regulating the sale letting disposal and occupation of the waste lands of the Crown within the said Colony.)

(*b*) Alternatively with (*a*), that such taxation is repugnant to the provisions of some one or more of the said Imperial Statutes and is therefore altogether invalid; upon the ground that, if such taxation were held to be invalid in one or more States and not in some other of the said States, such taxation would discriminate between States within the meaning of sec. 51 (II.) of the Constitution of the Commonwealth of Australia, and also upon the ground that the provisions of the said Acts purporting to impose by general words taxation upon similar interests in land in all the States, would not be severable as between the States in which such taxation was held to be valid and invalid respectively.

(*c*) That such taxation is a tax upon the property of a State or States contrary to the prohibition contained in sec. 114 of the Constitution of the Commonwealth of Australia.

(*d*) That such taxation is a tax upon a governmental function or instrumentality of the Government of the State of Queensland as well as of the other States of the Commonwealth.

5. The plaintiffs will further contend that the provisions of the said *Land Tax Act* 1910-1914 and *Land Tax Assessment Act* 1910-1914, in so far as they purport to impose a tax upon (*inter alia*) the unimproved value of land granted by the States after the date of the said Acts as freeholds or for any leasehold or other interest, are not a law with respect to taxation or with

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

respect to any other matter committed to the legislative power of the Commonwealth Parliament, but are in substance and according to their true nature legislation with respect to the control and management of the waste lands of the Crown in the several States and the appropriation of the proceeds of the sale of such lands and of other proceeds and revenues of the same, and are therefore repugnant to the Constitution of the Commonwealth and to the provisions of the several Acts of the Imperial Parliament conferring upon the Legislatures of the several States respectively the control and management of the waste lands as aforesaid.

6. The plaintiffs will further contend that the provisions of the said Acts imposing such taxation upon the owners of such freehold estates as are mentioned in the first clause of par. 4 hereof are not severable from the provisions imposing taxation upon other freehold estates and that the alleged imposition of taxation on such former freehold estates is also invalid.

7. The plaintiffs will also contend that the provisions of Part VI. of the *Land Tax Assessment Act* 1910-1914 are invalid—(*a*) upon the ground that they purport to enable the Commonwealth of Australia to acquire land otherwise than in accordance with the provisions of the Constitution of the Commonwealth of Australia; (*b*) upon the ground that the provisions of such Part VI. deal with a matter other than the imposition of taxation within the meaning of sec. 55 of the Constitution of the Commonwealth of Australia; (*c*) upon the ground that the provisions of such Part VI. are not matters incidental to the execution of the power of taxation within the meaning of sec. 51 (XXXIX.) of the Constitution of the Commonwealth of Australia; (*d*) upon the ground that the provisions of such Part VI. are repugnant to the said Imperial Statutes, Letters Patent and Order in Council, and are therefore invalid.

8. In the alternative with par. 7 hereof, the plaintiffs will contend that the provisions of the said Part VI. are not applicable to the case of leasehold estates under the laws of a State relating to the alienation or occupation of Crown lands.

9. The plaintiffs will contend that the provisions of secs. 36, 39 and 40 of the *Land Tax Assessment Act* 1910-1914 purport

to impose taxation upon a subject matter of taxation other than land and that the said *Land Tax Act* 1910-1914 is a law imposing taxation which deals with more than one subject of taxation within the meaning of sec. 55 of the Constitution of the Commonwealth of Australia and is invalid, or alternatively that the provisions of the said secs. 36, 39 and 40 are invalid.

10. The plaintiffs will contend if, contrary to their contention, the said taxation of Crown leaseholds is valid, that in the application of the provisions of the *Land Tax Assessment Act* 1910-1914 to the determination of the unimproved value of a leasehold estate, held under the laws of a State relating to the alienation or occupation of Crown lands, any enhanced value given to such lands or leasehold estate by reason of any natural advantages having been discovered by reason of the improvements made thereon by the owner or his predecessor in title should be disregarded.

11. Since the passing of the *Land Tax Assessment Act* 1914 the plaintiffs Goldsbrough, Mort & Co. Ltd. and a very large number of other alleged taxpayers in the State of Queensland have been required by the Commissioner of Land Tax to furnish returns (*inter alia*) of all leasehold estates held by them under the laws of the respective States relative to the alienation or occupation of Crown lands. Similar returns have been demanded in respect of the interests held by all the persons hereinbefore mentioned respectively in all other lands or interests or alleged interests in lands as described in the said Act and all such returns will continue to be demanded in accordance with the provisions of the said Act in each succeeding year.

12. The plaintiffs claim:—

(1) A declaration that the *Land Tax Act* 1910-1914 with which is incorporated the *Land Tax Assessment Act* 1910-1914 or alternatively the *Land Tax Assessment Act* 1910-1914 is invalid upon the grounds:—

(*a*) That the provisions of the said Acts purport to impose the incidence of taxation upon all land in the Commonwealth of Australia, including all then existing Crown lands in the various States as they are from time to time granted as freeholds or are leased by or on behalf

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

of such States respectively, and upon all then existing Crown leaseholds in the said State, and are repugnant to the provisions of the said Imperial Statutes, Letters Patent and Order in Council as aforesaid respectively or some one or more of such Statutes, and are consequently invalid under the provisions of sec. 2 of the *Colonial Laws Validity Act* 1865;

(*b*) That the provisions of the said Acts purport to impose the said incidence of taxation upon certain governmental functions or instrumentalities of the said Australian States respectively, to wit that of managing controlling selling and disposing of the Crown lands of the said States respectively either in fee simple or for any lesser estate (including leasehold estates) and of receiving and using the proceeds thereof;

(*c*) That the provisions of the said Acts purport to impose the said incidence of taxation upon the property of the said States respectively contrary to the prohibition contained in sec. 114 of the Constitution of the Commonwealth of Australia;

(*d*) That the said incidence of taxation purporting to be imposed by the said Acts is not really "taxation" within the meaning of sec. 51 (II.) of the said Constitution, nor does it come within any other power of legislation of the Federal Parliament

(*e*) That sec. 36 of the said *Land Tax Assessment Act* 1910-1914 and secs. 39 and 40 of the same Act deal with more than one subject of taxation within the meaning of sec. 55 of the said Constitution.

(2) Alternatively with claim 1, for a declaration that secs. 27, 28 and 29 of the said *Land Tax Assessment Act* 1910-1914, which purport to impose the taxation described in the said Acts upon the owner of a leasehold estate held under the laws of a State relating to the alienation or occupation of Crown lands, are invalid upon the grounds similar to (*a*) (*b*) and (*c*) of claim 1.

(3) Alternatively with claim 1 (*e*), for a declaration that secs. 39 and 40 of the *Land Tax Assessment Act* 1910-1914 are invalid

as they purport to deal with a subject matter of taxation other than that dealt with by the other provisions of the Act.

(4) A declaration that Part VI. of the *Land Tax Assessment Act* 1910-1914 is invalid or, alternatively, is not applicable to the taxation of leasehold estates under the laws of a State relating to the alienation or occupation of Crown lands.

(5) A declaration that in the assessment of the unimproved value of the leasehold estates referred to in par. 10 hereof any enhanced value given to such land or leasehold estate by reason of any natural advantages having been discovered only through the improvements made thereon by the owner or his predecessor in title should be disregarded.

(6) An injunction to restrain the defendants or either of them from enforcing any of the provisions of the *Land Tax Assessment Act* 1910-1914 with respect to the making of returns or payment of taxes prescribed by the said Act, both as regards the plaintiffs Goldsbrough, Mort & Co. Ltd. and any clients for whom they act as agents and any other alleged taxpayer in the State of Queensland, either altogether or with respect to any part of the said Acts declared to be invalid.

The defendants demurred to the whole of the statement of claim as being bad in substance, and the demurrer now came on for argument.

Mitchell K.C. and Sir *William Irvine* K.C. (with them *Pigott* and *Harrison Moore*), for the plaintiffs. The *Land Tax Assessment Act* 1910-1914, in so far as it purports by sec. 29 to tax leasehold estates of Crown lands, is repugnant to those provisions in Imperial Acts, such as the *New South Wales Constitution Act* 1855, which gave to the Colonies which are now the States of the Commonwealth the control and management of the waste lands of the Crown. See sec. I. and the Schedule secs. 1, 43, 58 of the latter Act. To the extent of that repugnancy the *Land Tax Assessment Act* is, by virtue of sec. 2 of the *Colonial Laws Validity Act* 1865, invalid. The *Colonial Laws Validity Act* applies to Commonwealth legislation. See *Quick and Garran's Constitution of the Australian Commonwealth*, p. 352. That Act assumes that the Colonial Act in question is within the

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

legislative competency of the Legislature. By the various Imperial Acts which gave to the Colonial Legislatures the control and management of the waste lands, the proprietary rights which the Sovereign as owner of those lands had were vested in those Legislatures. Those rights were transferred from the Imperial Crown to the Crown in right of the Colonies. The incidence of the *Land Tax Assessment Act* upon Crown leaseholds is such that it must regulate the granting of leases by the States. There is a substantial interference with the power to lease, and so a repugnancy exists. There can be a repugnancy between two Acts which do not deal with the same subject matter. The question of repugnancy is to be decided here by seeing whether, if the Commonwealth land tax legislation is valid, the States have the control and management of their waste lands. [They referred to *Lefroy's Federal Constitution of Canada*, p. 52; *Smiles* v. *Belford* (1); *John Deere Plow Co. Ltd.* v. *Wharton* (2); *Union Colliery Co. of British Columbia* v. *Bryden* (3); *Madden* v. *Nelson and Fort Sheppard Railway Co.* (4); *Baxter* v. *Commissioners of Taxation (N.S.W.)* (5).]

[ISAACS J. referred to *Graves & Co. Ltd.* v. *Gorrie* (6); *In re R.* v. *Marais*; *Ex parte Marais* (7).]

A repugnancy also exists in respect of the taxation of freehold estates which might be granted by the States after the passing of the *Land Tax Assessment Act*, for by reason of the tax purchasers would not give so much for the land as they otherwise would. The Act, in so far as it applies to Crown leaseholds, is invalid on the ground also that it interferes with State instrumentalities. The tax is progressive, and leases for one year are exempted. If the tax were so high that it would lead persons not to take leases from the Crown for more than one year there would be a manifest interference. The tax is imposed on the difference between the actual rent and the rack rent. That interferes with the unrestricted discretion of the States to lease Crown lands for less than the rack rent. If the Commonwealth has power to tax Crown leaseholds, it has also power to charge those

(1) 1 Ont. App. Rep., 436.
(2) (1915) A.C., 330.
(3) (1899) A.C., 580.
(4) (1899) A.C., 626.
(5) 4 C.L.R., 1087.
(6) (1903) A.C., 496.
(7) (1902) A.C., 51.

leaseholds in case of non-payment of the tax: *Northern Pacific Railroad Co.* v. *Traill County* (1).

[ISAACS J. referred to *Wisconsin Railroad Co.* v. *Price County* (2); *Sargent* v. *Herrick* (3).]

If there is power to charge there is power to direct a sale in pursuance of the charge. That at once would be an interference. The tenants of Crown leaseholds should be regarded as State instrumentalities. They are the instruments adopted by the States to carry out their policy of managing the waste lands. [They referred to *Weston* v. *City Council of Charleston* (4); *Heiner* v. *Scott* (5); *Williams* v. *Attorney-General for New South Wales* (6).] Part VI. of the *Land Tax Assessment Act*, in so far as it purports to affect Crown leases is invalid. It goes beyond the incidental powers conferred by sec. 51 (XXXIX.) of the Constitution. Both the Attorney-General and the plaintiff Company are entitled to a declaratory judgment on this point: *Williams* v. *Attorney-General for New South Wales* (6); *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (7). The Act is invalid by reason of sec. 55 of the Constitution in that the imposition by secs. 39 and 40 of taxation upon shareholders of a company in respect of land of the company is not land taxation, for the shareholders of a company have no interest in that land: *Austin* v. *The Aldermen* (8). [They also referred to *Elder* v. *Wood* (9); *Manuel* v. *Wulff* (10); *Morgan* v. *Deputy Federal Commissioner of Land Tax*, (*N.S.W.*) (11).] The Act is not really a land tax Act, but so far as it applies to Crown leasehold, future as well as past, is an Act to regulate the areas in which the States shall lease their lands. The plaintiffs are entitled to a declaration as to the proper basis for the assessment of the taxable value of a lessee's interest in a Crown leasehold. The Act, in so far as it purports to impose a tax upon Crown leaseholds, is invalid under sec. 114 of the Constitution on the ground that the tax is one upon property of the States. Crown leases are frequently granted for limited

(1) 115 U.S., 600.
(2) 133 U.S., 496.
(3) 221 U.S., 404.
(4) 2 Pet. 449, at p. 467.
(5) 19 C.L.R., 381.
(6) 16 C.L.R., 404.
(7) 6 C.L.R., 469.
(8) 7 Wall., 694.
(9) 208 U.S., 226.
(10) 152 U.S., 505.
(11) 15 C.L.R., 661.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

purposes, such as cutting timber, but the land tax is to be assessed on the hypothesis that the land may be put to any use. The tax has no relation to the value of the tenant's interest, but is a regulation of the use by the States of their land. [They referred to *Peterswald* v. *Bartley* (1); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (2). The power of taxation is a power to tax citizens in respect of anything, including land and interests in land. That power is coupled in sec. 114 of the Constitution with a prohibition against taxing property of the States. The *Land Tax Assessment Act* by sec. 29 purports to tax citizens in respect of interests which are not in them but in the States. A tax upon the interest of a Crown tenant under any existing or future lease is a tax upon the letting of Crown land, and that is within the prohibition of sec. 114. That section should be construed having regard to the purposes with which it was enacted, and that purpose is to be gathered from the history of the Act and the whole language of the Constitution: *Prigg* v. *Commonwealth of Pennsylvania* (3); *Vardon* v. *O'Loghlin* (4). The word "property" in sec. 114 includes the waste lands of the States, including the exercise of all the powers included in property. That includes the right to create freehold or leasehold estates in the lands. Every act which the Crown does as to those lands is the exercise of the rights of property. A tax upon any estate or interest that may be carved out of those lands is a tax upon the carving out. A tax upon the beneficial interest of a person in an existing contract with the Crown is a tax upon the contract, or upon the function of entering into the contract: *Weston* v. *City Council of Charleston* (5). It affects a function of government: *Bank of Commerce* v. *New York City* (6). That principle has been applied in the United States to a tax upon Government stock in the hands of an individual: *Pollock* v. *Farmers' Loan and Trust Co.* (7).

[HIGGINS J. referred to *State Freight Tax Case* (8).

(1) 1 C.L.R., 497, at p. 510.
(2) (1897) A.C., 231.
(3) 16 Pet., 539, at pp. 608, 610.
(4) 5 C.L.R., 201, at p. 215.
(5) 2 Pet., 449.
(6) 2 Black, 620, at p. 628.
(7) 157 U S., 429, at pp. 584, 586.
(8) 15 Wall., 232.

ISAACS J. referred to *Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (1).]

In the United States it has also been held that a State cannot impose a tax upon land of the United States so long as any real interest is still in the United States: *Stearns* v. *Minnesota* (2). See *Elder* v. *Wood* (3).

[ISAACS J. referred to *Jetton* v. *University of the South* (4).]

Starke and *Mann*, for the defendants, who referred to *Calgary and Edmonton Land Co.* v. *Attorney-General of Alberta* (5), were not called upon.

Cur. adv. vul

The following judgments were read:—

June 15.

GRIFFITH C.J. Notwithstanding the very careful and elaborate arguments addressed to us by Mr. *Mitchell* and Sir *William Irvine*, I am unable to entertain any serious doubt upon any of the points which we are called upon to decide.

The first point made, which was insisted upon at some length, was that the provisions of the *Land Tax Assessment Act* 1914 under which leasehold estates in Crown lands are made liable to land tax are invalid under the *Colonial Laws Validity Act* 1865 (28 & 29 Vict. c. 69) on the ground that the provisions attacked are repugnant to laws of the Parliament of the United Kingdom (of which the Act 18 & 19 Vict. c. 54 may be taken as an instance), by which full powers of legislation with respect to waste lands of the Crown in the Australian Colonies were vested in the Legislatures of those Colonies. It is unnecessary to consider whether if those powers had been in any way qualified by the Constitution of the Commonwealth the *Colonial Laws Validity Act* would have been applicable to the case, since the powers whatever they were, were expressly continued by sec. 107 of the Constitution, which provides that "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the

(1) 5 C.L.R., 818.
(2) 179 U.S., 223, at p. 251.
(3) 208 U.S., 226, at p. 231.
(4) 208 U.S., 489.
(5) 45 Can. Sup. Ct. Rep., 170, at p. 193.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Griffith C.J.

Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

The repugnance, therefore, if any there be, is between the provisions impeached and the Constitution, and the *Colonial Laws Validity Act* is irrelevant. As to the nature of the powers of the State Legislatures and State Governments to deal with Crown lands, it is sufficient to say that under the Constitution they are complete and exclusive.

The attack upon the validity of the tax was presented in various forms, which, I think, may be fairly summarized under three heads: (1) That the Act, although purporting to be an Act imposing taxation, is in substance, so far as it imposes a tax upon Crown leaseholds, an Act attempting to control the administration of Crown lands; (2) That, if it is to be regarded as a taxing Act, it imposes taxation upon property belonging to the States, which is forbidden by sec. 114 of the Constitution; (3) That it is invalid as infringing the rule laid down by this Court in *D'Emden* v. *Pedder* (1) and *Baxter's Case* (2).

With regard to the first ground, it has been often pointed out that the Court will have regard to the substance of an enactment and is not confined to its mere form. It is sufficient to mention *Barger's Case* (3); *Union Colliery Co.* v. *Bryden* (4); and the very recent case of *John Deere Plow Co. Ltd.* v. *Wharton* (5), in which the Lord Chancellor *Haldane*, delivering the judgment of the Judicial Committee, pointed out that, although provisions similar to those of the Provincial Act then attacked might, if forming part of a Statute of general application, be within the competency of the Provincial Legislature, yet, having regard to the whole scheme of the Act in question they must be taken to have been directed to a purpose not within their competency. It is, therefore, necessary to inquire what is the real design and purpose, or, to use Lord *Watson's* phrase, the "pith and substance" of the Act.

(1) 1 C.L.R., 91.
(2) 4 C.L.R., 1087.
(3) 6 C.L.R., 41.
(4) (1899) A.C., 580.
(5) (1915) A.C., 330.

The *Land Tax Assessment Act* as originally passed did not affect Crown leaseholds except in cases where the lessees were substantially the absolute owners. By the Amending Act of 1914 its operation is extended so as to affect a large number of other Crown leaseholds, in many of which the lessees' use of the land is by law burdened with onerous conditions that, in some cases, deprive the lessee of the full beneficial use of the land leased. It is said that the imposition of a land tax on such leaseholds will, in effect, discourage their acquisition, and that this is the real design and purpose of the Act.

Sec. 11 of the Principal Act enacts that land tax shall be payable by the owner of land upon the taxable value of all the land owned by him and not exempt from taxation. Sec. 27 deals with the case of owners of leasehold estates in land under leases made or agreed to be made after the commencement of the Act, and, as amended by the Act of 1912, provides that he shall be deemed to be the owner of land of an unimproved value equal to the unimproved value of his estate, by which I understand the owner of a like estate in land of the same unimproved value. All leases from the Crown are to be treated as made after the commencement of the Act. Sec. 28, as amended by the same Act, provides that in such cases the unimproved value of a leasehold estate in land means the value of the amount (if any) by which $4\frac{1}{2}$ per cent. of the unimproved value of land exceeds the rent reserved by the lease for the unexpired term, the excess being capitalized at the same rate. This is, on its face, an attempt to define the value of the term created by the lease, which value is to be the subject of taxation. In every case of a lease the ownership of the land is divided between the lessor and the lessee. The value of the lessee's share in the total ownership is the value of the term. The residue represents the value of the reversion, which remains in the lessor. It appears to me to follow that the plain design and purpose of this enactment is that the lessee shall pay land tax upon, and according to, the value of his interest in the land, and that as such it forms a natural part of a scheme of general land taxation. The first objection therefore fails.

A subsidiary point was made that the rule for assessing the

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY GENERAL FOR THE COMMONWEALTH.

Griffith C.J.

taxable value of leases, as applied to Crown leases under which the lessee has limited rights of user of the land, would operate to make the taxable value of the term much greater than its real value. I do not think that this objection, if sustainable in fact, would affect the validity of the tax. But I am strongly disposed to think that when the Act says, as it does, that the lessee is to be deemed to be the owner of a like estate in land of the same value, it is implied that the "land" of which he is to be deemed to be the owner means land subject by law to the same disabilities, or, as it may be said, struck with the same qualified sterility, as that of which he is the lessee. If this is so, there is no foundation in fact for the objection.

The considerations to which I have already adverted show that the subject of taxation is the interest of the lessee in the land. That interest cannot, in any relevant sense of the term, be called "property belonging to the State."

It was, however, contended that these words mean not only the corporeal or incorporeal entity called property, but also include the right of alienation, and that the exercise of this right is in effect taxed by the provisions impeached. The obvious answer to this contention is that the right of alienation is a part or incident of property, and not something extrinsic or additional to it. The argument involves reading the words of sec. 114 of the Constitution as forbidding the imposition of any taxation the burden of which falls directly or indirectly upon property belonging to the State. The question of the ultimate incidence of the burden of taxation is an interesting and sometimes a difficult one, but it has no bearing on the construction of sec. 114. The second objection therefore also fails.

The remaining question is whether the provisions impeached contravene the rule laid down in *D'Emden* v. *Pedder* (1), which was stated in these words: "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." It has often been pointed out that

(1) 1 C.L.R., 91, at p. 111.

this rule, the converse of which has always been understood to apply for the protection of the States, is a rule of construction, and is merely an application of a general rule applicable to the construction of all contracts, the principle of which is clearly expressed in the well known case of *The Moorcock* (1). It is sometimes called the doctrine of implied covenants or stipulations, that is, stipulations which upon the construction of the whole instrument appear to have been necessarily intended by the parties.

In order that the doctrine may be applied it must appear clearly that the implied obligation or restriction set up *must* have been intended by the parties to the compact.

In *Deakin* v. *Webb* (2) it was contended that the rule, being based upon necessary implication, could not be extended beyond the necessity, and that upon a consideration of the whole Constitution it would be found that the rule did not extend to the interference with the Commonwealth power then in question. The Court, accepting the first contention, proceeded to deal with the matter on that basis. It is manifest that, since the rule is founded upon the necessity of the implication, the implication is excluded if it appears upon consideration of the whole Constitution that the Commonwealth, or, conversely, the State, was intended to have power to do the act the validity of which is impeached. Now, at the time of the establishment of the Commonwealth by far the greater part of its territory consisted of Crown lands which, as was expected and hoped, would in the natural course of settlement become private property, and a very large part of these lands was held under Crown leases. Can it then be said, as a matter of construction, that the parties to the Federal Constitution *must* have intended that the power of taxation which was conferred in general terms by sec. 51 should not be exercised in respect of those lands when they became private property, or in respect of any proprietary interest that private persons might acquire in them, so that in effect the whole of these vast areas were, even in private hands, to be for ever exempt from Commonwealth taxation? The question answers itself. A further answer to the argument is that, for reasons

(1) 14 P.D., 64. (2) 1 C.L.R., 585.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Griffith C.J.

already given, the taxation impeached cannot be regarded in any relevant sense as an interference with any legislative or executive power of the States. There is, therefore, no foundation for the argument that the rule applies to the present case.

The validity of the whole Act was also impeached on the ground that it offends against the provisions of sec. 55 of the Constitution by dealing with more than one subject of taxation, inasmuch as by secs. 39 and 40 it imposes a tax upon members of a joint stock company in respect of land owned by the company. This point was expressly decided by the Court in *Morgan's Case* (1). The arguments sought to be adduced as a basis for asking the Court to review that decision did not go further than to establish a position which the Court then accepted and thought irrelevant. Mr. *Mitchell* therefore very properly did not do more than repeat and insist on the objection. I see no reason for doubting the correctness of the decision in *Morgan's Case.*

The plaintiffs also contended that the provisions of sec. 48 (relating to the acquisition of a taxpayer's interest in land in certain cases), and of sec. 56, which makes the tax a charge upon the interest taxed, are invalid as applied to Crown lands. It is not alleged that any case has yet arisen in which it is proposed to enforce these provisions in such a case. We intimated during the argument that in our opinion the plaintiffs are not at present entitled to claim such a declaration. It is therefore unnecessary to express any opinion upon the merits of the objection, which in any view does not go to the validity of the whole Act.

The plaintiffs also ask for a declaration as to the basis of assessment of the taxable value of the lessees' interests in Crown leases. The Act provides that such questions may be raised by way of appeal from the assessment when made. Without expressing any opinion as to the competency of the Court in a proper case to expound the law in anticipation of an assessment, the Court, as already intimated, does not think that it ought to do so in this action.

My brother *Gavan Duffy*, who is unable to be present, desires me to say that he concurs in the conclusion at which I have arrived.

(1) 15 C.L.R., 661.

Isaacs J. The grounds upon which the Land Tax Act and the Land Tax Assessment Acts were impeached are reducible to five.

(1) That the provisions as to Crown leases are, by force of the *Colonial Laws Validity Act* 1865, absolutely void and inoperative as being repugnant to sec. 2 of the Imperial Act 18 & 19 Vict. c. 54.

(2) That the inclusion of Crown leases, and particularly future Crown leases, is contrary to an implied prohibition of the Federal Constitution, by which the power of taxation is forbidden so far as it extends to interfere with State functions and instrumentalities.

(3) That the Federal taxation of State Crown leases is forbidden by sec. 114 of the Constitution.

(4) That Part VI. of the Act is invalid, because it attempts to force on the State a tenant against its will, and so to affect its reversion.

(5) That the provisions in sec. 39 as to shareholders of a company amount to taxation on personal property, namely, shares, and not to a tax on land, and are therefore a contravention of sec. 55 of the Constitution.

In addition to those objections to the Acts themselves, a declaratory interpretation of the Act was sought. This last claim was dealt with during the argument by a discretionary refusal to make any declaration in the circumstance of this case, assuming, without deciding, that the plaintiffs have disclosed a state of facts upon which a declaration could agreeably to recognized practice be made. A declaratory decree is always a matter of judicial discretion. In *Pirthi Pal Kunwar* v. *Guman Kunwar* (1) the Privy Council said:—"It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the case, to grant the relief prayed for. There is so much more danger than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation." Now, I do not mean

(1) 17 Ind. App., 107; 17 Calc., 933.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

to suggest that this action partakes in the least of the nature there specially indicated; but, were this Court to encourage suits for anticipatory interpretation of Commonwealth legislation, a vista of judicial occupation would present itself, of which the limits are not easy to discern.

I turn now to the various objections left for decision.

1. *Colonial Laws Validity Act* 1865.—The argument on this question assumed as a starting point that apart from the effect of the Statute 28 & 29 Vict. c. 63, the legislation is valid, that is, it is within the ambit of the power of taxation properly construed. Starting with that assumption, it is then said that as the Act 18 & 19 Vict. c. 54, an Imperial Act, expressly declares that the control and management of waste lands in New South Wales are to be vested in the Legislature of that Colony, it follows that any exercise of the power of taxation by the Commonwealth Parliament which, however authorized by the Constitution itself, in fact interferes with the discretion of the New South Wales Legislature in relation to waste lands, is "repugnant" to the Act 18 & 19 Vict. c. 54, and therefore struck by sec. 2 of the Act of 1865.

The cases to which that section applies are not, I apprehend, in doubt, more particularly after the expression of the Lord Chancellor in *Marais' Case* (1). It declares the supremacy of the Imperial Parliament whenever it chooses to legislate for any portion of the Empire, notwithstanding any local enactment on the same subject. This is a doctrine inherent in the legal and constitutional relations of the constituent portions of the Empire, and one which a Court of law must recognize, whatever political objections might be urged to the Imperial exercise of power.

Next, the section declares that the local enactment is to be void and inoperative only to the extent of the repugnancy. I am not prepared at the present moment to assent to the view advanced, that the words "absolutely void" have no further effect than the other word used, namely, "inoperative" or, in other words, that the effect of the section is suspensory only. It is not necessary here to determine that, but there are considerations such as those mentioned in *Maxwell on Statutes*, pp. 347-348, which lead me

(1) (1902) A.C., 51, at p. 54.

to reserve my opinion as to the correctness of that view. In this connection it may be observed that in the opinion of Sir *Roundell Palmer* and Sir *Robert Collier* of 28th September 1864 —the opinion leading to the passing of the *Colonial Laws Validity Act*, and found at length in *Blackmore's Constitution of South Australia* (at p. 67), and to which I refer, it is hardly necessary to say, only as the opinion of most eminent lawyers— the effect of repugnancy at common law is said to be that "the subject matter of the invalid part of the legislation is wholly *ultra vires*." That refers, of course, to antecedent Imperial law; and a question remains whether, at common law, a subsequent Imperial Act does or does not repeal *pro tanto* any repugnant local enactments, and whether the *Colonial Laws Validity Act* alters the common law effect of repugnancy between Statutes. These are highly important considerations, which are mentioned as not overlooked, but which are not necessary to be determined now.

Whatever be the effect of the words "absolutely void" and "inoperative," there must be shown to be an Imperial Act which, for the purpose of governing the Commonwealth or part of it, either alone or together with some other portion of the Empire, in respect of taxation, enacts something repugnant to the provisions of the Acts now impeached. If "repugnant" means inconsistent, then this particular ground of objection must be idle, because the assumption is that the Acts are within the power, and there is no Imperial Act making any inconsistent provision with respect to taxation.

For the maintenance of the proposition advanced, learned counsel for the plaintiffs was driven to rely entirely upon his interpretation of the word "repugnant." He urged that "repugnancy" was not equivalent to "inconsistency." Without supplying any synonym, the summation of the contention was that "repugnancy" indicated adverse or inimical tendency, that the Crown lease provisions in the Commonwealth Act were repugnant, because they naturally in their practical operation detracted from what the State might desire to attain in disposing of its waste lands. I say "might desire," because it is the State's power under the Imperial Acts that has to be guarded, not the actual exercise of that power by means of a colonial Act.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

That the meaning suggested is not the true meaning of "repugnant" in sec. 2 of the *Colonial Laws Validity Act* is really beyond serious question. The term has been employed in similar connection from the earliest times of colonization. *Stokes*, writing in 1783, quotes it in his *Constitution of the British Colonies* (p. 27) as contained in commissions to Governors, and in Colonial Charters. Many Statutes *in pari materiâ* used the same word, as, for instance, 7 & 8 Will. III. c. 22, 3 & 4 Will. IV. c. 59 (sec. 56), 6 Vict. c. 22, and others, including, it may be pointedly observed, the very Act 18 & 19 Vict. c. 54 which is relied on. In the history of the extraordinary circumstances leading up to the passing of the *Colonial Laws Validity Act*, its meaning was not considered doubtful by the Imperial law officers. The first set of questions put to them and the answers they gave are set out in Mr. *Keith's* informative work, *Responsible Government in the Dominions*, at pp. 404-407.

Reference to questions 2 and 3 and the answers thereto indicates that the law officers considered "inconsistency," "repugnancy" and "contrariety" as interchangeable terms in this connection.

I entertain the same opinion; it is supported by such cases as *Gentel* v. *Rapps* (1); and, consequently, I hold the first ground fails.

2. *Interference with State Functions.*—This branch of the argument attacks the legislation as not authorized by the Commonwealth Constitution—and therefore *ultra vires*. This compels us to look closely at what has been done. The *Land Tax Act* 1910 (No. 21 of 1910), as amended by No. 28 of 1914, imposes a land tax at one rate when the owner is not an absentee, and at another rate when he is. For the definition of "owner" we have to look to the Assessment Act, which is declared to be incorporated and read with the Land Tax Act; and for the definition of "land" we turn to the *Acts Interpretation Act* 1901, sec. 22. The central point relevant to this particular objection is this: that the land tax is general, and, so far as its own terms are concerned, any exceptions have to be found specified. I say nothing about the common law exemptions of the Crown, or the

(1) (1902) 1 K.B., 160, at p. 166.

effect of sec. 2 of the *Acts Interpretation Act* upon the Crown, in right of a State. But for the purpose of ascertaining the true meaning and effect of these taxing Acts the position I have indicated is clear.

The Parliament has not taken as the *discrimen* for imposing taxation the sale or leasing by the Crown of State lands. Everybody is *primâ facie* taxed as owner in respect of the "land" he owns.

If no exception were made, it would be difficult to see how it could be urged that State functions were attacked, unless on the principle that Australian citizens who had obtained property from the States were specially privileged. No trace of this is to be discovered in the Constitution.

But various exceptions are made in the Tax Statutes. Notably, sec. 13 exempts "(*a*) all land owned by a State." Sec. 14 qualifies this by enacting that the exemption is limited to the State, and does not extend to any other person who is the owner of any estate or interest in the land. What is included in "land taxation" is excepted in favour of the State—all its rights and interests, whatever they may be. But its purchasers and lessees are not exempted. As to its lessees, at first sec. 29 of the Assessment Act exempted all Crown lessees, except perpetual lessees and purchase lessees. The latest Act amends this by reducing the area of exemption, and putting certain lessees, previously specially favoured, back into the line of liability in which the people of Australia generally stand. At first the State origin of the property was as to them a *discrimen* of exemption, now it has ceased to be so; but it has not become a standard or a special reason for taxation. Is it, then, forbidden by the Constitution?

It is, of course, conceded that in themselves the words of the power of taxation are large enough to include all that has been done. They are contained in sec. 51 in these terms:—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (II.) Taxation; but so as not to discriminate between States or parts of States."

What has been done is taxation in form and legal effect. So much is not denied. But the Court is asked to say that the

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

legislation is unauthorized, because the "pith" and "substance" of the inclusive taxation of Crown lessees is that it is a penalty on them, that it is a deterrent on them becoming or continuing to be Crown lessees. That, it is said, is an interference with State functions, or, to use a metaphor that has been veritably hunted to death, an interference with State "instrumentalities." In that expansive term is included every factor that is essential to the management of Crown lands, every factor *sine quâ non*, animate and inanimate, concrete and abstract, including the Governor of the State, the Minister, the State officials, their executive acts, the land, the lease, and even the Crown lessee himself and the money he pays or would otherwise be prepared to pay to the State as lessee. I think the high-water mark of the argument as to instrumentalities was reached when it was urged that the lessee, who is, so to speak, the adverse party to the Crown in relation to the land, is himself a State instrumentality. The word is nowhere found in the Constitution, and is, I think, on the whole useless and misleading. If a Crown lessee is a State instrumentality for developmental purposes, so is a Crown purchaser in fee. And as in Australia an enormous proportion of the population derive directly from the Crown, the result of giving effect to the argument would be either to make land taxation almost impossible, or to throw the whole burden of it on the balance of landed proprietors, if indeed the same argument did not follow them as instrumentalities more or less removed. But for the earnestness with which the view was pressed, I should have thought it incapable of serious presentment.

The question is simply one of *ultra vires* as understood in British jurisprudence, and this ought and must in my opinion be determined by a consideration of the terms of the Constitution construed according to recognized canons of interpretation.

One canon of interpretation that has always been applied by this Court to the Federal Constitution has been this: that whenever a Commonwealth power is asserted, some words creating and supporting the power must be found in the Constitution itself. Here the word is found, namely, "taxation," and the observations I made in *Barger's Case* (1) as to the importance of the

(1) 6 C.L.R., 41, at pp. 81 *et seqq.*

power, the primary extent of the grant in par. II. of sec. 51, and the limitations placed upon that grant, I adhere to and do not verbally repeat.

I think there is an apposite passage on the duty of a Court in interpreting a Statute, contained in the judgment of Lord *Haldane* L.C. in the case of *Inland Revenue Commissioners* v. *Herbert* (1). Lord *Haldane* said :—"I think it worth while to recall a principle which must always be borne in mind in construing Acts of Parliament, and particularly legislation of a novel kind. The duty of a Court of law is simply to take the Statute it has to construe as it stands, and to construe its words according to their natural significance. While reference may be made to the state of the law, and the material facts and events with which it is apparent that Parliament was dealing, it is not admissible to speculate on the probable opinions and motives of those who framed the legislation, excepting in so far as these appear from the language of the Statute. That language must indeed be read as a whole. If the clearly expressed scheme of the Act requires it, particular expressions may have to be read in a sense which would not be the natural one if they could be taken by themselves. But subject to this the words used must be given their natural meaning, unless to do so would lead to a result which is so absurd that it cannot be supposed, in the absence of expressions which are wholly unambiguous, to have been contemplated."

So far as the scheme of the Constitution is concerned, it is, as pointed out in the *Colonial Sugar Refining Co.'s Case* (2) and always recognized by this Court, to transfer and grant certain powers to the Commonwealth, and, subject to that transfer and grant, to leave the State powers untouched, except where expressly excluded. The effect of the scheme is therefore satisfied by pointing to the express power of taxation; and apart from express limitations, which of course include whatever is necessarily implied from the words used when they are properly construed, the language of that power must, in accordance with the principle so clearly stated by Lord *Haldane*, be given its full natural meaning as applied to a representative Legislature. When that

(1) (1913) A.C., 326, at p. 332. (2) (1914) A.C., 237 ; 17 C.L.R., 644.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

point is reached, it is no answer to say that there is an implied prohibition, somewhere in the structure of the Constitution, not contained in any word or phrase and not deducible by means of any principle of construction or interpretation by which words of general import are cut down by reference to their subject matter. See *Webb* v. *Outrim* (1). As to the subject matter, it is such as demands the very widest connotation, consistent with established canons of construction, and I may refer to the language used in *Nicol* v. *Ames* (2) which I quoted in *Barger's Case* (3) as according with my own view on this question.

If, therefore, we find any inconsistency or repugnancy, whatever signification may be given to the latter word, between the Act of 1855 and the Act of 1900, then, on ordinary principles of statutory construction, the later will of the Imperial Parliament must prevail. And not only is that the inevitable consequence where nothing is expressly said upon it, but in the case of the Australian Constitution very great care has been taken to place that result beyond controversy. In the Constitution itself, we find sec. 106 declaring that the State Constitution is to be "subject to this Constitution"; that is, State powers are to give way to the requirements of the Federal Constitution. If they are repugnant to that Constitution, then they *pro tanto* cease to exist.

If there still exists a State power of legislation, it may be exerted, but with the consequence expressed in sec. 109 that wherever it is found to be inconsistent with a law of the Commonwealth it is *pro tanto* invalid. I draw attention to the word *invalid.*

And then, in covering sec. V. of the Constitution Act itself, that Act (which includes the Constitution), and all Commonwealth laws made under it, are to be binding on the Courts, Judges and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State. In other words, there is no law possible which a State may pass which can affect the validity and binding force of a Commonwealth law supported by the Constitution. How, then,

(1) (1907) A.C., 81, at p. 91. (2) 173 U.S., 509, at p. 515.
(3) 6 C.L.R., 41, at p. 81.

can it be said that a Commonwealth taxing law must be invalid if it conflicts with a State law, actual or potential, on the subject of Crown lands?

If, indeed, it could be shown that the Commonwealth Act was not really taxation, but only colourably so, being in its true construction and effect an attempt to manage and control the Crown lands of the State of New South Wales or any other State, it would necessarily fail for want of power to make it. It would then be an Act of a totally different character. I have dealt with this aspect of the case also in *Osborne's Case* (1), and what is there said may be taken as incorporated now. There is a passage in the opinion of Sir *Roundell Palmer* and Sir *Robert Collier*, above referred to, which may with advantage be quoted. It is there said:—"It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the *object*, the *purpose*, and the *intention* of the enactments is the same; it need not be expressed in any recital or preamble; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence."

The question according to that opinion, with which I respectfully agree, is whether the "effect" that is the legal effect, or as stated later the "legal operation," is to regulate the management and control of Crown lands.

An Act of which, when the "substance" (*Quebec Case* (2)) or the "pith and substance" (*Bryden's Case* (3)) is ascertained, it is truly said that it is legislation on an unauthorized subject, is so far invalid. The *Quebec Case* was such, because the Act, when stripped of what I may term inactive expressions, remained with provisions operative only on an unauthorized field. *Bryden's Case* also was such a case. The regulations there impeached and defensible only if they regulated coal mines, were found, as pointed out in *Cunningham* v. *Tomey Homma* (4), not to be aimed at the regulation of coal mines at all.

When the Acts here in question are examined as closely as you please, there is no reason whatever for saying that taxation

(1) 12 C.L.R., 321, at pp. 360-362.
(2) 3 App. Cas., 1090, at p. 1099.
(3) (1899) A.C., 580, at p. 587.
(4) (1903) A.C., 151, at p. 157.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

is not of their "pith and substance." There is indeed nothing else. They may, possibly, not by means of their legal operation as taxing Acts but entirely outside their legal operation, introduce secondary business considerations affecting the mind of an intending settler. So may any tax—income tax or other tax; so may any particular Customs duty. But the interrelation and interaction of circumstances, whether arising from natural or artificial causes, are inevitable in civilized society, and if that were sufficient to invalidate a law otherwise within the terms of a power to make it, the Commonwealth and States alike would be brought to a legislative standstill. I refer on this point to some observations of mine in *Osborne's Case* (1).

One further observation is needed. It was suggested that even if taxation of land already leased by the Crown were permissible, the antecedent declaration of such taxation was not. It was said to be in effect equivalent to a statement that if a citizen of the State were to desire to lease land from the Crown, he would be prevented from offering so much, and the State would be prevented from receiving so much, as if that threatening declaration were absent. In other words, it is an Act *in terrorem*. There is no substance whatever in the distinction. The taxing Act is always speaking in the present. It does not affect to change or menace men's actions, but is a standing declaration of the law with respect to landed estates as they appear to exist at a given moment. It might as well be said that the Constitutional power to pass such an Act is a constant menace, or that a Commonwealth income tax would be a constant interference with the States' power of regulating intra-State trade, or that the State income tax is a perpetual interference with the freedom of inter-State trade guaranteed by sec. 92 of the Constitution.

3. *Section* 114.—This ground is rested, so far as I could gather, upon the notion that the States governmental interest in the development of its lands is "property" within the meaning of the section. The *Steel Rails Case* (2) decided that "property," within the meaning of the section, meant merely the physical substance of the thing possessed. But whether that is so or not,

(1) 12 C.L.R., 321, at p. 361. (2) 5 C.L.R., 818.

the tax, as already pointed out, is not placed on the State, or in respect of any interest remaining in the State. It is placed on the lessee alone, and in respect of what he himself possesses.

Any charge or other remedy to enforce the tax affects the lessee's interest alone, and there is nothing said which in any way affects any rights which the State may have. The lessee in all respects is in no different position proportionately to his interest from that of a freeholder, and unless governmental power is, as argued, equivalent to property, the objection is not sustainable. There is a case where the Privy Council dealt with this very point. In the *Fisheries Case* (1) Lord *Herschell*, speaking for a very powerful Board, said :—" It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion." This broad distinction was again adverted to in *Ontario Mining Co.* v. *Seybold* (2). There can be no distinction in this respect between legislative and administrative powers. In no sense, then, is State property made subject to the land tax.

4. *Part VI.—Acquisition of Land.*—The power to acquire property the subject of tax, either by way of forfeiture or on terms which assume the accuracy of the owner's valuation, is a familiar incident of taxation enactments. I adhere to the views I expressed as to this section in *Osborne's Case* (3).

5. *Shareholders under Section* 39.—This question received most careful consideration in *Osborne's Case* (4) and in *Morgan's Case* (5). Learned counsel for the plaintiffs, however, desired to draw the Court's attention to a line of cases which he said would show the former conclusions of the Court were erroneous, because they established that shareholders have under English law no individual right in the company's property, but merely a right to a share in the company itself, which is personalty, not realty, and in winding up only is there a right to participate in the division

(1) (1898) A.C., 700, at p. 709.
(2) (1903) A.C., 73, at p. 82.
(3) 12 C.L.R., 321, at p. 371.
(4) 12 C.L.R., 321.
(5) 15 C.L.R., 661.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Isaacs J.

of any surplus. In deference to a weighty suggestion, he did not proceed with this argument, but at my request handed me a list of the cases. I have carefully read and considered them, though without the aid of argument. They have not altered my previous opinion. One of them, *Watson* v. *Spratley* (1), contains expressions (*per Parke* B., at p. 244) which help the conclusion I had already taken. They certainly all very strongly support the view of the rights of a shareholder under English legislation above stated, as presented by learned counsel. But the matter does not depend upon that.

A share is, according to ordinary statutory law, personalty and not realty. The corporation is the sole owner of the corporate property, and therefore of the land which is taxed, and no shareholder can assert any right to the land *in specie*. All he has is his share in the company. But the *Land Tax Assessment Act* does not purport to tax the "share." The land owned by a company may form a comparatively small portion of its property or productive capacity—for instance, a shipping company—and the land alone comes within the purview of sec. 39. The share is only taken as the proportionate standard of the shareholder's interest in the land and the measure of his separate responsibility in respect of the joint responsibility of all for the land tax.

Personalty is not taxed, and the Act does not purport to tax it. The land value alone is the subject of taxation, and sec. 39 assumes to declare as a competent act of legislation, and for the purpose of payment, that the shareholders who, notwithstanding the undoubted separate, though factitious and abstract, entity of the corporation and its legal and equitable ownership of the land, are the persons really interested when the fundamental question of benefit is considered, are to be deemed owners for the purpose of the Act. This gives rise to the questions: (1) whether taxation of land includes the power to declare a shareholder liable for the tax on land owned by the corporation, and (2) whether as between the Commonwealth's power of taxation and its power with respect to corporations on the one hand, and the State's power of regulating the ownership of land and regulating companies on the other, the legislation is justified. In other

(1) 10 Ex., 222.

words, it may present a question either of simple power or of conflict of powers between Commonwealth and State. If the legislation in sec. 39 be *ultra vires*, it is clearly distinct and severable, and the other portions of the Act—which alone are material here—are unaffected. But there is no attempt to deal with more than one subject of taxation, so as possibly to bring to the ground the whole fabric of land taxation as a violation of sec. 55 of the Constitution, and throw the finances of the Commonwealth into disorder.

If the Statute plainly and unequivocally said that two separate subjects should be taxed as to leave no room for doubt, the Court might have a clear, though regretful, duty to perform; but the limitations of sec. 55 are too well known to permit of the belief, without such unmistakable expression, that Parliament intended its enactment to be self-destructive.

For these reasons, the Statutes are not open to any of the objections taken, and the defendant is entitled to judgment.

HIGGINS J. I concur with the view that the demurrer should be allowed, and this action dismissed. I want to add a few remarks on certain of the points argued; but in selecting these points I must not be taken as having omitted to consider the other points raised in the elaborate arguments of counsel.

As the Chief Justice pointed out during the argument, the State Constitution and the powers of the State Parliament continue as at the establishment of the Commonwealth, under the express words of our Federal Constitution (secs. 106, 107); and, amongst the rest, the State Constitution conferred on New South Wales by Act 18 & 19 Vict. c. 54 continues, with complete power for the New South Wales legislation over the Crown lands, "the entire management and control of the waste lands belonging to the Crown in the said Colony." Any Act passed by the Federal Parliament purporting to manage or to control any of these lands would be outside the ambit of the powers conferred on the Federal Parliament by sec. 51 of the Constitution, and void; and there would be no need of bringing in aid the provisions of the *Colonial Laws Validity Act*. Sec. 2 of this Act obviously refers to the case of a colonial legislature making a law which, but for

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Higgins J.

the existence of some Act of the British Parliament extending to the Colony, is within the ambit of its powers, but which is, in some one or more provisions, "repugnant" to the British Act. It is, therefore, hard to conceive of any law of the Federal Parliament *within its powers* that would be "repugnant" to the Act 18 & 19 Vict. c. 54. The repugnancy must be between the Commonwealth law and the 18 & 19 Vict. c. 54—not between the Commonwealth law and the State Act. What does "repugnant" mean? I am strongly inclined to think that no colonial Act can be repugnant to an Act of the Parliament of Great Britain unless it involve, either directly or ultimately, a contradictory proposition—probably, contradictory duties or contradictory rights. If the Federal Parliament, in pursuance of its power to acquire land, were to vest land in A, and the State Parliament were to say that it vests it in B, there would be no repugnancy within the *Colonial Laws Validity Act*; for the repugnancy would be between the Federal law and the State law, and under sec. 109 of the Constitution the Federal law prevails. By sec. 106, the Constitution of the State continues, but subject to the Federal Constitution. But if it is the British Parliament that vests the land in B, there is a repugnancy; and the British Act prevails. Assuming now that this Land Tax Act is an exercise of the power of taxation within sec. 51 (II.) of the Constitution—and I think that it is—it prevails over any State law that conflicts with it; and it is not "repugnant" to the British Act 18 & 19 Vict. c. 54 by reason merely of its hampering or prejudicially affecting the policy or scheme devised by the State Legislature for dealing with its Crown lands. There is not, indeed, any allegation in the statement of claim that the Land Tax Act has such an effect; but, even if there were such allegation, it would not affect the result. There cannot be two law-making bodies operating over the same area and on the same persons—even if the law-making bodies legislate for different subject matters—without frequent mutual interaction and disturbing influence; but this does not show that the laws of either Legislature are repugnant to the British Act which creates the other Legislature.

Then it is said that this tax is a tax on State instrumentalities; and the doctrine of *D'Emden* v. *Pedder* (1) is invoked. That

(1) 1 C.L.R., 91.

case is binding on this Court, and is not attacked; but I ventured to express some thoughts about it, on appropriate occasions, in *Baxter* v. *Commissioners of Taxation* (1) and in *Attorney-General for New South Wales* v. *Collector of Customs* (2). In effect, in sec. 51 (II.) of the Constitution, where the Federal Parliament is given power of taxation, "but so as not to discriminate between States or parts of States," we are to read in, as a second exception, the words "and so as not to tax State instrumentalities." In this case Mr. *Mitchell* evidently found a difficulty in finding his "instrumentalities"; but eventually he said that the Crown lessees are State instrumentalities—at all events those who hold under improvement leases. I do not think that the lessees would recognize themselves in this character. They take the produce, not the State; they hold adversely to the State; their rights, such as they are, are deducted from the State's rights. They are not agents for the State.

But I confess that I have felt some difficulty as to the case of *Weston* v. *City Council of Charleston* (3), where it was held that the City of Charleston could not tax stock of the United States. *Marshall* C.J. in that case, indeed, distinguished the case of Government lands sold from the case of Government stock sold, saying that such lands were subject to State taxation. Yet it is obvious that the fact that such lands are taxable must affect the selling price of other Government lands. However, rightly or wrongly, the Court in that case treated the tax on Government stock as being a "tax on the contract, a tax on the power to borrow money on the credit of the United States"; and, if that were so, no doubt it was a tax on a federal "instrumentality." I use this word as it is the word of the cases.

With regard to the argument that the Act offends against sec. 55 of the Constitution by dealing with more than one subject of taxation, I wish to say a little. It is urged that sec. 39—which treats the shareholders (or the beneficial owners of shares) in a company holding land, as holding the land in the proportions of their paid-up capital—involves a taxation of shares; and shares are, of course, personal property, not real property. The shareholders have no property in the land whatever. But it is clear

(1) 4 C.L.R., 1087, at p. 1164. (2) 5 C.L.R., 818, at p. 852.
(3) 2 Pet., 449.

H. C. OF A. 1915.

ATTORNEY-GENERAL FOR QUEENSLAND v. ATTORNEY-GENERAL FOR THE COMMONWEALTH.

Higgins J.

that the owners of the shares are taxed by sec. 39 in respect of land, and land only; for it is only so far as the value of the assets of the company is due to the value of the land of the company that there is any increase in the amount on which the owner of the shares is assessed. The shareholders are not taxed on their shares; but the land is valued, and they are taxed in respect of the land "in *the proportions* of their interests in the paid-up capital of the company" (sec. 39). The system adopted is peculiar; but it is due, no doubt, to the fact that the tax imposed is a progressive tax, that the greater the total amount of land values centred in one person, the greater is to be the rate of taxation. If a wealthy man hold most of the shares in twenty land companies, and if the tax were to be computed for each company and not for the shareholders, the shareholder in question might, for each company, pay tax at a low rate, or, possibly, pay no tax at all. It is true that the companies may pay tax also for their lands; but the justice of this system is a matter for Parliament, not for this Court. What I want to show is that this sec. 39, in conjunction with the adjoining sections, deals with only one subject of taxation—land values. But I may add that I adhere to the opinion which I expressed in *Osborne's Case* (1) to the effect that, even if the Act did deal with more than one subject of taxation, it by no means necessarily follows that the whole Act is void.

POWERS J. I have had the privilege of reading the judgment just delivered by the Chief Justice, and I concur in it.

RICH J. I concur in the conclusion at which the Court has arrived.

Demurrer allowed, except as to the fourth and fifth claims. As to those claims, action dismissed. Plaintiffs to pay the costs of the action.

Solicitors, for the plaintiffs, *Whiting & Aitken.*

Solicitor, for the defendants, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

(1) 12 C.L.R., 321, at pp. 373-374.