[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND THE CENTRAL WOOL COMMITTEE . . . . . } PLAINTIFFS;

AGAINST

THE COLONIAL COMBING, SPINNING AND WEAVING COMPANY LIMITED . . } DEFENDANT.

Constitutional Law—Powers of Commonwealth Government—Executive power—Power to contract—Granting of licence—Consent to sell wool tops—Taxation—Consideration—Appropriation of public revenue—Authority under statute of Commonwealth Parliament—Responsibility of Ministers to Parliament—Commonwealth of Australia Constitution Act (63 & 64 *Vict. c.* 12), *sec. V.—The Constitution, secs.* 2, 53, 55, 61, 64, 81—*War Precautions Act* 1914-1916 (*No.* 10 *of* 1914—*No.* 3 *of* 1916), *sec.* 4—*War Precautions* (*Wool*) *Regulations* 1916 (*Statutory Rules* 1916, *No.* 322), *reg.* 10—*Bill of Rights* (1 *W. & M., sess.* 2, *c.* 2).

H. C. OF A. 1922.

MELBOURNE, *Oct.* 10-12; *Nov.* 8-10.

SYDNEY, *Dec.* 13.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers and Starke JJ.

MELBOURNE, *Oct.* 12-13, 16-20, 23-25.

SYDNEY, *Dec.* 13-14.

Isaacs, Higgins and Gavan Duffy JJ.

During the continuance of the War and after the making of the *War Precautions* (*Wool*) *Regulations* 1916 and the *War Precautions* (*Sheepskins*) *Regulations* 1916 the Executive Government of the Commonwealth entered into agreements with a company, which was engaged in the manufacture within the Commonwealth and the sale of wool tops, each of which agreements was either an agreement to give consent to a sale of wool tops by the company in return for a share of the profits of the transaction (which was called by the parties a "licence fee"), or an agreement that the business of manufacturing wool tops should be carried on by the company as agent for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth, or a combination of both these agreements.

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy* and *Starke* JJ., that, apart from any authority conferred by an Act of the Parliament of the Commonwealth or by regulations thereunder, the Executive Government of the Commonwealth had no power to make or ratify any of the agreements.

Held, also, by *Isaacs*, *Higgins* and *Gavan Duffy* JJ., that neither the *War Precautions* (*Wool*) *Regulations* 1916 nor the *War Precautions Act* 1914-1916, under which those regulations were made, conferred any authority for the making of any of the agreements.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Attorney-General v. *Wilts United Dairies Ltd.*, (1922) 91 L.J. K.B., 897; 127 L.T., 822; 38 T.L.R., 781, followed.

Per Isaacs J. :—(1) Sec. 61 of the Constitution, by its declaration that "the executive power of the Commonwealth . . . extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth," definitely delimits constitutionally the King's executive power as between Commonwealth and States, but the validity of any executive act of the Commonwealth within the defined limits is not thereby determined : it depends on whether the act is warranted by law. (2) The agreements, so far as they purported to bind the company to pay to the Government money as the price of consents, were taxation, and without parliamentary authority were void on the principle of *Attorney-General* v. *Wilts United Dairies Ltd.*, (1922) 91 L.J. K.B., 897; 127 L.T., 822; 38 T.L.R., 781. (3) So far as any agreement purported to bind the Government to pay to the company a remuneration for manufacturing wool tops, it was an appropriation of public revenue, and, being without legislative authority, was void on the principle of *Mackay* v. *Attorney-General for British Columbia*, (1922) 1 A.C., 457. (4) The constitutional rule of parliamentary practice, that Ministers are responsible to Parliament, gives rise to the general understanding, of which the Courts must take judicial notice as a legal element of contract, that Parliament is not to be fettered in its discretion as to public expenditure by executive action, and that therefore no contract is valid which involves the payment of public moneys by Government unless Parliament has sanctioned it by direct legislation or by appropriation of funds.

QUESTION RESERVED.

An action was brought in the High Court by the Commonwealth and the Central Wool Committee against the Colonial Combing, Spinning and Weaving Co. Ltd., a company incorporated and carrying on business in Australia, to recover damages arising out of the breach by the defendant of certain contractual relations alleged to have been created between the parties by three agreements of 1st March 1917, 5th and 19th January 1918, and 26th September 1918, respectively. A cross-action was brought by the defendant against the plaintiffs to recover damages for the breach by the plaintiffs of the agreement of 1st March 1917, which the defendant alleged had remained unaltered.

The agreement of 1st March 1917 (exhibit P452) purported to be made between the Government of the Commonwealth and the defendant Company, and was executed by the Prime Minister of the Commonwealth "for and on behalf of and so as to bind the Government of the Commonwealth and not so as to incur any personal

liability " and by the Company. So far as material the agreement was as follows :—

" Whereas under the powers conferred upon him by the *War Precautions Act* 1914-1916 His Excellency the Governor-General acting with the advice of the Federal Executive Council has made certain regulations known as the *War Precautions* (*Sheepskins*) *Regulations* and the *War Precautions* (*Wool*) *Regulations* regulating *inter alia* the conditions under which sheepskins and wool may be sold and purchased in Australia And whereas the Company being engaged *inter alia* in the manufacture and sale of wool tops and being controlled under the said *War Precautions Act* 1914-1916 and the said recited regulations to the extent set forth in this agreement has entered into and desires to extend and vary contracts and to enter into further contracts for the sale of wool tops to markets hitherto supplied by it And whereas it is necessary under the said regulations for the Company to obtain the consent of the Commonwealth Government to the purchase of such sheepskins and wool as it may require for the manufacture of wool tops And whereas the Commonwealth Government has approved that resultant wool (from fellmongered sheepskins) submitted by the Company for appraisement shall rank and share in all advantages given by participation in a certain pool called the ' wool pool ' formed in connection with the purchase by the Imperial Government of the Australian wool clip And whereas the Central Wool Committee constituted by the said regulations has recommended the Government of the Commonwealth of Australia to execute these presents . . . And whereas for the considerations hereinafter set forth the Commonwealth Government has agreed to consent to the purchase of sheepskins and wool by the Company for the purpose of manufacturing wool tops and for the purpose of holding normal reserves of stocks of sheepskins and wool (having regard to the fact that additional combing machinery is about to be installed) and has also agreed to consent to the sale by the Company of wool tops under the conditions hereinafter set forth and in consideration thereof the Company has agreed to make the payments and conform to the conditions hereinafter set forth Now this agreement witnesseth as follows :—
(1) The Commonwealth Government hereby consents to the sale to

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

and the purchase by the Company of such wool as may be required by the Company for the following purposes and for no other purposes: (a) the purpose of manufacturing wool tops to fulfil any contracts for the sale of wool tops which have been made or extended by the Company prior to the date of these presents or which may with the previous consent in writing of the Commonwealth Government be made or extended after the date of these presents. (b) the purpose of holding the Company's normal reserve of stocks having due regard for any increase in wool combing plant and machinery. Any wool so purchased by the Company and found to be not suitable for the manufacture of wool tops shall be appraised and rank and share in all advantages given by participation in the said recited wool pool but the quantity thereof shall not exceed twenty per centum of the total wool purchased. (2) The Commonwealth Government hereby consents to the sale to and the purchase by the Company of such sheepskins green or dry as may be required by the Company and to the use by the Company of so much of the resultant product after the sheepskins have been fellmongered as may be suitable for the manufacture of tops. Any resultant wool product or products from such sheepskins not suitable for the manufacturer of the wool tops shall be appraised and rank and share in all advantages given by participation in the said recited wool pool. (3) The Commonwealth Government hereby approves of the Company dealing in any manner it thinks best with the noils and other by-products of the manufacture of wool tops but the Company shall not sell for export to other countries than Great Britain or her allies without first obtaining the consent of the Commonwealth Government. (4) The Commonwealth Government hereby agrees that it will upon request by the Company give its consent to the sale by the Company of the following wool tops and no others, namely, any wool tops which the Company has contracted to sell by contract made or extended prior to the date of these presents and any wool tops which the Company shall with the previous consent in writing of the Commonwealth Government contract to sell by contract or contracts made or extended after the date of these presents. (5) For all wool purchased by the Company pursuant to the consent contained in clause 1 hereof the Company shall pay to the vendor the full appraised

price fixed in accordance with the said regulations. In the event of the appraised prices for all wool throughout the Commonwealth for the season 1916-1917 being in the opinion of the Commonwealth Government less than a parity of 15½d. per pound of greasy wool then the Company will forthwith after being required by the Commonwealth Government so to do pay to the Commonwealth Government such additional sum as shall be fixed by the Commonwealth Government as the amount necessary to make the price to the vendor equal to a parity of 15½d. per pound of greasy wool. The Company shall be entitled to make it a condition of its contract of purchase of wool that in the event of the appraised price for all wool throughout the Commonwealth for the season 1916-1917 being in the opinion of the Commonwealth Government more than a parity of 15½d. per pound of greasy wool then the Company shall be repaid by the vendor such an amount as will reduce the amount paid by it to a parity of 15½d. per pound of greasy wool. (6) For the purpose of this agreement the net earnings of the Company shall be ascertained at the end of each accounting period of the Company by deducting from the gross earnings of the Company from all sources all proper allowances for or as a reserve against amortization of leaseholds depreciation of plant and machinery interest ordinary business losses and all other expenses and outgoings of and incidental to the Company's business (other than any payment of the war-time profits tax referred to in clause 8 hereof) and such further allowance for amortization of plant and machinery purchased at war prices as will reduce the book value of such plant and machinery to the pre-war value of plant and machinery of the same kind. The first accounting period of the Company for the purposes of this agreement shall commence on the first day of March one thousand nine hundred and seventeen (that being the date of commencement of manufacture of tops hereunder) and shall continue to the end of the full ordinary accounting period of the Company then current. The net earnings for such first accounting period shall be deemed to be an amount bearing the same proportion to the net earnings for such full ordinary accounting period as the number of working days in the first accounting period hereunder bears to the number of working days in such full ordinary accounting

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

period. (7) The net earnings of the Company for each accounting period during the continuance of this agreement (after being ascertained in the manner set forth in clause 6 of these presents) shall be applied by the Company as follows, that is to say, the Company shall (i.) hold one-half of the net earnings at disposal of the Commonwealth Government and (ii.) subject as hereinafter provided retain the balance for its own purposes. (8) If the earnings of the Company in any accounting period during the continuance of the agreement shall become taxable under any special taxation imposed by the Parliament of the Commonwealth on profits earned in war time then the Commonwealth Government shall refund to the Company an amount equal to one-half of the war-time profits tax which shall be payable or shall have been paid by the Company in respect of such accounting period. And if in any accounting period the amount so to be refunded when added to the amount retained by the Company (after payment of the war-time profits tax) makes a sum less than one-third of the total net earnings for that period then the Commonwealth Government will also refund to the Company such further amount as shall be sufficient to make the total sum to be retained by the Company equal to one-third of the total net earnings for the period. (9) During the continuance of this agreement the Company shall not distribute amongst its shareholders any of the net earnings of the Company by way of dividend bonus or otherwise but shall reinvest such earnings in the extension of the plant and machinery of the business and of the business other than the accumulation of money. (10) Every amount which under clause 7 of these presents the Company has agreed to hold at the disposal of the Commonwealth Government shall forthwith after the end of the accounting period of the Company in respect of which the earnings were brought into account be paid by the Company into a special account at a bank approved by the Commonwealth Government in writing for that purpose and such account shall be called the 'Wool Top Manufacturers' Account.' No sum shall be withdrawn from the said account without the consent in writing of the Commonwealth Government and all moneys paid into the said account shall at all times be disposed of as the Commonwealth Government shall direct. . . . (13) Nothing

herein contained shall constitute or be construed to constitute any partnership between the Company and the Commonwealth Government. (14) If the Company shall liquidate or change its constitution or shall not punctually perform all its obligations to its creditors so that any of them shall be legally justified in seizing or obtaining judgment and execution or taking possession of any of its assets or appointing a receiver then this agreement shall *ipso facto* be terminable at the option of the Commonwealth Government. . . . (16) The Company shall enter into a bond with an approved surety in the sum of ten thousand pounds for the due and faithful observance and performance of all and singular the matters and things to be observed and performed by the Company under this agreement. (17) Any consent notice nomination or other communication by the Commonwealth Government to the Company shall be deemed to be duly given made and served if signed on behalf of the Commonwealth Government by John Michael Higgins the Chairman of the Central Wool Committee constituted by the said regulations and posted by prepaid post addressed to the Company at the address hereinbefore set forth."

The agreement of 5th and 19th January 1918 was contained in or implied from two telegrams of those dates (exhibits P80 and P101) sent by the Chairman of the Central Wool Committee to Frederick William Hughes, the managing director of the Company. The material portions of these telegrams were as follows :—

5th January—" As regards current output when prices have been fixed by the parties proceeds to be dealt with, first, as per terms and conditions of expired contract, secondly, that all moneys raised over and above the rate per pound of tops stipulated in the old contract " (the agreement of 1st March 1917) " to be paid into a trust account with the sub-committee of the Central Wool Committee on completion of each shipment and such money to be dealt with as the sub-committee may decide taking into account special conditions and increased cost of manufacture if any." 19th January—" As regards current output when prices have been fixed by the parties proceeds to be dealt with, firstly, as per terms and conditions of expired contract, secondly, that on the completion of each shipment all money raised over and above the rate per pound of tops stipulated in the

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

old contract to be paid (a) to the credit of a trust account with the sub-committee of the Central Wool Committee or (b) endorsed store warrants on wool or (c) approved bonds of equal value deposited with the sub-committee of the Central Wool Committee and such money or store warrants or bonds to be dealt with as the sub-committee may decide taking into account special conditions and increased cost of manufacture if any."

The agreement of 26th September 1918 was contained in a memorandum of that date of a conference at the Prime Minister's Department (exhibit P299), the material portion of which was as follows :—

"New agreement to be drawn between the Commonwealth Government and the Company based upon the following principles: —(1) Term to be subject to six months' notice on either side, such notice to operate as from the termination of any accountancy period. This agreement to date from 1st September 1918. (2) Back payments due by Company to Government to be immediately made on the basis of the expired contract plus the full excess over basis of 72d. per pound. (3) The second and third accountancy periods to be on an identical basis as to money payments. (4) *Re* taxation under old agreements and modifications thereof the Company is to be assured by the Treasury of a minimum of one-third of profits up to 72d. per pound ; over that rate Company is not to be obliged to pay the difference twice (that is, in form of taxation and licence fee). (5) For the purpose of the new agreement the following conditions shall apply :—(a) For the future the Company is to use appraised wool only for the manufacture of tops. (b) The Company shall declare the amount of their shareholder's funds, inclusive of amount of accumulated profits and reserves, the total amount of which must be maintained throughout the period of the agreement. (c) The Company may borrow for business purposes from any bank at normal rates of interest. (d) The wool, wool tops, noils, waste, &c., manufactured by the Company under this agreement and in possession of the Company shall be deemed to be the property of the Government, but the Central Wool Committee for the purposes of this agreement will, if necessary, arrange facilities for financing the stocks carried by the Company at normal rates of interest (insurable) interest on any stocks to be subsequently determined. (e) The

Company will be the owner of its property, plant and general business, but the work of making wool tops is to be undertaken as agents for the Government. (f) Amortization of plant, &c., and depreciation are to be as allowed by the Commissioner under the *War-time Profits Tax Act* and *Income Tax Act* respectively. (g) The Central Wool Committee is to be empowered to appoint a resident inspector whose duty it will be to report to the Central Wool Committee as directed by it. The inspector shall have no power to interfere with or direct the operations of the Company. (h) The Central Wool Committee is also to be empowered to appoint an auditor with full powers of inspection and report. (i) Both inspector and auditor are to be responsible to the Central Wool Committee alone. (j) If the Company objects to the nomination of either officer appeal may be made to the Prime Minister whose decision shall be final. (k) The Company shall furnish balance-sheets within six weeks from the end of each accountancy period. (l) The Company is to have the right to sell its business to any responsible person or company by consent of the Central Wool Committee. Power of refusal of consent is not to be unreasonably exercised. (m) The Company is as far as practicable to manufacture during the first accountancy period under the new agreement wool tops at the rate of six million pounds weight per annum. (n) The Company is to receive as remuneration over all costs of manufacture a sum of £64,000 per annum (free of war-time profits taxation at present rates) based on a six million pounds output of wool tops, but, as the Government is not prepared to grant the Company immunity from payment of war-time profits tax, the payments are to be expressed (after discussion with representatives of the Central Wool Committee) in the terms of a poundage payment on a tapered rate or otherwise, as the circumstances may demand. In order that this arrangement may be practicable without the poundage rate rising above 4½d. per pound at any point the Company is to increase its ratio of shareholders' capital to debenture and other borrowed money. (o) As it is not anticipated that the Company will be able during the first accountancy period to output more than six million pounds weight of wool tops, the question of payment for any excess over six million will have to be subsequently discussed and determined."

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

The action was heard before *Isaacs* J., who, after hearing evidence, made certain findings of fact; and he reserved for the consideration of the Full Court of the High Court the question "how consistently with the facts as found by me judgment should, having regard to the amended pleadings and particulars thereunder and the evidence as appears from the transcript of proceedings at the trial and the exhibits, be entered with respect to the several claims made in the action and the cross-action respectively."

The following questions arising out of the reservation were directed to be argued before the Full Bench, and were argued before *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and *Starke* JJ.:—

A.—Is the *War Precautions Act* a law imposing taxation within the meaning of sec. 55 of the Constitution, assuming that the agreements of March and January were within the powers conferred on the Commonwealth by the Wool Regulations?

B.—(1) Was it within the legal power of the Commonwealth Executive Government apart from any Act of the Parliament or regulation thereunder to make or ratify at the times the same were respectively made or ratified any and which of the following agreements: (*a*) 1st March 1917; (*b*) January 1918; (*c*) September 1918, consisting of pars. 2, 3 and 4 of exhibit P299, treating such paragraphs as separable from the rest of the provisions of that document; (*d*) September 1918, consisting of the terms of exhibit P299 disregarding pars. 2, 3 and 4 thereof; (*e*) September 1918, regarding exhibit P299 as a whole?

(2) If yes as to any of the said agreements, was the approval of the Governor-General in Council necessary to the making or ratification thereof?

Ultimately the Full Bench found a decision upon question A unnecessary.

The other questions arising out of the reservation were argued before *Isaacs*, *Higgins* and *Gavan Duffy* JJ.

Owen Dixon K.C. and *E. M. Mitchell* (with them *Russell Martin*), for the plaintiffs.

Sir Edward Mitchell K.C. and *Maughan* K.C. (with them *Weston*), for the defendant.

Cur. adv. vult.

Upon the questions argued before the FULL BENCH the following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The first question for our consideration is set out thus :—" (1) Was it within the legal power of the Commonwealth Executive Government apart from any Act of the Parliament or regulation thereunder to make or ratify at the times the same were respectively made or ratified any and which of the following agreements : (*a*) 1st March 1917 ; (*b*) January 1918 ; (*c*) September 1918, consisting of pars. 2, 3 and 4 of exhibit P299, treating such paragraphs as separable from the rest of the provisions of that document ; (*d*) September 1918, consisting of the terms of exhibit P299 disregarding pars. 2, 3 and 4 thereof ; (*e*) September 1918, regarding exhibit P299 as a whole ? "

In our opinion the answer to this question depends on the meaning of sec. 61 of the Constitution, which is as follows : " 61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." The section has three distinct functions : it vests the executive power of the Commonwealth in the Sovereign, it enables that power to be exercised by the Governor-General as the Sovereign's representative, and it delimits the area of that power by declaring that it extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth. The phrase " the laws of the Commonwealth " is found in sec. V. of the *Commonwealth of Australia Constitution Act* and in various places in the Constitution itself. In every case it probably means Acts of the Parliament of the Commonwealth. These enactments are described in sec. V. of the covering Act as " laws made by the Parliament of the Commonwealth under the Constitution," and throughout Part V. of Chapter I. of the Constitution, which confers and delimits the legislative power of the

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

KNOX C.J. GAVAN DUFFY J.

Commonwealth, they are called simply "laws." But whatever may be the meaning of the expression elsewhere, its collocation with the words "this Constitution" in sec. 61 leaves no room for doubt as to its meaning there. These words would be wholly unnecessary if the phrase "the laws of the Commonwealth" meant more than the laws made by the Parliament of the Commonwealth, for the phrase would then include the Constitution itself. In our opinion, an act not authorized by sec. 61 is not within the legal power of the Commonwealth Executive Government, and, even if done by the Sovereign or by the Governor-General, must invoke some authority other than the Constitution. In this case we must assume that the various agreements were not mediately or immediately authorized by any Act of the Parliament. There remains only to consider whether any of them can properly be described as made in the execution or maintenance of the Constitution itself. Each of the agreements is either an agreement to give consent to a sale of wool tops by the owner in return for a share of the profits of the transaction, called by the parties to the agreement a "licence fee," or an agreement that the business of manufacturing wool tops shall be carried on by the defendant Company as agent for the Commonwealth in consideration of receiving an annual stipend from the Commonwealth, or a combination of both of these agreements. It is clear that none of these agreements is made in maintenance of the Constitution, and in our opinion it is equally clear that none is made in the execution of the Constitution, because none of them is prescribed or even authorized by the Constitution itself, and execution of the Constitution means the doing of something immediately prescribed or authorized by the Constitution without the intervention of Federal legislation. It is true that sec. 64 of the Constitution directs that the Sovereign through his Ministers shall administer such departments of State as the Governor-General in Council may establish, and they would probably be authorized to make such contracts on behalf of the Commonwealth as might from time to time be necessary in the course of such administration; but it is not pretended that the contracts now in question come within that category. If and so far as they were not made under the authority of Commonwealth legislation, they were made by or under the direction of the Prime Minister

or the Acting Prime Minister while engaged in carrying out the political policy of the Government and as incidental and ancillary to that policy. (See *John Cooke & Co. Proprietary Ltd. and Field* v. *The Commonwealth and the Central Wool Committee* (1).)

If, for reasons we have stated, the Commonwealth could not make these agreements, it could not ratify them.

We think that we should answer " No " to the first question, and therefore make no answer to the second question.

ISAACS J. The first question has given rise to problems of high constitutional importance. It is whether it was within the legal power of the Commonwealth Executive Government, apart from any Act of the Parliament or regulation thereunder, to make or ratify, at the times they were made or ratified, certain agreements. The question, it will be observed, does not concern itself with mode or form. It is not how or by what special functionary the authority, if any, of the Government must be exercised. It is whether, assuming the most formal executive act imaginable by the proper functionary, the agreements referred to could, by virtue only of the common law prerogative, be validly made or ratified at the times they were respectively in fact made or ratified ?

I may at once state succinctly the conclusions at which I have arrived. In my opinion, unless authorized by some Commonwealth legislation the Executive Government would have no power to make any of the agreements. The final ground of my opinion, broadly stated, is that the law of the Constitution with respect to public finance prohibits such bargains.

With respect to the first three agreements, the vitiating cause is that, however formally expressed and however their constitutional effect may be disguised, they amount at bedrock to " taxation " of the individual; and, without parliamentary warrant, that is forbidden ground. Partly anticipating my reasons given later, I may quote a passage from a judgment of Lord *Parker* (then *Parker* J.) in *Bowles* v. *Bank of England* (2), a passage which exemplifies this to a very remarkable degree. He said :—" By the statute 1 W. & M., usually known as the *Bill of Rights*, it was finally settled that

(1) *Ante*, 394.

(2) (1913) 1 Ch., 57, at pp. 84-85.

H. C. OF A 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

there could be no taxation in this country except under authority of an Act of Parliament. The *Bill of Rights* still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament." *A fortiori* is the present case, where there has not been even a resolution of either House to support the claim.

Regarding the fourth agreement, as I construe it, it is not "taxation" but it brings into action the correlative financial principle of the Constitution, namely, the control of the public expenditure by parliamentary "appropriation." That agreement binds the Government to pay £64,000 a year to the Company out of the public funds, and, as I read the law as expounded by the Privy Council, that is equally forbidden without parliamentary authority.

But, clear as the conclusions appear when once they are reached, the considerations that meet us on the way are so various and so important that they need close statement and attention, for the parliamentary guardianship of taxation and expenditure is the pivot of the Constitution and the keystone of the arch of personal liberty.

(1) *The Agreements.*—Obviously the nature and effect of the various agreements and the relevant points of time must be first ascertained.

(*a*) *The agreement of March* 1917 was made at the time mentioned. For present purposes this agreement may be sufficiently stated by saying that after reciting the making of the Wool and Sheepskins Regulations, "regulating *inter alia* the conditions under which sheepskins and wool may be sold and purchased in Australia," and then reciting that the Company being engaged in the manufacturing and sale of wool tops and being controlled under

the regulations desired to carry on its business, and that the consent of the Commonwealth Government to the purchase of sheepskins and wool was necessary under the regulations, and that for the considerations thereinafter set forth the Government had agreed to consent to the purchase of sheepskins and wool and had also agreed to consent to the sale of wool tops under the conditions set forth, and in consideration thereof the Company had agreed to make the payments thereinafter mentioned, the agreement goes on to provide various stipulations on the part of the Commonwealth Government, including par. 4 in these words: "The Commonwealth Government hereby agrees that it will upon request by the Company give its consent to the sale by the Company of the following wool tops and no others, namely, any wool tops which the Company has contracted to sell by contract made or extended prior to the date of these presents and any wool tops which the Company shall with the previous consent in writing of the Commonwealth Government contract to sell by contract or contracts made or extended after the date of these presents." Then the Company in consideration for the stipulations of the Government agreed that it will, *inter alia*, pay to the Government one-half its net earnings during the continuance of the agreement and subject to a promise on the part of the Government that, if the Company's share of the profits be reduced to less than one-third by taxation, the Commonwealth Government will refund sufficient of the Government's contractual share to make up the full one-third to the Company. There were no property rights in the Government to be protected or transferred by the consent.

(*b*) *The agreement of January* 1918.—This was merely a modification of the first agreement by allotting to the Government, in consideration of further consents, such part of the prices obtained for wool tops as were in excess of 72d. per lb. as the sub-committee decided should be so allotted, and the net earnings up to 72d. per lb. being regulated by the original agreement. The sub-committee in fact allotted to the Government the whole of the excess over 72d. down to 28th February 1918.

(*c*) *The agreement of 27th September* 1918.—As to pars. 2, 3 and 4 of

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

exhibit P299, taken separately, this was an agreement that the agreement of January 1918 and the decision of the sub-committee should be carried out and extended to 31st August 1918, the Government giving a new stipulation, namely, a promise to give a Treasury assurance that the Company would not be required to pay any moneys twice, namely, both as war-time profits tax, and as excess profits under the new agreement. And further, this agreement was required by the Government as a condition, and was in fact entered into by the Company because the Government insisted on it as a condition of entertaining the question of the terms upon which future consents to sell wool tops would be given.

(*d*) *The September* 1918 *agreement, apart from back payments.*—This was a bargain of a different character. It was an agreement by which, in effect, the Company, while it retained ownership and possession of its business and factory and plant and general property, agreed that it would in future manufacture all wool tops, not for itself, but on behalf of the Government, and that all wool and wool tops, &c., manufactured and in its possession were to be deemed the property of the Government. The Central Wool Committee were to arrange necessary financial facilities, and the Government undertook to pay the Company, by way of remuneration at the rate of £64,000 a year on a basis of 6,000,000 lbs. of wool tops per annum, a poundage rate to be ascertained to provide that sum. This sum of £64,000 per annum was not to be paid *out of* the profits —indeed the promise to pay that sum stood independently of any profits at all. There might even be a loss on the sale of the wool tops manufactured, yet the sum of £64,000 as the basis mentioned was inalterable. It was a direct liability of the Government out of its own funds. These agreements were in fact ratified, as far as ministerial action could ratify them, and leaving aside the legal effect of the mode and the competency of the functionaries by which the *de facto* ratification took place at various times during the War, that is, before the royal proclamation of peace.

The question is as to the legal power which the Commonwealth Executive Government had—apart from Commonwealth legislation, which has to be considered in a separate judgment by the

Court differently constituted—to make or ratify any of these agreements. The arguments have covered many points of great interest and importance; and some of these, at all events, must be dealt with even if only for the purpose of disengaging them from the essentials of the problem.

(2) *Sources of Executive Power.*—There are, apart from Commonwealth legislation, only two possible sources of executive power to make these agreements: (1) Imperial statute law, other than the *Constitution Act*; (2) authority derived from the Constitution itself, by reason of what it says or imports. As to Imperial legislation—other than the *Constitution Act*—there is none relevant. None has been suggested which confers on the Commonwealth Government any executive authority beyond that contained in the Constitution. Chapter II. of the Constitution is headed "The Executive Government." Sec. 61 makes three declarations as to the executive power of the Commonwealth. Observe, it is not as to the Executive Government of the Commonwealth or as to the powers of the Government, but as to the "executive *power* of the *Commonwealth*." As to that "power," it declares that it (*a*) is vested in the Sovereign, (*b*) is exerciseable by the Governor-General as the Sovereign's representative, (*c*) "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." The reference to the Governor-General as the representative of the Sovereign must be read with sec. 2 of the Constitution, which constitutes him such representative. As to the first declaration it is a renewed statement of the law and introductory of what follows. *Blackstone* (vol. I., p. 190) says: "The Supreme executive power of these Kingdoms is vested by our laws in a single person, the King or Queen." In *Halsbury's Laws of England* (vol. VI., p. 318) it is said: "The executive authority is vested in the Crown as part of the prerogative." The second declaration need not be further considered now. The third is very important. It marks the external boundaries of the Commonwealth executive power, so far as that is conferred by the Constitution, but it leaves entirely untouched the definition of that power and its ascertainment in any given instance. It no more solves the difficulty in the present case than would the words "for the peace welfare and good government

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

of New South Wales" or the words "in and for Victoria" solve a similar difficulty in relation to the constitutional executive authority of those States. But the third declaration is an essential starting-point, and the extent it marks out cannot be exceeded. The argument upon those words included various contentions; as, for instance, that the executive authority of the Commonwealth Government embraced all the common law powers of the Imperial Government, and that "laws of the Commonwealth" included the common law—that once find a given subject matter within the ambit of the Constitution the legal power to make the agreement existed, and, what I regard as very crucial, though I do not agree with it, that the written words of the Constitution applied to sec. 61 form the only necessary solving test. These contentions convince me that the proper construction of the enactment requires a deeper consideration than I should have otherwise thought necessary. Sec. 61, when carefully examined, simply applies to the new constitutional structure, the Commonwealth, but with the necessary adaptation, the basic principle of the law of the Empire that the King is indistinguishably the King of the whole Empire, but that the springs of royal action differ with locality. Where responsible government exists, it is an axiom of the public life of the British Commonwealth of Nations that the King's agents to regulate the exercise of his royal authority with respect to each Dominion are those chosen by the people of that Dominion. In the development of the Federal system in the Dominions, the doctrine adapts itself to the differentiation of ministerial agents for different purposes in the same locality. The principle, as I understand it, is expounded in *R.* v. *Sutton* (1), and is confirmed in *Theodore* v. *Duncan* (2). Those cases are instances, and others of an important character will be cited later, which illustrate the flexibility of the common law and its capacity to adapt its principles to the changing circumstances of the life of the community no less than to that of the individuals who compose it. It is the duty of the Judiciary to recognize the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from

(1) (1908) 5 C.L.R., 789, at pp. 809-810. (2) (1919) A.C., 696, at p. 706.

the progressive life of the community, and act as a clog upon the legislative and executive departments rather than as an interpreter. It is only when those common law principles are exhausted that legislation is necessary.

The constitutional doctrine to which I have alluded has long been in essence an accepted thesis. For instance, see *Hearn's Government of England*, 2nd ed., p. 133. It has lately, as pointed out by Mr. *Dawson Hall* in the *Journal of Comparative Legislation* for October 1920, at p. 201, received very emphatic expression and application on the occasion of the British Empire Delegation in Paris in 1919. The united views of the Prime Ministers were thus expressed: "The Crown is the Supreme Executive in the United Kingdom and all the Dominions, but it acts on the advice of different Ministries within different constitutional units." That phrase "within different constitutional units," is exactly expressive of the true position, and the doctrine I have stated is the key to the full understanding and interpretation of the third declaration in sec. 61 of the Constitution. When the Constitution was framed there were six separate Colonies, six separate "constitutional units," in Australia. In the aggregate they covered the whole territory of the continent of Australia. Each had its separate Constitution and laws, throughout the territory of each the Sovereign exercised the executive power of the Colony in accordance with the local Constitution, and by the advice of local Ministers, and that executive power, by whatsoever functionary exerted, extended to the execution and maintenance of the Colonial Constitution and laws. But the limit of executive jurisdiction as to every Colony was its geographical area, and that was easily gathered from its Constitution as a truth long familiar. Over the whole of that geographical area, and not beyond it, the local Government exercised executive power—and normally the power was exclusive. But when the Federal Constitution of Australia was fashioned the new constitutional unit thereby created had to occupy (besides its own special territories) the same territory as the constituent States, and, so to speak, was superimposed upon them geographically. Two conditions had, therefore, to be satisfied. First, the constitutional domain of the new unit had to be delimited and distinguished from

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

the respective constitutional domains of the States, and, next, that could not be done simply in terms of territory. It was found by applying to the territory certain powers—powers differently phrased with respect to the three branches of government. As to the executive power, it was delimited by attaching to the notion of territory, which is always connoted, the words "extends to the maintenance of this Constitution, and of the laws of the Commonwealth." In other words, the domain of the Commonwealth executive power is a special domain of governmental action within the whole physical territory of the Commonwealth, and wherever else—as by covering sec. V. of the *Constitution Act*—its laws by Imperial authority operate. Of necessity, this domain is described but not defined in sec. 61. This constitutional domain is the field on which Commonwealth executive action lawfully operates. What I have said elucidates some of the contentions stated. It is clear now that there cannot be laid down as a rule of law that there is an unlimited application of the common law as exercised by the King's Government in England. Whatever of it is included in the "Constitution" belongs to the Commonwealth Government. And then it is also plain that the "constitutional domain" does not determine the existence or non-existence of the necessary power in relation to a given case, any more than marking the territorial domain determines a similar question in relation to State executive action. Having ascertained in a given case that the constitutional domain has not been transgressed, we may have to go further and find whether on that field in the circumstances the power in fact exerted was lawful. To make my meaning quite plain: Executive action in relation to a Commonwealth law is clearly outside State jurisdiction and clearly within the field of Commonwealth jurisdiction. If done at all, it is assumed that the Commonwealth Government should do it. Nevertheless, the statute must be examined in connection with the circumstances to determine the legality of what was done. And so with the provisions of the Constitution. Executive action to execute or maintain the Constitution is clearly in the exclusive field of Commonwealth power, and no intrusion into the constitutional domain of the State. But the legal warrant for the particular step, if challenged by an individual affected, remains to

be determined. In other words, the third declaration is a definite constitutional delimitation as between Commonwealth and States, but does not definitely determine the internal validity of executive action towards His Majesty's subjects. To that I now address myself.

(3) *The Legality of the first three Agreements.*—There are, as I have said, only two possible sources of authorization to make the agreements apart from Commonwealth legislation, namely, (*a*) Imperial statute other than the *Constitution Act* itself, and (*b*) some authority derived expressly or impliedly from the Constitution. As already observed, no Imperial statute has been suggested and I know of none relevant. Then, what authority can be pointed to arising out of the Constitution to support the entering by the Commonwealth Government into the agreements? I do not confine myself to the mere words of the Constitution. I do not limit my search to express literal terms or to implication from the literal terms of the instrument. The mere fact of the creation of the Executive Government carries with it some constitutional consequences, unwritten, it is true, but nevertheless very real, that Courts recognize and that are included in the terms "maintenance of the Constitution." But it is a good starting-point to ask whether there is to be found in the written terms of the Constitution, regarding it as a self-operative enactment, anything which in express words or by reasonable implication of any of its literal terms gives authority to the Commonwealth Executive Government to make the agreements or any of them. One feature of outstanding importance, when the three first-mentioned agreements come to be carefully scrutinized, is that they relate to internal trade of the States as well as to inter-State and foreign trade. The agreement of March 1917, which was the basis of both the other two, made the promise to pay the stipulated proportion of profits a condition of consent to purchase and sell intra-State quite as much as inter-State or (as to sales) abroad. *Primâ facie*, at all events, that would be beyond the permitted region of the Commonwealth executive power as delimited by the third declaration in sec. 61. But not necessarily in the circumstances. Legislation, if valid, might at the time have brought it within the jurisdictional area, and (being now

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

unconcerned with legislation) it has been contended that, at the time the March 1917 agreement was made, the state of war of itself entitled the Government to make it by virtue of the Crown prerogative, and that the executive department of the Government was the sole judge of the necessity. And this has to be examined; and it forms a striking example of the insufficiency of the mere words of sec. 61, or the mere words of other sections of the Constitution, taken by themselves and apart from the circumstances of the moment to form an invariable measuring-rod of Commonwealth executive power. It is unquestionable law that "those who are responsible for the national security must be the sole judges of what the national security requires" (*The Zamora* (1)). It is equally undoubted law that in presence of national danger in time of war the prerogative attracts, by force of the circumstances that exist, authority to do acts not otherwise justifiable. Lord *Sumner*, in *Attorney-General* v. *De Keyser's Royal Hotel Ltd.* (2), observes: "Of course, with the progress of the art of war, the scope both of emergencies and of acts to be justified by emergency extends, and the prerogative adjusts itself to new discoveries, as was resolved in the *Saltpetre Case* (3); but there is a difference between things belonging to that category of urgency, in which the law arms Crown and subject alike with the right of intervening and sets public safety above private right, and things which, however important, cannot belong to that category, but, in fact, are simply committed to the general administration of the Crown." Also per Lord *Moulton* (4). Viscount *Haldane* for the Privy Council, in *In re Board of Commerce Act* 1919 *and Combines and Fair Prices Act* 1919 (5), in very clear words indicated the same principle in connection with sec. 92 of the Canadian Constitution. But it must appear to the Court, if the executive action is challenged, and it is the duty of the Crown as representing the Commonwealth to make it appear, that the Executive considered the step necessary for the national security and in fact acted on that basis. In that case—at all events where the contrary is not so demonstrably clear as to be beyond all possibility

(1) (1916) 2 A.C., 77, at p. 107.
(2) (1920) A.C., 508, at p. 565.
(3) (1606) 12 Rep., 12.
(4) (1920) A.C., at p. 552.
(5) (1922) 1 A.C., 191, at p. 197.

the true position—the Court must accept the judgment of the Executive and cannot investigate reasons. But, unless the Executive satisfies that condition, the Court is free to inquire as to the legality of the step complained of.

No imminent national danger is suggested as the motive force for the agreement of March 1917—none such is pleaded or shown; in fact, it was the judgment, not of the Executive Government operating on the issue of public peril but of the Central Wool Committee operating on the issues of the Imperial contract, local manufactures and equalization of trade profits, that led to the pecuniary arrangements in question, and the Executive cannot delegate this supreme decision.

The war power then—apart from statute—is inapplicable to warrant the entry into what is normally State jurisdiction only. The consequence is that, in my opinion, were there no other reason than the transgression of the limits of the constitutional domain of the Commonwealth executive power marked out by the third declaration in sec. 61, that would—since separability is impossible—be enough to invalidate the agreement of March 1917 and, with it, the other two dependent agreements.

(4) *Taxation.*—There was a special ground of objection taken to the agreements and argued to repletion. I refer to their character as imposing taxation. I must confess that, having regard to the recent decision in the case of *Attorney-General* v. *Wilts United Dairies Ltd.* (1) (supplemented by the transcript of the shorthand report of the judgments in the House of Lords) and to the plain words of the Constitution, I have never been able to entertain any doubt that the three agreements were obnoxious to that objection. There being no words in the Constitution explicitly authorizing such a contract, the question must turn on implication. It is, of course, impossible to formulate any definition that could affirmatively test the legality of all contracts made by the Executive Government. The authority must be searched for in each case, and on this agreement the only authority vouched is the prerogative introduced by the presence of the Crown in the Constitution. If I assume

(1) (1921) 37 T.L.R., 884; (1922) 38 T.L.R., 781.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

for the moment that all other difficulties were absent, that an agreement for the purpose of regulating the trade in wool and wool tops was entirely within the competency of the Government by virtue of the prerogative, I still have to inquire whether that included the power to insist on receiving as the price of consent the proportion of profits stipulated for. In other words, I have to inquire whether the words of the Constitution vesting and delimiting the executive power contain, even in war time, an implication of power to include such a provision. As to the nature of the condition made that the Company should pay over a proportion of its profits as consideration for consent, the words of Lord *Buckmaster* in the *Wilts Case* are exactly applicable. His Lordship said (1):—"However the character of this payment may be clothed, by asking your Lordships to consider the necessity for its imposition, in the end it must remain a payment which certain classes of people were called upon to make for the purpose of exercising certain privileges, and the result is that the money so raised *can only be described as a tax the levying of which can never be imposed upon subjects of this country by anything except plain and direct statutory means.*" Lord *Atkinson* and Lord *Sumner* gave a simple and direct concurrence. Lord *Wrenbury* delivered a short judgment to the same effect, but notwithstanding its brevity the learned Lord found it necessary to say it was "the assertion of a right in the Executive *to impose taxation*" (2). Lord *Sterndale* gave a complete concurrence. It was vigorously urged for the Crown that here there was not a "levy" but an "agreement" for consideration. But that is only a recrudescence of the old struggle between the prerogative and the right of parliamentary control which is often thought to have ended long ago, but which finds its re-appearance even to-day, and the ideas by which the supremacy of Parliament was sought to be evaded are curiously found repeated in the *Wilts Case*, and even in the present case.

It was an early expedient on the part of the Crown in its claim to regulate trade to assert a prerogative "to make agreements, apart from Parliament, with the merchants" as a device to cover what was really taxation (*Anson on the Law and Custom*

(1) (1922) 91 L.J. K.B., 897, at p. 900; 127 L.T., 822, at p. 823.

(2) (1922) 91 L.J. K.B., at p. 900; 127 L.T., at p. 824.

of the Constitution, 4th ed., vol. I., "Parliament," at pp. 334-335). It was also an early expedient to endeavour to escape from the illegality of a direct levy by forced "gifts, loans and benevolences," all of which were prayed against by the *Petition of Right* and are included in the broad prohibitory declaration of the *Bill of Rights*. A "loan" implies an agreement to repay, and the term is therefore a "specious appellation" (*Taswell-Langmead's Constitutional History*, 8th ed., p. 340). A "voluntary benevolence" is still more a specious demand (*ibid.*, p. 357). The *Wilts Case* (1) was a case of "agreement"; and, as the House of Lords definitely decides, under whatever name or by whatever device it is claimed, the proper name of the compulsive demand is, as Lord *Buckmaster* says, a "tax," and, as Lord *Wrenbury* says, "taxation."

At common law, therefore, the provision as to profits in the three first-mentioned agreements is "a tax" or "taxation." As the ordinary meaning of the generic word "taxation" is the same in Australia as in England, it falls within the appellation "taxation" in the Commonwealth Constitution, and, in the result, the first question must, as to the three first-mentioned agreements, be answered adversely to the Crown.

(5) *The fourth Agreement and Appropriation.*—The fourth agreement—treating it as a separate independent bargain—stands on quite a different footing. It was made in war time, it gave control of Australian wool tops to the Government, and I am not prepared to say without fuller consideration that—apart from one feature, that of constitutional finance—it was, in the circumstances, outside the power of the Commonwealth Government. Sir *William Anson*, in his *Law and Custom of the Constitution* (3rd ed., vol. II., Part I., at pp. 145-146), in speaking of the functions of government very truly observes :—"There are some things which are necessary to be done, and some rules necessary to be enforced, if a State is to be solvent and orderly at home and to maintain independence and dignity abroad. There are others which are not necessary but expedient to be done, and other rules in like manner to be observed, for the well-being of the community. The first of these represent the duty of the Executive *par excellence, the essential business of government.*

(1) (1922) 38 T.L.R., 781; 91 L.T. K.B., 897; 127 L.T., 822.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

The second represent the desire of the State to regulate human conduct so as not merely to secure the existence of the community, but to *promote its well-being.*" As the learned writer says, this division is not exhaustive nor is the distinction always easy to substantiate—I presume he means not always easy to substantiate historically. But as a broad distinction it is sound. The distinction is pointed to in *Coomber* v. *Justices of Berks* (1), where Lord *Watson* refers to "the administration of justice, the maintenance of order, and the repression of crime," as being "among the primary, and inalienable functions of a constitutional Government" and "proper government purposes and uses." Therein lies the vast difference between a State, for instance, carrying on ordinary industrial operations that a private person might be authorized to carry on, and its performance of what Lord *Watson* calls "inalienable functions of government" which cannot be delegated to private individuals. In ordinary times of peace, the business of wool-top manufacture would *primâ facie* fall within the second class formulated by Sir *William Anson* and be within executive power only when specially authorized by a competent law. But in war time it may be—I do not need to say more—that the emergency would so widen the application of the defence power without intruding on the special jurisdiction of the States, and would so enlarge the implied authority of the Executive in the exercise of the *suprema potestas* in the manner indicated in the authorities I have earlier quoted, as to bring the case within *Anson's* first class. I do not, therefore, dismiss this as necessarily invalid on general principles—that is, as necessarily outside the third declaration of sec. 61. It is another and I think a very striking instance of the impossibility of regarding the mere written words of the Constitution as affording the only test of validity. Those written words have to take into account the circumstances of the moment and the extent of constitutional development. The doctrine of responsible government, for instance, is invisibly but none the less inextricably and powerfully interwoven with the texture of the written word, and any interpretation of the document which disregarded the implication of that doctrine would be false and misleading. For the importance of this consideration I refer

(1) (1883) 9 App. Cas., 61, at p. 74.

to the judgment of four Justices of this Court in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1). That doctrine is, in my opinion, of vital importance in relation to the question I am now answering, because it determines whether the authority of the Executive Government extended to make a contract to pay £64,000 a year to the Company. The statement I have already made as to the terms of the contract suffice to show that, according to law (sec. 81 of the Constitution and the *Audit Act* and recognized constitutional practice), whatever moneys the Company was bound to pay to the Government as the result of the Government's trading would have to be paid into the Consolidated Revenue Fund. It has long been an accepted thesis of the Constitution, as declared by the Committee on Public Moneys in 1857, that "it is essential to a complete parliamentary control of the public money that no portion of it should be arrested in its progress to the consolidated fund, from which alone it can be issued and applied with parliamentary sanction." For this and other references to the Reports of that Committee I am indebted to Colonel *Durell's* informative work on *Parliamentary Grants*. The *Audit Act* enforces this essential safeguard. And, leaving aside any implication of indemnity to the Company in case of loss, the specific provision as to £64,000 a year, not by way of deduction from proceeds, not limited to a profit fund, but a straight-out liability out of unspecified Government moneys, differentiates this bargain from the three prior agreements, and leaves it, not one of "taxation," that is, taking the Company's money, but one of "payment" to the Company of public money. How can that be justified without legislation? In my opinion it cannot. And the clear authority for that is *Mackay* v. *Attorney-General for British Columbia* (2). There Viscount *Haldane*, speaking for a very powerful Judicial Committee, comprising besides himself the present Lord Chancellor, Lord *Dunedin*, Lord *Shaw* and Lord *Phillimore*, said (3): —"The character of any constitution which follows, as that of British Columbia does, the type of responsible Government in the British Empire, requires that the Sovereign or his representative should act on the advice of Ministers responsible to the Parliament,

(1) (1920) 28 C.L.R., 129, at p. 147. (2) (1922) 1 A.C., 457.
(3) (1922) 1 A.C., at p. 461.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

that is to say, should not act individually, but constitutionally. *A contract which involves the provision of funds of Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute.*" That is a very clear and unmistakable statement, by the supreme judicial authority for the Dominions, of a principle which, applied to the agreement in hand, at once declares its invalidity, unless supported by legislative provision. Nevertheless, its accuracy has been doubted on the ground that it was a mere dictum, unnecessary for the case and not supported by principle or authority. I must confess my inability to entertain the doubt on either ground, and feel somewhat reluctant to do more than rest on the citation. But the doctrine stated is so vital to the working of our Federal Constitution, as it is to the Constitutions of the States, that I believe it not presumption or waste of time to indicate why I consider the passages quoted both part of the *ratio decidendi* and constitutionally essential to self-government as it is now understood. The case itself was concerned with the question whether a contract made by the Minister for Public Works was binding on the Crown. It appears from the judgment that in the Court of Appeal of British Columbia the dissenting Judge had held (1) "that an Order in Council was not a condition precedent to the making of a binding agreement;" (2) "that the agreement contained a well-constituted submission to arbitration;" and (3) "that the Crown was, in the circumstances, estopped from denying the validity of the agreement and the award" (1). The Judicial Committee, as it appears to me, thought it would have been taking all too narrow a view to have said merely that the terms of the Act were not complied with. Their Lordships apparently thought it necessary to consider also how far the contractual or otherwise binding relations set up could be supported in any legal aspect. The general power of the Executive Government to contract, either directly or by estoppel, came into the field of decision. And so the decisive principle enunciated as quoted was an essential part of the reasoning by which the conclusion was reached. But even if *obiter*, was it not right? I cannot doubt it. It is rested on the basis of responsible government. To properly apprehend the

(1) (1922) 1 A.C., at p. 460.

support given by that feature of the Constitution, a very brief retrospect is necessary.

For centuries under responsible government, as any history will tell us, the insistence of the House of Commons on control of taxation was the basis of popular liberty. That alone, however, would have been of little use but for the accompanying power over appropriation. The *Report of the Committee on Public Moneys* of 1857 (App. 3, p. 568) said: "The chain of historical evidence undeniably proves that a previous and stringent appropriation, often minute and specific, has formed an essential part of the British Constitution." This practice also dates back to a very early period. But, even then, there arises the necessity for control over the actual expenditure of the sums appropriated. So long as the Cabinet remained in fact, as it still is in strict legal theory, an independent organ of government—the Executive as distinct from the legislative organ, and co-ordinate with that and the judicial organ—the servants of the Crown as distinct from the representatives of the people—so long as Ministers owed their position to the royal choice and not to the approval of Parliament, the authority of the Executive to bind the Crown by contract depended, in the eye of the law, on ordinary legal considerations of the right of the Crown as a principal and at its own discretion to bind itself or its property. In these circumstances, there entered no element of parliamentary approbation, short of formal enactment. In the early years of the nineteenth century a change began, and proceeded until Parliament, though obviously incapable of direct executive action, exercises complete control. Ministers, nominally the selection of the Crown, are in fact the choice of Parliament, and pre-eminently of that branch of Parliament that chiefly controls the finances. To Parliament, Ministers are responsible: the strict theory of the Constitution that Ministers are the servants only of the Crown gives way in actual practice to the acknowledged fact that they are really the executants of the parliamentary will, and must account to Parliament, and look for their authority to Parliament—authority express or tacit, arising from the confidence it gives to the administration. The theory that the Crown chooses its Ministers is overshadowed by the constitutional rule that it chooses only such as possess the

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

confidence of Parliament; and the theory that Ministers execute the royal will accommodates itself to the fact that the royal will is to do what Parliament desires. There emerges from this the general understanding that Parliament is not to be fettered in its discretion as to public expenditure by anything the Executive may do. Parliamentary discretion would be severely fettered if the Executive could make a compact binding the Crown in law to pay away portion of the public funds and leaving to Parliament the alternative of assenting to the payment or disavowing a public obligation. That would be seriously weakening the control by Parliament over the public Treasury.

Churchward v. *The Queen* (1) was a notable case. A contract was made in 1859 for twenty-five years for the conveyance of mails, whereby the Admiralty Commissioners (for His Majesty) agreed to pay to the applicant £18,000 a year, out of moneys to be provided by Parliament, for carrying mails between England and the Continent. There was a plea that Parliament had not voted any moneys for this service since 1863. *Cockburn* C.J. certainly did not go so far as I have stated, because he simply construed the contractual promise to pay as conditional on Parliament voting the money; but many of his observations tend in the direction I have indicated. *Shee* J. went further than the Chief Justice, and thought that the condition deduced from the expressed words of the contract would in any event be implied by reason "of the notorious inability of the Crown to contract unconditionally for such money payments in consideration of such services." And the learned Judge speaks of "the condition of parliamentary provision." That case was determined in 1865. Since 1865, parliamentary supervision of executive action both in law and in practice in relation to finance has greatly developed. In 1916 the case of *Commercial Cable Co.* v. *Government of Newfoundland* (2) was determined by the Privy Council. In the *Amalgamated Engineers' Case* (3) four Justices of this Court referred to that case as "a landmark in the legal development of the Constitution," and said:—"There the principle of responsible government was held by the Privy Council to control the question of the

(1) (1865) L.R. 1 Q.B., 173.
(2) (1916) 2 A.C., 610.
(3) (1920) 28 C.L.R., at p. 147.

Crown's liability on an agreement made by the Government of Newfoundland. The elective Chamber having made a rule—*not a law*, be it observed—for regulating its own proceedings, requiring certain contracts to be approved by a resolution of the House, it was held that, in view of the constitutional practice of the Executive conforming, under the principle of responsible government, to the requirement of the elective Chamber, the rule was a restriction on the Governor's power under his commission to represent the Crown, and consequently on his power on behalf of the Crown to contract, which everyone transacting public business with him must be taken to know. The rule was in terms held to have become part of the Constitution of Newfoundland."

In other words, the constitutional practice that the Crown's discretion to make contracts involving the expenditure of public money would not be entrusted to Ministers unless Parliament had sanctioned it, either by direct legislation or by appropriation of funds, had, like many other general customs of the country, acquired such consistency and notoriety that, stating it in legal terms, everyone must be deemed to have notice of it, and consequently no Court can regard any contract as valid which violates that practice. It is that same rule of law which is restated in *Mackay's Case* (1), and which I have in the circumstances felt at liberty and indeed bound to re-examine, notwithstanding that I personally should have been prepared to accept that case by way of final authority. I cannot part with this point, however, without observing that, in their recognition of the constitutional practice as a legal element of contract, their Lordships of the Privy Council have rendered a signal service to the cause of self-government by assuring to the people the effective control of the public purse.

I have only to add as to the first question, that if the third and the fourth agreements are regarded as inseparable the vice of each would destroy both.

The second question, being contingent on an affirmative answer to the first, need not be answered.

HIGGINS J. During the discussion of the case reserved and

(1) (1922) 1 A.C., 457.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

directed to be argued before the Full Court, counsel for the plaintiff, being faced by the argument that the validity of the agreements found to have been made in fact could not be supported by the regulations set out in the Second Schedule to the *Commercial Activities Act* 1919, urged the startling proposition that the Executive Government of the Commonwealth has power to enter into any agreement apart from statute or regulation—any agreement *for any purpose*—unless prohibited by statute. No authority was cited at the time in support of the proposition; but the point seemed to be sufficiently grave to call for the assistance of all the available members of the Bench, in order that such a question "affecting the constitutional powers of the Commonwealth" within the words of the *Judiciary Act* 1912, might be definitively settled.

The two questions stated for the Full Bench have been set out. The agreements appear in exhibits P452, P80 and P101, and P299. If the Government has power to contract to the effect of these agreements, it would seem to have power to contract for any purpose not prohibited by statute, as contended by counsel. What is there to prevent the Government from contracting to supply coal to all the factories in Australia? There might be no appropriation of moneys by Parliament; but the Commonwealth might be rendered liable in damages amounting to millions of pounds, if it broke the contract (*Thomas* v. *The Queen* (1); *Windsor and Annapolis Railway Co.* v. *The Queen* (2)). Question 1, however, appropriately limits this discussion to the legal power of the Government to make (or ratify—but if it cannot make an agreement it cannot ratify it) the three agreements—or four, if exhibit P299 is to be treated as containing two separate independent agreements.

For the purpose of the question we have to ignore the existence of any relevant Act of the Parliament, or regulation under any Act; and yet the agreements are unintelligible apart from the *War Precautions Act* and the *Commercial Activities Act* and the regulations thereunder. The agreement of 1st March 1917 actually recites the former Act and the regulations, and the necessity to obtain the consent of the Commonwealth Government to the purchase of sheepskins and wool and to the sale of wool tops; and the Government

(1) (1874) L.R. 10 Q.B., 31. (2) (1886) 11 App. Cas., 607.

purports to consent accordingly, and to agree to consent for an indefinite future on the terms (*inter alia*) of getting one-half of the net earnings into its disposal.

The question asked throws us back on the Constitution; for the Governor-General and the Executive Government are both the creatures of the Constitution; and the Constitution is the creature of the British Act 63 & 64 Vict. c. 12. The Executive Government has no powers except such as are conferred by or under this British Act, expressly or by necessary implication. Now, under sec. 2 of the Constitution, "a Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as *Her Majesty may be pleased to assign to him.*" Then, under sec. 61, "the executive power of the Commonwealth is vested in the Queen, and is exerciseable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." It is not contended that the King has assigned to the Governor-General any powers or functions, under sec. 2, which are additional to those referred to in sec. 61 or relevant to these contracts. We have seen a copy of the letters patent under the great seal, creating the office; and there the Governor-General is commanded "to do and execute all things that shall belong to his command, and to the trust that We have reposed in him, according to the several powers and authorities granted or appointed him by virtue of the *Commonwealth of Australia Constitution Act* 1900 and of these present letters patent and of such commission as may be issued to him under Our sign manual and signet or by Our order in Our Privy Council or by Us through one of Our principal secretaries of State and to such laws as shall hereafter be in force in Our said Commonwealth." The instructions issued under the royal sign manual and signet, 29th October 1900, contain no additional relevant powers, though they vest in the Governor-General some of the royal prerogative of pardon for offenders. In short, the Governor-General is not a general agent of His Majesty, with power to exercise all His Majesty's prerogatives; he is a special agent with power to

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

carry out the Constitution and the laws, and such powers and functions as the King may assign to him (see *Commercial Cable Co.* v. *Government of Newfoundland* (1)). For the purpose of this question we are to ignore the laws of the Commonwealth ; and the only power left is the power to execute and maintain this Constitution ; and to make these agreements is not within the ambit of that power.

For the reasons which I have stated, I feel justified in answering the first question in the negative.

An attempt has been made, however, to support these contracts by decisions and dicta as to the King's prerogative. But it is not necessary in this case to attempt to define the boundaries of the King's prerogative. We have merely to consider the limits of the powers granted to the Governor-General. We should be chary of making any pronouncement as to the King's prerogative until it becomes absolutely necessary. I am mindful of the quaint warning uttered by *Dodderidge* J. in *Darcy* v. *Allen* (2)—the case of the monopoly granted for playing cards : " He that hews above his hand, chips will fall into his eyes." I want to confine myself to the Constitution granted to the Australian people. I do not ignore the fact that sec. 61 uses the word " extends "—" extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth " ; and it has been suggested that the phrase used is one of extension, not of limitation, of powers. But the point is that even if the King could legally, and should see fit constitutionally, to give other powers, there is no evidence or indication that His Majesty has done so.

But it may not be amiss to point out that even the King can claim no prerogative but such as the law allows, and that the Courts can inquire as to the extent of any prerogative (*Comyn's Digest*, " Prerogative " (A)). To use the words of *Dodderidge* J. in *Darcy* v. *Allen* (2)—words used at a time when the prerogative was at its zenith—" the princes of this realm have been at all times content that their patents and grants should be examined by the laws." That is to say, the prerogative is limited ; and the party who relies on any prerogative right has the burden of showing it affirmatively. The

(1) (1916) 2 A.C., at p. 616.

(2) (1602) Moore (K.B.), 671, at p. 672.

plaintiff here has not shown that the right to make these agreements exists in the King—much less that it exists in the Governor-General.

In the recent case of *Mackay* v. *Attorney-General for British Columbia* (1) there was a contract made by a Minister for acquiring certain lands for public purposes. The case turned on the point that the Governor in Council had not sanctioned the acquisition under the Newfoundland Act; but Viscount *Haldane*, expressing the opinion of the Judicial Committee of the Privy Council, said (2): "A contract which involves the provision of funds by Parliament requires, if it is to possess legal validity, that Parliament should have authorized it, either directly, or under the provisions of a statute." This language is clear enough; but it may be said that it relates only to contracts involving the direct payment of money. The contract under discussion in the case involved the direct payment of a price for land, and Lord *Haldane* applied his words to the actual case before him. But if such a contract is invalid, a contract which involves the payment of money as damages for breach must be invalid also. In a previous case of *Commercial Cable Co.* v. *Government of Newfoundland* (3) there was a contract made by the Governor under the great seal of Newfoundland with a cable company, and one of the terms was to remit duties on all equipment and materials that the company should introduce. There was in an Act a power to remit duties, but their Lordships held that it did not apply to a contract which dealt, not with a remission in a particular case, but with an exemption of a prospective and continuing character; and that any such contract to remit would "require the special sanction of the Legislature." There is actually such an agreement to consent for the indefinite future in the present case.

As for the case of *O'Keefe* v. *Williams* (4), affirmed by the Judicial Committee (5), on which much reliance has been placed by counsel for the plaintiffs, I think it has been misapprehended. That case did not turn on the Commonwealth Constitution at all. So far as relevant, it was confined to a question of pleading—a demurrer to

(1) (1922) 1 A.C., 457.
(2) (1922) 1 A.C., at p. 461.
(3) (1916) 2 A.C., 610.
(4) (1907) 5 C.L.R., 217.
(5) (1910) A.C., 186.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

a declaration on a contract. The demurrer raised the point that the contract was not permitted by the New South Wales Land Acts; and it was held that the Land Acts did not affect the contract. The Judicial Committee affirmed the decision of the High Court overruling the demurrer, saying (1):—"It is impossible to say as a matter of law that the Crown could not bind itself by an agreement such as that declared upon. If any party makes a contract for a good consideration to do something which he was already bound to do, though no one was at the time sure that the duty already existed, the other party can sue upon the contract." It was a kind of agreement for a compromise of doubtful rights; and no one urged that the Government of New South Wales could not, under the New South Wales Constitution, agree to such a compromise.

As the first question is answered in the negative, the second question need not be answered.

STARKE J. This case was heard before my brother *Isaacs*, who found certain facts, and reserved for the consideration of the Full Court the question, what judgment should be entered upon the facts so found? The Chief Justice and I, when at the Bar, had been counsel for opposite parties in this litigation, and would, in the ordinary course, have taken no part in the decision of this case. But during its discussion before the Full Court, some questions affecting the constitutional powers of the Commonwealth arose, and it was doubtful if a decision of the case could be arrived at unless those questions were determined. The *Judiciary Act* 1912 (No. 31 of 1912), sec. 3, and the amending Act of 1920 (No. 38 of 1920), sec. 2, provide: "A Full Court consisting of less than all the Justices shall not give a decision on a question affecting the constitutional powers of the Commonwealth, unless at least three Justices concur in the decision." The Chief Justice and I thought that we could not, with due regard to our duty, decline the responsibility of adjudicating upon such questions if they actually called for decision, but we made it clear that we should take no further part in the case.

The questions argued before the Full Bench, consisting of the

(1) (1910) A.C., at p. 191.

Chief Justice, my brothers *Isaacs*, *Higgins*, *Gavan Duffy*, *Powers* and myself, were as follows:—(1) Is the *War Precautions Act* a law imposing taxation within the meaning of sec. 55 of the Constitution, assuming that the agreements of March and January were within the powers conferred on the Commonwealth by the Wool Regulations? (2) Was it within the legal power of the Commonwealth Executive Government apart from any Act of the Parliament or regulation thereunder to make or ratify, at the times the same were respectively made or ratified, any and which of the following agreements: (*a*) 1st March 1917; (*b*) January 1918; (*c*) September 1918, consisting of pars. 2, 3 and 4 of exhibit P299, treating such paragraphs as separable from the rest of the provisions of that document; (*d*) September 1918, consisting of the terms of exhibit P299, disregarding pars. 2, 3 and 4 thereof; (*e*) September 1918, regarding exhibit P299 as a whole? (3) If yes as to any of the said agreements, was the approval of the Governor-General in Council necessary to the making or ratification thereof?

Arguments in relation to other points in the case were heard by the Full Court, consisting of my brothers *Isaacs*, *Higgins* and *Gavan Duffy*; but the Full Bench confined itself to the questions already set forth. It is unnecessary to deal with the first question in view of the opinion entertained by the members of the Full Court as to the true construction of the *War Precautions* (*Wool*) *Regulations*, reg. 10. Question 2, however, becomes critical, and for its determination some consideration must be given to the circumstances under which the agreements were made. Substantially, those circumstances may be found in, or inferred from, the recitals to the agreement of 1st March 1917. But let me restate them in relation to their bearing upon the questions raised for determination.

The Colonial Combing, Spinning and Weaving Co. was, at the time of the agreements in March 1917, incorporated in Australia and lawfully engaged in the manufacture and sale of wool tops and by-products. It purchased wool and also sheepskins, which it fellmongered, for the purpose of its business. In 1916 the question of ensuring an adequate supply of wool to meet the military needs of the British and Allied arms had arisen, and the Imperial Government suggested the acquisition of the wool clip of Australia. The

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Starke J.

Commonwealth Government assented to this suggestion, and steps were taken to secure the wool for the purposes of the Imperial Government. It is quite unnecessary in this case to enter upon a detailed statement of the arrangement between the Imperial and the Commonwealth Government: it is sufficient to say that the *War Precautions* (*Wool*) *Regulations* 1916 and the *War Precautions* (*Sheepskins*) *Regulations* 1916 were passed for the purpose of ensuring that arrangement. In substance, wool and wool tops could not be sold except through or to or with the consent of the Central Wool Committee or otherwise in accordance with the regulations (Wool Regulations, reg. 10). Surplus sheepskins, not required for fellmongering or local requirements needs, might be sold, but only to, through or with the consent of the Commonwealth Government (Sheepskins Regulations, reg. 5).

Now the Company, after the passing of these regulations, desired to carry on its business of acquiring wool, shorn or from skins, manufacturing the same into tops and by-products of various kinds, and selling its manufactures to the best advantage. But it could only do so subject to the regulations: it must obtain the consent of the Commonwealth or of the Central Wool Committee, otherwise the carrying on of business was impossible. The agreement of 1st March 1917 was the outcome of this position. The Commonwealth Government "for the consideration" in the agreement "set forth" agreed to consent to the purchase of sheepskins and wool by the Company for the purpose of manufacturing tops, &c., and *to the sale* by the Company of wool tops under conditions set out in the agreement, and *in consideration thereof* the Company agreed to make the payments and conform to the conditions laid down in the agreement. The so-called consideration moving from the Company was, subject to certain adjustments, an undertaking to hold one-half of the net earnings of the Company in the conduct of the business at the disposal of the Commonwealth Government. The agreement of 1918 was to the same effect, but on this occasion the Government and the Wool Committee insisted upon the deposit of further moneys in a trust account to be dealt with as might be decided, taking into account special conditions and increased cost, if any, of manufacture. The agreement or agreements of September 1918 stipulated for

payments of all moneys, "back payments," due by the Company to the Government under the preceding agreements. But, as I construe this agreement, the Government then proceeded to take over the business of the Company, and stipulated that the products thereof should be deemed the property of the Government, and that the Company should, in the making of wool tops, act as agents for the Government. The Company was to receive as remuneration, over all costs of manufacture, a sum of £64,000 per annum, free of certain war-profits taxation, on a six million pounds output of wool tops, and, if the output should exceed six million pounds, payment for any such excess was to be discussed and determined. In other words, the Government took the net earnings of the business over the sum agreed to be paid to the Company.

We are to assume that these agreements cannot be supported under any legislative provision. An attempt was made to support them on the footing of compensation to the Commonwealth for the loss of rights or as a compromise of doubtful rights. These rights were said to flow from the arrangement entered into between the Imperial and the Commonwealth Governments for the acquisition of the wool clip of Australia and from the regulations made under the *War Precautions Act*. But in truth the agreements substantially excluded the wool tops, &c., from the scope of this arrangement, and admittedly did so for the purpose of enabling the Company to carry on its business. Doubtless, the carrying on of this business and its firm establishment were considered as matters of concern, not only to the Company, but also to the community at large. Nevertheless, it was the Company itself that owned the business, and organized and established it. In my opinion, the Government gave up no rights and compromised no rights by reason of the agreements. What it did, in plain language, was to extort a certain part of the net earnings of the business of the Company as a condition of its consent to the doing of acts by the Company which were essential to the carrying on of the latter's business.

The question, then, for the consideration of the Court is whether the King—the Executive Government of the King in the Commonwealth—can, without parliamentary sanction, exact the payment of the moneys mentioned in these agreements, as a condition of or as

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Starke J.

consideration for giving consent to acts necessary to the conduct of the subject's business? So stated, the problem recalls many conflicts in the past between the King and the subject as to the right of the King to levy taxes upon, or to exact or extort money from, the subject without the consent of Parliament. But that contest has long since ended; and we may now say, with confidence, that it is illegal for the King—or the Executive Government of the King—without the authority of Parliament, to levy taxes upon the subject, or to exact, extort or raise moneys from the subject for the use of the King "as the price of exercising his control in a particular way" or as a consideration for permitting the subject to carry on his trade or business. The history of the struggle to assert parliamentary control is outlined by Professor *Maitland* in the lectures delivered by him upon *Constitutional History* (see pp. 92-96, 180-181, 306-311, 430 *et seqq.*) and by Sir *William Anson* in his *Law and Custom of the Constitution* (4th ed., vol. I., "Parliament," pp. 333-341).

It is neither necessary nor desirable to consider whether all the exactions included in the foregoing proposition would or would not fall within the power of taxation contained in the Constitution, or whether the opinions delivered by the noble and learned Lords in the case of *Attorney-General* v. *Wilts United Dairies Ltd.* (1) necessarily involve that conclusion. The question must be considered, in Australia, in connection with secs. 53 and 55 of the Constitution. As a generic description the word "tax" is wide enough, no doubt, to cover all the exactions referred to. But whether, in all cases and in all forms, an authority given by Parliament to make such charges would be an exercise of the constitutional power of taxation, requiring an observance of the provisions of secs. 53 and 55 of the Constitution, appears to me to be a question which, though of far-reaching importance, it is quite unnecessary to deal with for the purpose of the decision of this case. Therefore I reserve my opinion upon the subject until a case shall arise in which the matter calls for decision.

The case of *Mackay* v. *Attorney-General for British Columbia* (2) has been much referred to in connection with the agreement of September 1918. If that agreement involves the provision of funds

(1) (1922) 38 T.L.R., 781; 91 L.J. K.B., 897; 127 L.T., 822.
(2) (1922) 1 A.C., 457.

by Parliament, then the authority of Parliament is necessary for its validity. So much is authoritatively decided in *Mackay's Case*. But, whatever the form of the agreement, its substance amounts to this: that the Crown takes the net earnings of the business of the Company, subject to an agreed sum reserved for the Company. I regard such an agreement as an illegal extortion of money from the subject rather than as an agreement involving the provision of funds by Parliament.

The provisions of the Constitution were referred to. The Executive power of the Commonwealth "is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." But this section simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or to the prerogative or inherent powers of the King. I agree with the other members of the Court that the agreements cannot be supported under any provision of the Constitution, and the question No. 2 is based upon the assumption that they cannot be supported under any law of the Commonwealth. And the general principles of the constitutional law of England make it clear, in my opinion, that no prerogative or inherent executive power residing in the King or his Executive Government supports the agreements.

I answer the second question in the negative.

I do not answer the other questions.

[POWERS J. did not deliver a judgment.]

The first question answered in the negative.

Upon the questions argued before the FULL COURT the following written judgments were then delivered:—

ISAACS J. The question now remaining to be determined is whether the agreements of March 1917, January 1918 and September 1918 (part) can be supported by any Commonwealth legislation? The only legislation suggested is the *War Precautions Act*, under

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

which the Wool Regulations were made. The material regulation is reg. 10, which is in these terms: "No person shall sell any wool or tops except through or to or with the consent of the Commonwealth Government or otherwise in accordance with these regulations." It was under this regulation that the Government, represented by the Central Wool Committee, insisted on refusing consent to the sale of wool tops by the Company under the contracts of March 1917 and January 1918 unless the stipulated share of profits was promised, and with respect to pars. 2, 3 and 4 of the agreement of 27th September 1918 it was insisted on, as stated in my Full Bench judgment, as a condition of entertaining the question of the terms on which future consents to sell wool tops would be given. The rest of the agreement of 27th September is not attempted to be supported by any statutory provision, and need not be further considered.

The words of reg. 10 are undoubtedly very wide, and, being made under the *War Precautions Act* and intended for defence in time of war, should, in my opinion, be given the widest possible construction not inconsistent with established law or imperative canons of construction. The case of *R.* v. *Halliday* (1) is a strong authority for this position. Lord *Finlay* L.C. said (2): "It may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and . . . Parliament may do so feeling certain that such powers will be reasonably exercised." Nevertheless, there is, as has been stated in my Full Bench judgment, a basic principle in relation to taxation.

The *Wilts Dairies Case* (3) makes it plain that where statutory powers are conferred which in their literal terms are unrestricted, as for instance, that "no person shall deal in milk by wholesale unless he is the holder of a licence," those literal terms have to be construed by the aid of the constitutional principle established for the protection of the subject. Lord *Buckmaster* in *Greenwood* v. *F. L. Smidth & Co.* (4) says:—"It is . . . important to remember the rule, *which the Courts ought to obey*, that, where it is desired to impose a

(1) (1917) A.C., 260.
(2) (1917) A.C., at p. 268.
(3) (1922) 38 T.L.R., 781; 91 L.J. K.B., 897; 127 L.T., 822.
(4) (1922) 1 A.C., 417, at p. 423.

new burden *by way of taxation*, it is essential that *this intention should be stated in plain terms*. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer." Lord *Atkinson*, Lord *Sumner*, Lord *Wrenbury* and Lord *Carson* agreed with Lord *Buckmaster's* judgment. This is the latest statement of the law and perhaps the most explicit to be found as to the duty of the Court. It is entirely in accord with what the Judicial Committee, speaking by Lord *Blackburn*, said in *Oriental Bank Corporation* v. *Wright* (1), followed in *Brunton* v. *Acting Commissioner of Stamp Duties for New South Wales* (2).

The ordinary meaning of "taxation," which is not altered by the Commonwealth Constitution, is the same in Australia as in England. In addition, the *Bill of Rights* is an Imperial statute in force in Australia by virtue of the Act 9 Geo. IV. c. 83, sec. 24. That Act is a definite law which, though, as *May* says in his *Parliamentary Practice* (10th ed., at p. 4), it "was but a declaration of the ancient law of England," stands nevertheless as an unrepealed enactment operating of its own force as a law and as part of the Constitution of England (see per *Parker* J. in *Bowles* v. *Bank of England* (3)). And, except so far as altered by local statute, it is part also of the Constitution under which every Australian, whether as a member of a State or of the Commonwealth, lives and moves. This principle is applicable whatever use is intended to be made of the money, whatever body administers it, and whatever name is given to it.

No distinction exists whether we say the money is a "tax" or a "burden," whether it is "imposed," "levied," "exacted" or "extorted." Nomenclature is immaterial; substance is all important. The term "exaction" is applicable to all taxation, legal or illegal, the term "extortion" to illegal taxation (see *Taswell-Longmead*, 8th ed., pp. 352-353; *Quick and Garran on the Constitution*, p. 550). Even the *Bill of Rights* does not cover the whole field of taxation, because "taxation" extends beyond the levying of money

(1) (1880) 5 App. Cas., 842, at p. 856. (2) (1913) A.C., 747, at p. 760.
(3) (1913) 1 Ch., at p. 84.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

"for or to the use of the Crown." See, for instance, *Kingston-upon-Hull Dock Co.* v. *Browne* (1), quoted in *Assheton Smith* v. *Owen* (2). The English poor rate is unquestionably "taxation" in the strictest sense, and yet it is not "for or to the use of the Crown." The municipalities' unimproved land tax in New South Wales and municipal rates generally throughout Australia are "taxation," and yet not "for or to the use of the Crown." The *Reports of the Royal Commission* presided over by Lord Balfour of Burleigh, 1897 to 1901, afford numerous illustrations.

The House of Commons in 1698 insisted on the same rule as to amendments by the House of Lords in a bill relating to a workhouse, as in bills relating to general taxation for the use of the Crown (*Hatsell*, vol. III., p. 128). And the doctrine of the common law applying to all classes of taxation is thus stated by Lord *Blackburn* in *Coltness Iron Co.* v. *Black* (3): "No *tax* can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a *burden* on him." That principle was enunciated with direct reference to an inquiry into the *Income Tax Act*. But the learned Lord proceeded almost immediately to consider what he called "if not exactly *in pari materiâ* . . . at least an analogous subject," namely, the statute of 43 Eliz. c. 2.

It was sought in two ways to protect the claim. First by calling it a "licence fee," the suggestion being that fees for licences were, by sec. 53 of the Constitution, not regarded as taxation. As to this, I would first observe that for the six months attributable to the first agreement a sum of £48,384 1s. 11d. was paid—said to be subject to adjustment. And the Commonwealth claims in respect of the January 1918 agreement £121,219 8s. 8d. for the price up to 72d. per lb. and £202,192 15s. 7d. for the extra price above 72d. per lb.; in all £323,412 4s. 3d. Does that come within the fair meaning of sec. 53 "fees for licences"? The interpretation of the terms found in sec. 53 of the Commonwealth Constitution must, of course, depend on the context there appearing, but, reading that section with the light of the long constitutional history that led to its enactment as well as the structure of the document in which it is

(1) (1831) 2 B. & Ad., 43, at p. 58. (2) (1906) 1 Ch., 179, at p. 205.
(3) (1881) 6 App. Cas., 315, at p. 330.

found, it is clear to me that the expression "fees for licences" cannot extend to cover what, on the facts of this case, is in essence a direct and positive impost on the capital or income of this Company, and in no way a mere "fee for a licence" as that is commonly understood and regarded as a necessary or effective means of executing some general and ancillary object of legislation not being in itself taxation.

In my opinion the effect of the first three agreements is that they amount to an imposition of taxation within the Constitution as well as at common law, they are not protected by the words "fees for licences," and that, by reason of the canon of construction stated in *Greenwood* v. *F. L. Smidth & Co.* (1), reg. 10 does not authorize the imposition.

Then it was very energetically sought to distinguish this case from the *Wilts Case* (2) on the facts; and in this way:—It was for the purpose of the day conceded that the judgment of this Court in *John Cooke & Co. Proprietary Ltd. and Field* v. *The Commonwealth and the Central Wool Committee* (3) correctly determined that no legal relations existed between the Commonwealth and the woolgrowers. Mr. *Dixon* stated that, though he made no admission, yet before this Court he did not feel at liberty to challenge that conclusion. Therefore I do not feel free to consider it for myself. Mr. *Dixon*, consequently, while not maintaining that the Commonwealth had any direct property in the wool itself on which it could found a right to deal on a proprietary footing with the Company as to the wool, nevertheless said the Commonwealth had a twofold interest that gave it a right to bargain for the profits. First, he said, the Commonwealth was agent of the Imperial Government to protect its interests, and next, he said, it had its own interest in the potential half share of profits promised to it by the Imperial Government, in respect of any civilian wool it sold out of its purchase. I cannot accede to either of these positions. The Commonwealth did not in fact assume to deal in either guise, even if it had the right. If it had so assumed, it would have been absurd. The wool and wool tops the subject of the March 1917 and January 1918 agreements were

(1) (1922) 1 A.C., at p. 423.
(2) (1922) 38 T.L.R., 781; 91 L.J. K.B., 897; 127 L.T., 822.
(3) *Ante*, 394.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Isaacs J.

outside the wool going to the Imperial Government under its purchase, being wool "reserved," so to speak, for Australian manufacturers out of the purchase and to be accounted for on settled terms. The terms of the agreements show affirmatively they are based wholly (though it would be sufficient if only partly) on the government power of the Executive to give or refuse "consent."

In the result the agreements are invalid for the reasons stated. It is unnecessary to consider many other very important and interesting questions raised which, on a contrary conclusion, would have required decision.

The Crown's action entirely fails on the law; and the Company's cross-action, for the same reasons, also entirely fails. We say nothing as to the claims in the cross-action for the return to the Company of the two sums of £48,384 1s. 11d. and £40,603 14s. 10d., inasmuch as by a memorandum of agreement between the parties, handed to the Court to-day and recorded, these and other matters have been settled between them.

With regard to the costs, both parties have set up agreements which turn out to be invalid, and consequently the plaintiffs (the Commonwealth Government and the Central Wool Committee) fail on the law in the action, and the defendant (the Company) fails on the law in the cross-action. An enormous time was occupied by the trial of issues of fact—a trial which practically eventuated, so far as the facts are concerned, in the complete success of the Government. The circumstances are fully set out in the judgment on the facts referred to this Court. In my opinion the Company should pay the costs occasioned by the contest as to facts. The order as to costs, in my opinion, should be that the defendant Company be ordered to pay all costs of and occasioned by the issues of fact, including the whole costs of the trial, and, except those costs, the parties should bear their own costs of the action and of the three arguments in the Full Court.

HIGGINS J. My brother *Isaacs* J., who tried this action, has reserved for the consideration of the Full Court the question how, consistently with the facts found by him, judgment should be entered; and it is for us to decide this question on the basis of his findings of

fact. Substantially, the action is brought to enforce three agreements, all of which have been found to have been made—an agreement of 1st March 1917, an agreement of January 1918, and an agreement of 26th and 27th September 1918. If the agreements are invalid, no judgment can be entered; and I propose to address myself to the question of validity. If they are invalid, there is no need to deal with the numerous other points of difficulty suggested in the course of the long argument.

(1) *As to the Agreement of 1st March* 1917.—Unless this agreement can be supported under reg. 10 of the Second Schedule to the *Commercial Activities Act* 1919, I cannot see how it can be supported at all. The words of reg. 10 are :—" (1) No person shall sell any wool or tops except through or to or with the consent of the Central Wool Committee or otherwise in accordance with these regulations. (2) The consent of the Central Wool Committee under this regulation may be evidenced by a certificate to that effect under the hand of the Chairman of the Central Wool Committee." At the time that the agreement was made, in March 1917, the consent required by the regulation was the consent of the " Commonwealth Government "; and it was signed as for the Commonwealth Government by Mr. W. M. Hughes, the Prime Minister—not by the Governor-General. But, under reg. 1 (2) of the Second Schedule, all the regulations of the Schedule (except regs. 18 and 28) are to be " deemed to have come into operation on the twenty-third day of November, 1916 "; and there is nothing in the regulations validating transactions which had taken place in pursuance of the regulations as they stood at the time of the transactions. Assuming, however, that the agreement may be treated as executed by the Commonwealth Government, and that it may be treated as remaining valid if it ever was valid, I propose to consider the substance of the agreement—was there any authority to make it ? If reg. 10 does not give the authority, there is no authority; and the agreement is invalid.

It may be (I do not decide it) that the power to make regulations under the *War Precautions Act* 1914-1916—to " make regulations for securing the public safety and the defence of the Commonwealth " (sec. 4 (1) (i.))—could have been exercised so as to cover the making of an agreement such as this; but unless it was so exercised, the

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

power to make agreements depends on the regulations actually made —and the only relevant regulation is reg. 10.

Now, this regulation is confined to the act of selling only—"No person shall sell any wool or tops except through or to or with the consent of the Commonwealth Government." The Commonwealth Government was desirous of carrying out its promise to "secure to the Imperial Government" (exhibit P9) in the exigences of war, the whole of the Australian clip of wool, merino as well as cross-bred; and its first and main device was to provide that unless the wool-producer sold through or to or with the consent of the Commonwealth Government, he could not sell at all. That is to say, unless the producer came voluntarily into the "pool," he could get no profit of his capital and exertions for the year. The Commonwealth Government was to get the wool-producers to sell their wool to the Imperial Government; and reg. 10 was the method whereby the Commonwealth Government endeavoured, practically, to force the producers into the pool. The consent to sell referred to is obviously a consent to the producer or owner of the wool to sell, and, *primâ facie*, the consent should specify the particular transaction, and the name of the vendor, at the very least. It appears from reg. 20 that purchasers of appraised wool must be authorized to buy; but the consent referred to in reg. 10 is a consent to the vendor selling—like a licence to sell. Reg. 10 enables a vendor to sell not only through or to or with the consent of the Central Wool Committee but "or otherwise in accordance with these regulations"; and these last words are to some extent met by a sale to authorized buyers under reg. 20, without the consent of the Central Wool Committee at all. But still it is the *sale* that is to be allowed by regs. 10 and 20; and, in my opinion, there is nothing in the regulations enabling the Government to give a general right to purchase. Reg. 20 is merely ancillary to reg. 10, and enables the person licensed to sell to find a suitable purchaser. A sale by the producer to the Imperial Government through the Commonwealth Government as intermediary would, I think, be treated as a sale "through" the latter Government. A sale "to" the Commonwealth Government by the producer was another course permitted. A sale "with the consent" of the Commonwealth Government was another course. It is on this

last mentioned option, of selling with the consent of the Commonwealth Government, that counsel for the Commonwealth rely as being sufficient to authorize this agreement.

Looking now at the agreement, we find that in its very first clause it purports to be a consent to the Company to *purchase* such wool as may be required for the purpose of manufacturing wool tops. There is no limitation as to the vendors—any vendor may sell to the Company. Clause 1 of the agreement is not in pursuance of reg. 10 at all; for it purports to be a consent "to the *sale to* and the *purchase by* the Company of such wool as may be required by the Company." The vendor is not named, either directly or indirectly; the transaction is not specified; and the clause purports to allow the Company to purchase from anybody or everybody. This is not a consent to a vendor selling, but a general consent to a certain purchaser to buy where he can. Then, in clause 3, the Government "approves" of the Company "dealing in any manner it thinks fit with the noils and other by-products of the manufacture of wool tops"; where is this power of approval given by the regulations? Then, by clause 4, the Government agrees "that it will on request by the Company give its consent to the sale by the Company of the following wool tops and no others . . . (*inter alia*) any wool tops which the Company shall with the previous consent in writing of the Commonwealth Government contract to sell by contract or contracts made or extended after the date of these presents." It will be observed that hereby the Government contracts that it *will* give its consent to the sale of any wool tops as described; but that a previous consent (in writing) to any contract of sale is still required. But, as in the case of trustees having power to give or withhold consent—say, to marriage or to leaving the jurisdiction—the power of the Government to give or withhold consent does not carry with it a power to contract that it will give or withhold consent in the future. The discretion must be exercised when the occasion arises, according to the facts existing at the time (*Weller* v. *Ker* (1); *Chambers* v. *Smith* (2); *Moore* v. *Clench* (3); *Commercial Cable Co.* v. *Government of Newfoundland* (4); and cases cited in *Lewin on Trusts*, 12th ed., p. 769).

(1) (1866) L.R. 1 H.L. (Sc.), 11.
(2) (1878) 3 App. Cas., 795, at p. 816.
(3) (1875) 1 Ch. D., 447, at p. 453.
(4) (1916) 2 A.C., at p. 615.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

The fact that a consent has still to be given at the time may make the agreement nugatory: but if clause 4 has any operation further than contemplated by reg. 10, that operation is not permitted by the regulation. But clause 7 creates another difficulty. It provides, as to the net earnings of the Company for each accounting period, that the Company is to hold one-half of the net earnings at the disposal of the Government; and (clause 10) the amount for the Government is to be paid forthwith into a bank to the wool top manufacturer's account to be "disposed of as the Commonwealth Government shall direct." That is to say, the Government, being entrusted with the power to give or withhold consent to sales, uses that power for the purpose of securing money for itself—gives its consent on the terms of receiving half the profits. If a trustee or other person entrusted with such a power were to exercise it in such a fashion, the Courts would not hesitate to treat such a bargain as an abuse of the power—what is called a "fraud on the power." An executor having power to dispose of a church preferment cannot bargain for an advantage to himself (*Richardson* v. *Chapman* (1)); a municipal corporation, trustee for a school, cannot grant a lease containing a covenant that the lessee shall grind his corn at the corporation mill (*Attorney-General* v. *Stamford* (2)); trustees for a school cannot lease to one of the trustees (*Attorney-General* v. *Dixie* (3)); governors of a school cannot lease to one of the governors (*Attorney-General* v. *Earl of Clarendon* (4)); a parent with a power to appoint among children cannot bargain with a child for purchase of a share appointed (*Cuninghame* v. *Anstruther* (5)); a parent with such a power cannot appoint money to a daughter to meet his burial expenses (*Hay* v. *Watkins* (6)); a tenant for life having statutory power to lease cannot lease to a trustee for himself (*Boyce* v. *Edbrooke* (7)). The same principle applies to all discretionary powers, such as consents. As *Farwell* puts it (*Farwell on Powers*, 3rd ed., p. 463): "Trustees must exercise any discretionary power they may have (*e.g.*, to consent) *bonâ fide* for the benefit of the persons for whom they are trustees" (*Eland* v. *Baker* (8); and see *Strange* v. *Smith* (9); *Clarke* v.

(1) (1760) 7 Bro. Parl. Cas., 318.
(2) (1747) 2 Swans., app., 591.
(3) (1805) 13 Ves., 519.
(4) (1810) 17 Ves., 491.
(5) (1872) L.R. 2 H.L. (Sc.), 223.
(6) (1843) 3 Dr. & War., 339.
(7) (1903) 1 Ch., 836.
(8) (1861) 29 Beav., 137.
(9) (1755) Amb., 263.

Parker (1); *Mesgrett* v. *Mesgrett* (2)). Most of these cases relate to trustees; but the principle is not confined to trusts. In the recent case of *Vatcher* v. *Paull* (3) Lord *Parker of Waddington*, in the Privy Council, explained the position:—"The term fraud in connection with frauds on a power does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common law meaning of the term or any conduct which could be properly termed dishonest or immoral. It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee, whereby the appointor, or some other person not an object of the power, is to derive a benefit. But such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself, or some other person not an object of the power. In such a case the appointment is invalid." In commenting on these words *Farwell* L.J. says (*Farwell on Powers*, 3rd ed., p. 458):—"It will be observed that the essential notion is disposition beyond the scope of the power, not breach of trust by the donee, though it is not unusual to speak of the donee of a limited power as being in a fiduciary position. His position is referable to the terms, express and implied, of the instrument creating the power and the implied obligation not to appoint for an ulterior purpose, and is not in truth founded, like the position of a trustee, upon a state of conscience imputed to him by Courts of equity. But there is a strong analogy between the obligation imposed on a donee by the terms of the instrument creating the power and that imposed upon a trustee by the terms of the instrument creating the trust." The same principle, indeed, seems to be at the root of the numerous cases decided by Courts of common law, in which a by-law has been held "unreasonable"—rather an unhappy term. For instance, in *Calder and Hebble Navigation Co.* v. *Pilling* (4) a canal company had power to make by-laws for the good government of the company, and for

(1) (1812) 19 Ves., 1, at p. 18.
(2) (1706) 2 Vern., 580.
(3) (1915) A.C., 372, at p. 378.
(4) (1845) 14 M. & W., 76.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

the good and orderly using of the navigation and for the well governing of the bargemen, watermen and boatmen. The company made a by-law directing that the navigation should be closed every Sunday, and urged that the by-law was not "unreasonable"; but the Court held that the company had no power to enforce the proper observance of religious duties. It is enough to show that the execution of the power is for purposes foreign to the power; and the purpose of increasing the funds of the Treasury is a purpose which is foreign to the power to give consent. I am unable to see why the same principle should not be applied where the Government is the donee of the power. This power is conferred on the Government in the critical times of war, so as to prevent the wool from getting into enemy hands, and to secure the benefit of the wool to the armies of the Imperial Government and its allies. In addition to these purposes, there is another purpose—to allow local manufacturers to get wool for their factories (see recital to the *Commercial Activities Act* 1919); and the words "with the consent," &c., would subserve this latter purpose.

The Act, as carried out in reg. 10, takes away the ordinary right of a subject to carry on his business, to sell his commodities as he chooses; it allows him, however, to sell to or through the Commonwealth Government, or with its consent. There is no obligation on the Government to consent. I should think that there is an implied obligation to entertain applications for consent; but even if there is no such obligation to be implied, a bargain such as contained in this contract is a clear abuse of the power to consent to a sale, interfering with the legitimate exercise of such a responsible discretion.

Primâ facie, reg. 10 does not contemplate a contract at all. At all events, the purpose of enriching the national funds by a bargain as a condition of consent is not contemplated by the regulation. It is true that under reg. 25B (Statutory Rules 1918, No. 18, reg. 2, and No. 137, reg. 5) "the Chairman of the Central Wool Committee, acting for and on behalf of the Committee, may enter into an agreement with any person for any purpose connected with or incidental to the carrying out of these regulations"; but this power is, from its very terms, limited to contracts connected with or

incidental to the carrying out of the regulations. It does not extend to a contract which is not connected with or incidental "*to the carrying out of these regulations*"; it does not authorize a contract for a purpose which goes beyond the regulations. I might suggest a case in which the power to enter into an agreement might, perhaps, be legitimately applied; *e.g.*, if the Government were asked to consent to a sale to a purchaser in Java or in China, it might probably stipulate with the vendor, as a condition of consent, as to the mode of transport and as to the precautions to be taken in delivering the wool. But the power to contract does not extend to contracts which are not connected with or incidental to the consent to the sale; it does not extend to contracts to allow purchases generally, or to contracts allowing dealings generally, or to contracts for the division of the profits.

I apply my mind, on the present matter, to the power as conferred by the regulations. The difficulty here lies in the fact that the drastic powers conferred on the Government by the *War Precautions Act* might perhaps (I do not decide it) have enabled the Governor-General in Council to make regulations for increasing the Commonwealth funds for war purposes. The point is that such a regulation has not been made; and the rights of any subject to receive the profits which he makes in his business cannot be interfered with by the Government except under some law made by Parliament or under a regulation authorized by Parliament. I cannot understand how the advisers of the Government could ever have approved of the Government putting itself in such a false position as that contemplated by this agreement of 1st March 1917.

Then there is a further objection to the agreement based on the recent decisions of the Court of Appeal and of the House of Lords in *Attorney-General* v. *Wilts United Dairies Ltd.* (1). In view of the scarcity of food under war conditions in Great Britain, the Food Controller was authorized to grant licences to dairymen in Wiltshire, Hampshire, &c., to purchase milk in the south-western counties of Devon, Cornwall, &c. (rich milk-producing areas) subject to such conditions as he might determine. He issued such licences to a dairying company subject to the condition of paying 2d. per gallon

(1) (1921) 37 T.L.R., 884; (1922) 38 T.L.R., 781.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

to the Exchequer; the company signed an agreement to observe this condition in consideration of the grant of the licence; and an action was brought by the Crown to enforce the payment. There had been no order or regulation made under the relevant Acts expressly authorizing the demand for the payment of money; but the Crown relied on the order authorizing the issue of licences "subject to such conditions as the Food Controller may determine." It was held by the Lords Justices that this general power to impose conditions did not authorize the Food Controller to require the company to pay money to the Crown as a condition of granting him a licence to carry on his ordinary right to trade; that there must be, under the *Bill of Rights*, express authority from Parliament (by statute or authorized regulation), to make such a payment of money obligatory; and that the agreement was "illegal and unenforceable." As *Atkin* L.J. said (1):—"If an officer of the Executive seeks to justify a charge upon the subject made for the use of the Crown . . . he must show, in clear terms, that Parliament has authorized the particular charge. . . . There are clearly no express words, and all the powers given appear capable of performance without any power to levy money." It appears from that case (what I should otherwise have doubted) that the fact that there was an *agreement* to pay, *not a direct levy*, made no difference:—"It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement" (2). The case was affirmed in the House of Lords; and no one has suggested any ground on which we should hold the principle laid down in that case as being inapplicable to the facts before us.

I do not ignore the argument that the money to be paid to the Commonwealth Government was not to be available for the general purposes of the Government, but was meant (as is contended) for some purposes of the pool. But, in the first place, the legal position of the Government as to the money is expressly stated in the agreement—the money was to be "at the disposal of the Commonwealth Government" (clause 7), "at all times be disposed of as the Commonwealth Government shall direct" (clause 10). This was in law

(1) (1921) 37 T.L.R., at p. 886. (2) (1921) 37 T.L.R., at p. 887.

absolute property, and nothing less (*Kellett* v. *Kellett* (1)); and this Court has to act on the legal relations only. What is property but the absolute right of disposal ? We have nothing to do with political considerations, with such responsibility to Parliament and to electors as might impel the Government to distribute the money among members of the pool or use it for some purpose of the pool. In the second place, even if we should take such political considerations into account, the bargain would still remain obnoxious to the objection that a power conferred by regulation to give or withhold consent cannot be used for purposes foreign to the regulation, and, above all, cannot be used at the expense of A for the benefit of B, C, D, E, &c.

I am, therefore, of opinion that the agreement of 1st March 1917 is invalid on three grounds: (1) because the regulations made under the *War Precautions Act*, and declared by the *Commercial Activities Act* to be " duly made " do not authorize any such agreement; (2) because the agreement is an abuse of the power—a " fraud on the power " to give consent as conferred by the regulations; (3) because, according to the *Wilts Case* (2), it transgresses the principles of the *Bill of Rights* without the express authority of Parliament. These grounds, indeed, seem to merge into one ground, with three aspects. The promise of the Company to pay to the Government half the profits is void ; and as the last recital of the agreement makes all the promises on one side considerations for all the promises on the other side, the whole agreement is void and unenforceable.

(2) *As for the Agreement of January* 1918, found as a fact by the learned Judge, and modifying the agreement of 1st March 1917, I have come to the same conclusion. Without going into the circumstances under which this agreement was made by the sub-committee and confirmed by the Prime Minister (so far as he could confirm it), I may say that it carries on the provisions of the previous agreement until the price reaches 72d. per lb. for tops, and when the price reaches more than 72d. not half but all the proceeds are to be paid to the Government, by payment into a trust account of the sub-committee, or by endorsed store warrants, or by approved bonds.

(1) (1868) L.R. 3 H.L., 160. (2) (1922) 38 T.L.R., 781.

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

Higgins J.

In my opinion, all the three grounds of objection apply to this agreement also.

(3) *As for the Agreement of 26th and 27th September* 1918.—This, in my opinion, is invalid also—and *à fortiori*. For the Commonwealth Government refused to exercise its power to give consents to the sale of wool tops, under reg. 10, unless and until the Company agreed to let all the wool tops manufactured by the Company after 31st August 1918 be the property of the Commonwealth, and unless the Company undertook to carry on the business of the Company as agent for the Government at an annual remuneration. The Government also refused even to consider the giving of any more consents until the Company agreed to pay all that was due under the previous agreements. I do not concern myself with sundry questions as to the execution of this third agreement, or with the absence of the authority of the Governor-General in Council, or of Parliament, or with the question as to whether in law this agreement contained in fact two independent agreements, one for the past transactions and one for the future. It has been found as a fact by my brother *Isaacs* that the clauses 2, 3 and 4 of the new agreement as written (as to back payments) were meant to be an independent agreement from clauses 1 and 5 (as to future payments); and I accept that finding. But this still leaves it open to us to say whether in law they must be treated as one, regard being had to the construction of the document itself. I am strongly inclined to think that the document on its true construction compels us to treat the two agreements as one; but even if we are to accept it that there were two separate and independent agreements as a matter of law, the agreement as to the future is invalid on each of the three grounds which I have stated, and the agreement as to the past is invalid as being in furtherance of the previous agreements which were illegal.

I cannot refrain from comment on the pleadings in this case. They, at all events the defendant's pleadings, are so long, rambling and diffuse, especially with the added particulars, as to add very considerably to the task of the Court and the protraction of the proceedings. They constitute rather a discursive argument, with reckless reiterations, and they are worse in this respect than any pleading

I have ever seen. They fill over sixty-two pages of broad sheets. The fact that large sums of money are involved is no excuse for such prolixity. If this case should come to be considered by some other tribunal, it will probably be noted with surprise that in this Court it was not until what is grotesquely called "amended further pleading to amended reply, and amended reply to amended defence to cross-action" that the main point was taken—that the Commonwealth Government "had not at any material time any lawful right to demand a licence fee or a share of profits or other interest in the Company's business as a condition or term of giving consents to the sale of and/or permits for the shipment of wool tops," &c. The issues of fact and law are really few; and they could easily have been compressed within two or three pages at the most if proper effort had been made to confine the statement to "the material facts on which the party pleading relies to support his claim or defence," as prescribed by our Rules (Order XVII., r. 1; and see r. 13).

In my opinion, the judgment as proposed by my brother *Isaacs* J. in his reasons for judgment, including the order as to costs, fits the circumstances of the case.

GAVAN DUFFY J. In view of the opinion which I have already expressed, it is enough to add that I can find no authority from Parliament to make any of the contracts relied on by the parties in this case. The result is that they are not the contracts of the Commonwealth, and both the action and the cross-action must, therefore, fail. The reservation for this Court was made under sec. 18 of the *Judiciary Act*, and is as follows:—"I reserve for the consideration of the Full Court the question how consistently with the facts as found by me judgment should, having regard to the amended pleadings and particulars thereunder and the evidence as appears from the transcript of proceedings at the trial and the exhibits, be entered with respect to the several claims made in the action and the cross-action respectively, and I direct that this case be argued before the Full Court as hereinbefore mentioned." In my opinion we ought to determine the question reserved for our consideration by saying that judgment should be entered for the defendant with respect to the several claims made by the plaintiffs in the

H. C. OF A. 1922.

THE COMMONWEALTH v. COLONIAL COMBING, SPINNING AND WEAVING CO. LTD.

action and for the plaintiffs in respect of the several claims made by the defendant in the cross-action. We should also direct that the costs of the proceedings before us shall be costs in the action. It will then become the duty of the learned Judge who tried the action to cause judgment to be entered in conformity with our determination and to allocate the costs of the action as he may in the exercise of his discretion think fit.

On the action judgment entered for the defendant. On the cross-action judgment entered for the plaintiffs. Defendant to pay costs of and occasioned by the issues of fact, including the whole of the costs of the trial; and, except those costs, the parties to bear respectively their own costs of the action and of the arguments in the Full Court.

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

Solicitors for the defendant, *Fink, Best & Miller.*

B. L.