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Having regard to this answer, and the parties admitting that they have placed before me all the evidentiary facts they desire to bring before me, I find that as a fact the appellant was at the material time carrying on mining operations within the meaning of sec. 17, and hold that it is entitled to the deductions allowed by that section.

Deductions and appeal allowed with costs.

Solicitors for the appellant, *Faithfull, Maddock & Oakes.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

THE EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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MELBOURNE, *Oct.* 29.

SYDNEY, *Dec.* 13.

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

Land Tax (Commonwealth)—Assessment—Exemption—Agreement by Government of Colony to exempt from taxation—Agreement to recoup taxation paid—Construction of contract—Circuity of action—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 69, 85 (IV.)—*Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 10-13, 44, 46—*Anglo-Australian Telegraph Act* 1870 (*S.A.*) (*No.* 11 *of* 1870), *secs.* 1, 2.

An agreement was made in 1871 between the Government of the Province of South Australia and a company to whose rights the appellant succeeded, whereby the company was empowered to lay down at Port Darwin the land end of a submarine telegraph cable and to take possession of a certain area of land for the purpose of landing, maintaining and protecting the cable and setting

up a telegraph station in connection therewith and for the residence of officers, and the Government of South Australia agreed to grant that land to the company. The agreement further provided that "so long as the land so to be taken . . . and the cable station, offices, and works in connection therewith, shall be used exclusively for the purposes of telegraphic communication with Europe and other places, the same premises, and the undertaking, property and profits of the company shall be exempt from all provincial, local, and other taxes, rates, charges, and assessments within the said Province, whether now existing or chargeable, or hereafter to be charged, imposed, or created; and every legislative and other Act, by virtue of which any tax, rate, charge, or assessment might otherwise be imposed upon or in respect of the said premises, or any of them, shall contain an express exemption of the premises from the charges thereby created or authorized." On 14th April 1900 another agreement was made between the Colonies of South Australia, Western Australia and Tasmania and the appellant in respect of the laying down by the appellant of the land end of another cable and the granting to the appellant of certain lands and rights, licences and facilities for the laying down and working of that cable. One of the provisions of this agreement was that "each of the Governments of the respective contracting Colonies shall cause all cables cable apparatus . . . of the" appellant "... which are used solely for the purpose of the cable business of the" appellant ". . . or for laying repairing or working any of their cables land lines or cable ships to be relieved from all custom duties and wharfage rates in its own respective Colony and shall cause every vessel which shall be used by the" appellant ". . . for the purpose of laying repairing or duplicating any cable or any vessel belonging to or chartered by the" appellant " . . . in which any such cable cable apparatus . . . shall be carried to be exempt from all port and light dues whether upon entering any port or passing through any waters of any such Colony . . . and shall also repay to the" appellant "such sums as will be sufficient to recoup the" appellant "any income tax and any rates or taxes parliamentary or otherwise which the" appellant "shall be required to pay in such respective contracting Colony except rates and taxes on premises occupied for the purpose" of receiving from and delivering to the public telegrams. Both these agreements were carried into effect. In 1919 the appellant acquired certain land in Adelaide upon which buildings were erected, portions of which were let to tenants, portion was used by the appellant as a local office for the purpose of receiving from and delivering to the public telegrams, and portion was used by the appellant for its business generally. The appellant was assessed for Federal land tax under the *Land Tax Assessment Act* 1910-1916.

Held, as to the agreement of 1871, that it had not the effect of exempting the land at Adelaide from Federal taxation:

By *Knox* C.J., *Higgins*, *Gavan Duffy*, *Powers and Starke* JJ., on the ground that the clause of exemption did not purport to exempt from any taxation imposed by an authority superior to the Legislature of South Australia, such as the Parliament of the Commonwealth;

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By *Isaacs* and *Rich* JJ., on the ground that the clause of exemption in the agreement above quoted was limited to the land and the undertaking and property of the company at Darwin.

Held, also, as to the agreement of 1900, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Powers* and *Starke* JJ. and (assuming that the doctrine of circuity of action did not apply) by *Isaacs* and *Rich* JJ., that the agreement had not the effect of exempting the land at Adelaide from Federal taxation, since the clause in it above quoted was not an exemption from taxation but merely an agreement to repay such sums as would be sufficient to recoup the appellant any taxes which it should be required to pay.

Held, further, by *Knox* C.J., *Gavan Duffy*, *Powers* and *Starke* JJ., that, even if the obligation as to recoupment passed to the Commonwealth under sec. 85 of the Constitution so that the Commonwealth would be bound to repay the tax to the appellant, the doctrine of circuity of action could not be applied so as to exempt the appellant from liability to assessment.

Per Isaacs and *Rich* JJ. : The question was one of liability to pay tax, and the doctrine of circuity of action applied.

CASE STATED.

On an appeal to the High Court by the Eastern Extension Australasia and China Telegraph Co. Ltd. from an assessment of it for Federal land tax under the *Land Tax Assessment Act* 1910-1916, *Isaacs* J. stated a case for the determination by the Full Court of the question whether upon certain facts stated the appellant was exempt from land tax in respect of land held by the Company, and for which it had been assessed.

The statement of facts was substantially, and so far as is material, as follows :—

(1) The appellant is a company duly incorporated under the laws of England, and having its registered office at Finsbury Pavement, London.

(2) In or about the year 1870 the Executive Government of the Province of South Australia was desirous of establishing telegraphic communication with Europe, and for that purpose entered into negotiations with the British-Australian Telegraph Co. Ltd. As a result of the negotiations and pursuant to the powers in that behalf conferred by the *Anglo-Australian Telegraph Act* 1870 (S.A.) (No. 11 of 1870) the Government entered into an agreement with the said company, as appears by articles of agreement dated 29th August 1871.

(3) In or about the year 1874 the British-Australian Telegraph

Co. Ltd. was merged in the appellant Company, which was formed by the amalgamation of certain associated companies. Pursuant to the agreement of 29th August 1871 the cable therein referred to was laid, and by land grant dated 26th May 1874 the land referred to in art. 1 of the said agreement was granted or assured to the appellant Company in fee simple, subject to a collateral deed of covenant by which the appellant Company covenanted that, if any of the pieces of land so granted or assured should cease to be used for the purpose of telegraphic communications, such pieces of land should revert to the Government, and the appellant Company would execute such assurances as should be necessary for revesting the fee simple thereof in the Government. As a result of the said amalgamation the appellant Company undertook and has ever since fulfilled the obligations under the said agreements and the rights and benefits of the Company were, and are now, vested in the appellant. The land, cable station, offices and works referred to in art. 1 of the said agreement have been, and are, used exclusively for the purposes of telegraphic communications with Europe and other places.

(4) On 14th April 1900 an agreement in writing was entered into between the Governments of the Province of South Australia and of the Colonies of Western Australia and Tasmania and the appellant.

(5) On 16th January 1901 an agreement was entered into between the Government of the Colony of New South Wales and the appellant.

(6) All the agreements hereinbefore referred to were in force and binding upon the respective States of the Commonwealth and the appellant on 1st March 1901, on which day the Post, Telegraph and Telephone Departments of all States were transferred to the Commonwealth pursuant to the Constitution.

(8) The appellant is the owner of certain lands in several of the States, and the assessment appealed against has been made in respect of the same.

(10) Those lands comprise a piece of land in King William Street, Adelaide, South Australia, of which the appellant is the owner in fee simple and which was purchased from the former owner (not the Crown) in 1919. At all material times (a) portions of the building on the said land have been in possession of lessees from the appellant and used by such lessees for their own various businesses; (b) portion of

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the said building has been used by the appellant as a local office for the purpose referred to in clause 12 of the agreement of 14th April 1900; (c) the remainder of the said building and of the said land has been used by the appellant for its business generally, including the working of the new cable and subterranean line to Adelaide mentioned in clause 12 of the said agreement of 14th April 1900 and of its submarine cables having their terminal stations at Roebuck Bay and Darwin and of its other cables.

(11) For the purposes of this case it is agreed that the total unimproved value of the lands referred to in par. 8 hereof, and as to which an assessment has been made, other than so much of the land at Adelaide as is referred to in par. 10 (c) hereof is £5,000.

The unimproved value of the land at Adelaide was assessed, as appeared from a schedule to the statement of facts, at £11,240. From that schedule it also appeared that certain land at Darwin used by the appellant as a cable station was not included in the assessment; and that the total unimproved value of the land which was assessed was £13,485.

The articles of agreement of 29th August 1871 referred to in par. 2 of the statement of facts contained the following (among other) articles:—

"Art. 1. The Company may lay down at any part of the coast at, in or near . . . Port Darwin in the said Province which they may select as most convenient for the purpose, and which shall have been approved by the Government or their representative at Port Darwin, the land end of a submarine cable to be laid by the Company as hereinafter mentioned, and to be used for the purposes of telegraphic communication with Europe, and . . . may take possession of so much and such land, not exceeding six acres, at or within ten miles from the place selected for landing the said cable as they may require for the purposes of landing, maintaining, and protecting the said cable and for a telegraphic station in connection therewith, and for a residence of the manager, clerks, and others employed in superintending and working the same, and may for ever thereafter hold and use the same land for the purposes aforesaid," &c.

"Art. 2. Upon the request of the Company, the Government will

execute, or procure to be executed . . . a grant of the land to be selected and taken as aforesaid in fee simple in possession . . . provided always that should the land so taken, or any portion thereof, at any time be disused for the purpose of telegraphic communication within the scope of this contract, and such disuse shall continue for the period of six consecutive calendar months, then at the expiration of that period the land, or the portion thereof so disused for the above purposes, shall revert to the Government," &c.

" Art. 3. So long as the land so to be taken, or to be taken under art. 12 of this agreement, and the cable station, offices, and works in connection therewith, shall be used exclusively for the purposes of telegraphic communication with Europe and other places, the same premises, and the undertaking, property and profits of the Company shall be exempt from all provincial, local, and other taxes, rates, charges, and assessments within the said Province, whether now existing or chargeable, or hereafter to be charged, imposed, or created; and every legislative and other act, by virtue of which any tax, rate, charge, or assessment might otherwise be imposed upon or in respect of the said premises, or any of them, shall contain an express exemption of the premises from the charges thereby created or authorized."

" Art. 4. The Government will on or before the thirty-first day of December, one thousand eight hundred and seventy-one, construct and complete and open for traffic a line of telegraph wire (hereinafter called ' the land line ') between Port Darwin and Adelaide " &c.

" Art. 12. If the land line is not complete and open for traffic on the thirty-first day of December, one thousand eight hundred and seventy-one, . . . the Company may at any time thereafter lay down and complete, and thenceforth maintain and use, a line of telegraphic communication between their cable at Port Darwin and Burketown, in the Province of Queensland, . . . and if they think fit may abandon any station they may have selected under the authority contained in the first article of this agreement for the land end of their cable in or near Port Darwin, and surrender the land taken for the same to the Government, and select and take and retain and use another station for landing their cable in or near Port Darwin, and for the offices and works in connection therewith, and

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may take, use and for ever retain such land within the Province of South Australia as they may reasonably require for any of the purposes aforesaid, but so that all the provisions hereinbefore contained with respect to land to be taken by the Company for the purposes of their station at or near Port Darwin shall extend to the land to be taken by them under this article," &c.

The agreement of 14th April 1900 referred to in par. 4 of the statement of facts contained the following (among other) provisions:—

"12. The Extension Company shall with all convenient speed after the necessary landing rights have been obtained procure to be manufactured and laid between Durban in the Colony of Natal and Australia a submarine telegraph cable. . . . The Extension Company shall also lay or procure to be laid in connection with the new cable two subterranean land lines. . . . The Extension Company shall also establish and supply or procure to be established and supplied all stations offices and apparatus necessary for the proper working of the new cable and the said subterranean land lines."

"16. The Extension Company shall on and after the opening for traffic of the Pacific cable or any other competing cable be entitled to open local offices and to collect direct from and to deliver direct to the public in the cities of Perth Adelaide and Hobart any telegrams forming part of the Australasian traffic," &c.

"19. Each of the Governments of the respective contracting Colonies shall cause all cables cable apparatus telegraph instruments machinery stationery and goods of any kind of the Extension Company or their assigns which are used solely for the purpose of the cable business of the Extension Company or their assigns or for laying repairing or working any of their cables land lines or cable ships to be relieved from all custom duties and wharfage rates in its own respective Colony and shall cause every vessel which shall be used by the Extension Company or their assigns for the purpose of laying repairing or duplicating any cable or any vessel belonging to or chartered by the Extension Company or their assigns in which any such cable cable apparatus and telegraph instruments machinery stationery and goods as aforesaid shall be carried to be exempt from all port and light duties whether upon entering any port or passing through any waters of any such Colony or otherwise howsoever and

shall also repay to the Extension Company such sums as will be sufficient to recoup the Extension Company any income tax and any rates or taxes parliamentary or otherwise which the Extension Company shall be required to pay in such respective contracting Colony except rates and taxes on premises occupied as local offices for the purpose referred to in clause 16 hereof " &c.

The agreement of 16th January 1901 referred to in par. 5 of the statement of facts contained a clause (clause 18) in the same terms as those above set out in clause 19 of the agreement of 14th April 1900.

Owen Dixon K.C. (with him *Downer*), for the appellant. Art. 3 of the agreement of 29th August 1871 was a promise by the Province of South Australia that the Company would not be subject to taxation upon any property which it might have and which would come within the term " undertaking, property and profits," and the land at Adelaide comes within that term. Clause 12 of the agreement of 14th April 1900 contains an undertaking by each of the Colonies which was a party to the agreement to repay to the appellant any sums which it had to pay in the particular Colony, no matter by what authority the tax was imposed. Those agreements were public and notorious facts when the several Departments of the Colonies were taken over by the Commonwealth, and, even if sec. 85 (IV.) of the Constitution does not apply, the *Land Tax Assessment Act* should not be construed so as to impair those agreements. The rule that general words of a statute should not be construed as embracing matters which are the subject of particular privileges applies (see *Mayor of Leicester* v. *Burgess* (1); *Garnett* v. *Bradley* (2); *Attorney-General* v. *Horner* (3); *Attorney-General* v. *Exeter Corporation* (4)). Sec. 85 (IV.) of the Constitution applies. The obligations created by the two agreements were current obligations of the State of South Australia in respect of the Postal Department. Under the agreement of 1900, if the Commonwealth could impose the land tax it was bound to repay the amount of the tax to the appellant, and therefore the appellant is not liable to assessment.

(1) (1833) 5 B. & Ad., 246.
(2) (1878) 3 App. Cas., 944, at p. 969.
(3) (1884) 14 Q.B.D., 245.
(4) (1911) 1 K.B., 1092, at p. 1097.

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Ham, for the respondent. Where the construction of a statutory exemption is doubtful the Court should not adopt a construction which will extend the class exempted if the language will admit of another construction (*Swinburne* v. *Federal Commissioner of Taxation* (1)). Sec. 85 (IV.) of the Constitution does not apply, for the term " current obligations of the State in respect of the Department transferred " does not include an obligation of the State entered into before the matter in respect of which the obligation arose was given over to the particular Department. The provision in the agreement of 1871 for exemption from taxation, and that in the agreement of 1900 to recoup the appellant any taxation it may have to pay, should be construed as applying only to taxes imposed by or under the authority of the Legislature of South Australia (*Pole-Carew* v. *Craddock* (2) ; *Associated Newspapers Ltd.* v. *City of London Corporation* (3)). It requires express and explicit authority to make a contract exempting from taxation (*Commercial Cable Co.* v. *Government of Newfoundland* (4)). The obligation of the covenant in the agreement of 1900, even if it passed to the Commonwealth, does not help the appellant, for the obligation to recoup assumes that the tax is properly payable.

Owen Dixon K.C., in reply.

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The *Land Tax Assessment Act* 1910-1916 enacts that, subject to the provisions of the Act, land tax shall be levied and paid upon the unimproved value of all lands within the Commonwealth which are owned by taxpayers and which are not exempt from taxation under the Act. The tax is charged on land as owned at noon on 30th June immediately preceding the financial year in and for which the tax is levied, and is payable by the owners of land as defined by the Act (see secs. 10 and 12). The appellant, the Eastern Extension, Australasia and China Telegraph Co. Ltd., was the owner of a piece of land in King William

(1) (1920) 27 C.L.R., 377.
(2) (1920) 3 K.B., 109, at p. 120.
(3) (1916) 2 A.C., 429.
(4) (1916) 2 A.C., 610, at p. 615.

Street, Adelaide, on 30th June 1920, and has been assessed to land tax pursuant, as it is claimed, to the provisions of the Act. It is admitted that the land is liable to taxation under the provisions of the Act if those provisions are read literally. But it is said that the British Australian Telegraph Co. Ltd., to whose rights the appellant succeeded, and the appellant itself, made certain agreements with the Government of South Australia, whereby that Government exempted the Company's property from all taxation, including land taxation, and that, by force of the Constitution, sec. 85, sub-sec. IV., the appellant is entitled to a complete immunity from the tax sought to be levied upon it.

The Constitution provides (sec. 69) for the transfer to the Commonwealth of Australia of certain Departments of the Public Service of each State including posts, telegraphs, and telephones; and sec. 85 enacts as follows: "When any Department of the Public Service of a State is transferred to the Commonwealth . . . (IV.) the Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the Department transferred." On 1st March 1901 the Post, Telegraph and Telephone Departments of all the States were transferred to the Commonwealth, and the provisions of sec. 85, sub-sec. IV., then became operative. The agreements upon which the appellant relies must now be stated.

In 1871 the Government of South Australia made an agreement with the British Australian Telegraph Co. Ltd. which was authorized, so it was argued, by a South Australian Statute, No. 11 of 1870. By this agreement the Company was empowered to lay down, in or near Port Darwin, the land end of a submarine cable, and to take possession of an area of land, for the purposes of landing, maintaining and protecting the cable and setting up a telegraphic station in connection therewith, and for the residence of officers. This land was granted by the Government subject to reconveyance if it or any portion of it were not used for telegraphic purposes within the scope of the contract, but it is not the subject of the land tax assessment involved in this case, and is "tentatively regarded" by the Commonwealth as not being owned in accordance with sec. 3 of the *Land Tax Assessment Act*. Art. 3 of the agreement contains the following stipulation: "So long as the land so to be taken, or to be taken under art. 12 of

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this agreement, and the cable station, offices, and works in connection therewith, shall be used exclusively for the purposes of telegraphic communication with Europe and other places, the same premises, *and the undertaking, property and profits of the Company shall be exempt from all provincial, local, and other taxes, rates, charges, and assessments within the said Province, whether now existing or chargeable, or hereafter to be charged, imposed, or created*; and every legislative and other act, by virtue of which any tax, rate, charge, or assessment might otherwise be imposed upon or in respect of the said premises, or any of them, shall contain an express exemption of the premises from the charges thereby created or authorized." It is not disputed that the land referred to in art. 3 and the cable station, offices and works in connection therewith, have been used exclusively for the purpose of telegraphic communication. The extent and legal effect of the article therefore falls for determination. The appellant endeavours to establish the respondent's liability under it by two distinct contentions.

First, it is said that its terms cover both Commonwealth and State taxation. But the natural meaning of the words and the purpose of the article suggest only an exemption from charges or taxes which the Legislature of South Australia or some body deriving its authority from such Legislature has power to impose. An agreement to exempt from taxes or charges imposed by a superior authority, whether Imperial or Commonwealth, ought not to be inferred in the absence of the clearest words and the most express intention to that effect: and the words used here are quite inappropriate for such a purpose. But it is said that at all events its terms apply to all taxation which the State could directly or indirectly impose, and that consequently when the Department was transferred to the Commonwealth there existed a current obligation of the State to abstain from imposing any taxation, and that under sec. 85 of the Constitution the Commonwealth must assume the obligation not to impose any taxation. It is true that the effect of the article was to make the property wholly free of taxation, but that was only because the specific taxation mentioned in the article was in fact all that could then be imposed by any authority. Sec. 85 deals with the obligation as it exists at the time of transfer, not with its effect before or after transfer. The

article was an ample protection against taxation before the transfer; it is no longer so because the obligation, even if it passes under sec. 85, does not extend to taxation by the Parliament of the Commonwealth. This view of the true meaning of the article relieves us from considering, and indeed renders it undesirable for us to consider, whether the Act of 1870, No. 11, warrants an agreement to exempt any company or person from local taxation.

Another agreement is, however, relied upon, which was made in 1900 between the respective Governments of South Australia, Western Australia and Tasmania, and the appellant. In 1901 the Government of New South Wales entered upon a somewhat similar arrangement. The agreement of 1900 stipulated for certain rates for the transmission of telegraphic communications and for their apportionment, for the laying of a new cable between South Africa and Australia, and the grant of suitable sites and offices, and rights, licences and facilities for the purpose of laying and working the new cable. Art. 19, upon which reliance was placed in argument, stipulates, so far as material, as follows: "Each of the Governments of the respective contracting Colonies shall cause all cables cable apparatus . . . of the Extension Company . . . which are used solely for the purpose of the cable business of the Extension Company . . . or for laying repairing or working any of their cables land lines or cable ships to be relieved from all custom duties and wharfage rates in its own respective Colony and shall cause every vessel which shall be used by the Extension Company . . . for the purpose of laying repairing or duplicating any cable or any vessel belonging to or chartered by the Extension Company . . . in which any such cable, cable apparatus . . . shall be carried to be exempt from all port and light dues whether upon entering any port or passing through any waters of any such Colony . . . and shall also repay to the Extension Company such sums as will be sufficient to recoup the Extension Company any income tax and any rates or taxes parliamentary or otherwise which the Extension Company shall be required to pay in such respective contracting Colony *except rates and taxes* on premises occupied as local offices for the purpose referred to in clause 16 hereof." We are not concerned with the exception of rates and taxes on premises occupied as local offices for the purposes

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referred to in clause 16, because the parties have agreed that the exception cannot affect the amount of the assessment in this case. It is material, however, to note that the *Constitution Act* was passed on 9th July 1900, that the Commonwealth was proclaimed on 1st January 1901, and that the Departments of Customs and of Excise in each State were transferred to the Commonwealth on its establishment (see Constitution, sec. 69). The framing of the Constitution Bill was the result of a long political movement, and it may be truly said that the parties entered into the agreement of April 1900 in full view of the changes in the organization of Government that were about to take place in Australia. The stipulations as to customs duties, income tax, and any rates and taxes, parliamentary or otherwise, may possibly refer both to State and Commonwealth charges and taxation of the kind referred to in the agreement. But, when the agreement is critically examined, we do not find any exemption from land taxation, but an agreement *to repay* such sums as will be sufficient *to recoup* the Company any taxes which it shall be required to pay. The agreement is based upon the existence of a power to tax, and in no wise exempts or attempts to exempt the Company from taxation imposed in pursuance of such a power. It is argued for the appellant that this view only leads to a multiplicity of actions. The Company will pay land tax to the Commonwealth, and then claim it over against the State, or against the Commonwealth if the obligation passes by force of sec. 85, sub-sec. IV., of the Constitution. The Court cannot, however, affirm that the Company is not liable to be assessed to land tax as an owner of land, because of some rights *in personam* which it may have against the Governments of South Australia or the Commonwealth. The doctrine of circuity of action arises only when it is sought to enforce a cause of action which already exists; and cannot operate to prevent its coming into existence. It is suggested that the words " on the ground that he is not liable for the tax " in sec. 44 of the *Land Tax Assessment Act* 1910-1916 go to show that the question at issue in the appeal against the assessment in this case is the ultimate liability of the taxpayer to pay the tax assessed. We think that the liability alluded to is a liability to assessment, and not to pay the amount assessed.

This construction of the 1900 agreement makes it quite unnecessary

to consider whether the agreement has any parliamentary sanction, whether it extends to charges and taxes imposed by the Commonwealth, and, if so, whether the obligations of the State under the agreement are " current obligations " within the meaning of sec. 85 of the Constitution.

As a final and alternative argument, the appellant urged that if the Commonwealth Legislature could impose the tax to which objection was taken, it had not in fact done so. The Commonwealth *Land Tax Assessment Act* ought not, it was said, to be so construed as to abolish or affect the " notorious privilege " conferred upon the Company by the agreements to which we have already referred, more especially as the burden of indemnifying the Company in respect of any taxes paid by it was cast upon the Commonwealth as a current obligation of the State within the meaning of sec. 85 of the Constitution. Whatever might be the validity of such an argument if the agreements bore the meaning attributed to them by the appellant Company, it has none if they bear the meaning which we have attributed to them.

The question stated for the opinion of the Court should be answered in the negative.

ISAACS AND RICH JJ. The Eastern Extension, Australasia and China Telegraph Co. was assessed by the Federal Commissioner of Taxation for land tax under the *Land Tax Assessment Act* 1910-1916, in respect of certain land in Adelaide, South Australia. The Company appealed, and on the hearing a case for the opinion of the Court was stated under sec. 46 of the Act. The question for determination is whether the Company is exempt from land tax in respect of the land for which it has been assessed—that is, exempted by the effect of the Constitution from all liability *to pay* land tax in respect of all the land assessed. " Exempt " does not mean non-liability on account of not reaching the value set by the Act itself, but means freedom from all statutory obligation *to pay* tax whatever the value may be.

No doubt exists anywhere that upon the natural and ordinary meaning of the words of the Act, the Company would not be exempt, and would have *to pay*. The Company, however, contends that sub-sec. IV. of sec. 85 of the Commonwealth Constitution, operating

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on two agreements made between the Company and the Government of South Australia in 1871 and 1900 respectively, has the legal effect, in the events that have happened, of exempting the Company from all liability to pay Federal land tax in respect of the land claimed to be taxable by the Commissioner.

There was an argument that, in some way independently of the strict effect of the Constitution, the interpretation of the *Land Tax Assessment Act* was so affected by the agreements as impliedly to except the Company from liability. We may not have been able to understand the full force of the argument, but so far as we do understand it we are quite unable to accept it.

The first of those agreements may be described as a tax exemption agreement, because it purports simply to provide for exemption from taxation. The second agreement provides exemption in respect of certain imposts not material here, but as far as concerns land tax it is a reimbursement agreement, being an agreement to " repay " to the Company by way of recouping it, whatever tax it is required to pay in South Australia.

Some discussion took place as to the distinction between the Commonwealth and the Commissioner as a statutory officer and also as to the necessity of determining the effect of the clause to " repay " in the 1900 agreement, since the only question is as to the exemption of the Company from the statutory liability to pay land tax (secs. 10 and 11 of the Act). It is desirable we think to clear the way of these matters first. The Commissioner is no doubt a statutory officer having duties created by the Commonwealth Parliament. But those duties are as between him and the Commonwealth and cannot create as against an individual any rights greater than those the Commonwealth could possibly have. Even the Parliament from which he derives his authority cannot confer upon him, as representative of the Commonwealth, power which is denied by the Constitution to the Commonwealth itself. The stream cannot rise higher than its source. Whatever, therefore, is an answer to the Commonwealth by virtue of the constitutional provision referred to is an answer to the Commissioner.

Then, as to the distinction between the right of the Commonwealth *to demand payment* of the tax and its obligations (if any) *to repay it*

immediately by force of the terms of sec. 85 (IV.) of the Constitution compelling it to assume the obligations of the State (which, it is contended, means the Commonwealth, not indemnifying the State, but stepping into its legal position *vis-à-vis* those obligations), there is none in law, because, since it is in each case the identical moneys, then, if, as is contended, there is the Commonwealth direct obligation *to repay* to the taxpayer, there is no right, and therefore, in our opinion, there cannot be imagined a right, to *demand payment* from the Company in the first instance. There has been for centuries deeply embedded in the common law of England, a principle known as preventing circuity and multiplicity of suits. It is a principle which we are persuaded cannot properly be ignored. It is expressed in the maxim *Circuitus est evitandus* (*Coulter's Case* (1)). It is illustrated with its limitations in cases like *Carr* v. *Stephens* (2), *Walmesley* v. *Cooper* (3), *Connop* v. *Levy* (4) and *Charles* v. *Altin* (5). In *Walmesley* v. *Cooper* (6) Lord *Denman* C.J. speaks of the " principle . . . of avoiding circuity of action, i.e., the scandal and absurdity of allowing A to recover against B, in one action, the identical sum which B has a right to recover in another against A. The law, when it clearly detects the possibility of such a waste of the suitor's money and its own process, as well as of the public time, will interpose to prevent its happening." In *Charles* v. *Altin* (7) *Jervis* C.J. adopted the words of Lord *Denman*, namely, the " scandal and absurdity " of a circuity of action. We see no reason why, in the determination of this case, we are not bound to adhere to the high considerations which are at the root of this principle of the common law, and which are so powerfully expressed by Lord *Denman*. It would, we think, be a " scandal and absurdity " if the Company were declared liable to pay to the Government, and to leave with the Government until it was recovered back by litigation—and, of course, without interest—money which the Government would be under an instant obligation to repay if the Company's contention be correct. That the considerations to which we have adverted are applicable appears to us clear. The question set is whether the Company is " exempt from

(1) (1599) 5 Rep., 30a.
(2) (1829) 9 B. & C., 758.
(3) (1839) 11 A. & E., 216.
(4) (1848) 11 Q.B., 769.
(5) (1854) 15 C.B., 46.
(6) (1839) 11 A. & E., at pp. 221-222.
(7) (1854) 15 C.B., at p. 62.

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land tax" in respect of the land which has been in fact assessed. The tax is "imposed" by the Taxing Act (No. 21 of 1910). That Act incorporates by sec. 2 the Assessment Act. The central provision of the Assessment Act is sec. 10, which enacts that "(1) Subject to the provisions of this Act, land tax shall be *levied and paid* upon the unimproved value of *all lands* within the Commonwealth which are owned by *taxpayers*, and which are not *exempt* from taxation under this Act. (2) The land tax shall be at such rates as are declared by the Parliament." Sub-sec. 2 refers to the Taxing Act above mentioned. The words "Subject to the provisions of this Act" are a limitation on the generality of the declaration of liability. They include (*inter alia*) assessment. But assessment being a limitation or condition of liability to pay, it follows that it cannot create a liability not otherwise existing. The only liability to pay is on "taxpayers" —a word defined in sec. 3 as persons "chargeable with land tax." That is an absolute condition of any liability. Again, even taxpayers are not liable for land which is "exempt" under the Act. There could be no greater exemption from liability to pay land tax than a constitutional exemption. Sec. 11 limits the liability of a taxpayer to land "not exempt from taxation" under the Act. Sec. 44 enables any person assessed to appeal to the High Court against the assessment on the ground "that *he is not liable for the tax or any part thereof*" or "that the assessment is excessive." Now, in this case the assessment was made, and the Company claims, not that the amount assessed is wrong, if there is any liability to pay it, but that the Company is exempt from all taxation in respect of the lands assessed and that the assessment is of no force or validity, and that is the question raised on the special case. If there is any substance whatever in the question so raised, it is surely this: that the Company is not, in any circumstances, assessment or no assessment, liable to pay whatever land tax would at the moment be payable but for the agreements relied on. Whatever could be necessary to first fix the amount of the money which is presently payable, if the Company cannot invoke the principle of circuity of action, has been done. The amount is £61 12s. 6d., and, unless there is the exemption claimed, that is a "debt."

Our opinion, then, is that the Court is constrained by law to reject

the notion of possible *right to insist on payment of tax* (for that is the only possible relevant cause of action) *with possible obligation to return it*, and should fully consider that contention to the end. The contention involves (1) the construction of the agreements and their application to the facts prior to 1st March 1901, when the Department was transferred to the Commonwealth; (2) obligations of the State up to that date, and (3) the effect of sec. 85 (IV.) of the Constitution as to direct assumption by the Commonwealth of the current obligations of the State. Clear, however, as the matter is to us, for we cannot understand how a statute can impose a liability if the Constitution forbids it, the opposite view apparently commends itself to our learned brothers, and, as that is the opinion of the majority, we respectfully bow to it. We accordingly only deal with the first of the considerations stated.

The Construction of the Agreements.—So far as relevant, the agreement of 1871 provided that the Company might lay down on the coast at or near Port Darwin the land end of a submarine cable, and might take possession of land for cable and telegraphic purposes and purposes incidental thereto, not exceeding six acres, at or within ten miles from the cable landing place. The contract gave no power to the Company to install itself in any other part of South Australia, except in the emergency circumstances set out in art. 12. Whatever rights it had to do so elsewhere in the Province depended on authority outside the agreement. And down to 1900 its terminal was Port Darwin (see the seventh recital by the 1900 agreement). The agreement of 1871, therefore, had no reference to the Company's carrying on business elsewhere in South Australia, except so far as might be done under the remedial powers under arts. 9 and 12 in case of Government default, powers that are not now material. In other words, the agreement of 1871 has not, within its ambit, the contemplation of the Company establishing a local office in Adelaide as part of the compact. Art. 3, the tax exemption clause, therefore must be read in the light of the general scope delineated by the agreement as a whole. We have to visualize the Company, having its landing station at or near Port Darwin, its acreage within ten miles for cable, telegraphic operations, residences, &c.—and in physical communication therewith the northern end of the Government land

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line. And we have to visualize the Company there receiving from and sending submarine messages to Europe and elsewhere, and also there receiving from and communicating to the Government messages to be transmitted, or that have been transmitted, on the submarine line. The "premises" referred to in art. 3 are the premises there; "the undertaking property and profits of the Company" are referable to that place so far as South Australia is concerned. Consequently we are of opinion that, apart from all other questions, the Adelaide land is outside the purview of art. 3 of the 1871 agreement. But the Darwin cable station (items 7 and 8 in the schedule to the case) is within the agreement, and the question of exemption arises as to this station, and as the Act, sec. 46, says "the High Court shall hear and determine the question" we find it our judicial duty to answer as to this land also.

The agreement of 1900 is somewhat more complicated, but it relates its own history to help in judging of its own effect. The competitive Pacific cable was projected. The Extension Company was arranging for a new cable from Durban finally reaching Fremantle from the Cocos Islands. As there were in existence agreements between the Company and various Australian Governments regulating the rates for the transmission of telegraphic messages from and to Australia to and from and through Europe, the Company by notice terminated the rate arrangements as from 30th April 1900. Then the new agreement of 14th April 1900 was made providing broadly for four objects, namely, (1) new rates; (2) new cable construction to Fremantle and Glenelg with subterranean land lines to the respective capitals; (3) local offices in Perth, Adelaide and Hobart, with special Government wires connecting the Adelaide local office with the Victorian and New South Wales frontiers, and power to deal with the public in collecting and delivering messages; and (4) taxation arrangements. The first and second objects are matters which are for the mutual accommodation of the parties. The third, in clauses 15 and 16, is entirely for the business advantage of the Company (see also clause 22), though an undoubted convenience for the public, and this is reflected in the fourth object. The fourth is a term in which the provisions indicate the way the second and third objects were respectively regarded. As to the third object,

the land assessed includes a portion designated as number 13 in the schedule to the case. From its value it would be decisive as to the eventual liability of the Company upon this assessment, but it does not for that reason determine the question of exemption which the case is framed to raise. The answer requires to be given as to all the land, and depends upon the considerations already stated. The portion of No. 13 referred to is marked out in par. 10 (c) of the case. The whole land No. 13 has a building upon it which the case shows is divided into three parts: (a) let to other persons for their own business purposes, (b) used by the Company for the third object of the agreement and (c) used by the Company *for its business generally*. This undoubtedly includes the second object, but, as it is for the Company's business generally, it necessarily includes also the third. Indeed, the Roebuck Bay and Darwin terminals are specifically mentioned, and this business is included in the business to be handed to the Company at Adelaide at its local office established as the third object of the agreement.

Now, as to the taxation provisions, the fourth object. That is set out in clause 19 of the agreement. All cables and all apparatus &c. necessary for their cable business or land lines—that is, under both agreements—are to be "relieved" from all customs duties, and wharfage rates "in each respective Colony," and vessels engaged in the Company's work are to be exempt from port and light dues. So far there is nothing immediately relevant to the property involved in this case. But then comes an undertaking by the South Australian Government that it will also "repay to the Extension Company . . . any income tax and *any rates or taxes parliamentary or otherwise which the Extension Company shall be required to pay in such respective contracting Colony*." Up to this point it would certainly be an undertaking by the Government to repay whatever parliamentary or municipal impost was paid for income tax, land tax, or otherwise, and would include such payment in respect of the local offices, used for the third object of the agreement. But then follow these words: "*except rates and taxes on premises occupied as local offices for the purpose referred to in clause* 16 *hereof*." Those words just as clearly take out of the repayment obligation land tax in respect of the local office included in par. 10 (c), because that portion of the land is

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" occupied for the purpose referred to in clause 16 " of the agreement, although it is *not exclusively* occupied for that purpose. The Company could not escape liability merely because it added a use which by itself would be free. No new liability would be added by the additional use, but no existing liability would be removed by it. For the land in par. 10 (c) the Company was therefore not exempted by the agreement from the State land tax. But, except that land, it appears that clause 19 of the agreement of 1900 to the extent of its provisions covers the whole property and business of the Company. The " cable business " includes all in cable business. The " custom duties and wharfage rates " and " port and light dues " cover all acts of the nature referred to. " Income tax " covers the complete operations of the Company within the respective jurisdictions. The expression " rates or taxes parliamentary or otherwise " is unlimited, and extends to its property anywhere in the territorial jurisdiction of each " contracting Colony." To make it quite clear that nothing is given up by the Company, the proviso adds that assurance, and it is affirmatively stated that clause 19 shall be deemed " collateral and additional " to (*inter alia*) the agreement of 1871. There is, therefore, an undertaking by the State of South Australia to repay by way of recoupment all income taxes and land tax and all rates whatever (except as stated) which the Company may be required by law to pay. It is a matter for consideration, from the standpoint of construction, that the clause took the form of " relief " from customs duties and wharfage rates and port and light dues, &c., but of " repayment " in respect of other taxation. The change of form is singular. The combined facts that the passing of the Federal Constitution then before the Imperial Parliament was assured, that the Department was destined to be taken over, that that time was probably sufficiently distant to enable the new cable to be installed, and that when the Department was taken over the current obligations of the State in respect of the Department would be assumed by the Commonwealth, may conjecturally have influenced the form of clause 19 as to its departure from the form of art. 3 of the 1871 agreement, and its own provisions as to customs and wharfage, &c., on the one hand, and income and other taxes, on the other hand. But that would be only conjecture, and it would be conjecture that would do violence

to the good faith of the Colonies concerned. We cannot assume that the repayment form was adopted with the intention, within a comparatively short period and then for ever (clause 21), if the Company so willed, of fastening the real obligation on the Commonwealth, notwithstanding the Imperial Pacific Cable project was under consideration by the British, Canadian, and some Australasian Governments. We assume therefore, that the true construction of the 19th clause was to confine its operation to the Colonies parties to the agreement and that income tax, rates and other taxes must be read as taxes of the respective Colonies.

Mr. *Dixon* argued that the taxes referred to mean taxes by any competent authority during the continuance of the agreement. If so, they include (1) Imperial, (2) Commonwealth and (3) State taxation. As to Imperial, we reject the argument. The constitutional implication (using that expression in the common law sense of the conventions that prevail between the various self-governing units of the British Commonwealth of Nations) is that there will be no Imperial taxation in Australia. That must be excluded as an implication. As to Commonwealth taxation, for the reasons already given this must be excluded. The words themselves do not necessarily or naturally include any but the State taxation. There are no expressions in the contract itself which indicate that the Company is ever to be brought into contractual privity with the Commonwealth or any one but the Government with whom it is contracting. Clause 20 points to the absence of the Commonwealth from the minds of the contracting parties, particularly as Western Australia was not then a necessary member of the future Commonwealth (see covering Sec. III. of the Constitution Act). As to State taxation, that certainly was included—and, as we think, exclusively intended. That still remains in its entirety so far as construction is concerned.

The view we have expressed as to the effect of the doctrine of circuity of action being that of a minority, it would be profitless, and we think undesirable, for us to proceed to express the opinion we have formed with regard to the other two branches of the Company's contention, namely, (a) the legal nature of the State's obligations at the date of transfer and (b) that the effect of sec. 85 (IV.) of the Constitution is to transfer to the Commonwealth in respect of those

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obligations the *direct* liability of the State to the State's contractors. It need hardly be said that, if we were to proceed on the basis that the word " assume " in the constitutional provision means only indirect assumption by way of indemnification of the State, we should be tacitly construing that provision, and in a manner open to grave objections. And, further, we would wish, in the absence of any definition of " current obligations," to guard against any assumption that in our opinion an agreement by a State with a contractor as to customs duties, although necessarily confined at the time to State customs duties, could not affect Commonwealth customs duties by virtue of sec. 85 (IV.) when the Department is taken over, or even the payment of a specific sum out of Commonwealth Consolidated Revenue, because all the States could ever promise to pay was a sum out of the State Consolidated Revenue. It necessarily follows, since we have to rest at this point, that, supposing the obligations of the State under the agreements to have been its " current obligations " at the time of transfer and to have been " assumed " by the Commonwealth by virtue of the Constitution, the Commonwealth is not bound to refrain from taxing the Company; and that the answer to the question in the case stated must be No.

HIGGINS J. This appeal is against an assessment for land tax. The taxpayer, a cable company, has been assessed for the value of its land in New South Wales, South Australia, Tasmania, Victoria, Western Australia. The valuation " tentatively " omits £1,225, the value of the Company's six acres at Port Darwin; and that land does not concern us here. The main issue is as to £11,240, the value of a cable station and offices in Adelaide. The appellant purchased this land in 1919 from private owners, and is willing to have that portion which is leased to tenants and that portion which is used as a local office assessed for the tax, but objects to have the value of the remainder included in the assessment. If the appellant succeed as to this objection, the rest of the land assessed, as it is under the value of £5,000, will not render the appellant liable to land tax.

Now, under sec. 11 of the *Land Tax Assessment Act* 1910-1911, land tax is payable by the owner of the land upon the taxable value of *all* land owned by him and not exempt from taxation under that

Act (and see secs. 10 and 13). This Adelaide land is not within any of the exemptions allowed by the Act; and prima facie it should be included. But the appellant claims an exemption by virtue of an Act of South Australia, taken with sec. 85 (IV.) of the Commonwealth Constitution. Sec. 85 provides that "when any Department of the Public Service of a State is transferred to the Commonwealth . . . (IV.) the Commonwealth shall, at the date of the transfer, *assume the current obligations* of the State in respect of the Department transferred"; and, under sec. 69, the South Australian Department of Posts, Telegraphs and Telephones was transferred to the Commonwealth by proclamation on 1st March 1901. It is not pretended, of course, that the cable communications of this Company formed part of that Department.

The relevant provisions of the South Australian Act, No. 11 of 1870, may be briefly stated. By this Act, the Governor (of South Australia) in Council was empowered to make an agreement for the construction and maintenance of an electric telegraph line from Port Augusta to Port Darwin (Port Darwin was at the time within the "Province" of South Australia), and for the junction thereof with a telegraph line to Europe. Then, by an agreement dated 29th August 1870, the Governor in Council agreed that the British Australian Telegraph Co. (the appellant Company is assignee from the British company) might lay down the land end of a submarine cable at Port Darwin and take possession of land not exceeding six acres for the purpose. Art. 3 of this agreement provides as follows: "So long as the land so to be taken, or to be taken under art. 12 of this agreement" (art. 12 need not concern us), "and the cable station," &c., "shall be used exclusively for the purposes of telegraphic communication with Europe and other places, *the same premises*, and *the undertaking, property and profits of the Company* shall be exempt from all *provincial, local, and other taxes, rates, charges, and assessments within the said Province*, whether now existing or chargeable, or hereafter to be charged, imposed, or created; and *every legislative and other act*, by virtue of which any tax, rate, charge, or assessment might otherwise be imposed upon or in respect of the said premises, or any of them, *shall contain an express exemption* of *the premises* from charges thereby created or authorized."

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This article obviously raises several formidable difficulties in the chain of the appellant's reasoning. I concur with the view of my learned brothers that, on its true interpretation, the article does not even purport to exempt the Company from any taxation which an authority higher than the Provincial Legislature—say the Imperial Parliament or a Federal Parliament—might impose. Here, the Governor of this Province, acting under the authority of its Legislature, does not contract as to the legislation of independent or superior authorities; and the words "provincial, local, and other taxes, rates, charges, and assessments within the said Province" are evidently used in a descending scale, as applying to the Provincial Legislature and the bodies under its control.

But I am anxious that it should not be assumed that there are no other difficulties in the way of the appellant. It must not be taken for granted that the other links in the chain of reasoning are to be regarded as even probably sound. It is not expedient, I think, that a Judge who agrees with his colleagues in their answer to questions on grounds which are sufficient should express final opinions on points with which they have not dealt. But whatever is the true meaning of the expression "provincial, local, and other taxes," &c., it has yet to be shown that the South Australian Act empowered the Governor to make such a bargain as this, for exemption from taxes; and that, if it did so empower him, the Act was in that respect valid, or that it could not be repealed by a subsequent Act. There is not, in any of our Constitutions any such clause as in the Constitution of the United States forbidding any law impairing the obligation of contracts (cf. *Dartmouth College Trustees* v. *Woodward* (1); and see *Associated Newspapers Ltd.* v. *City of London Corporation* (2) and *Commercial Cable Co.* v. *Government of Newfoundland* (3)).

I desire also to reserve my opinion as to the exemption of "the undertaking, property, and profits of the Company" from taxation. Art. 3 seems to use the word "premises" for land; and the words which I have quoted bear a remarkable resemblance to the words which are used in a mortgage debenture (see *In re Florence Land and Public Works Co.*; *Ex parte Moor* (4), and subsequent cases). If these words, used in a mortgage debenture, would not forbid a

(1) (1819) 4 Wheat., 518.
(2) (1916) 2 A.C., at pp. 442-443.
(3) (1916) 2 A.C., 610.
(4) (1878) 10 Ch. D., 530.

specific mortgage of specific land or specific chattels, it may be that they do not here forbid a specific tax on land of the Company. It may be that the effect of the article is to exempt a tax on the business of the Company as a going concern or its profits. But the point has not been argued.

I concur also with my learned brothers in their view that the agreement of 14th April 1900 does not exempt the Company from this Federal land tax. This agreement was made between South Australia, Western Australia and Tasmania, and the Company; but the covenants are, in substance, to recoup the Company any payments made for certain taxes, and they do not even, in my opinion, purport to affect the right of South Australia, still less the right of the Commonwealth Parliament, to levy land tax, or the right of the Commissioner to collect the tax.

Under these circumstances, it is unnecessary to consider the effect of sec. 85 (IV.) of the Constitution. We do not decide the meaning of "assume the current obligations of the State in respect of the Department transferred." We do not decide whether such an (alleged) obligation as that created by either agreement is a "current obligation," or that it is an obligation "in respect of the Department transferred." In my opinion, there is no such obligation as alleged, current or not current. Even if there were such an obligation, it has yet to be established that sec. 85 (IV.) operates as a limitation of the powers of the Commonwealth Parliament conferred by secs. 51 and 52 of the Constitution, or that it can be used as an objection to the Commissioner's assessment.

In my opinion, the answer to the question should be No.

POWERS J. I agree that the question stated for the opinion of the Court in this case should be answered in the negative. I do so for the reasons given in the joint judgment of my learned brothers the Chief Justice, *Gavan Duffy* and *Starke* JJ.

Questions answered in the negative.

Solicitors for the appellant, *G. & J. Downer*, Adelaide.

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

B.L.