[HIGH COURT OF AUSTRALIA.]

BROKEN HILL SOUTH LIMITED (PUBLIC OFFICER) . . . . . APPELLANT;
APPELLANT,

AND

THE COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1936, *Nov.* 24-26.

MELBOURNE, 1937, *Mar.* 1.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income Tax (N.S.W.)—Assessment—Foreign company—Transactions outside State—Debentures—Interest—Security including real property in the State—"Money secured by the mortgage of any property in the State"—Income Tax (Management) Act 1912-1925 (*N.S.W.*) (*No.* 11 *of* 1912—*No.* 26 *of* 1925), *secs.* 4, 10 (*g*), 11—*Income Tax (Management) Act* 1928-1929 (*N.S.W.*) (*No.* 35 *of* 1928—*No.* 47 *of* 1929), *secs.* 4, 10, 11.

Constitutional Law (N.S.W.)—Legislative power—Peace, welfare and good government of State—Statute—Validity.

The *Income Tax (Management) Act* 1912-1925 (N.S.W.) provided that interest upon money secured by the mortgage of any property in New South Wales should be deemed to be derived from a source in the State and should be subject to taxation as income: In the *Income Tax (Management) Act* 1928-1929 (N.S.W.) (which superseded the Act of 1912-1925) "income" was defined to include interest upon such money. In each Act "mortgage" was defined to include any charge, lien or encumbrance to secure the repayment of money upon which interest was payable. The Act of 1912-1925 provided that nothing in the Act should apply to income derived from sources outside New South Wales: The Act of 1928-1929 did not so provide.

The appellant was a Victorian company registered as a foreign company and carrying on business in New South Wales. It was the holder of certain interest-bearing debentures issued to it in Victoria by the B. Co., which also

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was a Victorian company registered as a foreign company in New South Wales, and which possessed land in New South Wales and carried on business in that State and elsewhere. The debentures contained a covenant with the holder to pay principal and interest, and they also charged with such payments all the property of the B. Co., present and future, other than its uncalled and unpaid capital for the time being. The debentures were secured by a trust deed made between the B. Co. and a trust company, which deed was executed in Victoria and registered as a mortgage in that State. The trust deed constituted a specific charge and mortgage over certain specific premises and a floating charge over the general assets of the B. Co., some of which were situate outside New South Wales. The mortgage given pursuant to the deed comprised the land in New South Wales, and was registered under the provisions of the *Real Property Act* 1900 (N.S.W.). The debentures were also registered in New South Wales in accordance with the *Companies (Registration of Securities) Act* 1918 (N.S.W.). Interest on the debentures was paid to the appellant in Victoria. The appellant was assessed to income tax by the New South Wales Commissioner of Taxation in respect of part of the interest received by it under the debentures for the years ended respectively 30th June 1925 and 30th June 1929.

Held:—

(1) By *Latham* C.J., *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Rich* J. dissenting), that, on the proper construction of the *Income Tax (Management) Act* 1912-1925 (N.S.W.), the debenture interest received by the appellant during the year ended 30th June 1925 was subject to taxation thereunder; and, by *Latham* C.J., *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ., that the interest received during the year ended 30th June 1929 was likewise subject to taxation under the *Income Tax (Management) Act* 1928-1929 (N.S.W.).

(2) By *Latham* C.J., *Starke*, *Dixon*, *Evatt* and *McTiernan* JJ. (*Rich* J. dissenting), that the Acts, so construed, were within the constitutional power of the Parliament of New South Wales to make laws for the peace, welfare and good government of the State.

Decision of the Supreme Court of New South Wales (Full Court): *Public Officer, Broken Hill South Ltd.* v. *Commissioner of Taxation*, (1935) 36 S.R. (N.S.W.) 1; 52 W.N. (N.S.W.) 11, affirmed on different grounds.

APPEAL from the Supreme Court of New South Wales.

On separate appeals to the Supreme Court of New South Wales by the Public Officer of Broken Hill South Ltd. against additional assessments of that company by the Commissioner of Taxation of New South Wales for income tax in respect of the year ended 30th June 1925, and of the year ended 30th June 1929, cases were stated by *Street* J. at the request of the parties, under sec. 48 (11) of the *Income Tax (Management) Act* 1928-1929 (N.S.W.), for the opinion of the Full Court.

The case stated in respect of the appeal against the assessment for the year ended 30th June 1925 was substantially as follows :—

1. The appellant is a company incorporated under the laws of the State of Victoria and not otherwise and having a registered office which is its head office in the State of Victoria. At all material times it has been registered in and has had a registered office in the State of New South Wales under the New South Wales *Companies Acts* as a foreign company carrying on business in New South Wales and has carried on business in New South Wales and elsewhere.

2. British Australian Lead Manufacturers Pty. Ltd. (hereinafter called the " B.A.L.M. Co.") is a company incorporated under the laws of the State of Victoria and not otherwise and having a registered office which is its head office in the State of Victoria. At all material times the B.A.L.M. Co. has been registered in and has a registered office in the State of New South Wales under the New South Wales *Companies Acts* as a foreign company carrying on business in New South Wales and has carried on business in New South Wales and elsewhere.

3. In the years 1923 and 1924 the B.A.L.M. Co. borrowed and received in London and Melbourne, Victoria, and not elsewhere the sums of £75,000 and £41,000 respectively upon the security of debentures of £100 each redeemable at £105 each and carrying interest in the meantime at 7½ per cent per annum payable half yearly. The debentures are redeemable on 31st December 1937 subject to the right of the B.A.L.M. Co. to redeem at an earlier date upon giving the prescribed notice. The repayment of the principal sum and the payment of the premium of £5 on each £100 debenture and the interest are according to the terms and conditions of the debentures to be made at the registered office of the B.A.L.M. Co. at Melbourne or at its bankers for the time being. The B.A.L.M. Co. has only one register of debentures which is in Melbourne. All the debentures were sealed and issued to the lenders in Melbourne, Victoria. The debentures contained two clauses which were in the following terms :—" (*a*) This debenture is one of a series of like debentures of the company for securing principal sums not exceeding in the aggregate at any one time £125,000. The debentures of the said series whether original or not are all to rank *pari passu* as a

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first charge on the property hereby charged without any preference or priority one over another and such charge save as regards the real and personal property comprised in the first schedule to the indenture below mentioned is to be a floating security but so that the company is not to be at liberty to create any mortgage or charge on any of its undertakings or property other than its uncalled or unpaid capital for the time being in priority to or *pari passu* with the said debentures. (*b*) The holders of all the debentures of the series will be entitled *pari passu* to the benefit of and be subject to the provisions of an indenture (hereinafter called the trust deed) dated 27th March 1923 and made between the company of the one part and The Melbourne Trust Ltd. (hereinafter called " the trustee ") of the other part whereby the company specifically mortgaged certain of its property to and charged the residue of its undertaking and assets other than its uncalled or unpaid capital for the time being in favour of the trustee for securing the payment to the holders of the debentures of all principal moneys and interest secured thereby."

4. At all material times the debentures have been registered in New South Wales under the *Companies (Registration of Securities) Act* 1918.

5. The debentures are themselves secured by a certain debenture trust deed dated 27th March 1923 and made between the B.A.L.M. Co. of the one part and The Melbourne Trust Ltd. (now the Standard Trust Ltd.) the trustee of the other part. The trust deed was executed by the parties thereto in Melbourne and is registered as a mortgage in the Registrar-General's Office of the State of Victoria. The trust deed has been at all material times in the State of Victoria and outside the State of New South Wales. The Standard Trust Ltd. is a company incorporated under the laws of England and not otherwise but at all material times has carried on business in (among other places) the State of Victoria and has had a registered office in that State under and in accordance with the *Companies Acts* of that State.

6. In the trust deed the B.A.L.M. Co. covenanted with the trustee that the B.A.L.M. Co. would pay to the debenture holders all principal moneys and interest secured by the debentures as and when the same should respectively become payable pursuant to any of the

provisions of the trust deed or of the debentures. As thereby appearing the trust deed constitutes a specific charge and mortgage over certain specific premises and a floating charge over the general assets of the B.A.L.M. Co. some of which are situated outside New South Wales. The specifically charged premises comprise three parcels of freehold land in the State of New South Wales, two leasehold properties in that State, all plant, machinery and fixtures upon the freehold and leasehold lands and 39,995 shares in the capital of Australasian United Paint Co. Ltd. which is a company incorporated under the laws of the State of South Australia and not otherwise. The B.A.L.M. Co. has at all material times carried on upon the lands business as manufacturers of paints and other goods. Pursuant to the trust deed a mortgage under the *Real Property Act* 1900 over the freehold lands was given by the B.A.L.M. Co. to The Standard Trust Ltd. and at all material times has been duly registered in the Registrar-General's Office of the State of New South Wales and such mortgage is still subsisting. The said mortgage was executed by the parties thereto in Victoria. The certificate for the shares in the Australasian United Paint Co. Ltd. is indorsed by the B.A.L.M. Co. and held by The Standard Trust Ltd. in Melbourne under and in accordance with the trust deed.

7. Certain of the debentures were issued to the appellant in Melbourne and are still in force. Those debentures were at all material times held by the appellant company outside the State of New South Wales. Interest thereunder has always been paid by the B.A.L.M. Co. from its head office in Melbourne to the appellant in Melbourne. All payments of interest to the debenture holders were made outside the State of New South Wales.

8. By notice of additional assessment and adjustment sheet the respondent notified the appellant that he had made an assessment upon it in respect of the interest it had received during the income year ended 30th June 1925 from the B.A.L.M. Co. under the debentures of that company held by the appellant. By that assessment part only of the interest was taxed, namely, that part of the total interest which bore the same ratio to the total interest as the value of the assets of the B.A.L.M. Co. situate in New South Wales bore to the value of the B.A.L.M. Co.'s total assets.

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9. The appellant duly objected to the assessment on the following grounds:—(*a*) That the amount of interest received from the B.A.L.M. Co. is not income derived from a source in New South Wales, and is not subject to New South Wales income tax. (*b*) That the said interest is derived from a source in Victoria, and has already borne Victorian income tax. (*c*) That the said interest does not fall within the definition of "income" under sec. 4 of the Act. (*d*) Alternatively, the said interest even though it be "income" is not "assessable income" nor "taxable income" under the New South Wales *Income Tax (Management) Act*, and is not subject to tax. (*e*) That sec. 4 of the *Income Tax (Management) Act* 1912-1925 and the assessment are invalid and unconstitutional, in that they purport to impose tax upon interest arising beyond the jurisdiction of the State of New South Wales.

10. The respondent considered the objection and disallowed it.

11. The appellant, being dissatisfied with such disallowance, duly requested the respondent to transmit its objection to the Supreme Court as an appeal, which the respondent duly did.

The following questions were referred to the Full Court for its opinion thereon:—

1. Whether the interest or any part thereof is income subject to taxation within the meaning of the *Income Tax (Management) Act* 1912 as amended by subsequent Acts up to and including Act No. 26 of 1925.
2. If the answer to question 1 be in the affirmative whether the provisions of that Act as so amended purporting to render such interest or part thereof subject to taxation are within the constitutional powers of the New South Wales Legislature?

The facts and questions of law set forth in the case stated in respect of the appeal against the assessment for the year ended 30th June 1929 were substantially the same as those set forth in the other case stated except (*a*) that the assessment objected to was in relation to the year ended 30th June 1929; (*b*) that the taxpayer took as a further ground of objection that neither the whole nor any part of the interest under consideration was interest upon money secured by the mortgage of any property in New South

Wales, the debenture trust deed relating to the debentures issued by the B.A.L.M. Co. creating a charge over all the assets of the company wherever situate, including property outside New South Wales (specific mortgages of New South Wales properties being merely subsidiary to the debenture trust deed); therefore the interest on those debentures was not (exclusively) interest upon money secured by the mortgage of any property in New South Wales, and was not "income" under sec. 4; and (*c*) that the Act referred to in the first question was the *Income Tax* (*Management*) *Act* 1928-1929 (N.S.W.).

The questions in each case were answered by the Full Court:—1. Yes, the whole of the interest. 2. Yes: *Public Officer, Broken Hill South Ltd.* v. *Commissioner of Taxation* (1).

From those decisions the taxpayer appealed, by leave, to the High Court. The appeals were heard together.

Ham K.C. (with him *C. D. Monahan*), for the appellant. The court below conceded the position that the source of the income was not the mortgage over the land situate in New South Wales, but was the Victorian covenant to pay, that is, the covenant in each debenture. The fact that the trust deed, which was given as a collateral security to the debentures, contains a provision that a mortgage shall be given, if required, over the land situate in New South Wales, is immaterial. The whole transaction as a transaction, and the whole source of the interest, was Victorian. The registration of the debentures in New South Wales was an irrelevant registration which was not required by law and was not a proper or valid registration. It was not within the legislative competence of New South Wales to tax this income, and any State statutory provisions which purport to do so are void for extra-territoriality. The scheme of apportioning the income as adopted by the respondent, and set forth in par. 8 of the case stated, does not appear in, and is not authorized by, the Act. The debentures are the only documents on which the appellant could sue: the other documents are only machinery or collateral documents in order to enforce the charge. This latter fact is evidenced by the covenant in the debenture trust

(1) (1935) 36 S.R. (N.S.W.) 1; 53 W.N. (N.S.W.) 11.

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deed set forth in par. 5 of the case stated. Upon the true construction of the Acts the tax was improperly levied. Alternatively, in each instance such taxation is outside the competency of the legislature of New South Wales. There is considerable doubt as to whether the appellant received interest upon money which was secured upon a mortgage of land in New South Wales. There is a difference between receiving interest secured by a mortgage of property in New South Wales, and receiving interest secured by a mortgage which comprises some property in New South Wales and some property elsewhere. The difference between the relevant provisions of the 1912 Act and the relevant provisions of the 1928 Act, is significant especially having regard to the difference between the meaning of the words " means " and " include " in the definition of " income." In *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (1), the thing which the legislature seized upon to tax was income at its source. The court below took an erroneous view of that case. If the Act purports to affect persons who are not present within the State, or are not connected with it by ties of domicile or residence, and is in respect of things which are not within the State, then the legislation is void for extra-territoriality. The debenture holders have no proprietary interest in the land in New South Wales. The property over which payment of interest is secured has nothing to do with the source of that interest. Here it may well be that the money from which the interest was paid was wholly earned or obtained outside the State. The fact that payment was secured by several securities does not affect the true position that the source of the interest was the covenant to pay contained in the debentures. The words of extension in the definition of " income " in the 1912 Act and in the 1928 Act do not bring this interest into the tax; upon the proper construction of the Acts this tax is not sustained. There is nothing in the Acts to indicate precisely the intention of the legislature in the case of mortgages which comprise property within and without the State. If the legislature had intended to tax the whole of the interest it would have made express provision therefor (See secs. 18, 19, 33 (*d*) of the 1912 Act and sec. 11 (*b*) of the 1928 Act). To give the provision

(1) (1932) 48 C.L.R. 618.

an extended meaning would make it inconsistent with the opening words of the definition that income means income derived from any source in the State, and also with the emphatic provision in sec. 10 of the 1912 Act that nothing in the Act shall apply to income derived from sources outside the State. The Act should not be given an extra-territorial operation (*Attorney-General for Ontario* v. *Reciprocal Insurers* (1); see also *Interpretation Act of* 1897 (N.S.W.), sec. 17). Income derived from a source outside the State cannot be made liable to tax by " deeming " it to have been derived from a source within the State as provided in sec. 4 (*Macleod* v. *Attorney-General for New South Wales* (2)). The expression " property in the State " in the definition of " income " in sec. 4 of the Acts means that the whole of the property comprised in the mortgage must be within the State. The legislation is intended to apply only to transactions which are wholly in and of New South Wales. If the scope of the legislation includes income derived from transactions without the jurisdiction by persons not subject to that jurisdiction, it must to that extent be declared to be invalid (*Australian Railways Union* v. *Victorian Railways Commissioners* (3)). The general purpose and scope of the Acts are limited to income from sources within the State (*Commissioner of Taxes* v. *Union Trustee Co. of Australia Ltd.* (4)). The source of the interest received by the appellant is the covenant in the debenture (*Commissioners of Taxation* v. *Jennings* (5); *Webb* v. *Campbell* (6); *In re The Income Tax Acts* [*No.* 3] (7); *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (8)). The facts set forth in the case stated show that the transaction is an extra-territorial transaction. Numerous complications would arise if the operation of the Acts was not confined to income solely derived from a source in New South Wales. Prima facie, the Acts should be construed as not selecting as the subject of taxation any person, thing or circumstance not within

(1) (1924) A.C. 328.
(2) (1891) A.C. 455.
(3) (1930) 44 C.L.R. 319, at pp. 385, 386.
(4) (1931) A.C. 258, at pp. 264, 265, 267.
(5) (1898) 19 L.R. (N.S.W.) 193; 15 W.N. (N.S.W.) 86.
(6) (1900) 25 V.L.R. 506, at pp. 509, 511; 21 A.L.T. 227, at p. 228.
(7) (1901) 27 V.L.R. 304, at pp. 312, 313; 23 A.L.T. 70, at p. 72.
(8) (1921) 29 C.L.R. 225, at p. 233.

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the territory of New South Wales (*Macleod* v. *Attorney-General for New South Wales* (1); *Commissioners of Stamps (Q.)* v. *Wienholt* (2); *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (3); *Federal Commissioner of Taxation* v. *Munro* (4)). Even if the statutory provisions extend beyond the jurisdiction the court has power to cut them down. Unless they can be so limited they are *ultra vires*. The connection between the debenture holders and the land in New South Wales is too remote to bring the matter within the jurisdiction of the New South Wales legislature (*Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (5); *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (6); *Attorney-General* v. *Australian Agricultural Co.* (7)). That connection does not come within the scope of legislation for the peace, welfare and good government of New South Wales. It is nothing to the point that the legislature of New South Wales, if it had chosen, might have levied some tax upon the fact or circumstance of property in New South Wales being subject to a mortgage or charge. The Acts should be construed upon what they are levied, or as confined to the particular object or objects of taxation to which they are directed (*Commissioner of Taxes* v. *Union Trustee Co. of Australia* (8)). This is an imposition of a condition on a mortgage transaction and not on income as such.

E. M. Mitchell K.C. (with him *Hooton*), for the respondent. Neither the 1912 Act nor the 1928 Act is exclusively an income tax Act. They are simply taxing Acts, in which the legislature was entitled to include as many different subjects of taxation as it pleased. The mortgage debt is situate in New South Wales. The source of the interest which the debenture holders received was the covenant in the mortgage under the *Real Property Act* 1900 (N.S.W.) (*Toronto General Trusts Corporation* v. *The King* (9)). The interest received by the debenture holders is " upon money secured by the mortgage

(1) (1891) A.C., at pp. 458, 459.
(2) (1915) 20 C.L.R. 531, at p. 540.
(3) (1926) 38 C.L.R. 12, at p. 31.
(4) (1926) 38 C.L.R. 153, at p. 217.
(5) (1932) 48 C.L.R., at pp. 632, 633, 636.
(6) (1934) 51 C.L.R. 172, at pp. 187, 188.
(7) (1934) 34 S.R. (N.S.W.) 571, at pp. 578-580; 51 W.N. (N.S.W.) 197, at p. 198.
(8) (1931) A.C. 258.
(9) (1919) A.C. 679.

of any property in the State," and, therefore, is income within the meaning of that word as defined in sec. 4. That interest is income derived from a source in New South Wales, and comes within the scope and operation of the Acts. The literal meaning of the words of the Acts should not be restricted. A mortgagee who elects of his own free will to take as security for his debt property in New South Wales takes it subject to the laws of New South Wales. How far he accepts a charge and how much he puts upon it are matters entirely within his own control. It is immaterial whether the tax is one upon income, or is any other class of tax so long as it is a tax within the taxing power of the State. The source of the income is the covenant in the mortgage over the land in New South Wales (*Commissioners of Taxation* v. *Jennings* (1)). The reasons which existed in *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (2) for rejecting the argument that death duty was the price of probate do not exist here. Here the tax imposed is the price which the legislature by its legislation has notified that it intends to charge those people who elect to use the State's resources for the protection of their mortgage debt. It is not contrary to comity or principles of international law for the legislature to say that any person who comes to the State shall pay a tax in relation to the specific purposes for which he desires to use the property in New South Wales. Where property in the State is used for a particular purpose it is competent for the State to tax the use made of that property (*Walsh* v. *The Queen* (3)). In that case the Privy Council impliedly held that the legislation there in question was valid. Under the circumstances there was jurisdiction to measure the quantum of the tax by reference to the property of the taxpayer wherever situated (*Millar's Case* (4)). Here the holding of the security is the sole occasion for this particular tax. The repayment of the principal and payment of interest is none the less secured by the mortgage of property in the State because it is secured by the mortgage of property elsewhere. When the legislature intended to use the word " exclusively " or the expression " wholly in the State " it has done so (see, e.g. 1928 Act, secs. 11 (*b*), 20 (1) (*d*), 26 (2)). Also, whenever it so

(1) (1898) 19 L.R. (N.S.W.) 193; 15 W.N. (N.S.W.) 86.
(2) (1932) 48 C.L.R. 618.
(3) (1894) A.C. 144.
(4) (1932) 48 C.L.R., at pp. 631, 636, 637.

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desired, the legislature made provision for apportionment, and the fact that in this instance no such provision was made operates against the appellant. The Acts would be reduced to futility if the mere inclusion of one piece of property, whether real or personal, outside New South Wales, could deprive this particular provision of any force or effect. The inclusion of properties in a mortgage is a matter within the control of the mortgagee and not of the State; therefore the application of the Acts would be a question entirely for the determination of the mortgagee. The suggestion that there is no presumption that a subordinate legislature intends to use the full measure of its extra-territorial power is not supported by *Harding* v. *Commissioner of Stamps for Queensland* (1). The legislation which is attacked is legislation for the peace, order and good government of the State (*Trustees, Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2); *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (3)).

[EVATT J. referred to *Crowe* v. *The Commonwealth* (4).]

There is a sufficient nexus between the money lent on the security of land in New South Wales and the State to render it competent for the State legislature in pursuance of its powers to legislate for the peace, order and good government of the State to tax the debenture holder in respect of the income received by him (*Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (5)). The facts in *Millar's Case* (6) are radically different from the facts in this case in that here there is a direct connection between the taxpayer and the State, inasmuch as he is the owner of property in the State, whereas in *Millar's Case* (6) the taxpayer sought to be charged was not the owner of any such property. It is competent for the State legislature to impose a tax upon mortgagees measured by the quantum of interest received by them from moneys secured by the mortgage of property in the State. The fact that a mortgage has not been resorted to is no justification for the suggestion that it was of no economic value to the mortgagee (*Walsh* v. *The Queen* (7)). The circumstance that the property is held here as security

(1) (1898) A.C. 769.
(2) (1933) 49 C.L.R. 220, at pp. 239, 240.
(3) (1934) 50 C.L.R. 581, at p. 600.
(4) (1935) 54 C.L.R. 69.
(5) (1934) 51 C.L.R., at p. 189.
(6) (1932) 48 C.L.R. 618.
(7) (1894) A.C. 144.

for the whole of the income makes it a circumstance which is a sufficient link to attract the taxing power of the State for the formulation of a law which would be valid in the State.

[EVATT J. referred to *Morgan* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (1).]

The decision in that case is that regard may be had to the substance of the transaction. Once the nexus is established, the inclusion or otherwise of the transaction within the scope of its legislation is entirely a matter of State policy (*Toronto General Trusts Corporation* v. *The King* (2)). In any event the Acts apply to persons over whom the State has full taxing jurisdiction, that is, residents and persons carrying on business in the State (*Railroad Retirement Board* v. *Alton Railroad Co.* (3)). The appellant is carrying on business in the State. Although the legislature may have exceeded its powers, the legislation is valid and effective to the extent of those powers (sec. 92 of the 1928 Act). Each case can and should be decided upon its own facts. Similarly, if any provisions of the 1912 Act exceed the legislative powers of the State Parliament, those provisions to the extent of the excess may be severed, and so far as the provisions of the Act are within those powers they should be applied (*W. & A. McArthur Ltd.* v. *Queensland* (4) ; *Committee of Direction of Fruit Marketing* v. *Collins* (5) ; *Roughley* v. *New South Wales* ; *Ex parte Beavis* (6)). The Acts are taxing Acts the object of which is to collect tax from all persons who can be made liable therefor.

Ham K.C., in reply. There is a wide distinction between the question of construction and the question of validity. As regards validity, if it is a general expression which is in excess of the territorial jurisdiction of the State legislature, the whole statutory provision is invalid.

[DIXON J. referred to *Hill* v. *Wallace* (7).]

(1) (1912) 15 C.L.R. 661, at pp. 666, 667.
(2) (1919) A.C. 679.
(3) (1935) 295 U.S. 330, at pp. 361, 362 ; 79 Law. Ed. 1468, at p. 1482.
(4) (1920) 28 C.L.R. 530, at pp. 558, 559.
(5) (1925) 36 C.L.R. 410, at p. 417.
(6) (1928) 42 C.L.R. 162, at pp. 206-208.
(7) (1922) 259 U.S. 44 ; 66 Law. Ed. 822.

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The effect of " saving provisions " inserted in statutes to preserve validity to the extent of the powers of the particular legislature was dealt with in *Australian Railways Union* v. *Victorian Railways Commissioners* (1). The State legislature based its jurisdiction upon income from a source within the State, and was silent as regards property or the carrying on of a business within the State. The Acts cannot be supported upon a basis different from that which the legislature chose to adopt; it is not for the court to import other bases of jurisdiction (*Commissioner of Taxes* v. *Union Trustee Co. of Australia Ltd.* (2)). The question of the construing of an Act and cutting it down did not arise in *McArthur's Case* (3), so that case is not in point, but in *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (4) an Act in which legislative powers had been exceeded was declared wholly invalid. The source of the mortgage interest is the covenant and not the property (*Walsh* v. *The Queen* (5); *Webb* v. *Campbell* (6)). The transaction was localized in Victoria (*Toronto General Trusts Corporation* v. *The King* (7)). The income is a Victorian debt (*In re The Income Tax Acts* [*No.* 3] (8)).

Cur. adv. vult.

Mar. 1.

The following written judgments were delivered :—

LATHAM C.J. These are appeals from the decisions of the Full Court of the Supreme Court of New South Wales in two cases stated at the request of the parties under sec. 48, sub-sec. 11, of the *Income Tax* (*Management*) *Act* 1912-1928. The appellant company is incorporated under the laws of Victoria and has its head office in the State of Victoria. It is registered under the New South Wales *Companies Act* as a foreign company carrying on business in New South Wales.

The British Australian Lead Manufacturers Pty. Ltd. (which I propose to call the Lead Company) is also a company incorporated in Victoria and having its head office there. It is registered as a foreign company in New South Wales carrying on business there.

(1) (1930) 44 C.L.R., at pp. 385, 386.
(2) (1931) A.C., at p. 265.
(3) (1920) 28 C.L.R. 530.
(4) (1935) 51 C.L.R. 677.
(5) (1894) A.C. 144.
(6) (1900) 25 V.L.R., at p. 510; 21 A.L.T., at p. 228.
(7) (1919) A.C. 679.
(8) (1901) 27 V.L.R. 304.

The Lead Company in 1923 and 1924 borrowed £116,000 upon the security of a series of debentures of £100 redeemable at £105 each and carrying interest at 7½ per cent per annum. Payments of principal and interest are, according to the terms of the debentures, to be made at the office of the Lead Company in Melbourne at its business office for the time being. There is only one register of debentures, which is kept in Melbourne. All the debentures were sealed and issued to lenders in Victoria. The debentures contained a covenant with the holder to pay principal and interest and they also charged with such payments all the property of the company, present and future, other than its uncalled and unpaid capital for the time being. The conditions of the debentures provide that the charge, except with respect to certain real and personal property mentioned in the first schedule to a certain trust deed, is to be a floating security. It is declared by the conditions that the holders of all the debentures will be entitled *pari passu* to the benefit of the trust deed dated 27th March 1932 made between the Lead Company and the Melbourne Trust Ltd. as trustee for the debenture holders. It contains a covenant by the company with the trustee that the company will duly pay principal and interest to the debenture holders. It further provides that the company charges and mortgages in favour of the trustee certain freehold and leasehold lands in New South Wales and it also charges the general assets of the company by way of floating charge. The security constituted by the deed is to become enforceable in the event of default in payment of interest or principal and upon certain other events, none of which has happened. By a mortgage under the *Real Property Act* 1900 the Lead Company mortgaged the freehold land in New South Wales, to which reference has been made, to the trustee, and covenanted that it would pay to the trustee mortgagee the principal sum (being the sum secured by the debentures) with interest at 7½ per cent per annum.

The appellant is the Public Officer of Broken Hill South Ltd., which is the holder of some of the debentures mentioned. The question which arises for determination is whether the interest received by Broken Hill South Ltd. is income subject to taxation within the meaning of the *Income Tax (Management) Act* 1912 (in

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the case of the year ending 30th June 1925) or within the meaning of the *Income Tax (Management) Act* 1928 (in the case of income for the year ending 30th June 1929). A further question arises in each case, namely, whether, if upon the true construction of the relevant statutes the interest is liable to taxation, the provisions of the Act imposing such liability are within the constitutional powers of the Parliament of New South Wales.

The Commissioner of Taxation has not in fact sought to tax the whole amount of the interest, but there is no authority in the Act for any apportionment of the interest so as to make only portion of it taxable in New South Wales, and the case must be considered on the basis that, if the Acts are applicable and are valid, the whole amount of interest is to be deemed to be income of the taxpayer.

In the *Income Tax (Management) Act* 1912, sec. 4, it is provided that income means income derived from any source in the State or earned in the State and shall be deemed to exclude income revenue and profits exempted from the operations of the Act by sec. 10. Sec. 10 provides that nothing in the Act shall apply to (*inter alia*) income derived from sources outside the State. Sec. 4, however, also provides that interest upon money secured by the mortgage of any property in the State shall be deemed to be derived from a source in the State. The *Income Tax (Management) Act* 1928, which applies to the income for the year 1929, contains the following provision :

" ' Income ' means income derived or deemed to be derived directly or indirectly from any source in the State or in respect of which tax is otherwise expressly made payable under this Act and includes interest upon money secured by the mortgage of any property in the State."

Thus the 1912 Act provides that interest upon money secured by the mortgage of any property within the State shall be deemed to be derived from a source in the State so that such interest is to be regarded as income for the purposes of the Act. The 1928 Act directly provides that income includes interest upon such money.

The Full Court of the Supreme Court of New South Wales held :—
(1) That the sections quoted referred only to interest upon money secured by a mortgage which was a mortgage only of property within

the State, that is, that these provisions did not apply to a case where a mortgage created a security over property outside New South Wales as well as over property inside New South Wales. The money secured by the debenture trust deed is secured upon property of the Lead Company outside New South Wales as well as upon freehold and leasehold land in New South Wales and therefore it was held that the special definitions of income did not apply to bring the interest in question within the area of taxation. (2) It was also held, however, by the Full Court that the covenant in the mortgage of the freehold lands in New South Wales was located in New South Wales and was the source of the interest in question. On this ground it was held that the income was income derived from a source in this State and that therefore it was subject to tax under the Act. (3) The Full Court further held that the legislation in question was within the territorial competence of the Parliament of New South Wales for the reason that the act of the mortgagor in giving a security over property in New South Wales constituted a sufficient territorial connection between the transaction and the State of New South Wales to make it possible for the legislation to be regarded as being for the peace, welfare and good government of the State within the meaning of the *Constitution Act* 1902.

(1) I find myself unable to agree with the first proposition laid down by the Full Court. The words to be considered are " interest upon money secured by the mortgage of any property within the State." The fact that money is secured by a mortgage of property which is not in the State does not make it impossible for it to answer to the description of money secured by a mortgage of property in the State. I can see no reason for interpreting these words as meaning either that the only security for the money must be property within the State or that among the securities for the money there must be a mortgage which is a mortgage only of property within the State. It is true that in construing statutes of a subordinate legislature it is presumed that the legislature intends to legislate only as to matters within its territorial limits. But this principle does not appear to me to throw any light upon the meaning of the words now in question. A mortgage of property within the State is a thing or circumstance which has a direct relation to the territory of the

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State, whether or not other property is included in the mortgage, and whether or not other securities are given in respect of the money secured by the mortgage of property within the State. In my opinion the words should be construed in accordance with their natural meaning so as to apply to any case of money which is secured by the mortgage of any property in the State, whether or not it is also otherwise secured, and whether or not a mortgage securing it includes property outside as well as within the State. My brother *Dixon* has examined this aspect of the case in detail, and I agree with his reasoning and his conclusion.

(2) The judgment of the Full Court is based upon the view that the source of the interest received by the appellant is to be found in the covenant contained in the mortgage of freeholds in New South Wales so that the interest in question is income derived from a source in the State and so falls within the definition of income in sec. 4 of the 1912 Act and sec. 4 of the 1928 Act. This mortgage was registered in the Registrar-General's office of the State of New South Wales. The mortgage has under the law of New South Wales the attributes of a specialty and accordingly the covenant in the mortgage is to be regarded as localized in New South Wales (*Commissioner of Stamps* v. *Hope* (1); *Toronto General Trusts Corporation* v. *The King* (2); *Webb* v. *Campbell* (3)).

In my opinion, however, it does not follow that the interest paid on the debentures is income derived from a source in New South Wales. It is important to realize the precise nature of the transaction. The appellant as a debenture holder receives interest by virtue of the covenant in the debenture and not by virtue of the covenant in the mortgage of freeholds in New South Wales. The debenture constitutes the contract between the Lead Company and the appellant, and the appellant has a right to sue upon the covenant contained in the debenture. The mortgage contains a covenant between the Lead Company and the Melbourne Trust Ltd.—no money was paid under that covenant either to the Melbourne Trust Ltd. as covenantee or to the debenture holder, who was not a covenantee. If the facts had been different, if, for example, land in New South Wales had

(1) (1891) A.C. 476.
(2) (1919) A.C. 679.
(3) (1900) 25 V.L.R., at pp. 509-511; 21 A.L.T., at p. 228.

been realized and payment had been made through the Melbourne Trust Ltd. to the debenture holder, the case might have been different. Upon the facts as they are, however, it appears to me to be inaccurate to say that the interest paid to the debenture holder finds its source in the covenant contained in the mortgage of the New South Wales freehold.

(3) Upon the interpretation of the Act which appears to me to be correct a tax is imposed upon interest upon money which is in fact secured by the mortgage of property in New South Wales, whether or not the interest is derived from a New South Wales source. The question is whether the fact that the money is so secured in itself constitutes a sufficient territorial connection with New South Wales to entitle the Parliament of New South Wales to legislate so as to impose a tax upon persons who receive the interest and to impose that tax in respect of the whole amount of that interest. In order to show exactly what the question is which must be decided, it may be useful to consider a possible case. If a company carrying on business in several countries issued debentures, the payment of interest and principal under which was secured by a charge on the assets of the company in all those countries, the interest would under the Acts be regarded as income of the person who received it if the company in fact happened to have any property in New South Wales. Thus a person in Europe who purchased a debenture in an English company would find himself liable to pay income tax to the State of New South Wales on the whole of that interest, even though in fact none of it was derived from New South Wales—where in any given year the company might have no income or might actually suffer a loss. Is it within the competence of the legislature of New South Wales to legislate in this manner ?

It happens in this case that the appellant carries on business in New South Wales. There is no doubt that the legislature of New South Wales can impose such conditions as it thinks proper by way of taxation or otherwise upon persons who carry on business in New South Wales and therefore bring themselves within the legislative authority of the State (*Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1) ; *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (*Q.*) (2)).

(1) (1934) 51 C.L.R. 172. (2) (1935) 53 C.L.R. 534, at pp. 553, 556, 561.

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The question which has to be decided, however, is not a question whether the Parliament of New South Wales may tax persons carrying on business within New South Wales but whether the Parliament can tax persons whose only connection with New South Wales is that they receive interest upon money which is secured either wholly or in part by a mortgage of property in New South Wales, even though none of the money they receive may be derived from any source in New South Wales.

A resident of New South Wales can be taxed in New South Wales in respect of his income wherever derived, his property wherever situated, or of any other circumstance. The property in New South Wales of any person can be taxed in such manner as the Parliament of New South Wales determines. The law imposing any of the taxes mentioned would clearly be a law for the peace, welfare and good government of New South Wales. But it does not follow that any relation to or connection with New South Wales can be utilized as a basis for any taxation. For example, New South Wales might impose a head tax upon persons in New South Wales, but it could not be said that it was within the power of the Parliament of New South Wales to impose an annual head tax on any person who had at some time or another visited the State. The difficult question of the degree of connection which would bring the subject matter within the territorial competence of the State legislature has been considered in a number of cases in this court. In *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (1) it was held that it was beyond the territorial competence of the Parliament of New South Wales to impose a death duty in respect of shares which belonged to a person who died resident and domiciled outside New South Wales where his only connection with New South Wales, in respect of the taxation in question, was that the company the shares of which he held, though incorporated out of New South Wales and having no share register in the State, carried on mining business in the State. The shares did not owe their existence to any law of New South Wales and the shareholder did not, by virtue of his position as shareholder, have any interest in any property in New South Wales. The tax in question was not imposed upon the company which carried on

(1) (1932) 48 C.L.R. 618.

business in New South Wales. It was in terms imposed upon persons who died domiciled and resident out of New South Wales. It was held that the connection with New South Wales was too remote to entitle the enactment to the description of a law "for the peace welfare and good government of New South Wales." Mention was made of the fact that the tax was not imposed in respect of any benefit or advantage which the shareholder derived from property in New South Wales.

In *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1) it was held that Federal estate duty was chargeable upon movables situated abroad which passed by gift *inter vivos* within one year of the death of a person domiciled in Australia at the time of his death. The fact of domicil in Australia was regarded as undoubtedly sufficient to provide a territorial basis for Federal legislation in respect not only of movables owned by the deceased at the time of his death, but also of other movables which he had owned within a year of his death.

In *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (2) the court upheld a Federal income tax imposed upon interest paid or credited to persons who were absentees (that is, not residents of Australia) on money raised by debentures of a company and used in Australia. The tax was imposed upon the company, and the Act included a provision purporting to entitle the company to deduct the amount paid in tax from the interest payable to the absentee debenture holders. The tax was payable in respect of the whole amount of interest irrespective of whether or not the interest paid was derived from Australia, but it was held that the Act, upon its true construction, imposed the tax only upon companies which derived assessable income from sources in Australia. The case is similar to the present case in that the interest chargeable with tax was not necessarily interest derived from Australia, and that the whole amount of such interest was taxable. The tax applied in the case of interest paid to persons who themselves might have no connection with Australia beyond that specified in the Act. That connection consisted in the facts that the company derived income from sources in Australia, and that the money upon which interest

(1) (1933) 49 C.L.R. 220 (2) (1934) 51 C.L.R. 172.

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was paid was used in Australia. In the present case the connection with New South Wales which is the basis of the legislation is to be found in the fact that the money upon which interest is paid is secured upon property in New South Wales. (See also *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes (Q.)* (1).)

Croft v. *Dunphy* (2) establishes the proposition that the real principle to be applied in determining the territorial competence of a Dominion legislature is whether the particular law in question is really a law for the peace, welfare and good government of the territory in question and not merely whether the law operates by reference to some extra-territorial elements. The cases to which I have referred are examples of the application of that principle. They show that it is impossible to avoid the consideration of questions of degree in the application of such a principle. As I have already said I do not think that the fact that a person has once been in New South Wales can be regarded as a sound basis for legislation with respect to him. The circumstance in respect of which the law operates must be something which really appertains to New South Wales. In the present case the enactments in question are taxing Acts. They operate, according to what I regard as the proper construction of the Acts, upon all the interest, whatever its amount, which a person domiciled or resident anywhere in the world receives, if the money upon which the interest is paid is secured by any mortgage of any property in New South Wales.

The courts should not hold an Act to be invalid unless it is clearly beyond the power of the legislative body. There is no doubt that the Parliament of New South Wales could have taxed such interest as was derived from New South Wales and that it could have taxed it to any extent which Parliament thought proper. Again, Parliament could have provided that no security should ever be given over property in New South Wales at all, or that, if such security were given, it should be valid only subject to certain conditions. The provision in question is not of this character, but it does connect taxability of interest with the fact that the interest is secured upon New South Wales property. Thus there is a connection in fact with New South Wales. The existence of the security as a security

(1) (1935) 53 C.L.R. 534.

(2) (1933) A.C. 156.

depends entirely upon the law of New South Wales. The benefit resulting from the existence of the security depends upon the law of New South Wales. Parliament is not compelled to measure any taxation by the degree of benefit received in particular cases by the taxpayer. If it chooses, Parliament may make taxation burdensome or prohibitory in character so as to discourage or prevent a particular class of transactions. The facts that the tax does not depend upon the value of the New South Wales property or upon the New South Wales property in fact making a contribution to the sums actually paid in interest only show that Parliament has not adopted a particular measure of the extent of taxation in relation to a subject matter to which the power of Parliament extends. These matters affect the policy and not the validity of the provision in question, and it is not for a court to consider such questions of policy. Thus I am of opinion that, though perhaps this is an extreme case, this provision does relate to a matter which has a real connection with New South Wales and that it is not invalid.

In my opinion the appeals should be dismissed.

RICH J. In the consideration of this difficult case the legislative machinery under the operation of which the debenture interest has been assessed to income tax in New South Wales has been the subject of close examination. At a number of points the application given by the commissioner to that machinery has been challenged on grounds of more or less cogency. I am not prepared, however, to give to the provisions of the *Income Tax (Management) Act* 1928 an interpretation which, apart from any question of exterritoriality, would lead to the exclusion of debenture interest from the assessable income of the taxpayer. In the Act No. 11 of 1912, superseded by the Act of 1928, there was an overriding provision which has been dropped. By sec. 10 (*g*) of the earlier Act it was provided that "nothing in this Act shall apply to income earned from sources outside the State." I see no reason why this provision should not be taken to mean exactly what it says and apply it accordingly. Thus, before that Act can operate upon any item of income it must appear that it is not income earned from sources outside the State.

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The provision is expressed to overreach all the special provisions of the Act and therefore cannot be modified by that which " deems " income secured over property in New South Wales to have a local source. Apart from any such artificial definition or presumption, I should have no doubt that the debenture interest in the present case had not a source in New South Wales. It is interest payable out of New South Wales under an instrument held out of New South Wales securing money borrowed out of New South Wales by a company incorporated out of New South Wales from a lender residing out of New South Wales. But under the Act of 1928 I think that, if there were no question of exterritoriality controlling either the interpretation or the validity of the enactment, its provisions, construed according to their natural meaning, would suffice to make the debenture interest taxable. It may be right to limit the crucial part in the definition of " income " so as to avoid giving it an exterritorial effect, and, if so, the limitation proposed by the taxpayer has a good deal to commend it. That limitation is best expressed by saying that this part of the definition should be read as if it contained the word " wholly," so as to provide for the inclusion of interest wholly secured by the mortgage of any property in the State. But in any case I have arrived at the opinion that, unless it is so limited, in this or some similar manner, the provision must fail on the ground of exterritoriality. For unless it is so limited the provision amounts to an attempt to tax in New South Wales the whole amount payable for interest on any loan made anywhere in the world whenever any property situated in that State is included among the securities for payment of the interest. Thus a floating charge given by a ship-owning company over an undertaking extending throughout many parts of the world and including many ships navigating the trade routes of the Empire would be brought under the definition if the undertaking happened to include a shelter shed for a tallyman on a Sydney wharf, and the whole interest on a huge debenture debt, although in no other respect connected with New South Wales, would be liable to New South Wales tax. It is said that the New South Wales legislature is empowered to impose a liability upon anyone who avails himself of the law of New South Wales to obtain any security or increase of security for the payment

of any sum of money in reference to which the liability is measured. I do not deny that once any connection with New South Wales appears the legislature of that State may make that connection the occasion or subject of the imposition of a liability. But the connection with New South Wales must be a real one and the liability sought to be imposed must be pertinent to that connection. The obligation at present in question is to pay a tax on income. The receipt of income by the taxpayer is the ground and the measure of the imposition. It may be sometimes, perhaps often, true that the existence within the boundaries of the State of property over which income is secured is a cause of the receipt of the income. But the legislature has chosen to make the possibility of its being so and not the fact that in a given case it is in truth so the basis of the exercise of its jurisdiction. Considered as a mere possibility I think the connection is too remote. There is no necessary relation between receipt of income and the existence in New South Wales of some item of property comprised in a security to which directly or indirectly the taxpayer might resort if the interest were unpaid. Very many instances may be supposed in which the existence of property in the place imposing the tax is entirely irrelevant to the receipt of the income. It is not hard to imagine pastoral land in Queensland during a drought, or in other conditions depriving it of productivity, which is the source of nothing but a liability to rates, taxes and other outgoings. Suppose a taxpayer residing in Melbourne lodges in his bank in Melbourne the title to such a property as one among many securities to support his overdraft for the purposes of a commercial business. Could the legislature of Queensland tax the bank upon the interest ? In New South Wales itself there is much property both movable and immovable from which the proprietors fail to obtain an income. Because any such property is included in a security in a transaction which takes place outside New South Wales and relates in no other way to New South Wales, can the interest be taxed although it is paid altogether out of funds or sources with which New South Wales has no concern ? In my opinion the case falls within the decision of *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (1). Conceding that there is some

(1) (1932) 48 C.L.R. 618.

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connection with New South Wales, the tax is laid upon income which is not necessarily derived from or is affected by that connection. In my opinion, there is no sufficient relation between New South Wales and the thing to be taxed to justify the provision. The present case may be regarded as a typical example of the exterritorial operation sought to be given to the legislation.

The appeals should be allowed.

STARKE J. Appeal by special leave from the judgment of the Supreme Court of New South Wales upon cases stated for its opinion. The questions were whether certain interest, or any part of it, received by the appellant under certain debentures issued by the British Australian Lead Manufacturers Pty. Ltd. (called the B.A.L.M. Co.) in the income years which ended on 30th June 1925 and 30th June 1929 was assessable to income tax under the *Income Tax (Management) Act* 1912 and the *Income Tax (Management) Act* 1928 of New South Wales respectively, and if so whether the provisions of those Acts purporting to render such interest subject to taxation were within the constitutional powers of the State of New South Wales. The Supreme Court resolved each of these questions in the affirmative.

The facts are fully set forth in the cases stated. But it is desirable that I should state as shortly as possible those I consider essential to the determination of the questions stated. The B.A.L.M. Co., which is a Victorian company, though registered as a foreign company in New South Wales and carrying on business there and elsewhere, borrowed and received in London and Melbourne a considerable sum of money upon the security of a debenture issue. Each debenture was for £100, redeemable at £105 and carrying interest. Each debenture contained the usual covenant to pay the registered holder the amount of the debenture, the bonus or premium of £5, and the interest secured thereby. The debentures charged with such payments all the property of the company, present and future, other than its uncalled capital, provided that all the debentures should rank *pari passu* as a first charge on the property charged, and that such charge, save as regards real and personal property set forth in a trust deed, should be a floating security; the debentures also

provided that the holders thereof should be entitled to the benefits of the trust deed. The trust deed was in the usual form, and was made between the B.A.L.M. Co. and a trustee, which was a company incorporated in England. It contained a covenant on the part of the company with the trustee to pay the debenture holders all principal moneys and interest secured by the debentures. It also specifically charged in favour of the trustee certain real property in New South Wales (which was also the subject of a mortgage, hereafter mentioned), certain shares in a South Australian company, and in addition (but by way of floating charge only) all the undertaking and property of the company, both present and future, other than the specifically charged property and uncalled capital. The debentures were also supported by a mortgage, given by the B.A.L.M. Co. to the trustee, of certain lands in New South Wales. This instrument stated the consideration as the sum of £125,000 lent to the company by the trustee, but declared that the sum was the same as that secured by the debentures, and by it the company mortgaged to the trustee, for the purpose of securing the payment of the said principal sum and interest thereon, all its estate and interest in the said lands situated in the State of New South Wales, and covenanted to pay to the trustee the said principal sum and interest thereon. This mortgage was registered under the *Real Property Act* 1900 of New South Wales, and had effect as a security but did not operate as a transfer of the land charged (See Act, secs. 41 and 57). The appellant was a company incorporated in Victoria, but it was also registered as a foreign company in New South Wales, carrying on business there and elsewhere. It was the registered holder of several of the debentures issued by the B.A.L.M. Co., and kept them in Melbourne. It was paid interest in Melbourne by the B.A.L.M. Co. on the moneys secured by the debentures held by it during the income years already mentioned. It may be assumed that the interest was provided by the B.A.L.M. Co. out of funds available to it for the general purposes of its business, for there is nothing in the case suggesting that it issued from the lands in New South Wales charged or mortgaged for the benefit of the debenture holders. Now the *Income Tax (Management) Act* 1912 provides

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that income tax shall be paid in respect of the taxable income received by any person during the period of twelve months ending on 30th June preceding the year in which such tax is payable (sec. 9). Income means income derived from any source in New South Wales or earned in that State, including interest upon money secured by the mortgage of any property in the State, which shall be deemed to be derived from a source in the State (sec. 4). Mortgage includes any charge, lien or encumbrance to secure the repayment of money upon which interest is payable (sec. 4). Nothing in the Act shall apply to income derived from sources outside the State (sec. 10). The *Income Tax (Management) Act* 1928 is to the same effect, though the language is not precisely the same: income tax is payable in respect of the taxable income derived by any person during every income year (sec. 8). Income means income derived or deemed to be derived directly or indirectly from any source in the State, or in respect of which tax is otherwise expressly made payable under the Act, and includes interest upon money secured by the mortgage of any property in the State (sec. 4). Income year means the year beginning on the first day of July and ending on the 30th day of June during which the income in question was derived.

It is argued that the income or interest received by the appellant under the debentures held by it was derived directly or indirectly from a source within the State of New South Wales, because the instrument of mortgage over lands in New South Wales contains a covenant that the B.A.L.M. Co. would pay to the trustee the principal moneys and interest secured by that mortgage. But we must consider the substance of the transaction (*Lovell's Case* (1)). New South Wales was not the home of the transaction. The money was lent, the debentures were issued, the trust deed was executed, and the interest was paid, outside New South Wales. Moreover, the seats of management of both the B.A.L.M. Co. and the appellant were outside New South Wales though both were registered there as foreign companies and did some business there. The mortgage security was but a collateral security to the main security constituted by the debentures and the trust deed. The source of the income is, as was said in *Nathan's Case* (2), a question of fact, to be determined

(1) (1908) A.C. 46.

(2) (1918) 25 C.L.R. 183, at p. 195.

on practical grounds. The transaction was not really and substantially connected with New South Wales. The mortgage over New South Wales land was but an incident in it, and was not in fact the source of the interest paid to the appellant. But the *Income Tax (Management) Acts* of New South Wales provide that income derived from any source in New South Wales includes interest upon money secured by the mortgage of any property in the State, which shall be deemed to be derived from a source in the State. It is clear on the facts that the appellant did receive interest upon money that was secured by mortgage of property in New South Wales. A mortgage under the Acts includes any charge, lien or encumbrance to secure the repayment of money. Not only the instrument of mortgage, but also the debentures and the trust deed constituted such a charge. But it was contended that some limitation must be placed on the words of the Act, and that it was to be presumed that the legislature selected as a subject of taxation only persons, things or circumstances within its territory. One limitation suggested was that the money must be secured by mortgage over property in New South Wales only and not elsewhere. Another and perhaps a more likely limitation suggested was that the Acts referred to interest received in New South Wales and secured by a mortgage of property in New South Wales. But the debenture holders obtain the protection of the State of New South Wales in respect of the mortgage over the lands and property in that State. A mortgage upon real property in the State, whether a conveyance of the legal estate in the land or having effect as a security only, is dependent for its existence, maintenance and enforcement upon the laws of the State, and is therefore legitimately the subject of taxation there (Cf. *Savings and Loan Society* v. *Multnomah County* (1)). The Acts explicitly provide that interest upon money secured upon mortgage of any property in the State shall be assessable to income tax, and I see no reason for refusing to give these words their natural and ordinary signification.

But it is then contended that such a provision transcends the constitutional power of the State of New South Wales to make laws for the peace, welfare and good government of the State in all cases

(1) (1898) 169 U.S. 421 ; 42 Law. Ed. 805.

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whatsoever. "Under that general power" said this court in *Commissioners of Stamps (Q.)* v. *Wienholt* (1), "taxation is necessarily limited to the territory" (*Commercial Cable Co.* v. *Attorney-General of Newfoundland* (2); *Commissioner of Stamps Duties (N.S.W.)* v. *Millar* (3)). "It may be accepted as a general principle," said the Judicial Committee in *Croft* v. *Dunphy* (4), "that States can legislate effectively only for their own territories." But consistently with the territorial limitation imposed by the grant of power, it is competent for the State of New South Wales to impose taxes upon persons, natural or artificial, resident or carrying on business within its territory or upon property within its territory, or upon income made within its territory (*Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (5); cf. *Cooley* on *Taxation*, 3rd ed., pp. 84-95). The right to tax mortgages of property located in New South Wales was not disputed, as I understood the argument, so long as the tax operated *in rem*. But it was contended that there was no power to impose a tax *in personam* upon persons, natural or artificial, who were not domiciled or resident or carrying on business within the territory. The argument may have been suggested by such cases as *Dewey* v. *City of Des Moines* (6), but they rest, I think, upon the "due process" clause in the Constitution of the United States, which finds no counterpart in the Constitution of Australia. If the State can tax property located within its territory, then the constitutional authority of the State is not transcended because it taxes the owners, legal or equitable, of that property, whether domiciled or resident within the State or not. The *situs* of the property attracts the constitutional authority of the State to tax it, and thus enables it to cast the burden upon the owners of the property. The State of New South Wales might have taxed the value of the mortgage security itself, but instead it has taxed the persons deriving or entitled to interest upon money secured upon a mortgage of property within its territory. That tax is, in my judgment, within the competence of the legislative body of New South Wales, and does not transcend its powers. It may be that some difficulty will arise in recovering

(1) (1915) 20 C.L.R., at p. 540.
(2) (1912) A.C. 820, at p. 826.
(3) (1932) 48 C.L.R. 618.
(4) (1933) A.C., at p. 162.
(5) (1934) 51 C.L.R., at p. 181.
(6) (1899) 173 U.S. 193; 43 Law. Ed. 665.

the tax in cases where the owners are outside the State. That is a difficulty which has often been encountered in connection with taxation, but in the present case it does not exist, for the appellant is registered as a foreign company in New South Wales and carries on business there.

Both appeals should be dismissed.

DIXON J. The question for decision is whether interest upon debentures held by the taxpayer company forms part of its income assessable to income tax under the law of New South Wales. The debentures were issued by a company carrying on a manufacturing business in that State and elsewhere. Some of its assets are situated outside New South Wales. It is incorporated in Victoria and registered in New South Wales as a foreign company. Its head office is in Victoria. The debentures are secured by a floating charge of the usual kind over all the assets of the company. But under the debenture trust deed there is a specific charge over land of the company situate in New South Wales and an obligation is imposed upon the company to give to the trustee under the deed a first legal mortgage over such land. In fact this was done. The land was under the *Real Property Act* and a memorandum of mortgage in favour of the trustee was registered securing the entire debenture debt. It contains a covenant with the trustee to pay to the trustee the principal sum on the due date and another covenant to pay interest. But the latter covenant does not say to whom the payment of interest is to be made. The debenture trust deed contains a covenant with the trustee to pay to the debenture holders principal and interest and each debenture contains a covenant with the person whose name is inserted as debenture holder to pay to him or the registered debenture holder for the time being the principal sum on the due date and half-yearly interest in the meantime. The debentures provide that payments shall be made at the registered office of the company or at its bankers for the time being. In fact interest has been paid to the taxpayer company in Melbourne and to other debenture holders elsewhere out of New South Wales. The trustee is a company incorporated in England and carrying on business, among other places, in Victoria, where it has a registered

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office. The money was borrowed in London and Melbourne, where it was paid over. The debentures were sealed and issued in Melbourne. The register of debentures is kept in Melbourne and the debentures themselves have not been held in New South Wales.

No information has been laid before the court as to the nature or comparative extent of the operations or property of the borrowing company outside New South Wales.

Two different years of income have been chosen by the parties for the purpose of raising the question whether the taxpayer company must include interest upon the debentures in the income upon which it is taxed in New South Wales. One year is governed by the provisions of the *Income Tax (Management) Act* 1912-1925 (N.S.W.) and the other by those of the *Income Tax (Management) Act* 1928-1929 (N.S.W.), which is modelled on the Commonwealth *Income Tax Assessment Act* 1922-1928. Important features affecting the question are common to both statutes, but each presents considerations absent from the other, and it is more satisfactory to deal with each year separately.

Under the *Income Tax (Management) Act* 1912-1925 income tax was payable in each year upon the taxable income derived during a preceding period of twelve months (sec. 9). Taxable income was defined as the amount of income remaining after subtracting from the taxpayer's income the allowable deductions (sec. 4). Income was elaborately defined (sec. 4). The definition began with the proposition that income meant income derived from any source in the State or earned in the State. But it included the statement that interest upon money secured by the mortgage of any property in the State shall be deemed to be derived from a source in the State. The word " mortgage " was defined to include any charge, lien or encumbrance to secure the repayment of money upon which interest is payable. The Act contained a provision that the person beneficially entitled to any income, called the principal taxpayer, should pay the tax upon it; but a proviso imposed a secondary liability upon other persons described as representative taxpayers who were empowered to indemnify themselves. The list included mortgagors. Their liability was stated in the following clause :—" If the principal taxpayer is resident out of the State and is entitled to income being

interest payable upon money secured by a mortgage of any land in the State or being interest derived from any other source in the State the tax on such income shall be also payable by the mortgagor of such land or the person paying such interest, as the case may be" (See secs. 11 (1) (*d*) and 14). In the body of the Act a general negative provision occurred providing that nothing in the Act should apply to income from sources outside the State (sec. 10 (*g*)).

If the special provisions relating to interest upon mortgages were absent, I should be of opinion that the facts placed before the court would not bring the debenture interest received by the taxpayer under the tax imposed by the statute. For, with so many circumstances connecting the transaction with places out of New South Wales, I should not think that enough to give the interest a source in New South Wales could be found in the facts that some of the assets subject to the floating charge were in that State, that part of the borrower's business was conducted there and that the debenture deed was supported by a fixed mortgage over land there and that the mortgage contained an independent covenant to pay interest. But, unless full effect is denied to the literal terms of the provisions relating to interest secured by the mortgage of property in New South Wales, the conditions of liability which they describe are fulfilled and the interest is assessable. The debenture deed satisfies the definition of mortgage. It certainly contains a charge or encumbrance to secure the repayment of the money upon which interest is payable. Whether it would have done so if it had included no specific charge may be open to dispute. But I think that a floating security falls within the description " charge," and there is no reason to restrict the meaning of that word in the definition (See *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (1).) It is to be noticed that the word " mortgage " is defined not as a verb or verbal noun but as a substantive signifying a particular form of proprietary right or possibly an instrument creating it. In the definition of income the word mortgage is used as a verbal noun. It speaks of " money secured by *the* mortgage of any property in the State." But I think the word must receive a meaning extended by reference to the definition. The debenture deed is, therefore, enough to satisfy the require-

(1) (1932) 48 C.L.R. 391, at p. 420.

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ment expressed by the word " mortgage " in the paragraph which attributes a source in the State to interest upon money secured by the mortgage of any property in the State. But, in any case, I think that the mortgage under the *Real Property Act* would suffice to do so. For although, unlike the trust deed, its provisions are not incorporated in the debenture and the debenture holders are not parties to it, yet I think it " secures " the debenture moneys within the meaning of the provision. The trustee holds it for the debenture holders as a security for the repayment to them of the principal sum and interest.

The substantial question is whether full effect ought to be given to the literal words of the statement that interest upon money secured by the mortgage of any property in the State shall be deemed to be derived from a source in the State.

For the taxpayer company, it is contended that neither as a matter of interpretation nor as a matter of validity can this statement operate according to its full literal meaning. The width of application of which its general terms are capable is relied upon as raising a prima facie presumption against a literal and unqualified construction. Could it have been intended to tax the whole of the interest payable upon a loan secured over the undertaking of an enterprise carried on in many countries, simply because it included some asset in New South Wales, though negligible in value and of no commercial significance ? Does the legislation mean to tax interest upon a loan made in Queensland by one resident of that State to another upon mortgage of real property there situated, because a guarantee is taken from a third party who supports it by the deposit of the title deeds to property he owns in New South Wales ? If a mortgagee of land in Victoria goes into possession and applies the rents and profits to keeping down the interest on the loan, is he taxable in New South Wales because the loan is collaterally secured by a bill of sale over chattels in that State, although no resort is made to them ? If a receiver and manager is appointed under a debenture deed covering a business carried on partly in New South Wales and partly elsewhere, are the sums he pays to the debenture holders out of the profits of the business for interest taxable in New South Wales, although in that State the business is carried on at a loss ?

The restriction which the argument for the taxpayer company seeks to impose upon the generality of the provision would answer these questions in the negative. It is contended that properly understood the provision does not apply unless the money is secured by mortgage of property in New South Wales only. The considerations upon which this contention is founded are both negative and positive. It is said, on the one hand, that there is no specific reference to a security out of New South Wales; that there is no provision for apportioning the interest where the security includes property elsewhere, although a characteristic feature of the statute is its recourse to apportionment for the purpose of dealing with income arising from property, business or transactions out of as well as in the State; that it is not to be presumed that the legislation intends to exhaust all its territorial authority over subjects of taxation, still less to exceed it.

On the other hand, positive indications of a restrictive meaning are said to exist, (i) in the opening words of the definition of income which confine it generally to a source in New South Wales; (ii) in the emphatic provision that nothing in the Act shall apply to income derived from sources outside the State; (iii) in the distinction between the expression "mortgage of any property in the State," which is used, and the expression, which is not used, "mortgage comprising any property in the State"; and (iv) in the readiness with which the word "wholly" may be read before the word "secured" in order to give effect to the proposed restriction.

The question is one of interpretation, and, unless an artificial construction is adopted in order to avoid an excess of constitutional authority, we must give that meaning to the provision which we think it actually expresses. In forming an opinion as to what meaning it does express, we must be guided by the rules of construction and, accordingly, consider the subject matter and examine the rest of the statute in which it occurs. But we must not forget that the chief of those rules forbids departure from the ordinary grammatical sense of the words used except for the purpose of avoiding some obscurity or some inconsistency with other parts of the statute.

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The proposed limitation upon the generality of the words involves the introduction of a qualification which the terms of the provision do not express or even insinuate. It would not avoid the taxation of interest in all cases where the source from which the income arises lies outside New South Wales, although it might lessen the frequency of such cases. For in many loan transactions, as, for instance, between banker and customer, the security provided and its situation has little or no bearing upon the locality of the source of the income derived by the lender. It ascribes to the legislature an intention of the most unlikely kind, namely, to tax if the security covers nothing but property in New South Wales, but to abstain from taxing if any other property whatever is included. Further, the phrase "secured by the mortgage of any property" seems to me to tend against the proposed construction because it refers to the act of mortgaging. In the provision making a mortgagor a representative taxpayer the expression is "secured by a mortgage of any land." But this phrase again suggests that the existence of any mortgage and the inclusion of any land is enough. In my opinion the provision is not limited to cases where the money bearing the interest is secured over nothing but property in New South Wales. A quite different qualification is, I think, suggested by the argument based upon the introductory words in the definition of income which adopt source in New South Wales as the criterion, and upon the negative provision in sec. 10 (*g*) which enacts that nothing in the statute shall apply to income derived from sources outside the State. For that argument appears to me to be founded upon the view that the requirement that the source of income shall not be outside the State is an overriding one controlling the application of the special provision that interest upon money secured by the mortgage of property in the State should be deemed from such a source. The form of sec. 10 (*g*) clearly is that of a paramount exclusion and it ought to be so understood and applied. But in its application the question at once arises whether the locality of the source is to be determined entirely as a matter of fact and independently of statutory provision. Does it not rather depend on what the legislature has chosen to regard as a source of income? The paragraph relating to interest in the definition of income has the effect of determining that the

source of income is in New South Wales. In applying sec. 10 (*g*), it appears to me that such a source must be assumed. On that assumption, its operation is not that of an inconsistent but paramount provision controlling the operation of the paragraph relating to interest. In point of meaning I think that the paragraph intends to ascribe a source in New South Wales to interest upon all money the repayment of which is secured by any charge, lien, or encumbrance over property any portion of which is situated in that State. It should receive this construction and be given an operation accordingly, unless such an operation would be beyond the territorial authority of the Parliament of New South Wales.

But, before considering the question of extra-territoriality, it is convenient to deal with the *Income Tax* (*Management*) *Act* 1928-1929, which governs the second of the two years of income. That Act contains an analogous provision concerning interest secured by the mortgage of property in the State, but it also contains particular provisions relating to interest paid to a debenture holder in a company. There is no paramount exclusion of income from sources outside the State. The definition of income differs from that in the earlier statute. It is as follows :—" ' Income ' means income derived or deemed to be derived directly or indirectly from any source in the State or in respect of which tax is otherwise expressly made payable under this Act and includes interest upon money secured by the mortgage of any property in the State " (sec. 4). The definition of " mortgage " is the same except that the words " upon which interest is payable " are omitted, but this seems immaterial.

Being based on the Federal legislation, the Act contains provisions like those dealt with in *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1) (secs. 17 and 18). Further, sec. 11 (*l*) directly enacts that the assessable income of any person shall (without in any way limiting the meaning of the words) include interest credited or paid to or otherwise derived by any depositor or debenture holder of a company.

What territorial connection with New South Wales the company, the debenture, or the debenture holder must have, if any, is not stated. But in sec. 80, which deals with the retention of money

(1) (1934) 51 C.L.R. 172.

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due to non-residents in order to pay the tax for which they are liable, "a debenture holder or depositor in a company deriving income from a source in the State" is mentioned. It may be that the territorial basis intended by sec. 11 (*l*) is that the company derives income from a source in the State. Such a view would be consistent with the history of the provision in the Commonwealth legislation (See *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1)). If this is the meaning of sec. 11 (*l*), the debenture interest in the present case would fall within it. But a question would then arise as to its validity. For the fact that the company derives income from New South Wales affords little, if any, territorial connection between that State and the interest received by the debenture holders from the company. The existence of this special and express provision for the inclusion of interest upon debentures of companies in the assessable income of a person might perhaps appear exhaustive, so that it would be a wrong to treat the definition of income as covering such interest. But sec. 11 is framed to guard against any such construction. It does so by means of the words "without in any way limiting the meaning of the words," *scil.*, "assessable income." Those words go back to the definition of "income." I think the same meaning as in the case of the analogous provision in the former Act should be given to the words in that definition, viz., "and includes interest upon money secured by the mortgage of any property in the State." Unless a qualified interpretation be required in order to preserve the provisions from invalidity on the ground of extra-territoriality, I think that the definition of income covers the interest upon the debentures in the present case, so that it falls within the assessable income from which the taxable income is obtained. Perhaps it also falls within sec. 11 (*g*) if that provision is valid and is subject to no artificial limitation of meaning. Sec. 92 contains the now familiar provision requiring severance and restrictive interpretation when an enactment goes beyond power; a discussion of the effect of such provisions will be found in the note to *Williams* v. *Standard Oil Co. of Louisiana* (2) (See too *Railroad Retirement Board* v. *Alton Railroad Co.* (3)). I do not see how sec. 17 of the *Interpretation Act* 1897 can effect a restriction which would relieve the interest from tax.

(1) (1934) 51 C.L.R. 172, at p. 185.
(2) (1929) 73 Law. Ed. (U.S.) 287, at p. 288.
(3) (1935) 295 U.S. 330; 79 Law. Ed. 1468.

The important question remains whether the attempt to include in the income liable to tax interest on money secured by the mortgage of any property in New South Wales exceeds the territorial limitations upon the legislative power. The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers. As in other matters of jurisdiction or authority courts must be exact in distinguishing between ascertaining that the circumstances over which the power extends exist and examining the mode in which the power has been exercised. No doubt there must be some relevance to the circumstances in the exercise of the power. But it is of no importance upon the question of validity that the liability imposed is, or may be, altogether disproportionate to the territorial connection or that it includes many cases that cannot have been foreseen.

In the present case no relation between the territory and the person, as distinguished from the transaction to which he is a party, is made the occasion of the tax. The thing in respect of which the taxpayer is made liable is the interest on money borrowed or otherwise owing. The imposition of the liability is based upon the fact that a security exists under the law of New South Wales over property in New South Wales for the repayment of the money. In my opinion this connection is sufficient. The interest grows out of the debt. If the creditor chooses to avail himself of rights in property conferred by the law of New South Wales in respect of land or chattels under the authority of the legislature, the law of New

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South Wales can impose upon him any liability which is relevant to the purpose of his doing so; and the purpose of his doing so is to secure repayment of the moneys. The argument to the contrary, while conceding that the mortgage could be made the subject of a tax, denied jurisdiction over the interest, which, it was said, had no necessary connection with the existence of the security. As a matter of business or of economics, it may be true that the source of interest payments is or may be independent of the security. But the legislative power is not tied down to such conceptions of the source of income as the criteria of liability to taxation. Perhaps it is a question of relevance. However that may be, the legislature has directed the exercise of its authority to the use made of property in the State and of securities provided by the law of the State, and as the purpose for which these things are used is to secure, or further secure, repayment of sums of money, it has taxed the interest at which the money is forborne.

In my opinion it is competent for the State Parliament to do so. Adopting this view, I do not think that any restrictive construction should be placed upon the natural meaning of the provisions relating to mortgage interest.

In my opinion the appeals should be dismissed.

EVATT J. These are two appeals by special leave from the Full Court of the Supreme Court of New South Wales. Each appeal raises the same question—whether it is within the competence of the Parliament of the State to tax the interest received upon money where the security taken by the mortgagee includes any property in New South Wales.

The first appeal relates to the *Income Tax (Management) Act* 1912; the second to the Act of 1928. The former Act taxed "income" by reference to its having been derived from any source in the State, but sec. 4 expressly included within the term "income" interest upon money secured by the mortgage of any property in the State, deeming such interest to have been derived from a source in the State. Under the Act of 1928, the definition of "income" also expressly included interest upon money secured by the mortgage

of any property in the State. In each Act, moreover, a mortgage was defined to include any charge, lien or encumbrance to secure the repayment of money.

A preliminary question is whether, in these two cases, the debenture interest received by the appellant company was interest upon money secured by a " mortgage " within the meaning of the two Acts. The answer must be Yes, for much the same reasons as were stated in *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (1), following, on this point, the judgment of *Cussen* A.C.J. in the court below (2).

Another preliminary question is whether the definition sections of the two Acts can be " read down " and limited to cases where the mortgage comprises property within New South Wales but no other property. The Full Court felt itself able to interpret the Acts in the way mentioned. But I think that the wording of each Act is too unyielding to allow of such an interpretation. Each Act aims at bringing within the denotation of " income " all the interest payable under a security so long as the property secured *includes* property within the State.

The Full Court also felt able to sustain the assessments by reason of the covenant contained in the specific mortgage to a trustee for debenture holders of certain freehold and leasehold lands in New South Wales, it being held that such covenant was itself the " source " of the debenture interest, *which should* therefore be regarded as having been derived from a " source " in the State. But the interest paid to the taxpayer was not paid under the covenant in the specific mortgage, and it is difficult to see how the covenant can be regarded as the source of such interest.

The main question on the appeals is whether, interpreting the definition sections in their ordinary grammatical sense, the legislation is legislation for the peace, welfare and good government of New South Wales.

Of recent years the extent to which the constitutional competence of Dominion legislatures to pass taxation legislation is affected by reason of territorial considerations has been considered by this court

(1) (1932) 48 C.L.R. 391.

(2) (1932) 48 C.L.R., at pp. 435, 436.

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in a catena of cases, viz.:—*Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (1); *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2); *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (3); and *Australasian Scale Co. Ltd.* v. *Commissioner of Taxation (Q.)* (4)). In some of these judgments, the great significance of the judgment of the Privy Council in *Croft* v. *Dunphy* (5) is emphasized, for, although sec. 3 of the *Statute of Westminster* is not yet in force in relation to the Commonwealth of Australia, *Croft* v. *Dunphy* (5) proceeded upon the basis of the law as existing prior to that statute.

Some of the cases also illustrate the fact, occasionally overlooked, that, constitutionally speaking, the status of the States of Australia is equal to, or co-ordinate with, that of the Commonwealth itself. Sovereignty is not attributable to one authority more than to the others; it is divided between them in accordance with the demarcation of functions set out in the Commonwealth Constitution. Within the limits so prescribed, the legislative authority of the States is of precisely equivalent quality and potency to that of the Commonwealth, the authority of which is, in secs. 51 and 52 of the Commonwealth Constitution, limited by reference to subject matter. In short, the Commonwealth Parliament may legislate for "the peace, order and good government of the Commonwealth with respect to" a large number of subject matters. Similarly, the State of New South Wales may legislate for the "peace, welfare and good government" of New South Wales. In relation to such a subject matter as that of taxation, and subject, of course, to any overriding provision of the Commonwealth Constitution, it is quite impossible to deny to the States in relation to their geographical area constitutional powers precisely analogous to those possessed by the Commonwealth Parliament in relation to its geographical area. The legislation of the States cannot be deemed *ultra vires* merely because of territorial reasons, unless analogous legislation of the Commonwealth Parliament would similarly be deemed unconstitutional and void. So far as concerns direct taxation, the States of Australia occupy a constitutional position quite different from that of the

(1) (1932) 48 C.L.R. 618.
(2) (1933) 49 C.L.R. 220.
(3) (1934) 51 C.L.R. 172.
(4) (1935) 53 C.L.R. 534.
(5) (1933) A.C. 156.

Provinces of Canada. Accordingly, the four cases referred to above are all in point, although two of them relate directly to the powers of the Commonwealth Parliament, and two to those of the States.

I have discussed the question in *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1), and I shall not repeat the conclusions reached in that judgment. But one point should perhaps be stressed. In any investigation of the constitutional powers of these great Dominion legislatures, it is not proper that a court should deny to such a legislature the right of solving taxation problems unfettered by *a priori* legal categories which often derive from the exercise of legislative power in the same constitutional unit. For instance, as was pointed out by *Griffith* C.J. in *Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (2), a court must accept the position that, in dealing with all questions of constitutional validity, a legislature is entitled to regard shareholders in a company as being the beneficial owners of property although the company is usually treated as its sole legal owner. This method of approach is illustrated in the judgment delivered by *Gavan Duffy* C.J. and myself in *Millar's Case* (3), although the particular opinion did not prevail in that case. On the hearing of the present appeals, counsel for the appellant founded himself largely upon the judgment of the majority in *Millar's Case* (4), arguing that a taxing enactment of a Dominion, if it is based upon a connection or relationship with the Dominion, must be strictly confined to legislation with respect to that connection or relationship. As a general principle, this contention cannot be accepted.

In the present case, the State of New South Wales may be regarded as thus putting forward its claim to tax :—" Under the terms of your mortgage investment, you receive in every year certain interest payments. But the security for the repayment of your principal moneys is, or at any rate includes, property in New South Wales. In a rare type of case the value of that property will be small in proportion to the value of your total moneys secured or the aggregate value of the property securing it. But you, the mortgagee, have deliberately chosen to accept a security over property in this

(1) (1933) 49 C.L.R., at pp. 235-241.
(2) (1912) 15 C.L.R., at pp. 666, 667.
(3) (1932) 48 C.L.R., at pp. 629, 630.
(4) (1932) 48 C.L.R. 618.

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State, and, in almost every possible case, the value of that part of the security will be significant. In the case of default, you, the mortgagee, will probably have recourse to the laws of this State. We therefore regard your investment as being, to a substantial extent, a New South Wales investment. We do not think it expedient to reduce the quantum of tax merely because part of the property is situate outside the State. We think it more convenient to tax you on the whole of the interest which you receive from the principal moneys secured (in part or in whole) by a charge on New South Wales property."

In my opinion, it is not longer possible to deny that such legislation is for the peace, welfare and good government of New South Wales. There is a territorial connection with that State, which, in an ordinary case, will turn out to be of great, and even decisive, consequence. In my opinion, neither a State nor the Commonwealth is constitutionally confined to legislating by reference to the precise economical advantage gained by the taxpayer from his having accepted security over property within the jurisdiction. Such advantage is often incommensurable. The legislature can pierce through the forms of the transaction, and determine to treat the taxpayer as a person deriving income from a New South Wales mortgage or charge.

The appeals should both be dismissed.

McTIERNAN J. I agree that the appeals should be dismissed.

The conclusions which I have reached are, firstly, that, in the case of the debenture interest included in the assessment made under the *Income Tax (Management) Act* 1912-1925, it falls within sec. 4 of that Act, and, in the case of the debenture interest included in the assessment made under the *Income Tax (Management) Act* 1928-1934, it falls within sec. 4 of that Act; and, secondly, that neither of these provisions, so construed, is in excess of the territorial limits of the legislature of New South Wales.

My reasons for these conclusions are substantially the same as those which the Chief Justice and *Dixon* J. have formulated on the questions of construction and constitutional power raised by the appeals, and to set out my reasons would merely involve the

substantial reiteration of the discussion in their judgments on these questions. In the view which I have taken on these two questions it is unnecessary to decide whether the source of the income was in New South Wales.

Appeals dismissed with costs.

Solicitors for the appellant, *A. J. McLachlan & Co.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J. B.

H. C. OF A. 1936-1937.

BROKEN HILL SOUTH LTD. *v.* COMMISSIONER OF TAXATION (N.S.W.).

[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

DAVEY AND OTHERS;

EX PARTE FREER.

H. C. OF A. 1936.

SYDNEY, *Dec.* 4.

EVATT J.

Immigration—Prohibited immigrant—Dictation test—Failure to pass—No attempt made by immigrant—Language, by whom to be chosen—Suitability or desirability of immigrant—Decision of Minister—Review by court—Certificate of health—Immigration Act 1901-1935 (*No.* 17 *of* 1901—*No.* 13 *of* 1935), *secs.* 3 (*a*), 3J, 14*.

A passage of not less than fifty words in the Italian language was dictated to an immigrant by a person duly authorized under sec. 3 (*a*) of the *Immigration Act* 1901-1935. The immigrant, who deliberately prevented herself from hearing the dictation, refused to, and did not in fact, write any words in the Italian or any language.

* The *Immigration Act* 1901-1935 by sec. 3 provides:—Sec. 3: "The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called 'prohibited immigrants') is prohibited, namely:—(*a*) any person who fails to pass the dictation test: that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer or authorized person." Sec. 3J: "The Minister may, if he thinks fit, prevent an intending immigrant from entering the Commonwealth, notwithstanding that a certificate of health has been issued to the intending immigrant." Sec. 14: "Every officer may with any necessary assistance prevent any prohibited immigrant, or person reasonably supposed to be a prohibited immigrant, from entering the Commonwealth."