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[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (NEW SOUTH WALES) . . } PLAINTIFF;

AND

W. R. MORAN PROPRIETARY LIMITED . DEFENDANT.

ON REMOVAL FROM THE DISTRICT COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 20, 21, 24, 26.

MELBOURNE, *June* 7.

SYDNEY, *July* 25.

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

Constitutional Law (Cth.)—Scheme of legislation—Wheat-industry assistance—Commonwealth and State Acts—Taxation of flour—Distribution of proceeds among States—Special grant to Tasmania—Distribution to taxpayers of such grant under Tasmanian Act—Discrimination between States—Bounties—Uniformity—Financial assistance—Delegation—Motive of legislation—Admissibility of extrinsic evidence—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (ii.), (iii.), 92, 96, 99—*Flour Tax* (*Wheat Industry Assistance*) *Assessment Act* 1938 (*No.* 48 *of* 1938)—*Flour Tax Act* 1938 (*No.* 49 *of* 1938)—*Flour Tax* (*Stocks*) *Act* 1938 (*No.* 50 *of* 1938)—*Flour Tax* (*Imports and Exports*) *Act* 1938 (*No.* 51 *of* 1938)—*Wheat Tax Act* 1938 (*No.* 52 *of* 1938)—*Wheat Industry Assistance Act* 1938 (*No.* 53 *of* 1938), *secs.* 6, 7, 10, 14—*Flour Tax Relief Act* 1938 (*Tas.*) (2 *Geo. VI. No.* 40).

The scheme of legislation consisting of the *Flour Tax Act* 1938, the *Flour Tax* (*Stocks*) *Act* 1938, the *Flour Tax* (*Imports and Exports*) *Act* 1938, the *Wheat Tax Act* 1938 and the *Flour Tax* (*Wheat Industry Assistance*) *Assessment Act* 1938 (which Acts impose certain taxes on flour and wheat), the *Wheat Industry Assistance Act* 1938 (which provides for the appropriation of the proceeds of the taxes in payments to the States, and, in sec. 14, for an additional payment to Tasmania of an amount having a direct relation to the tax paid on flour consumed in that State), and the *Flour Tax Relief Act* 1938 of the State of Tasmania (providing for the distribution of such additional grant amongst payers of tax on flour consumed in that State) is not invalid as amounting to taxation so as to discriminate between States, or as involving a bounty

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which is not uniform throughout the Commonwealth, or because the fixing of the rates of tax or the determination of the amounts of the payments to be made to States is delegated to an executive authority.

So *held* by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ.

Per Evatt J. : The Commonwealth scheme of legislation above referred to is invalid because an essential and inseparable feature thereof is taxation discriminating between States contrary to sec. 51 (ii.) of the Constitution.

Observations on the relevance on questions of constitutional validity of the motive of the legislature and the end sought to be attained by the combined exercise of various powers of the Commonwealth and the States.

Admissibility of extrinsic evidence in determining the validity of a statute discussed.

ACTION removed to the High Court under sec. 40 of the *Judiciary Act* 1903-1937.

In an action brought in a District Court of New South Wales the defendant, W. R. Moran Pty. Ltd., was sued for the sum of £85 12s. tax and additional tax, alleged to be due under the Commonwealth *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 and the *Flour Tax (Stocks) Act* 1938. The case was removed to the High Court under sec. 40 of the *Judiciary Act* 1903-1937, and was referred by *Evatt* J. to the Full Court.

The only defence raised to the action was that the said Acts, or one of them, was invalid as being *ultra vires* of the Commonwealth Parliament.

In August 1938, at a conference attended by representatives of the Commonwealth Government and of all the State Governments of Australia, it was agreed that it was necessary to take action to ensure to wheat growers a payable price for wheat. The approved scheme involved the imposition of an excise duty upon flour by the Commonwealth Parliament. By this means the Commonwealth Government would obtain funds out of which moneys could be paid to assist wheat growers in general, and also to give relief to distressed wheat growers. It was part of the plan that special treatment should be given to Tasmania on account of the special circumstances of that State. Those special circumstances consisted in the fact that Tasmania alone, among the States of the Commonwealth, imports wheat from other States. The quantity of wheat produced

in Tasmania is relatively very small and, accordingly, the Tasmanian community, though it would bear the excise duty on flour by paying increased prices for bread &c., would receive very little money by way of moneys paid or other assistance given to the small number of Tasmanian wheat growers.

Another element in the scheme involved the fixing by or under State legislation of prices for flour and/or bread. The object was to prevent undue exploitation of consumers.

All the Parliaments of Australia combined to give effect to the plan. It was thought that by the co-operative action of all the Parliaments (and only by such co-operative action) the desired result could be achieved.

The Commonwealth Parliament passed three Acts imposing taxes on flour and one imposing a tax upon wheat. The first was the *Flour Tax Act* 1938, which imposed a tax upon flour manufactured in Australia and sold or used in the manufacture of other goods. The second, the *Flour Tax* (*Stocks*) *Act* 1938, imposed a tax upon flour held in stock upon a specified date. The third, the *Flour Tax* (*Imports and Exports*) *Act* 1938, imposed a tax upon flour and biscuits &c. imported into Australia and upon wheat exported from Australia after a date to be fixed by proclamation. Taxes under these Acts would, as a general rule, be paid by millers. The Acts were designed to raise money by taxing flour and flour products so as to form a fund which would provide the Commonwealth with means of paying moneys to wheat growers, so as to provide a payable price for wheat. The tax was fixed upon the basis that 5s. 2d. a bushel on rails at Williamstown was a payable price, and the Acts mentioned were designed to produce a sum representing the difference between any lower price and that price, so that the wheat grower would receive payment upon the basis of 5s. 2d. per bushel. If, however, the price of wheat went above 5s. 2d. per bushel at Williamstown, it was part of the scheme that a tax should be imposed upon wheat so as to form a fund from which moneys could be paid, not to wheat growers, but to millers. This tax was imposed by the fourth Act, the *Wheat Tax Act* 1938. The *Flour Tax* (*Wheat Industry Assistance*) *Assessment Act* 1938 provided the necessary machinery for the collection of these taxes.

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The Commonwealth Parliament enacted the *Wheat Industry Assistance Act* 1938 as another necessary part of the scheme. This Act recites the substance of the plan outlined above. The preamble of the Act refers to the conference held in August 1938, and declares that the Commonwealth and States have agreed to co-operate in order to give effect to the scheme, and that the State Parliaments have passed legislation providing for the fixing of prices for flour sold for home consumption in Australia. All the State Parliaments had in fact either passed special Acts enabling them to fix prices of flour and bread or already had an applicable statute in operation.

The defendant's principal objection was that the scheme involved an imposition of a tax, namely, an excise duty, which infringed sec. 51 (ii.) of the Constitution. Sec. 51 (ii.) provides that the Commonwealth Parliament shall have power to make laws with respect to " taxation ; but so as not to discriminate between States or parts of States."

The course adopted was to impose a tax upon flour in general terms, without any discrimination between States, and then to distribute the amount of the proceeds among the States for allocation to wheat growers, but with a special Commonwealth grant to meet the special case of Tasmania.

The taxing and assessment Acts dealt with the raising of money by taxation. The appropriation of money towards the desired objects was made by the *Wheat Industry Assistance Act* 1938. This Act provides for the payment of the proceeds of the flour taxes (which go into the consolidated revenue fund under sec. 81 of the Constitution) out of that fund into a wheat stabilization fund. The money in this fund is to be applied (sec. 6 (6)) in making payments to the States of amounts proportionate to the production of wheat in each State. Sec. 6 (7) provides that these grants to the States shall be paid upon condition that the amount so paid to a State shall be distributed to the wheat growers in the State in proportion to the quantity of wheat sold or delivered for sale by each wheat grower during the relevant year. Sec. 7 of the Act provides that specified other sums shall be paid, in the first year to only four named States. It is a condition of these latter special payments that these amounts shall be applied in the relief of distressed wheat

growers, or, in subsequent years, in meeting the cost of transferring wheat growers from unsuitable land. After the first year of operation of the scheme and during the following four years, the amounts to be paid to the States under sec. 7 are to be determined by the Minister administering the Act (sec. 7 (3)).

The special provision for Tasmania is contained in sec. 14 of the *Wheat Industry Assistance Act*. It provides that in addition to any amount granted to Tasmania under sec. 6 or sec. 7, a further sum, of such amount as the Minister should determine, shall be paid to the State of Tasmania in each year by way of financial assistance. This section is subject to a proviso that the amount paid to Tasmania in any year shall not be greater than the sum (if any) by which the amount collected in that year under the assessment Act in respect of flour consumed in Tasmania exceeds the total amount paid to Tasmania in respect of the year by way of grants under sec. 6 and sec. 7 of the Act. This proviso imposes a maximum limit upon the amount to be paid to Tasmania—the difference between what the community of Tasmania receives under the other provisions of the assistance Act and the amount which it pays under the taxation Acts. The assistance to wheat growers was regarded as benefiting Tasmania to a very small degree, because, as already stated, there are very few wheat growers in Tasmania, but the people of Tasmania consume as much bread per head as the people in any other part of the Commonwealth. Thus sec. 14 was devised as a means, not mathematically precise, but roughly accurate enough, of putting all parts of Australia, including Tasmania, upon substantially the same footing.

The Tasmanian Parliament passed an Act entitled the *Flour Tax Relief Act* 1938. This Act and all the Commonwealth Acts mentioned were assented to on the same day, 2nd December 1938. This Act, like the other Acts, did not disguise its object in any way. The preamble recited that the Commonwealth *Wheat Industry Assistance Act* provided for the payment to the State of moneys by way of financial assistance during any period in respect of which a tax was imposed upon flour. The next recital was : " Whereas it is desirable that the moneys so granted to this State should be applied to the relief of persons paying flour tax upon flour for consumption in this

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State." The Act provided that persons who paid flour tax to the Commonwealth might apply to a State official for relief in respect of the flour tax which they had paid. The evidence showed that, in fact, ninety per cent of the flour tax paid was repaid under this Act by the State to Tasmanian taxpayers, and to persons in other parts of Australia who, having paid tax upon flour in those other States, subsequently exported the flour to Tasmania, where it was used.

The result of this whole scheme of Commonwealth and State legislation is that a Commonwealth excise duty is imposed upon flour which is paid upon the same basis by persons in all States. The proceeds of the duty go into the Commonwealth consolidated revenue. An equivalent sum is then taken from the consolidated revenue and is paid by the Commonwealth by way of financial assistance to the States of the Commonwealth, upon condition that the States apply the moneys in the assistance and relief of wheat growers. In the case of Tasmania, however, a special grant is made by the Commonwealth which is not subject to any Commonwealth statutory conditions, but which, in fact, is applied, and which it was known would be applied, by the Government of Tasmania in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of flour consumed in Tasmania.

Further facts and relevant statutory provisions appear in the reasons for judgment hereunder.

Upon the matter being called on for hearing before the Full Court of the High Court, the States of New South Wales, Victoria, South Australia and Tasmania obtained leave to intervene.

Mason K.C. and *W. J. V. Windeyer* (with them *Leslie*), for the defendant. The assessment Act and all the taxing Acts, that is, the *Flour Tax* (*Wheat Industry Assistance*) *Assessment Act* 1938, the *Flour Tax Act* 1938, the *Flour Tax* (*Stocks*) *Act* 1938, the *Flour Tax* (*Imports and Exports*) *Act* 1938, and the *Wheat Tax Act* 1938, are part of the scheme referred to in the preamble to the *Wheat Industry Assistance Act* 1938. That scheme includes the legislation also referred to in that preamble as having been passed by the

Parliaments of the various States, e.g., the *Flour Tax Relief Act* 1938 (Tas.). It is significant that all these statutes came into force on the same day. The scheme involves: (*a*) an excise duty which discriminates between States by reason of sec. 14 of the *Wheat Industry Assistance Act*; (*b*) bounties under sec. 6 of that Act, which are not uniform by reason of sec. 10 of the Act; and (*c*) grants under sec. 7 of the Act, which are not valid under sec. 96 of the Constitution because a Minister and not the Parliament determines the amount and conditions of the grants. Although it may have been the intention to assist wheat growers, the validity of the tax upon flour is disputed because the way in which it is levied and appropriated is not in accordance with the Constitution. The scheme offends against secs. 51 (ii.), 96 and 99 of the Constitution. Having regard to the fact that it is a wheat tax, and also to the fact that the whole object of the legislation is to produce a home consumption price for wheat, what is proposed is a bounty to wheat growers raised by an excise tax which discriminates, and the bounty is not, by reason of sec. 10 of the *Wheat Industry Assistance Act*, uniform throughout the Commonwealth. Discrimination brought about by means of a scheme involving a number of Acts is just as bad as if the discrimination were brought about by one Act only. For the purpose of determining the effect and validity of the *Wheat Industry Assistance Act*, and particularly sec. 14, the court is entitled to have regard to the proceedings of the conference referred to in the preamble to that Act (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1)). Although the *Wheat Industry Assistance Act* refers in secs. 6 and 14 to "grants of financial assistance," the various Acts must be examined in order to ascertain their "pith and substance" or "true nature and character" (*Shannon* v. *Lower Mainland Dairy Products Board* (2); *Attorney-General for Alberta* v. *Attorney-General for Canada* (3); *Hammer* v. *Dagenhart* (4)) and "the real object of arming the Minister with the power" (*James* v. *Cowan* (5)) of making grants to Tasmania under sec. 14 of the *Wheat Industry Assistance Act*. In making that examination regard

(1) (1939) A.C. 117, at pp. 130-133.
(2) (1938) A.C. 708, at pp. 719, 720.
(3) (1939) A.C. 117.
(4) (1918) 247 U.S. 251; 62 Law. Ed. 1104.
(5) (1932) A.C. 542, at p. 558; 47 C.L.R. 386, at p. 396.

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may be had to: (*a*) all enactments forming part of the legislative scheme (*Attorney-General for Ontario* v. *Reciprocal Insurers* (1); *In re Insurance Act of Canada* (2); *United States* v. *Butler* (3); *R.* v. *Barger*; *The Commonwealth* v. *McKay* (4); *Attorney-General for Alberta* v. *Attorney-General for Canada* (5)); (*b*) all matters referred to in the preamble of the *Wheat Industry Assistance Act*, e.g., the resolutions of the conference —these resolutions refer to special arrangements as on former occasions to meet the special circumstances of Tasmania and evidence is admissible to prove the nature of such special arrangements. (See also *Attorney-General for British Columbia* v. *Attorney-General for Canada* (6)—where the court referred to the report of a Royal Commission; the *Alberta Case* (7)—where regard was had to various extrinsic matters; *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (8)—where regard was had to the legislative history and the report of a select committee; and *Harvard Law Review*, vol. 38, p. 6.) All sources of information outside a statute may be used for ascertaining its meaning (*Craies* on *Statute Law*, 4th ed. (1936), pp. 118-147)—See also *Tasmania* v. *Victoria* (9) and *See* v. *Cohen* (10); (*c*) the manner in which the legislative scheme in fact operates in the different States, and by what names the assistance afforded by sec. 14 of the *Wheat Industry Assistance Act* has "come to be known and described" (*Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (11)—where the court had regard to the circumstances in which a payment of the tax was or was not enforced; *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills Ltd.* (12); *R.* v. *Barger* (13)). In all cases the statutes may be looked at to determine whether there is an infringement of the Constitution (*Victoria* v. *The Commonwealth* (14)). The *Flour Tax Relief Act* 1938 (Tas.) is an integral part of the scheme. The provisions of that Act, especially having regard to the close co-operation between the Commonwealth and the State in applying those

(1) (1924) A.C. 328, at pp. 331, 332, 336, 338, 340.
(2) (1932) A.C. 41, at p. 52.
(3) (1935) 297 U.S. 1, at p. 58; 80 Law. Ed. 477, at p. 784.
(4) (1908) 6 C.L.R. 41, at p. 47.
(5) (1939) A.C. 117.
(6) (1937) A.C. 368, at pp. 374, 376.
(7) (1939) A.C .117; (1938) S.C.R. (Can.) 100.
(8) (1931) A.C. 310, at pp. 317, 318.
(9) (1934) 52 C.L.R. 157, at p. 168.
(10) (1923) 33 C.L.R. 174, at p. 181.
(11) (1930) A.C. 357, at p. 363.
(12) (1937) 56 C.L.R. 390.
(13) (1908) 6 C.L.R., at p. 115.
(14) (1926) 38 C.L.R. 399, at p. 406.

provisions and the procedure followed thereunder, create, confirm or support the invalidity of the Commonwealth legislation, particularly the *Wheat Industry Assistance Act*. Under the scheme as a whole special treatment is accorded to the State of Tasmania. Under sec. 6 (7) of the last-mentioned Act the money received thereunder by a State must be paid to specified persons in amounts certain. That is not a grant of financial assistance to the State, it is a grant of financial assistance to wheat growers in certain proportions (*R.* v. *Barger* (1)). The State has not any discretion in the matter; it is under a statutory duty to distribute the money in the manner prescribed by sec. 6 (7). What is in fact a bounty cannot by mere verbiage be converted into a grant of financial assistance to the States. If the real purpose of arming the Minister with the power to grant financial assistance to the State of Tasmania under sec. 14 of the *Wheat Industry Assistance Act* was to enable a refund of the tax to taxpayers in respect of flour consumed in Tasmania, and the Minister exercises the power for that purpose, sec. 92 of the Constitution is infringed (*James* v. *Cowan* (2)). The tax as imposed by the taxing Acts is not a valid exercise of the taxation power of the Parliament; the legislation purports to empower the Minister and the stabilization committee to impose taxes, in other words, the tax is fixed by the Minister upon a recommendation by the committee, and is not fixed by the Parliament.

E. M. Mitchell K.C. (with him *Sugerman*), for the plaintiff. Whatever officers of the Commonwealth or the States may do is quite irrelevant and has not any bearing upon the validity or otherwise of the legislation under consideration (*Riverina Transport Pty. Ltd.* v. *Victoria* (3)). In determining the validity of that legislation the court should have regard only to the words used by the legislature and should not have regard to extraneous matters, e.g., negotiations and discussions which took place prior to the passing of the legislation (*James* v. *The Commonwealth* (4)). Evidence of such prior negotiations and discussions is inadmissible. In interpreting an Act every reasonable presumption must be made in favour

(1) (1908) 6 C.L.R. 41.
(2) (1932) A.C., at p. 558; 47 C.L.R., at p. 396.
(3) (1937) 57 C.L.R. 327, at pp. 341, 343.
(4) (1936) A.C. 578, at pp. 614, 615; 55 C.L.R. 1, at pp. 43, 44.

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of the validity of the Act. An unconstitutional interpretation should not be accepted unless it is clear beyond reasonable doubt that such an interpretation must be accepted (*Federal Commissioner of Taxation* v. *Munro*; *British Imperial Oil Co. Ltd.* v. *Federal Commissioner of Taxation* (1); *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (2)). The preamble to the *Wheat Industry Assistance Act* recites all that the Commonwealth considered necessary as an integral part of the scheme; other matters which were not recited were not regarded as an integral part of the scheme but they may be collateral matters: See *R.* v. *Barger* (3). The operation of the Commonwealth legislation is not in any way dependent upon either the operation or the continuation of the State price-fixing Acts. The fixation of prices by the State was merely the motive for the Commonwealth to pass the legislation; it is not a necessary or integral part of the scheme. A taxing Act may only deal with the imposition of taxation, and by its nature cannot discriminate. The end desired to be attained by the appropriation Act, that is, the *Wheat Industry Assistance Act*, is immaterial to the validity of the taxing Act. The *Wheat Industry Assistance Act* is not an Act with respect to taxation. The taxing Acts do not discriminate; nor does the *Wheat Industry Assistance Act* discriminate by reason of sec. 14. Discrimination was dealt with in *Cameron* v. *Deputy Federal Commissioner of Taxation* (4) and *James* v. *The Commonwealth* (5). The intention of the Commonwealth Parliament is clearly expressed in that section that the State of Tasmania should be at liberty to use for any purpose it desired and without any restrictions or conditions whatsoever the amount granted to it under that section. Grants made under secs. 6 and 7 of the *Wheat Industry Assistance Act* are made subject to conditions, but it is important to note that grants made under sec. 14 are made free of any conditions. The grants made under secs. 6, 7 and 14 are grants of financial assistance within the meaning of sec. 96 of the Constitution. The validity of the taxing Acts is not dependent upon the validity of the *Wheat Industry Assistance*

(1) (1926) 38 C.L.R. 153, at pp. 175, 178, 180.
(2) (1931) A.C. 275, at p. 298; (1930) 44 C.L.R. 530, at p. 545.
(3) (1908) 6 C.L.R., at pp. 66, 67, 77, 93.
(4) (1923) 32 C.L.R. 68.
(5) (1928) 41 C.L.R. 442, particularly at pp. 460, 461.

Act, either partial or total. Sec. 10 of that Act is internal evidence that the continued operation of the taxing Acts is not to depend upon the interruption of payments made under the *Wheat Industry Assistance Act*. Acts directed to a common purpose are not necessarily interdependent upon one another. Even if, for example, the *Flour Tax Relief Act* 1938 (Tas.) were to be repealed, sec. 14 of the *Wheat Industry Assistance Act* would continue to be operative. The discrimination, if any, complained of is the result of State action, which does not and cannot affect the Commonwealth legislation. The effect of the Commonwealth legislation is exhausted upon the making of the grant. A Commonwealth statute cannot be rendered invalid by any State statute or regulation or action thereunder. All the State Acts have saving clauses and the partial or total invalidity of State Acts will not invalidate Commonwealth legislation. There is no rule that if any Act in a plan falls every other Act in that plan falls with it. That this is so is evidenced by sec. 10 of the *Wheat Industry Assistance Act*. The taxing Acts are separate and independent Acts. They are valid exercises of the taxation power of the Parliament. "Revenue" in sec. 99 of the Constitution means the law for the collection of revenue and not a law for expenditure from the consolidated revenue fund. Revenue is what comes in. Sec. 51 of the Constitution is expressed to be subject to the Constitution. Sec. 96 is not so expressed and, therefore, the power in that section must be taken at its full face value.

[STARKE J. referred to *Victoria* v. *The Commonwealth* (1).]

That case decided it was an absolutely independent overriding power. *The Wheat Industry Assistance Act* is not a law with respect to taxation. It is a law for the granting of financial assistance and is not subject to sec. 51. It was intended by that section to empower the Commonwealth to give relief by way of grants of financial assistance with or without terms and conditions notwithstanding the inflexible provisions of other sections. From the construction of the *Wheat Industry Assistance Act* as a whole it is clear that the Commonwealth meant to make an unfettered grant to the States; it meant to divest itself of all its ownership or property in the money and did not merely mean to make the State

(1) (1926) 38 C.L.R. 399.

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the paymaster or agent of the Commonwealth. Money paid under secs. 6, 7 and 14 of the Act is not a bounty under sec. 91 of the Constitution. It is not necessary for the Parliament itself to establish the terms and conditions (*Victoria* v. *The Commonwealth* (1)). An approval or determination by the Minister is an approval or determination by the Parliament (*Roche* v. *Kronheimer* (2); *R.* v. *Burah* (3); *Powell* v. *Apollo Candle Co.* (4); *Nott Bros. & Co. Ltd.* v. *Barkley* (5)).

[LATHAM C.J. referred to *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (6).

[EVATT J. referred to *Baxter* v. *Ah Way* (7).]

Powell's Case (8) and *Roche* v. *Kronheimer* (2) are not affected by *Le Mesurier* v. *Connor* (9). The relevant provisions of the *Wheat Industry Assistance Act* constitute a mandatory command by the Parliament to make the grant and that the amount, time and method of payment of such grant should be determined by the Minister. With regard to sec. 96 of the Constitution there is a double head of power, namely, the power conferred by sec. 96 and the power conferred by sec. 51 (xxxvi.). If any provision of the *Flour Tax Relief Act* 1938 (Tas.) infringes sec. 92 of the Constitution the offending provision is severable under the Tasmanian *Interpretation Act*. Commonwealth legislation cannot be made invalid by State legislation. Sec. 99 does not apply therefore there are not any obligations with respect to preference. Sec. 51 (ii.) and sec. 99 are associated together.

Weston K.C. (with him *Leaver*), for the States of New South Wales, Victoria and South Australia (intervening). These States desire generally to adopt the argument addressed to the court on behalf of the plaintiff. Upon the question of delegated authority it is interesting to note that the relevant section in *Powell* v. *Apollo Candle Co.* (8) is entirely, for present purposes, in parallel terms with sec. 96 of the Constitution : See also *Victorian Stevedoring*

(1) (1926) 38 C.L.R. 399.
(2) (1921) 29 C.L.R. 329.
(3) (1878) 3 App. Cas. 889, at p. 906.
(4) (1885) 10 App. Cas. 282, at pp. 284, 290, 291.
(5) (1925) 36 C.L.R. 20.
(6) (1938) 59 C.L.R. 170.
(7) (1909) 8 C.L.R. 626.
(8) (1885) 10 App. Cas. 282.
(9) (1929) 42 C.L.R. 481.

and General Contracting Co. Pty. Ltd. and Meakes v. *Dignan* (1). The defence pleaded in this action is that the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 and the *Flour Tax (Stocks) Act* 1938 are *ultra vires* of the Commonwealth Parliament. The only ground upon which the *Flour Tax (Wheat Industry Assistance) Assessment Act* is attacked is that it is part and parcel of a certain scheme. The only grounds upon which the *Flour Tax (Stocks) Act* is attacked are that it is part and parcel of the scheme and that it is not a valid tax because of the provisions of sec. 5 thereof. As to the scheme the transcript shows (*a*) that the resolutions referred to at the conference of Commonwealth and State Ministers held on 29th August 1938 were the proposals passed at a meeting of State Premiers held on 26th August 1938; and (*b*) that the proposals were not accepted by the Commonwealth at the conference, and that the Prime Minister undertook that they would be thoroughly examined with a view to determining whether they could be brought within the bounds of the government's policy. The passing of the Commonwealth Acts numbered 48 to 53, both inclusive, and the executive action of the Commonwealth duly taken thereunder, indicate the extent to which the Commonwealth accepted the proposals and co-operated in the scheme. The extent to which the proposals were accepted by the Commonwealth is to be found exclusively in the legislation. The fact that at the conference the Prime Minister did not accept the proposals, and the fact that sec. 14 provides in the manner therein shown prevents the defendant from relying upon any agreement *de facto* that there should be any link in law between the disbursement of the moneys to the State of Tasmania and their ultimate payment or relief to taxpayers. Assuming that the court is at liberty to look at the resolutions of, and/or the proceedings at, the conference, and/or the earlier Tasmanian arrangements, the court may conclude that the Commonwealth intended to make a grant to the State of Tasmania of approximately the amount of tax upon flour consumed in Tasmania and that the State of Tasmania intended to pay approximately the amount of the grant by way of relief in respect of such taxation. The scheme was not legally binding upon any of the parties (*The Commonwealth*

(1) (1931) 46 C.L.R. 73.

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v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1)). The scheme, so far as it has been implemented by legislation or executive action, rests upon powers possessed by the Commonwealth and powers possessed by the States, and it is irrelevant that by the co-operation of Commonwealth and States results may have been attained that could not have been attained by the exercise of Commonwealth powers only. The scheme consists of measures for the collection of moneys (the assessment Act and the taxing Acts) and measures for the disbursement of those moneys (the assistance Act). Even if the assistance Act or any part thereof is invalid, that invalidity has no effect upon the validity of the assessment Act or the taxing Acts. The objections urged against the assistance Act are all easily remediable by amendment of that Act. The assessment Act and the taxing Acts are in form and substance taxing Acts or Acts dealing with the imposition of taxation and nothing else. *Barger's Case* (2) is not a decision that the Act there in question was not a taxation Act, but is a decision that the taxation power is limited by reference to the reserved powers of the State, and the Act was not a taxation Act within the meaning of that limited definition (3). That limitation was improperly read in (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (4)). Sec. 51 (ii.) of the Constitution means that the Parliament may make laws with respect to taxation, but must make such laws so as not by these laws to discriminate between States or parts of States. No part of the Commonwealth legislation discriminates or directs discrimination or authorizes discrimination *qua* taxation. The discrimination, if any, is the result of the Tasmanian Act and nothing else. If the Tasmanian Act were repealed or the Tasmanian Minister ceased to distribute moneys thereunder, there would not be any discrimination, even if there be discrimination while he distributes relief thereunder. Sec. 5 of the *Flour Tax (Stocks) Act* 1938 is a valid exercise by the Commonwealth of its taxing power. The section does not delegate taxing power to the Minister or the committee. Discrimination is not alleged between taxpayers in relation to States, but only between tax paid on flour consumed in

(1) (1922) 31 C.L.R. 421.
(2) (1908) 6 C.L.R. 41.
(3) (1908) 6 C.L.R., at pp. 66, 68, 71, 73, 77, 78.
(4) (1920) 28 C.L.R. 129.

Tasmania and tax paid on flour not consumed in Tasmania. There is not any tax imposed upon ultimate consumers. The provisions of sub-secs. 6 and 7 of sec. 6 of the *Wheat Industry Assistance Act* constitute a valid exercise of the power to grant financial assistance to the States. The condition imposed by sub-sec. 7 is authorized by sec. 96 of the Constitution. That sub-section does not confer upon a wheat grower a right legally enforceable; it would be immaterial if such a right were conferred. Sub-secs. 2, 3 and 5 of sec. 7 of the Act also are valid as an exercise of the power to grant financial assistance to the States. In any event they are not operative at present, and are severable from the rest of the Act. Even if payments under sec. 6 (7) are payments of bounty the payments are not by way of bounty on production or export but upon sale or delivery and discrimination is not prohibited with respect to them; thus they are lawful. Sec. 14 of the Act is *intra vires*. Grants made thereunder rest upon the exercise of legislative authority by the Commonwealth Parliament, although the factum upon which legislation becomes operative is a determination by the Minister. The grant is unconditional. No obligation as between the Commonwealth and the State of Tasmania or the State and any taxpayer to expend the money granted in tax relief is imposed upon the Tasmanian executive by any Commonwealth Act or by any legally binding agreement. Even if such an obligation were imposed upon the Tasmanian executive by the Tasmanian Act the validity of the Commonwealth legislation would not be affected. Similarly if such an obligation were so imposed by the scheme; in that case sec. 14 would still operate by way of grant of financial assistance to the State of Tasmania. Even if sec. 14 were invalid, that would not invalidate the rest of the Act or the other Commonwealth Acts. There has not been any delegation of legislative power, but even if there had been that delegation is permissible either upon the broad view that the Commonwealth Parliament can delegate its legislative powers as fully as the Imperial Parliament can do, or, on the alternative view, that in any event the delegation is not such as to be *ultra vires* (*Radio Corporation Pty. Ltd.* v. *The Commonwealth* (1)). The possible effect upon trade, even assuming that inter-State trade may

(1) (1938) 59 C.L.R. 170.

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be incidentally affected, does not constitute an infringement of sec. 92 of the Constitution. The only bounties which are required to be uniform are bounties upon the production and export of goods. Bounties upon the sale and delivery of goods are not within the prohibition of sec. 51 (iii.) of the Constitution.

A. R. Taylor, for the State of Tasmania (intervening). This State adopts the arguments respectively addressed to the court on behalf of the plaintiff and the other intervening States. There is not any scheme apart from the plan which is evident upon a consideration of the relevant legislation. The plan is implemented by the legislation of two groups of legislative bodies, that is, the Commonwealth and the States, and so far as the validity of the legislation is concerned consideration must be given to the legislative authority of each group. If the legislation of the Commonwealth is valid and that of the State is valid it is immaterial that a result, which is beyond the legislative competence of the Commonwealth alone, or that of the States alone, has been achieved. The authorities referred to on behalf of the defendant are authorities as to the legislative fields, and the "pith and substance" rule was applied in those cases to determine the true nature of the legislative action in order to see whether the particular enactment fell within a forbidden field. In no case was reliance placed upon any factor, to which effect could not be given under the terms of the relevant statute, to establish invalidity. There is no such conflict here. The question is whether some plan or scheme not implemented by legislation discriminates between States. Sec. 14 of the *Wheat Industry Assistance Act* does not operate to effect a discrimination, except in so far as a permitted grant of financial assistance under sec. 96 of the Constitution does in fact constitute discrimination. The grant authorized by sec. 14 is a grant of financial assistance and is not a refund of tax since (*a*) it is made to the State and not to the taxpayers, and (*b*) it is made unconditionally and may be applied by the State in the manner desired by that State. Sec. 14 was referred to on behalf of the defendant as the price of Tasmania's co-operation. This does not establish the defendant's main proposition, as neither the Commonwealth or any of the other States is concerned as to the manner in

which grants under sec. 14 are applied. Grants of assistance under sec. 6 of the *Wheat Industry Assistance Act* are not by way of bounty: —(i) they are grants to the States, who alone may receive and make a determination as to the ultimate destination of the moneys; (ii) they are not conditioned on the production of goods notwithstanding the statements in the preamble. Production is the basis of distribution between the States, but as between the growers the basis is sale or delivery (sec. 6 (7)); (iii) the condition specified by sec. 6 (7) is a valid condition under sec. 96 of the Constitution. The attack on secs. 7 and 14 is, in effect, that Parliament is not competent to delegate the authority necessary to carry out the provisions of the section. It is submitted that the sections are valid, since the grant is effected by valid conditional legislation out of a fund already appropriated by Parliament for that purpose. In any event the provisions of these sections deal with a distinct part of the legislative plan and are severable and the taxing Acts are likewise severable from the remainder of the Commonwealth legislation. The objection to sec. 5 of the *Flour Tax (Stocks) Act* 1938 is answered by the submission that the rate of tax is fixed by Parliament, and that constitutional legislation of this type is valid. There is not any scheme apart from that evidenced by a review of the legislation itself. This is not one type of legislation in the guise of another type, as was the case in *Osborne* v. *The Commonwealth* (1), *R.* v. *Barger* (2) and *Attorney-General for Alberta* v. *Attorney-General for Canada* (3); the only question is one of discrimination. Every grant of financial assistance under sec. 96 of the Constitution must in fact operate to effect discrimination, because the moneys which have been applied for the purpose of the grant have been collected in the various States and given to one in preference to others.

Mason K.C., in reply. The arguments addressed to the court on behalf of the plaintiff and the intervening States are very similar to the argument which was rejected in *Attorney-General for Alberta* v. *Attorney-General for Canada* (3). The Commonwealth Parliament

(1) (1911) 12 C.L.R. 321. (2) (1908) 6 C.L.R. 41.
(3) (1939) A.C. 117.

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has no power to give relief to taxpayers out of the tax it collects. The "tax as imposed is linked up with an object which is illegal" (*In re Insurance Act of Canada* (1)). In the preamble to the *Wheat Industry Assistance Act* it is recited that the proceeds of the tax should be paid out to wheat growers on the basis of "the quantities of wheat respectively produced by them." Therefore the matter comes within the provisions of sec. 51 (iii.) of the Constitution.

Cur. adv. vult.

June 7. LATHAM C.J. The court, by a majority, holds that the defence to the action fails and that judgment should be entered for the plaintiff for the amount claimed. The reasons for judgment will be delivered later.

July 25. The following written reasons for judgment were delivered:—

LATHAM C.J. In this action the defendant is sued for a sum of £85 12s. tax and additional tax, alleged to be due under the Federal *Flour Tax* (*Wheat Industry Assistance*) *Assessment Act* 1938 and the *Flour Tax* (*Stocks*) *Act* 1938. The case has been removed to the High Court under sec. 40 of the *Judiciary Act* 1903-1937 and has been referred by *Evatt* J. to the Full Court. The plaintiff is entitled to judgment for the amount claimed unless the defendant establishes the only defence which is raised, namely, that the said Acts are, or one of them is, invalid as being *ultra vires* of the Commonwealth Parliament.

In August 1938 at a conference attended by representatives of the Commonwealth Government and of all the State Governments of Australia it was agreed that it was necessary to take action to ensure to wheat growers a payable price for wheat. The approved scheme involved the imposition of an excise duty upon flour by the Commonwealth Parliament. By this means the Commonwealth Government would obtain funds out of which moneys could be paid to assist wheat growers in general, and also to give relief to distressed wheat growers. It was part of the plan that special treatment should be given to Tasmania on account of the special circumstances

(1) (1932) A.C., at p. 52.

of that State. Those special circumstances consisted in the fact that Tasmania alone, among the States of the Commonwealth, imports wheat from other States. Apparently all the wheat required for flour milling in Tasmania has to be brought from other States. The quantity of wheat produced in Tasmania is relatively very small and accordingly the Tasmanian community, though it would bear the excise duty on flour by paying increased prices for bread, &c., would receive very little money by way of moneys paid or other assistance given to the small number of Tasmanian wheat farmers.

Another element in the scheme involved the fixing by or under State legislation of prices for flour and/or bread. The object was to prevent undue exploitation of consumers.

All the Parliaments of Australia combined in order to give effect to the plan. It was thought that by the co-operative action of all the Parliaments (and only by such co-operative action) the desired result could be achieved.

The Commonwealth Parliament passed three Acts imposing taxes on flour and one imposing a tax upon wheat. The first was the *Flour Tax Act* 1938, which imposed a tax upon flour manufactured in Australia and sold or used in the manufacture of other goods. The second, the *Flour Tax* (*Stocks*) *Act* 1938, imposed a tax upon flour held in stock upon a specified date. The third, the *Flour Tax* (*Imports and Exports*) *Act* 1938, imposed a tax upon flour and biscuits &c. imported into Australia and upon wheat exported from Australia after a date to be fixed by proclamation. Taxes under these Acts would, as a general rule, be paid by millers. The Acts were designed to raise money by taxing flour and flour products so as to form a fund which would provide the Commonwealth with means of paying moneys to wheat farmers, so as to provide a payable price for wheat. The tax was fixed upon the basis that 5s. 2d. a bushel on rails at Williamstown was a payable price, and the Acts mentioned were designed to produce a sum representing the difference between any lower price and that price, so that the farmer would receive payment upon the basis of 5s. 2d. If, however, the price of wheat went above 5s. 2d. at Williamstown, it was part of the scheme that a tax should be imposed upon wheat so as to form a fund from which moneys could be paid, not to farmers, but to millers. This

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tax was imposed by the fourth Act, the *Wheat Tax Act* 1938. The *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 provided the necessary machinery for the collection of these taxes.

The Commonwealth Parliament enacted the *Wheat Industry Assistance Act* 1938 as another necessary part of the scheme. This Act recites the substance of the plan which I have outlined. The preamble of the Act refers to the conference and declares that the Commonwealth and the States have agreed to co-operate in order to give effect to the scheme and that the State Parliaments have passed legislation providing for the fixing of prices for flour sold for home consumption in Australia. All the State Parliaments had in fact either passed special Acts enabling them to fix prices of flour and bread or already had an applicable statute in operation.

Upon the argument in this case it was objected that the court should not look outside the four corners of the statutes in question and that the proceedings of the conference were irrelevant. The *Wheat Industry Assistance Act*, however, expressly refers in the preamble to the conference, and I am, therefore, of opinion that there can be no objection to looking at the record of what was done at the conference. An examination of that record does not add anything to what is apparent upon the face of the Federal and State statutes. These statutes show that the Commonwealth and the State Governments agreed to ask their Parliaments to pool their constitutional powers for the purpose of bringing about a result which admittedly neither the Commonwealth Parliament alone nor the State Parliaments alone could achieve. The question which arises is whether the Commonwealth Parliament, in providing its contribution to this scheme, has infringed the Constitution.

The principal objection is that the scheme involves an imposition of a tax (namely, an excise duty) which infringes sec. 51 (ii.) of the Constitution. Sec. 51 (ii.) provides that the Commonwealth Parliament shall have power to make laws with respect to "taxation; but so as not to discriminate between States or parts of States." As I have already stated, it was part of the scheme that special treatment should be provided for the special circumstances of Tasmania. It was obvious that the Commonwealth Parliament could not impose an excise duty and exclude Tasmania from the Act

imposing the duty. The course adopted was to impose a tax on flour in general terms, without any discrimination between States, and then to distribute the amount of the proceeds among the States for allocation to wheat farmers, but with a special Federal grant to meet the special case of Tasmania.

The taxing and assessment Acts dealt with the raising of money by taxation. The appropriation of money towards the desired objects was made by the *Wheat Industry Assistance Act* 1938. This Act provided for the payment of the proceeds of the flour taxes (which go into the consolidated revenue fund under sec. 81 of the Constitution) out of that fund into a wheat industry stabilization fund. The money in this fund is to be applied (sec. 6 (6)) in making payments to the States of amounts proportionate to the production of wheat in each State. Sec. 6 (7) provides that these grants to the States shall be paid upon condition that the amount so paid to a State shall be distributed to the wheat growers in the State in proportion to the quantity of wheat sold or delivered for sale by each wheat grower during the relevant year. Sec. 7 of the Act provides that specified other amounts shall be paid, in the first year, to only four States, namely, New South Wales, Victoria, South Australia and Western Australia. It is a condition of these latter special payments that these amounts shall be applied in the relief of distressed wheat growers, or in subsequent years, in meeting the cost of transferring wheat growers from unsuitable land. After the first year of operation of the scheme and during the following four years, the amounts to be paid to the States under sec. 7 are to be determined by the Minister administering the Act (sec. 7 (3)).

The special provision for Tasmania is contained in sec. 14 of the *Wheat Industry Assistance Act*. It provides that, in addition to any amount granted to Tasmania under sec. 6 or sec. 7, a further sum, of such amount as the Minister should determine, shall be paid to the State of Tasmania (not to the millers of Tasmania) in each year by way of financial assistance. This section is subject to a proviso that the amount paid to Tasmania in any year shall not be greater than the sum (if any) by which the amount collected in that year under the assessment Act in respect of flour consumed in Tasmania exceeds the total amount paid to Tasmania in respect of the year

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by way of grants under sec. 6 and sec. 7 of the Act. This proviso imposes a maximum limit upon the amount to be paid to Tasmania —the difference between what the community of Tasmania receives under the other provisions of the assistance Act and the amount which it pays under the taxation Acts. The assistance to wheat growers was regarded as benefiting Tasmania to a very small degree, because (as already stated) there are very few wheat growers in Tasmania, but the people of Tasmania consume as much bread per head as the people in any other part of the Commonwealth. Thus, sec. 14 was devised as a means, not mathematically precise, but roughly accurate enough, of putting all parts of Australia, including Tasmania, upon substantially the same footing. It is contended that the payment to the State of Tasmania of an amount which bears a relation (namely, by way of maximum limit) to the amount of excise duty paid on flour, really amounts to a prohibited discrimination in favour of Tasmania.

The Tasmanian Parliament passed an Act entitled the *Flour Tax Relief Act* 1938. This Act and all the Federal Acts mentioned were assented to on the same day, 2nd December 1938. This Act (like the other Acts) did not disguise its object in any way. The preamble recited that the Federal *Wheat Industry Assistance Act* provided for the payment to the State of moneys by way of financial assistance during any period in respect of which a tax was imposed upon flour. The next recital was : " Whereas it is desirable that the moneys so granted to this State should be applied to the relief of persons paying flour tax upon flour for consumption in this State." The Act provided that persons who paid flour tax to the Commonwealth might apply to a State official for relief, and might thereupon obtain a payment by way of relief in respect of the flour tax which they had paid. The evidence shows that, in fact, ninety per cent of the flour tax paid was repaid under this Act by the State to the Tasmanian taxpayers, and to persons in other parts of Australia who, having paid tax upon flour in those other States, subsequently exported the flour to Tasmania, where it was used.

The result of this whole scheme of Federal and State legislation is that a Federal excise duty is imposed upon flour which is paid upon the same basis by persons in all States. The proceeds of the

duty go into the Federal consolidated revenue. An equivalent sum is then taken from the consolidated revenue and is paid by the Commonwealth by way of financial assistance to the States of the Commonwealth, upon condition that the States apply the moneys in the assistance and relief of wheat growers. In the case of Tasmania, however, a special grant is made by the Commonwealth which is not subject to any Federal statutory conditions, but which, in fact, is applied, and which it was known would be applied, by the Government of Tasmania in paying back to Tasmanian millers and others nearly the whole of the flour tax paid by them in respect of flour consumed in Tasmania.

It is now possible to deal with the principal contention of the defendant, based upon sec. 51 (ii.) of the Constitution. Under sec. 51 (ii.) the Commonwealth Parliament can undoubtedly tax flour as it has done in the various taxation Acts to which I have referred. But the power to legislate with respect to taxation is subject to the condition expressed in the words "but so as not to discriminate between States or parts of States." It is contended that, if the taxation Acts and the *Wheat Industry Assistance Act* (with its preamble) are read together, it is evident that the amount paid in taxation by persons in Tasmania is to be refunded to the Government of Tasmania for repayment to them, so that there is a discrimination in favour of Tasmania and against the other States. The argument is that if Tasmania had been excluded from the taxation Acts, those Acts would clearly have been bad, but that the same result is produced by collecting the tax from Tasmania, and then paying it, or most of it, back to Tasmania. But sec. 51 of the Constitution relates only to the powers of the Commonwealth Parliament, and the provision prohibiting discrimination affects and can affect that Parliament only. Unless the Federal taxation legislation itself discriminates between States or parts of States, it is not rendered invalid by the condition attached to sec. 51 (ii.). The Federal taxation Acts themselves plainly do not discriminate between States. They are therefore not affected by the condition contained in sec. 51 (ii.). The special treatment which is given to Tasmania does not arise from any discrimination in any law passed by the Federal Parliament "with respect to taxation." The *Wheat Industry*

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Assistance Act is not an Act with respect to taxation. It is an Act appropriating money. It provides, not for the collection, but for the expenditure of money. There is no provision in the Constitution to the effect that appropriation Acts must not discriminate between States or that Federal expenditure in the several States must be equal in any sense. Such a provision would obviously encounter very grave practical difficulties.

What is said to be the discrimination in favour of Tasmanian taxpayers really arises from Tasmanian legislation. No Commonwealth legislation provides for the repayment of any money to any Tasmanian taxpayer. It provides only for the payment of a sum to the Government of Tasmania. The Government of Tasmania has, with the authority of the Parliament of Tasmania, devoted this money to giving relief to Tasmanian taxpayers. But such action cannot be an infringement of sec. 51 (ii.), because that section does not apply to the Parliament of Tasmania. In my opinion, there would be nothing unlawful or invalid in any State enacting legislation providing for the repayment to its citizens of moneys which they had paid to the Commonwealth by way of taxation. Such a law might be open to political objection, but no remedy could be obtained by any objection in the courts. The enactment of such a law could not affect the validity of any Act passed by the Parliament of the Commonwealth. It may be added that a State Parliament could achieve much the same practical result in some cases by reducing its own taxes. The validity of such a reduction would not be open to doubt.

A somewhat similar question to that which arises under the first objection was answered in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1). The Commonwealth Parliament imposed uniform duties of excise upon sugar but subject to exemptions so far as goods had borne customs or excise duties under State legislation. In Queensland there had been no State excise duty on sugar and accordingly the amounts payable by way of excise duty to the Commonwealth varied in the case of different States. But this result was brought about not by the Federal legislation, but by the State legislation. Their Lordships of the Privy Council say: "The rule laid down by

(1) (1906) A.C. 360.

the Act is a general one, applicable to all States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves" (1). In that case the resulting inequality was an effect of past legislation, and the inequality in result was, therefore, obvious *ab initio*. The case is, therefore, a stronger one than the present case, where it is open to the Tasmanian Parliament, as a matter of law, to repeal the *Flour Tax Relief Act* and to alter the manner of expending the money received from the Commonwealth under the *Wheat Industry Assistance Act*.

The defendant relied very strongly upon the case of *Attorney-General for Alberta* v. *Attorney-General for Canada* (2). The principle which it was sought to derive from that case was that a statute, apparently valid when considered by itself, might nevertheless be held to be invalid if it were part of a "scheme" for achieving a prohibited purpose. The case cited provides one of many illustrations of the difficulties arising from the distribution of Dominion and Provincial legislative powers under the *British North America Act* 1867. Sec. 91 of that Act places certain matters within the exclusive legislative power of the Dominion Parliament. Sec. 92 places certain matters within the exclusive legislative power of the Provincial Parliaments. But reality does not satisfactorily respond to the statutory fiat. The matters mentioned in the two sections overlap. Accordingly very difficult problems arise in the case of Canada with respect to the category to which legislation should be assigned. This precise problem does not arise in Australia, where the Constitution does not assign exclusive powers to the Commonwealth and also exclusive powers to the States. In the present case no question of judicial selection as between mutually exclusive categories arises.

In the next place it may be noted that the *Alberta Case* (2) dealt with a legislative power which was defined by reference to purpose. The power was conferred upon the Provincial Parliament by sec. 92 (2): "Direct taxation within the province *in order to the raising of a revenue* for provincial purposes." The words in italics are so printed in the report (3). It was reasonably plain that the purpose

(1) (1906) A.C., at p. 367.
(2) (1939) A.C. 117.
(3) (1939) A.C., at p. 130.

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of the challenged legislation was not the raising of any revenue by taxing banks. The purpose was plainly a purpose of putting the banks out of business. But " banking " was one of the subjects as to which the Dominion Parliament had exclusive legislative power under sec. 91. The Provincial Act was therefore invalid. In the present case no consideration of the purpose of the Commonwealth Parliament is relevant. This, indeed, is the general rule. If a power is not defined by reference to purpose, the element of purpose is irrelevant. In *Barger's Case* (1) all the justices took this view: See per *Griffith* C.J., *Barton* and *O'Connor* JJ. (2), per *Isaacs* J. (3), and per *Higgins* J. (4)—See also *James* v. *Cowan* (5). Sec. 51 (ii.) of the Commonwealth Constitution makes no reference to any purpose of the Commonwealth Parliament. It confers a power to make laws with respect to taxation, but so as not to discriminate between States or parts of States. The condition relates only to laws with respect to taxation. If such a law does in fact discriminate between States, it is not within the power granted. The absence of a purpose to discriminate would be nothing to the point. If such a law does not in fact so discriminate, the presence of a purpose to discriminate would equally be nothing to the point. The laws with respect to taxation, that is, the taxing Acts and the assessment Act, do not discriminate between States. Thus the condition of sec. 51 (ii.) is not infringed. In my opinion the *Alberta Case* (6) does not assist the plaintiff.

In my opinion, for the reasons given, neither the *Flour Tax (Stocks) Act* 1938 nor any other of the Acts mentioned is open to the objection that it is legislation with respect to taxation which discriminates between States.

It is further objected that the payments made under the *Wheat Industry Assistance Act* are bounties on the production or export of goods, and that they are not uniform. Sec. 51 (iii.) of the Commonwealth Constitution provides that the Parliament shall have power to make laws with respect to bounties on the production or export of goods " but so that such bounties shall be uniform throughout the Commonwealth." In support of this objection reference is

(1) (1908) 6 C.L.R. 41.
(2) (1908) 6 C.L.R., at p. 67.
(3) (1908) 6 C.L.R., at pp. 89, 92, 93.
(4) (1908) 6 C.L.R., at pp. 119, 129.
(5) (1930) 43 C.L.R. 386, at p. 421.
(6) (1939) A.C. 117.

made to the fact that the grants made to the States under secs. 6 and 7 vary in amount, and that, under sec. 10, the Governor-General may suspend payments if he is satisfied that State legislation is amended, or that action is taken under State legislation, so as to affect prejudicially the position of wheat growers in the State in respect of wheat sold for home consumption in Australia. The same section gives power to the Governor-General to suspend payments to a State if the State has not taken steps to adequately protect consumers of flour &c. against excessive prices. In my opinion this objection fails for several reasons.

In the first place, the payments made by virtue of the *Wheat Industry Assistance Act* are payments made to States upon condition that the States shall pay moneys to wheat growers. The payments made by the Commonwealth are not bounties upon either the production or the export of goods. They are payments by way of financial assistance to States, subject to terms and conditions fixed by the Commonwealth Parliament. The Federal Acts do not authorize any payment by any Federal authority to any wheat grower in any State. In the second place, although the amount paid to each State is determined by the amount of wheat produced in the State (*Wheat Industry Assistance Act*, sec. 6 (6)), the moneys are to be paid by the State to wheat growers " in proportion to the quantity of wheat sold or delivered for sale." Thus a wheat grower who receives a payment from a State does not receive it in respect of wheat produced or exported, but only in respect of wheat which he sells or delivers for sale. For example, he would receive no payment in respect of seed wheat retained out of his harvest. Finally, every wheat grower in all the States is treated in the same way. He is to receive moneys " in proportion to the quantity of wheat sold or delivered for sale by " him (*Wheat Industry Assistance Act*, sec. 6 (7)). Thus, if it were necessary that these payments should be uniform, that condition would be satisfied. The payments for the relief of distressed wheat growers and for taking them off unsuitable land are plainly not bounties on the production or export of goods. Thus the objection based upon sec. 51 (iii.) of the Constitution fails at all points.

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The defendant further objects that the provisions for grants to States are invalid because the Minister, and not the Commonwealth Parliament, determines the amount and the conditions of the grants. Thus, under sec. 7 of the *Wheat Industry Assistance Act*, the Minister, after the first year, determines the amount to be received by the States, and the Minister must approve the method of distribution of moneys for transferring distressed wheat farmers from unsuitable land (sec. 7 (5)). Further, under sec. 10, the Governor-General may suspend payment altogether in certain events, and under sec. 14 the Minister, subject to a maximum limit, determines the amount to be paid to Tasmania.

In my opinion, none of these objections, even if well founded as objections to the validity of these sections, could affect the validity of the taxation Acts. Even if the provisions as to the distribution of the funds established under the *Wheat Industry Assistance Act* were invalid, that invalidity would affect only the expenditure of moneys under that Act, and not the collection of moneys under the various flour taxation Acts. Although the Acts are all directed towards the assistance of wheat farmers, and in a readily intelligible sense form part of one scheme, there is nothing to show that Parliament intended that the tax should not be collected if any of the provisions for expenditure of money out of the consolidated revenue fund, augmented by the proceeds of the tax, should prove to be invalid. An analogous case may be suggested. Parliament might provide by an appropriation Act for the expenditure of, let it be supposed, a certain proportion of the moneys collected by way of income tax. If those provisions for appropriation were invalid, I do not think that it could be contended that therefore the whole or any part of the income taxation legislation of the Commonwealth was invalid.

But, in the second place, the objections are, in my opinion, not well founded. The grants made by the *Wheat Industry Assistance Act* are made by virtue of the power conferred on the Commonwealth Parliament by sec. 96 of the Constitution, which is as follows: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such

terms and conditions as the Parliament thinks fit." The words of this section show that Parliament may grant financial assistance to a single State under this power and may therefore discriminate between States in making grants. They also show that the Parliament has the fullest power of fixing the terms and conditions of any grant made under the section. Parliament does fix the terms and conditions of the grant if, by legislation, it authorizes a Minister to determine such terms and conditions. It is too late now to argue that terms and conditions determined by a Minister under such legislation are not determined by the Parliament (*Powell* v. *Apollo Candle Co.* (1); *Baxter* v. *Ah Way* (2); *Roche* v. *Kronheimer* (3); *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes* v. *Dignan* (4); *Radio Corporation Pty. Ltd.* v. *The Commonwealth* (5)). Further, the case of *Victoria* v. *The Commonwealth* (6) (the *Roads Case*) is conclusive against the defendant upon this point. It was there held, by a court of seven justices, that the *Federal Aid Roads Act* 1926 was a valid enactment, "being plainly warranted by the provisions of sec. 96 of the Constitution, and not affected by those of sec. 99 or any other provisions of the Constitution" (7). The *Federal Aid Roads Act* approved agreements between the Commonwealth and the States for making roads under which payments were made to the States "in such amounts at such times and subject to such conditions as the Minister may from time to time determine." Other provisions of the agreements required the Minister to be satisfied as to various matters before he was bound to make payments. It was argued that "the terms and conditions referred to in sec. 96 must be terms and conditions imposed by the Parliament itself and not terms and conditions fixed by executive authority" (8). This argument was rejected, and it must again be rejected in the present case.

Sec. 96 is a means provided by the Constitution which enables the Commonwealth Parliament, when it thinks proper, to adjust inequalities between States which may arise from the application of uniform non-discriminating Federal laws to States which vary in

(1) (1885) 10 App. Cas. 282.
(2) (1909) 8 C.L.R. 626.
(3) (1921) 29 C.L.R. 329.
(4) (1931) 46 C.L.R. 73.
(5) (1938) 59 C.L.R. 170.
(6) (1926) 38 C.L.R. 399.
(7) (1926) 38 C.L.R., at p. 406.
(8) (1926) 38 C.L.R., at p. 405.

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development and wealth. Discrimination is prohibited in laws with respect to taxation (sec. 51 (ii.). Bounties must be uniform (sec. 51 (iii.)). Laws or regulations of trade, commerce or revenue must not give preference to one State or part thereof over another State or part thereof (sec. 99). But these "equal" laws may produce very unequal results in different parts of Australia. A uniform law may confer benefits upon some States, but it may so operate as to amount to what is called "a Federal disability" in other States. Sec. 96 provides means for adjusting such inequalities in accordance with the judgment of Parliament. That section is not limited by any prohibition of discrimination. There is no general prohibition in the Constitution of some vague thing called "discrimination." There are the specific prohibitions or restrictions to which I have referred. The word "discrimination" is sometimes so used as to imply an element of injustice. But discrimination may be just or unjust. A wise differentiation based upon relevant circumstances is a necessary element in national policy. The remedy for any abuse of the power conferred by sec. 96 is political and not legal in character.

It was also objected that as the object of the provision in sec. 14 of the *Wheat Industry Assistance Act* enabling the minister to grant special financial assistance to Tasmania was to make it possible for Tasmania to refund the tax to Tasmanian taxpayers, the "real purpose" of that Act was to make possible a discrimination between the States in breach of sec. 51 (ii.) of the Constitution.

This objection is, in my opinion, met by what I have already said, namely, that the taxation legislation of the Commonwealth does not discriminate between States, that appropriation Acts of the Commonwealth are not subject to sec. 51 (ii.) of the Constitution, and that legislation by the State of Tasmania is not subject to any limitation arising from that section.

The regulations under which Tasmania distributed the money received from the Commonwealth provided that taxpayers should enter into a bond to repay the amount received by way of relief if they exported from Tasmania to other States flour upon which tax had been paid in Tasmania in respect of which payment they had received relief. This, it was said, imposed a burden upon inter-State

trade contrary to sec. 92 of the Constitution. But even if the regulations which Tasmania has chosen to make are inconsistent with sec. 92, their invalidity cannot have the effect of making any Commonwealth legislation invalid. It would, I think, be impossible to hold that, because a State government elected to make certain regulations under a valid State Act, Commonwealth legislation, not referring to or dependent upon such regulations in any way, could be rendered invalid. Commonwealth statutes are not at the mercy of State legislatures or governments in the manner suggested.

The only remaining objection of the defendant is based upon provisions under the flour taxation Acts which enable the Minister, in accordance with a recommendation from the Wheat Stabilization Committee established under the *Wheat Industry Assistance Act*, to fix the amount of tax. The amount of tax, within a limit, is to be determined by the difference between the actual price of wheat and 5s. 2d. per bushel on rail at Williamstown, the difference in wheat prices being translated into difference in flour prices: See, for example, *Flour Tax (Stocks) Act*, sec. 5. The objection is that the Minister, and not Parliament, fixes the tax. The same objection was taken in *Powell* v. *Apollo Candle Co.* (1). In that case an Order in Council issued under the *Customs Regulation Act* 1879, of New South Wales authorized the Governor, acting upon the opinion of the Collector of Customs, to fix the rate of duty upon imported articles. It was objected that the power of taxation was vested by the Constitution in Parliament and not in the Governor. Their Lordships of the Privy Council said:—"It is argued that the tax in question has been imposed by the Governor, and not by the legislature, who alone had power to impose it. But the duties levied under the Order in Council are really levied by the authority of the Act under which the order is issued. The legislature has not parted with its perfect control over the Governor, and has the power, of course, at any moment, of withdrawing or altering the power which they have entrusted to him. Under these circumstances their Lordships are of opinion that the judgment of the Supreme Court was wrong in declaring sec. 133 of the *Customs Regulation Act* 1879 to be beyond the power of the legislature" (2). This case was followed

(1) (1885) 10 App. Cas. 282.

(2) (1885) 10 App. Cas., at p. 291.

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and applied in this court in *Nott Bros. & Co. Ltd.* v. *Barkley* (1), where *Isaacs* J. (2) described the same objection as "a cardinal error," saying that the Privy Council "had for ever settled that question in *Powell* v. *Apollo Candle Co.*" (3). Accordingly, in my opinion, this objection fails.

I have not referred to some arguments which were addressed to the court with respect to the admissibility of certain evidence. I have said that the reference in the preamble of the *Wheat Industry Assistance Act* to the conference of Premiers made the report of the proceedings at that conference admissible. But I do not think that this fact is important in the present case. Federal and State legislation passed after the conference very plainly carries out the general scheme which the conference desired. But this circumstance appears to me to be irrelevant. If the statutes carry out the scheme, their validity is determined by what they in fact do and the prearranged scheme is irrelevant. If the statutes do not carry out the scheme, their validity is still determined by what the statutes in fact do and again the scheme is irrelevant. Evidence was tendered of statements by the Treasurer of the Commonwealth contained in minutes approved by him as to the basis of the grants to Tasmania. These minutes show that the Treasurer was carrying out the scheme according to its intention, but the validity of the statute under which he acted could not be affected by what the Treasurer purported to do under the statute, if what he did was not authorized by the statute. If what he did was authorized by the statute, then the question is whether a statute conferring such authority is valid. Thus this evidence also does not appear to me to be important. I do, however, agree that, where the question of the validity of a statute is raised, a declaration by parliament as to the character of the statute cannot be accepted by a court as conclusive in relation to the question of validity. There is ample authority for this statement in decisions of the Privy Council. See *Shannon* v. *Lower Mainland Dairy Products Board* (4), citing *Gallagher* v. *Lynn* (5): In the case of a parliament of limited powers "the legislation must not under the guise of dealing with one matter in fact encroach upon

(1) (1925) 36 C.L.R. 20.
(2) (1925) 36 C.L.R., at p. 29.
(3) (1885) 10 App. Cas. 282.
(4) (1938) A.C., at p. 720.
(5) (1937) A.C. 863, at p. 869.

the forbidden field." See also *Attorney-General for Ontario* v. *Reciprocal Insurers* (1) : " Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature is really doing." Reference may also be made to *In re Insurance Act of Canada* (2), where their Lordships inquired whether an amendment was or was not " a genuine amendment " of the law or really an attempt by a *soi-disant* amendment to deal with a matter which was not within the power of the legislature ; and reference is made to a " false definition " intended to give a colour of validity to a statute which was, in truth, invalid (3). It is also well settled in the United States of America that the mere declaration by a legislature that the subject matter of the legislation falls within a particular category cannot be accepted as conclusive when a question of the validity of the statute arises : See, for example, *Tyson & Brother* v. *Banton* (4).

For the reasons given, I am of opinion that the defences to the action fail, and that there should be judgment for the plaintiff for the amount claimed.

RICH J. I have had the opportunity of reading the judgment of the Chief Justice and concur in it.

STARKE J. These proceedings commenced in the District Court at Sydney in New South Wales. The claim was for £85 12s., being the first instalment and additional tax for late payment payable to the Crown under the *Flour Tax (Stocks) Act* 1938, No. 50, and *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938, No. 48. The only defence raised was that the Acts were beyond the power of the Commonwealth Parliament. The proceedings were then removed into this court under sec. 40 of the *Judiciary Act*. Evidence was taken before this court, both documentary and oral, but all subject to objection and pursuant to the power contained in the *Judiciary Act*, sec. 18, and a direction was given that the case be argued before the Full Court.

(1) (1924) A.C., at p. 337.
(2) (1932) A.C., at p. 49.
(3) (1932) A.C., at p. 51.
(4) (1927) 273 U.S. 418 ; 71 Law. Ed. 718.

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The preamble to the *Wheat Industry Assistance Act* 1938, No. 53, sets forth the circumstances surrounding the imposition of the tax. It is as follows:—"Whereas at a conference between the Prime Minister of the Commonwealth and the Premiers of the States held in Canberra, at the request of the Premiers, on the twenty-ninth day of August, One thousand nine hundred and thirty-eight, the co-operation of the Government of the Commonwealth was sought in putting into operation a scheme to ensure to wheat growers a payable price for wheat: And whereas the Premiers on behalf of their respective States undertook that, if the Commonwealth agreed to co-operate in the said scheme, legislation would be passed by the said States providing for the fixing of such prices for flour sold for home consumption in Australia as would provide for wheat growers a payable average price on all the wheat produced by them: And whereas, in order to ensure a payable price in respect of the wheat sold for home consumption in Australia, it was represented at the said conference that it would be necessary that a tax be imposed upon flour sold for home consumption in Australia and that the proceeds of the tax be distributed among wheat growers in proportion to the quantities of wheat respectively produced by them: And whereas the Prime Minister on behalf of the Commonwealth agreed that the Commonwealth would co-operate in the said scheme and that any legislation necessary on the part of the Commonwealth would be submitted to the Parliament of the Commonwealth: And whereas legislation has been passed by the Parliaments of the States providing for the fixing of prices for flour sold for home consumption in Australia."

This scheme, as it was called, was implemented both by the Commonwealth and the States. The Commonwealth enacted the *Flour Tax Act* 1938, No. 49, the *Flour Tax (Stocks) Act* 1938, No. 50, the *Flour Tax (Imports and Exports) Act* 1938, No. 51, a *Wheat Tax Act* 1938, No. 58, an assessment Act, the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938, No. 48, and the *Wheat Industry Assistance Act* 1938, No. 53. The States, other than Tasmania, passed various Acts, all to the same effect, providing for the regulation of flour and other products of wheat and for the application of moneys paid to the State by the Commonwealth for assistance to

the wheat growers. The Acts of the State of Tasmania were the *Wheat Products Prices Act* 1938 (2 Geo. VI. No. 39) which provided for the regulation of the prices of flour and other products of wheat and the *Flour Tax Relief Act* 1938 (2 Geo. VI. No. 40) which provided for the relief of persons paying flour tax on flour for consumption in or imported into Tasmania.

The *Flour Tax (Stocks) Act* 1938 imposed a tax upon all flour in excess of one thousand pounds in weight held in stock on 5th December 1938 by any person not the manufacturer of that flour. The rate of tax, not in any case exceeding £7 10s. per ton of flour, was such rate per ton of flour as the Minister in accordance with a recommendation by the committee (the Wheat Stabilization Advisory Committee constituted under the *Wheat Industry Assistance Act* 1938, No. 53), declares to be the amount by which the price per ton of flour based upon the price of wheat per bushel free on rails at Williamstown in the State of Victoria at the time of the recommendation of the committee was less than what in the opinion of the committee the price of flour would be if the price of wheat per bushel free on rails at Williamstown were five shillings and two pence.

This form of imposing taxation was bad, so it was contended, because the Parliament could not confer upon or delegate to any executive authority the function of determining the rate of tax. But this contention has many times been considered in this court and always rejected for reasons that are stated in the cases of *Victorian Stevedoring and General Contracting Co. Ltd. and Meakes* v. *Dignan* (1): See also *Roche* v. *Kronheimer* (2) and *Crowe* v. *The Commonwealth* (3).

The preamble, already mentioned, was referred to in support of an argument to the effect that the flour taxes were imposed to provide financial assistance to the States and to ensure wheat growers a payable price for wheat, but that the Parliament had not granted such financial assistance. The argument was based upon the Constitution, sec. 96, which enacts that Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit. The *Wheat Industry Assistance Act* 1938,

(1) (1931) 46 C.L.R. 73. (2) (1921) 29 C.L.R. 329.
(3) (1935) 54 C.L.R. 69.

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No. 53, sec. 7 (2), provides for payments to each State by way of financial assistance out of a fund into which had been paid from consolidated revenue the amounts collected by way of flour taxes of such amount, if any, as the Minister administering the Act (*Acts Interpretation Act* 1901-1937, sec. 17) after advice from the State Minister determined. Substantially this contention again asserts the proposition that Parliament cannot delegate its authority or confer upon an executive authority the function of determining the amount of assistance that a State requires. It is contrary to the decisions already mentioned, and also to the actual decision, *Victoria* v. *The Commonwealth* (1) : See clause 2 (3) of the agreement scheduled to the *Federal Aid Roads Act* 1926, No. 46. I would add that I am far from convinced that the validity of the taxing Acts depends, in any way, upon the validity or effectiveness of the grant of financial assistance to the States.

Much broader ground, however, was relied upon in support of the defence. It is said that the scheme of the Acts already mentioned involves taxation which discriminates between the States (Constitution, sec. 51 (ii.)), bounties on the production or export of goods which are not uniform throughout the Commonwealth (Constitution, sec. 51 (iii.)) and preference to the State of Tasmania over the other States contrary to sec. 99 of the Constitution : " The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

The provisions of the various Acts may be summarized. The tax Acts impose the taxation and the assessment Act provides for its assessment, collection and recovery. The *Wheat Industry Assistance Act* 1938, No. 53, provides for the grant of financial assistance to the States. A wheat industry stabilization fund is created into which is paid, out of the consolidated revenue fund, all moneys collected under the assessment Act, sec. 5. Moneys to the credit of the fund are applied in making grants of financial assistance to the States (sec. 6). The whole amount paid into the fund, subject to the deduction of certain payments, expenses and credits, is applied in making payments to the States of such amounts respec-

(1) (1926) 38 C.L.R. 399.

tively that there shall be paid to each State in respect of that year the amount which bears to that total amount after the deduction has been made, the same proportion as the quantity of wheat produced in that State during the year bears to the total quantity of wheat produced in Australia during that year. Any amount so granted and paid to a State shall be paid to the State upon condition that it is distributed to the wheat growers in that State in proportion to the quantity of wheat sold or delivered for sale by each wheat grower during the year in respect of which payment is made (sec. 6). Special accounts are kept in the fund, called "Wheat Industry Special Account" and "Wheat Tax Account," and the amounts at credit of those special accounts applied for purposes mentioned in accordance with the determination of the Minister administering the Act: See secs. 6 (3), (4), (5), (7) and (8); *Acts Interpretation Act* 1901-1937, sec. 17—the Minister.

This court has decided that grants of financial assistance to the States may be made on such terms and conditions as the Parliament thinks fit and are therefore unaffected by sec. 99 or any other provision of the Constitution (*Victoria* v. *The Commonwealth* (1)).

So far, admittedly, the provisions of the *Wheat Industry Assistance Act* 1938, No. 53, do not contravene any provision in the Constitution. But the argument concentrated upon sec. 14 of that Act coupled with the Tasmanian legislation. The provisions of sec. 14 are:—"(1) In addition to any amount granted by way of financial assistance to the State of Tasmania in pursuance of section six or section seven of this Act, there shall, subject to this section, be granted out of the fund to that State, in each year by way of financial assistance, such amount as the Minister determines: Provided that the amount paid to that State in any year shall not be greater than the sum (if any) by which the amount collected in that year under the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 in respect of flour consumed in that State (whether as flour or as goods manufactured from flour) exceeds the total amount paid to that State in respect of that year under section six and section seven of this Act: Provided further that no amount shall be payable under this section in respect of any year during which no moneys (other than moneys

(1) (1926) 38 C.L.R. 399.

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collected as tax upon wheat exported from Australia or upon wheat produced and sold in Australia) were collected under the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938. (2) Payments under this section shall be made at such times and in such instalments as the Minister determines. (3) For the purposes of this section 'year' means a period of twelve months commencing on the date of coming into operation of the *Flour Tax (Wheat Industry Assistance) Assessment Act* 1938 or any period of twelve months commencing on any anniversary of that date."

The Tasmanian *Flour Tax Relief Act* 1938 (2 Geo. VI. No. 40) provided for the opening in the books of the State Treasury of an account called the "Flour Tax Relief Suspense Account" which was credited with all moneys received by the State from the Commonwealth as a grant by way of financial assistance under the *Wheat Industry Assistance Act* 1938, No. 53, of the Commonwealth (sec. 4). Any person who in Tasmania paid flour tax on flour for consumption in the State or who imported into the State from any other State flour for consumption in the State upon which flour tax had been paid elsewhere than in the State might apply for payment to him of an amount by way of relief in respect of the flour tax so paid and payments might be made accordingly (secs. 5, 6 and 7). According to the evidence an amount was paid to persons claiming relief under the Act equal to the amount of flour tax paid less ten shillings per ton.

It is this scheme or method of relief from flour taxation that operates, so it is argued, in a manner prohibited by the Constitution and avoids the whole of the flour taxes imposed by the Commonwealth. But the invalidity of sec. 14 does not destroy and bring down the flour tax Acts of the Commonwealth. The provision in sec. 14 is perfectly distinct and separable. It is not so interwoven and intermixed with the other provisions of the Act that a radically or substantially different law is enacted if the provisions of sec. 14 be inoperative. The grant to Tasmania under sec. 14 is not dealt with as part of an indivisible scheme but as a separate and independent subject matter. The legislation, if sec. 14 were inoperative, leaves intact a body of provisions "consistent, workable and effective," dealing with a subject matter within the power of the Common-

wealth (*Whybrow's Case* (1); *Olsen* v. *City of Camberwell* (2)). Further still, the provisions of the *Acts Interpretation Act* 1901-1937, sec. 15A, operate as a legislative declaration that the flour tax Acts shall not fail even though the provision in sec. 14 be invalid: "Every Act . . . shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power" (*Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (3); *Australian Railways Union* v. *Victorian Railways Commissioners* (4))—Cf. *Carter* v. *Carter Coal Co.* (5). The same answer may be given to an argument based on secs. 6 (7) and 10 that bounties have been granted by the Parliament that are not uniform throughout the Commonwealth.

Consequently the defence in this case fails. In this view it is not actually necessary to decide whether the provisions of sec. 14, coupled with the Tasmanian Act, operate in contravention of the Constitution. One cannot but be impressed, as *Higgins* J. said in *Attorney-General for New South Wales* v. *Brewery Employees Union of New South Wales* (6), "with the wisdom of the practice, so well established in the Supreme Court of the United States, never to decide against an Act as unconstitutional except 'in the last resort and as a necessity in the determination of real, earnest and vital controversy between individuals': *Chicago and Grand Trunk Railway Co.* v. *Wellmann* (7). Nothing would tend to detract from the influence and the usefulness of this court more than the appearance of an eagerness to sit in judgment on Acts of parliament, and to stamp the Constitution with the impress which we wish it to bear. It is only when we cannot do justice, in an action properly brought, without deciding as to the validity of the Act, that we are

(1) (1910) 11 C.L.R. 1, at p. 36.
(2) (1926) V.L.R. 58, at p. 68; 47 A.L.T. 116, at p. 120.
(3) (1921) 29 C.L.R. 357.
(4) (1930) 44 C.L.R. 319, at p. 386.
(5) (1936) 298 U.S. 238, at pp. 312, 313, 321, 322, 334, 335; 80 Law. Ed. 1160, at pp. 1189, 1190, 1194, 1195, 1201.
(6) (1908) 6 C.L.R. 469, at p. 590.
(7) (1892) 143 U.S. 339, at p. 345; 36 Law. Ed. 176, at p. 179.

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entitled to take out this last weapon from our armoury": Cf. *Carter* v. *Carter Coal Co.* (1).

I shall, however, do no harm in this particular case in expressing my opinion that the Commonwealth Acts do not contravene any provision of the Constitution. The court cannot concern itself with the motives of the Parliaments. All it can rightly do is to inquire whether the means devised by the Parliaments in the execution of their powers are prohibited by the Constitution. It is plain on the face of the various Acts already mentioned and is explicitly recited in the preamble to the *Wheat Industry Assistance Act* 1938, No. 53, that the Commonwealth and the States were co-operating in a scheme to ensure wheat growers a payable price for wheat. The legislative bodies of the Commonwealth and the States were each entitled to use to the full the powers vested in them for the purpose of carrying out the scheme. Co-operation on the part of the Commonwealth and the States may well achieve objects that neither alone could achieve; that is often the end and the advantage of co-operation. The court can and ought to do no more than inquire whether anything has been done that is beyond power or is forbidden by the Constitution.

The main feature of the scheme to ensure wheat growers a payable price for their wheat has not been attacked. It is contended, however, that the provisions of secs. 6 and 10 of the *Wheat Industry Assistance Act* 1938, No. 53, involve a bounty on the production or export of goods that is not uniform throughout the Commonwealth. The argument, if sound, would not, in my opinion, destroy the taxing Acts for reasons already given. But sec. 6 grants no bounties: it grants financial assistance to the States upon condition that the amount granted is distributed to wheat growers in manner provided by the section. Even if the same result might have been achieved by the grant of bounties, still the Parliament did not resort to that method but to another authorized and not forbidden by the Constitution. The lack of substance in the contention is accentuated when it was suggested that uniformity is lacking in the grant of the so-called bounties because the Parliament might under sec. 10 suspend financial assistance to any State in certain events. But

(1) (1936) 298 U.S., at p. 325; 80 Law. Ed., at p. 1196.

such a provision is not wanting in uniformity: it applies a uniform rule to the cases stated in the section though the cases may not occur in each State at the same time: Cf. *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1).

The main objection, however, is based upon the provisions of sec. 14 of the *Wheat Industry Assistance Act* 1938, No. 53. These provisions, at all events, it is said, involve a plain discrimination in taxation between the States or a manipulation of the revenue of the Commonwealth so as to give a preference to Tasmania over the other States. But the taxation Acts do not discriminate in any way between the States. The tax is imposed upon every person within the categories mentioned in the Acts in whatever State he may be: tax Acts (*supra*); assessment Act (*supra*), secs. 10 to 14 both inclusive. Further, sec. 14 is, on its face, a grant by way of financial assistance to Tasmania. It is true that the amount of the grant depends upon the tax collected upon flour consumed in Tasmania and is not greater than the sum, if any, by which the amount of tax collected exceeds the total amount of grants by way of financial assistance paid to the State under other sections of the Act. But the State is free to deal with the grant free from any control of the Commonwealth. The Commonwealth does not by any law or regulations of revenue give any preference to the State of Tasmania that is forbidden by the Constitution for, as already observed, grants of financial assistance to a State are unaffected by sec. 99 or any other provision of the Constitution. A grant of financial assistance of a State necessarily depends upon the financial position of the State at the time of the grant. The Constitution in sec. 96 explicitly enacts that financial assistance may be granted to any State, which makes plain that a grant under this section to one or more States and not to others is no infringement of the provisions of sec. 99 of the Constitution.

A grant of financial assistance to a State under sec. 96 is not, therefore, a law or regulation of trade, commerce or revenue which gives preference to one State over another State. Such a grant is authorized and not forbidden by the Constitution.

(1) (1906) A.C. 360.

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It is clear enough though that an end contemplated by the *Wheat Industry Assistance Act* 1938, No. 53, sec. 14, and the *Flour Tax Relief Act* of Tasmania was relief from flour tax in respect of flour consumed in or imported into Tasmania by payments of amounts determined in the manner required by the Act. The Commonwealth legislation on its face purports to levy flour taxes and by sec. 14 to grant financial assistance to Tasmania, but it is said that the real object or purpose of the legislation is the giving of a preference to Tasmania. The history of the legislation, its operation, and the resolutions of a conference recited in the preamble already mentioned were legitimately referred to in support of this contention, but a good deal of inadmissible evidence was also relied upon such as communications between Ministers of State and other executive officers and speeches made at conferences by the Prime Minister of the Commonwealth and ministers of the States. I do not find it necessary to discuss the evidence in detail, for I think all the material relevant to the contention appears upon the face of the legislation itself, particularly in the preamble to the *Wheat Industry Assistance Act* 1938, No. 53. Everything is plainly and fairly stated: nothing is cloaked and hidden. But, as already stated, the end was achieved lawfully by methods within the constitutional powers of the legislative bodies and by means that are not anywhere forbidden by the Constitution.

Several cases, however, were referred to in support of the contention, but I shall confine myself to three: *Attorney-General for Alberta* v. *Attorney-General for Canada* (1), *United States* v. *Butler* (2) and *R.* v. *Barger* (3).

The *Alberta Case* (4) was a decision under a reference to the Supreme Court of Canada pursuant to the *Supreme Court Act*. The Legislative Assembly of the Province of Alberta had passed a Bill imposing on every corporation (other than the Bank of Canada) incorporated for the purpose of doing banking business in the Province an annual tax, in addition to any tax payable under any other Act, on capital and on reserve fund and undivided profits. It was sought to justify the Bill under sec. 92 (2) of the *British North America Act* as being

(1) (1939) A.C. 117.
(2) (1935) 297 U.S. 1; 80 Law. Ed. 477.
(3) (1908) 6 C.L.R. 41.
(4) (1939) A.C. 117.

"direct taxation within the province in order to the raising of a revenue for provincial purposes." The Judicial Committee examined the provisions of the Bill, the legislative history of Alberta leading up to the Bill in question, its operation and effect and its object or purpose, and the conclusion was reached that instead of being in any true sense taxation in order to the raising of revenue for Provincial purposes the Bill was merely part of a legislative plan to prevent the operation within the Province of banking institutions which had been incorporated and given the necessary power to conduct their business by the Dominion Parliament pursuant to sec. 91 (15) and (16) of the *British North America Act*. But the constitutional power of the Commonwealth in respect of taxation is general in its terms: "Taxation: but so as not to discriminate between States or parts of States" (sec. 51 (ii.)). And the aim and purpose of the Australian legislation is to raise money for the purpose of assisting wheat growers and not to trespass upon any authority of the States.

United States v. *Butler* (1) dealt with an Act of Congress which enacted a processing tax upon the first domestic processing of commodities. The Act on its face was passed to increase the price of certain farm products for the farmer by decreasing the quantities produced: the decrease was to be attained by making payments of money to farmers who under agreements with the government reduced their acreage and crops. It was decided, three justices dissenting, that the Act was part of a plan to invade the reserved rights of the State (2) and to trespass upon their authority. But the Commonwealth legislation invades no rights reserved by the Constitution to the States and in no wise trespasses upon their authority: See *Engineers' Case* (3).

The case of *R.* v. *Barger* (4) in this court held, against the dissent of two justices, that an Act purporting to impose duties of excise was in truth an Act to regulate the conditions of manufacture of agricultural implements and therefore not an exercise of the power of taxation conferred by the Constitution. The terms of the Act itself led to this conclusion, but are not relevant to the legislation

(1) (1935) 297 U.S. 1; 80 Law. Ed. 477.
(2) (1935) 297 U.S., at p. 68; 80 Law. Ed., at p. 489.
(3) (1920) 28 C.L.R. 1.
(4) (1908) 6 C.L.R. 41.

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now in question. All the members of the court, however, concurred in the view that the question was one of power, that the motives which actuated the legislature, the end desired, and the indirect effect of the Act were all equally irrelevant. And, in my opinion, the legislation, in this case, is within power for the reasons already given.

EVATT J. This action raises a question of the greatest constitutional importance. Before any decision was given the action was removed to this court from a New South Wales District Court, where the defendant's sole defence to actions brought for the recovery of flour tax under Commonwealth Acts Nos. 48 and 50 of 1938 was that such Acts were *ultra vires* the Commonwealth Parliament. Before this court, several minor grounds were relied upon to establish the invalidity of the Commonwealth Acts. But the outstanding point is whether Commonwealth Acts Nos. 48 to 53 of 1938 inclusive, which include a scheme of taxing flour, infringe the prohibition contained in sec. 51 (ii.) of the Commonwealth Constitution to the effect that the Commonwealth power of taxation must be exercised "so as *not* to discriminate between States or parts of States."

This point does not raise any question as to the limits *inter se* of the constitutional powers of the Commonwealth and any of the States: See *James* v. *Cowan* (1). The issue is simply whether the Commonwealth Parliament's undisputed power of taxation has been used inconsistently with an overriding constitutional mandate.

In my opinion there has been a very thinly disguised, almost a patent, breach of the provision against discrimination; and the especial significance of the present case lies in its result, which practically nullifies a great constitutional safeguard inserted to prevent differential treatment of Commonwealth taxpayers solely by reference to their connection or relationship with a particular State.

In the present case, moreover, the discrimination exercised by the Commonwealth in favour of the State of Tasmania bears little resemblance to the comparatively minor type of differentiation illustrated by *Cameron's Case* (2), where the Commonwealth statutory rule was

(1) (1932) A.C., at p. 560; 47 C.L.R., at pp. 397, 398.
(2) (1923) 32 C.L.R. 68.

seeking to lay down a fair average value of stock but offended because that value was varied in accordance with the State in which the stock were found. But here, taxpayers associated with the favoured State obtain the tremendous advantage of a remission or exemption of more than ninety per cent of a very heavy levy which is exacted without any remission or exemption in the case of taxpayers similarly associated with the other five States of the Australian Commonwealth.

Under the Commonwealth Constitution, taxing schemes are often spread over a number of Acts. For one thing, except in the case of duties of customs or of excise, laws imposing taxation must deal with one subject of taxation only (The Constitution, sec. 55). The draftsman is very apt to separate different aspects of what is or may be regarded as one subject of taxation. Again, sec. 53 of the Constitution takes away from the Senate the power of originating or amending bills imposing taxation; but sec. 55 intervenes to prevent the device of "tacking" by the House of Representatives by requiring that laws imposing taxation shall deal only with the imposition of taxation. For very many years this requirement has been observed by the draftsman with a literalness which at times seems to have been almost pedantic. The established practice is to pass one Act which imposes a rate of taxation and another tax Act, called the "assessment" Act, which defines the *subject matter* of the tax, provides for its collection and recovery, for exemptions, for refunds in appropriate cases and for other necessary incidents in any taxation scheme. The practice has been followed in the Commonwealth's present taxing scheme.

In the light of the established practice, the Commonwealth legislature, if it was minded to establish a taxation system which discriminated between States, and to do so by the most direct method, would include in the assessment Act a provision exempting either wholly or partially from the operation of the tax imposed by the rates Act either taxpayers or goods solely because of their association with the States which were to be favoured. Thus, in a system of income taxation, the assessment Act would provide (*a*) that those entitled to exemption should include, e.g., all persons who were resident in the State of New South Wales, or (*b*) that the "income"

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subject to tax should not include income earned in such State, or (c) that from the "income" of every taxpayer there should be deducted expenditure incurred in earning it, provided it was incurred in such State.

Similarly, in a system of taxing the production of a commodity, the assessment Act might provide that taxpayers should be entitled to exemption from payment of a stated percentage of the tax on condition that the commodity should be manufactured in Victoria, or on condition that the commodity should be consumed in Victoria, or on condition that the raw materials used in its manufacture should be purchased from Victoria.

In all such cases of discrimination contrary to sec. 51 (ii.), the rates Act would not, of itself, evidence the fact of discrimination. It would, presumably, merely declare that taxation at the rate it fixes shall be imposed in accordance with the provisions and conditions specified in the assessment Act. Incidentally, the examples given above show that sec. 51 (ii.) is infringed wherever a condition or provision or exemption or relief from taxation fails to treat all States of the Commonwealth alike. It is no answer to say that if a stated condition of exemption from income tax was residence in Victoria, every taxpayer in Australia was at liberty to satisfy the condition by residing in Victoria. By establishing such a condition of exemption, the taxing scheme infringes sec. 51 (ii.) (per *Isaacs* J. in *Cameron's Case* (1)); and, unless it was clear that in case of challenge in the courts, the exemption was to be regarded as obliterated (and the proceeds from the tax thereby increased), the tax, as well as the exemption from tax, would be void, for the forbidden discrimination arises from their conjoint operation.

The leading case on sec. 51 (ii.) of the Constitution is *R.* v. *Barger* (2). There the Commonwealth *Excise Tariff* 1906 was held to be invalid upon four distinct grounds, three of which were specified by the majority of the court (3) and are irrelevant to the present question. But the fourth ground of attack was based upon sec. 51 (ii.) and it was also sustained. All that the *Excise Tariff* did was to impose duties of excise upon specified goods at specified

(1) (1923) 32 C.L.R., at p. 76.
(2) (1908) 6 C.L.R. 41.
(3) (1908) 6 C.L.R., at p. 78.

rates, and to provide that the Act should not apply to goods manufactured by any person in any part of the Commonwealth under conditions as to remuneration of labour which were (by any one of four prescribed methods) deemed fair and reasonable.

It was possible that, as a result of the so-called "exemption," goods of the same class would be excisable in some parts of the Commonwealth but not in others. But it is very difficult to appreciate the court's finding that because of such possibility the Act discriminated between States or parts of States because there was differentiation in the taxing scheme by reference to the criterion of locality. The majority so held, but, with great respect, I think erroneously. This particular ruling in *R.* v. *Barger* (1) has never been formally overruled, but the reasoning of the judges in cases like *Cameron* v. *Deputy Federal Commissioner of Taxation* (2) tells against it. Of course, the first ground of the decision—that the *Excise Tariff* was in substance not an attempt to raise revenue, but to penalize unfair labour conditions and was therefore outside the specified heads of Commonwealth legislative power—was quite independent of the argument based on sec. 51 (ii.).

In *Cameron's Case* (3), *Higgins* J. said of *Barger's Case* (1) :—"We were in the minority in that case as to the main decision; but I cannot find that as to our general understanding of discrimination between States, as to our major premiss, we were in conflict with the majority of the court. Unless and until overruled on the subject, I adhere to what I then said".

In these circumstances it is convenient, because most favourable to the Commonwealth, to accept the judgment of *Isaacs* and *Higgins* JJ. in *Barger's Case* (1) as correctly stating the principle to be applied in the interpretation of sec. 51 (ii.). *Isaacs* J. said :—

> "The pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities; and there is nothing, in my opinion, to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that

(1) (1908) 6 C.L.R. 41. (2) (1923) 32 C.L.R. 68.
(3) (1923) 32 C.L.R., at pp. 78, 79.

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is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States " (1).

Applying this principle, the learned judge held, in my opinion rightly, that in the case of the particular enactment under discussion, " the area is marked out by the circumstances, not the circumstances by the area " (2).

In his judgment, *Higgins* J. said :—" *There is not one rate of excise for Queensland and another for West Australia, nor is there one set of conditions of exemption for Tasmania and another for Victoria.* Each manufacturer is to be treated on his own merits ; and all the four bases for exemption are applicable to all manufacturers, wherever they are found in Australia " (3).

In *Cameron's Case* (4), *Isaacs* J. applied these principles. He said :—

" Stock in Queensland and stock in New South Wales are, by reason solely of their State situation, ' treated differently,' by the mere fact that different standards are applied to them respectively. It does not matter whether those legal standards are arbitrary or measured, whether dictated by a desire to benefit or to injure, the simple fact is they are ' different,' and those different legal standards being applied simply because the subject of taxation finds itself in one State or the other there arises the discrimination by law between States which is forbidden by the Constitution ".

It is clear from these principles laid down in *Barger's Case* (5) and applied in *Cameron's Case* (6) that, if the Commonwealth Parliament granted an exemption from tax to all manufacturers who sold the excisable goods in (say) New South Wales, what *Isaacs* J. calls " the constitutional injunction " of sec. 51 (ii.) would have been disobeyed. Equally in case of income taxation, if an exemption had been granted to all Australians who were resident in New South Wales. In neither case would it have been an answer that, in theory, every manufacturer could have obtained the exemption by restricting his sales to New South Wales, and every income taxpayer resident elsewhere could have changed his residence to that State. In neither case, to use the language of *Isaacs* J. is the " differentiation . . . dependent on natural or business circumstances " (1) ; on the contrary, it is entirely dependent on the factor of locality because it is locality. In neither case do the particular circumstances

(1) (1908) 6 C.L.R., at p. 108.
(2) (1908) 6 C.L.R., at p. 110.
(3) (1908) 6 C.L.R., at p. 131.
(4) (1923) 32 C.L.R., at pp. 76, 77.
(5) (1908) 6 C.L.R. 41.
(6) (1923) 32 C.L.R. 68.

govern or determine the scope of immunity or exemption : immunity or exemption results solely from a consideration of State boundaries.

It is hardly likely that this court will ever be called upon to give its judgment upon instances so plain as those illustrated ; where the exemption from tax is granted upon a State basis, and where the tax is not collected from the exempted persons or upon the exempted goods.

A second type of discrimination arises where the tax is imposed without discrimination, but provision is made in the assessment Act for refunding the tax or a portion thereof to those taxpayers who (to pursue similar illustrations) are resident in New South Wales, or to those taxpayers who manufacture the excisable commodity in Victoria or to those taxpayers who sell the commodity in South Australia. In all such cases, the taxing scheme constituted by the rates Act and the assessment Act would just as clearly infringe the injunction of sec. 51 (ii.). True, the Commonwealth would collect from all taxpayers alike ; but it would refund the tax solely because of considerations applicable to a single State.

In all such cases, moreover, the fact that the provision for refunding would require an appropriation of Commonwealth funds would not be material. Considered by itself, a provision authorizing the expenditure of money would not be a provision with respect to taxation. Considered as part of the taxing scheme, provisions authorizing refunds of tax are provisions in relation to taxation, and are always included in the tax assessment Act.

It needs little imagination to visualize that in all these cases, the representatives elected to the Federal Parliament from the favoured State would view with equanimity, if not with enthusiasm, such a differentiation in the incidence and burden of Commonwealth taxation ; but that is the very possibility which sec. 51 (ii.) was designed to avert ; for by various combinations of State interests, some States could be greatly advantaged, and other States seriously disadvantaged by such taxing schemes. In such cases at least, the aphorism of Chief Justice *Marshall* would apply. The power to tax would be the power to destroy.

I shall now turn to the legislation of the Commonwealth which is said to infringe sec. 51 (ii.). The six Commonwealth Acts

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here in question (Acts Nos. 48 to 53 inclusive) all became law on the same day (2nd December, 1938). On the same day, a Tasmanian Act (No. 40 of 1938) also became law. It will appear that in all seven Acts there was a concurrence, not only of time, but of subject matter and purpose.

Dealing first with the Commonwealth Acts, we find that three of them (Nos. 49 to 51) impose taxation upon flour, No. 49 upon flour manufactured in Australia, No. 50 upon flour held in stock on December 5th 1938, and No. 51 upon flour imported into Australia. Portion of Act No. 51 and the whole of Act No. 52 were part of the same legislative scheme, and imposed a tax upon wheat exported from Australia and wheat grown in Australia and sold to a wheat merchant. But these taxes upon wheat were to operate only in the event of a considerable increase in the price of wheat. That event has not yet happened ; the main object of the scheme having been to increase to a " stabilized " level the effective price of wheat in Australia.

Further, the Tasmanian Act, No. 40 of 1938, relates only to persons who have paid the *flour tax* imposed by the Commonwealth Acts Nos. 49 to 51 inclusive.

Each of the Commonwealth Acts imposing taxation upon flour incorporates most of the provisions of the Commonwealth Act No. 48, i.e., the *Flour Tax* (*Wheat Industry Assistance*) *Assessment Act*, which provides for the collection and recovery of the various taxes, for the administration of the taxing scheme, for certain exemptions (such as flour for use in the Northern Territory) and for refunds of tax, e.g., in relation to flour upon which tax has been paid but which subsequently becomes exempt from tax because (say) consumed in the Northern Territory : See, e.g., Act No. 48, secs. 14 (1) (*d*) and sec. 30.

The crucial point of the present case is conveniently illustrated by this exemption from flour tax and the creation of the ancillary right to refund in the case of flour consumed in the Northern Territory. That Territory is not a State and is therefore outside the prohibition of sec. 51 (ii.). But if such a provision had been applied in favour of the State of Tasmania or if the Northern Territory were a State,

then it is elementary that a discrimination contrary to sec. 51 (ii.) would have been enacted by the Commonwealth.

If such an immunity or exemption was part of the Commonwealth's scheme of legislation, it could have been expressly provided either in the taxing Act, or in the assessment Act, that *in case of flour consumed in the State of Tasmania* :—(*a*) the flour tax was to be levied at the rate of only (say) 8.5 per cent of the rate levied upon flour consumed in the other States of Australia (8.5 per cent is taken because where the flour tax is levied at the rate of £5 17s. 6d. per ton, flour for consumption in Tasmania is in substance levied at the rate of only ten shillings per ton) ; or (*b*) the taxpayer was to be granted a formal exemption of 91.5 per cent of the tax otherwise payable ; or (*c*) the taxpayer, though not granted a formal exemption as in (*b*), was to become entitled to a refund of 91.5 per cent of the tax already paid by him, the Commonwealth providing the necessary funds from the proceeds of the flour tax and payment being made to the taxpayer by some person designated by the Commonwealth of Australia.

If any one of the three courses mentioned had been adopted, the fact of unconstitutional discrimination would have been plainly evident. But a parliamentary draftsman would naturally shrink from so open a defiance of constitutional requirements. Therefore precisely the same result was sought to be achieved by a slight alteration in the *modus operandi*. Instead of adopting any one of the three methods above specified, the draftsman, having several convenient precedents at hand in legislation passed in 1934 and 1935, decided upon a slight variation of method (*c*) above specified.

The Commonwealth was to hand over to another authority approximately 91.5 per cent of the proceeds of the tax collected by the Commonwealth upon flour consumed in Tasmania, and such authority was to repay to each taxpayer affected 91.5 per cent of the tax already paid by him upon flour consumed in Tasmania. Inasmuch as this rebate or remission or exemption would operate for the benefit of Tasmanian consumers, it was decided to select the State of Tasmania itself as the proper and convenient " authority " for the purpose of acting as the Commonwealth's conduit pipe for the refund of Commonwealth tax. Of course, the Commonwealth

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Deputy Commissioner of Taxation in Tasmania or a private person might have been chosen to act: but those responsible thought it better to follow the less direct but very convenient method already devised by those who were the Commonwealth's legal advisers in the years 1934 and 1935.

During those years, on three separate occasions, legislation was passed by the Commonwealth and by the State of Tasmania which was intended to secure, and did secure, for Tasmania special treatment in relation to the flour tax then imposed and collected under the authority of the Commonwealth Parliament. Those occasions were as follows:—

(I.) On 12th December 1933 the Commonwealth Parliament enacted No. 42 of 1933. The Act provided for assistance to wheat-growers. But sec. 12 required a special grant to Tasmania "in each month during which a tax is, under any law of the Commonwealth, imposed upon flour."

On 22nd December 1933 the State of Tasmania enacted No. 31 of 1933, called the *Flour Tax Relief Act*. It required the payment into a special account of the moneys received by way of "special grant" under the Commonwealth Act No. 42 of 1933, and by sec. 2 (3) directed the treasurer to pay out of the special account the full amount of the flour tax paid in respect of flour consumed in Tasmania; the money was payable either to the taxpayer who paid the Federal tax in Tasmania, or to the importer who imported such flour after tax had been paid on it elsewhere in Australia.

(II.) A year later, on 17th December 1934, the Commonwealth Parliament passed Act No. 59 of 1934, which by sec. 9 granted to Tasmania a certain sum for each month during which the Commonwealth tax on flour was being collected. Then, on 4th January 1935, the Tasmanian Parliament passed Act No. 89 of 1934. Again, that Act created a special account into which the special Commonwealth grant was to be swept. The procedure for obtaining refunds of the tax or "relief in respect of the flour tax" was slightly altered. A certificate had to be obtained, and there was no provision that the whole of the tax was to be refunded.

(III.) A year later still, on 9th December 1935, the Commonwealth Parliament passed Act No. 73 of 1935. On this occasion,

the Act was called *Tasmania Grant (Flour Tax) Act*, a name which sufficiently evidenced the purpose of the Commonwealth differentiation in favour of taxpayers wherever the flour came to be consumed in Tasmania. Otherwise, the Act practically repeated the terms of the relevant sections of the two previous Acts.

The Tasmanian Act, No. 71 of 1935, merely amended and continued the Act No. 89 of 1934.

By the end of 1935, therefore, the procedure was becoming well settled. It was desired to give Commonwealth taxpayers exemption from flour tax if the flour was to go into use in Tasmania. The Commonwealth would collect the tax in all the States including Tasmania. Then it would provide a special grant to Tasmania for flour tax purposes; and a refund or a rebate would be paid by Tasmanian officials to the Commonwealth taxpayers. The result was that Tasmania received no subvention towards ordinary revenue purposes, the Commonwealth lost the benefit of the tax collected in respect of flour consumed in Tasmania, and those who were called upon to pay such tax received a rebate or refund amounting to all or a very large portion of the tax. In substance and reality, the Commonwealth saw to it that a special section of its taxpayers were granted an exemption, that exemption proceeding solely by reference to the benefiting of Tasmanian taxpayers and Tasmanian consumers. The Tasmanian legal apparatus operated, as it was intended to operate, merely as the means selected for returning to Commonwealth taxpayers moneys which Commonwealth officers had already collected from such taxpayers.

The evidence shows that this scheme of differential treatment was operated in a very simple manner. On every day, the Tasmanian officers received from the Commonwealth taxation department in Tasmania returns showing the name of the taxpayer and the amount of tax paid by him. At first, the Tasmanian officials paid to each person entitled every penny of the tax which had been paid to the Commonwealth. Later, owing to a failure to estimate with precision, they paid at the rate of £2 4s. 6d. per ton out of the total tax of £2 12s. 6d. per ton. The Tasmanian officials notified the Commonwealth taxpayers through the press and otherwise that the refunds were to be made: further, upon payment over the counter, the

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Commonwealth tax officials advised the taxpayers as and when they paid, that they should apply for refunds to the Tasmanian officials.

This evidence shows the general nature of the scheme. Normally, payments by taxpayers to the Commonwealth taxation authorities cannot be revealed to other State officials without serious infringement of the secrecy required by the Commonwealth taxation laws. On this occasion, there was no occasion for secrecy. The Commonwealth officials still collected the moneys, but they knew and intimated that refunds would be made on application to another office round the corner. The Commonwealth's device was, to turn the phrase, that of *sauter pour mieux reculer*.

In order to see how closely the methods of 1934-1935 were followed in the present scheme, I now turn to the enactment of the Commonwealth, which provided for Tasmania the fund out of which refunds of tax were to be payable.

The Commonwealth Act is No. 53 of 1938, called the *Wheat Industry Assistance Act*. Its recitals are of great importance, but I postpone consideration of them for the moment. It establishes a fund into which all moneys collected under the assessment Act are to be paid. In the contingency (which at the commencement of the scheme was deemed very unlikely) of the price of wheat exceeding the " stabilized price," so that moneys would be received from the tax upon wheat grown in Australia, a wheat tax account was to become a reality, sec. 6 (4). There is also a " wheat industry special account," established for a purpose which is not here material.

Omitting these two separable accounts, the principal fund, called the wheat industry stabilization fund, is devoted to the making of payments to the States for distribution to the wheat growers thereof in proportion to the production and sale of wheat in the respective States. Of course, an essential feature of the stabilization scheme is to tax flour at the point of manufacture so that the burden of the tax will be passed forward to the ultimate consumer in the shape of increased prices of bread ; the proceeds of the tax being devoted to the wheat producer who is producing on an unprofitable basis. There is no constitutional objection to the Commonwealth's taxing one class (the consumer) for the benefit of another (the producer) ; indeed, uniform bounties on production or export are placed within

the Commonwealth's exclusive jurisdiction by sec. 51 (iii.) and sec. 90. But the Commonwealth's taxing power must not be exercised in conflict with sec. 51 (ii.).

Before the wheat producers (through the States) become entitled to any payment under secs. 6 (6) and (7) of the Act, the fund is first charged with (*a*) refunds of tax under the assessment Act and the administrative expenses of the Act, and (*b*) the payments to Tasmania provided for under sec. 14 of this Act. It is curious, and perhaps significant, that in this way the Commonwealth grouped with refunds of tax (payable, e.g., in relation to flour consumed in the Northern Territory which is exempt from tax) the special payments under sec. 14, the effect of which is to provide for refunds of tax in relation to flour consumed in Tasmania.

Sec. 14 provides that in addition to the amounts payable to Tasmania for the benefit of its wheat growers (on the same footing as all other States and all Australian wheat growers) a special yearly grant is to be paid to Tasmania, the amount to be determined by the Commonwealth Minister. It is also provided that :—(1) This annual amount is not to be greater than the amount by which the tax collected in respect of flour consumed in Tasmania exceeds the payments Tasmania may receive either as bounty for her wheat growers under sec. 6 (7) or for distressed growers under sec. 7 ; (2) If no flour tax is collected by the Commonwealth, the special grant under sec. 14 ceases to be payable.

It is to be noticed that (1) no State other than Tasmania receives money under sec. 14 ; (2) the moneys receivable by Tasmania under secs. 6 and 7 of the *Wheat Industry Assistance Act* would be very small compared with the amount of flour tax collected in respect of Tasmanian consumption of flour which is subject to tax. On 19th January 1939 the Federal treasurer estimated that the two annual sums amounting to £6,205 and £124,400 respectively. It follows that the sec. 14 grant to Tasmania is, and probably will remain, about nineteen times the moneys payable to Tasmania under secs. 6 and 7.

It has been suggested that, in respect of wheat production, Tasmania stands apart from the other five States, and that the remission of flour tax is to be explained on the theory that if one

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adds the large benefit to Tasmania of the flour tax grant (sec. 14) to the very small benefit of the bounties to Tasmanian wheat growers (secs. 6 and 7), one will find that, speaking very broadly, Tasmania may be said to receive a corresponding benefit to the other States. I think that the comments to be made are :—(1) Sec. 51 (ii.) cannot be infringed because the State in favour of which taxation discrimination is shown gets little or no benefit from the funds provided by the taxation scheme ; (2) while Tasmania is not a great wheat-producing State, neither is Queensland. The area of Queensland is approximately twenty-five times as great as that of Tasmania, and its population is less than five times as great. The area sown for wheat in Queensland is nineteen times as great as that in Tasmania, and the actual production is only seven times as great. Therefore a case for differential treatment could be made as much in favour of Queensland as of Tasmania. In truth, there is nothing in the Commonwealth scheme of distributing moneys derived from the flour tax which ensures any equality of the States even in economic result ; to say nothing of the extraordinary theory that because (say) New South Wales is a great wheat-producing State, the large consuming population of that State should pay more for their flour and their bread than the small wheat-producing States.

On 2nd December 1938 the Tasmanian *Flour Tax Relief Act* was passed. It recited that the State was to receive grants during any period in respect of which a tax is imposed upon flour. It provided that the Secretary for Agriculture " may " certify to payment of flour tax, and that the Secretary was to determine the amount of " relief " payable to any Commonwealth taxpayer in respect of flour consumed in Tasmania.

The operation of sec. 14 of the *Wheat Industry Assistance Act* 1938 (Commonwealth) and the Tasmanian *Flour Tax Relief Act* 1938 is substantially the same as under the previous legislation. It is to be noted, however :—(1) While sec. 14 in terms does no more than fix a maximum grant, the Minister has in fact granted up to the maximum, though the actual figure has to be estimated and adjusted from time to time and it varies in accordance with the rate of flour tax, which is also adjusted from time to time in accordance with the prevailing price of wheat ; (2) under sec. 10 (*b*)

of the Commonwealth Act, the Commonwealth has reserved power to suspend payments where the consumers are not adequately protected. Therefore, if Tasmania failed to use the sec. 14 grant for the benefit of taxpayers and indirectly of Tasmanian consumers, the Commonwealth could suspend the grant altogether.

Under the Tasmanian *Flour Tax Relief Act* 1938, the Secretary for Agriculture has determined that for the present the amount of the refund to be made to taxpayers will be the full amount of the flour tax paid to the Commonwealth less ten shillings per ton on the taxable amount of flour. This determination was made " mentally," but it is to endure for nine months. There have been fluctuations in the rate of the flour tax, but the refund has in all cases been the amount of the tax paid, less ten shillings per ton. The ten shillings per ton was taken off because Tasmanian officials estimated that the sec. 14 grant would fall short of the total tax collected in respect of Tasmanian consumption by an amount corresponding to such deduction. However, when the flour tax was £5 17s. 6d. per ton, the taxpayer received back £5 7s. 6d., i.e., approximately ninety-one per cent of the flour tax paid. The ninety-one per cent is subject to review, and may increase : in substance, the Tasmanian officials consider themselves, and correctly so, chosen instruments for repaying so much of the tax on flour consumed in Tasmania as can be repaid from the moneys granted by the Commonwealth under sec. 14.

The main contention of the Commonwealth is that Tasmania's decision to use the sec. 14 grant for flour tax relief had nothing whatever to do with the Commonwealth's scheme of taxation. But this is contradicted by the fact that not only was the Tasmanian legislation put into force simultaneously with that of the Commonwealth, the passing of each being in fact, if not in form, contingent upon the passing of the other ; but every executive determination of the Commonwealth Minister under sec. 14 has been come to with the knowledge and upon the footing that the Commonwealth taxpayers described in the Tasmanian Act will obtain a refund from the moneys granted to Tasmania. It is plain that the Minister acted within the scope of the statutory power conferred upon him ; and

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it is impossible for the Commonwealth legislature to evade overriding constitutional guarantees like that contained in sec. 51 (ii.) by authorizing and requiring the Commonwealth executive to play a vital part in the Commonwealth's plan of taxation discrimination: Compare, for instance, what Lord *Atkin* said in *James* v. *Cowan* (1).

Here I would like to quote from a decision of the Judicial Committee delivered by Lord *Macmillan* in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* :—

> "Now, in the present case, the real nature of the tax in question is transparently obvious. While the statute sets out to impose a tax on all timber cut within the Province it proceeds in the relative schedules to reduce the tax by rebate to an illusory amount in the case of timber used in the Province, leaving it to operate to its full effect only on timber exported. The best evidence that the tax was intended to be to all intents and purposes an export tax is afforded by the fact that since 1914 the minute rebated tax on timber and used within the Province has not been collected. Indeed, the tax has come to be known as 'the timber tax on export,' and is so described in the final report of the Royal Commission of inquiry on Timber and Forestry, 1909-1910, extracts from which are among the exhibits in the case" (2).

The above passage illustrates the principle that it is necessary to consider the existence and extent of a rebate of a tax in order to determine the real nature of the tax and whether it operates without discrimination.

But the Commonwealth's intention to discriminate in favour of Tasmania is even more clearly revealed by the history of the legislative scheme.

The defendant maintains that, from the first, the legislative scheme to which the Commonwealth adhered included as an essential feature thereof a condition that, in relation to flour to be consumed in Tasmania, an exemption which would enormously lighten both the incidence and burden of flour tax would be provided in accordance with the *modus operandi* adopted in 1934 and 1935. The defendant produced documents which support this contention: no question as to their accuracy is raised: but the plaintiff contends that in such cases as the present no extrinsic evidence is admissible. The objection resembles that of the Province of Alberta in the recent case of *Attorney-General for Alberta* v. *Attorney-General for Canada* (3) to the effect that "the scope and effect of a legislative measure

(1) (1932) A.C., at p. 555; 47 C.L.R., at pp. 393, 394.
(2) (1930) A.C., at p. 363.
(3) (1939) A.C. 117.

is to be ascertained by an examination of its actual provisions, and it is only when expressions used in it are ambiguous or imprecise that reference may be made to extraneous material. A statute expressed in unambiguous and precise terms cannot properly be held invalid on the grounds that another statute of the same legislature is invalid and that a common intention underlies both " (1).

In considering the question of admissibility of evidence, a fundamental distinction has to be drawn between cases where the court has no function committed to it except that of interpreting a statute, and cases where, in accordance with a constitutional charter, the court has to determine whether there has been an infringement by the legislature of some overriding constitutional provision. In the former case, the court's function is to interpret the language which the legislature has employed, though, even there, the court is not bound to shut its eyes to public general knowledge of the circumstances in which the legislation was passed.

In the latter case, the court may entirely fail to fulfil its duty if it restricts itself to the language employed in the Acts which are challenged as unconstitutional. As the Privy Council has said: " Where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the legislature is really doing " (per *Duff* J., *Attorney-General for Ontario* v. *Reciprocal Insurers* (2)).

In such cases the court is not to be over persuaded by the appearance of the challenged legislation. As a rule there is little need to travel beyond the words used by the legislature. Thus, under the guise of an expropriation by a State of a commodity within its borders and a provision enabling the person expropriated to repurchase the commodity at a higher price, the legislation may itself reveal that a forbidden method of taxation is being resorted to (*Attorney-General (N.S.W.)* v. *Homebush Flour Mills Ltd.* (3)). In that case, this court applied the well-known principle that in relation to constitutional prohibitions binding a legislature, that legislature cannot disobey the prohibition merely by employing an indirect method of achieving exactly the same result.

(1) (1939) A.C., at p. 122. (2) (1924) A.C., at p. 337.
(3) (1937) 56 C.L.R. 390.

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But it is often necessary to produce evidence in order to determine whether the executive has employed for one purpose a power which can only be lawfully exercised for another (*James* v. *Cowan* (1)). On such occasions, the field of admissible evidence is widened.

A similar rule applies although no executive action is involved or questioned. The issue may be whether legislation which at first sight appears to conform to constitutional requirements is colourable or disguised. In such cases the court may have to look behind names, forms and appearances to determine whether or not the legislation is colourable or disguised. This is a fundamental principle applicable to the Constitutions of the United States and Canada as well as to that of the Commonwealth. As Lord *Maugham* said recently : " It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other " (*Attorney-General for Alberta* v. *Attorney-General for Canada* (2)).

The same principle is also applicable to constitutional guarantees or prohibitions such as those contained in sec. 51 (ii.) and sec. 92 (to take two examples only) of the Commonwealth Constitution. Sec. 51 (ii.) proclaims that the great power of taxation, if exercised, must be exercised " so as *not* to " create a described condition of affairs. If that condition may be produced in various ways and by devious methods, it may become the duty of the court to examine closely whether the legislature has deliberately set out to produce the forbidden result although by a somewhat indirect method. In principle there is no reason whatever why public announcements of governmental policy, official governmental records and communications, and even the records of the proceedings in parliament, including records of debates, must necessarily be excluded from the field of relevant evidence. In special circumstances, some of this material may afford strong, even conclusive, evidence as to the scheme, object or purpose of the statute, although, as has been said: " Generally speaking," however, " the speeches of individuals " (in the legislature) " would have little evidential weight " (3). A valuable

(1) (1932) A.C. 542 ; 47 C.L.R. 386. (2) (1939) A.C., at p. 130.
(3) (1939) A.C., at p. 131.

discussion on the topic of the admissibility of extrinsic evidence in relation to constitutional interpretation is contained in an article by Dean *MacDonald* (*Canadian Bar Review*, February 1939): See also *Columbia Law Review*, vol. 36, p. 283, and *Harvard Law Review*, vol. 38, p. 6.

From the *Alberta* and other cases it is established that:—

(i) The court may have to examine the operation and effect of the impugned legislation. For that purpose evidence may be admissible (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1)).

(ii) For the same purpose, the court "must take into account any public general knowledge of which the court would take judicial notice" (*Attorney-General for Alberta* v. *Attorney-General for Canada* (1)).

(iii) The court may consider other Acts passed by the legislature whose enactment is being questioned (1).

(iv) In determining "the object or purpose of the Act in question" the court must consider "matters of which the court would take judicial notice . . . and other evidence in a case which calls for it" (*Attorney-General for Alberta* v. *Attorney-General for Canada* (2)).

(v) It is legitimate to look at legislative history "as leading up to the measure in question" (3) in order to determine whether the measure "instead of being in any true sense" in furtherance of a permitted purpose is "part of a legislative plan" to carry out a purpose which is not permitted (*Attorney-General for Alberta* v. *Attorney-General for Canada* (4)).

(vi) In order to ascertain "the object and effect" of the Acts which are "part of a general scheme of legislation" it is proper to "look at the history of the legislation passed in furtherance of the general design" (*Re Alberta Legislation* (5), per *Duff* C.J.).

(vii) In applying the doctrine of general knowledge, the court's "duty as judges" may be "to take judicial notice of facts which are known to intelligent persons generally," and to reject suggested arguments if they "would be incontinently rejected by anybody

(1) (1939) A.C., at p. 130.
(2) (1939) A.C., at pp. 130, 131.
(3) (1939) A.C., at p. 132.
(4) (1939) A.C., at pp. 132, 133.
(5) (1938) 2 D.L.R. 81, at p. 83.

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possessing the most rudimentary acquaintance with affairs" (*Re Alberta Legislation* (1)).

(viii) In relation to taxation Acts, the court may, in order to ascertain "the real nature of the tax" look at its system of rebates, the reports of public investigations, even the name by which the tax "has come to be known" (*Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co. Ltd.* (2)), and as to report of a royal commission see *Attorney-General for British Columbia* v. *Attorney-General for Canada* (3), per Lord *Atkin*.

In attempting an analysis of the present scheme of taxation of the Commonwealth, I have examined it with relation to the actual operation and effect of the legislation. This course is warranted by proposition i (*supra*).

It will next be shown that the Commonwealth Acts are part of a general scheme or plan of legislation. To prove this fact, extensive recourse to the so-called "extrinsic" evidence is not required, for in the preamble to the *Wheat Industry Assistance Act*, the validity of which (as part of a scheme of discriminatory taxation) is challenged, the Commonwealth Parliament has itself declared (*a*) that at a conference between the Commonwealth and the States held on 29th August 1938 "the co-operation of the Government of the Commonwealth was sought in putting into operation a scheme to ensure to wheat growers a payable price for wheat," (*b*) that it was represented at the said conference that the scheme would require "that a tax be imposed on flour sold for home consumption in Australia" and that the proceeds thereof should be distributed among wheat growers, and (*c*) that the Commonwealth agreed to "co-operate in the said scheme."

In view of these recitals, a reference to the conference of 29th August 1938 between the Prime Minister and the Premiers of the States is not only permissible but necessary in order to identify "the scheme" to which the Commonwealth was adhering by giving it legislative effect. At the conference, the Premier of New South Wales stated to the Prime Minister that, on 26th August, the Premiers had "unanimously arrived at certain definite conclusions" as follows :—

(1) (1938) 2 D.L.R., at p. 103. (2) (1930) A.C. 357, at p. 363.
(3) (1937) A.C., at p. 376.

(1) That this conference affirms the necessity of action being taken to ensure to wheat growers a payable price for their product.

(2) That, as a first step of urgent national importance the Governments of the Commonwealth and the States should take such immediate joint action in their respective jurisdictions as is necessary to implement a home-consumption-price plan in the season 1938-1939 and following seasons : such plan to be based on an equalization levy on wheat or flour (used for home consumption) collected under the excise power of the Commonwealth.

(3) That such a proposal should also ensure a stable home-consumption price of flour and bread in the various States at a level fair to both producer and consumer based on a home-consumption price of 4s. 8d. a bushel at country sidings for wheat, or its equivalent, special arrangements to be made (as on former occasions) to meet the special circumstances of Tasmania.

(4) That it is of vital importance that such proposal be of a long-range character, and placed on a sound legal, financial and commercial basis from the outset, and not left vulnerable to legal challenge or dependent on voluntary co-operation.

(5) That conference is unanimously of opinion that it is impossible to devise any practicable plan based on voluntary co-operation of growers, millers and merchants.

(6) This conference has received several proposals from farmers' organizations for the institution of a permanent price equalization fund built up by contributions from the Commonwealth and wheat growers. The conference is of opinion that they are worthy of detailed examination, and as they involve Federal finance, this conference submits them to the Federal Government for consideration.

For present purposes, the crucial part of the scheme was the agreement, stated in head 3 above, viz., " special arrangements to be made (as on former occasions) to meet the special circumstances of Tasmania." The Premier of New South Wales, as spokesman for all the Premiers, explained this vital provision as follows :—

> " I repeat that State action would involve the fixing of a home-consumption price for wheat. We exempt from the influence of that fixation wheat used for the poultry industry, and give a special exemption in respect of Tasmania, which does not produce wheat extensively. Similar special arrangements

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have been made heretofore, and we feel that in order to make the proposals operate fairly in their incidence throughout the Commonwealth, an exemption should be made in respect of that one State."

At a later stage in the conference, the Premier of Tasmania, also addressing the Prime Minister of Australia, who (as is well known) was a representative of Tasmania in the Federal Parliament, said :—

"Tasmania is in entire agreement with the views expressed by Mr. Stevens, and supplemented by his colleagues. As I concur in these views I do not think that any useful purpose would be served by reiterating them. You, sir, know the position of Tasmania just as I know it myself. This position was recognized in 1934-1935, and Mr. Stevens has this morning again acknowledged the State's special circumstances. Tasmania is the only State which has to import the whole of its wheat for flour-milling purposes."

Thus we see that an important part of the scheme which the States were proposing to the Commonwealth and which the Commonwealth subsequently accepted was that special arrangements were to be made (as on former occasions) to meet the special circumstances of Tasmania. The "former occasions" referred to the schemes of 1934 and 1935 by which flour tax, although collected by the Commonwealth on all flour consumed in Australia, was refunded to Tasmania and handed back to taxpayers and others in all cases where the flour was consumed in Tasmania. In 1938, the spokesman of the State Premiers described what was done in 1934-1935 as a "special exemption in respect of Tasmania" and as "an exemption . . . in respect of that one State." What was to be done in 1938 was to be a "special arrangement . . . as on former occasions." In other words, the Commonwealth was being asked to agree to a scheme of taxation from which the State of Tasmania would obtain a special exemption.

We have already observed that, in the present year, the scheme of exempting Tasmanian consumed flour corresponds in all essentials to the scheme of 1934-1935. Although it may not be strictly necessary, I now furnish several additional references in order to make clear the nature of the "arrangements" made by the Commonwealth in 1934-1935 which the Commonwealth agreed to reproduce in 1938.

(1) In 1934-1935, the Federal Commissioner of Taxation was authorized by the Commonwealth to disclose to Tasmanian officials information to assist them in making refunds in respect of Tasmanian consumed flour only and to prevent millers from retaining the refund if the flour went into consumption in any of the other States.

(2) The practice in 1934-1935 was then stated on behalf of Tasmania as follows :—

> "In order to ensure that the flour in respect of which the refunds of tax are made is consumed in Tasmania and not exported, the Department takes a bond from the taxpayers conditioned on the flour being consumed in Tasmania. So long as the flour in respect of which the refund of tax is made is consumed in Tasmania, the Department takes the view that it is not concerned as to the manner in which the flour is ultimately consumed, whether in the form of bread or biscuits ; but it takes precautions to see that none of the flour which is in effect free of tax is exported from the State."

(3) On 12th June 1934 the Tasmanian Premier in a letter to the Prime Minister said, *inter alia* : "So far as the State Government is concerned, the flour tax can be refunded only from amounts received from the Commonwealth *for that implied purpose.*" (Italics are mine.)

(4) On 11th December 1934, in connection with the legislation then being prepared to impose a flour tax, the Tasmanian Premier telegraphed to the Commonwealth Prime Minister: "Would appreciate urgent advice as to precise terms of amendment proposed by Commonwealth providing for payment of grant to this State to be applied towards refund of flour tax."

(5) In December 1935, the Prime Minister and the Premier of Tasmania exchanged the following telegrams in relation to the legislation enacted in that month and previously referred to in this opinion :—

> From Prime Minister to Premier :—"Legislation now before Parliament provides for continuance of present flour tax. It is proposed to submit a Bill to Parliament before it rises on Friday providing for payment to your State of £4,300 per month during period of continuance of tax commencing from January 7th to enable rebates at present rate of £2 1s. per ton to be continued by your Government. I shall be glad of your assurance that in the event of this legislation being passed rebates will be continued by your Government at present rate during currency of tax. Would appreciate reply by noon Thursday 5th. I may add that Act was passed by Parliament to-day authorizing payment not exceeding £4,500 for period up to January 6th."
>
> From Premier of Tasmania to the Prime Minister :—"Reference your lettergram of to-day's date flour tax legislation. My Government undertakes that in event of Bill being passed flour tax rebates will be continued at present rates during currency of tax provided that payment to this State of £4,300 per month is made during period of continuance of tax."

This evidence is admissible to show the clear understanding by the Commonwealth in 1934-1935 that the purpose of the special

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grants made and to be made to Tasmania was to furnish Tasmania with the money to enable rebates to be made where the flour had been consumed in Tasmania. The evidence as a whole clearly establishes that the "special arrangements" made "on former occasions" were arrangements by which the Commonwealth, without making a direct and specific exemption, paid to Tasmania moneys to enable refunds of tax to be paid to Commonwealth taxpayers in respect of flour consumed in Tasmania. The Acts, the executive action taken, the *modus operandi* and the correspondence all show that the Commonwealth's purpose in making special payments to the Tasmanian Government was to enable flour consumed in Tasmania to be exempt from tax, in whole or in part, while flour consumed elsewhere in the Commonwealth was to bear the full burden of the tax.

Even in relation to the present legislative scheme, there is evidence which strengthens the inference that the object and purpose of the Commonwealth's special grant to Tasmania under sec. 14 was to refund tax wherever the taxed commodity was consumed in Tasmania. On 30th November 1938, two days before both the Commonwealth and Tasmania passed their respective Acts, a telegram from the Premier of Tasmania to the Prime Minister of the Commonwealth referred to clause 14 (which became sec. 14) of the *Wheat Industry Assistance Bill*. At that time, the clause fixed the grant to Tasmania by reference to the amount of flour tax "collected" in Tasmania. The Premier of Tasmania demanded that the Commonwealth legislation should conform to the precedents of 1934 and 1935 and that the amount of the special grant should be determined by reference to the amount of flour tax collected "in respect of flour consumed in Tasmania." The telegram said :—

> If amount of rebate of flour tax is to be based on collections in Tasmania difficult questions will arise as to inclusion of imported flour for purposes of flour tax remission. Commonwealth Government has insisted on inclusion of imported flour and we agree that this is desirable. If rebate is to be made in respect of imported flour under present proposal the amount of rebate will fall short of the amount of tax by considerable sum. It will be remembered that my concurrence in plan agreed on at Premiers' Conference and Conference of Commonwealth and State Ministers was conditional on same treatment being given to this State as in 1934 and 1935 when amount of special grant for flour tax remission was based on consumption of flour in this State. I therefore

urge Commonwealth Government to alter clause 14 of Bill so as to reproduce same results as achieved by the *Wheatgrowers Relief Act* 1934-1935, sec. 9. Wheat Products Bill is now in Legislative Council and can be disposed of this week if satisfactory arrangements are made with respect to remission of flour tax. If, however, provisions of Wheat Industry Assistance Bill are not altered I can give no assurance that price-fixing Bill will be passed."

It is to be observed that every word and phrase of this telegram is consistent with, and consistent only with, the conclusion that both the Commonwealth and Tasmania recognized the real purpose of the "special grants" made and to be made by the former to the latter. The demand made by Tasmania was acceded to by the Commonwealth, and clause 14 was altered so as to conform to the precedents of 1934 and 1935.

From whatever angle the matter is approached, the inference is irresistible that sec. 14 of the *Wheat Industry Assistance Act* 1938 was passed by the Commonwealth with the object of enabling flour consumed in Tasmania to obtain a practical exemption from flour tax by means of (*a*) a "grant" to Tasmania out of the fund provided by the receipts from the flour tax, (*b*) employment by Tasmania of the "grant" for the purpose of refunding the tax to those who had been or would be called upon to pay it.

Here it is convenient to deal with several contentions made on behalf of the plaintiff that sec. 14 of the *Wheat Industry Assistance Act* is not a law with respect to taxation because it deals with the disbursement of Commonwealth moneys. No doubt it does authorize the disbursement of moneys. But the question whether sec. 14 is a law with respect to taxation depends upon the prior question whether the real purpose of sec. 14 is to effect a refund of part or all of the tax. If so, sec. 14 is a law with respect to taxation just as much as are provisions with respect to refunds of tax which in themselves merely authorize disbursement of moneys and which are usually contained in tax assessment Acts. In short, it is impossible to dissociate sec. 14 from the purpose which has been stamped upon it by the Commonwealth's adherence to the scheme.

The same finding as to the true purpose of sec. 14 also disposes of the argument that, inasmuch as sec. 96 enables the Commonwealth to make a grant of financial assistance and to make it to one State only, sec. 14 is authorized by the Constitution itself. The broad

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answer to the argument is that sec. 96 cannot be employed for the very purpose of nullifying constitutional guarantees contained elsewhere in the Constitution. For instance, it was not and could not be contended that, in defiance of sec. 92 which provides for inter-State freedom of trade and which binds Commonwealth and State alike, the Commonwealth could make a grant (under sec. 96) of money to one or all of the States for the express purpose of enabling the States to discriminate against inter-State trade, e.g., by subsidising traders on condition that they did *not* engage in inter-State trade : or that, in face of sec. 99, which precludes the Commonwealth from enacting commercial laws which give a preference to one State over another, the Commonwealth could grant moneys to one State for the express purpose of enabling that State to subsidise traders engaged in inter-State trade on condition that they resided in such State or employed a certain proportion of employees who belonged to trade-unions registered in that State.

In these instances, the Commonwealth, while purporting to grant money to a State under sec. 96, would in reality be authorizing the employment of its funds for the sole purpose of infringing constitutional prohibitions ; and it is clear that sec. 96 cannot be used as an instrument for such a purpose.

Sec. 96 was referred to in the case of *Victoria* v. *The Commonwealth* (1), where the validity of the *Federal Aid Roads Act* 1926, was affirmed by this court. The only substantial ground upon which its validity was attacked was that inasmuch as road making was not a function committed to the Commonwealth under sec. 51 of the Constitution, the Commonwealth could not impose a term or condition upon its grant of money to a State that the money must be expended upon road making. This argument was rejected.

The court held that the particular Act was not affected by sec. 99 of the Constitution which deals only with laws of "trade, commerce or revenue." The Act did not relate to trade or commerce ; and it dealt with Commonwealth expenditure, not with its revenue. The decision does not even suggest that the power under sec. 96 can be invoked for the very purpose of nullifying the prohibition of discrimination in Commonwealth taxation laws which is enacted by sec. 51 (ii.).

(1) (1926) 38 C.L.R. 399.

Sec. 96 has been regarded as raising several difficulties. One of them is whether the power of the Parliament to grant financial assistance was not terminated when the Braddon clause (sec. 87) terminated. The words in sec. 96 are verbatim the same as those in sec. 87, and perhaps the court should take judicial notice of the fact that the two sections were closely associated with each other and may well have been intended to stand together and terminate together. The difficulty is accentuated by the fact that if sec. 96 is read otherwise, and its operation ceases only when parliament otherwise provides, this would seem to contemplate the possibility that one Parliament is authorized to bind itself and its successors in a way which can hardly have been intended. However that may be, it seems clear that sec. 96 cannot be relied upon in the present case.

It was also contended for the plaintiff that "the discrimination . . . is the result of State action and does not affect Federal legislation" and that even if the Tasmanian *Flour Tax Relief Act* is invalid, sec. 14 is not invalidated. Again the answer depends upon whether sec. 14 is to be stripped of its disguise. If its purpose is to establish taxation discrimination in favour of Tasmania, it is clearly invalid. But the Tasmanian *Flour Tax Relief Act* is not thereby invalidated. The State of Tasmania is not bound by sec. 51 (ii.) of the Constitution. All that happens is that the special grant under sec. 14 is unauthorized by law, so that there is nothing upon which the Tasmanian Act can operate. It is erroneous to assume that the taxation discrimination is the result of the Tasmanian Act. It is the result of the combined operation of the Commonwealth's imposition of flour taxes and the Commonwealth's special grant to one State for the purpose of refunding the tax to Commonwealth taxpayers who are associated with that one State.

The further contention that the taxing scheme is not legally binding on the Commonwealth or any of the States is quite misconceived. The injunction of sec. 51 (ii.) regards such a question as irrelevant. The injunction concerns itself solely with the operation of Commonwealth taxing laws. Do they, or do they not, at the moment of their operation discriminate as laws between States? If yes, they infringe sec. 51 (ii), whether or not the Commonwealth

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has made an arrangement or bargain to enact them. The existence of the bargain or scheme is of importance, not as establishing a binding legal bargain, but as evidencing the real nature of the legislation enacted in pursuance of the scheme.

It has also been suggested that the decision of the Privy Council in *Colonial Sugar Refining Co. Ltd.* v. *Irving* (1) is applicable to the present case. There it was contended that the Commonwealth *Excise Tariff* 1902 was *ultra vires* of the Commonwealth Parliament upon the ground that sec. 51 (ii.) was infringed. Under that Act, an exemption from the duties imposed was granted in respect of goods on which customs or excise duties had already been paid under State legislation passed before the States powers on those topics was excluded. The scale of duties was not uniform throughout the several States, and in the State of Queensland no excise duty at all had been imposed upon sugar. As a result of such lack of uniformity " the exemption operated unequally on the traders and manufacturers of the several States " (2). It was argued that this inequality of consequence infringed sec. 51 (ii.).

It is difficult to understand how, as a law, the enactment of the exemption (which applied equally to all the States) could be regarded as affecting any discrimination between States. Similar legislation has always been recognized as permissible. For instance, in estimating the Commonwealth estate duty, deductions from the value of the estate of the amount of probate or succession duties payable in any State have always been allowed and authorized by Commonwealth law. The fact that the *quantum* of such duties may vary in the several States and that in one or more States they may not be imposed at all would not make the Commonwealth law discriminate as a law. As the Privy Council said, " the rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves " (3).

Similarly, if the Commonwealth levied an excise on a commodity which in fact was being produced in one State only, there would be

(1) (1906) A.C. 360.
(2) (1906) A.C., at p. 367.
(3) (1906) A.C., at p. 367.

no infringement of sec. 51 (ii.) so long as the Commonwealth tax extended to the commodity wherever in Australia it was produced. As in the case of a constitutional requirement of uniformity " what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States " (*Knowlton* v. *Moore* (1)).

But the present taxing enactments of the Commonwealth stand on a very different footing, unless of course the action of Tasmania in refunding tax to Commonwealth taxpayers was quite unrelated to the enactment of the Commonwealth in making available to Tasmania portion of the moneys collected from the imposition of the same tax. Upon the assumption that the object of sec. 14 of the assistance Act is as has already been described, the discrimination established is not constituted by mere unequal operation in the States through casual or accidental features of the laws of those States ; the case is one where discrimination is aimed at and achieved by the Commonwealth Act, with the favoured State playing the subordinate role of executant of the Commonwealth's scheme for refunding the tax. If this is the correct view of the legislation of the Commonwealth, the case of the *Colonial Sugar Refining Co. Ltd.* v. *Irving* (2) is valuable by way of contrast only.

The legal result of all these considerations is clear. The relevant Commonwealth Acts have been analysed in relation to (*a*) their necessary operation and effect, (*b*) the history of the scheme adopted by the Commonwealth in 1934-1935, (*c*) the executive action taken by the Commonwealth Minister under sec. 14 at a time when the Tasmanian *Flour Tax Relief Act* was already on the statute book, (*d*) the recital in the *Wheat Industry Assistance Act* of the Commonwealth's co-operation with the States in a certain scheme, (*e*) an analysis of the heads of the scheme so far as it was based on the exercise by the Commonwealth of its powers of taxing flour, (*f*) an investigation of the meaning of that portion of the scheme by which it was agreed that " special arrangements . . . as on former occasions " were to be made for Tasmania, and (*g*) a consideration

(1) (1900) 178 U.S. 41, at p. 108 ; 44 Law. Ed. 969, at p. 996.
(2) (1906) A.C. 360.

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of what the Commonwealth Parliament and executive did on such "former occasions" as well as the preparation for and the operation of its taxing laws on the present occasion. The conclusion is that the present scheme of Commonwealth taxation was devised with the very object of exempting all flour consumed in Tasmania from the principal burden of the tax. The co-operation of Tasmania in the general scheme of wheat stabilization was purchased at the price of exempting Tasmanian consumers from the burden of a tax which all other Australian consumers are called upon to bear. Up to the present time, the effective exemption has amounted to over 90 per cent of the tax.

The truth is that every well-informed person in Australia is aware that, in pursuance of prior design, the present flour tax applies to all flour manufactured and consumed in the Commonwealth, but that two exemptions obtain. One exemption is in relation to flour used in the Northern Territory, which, not being a State of the Commonwealth, is not affected by sec. 51 (ii.) of the Constitution. The other applies in relation to flour consumed in Tasmania where the taxpayer gets a refund of at least 90 per cent of the tax. In other words, everyone in Australia knows well that, contrary to the express prohibition of sec. 51 (ii.), the scheme of flour taxation designedly creates an exemption in favour of Tasmania. If the court to which the protection of the Constitution is committed is willing to shut its eyes to facts which are so well known, then, if I may adopt Lord *Atkin's* phrase, used in another connection, "the constitutional charter might as well be torn up" (1).

The final contention of the defendant was that, assuming sec. 14 of the *Wheat Industry Assistance Act* to be invalid, the Commonwealth Acts imposing the flour tax are separable and valid. But the Commonwealth's scheme of taxation is constituted by the series of Acts Nos. 48 to 53 inclusive. If, as I have held, there has been an infringement of sec. 51 (ii.), it must follow that, in the absence of an express statutory indication to the contrary, the Acts which make up the entire scheme, and are sufficiently expressed as doing so, are invalid.

(1) (1932) A.C., at p. 555; 47 C.L.R., at p. 394.

It is correct to say that, if sec. 14 of the *Wheat Industry Assistance Act* had not been included in the scheme, the residue of the Commonwealth's taxing scheme would have been valid. The difficulty is that the taxing scheme is one and indivisible. Moreover, but for the fact that sec. 14 worked an exemption in Tasmania's favour, it seems certain that Tasmania would not have become a party to the scheme ; in that event the States would not have been unanimous ; and the Commonwealth might well have refrained from accepting responsibility for taxing flour with a view to increasing the price of bread to the ultimate consumer.

Sec. 15A of the Commonwealth *Acts Interpretation Act* 1901-1937 lays down a general rule of construction which is in conformity with the general principle *ut magis valeat quam pereat.* If invalid and unconstitutional provisions can be discarded, the court may allow valid and constitutional provisions to remain effective. But a series of cases has established that where the infringing provisions can only be removed at the price of disturbing a general legislative scheme, all the enactments which go to make up the scheme must fall (*Australian Railways Union* v. *Victorian Railways Commissioners* (1) ; *Huddart Parker Ltd.* v. *The Commonwealth* (2) ; *Vacuum Oil Co. Pty. Ltd.* v. *Queensland* [*No.* 2] (3) ; *McDonald* v. *Victoria* (4)).

As was pointed out in the case last mentioned,

> " in the *Australian Railways Union Case* (1) the court held that sec. 33 as well as sec. 34 of the amending Commonwealth *Arbitration Act* of 1930 was invalid because the two sections were regarded as essential portions of one statutory scheme which stood as a whole or, if part of it fell, fell as a whole. In such a case sec. 15A of the Commonwealth *Acts Interpretation Act* was thought to be incapable of operation. The feature of the *Vacuum Oil Case* [*No.* 2] (3) was that the oil companies were required to purchase such quantity of power alcohol as was measured by a fixed percentage of ' every one hundred gallons of motor spirit sold.' In the case of legislation so framed, it was impossible to exclude any portion of the total sales, for that would completely revise and rewrite the required statutory formula " (5).

Further, in every case where an exemption from taxation on a basis contrary to sec. 51 (ii.) is granted by the Commonwealth Parliament, the discrimination results, not alone from the provisions which exempt the favoured State, but from those provisions coupled

(1) (1930) 44 C.L.R. 319.
(2) (1931) 44 C.L.R. 492.
(3) (1935) 51 C.L.R. 677.
(4) (1937) 58 C.L.R. 146.
(5) (1937) 58 C.L.R. 146, at p. 153.

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with the operations of other provisions of the scheme upon the remaining States of the Commonwealth. It would be difficult to apply sec. 15A to such a state of affairs, because the court cannot assume that the exemption was merely an accidental or subordinate feature of the taxing scheme. Moreover, to regard the exemption as invalid would be to add to the net yield of the tax and so increase the total burden of the people, a course which parliamentary practice usually places under rigid restrictions.

In this particular case, the exemption or refund provision constituted by sec. 14 is affirmatively shown to be an essential part of the scheme. To that scheme in all its parts, the Commonwealth adhered. The balancing of funds and accounts required by sec. 6 of the *Wheat Industry Assistance Act* would be disturbed, if sec. 14 alone was treated as invalid and void. In short, to quote from a well-known judgment of the Privy Council, " the offending provisions are . . . so interwoven into the scheme that they are not severable " (*In re The Initiative and Referendum Act* (1)).

In the result it becomes unnecessary to examine in detail the other contentions raised by the defendant. They were ably presented by counsel, but I am satisfied that, subject to one exception, they cannot be acceded to. That exception is the contention alleging an infringement by the Commonwealth of sec. 92 of the Constitution. This stands on a different footing, but it is dependent on the main argument that there has been a discrimination contrary to sec. 51 (ii.).

In principle it is difficult to see how, in case of an excise duty laid by the Commonwealth upon a commodity manufactured and sold within Australia, the mandate of sec. 92 will not be disobeyed if the Commonwealth exempts the commodity from tax in case it is consumed in a particular State ; in such circumstances every dealing in the commodity, whether intra-State or inter-State, will be taxed, except dealings which will result in the final delivery of the commodity in the favoured State.

Thus the sale to the other States of Tasmanian manufactured flour will bear the full burden of the tax ; every local sale of the same flour will be practically exempt. This seems to be a plain discrimination against selected inter-State dealings in flour solely

(1) (1919) A.C. 935, at p. 944.

because they are inter-State dealings of the selected character. Discrimination is not expressly forbidden by sec. 92, but in certain cases the proof of discrimination may show conclusively that the trade freedom of the border has been unconstitutionally restricted (*Riverina Transport Pty. Ltd.* v. *Victoria* (1)).

This point need not be elaborated because my opinion is that, because the Commonwealth flour-taxing scheme discriminates in favour of Tasmania contrary to sec. 51 (ii.), the Acts imposing the tax are invalid.

McTIERNAN J. I agree with the judgment of the Chief Justice.

Judgment for the plaintiff for the amount claimed.

Solicitor for the plaintiff, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

Solicitors for the defendant, *H. O. Marshall, Lupton & Scott.*

Solicitor for the States of New South Wales, Victoria and South Australia (intervening), *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the State of Tasmania (intervening), *Allen, Allen & Hemsley.*

J. B.

(1) (1937) 57 C.L.R., at p. 367.