[HIGH COURT OF AUSTRALIA.]

ATTORNEY-GENERAL FOR VICTORIA (AT THE RELATION OF DALE AND OTHERS) } PLAINTIFF;

AND

THE COMMONWEALTH AND OTHERS . DEFENDANTS.

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MELBOURNE, *Oct.* 5, 8-10; SYDNEY, *Nov.* 19.

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

Constitutional Law (Cth.)—Appropriation of money—Scope of power—Whether limited or unlimited as to purpose—"Purposes of the Commonwealth"—Power of incidental legislation—If power of appropriation unlimited, extent of power to control manner and method of expenditure—Provision for free medicine—Appropriation of moneys to pay chemists—Validity—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*xxxix.*), 75, 81, 83—*Pharmaceutical Benefits Act* 1944 (*No.* 11 *of* 1944).

High Court—Action for declaration of invalidity of Commonwealth statute—Power of Attorney-General for a State to sue.

The *Pharmaceutical Benefits Act* 1944 provides for the supply by chemists without charge to the public of certain medicines prescribed by medical practitioners, appropriates money to pay the chemists for the medicines supplied, and imposes duties on medical practitioners and chemists in relation to the prescription and supply of the medicines.

Held, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*McTiernan* J. dissenting), that the Act is not authorized under the power of appropriation in s. 81 of the Constitution and the power of incidental legislation in s. 51 (xxxix.), and is invalid.

Held, also, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *Williams* JJ., the Attorney-General of a State has a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents.

DEMURRER.

Ian Macfarlan, Attorney-General for Victoria, at the relation of John Dale, Peter McCallum and Roy Fallowes Watson, brought an action in the High Court against the Commonwealth, Frank

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McCallum and James Mackintosh Fraser. The statement of claim alleged that the relators were respectively the president, vice-president and honorary secretary of the Medical Society of Victoria; that Society was a voluntary and unincorporated association of legally qualified medical practitioners respectively carrying on their practice of the medical profession in Victoria and associated together for the maintenance of the welfare and status of the profession, and the promotion of all activities and practices calculated to maintain and improve the health of the community and the advance of medical science and practice and its application to the health of the community; on 5th April 1944 the Royal assent was signified to an Act of the Parliament of the Commonwealth entitled the *Pharmaceutical Benefits Act* 1944; the defendant McCallum was Director-General of Health of the Commonwealth and subject to the direction of the defendant Fraser had the general administration of the Act; the defendant Fraser was the Minister of State for Health of the Commonwealth and had the overriding direction of the Director-General of Health in relation to the Act; the Act provided, *inter alia*, for the granting of pharmaceutical benefits to all persons ordinarily resident in the Commonwealth without payment by such persons for such benefits and for the payment to approved pharmaceutical chemists at rates to be prescribed under the Act for the supplying of the benefits by the Commonwealth; the payments by the Commonwealth to the approved pharmaceutical chemists were by the Act to be made out of the trust account established under the *National Welfare Fund Act* 1943, which trust account was constituted out of portion of the annual income tax levied and raised by the Commonwealth; the Constitution did not authorize the enactment by the Parliament of the Commonwealth of the *Pharmaceutical Benefits Act* or the appropriation of public moneys of the Commonwealth for the purposes of the Act; the defendants McCallum and Fraser intended to carry into execution the *Pharmaceutical Benefits Act* and to expend moneys of the Commonwealth in so doing contrary to the law and the Constitution of the Commonwealth.

The plaintiff claimed (1) a declaration that the *Pharmaceutical Benefits Act* was invalid and void; (2) an injunction restraining the defendants McCallum and Fraser from carrying into execution any of the provisions of the Act, or expending any of the moneys of the Commonwealth in pursuance of the provisions or for the purposes of the Act.

The defendants demurred to the statement of claim on the grounds that (*a*) the facts alleged did not show any cause of action to which effect could be given by the Court against the defendants or any of

them ; (*b*) the *Pharmaceutical Benefits Act* was a valid and effective exercise of the legislative powers of the Parliament of the Commonwealth ; (*c*) the *National Welfare Fund Act*, the constitution of the trust fund thereunder and the appropriation out of the fund by or under the authority of the *Pharmaceutical Benefits Act* of public moneys of the Commonwealth for the purposes of the latter Act were within the legislative powers of the Parliament of the Commonwealth.

When the demurrer came on for hearing counsel for the defendants objected to the *locus standi* of the plaintiff, but the Court intimated that it would be more convenient to hear counsel for the plaintiff first, both on this question and on the validity of the Act.

P. D. Phillips (with him *T. W. Smith*), for the plaintiff. The *National Welfare Fund Act* establishes the National Welfare Fund out of which (s. 6) are to be made the payments "directed by any law of the Commonwealth . . . in relation to . . . welfare or social services." It does not authorize any expenditure for any particular purpose. It may be said that it limits the purposes for which moneys are to be paid out of the fund (although the limits are imprecise), but it leaves the appropriation to be effected independently. Section 17 of the *Pharmaceutical Benefits Act* purports to appropriate so much of the fund as is necessary for the purposes of that Act. If that Act did nothing more it might be referable to the power to appropriate, which is a legislative power of the Commonwealth. But there is no legislative power other than the appropriation power to which the Act can be referred, and the Act goes far beyond merely appropriating money. It affects the contractual relation of chemist and customer, the mode and manner of prescribing medicines by doctors, the control and distribution of poisons and drugs, payments for medical services and the provision of medical services in isolated areas, and it provides for the fixing of prices for medicines. All these are matters which, unless they are referable to some Commonwealth power, are within the arena of State legislative power. If the Act is not referable to any Commonwealth legislative power, it means that the Act trespasses upon the arena of State power. If the Act were valid, a State could not, for instance, prohibit or regulate the sale or use of certain drugs. A State therefore has a justiciable interest in challenging the validity of the Act in order to protect or define the ambit of its own legislative power. The question is one of the limits *inter se* of the powers of the Commonwealth and the States. A State through its Attorney-General has *locus standi* to litigate that question. [He referred to

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Attorney-General for N.S.W. v. *Brewery Employés Union* (1); *Commonwealth* v. *Queensland* (2); *Tasmania* v. *The Commonwealth* (3); *Anderson* v. *The Commonwealth* (4); *Tasmania* v. *Victoria* (5); *Attorney-General* (*Vict.*) v. *The Commonwealth* (6).] Another basis for the *locus standi* of the State is afforded by s. 94 of the Constitution. By giving the States a right to the surplus revenue of the Commonwealth s. 94 gives the States an interest in attacking an appropriation as invalid. If it appears that the appropriation is invalid, the money has been illegally appropriated, which means not appropriated at all; it is, therefore, surplus revenue in which the States have an interest. [He referred to *New South Wales* v. *The Commonwealth* (7); *Surplus Revenue Act* 1927; Acts No. 15 of 1908, No. 8 of 1910, No. 4 of 1927, No. 45 of 1934.] Apart from the particular provisions of s. 94, the effect of s. 87 and the ensuing sections up to and including s. 96 is such that the framework of the Constitution gives the States a justiciable interest in Commonwealth revenue and expenditure. In this regard our Constitution differs from that of the United States. Another distinguishing feature now relevant is the jurisdiction of the High Court under s. 75 (iii.) of the Constitution. The decision in *Massachusetts* v. *Mellon* (8) depends on considerations for which there is no room under our Constitution; it is, therefore, irrelevant to the question now before the Court. The *Pharmaceutical Benefits Act* must depend for its validity upon s. 81 of the Constitution. It is submitted that that section is not sufficient to support the Act, which, therefore, is invalid. Section 81 contains no substantive grant of power at all. At all events it is limited to the purposes of the Constitution. It looks in the main to the legislative powers of the Commonwealth. In providing that revenue is to be appropriated "for the purposes of the Commonwealth" it must take into account particular provisions of the Constitution (e.g., s. 61) which call for the expenditure of money; apart from such provisions, and from such administrative powers and purposes as result from legislation which the Parliament has power to enact, the reasonable construction is that it is confined to the purposes of the legislative powers. It must be limited to purposes to be found in the Constitution, and cannot confer an unlimited power to appropriate money to any purpose whatever, whether or not it is a purpose

(1) (1908) 6 C.L.R. 469, at pp. 498, 520, 550, 553, 557, 558.
(2) (1920) 29 C.L.R. 1, at pp. 7, 11, 12.
(3) (1927) 39 C.L.R. 411, at pp. 416, 419, 423, 427, 442.
(4) (1932) 47 C.L.R. 50, at p. 52.
(5) (1935) 52 C.L.R. 157, at pp. 168, 171, 174, 186-188.
(6) (1935) 52 C.L.R. 533, at pp. 556, 560, 561, 564.
(7) (1908) 7 C.L.R. 179, at pp. 188, 193, 199.
(8) (1923) 262 U.S. 447 [67 Law. Ed. 1078].

which can be the subject of Commonwealth legislation. On this view, it is true that the words " to be appropriated " &c. in s. 81 are unnecessary. It may be thought that the grant of legislative power necessarily involves the power to appropriate for the particular purpose of the legislation; if not, the " incidental " power in s. 51 (xxxix.) is sufficient to support an appropriation for any purpose on which Parliament can validly legislate under the Constitution. On the other hand, if s. 81 is not to be limited in this way, if it creates an unlimited power of appropriation, provisions such as ss. 96 and 105 are unnecessary. Although some legislative powers are to be found in sections of the Constitution which follow s. 81, the legislative powers are in the main to be found in sections which precede it, especially ss. 51 and 52. The function of s. 81 is to link up those provisions with the financial provisions of Chapter IV. If s. 81 had been intended to give added power, it could have been much more aptly expressed. [He referred to *Attorney-General for Victoria* v. *The Commonwealth* (1); *R.* v. *University of Sydney*; *Ex parte Drummond* (2); *Quick and Garran, Commonwealth Constitution*, (1901), pp. 811, 812; *Harrison Moore, Constitution of the Commonwealth of Australia*, 2nd ed. (1910), pp. 622-627; *Wynes, Legislative and Executive Powers in Australia*, 1st ed. (1936), pp. 252, 253.] Our Constitution differs materially from that of the United States, in which the relevant question has turned upon the effect of the grant of the power to tax contained in article 1, s. 8, clause 1. That clause is expressed in terms of very wide import: See *Selected Essays on Constitutional Law*, vol. 3, chapter 6, at pp. 543 *et seq.*; chapter 7, at pp. 565 *et seq.*; *United States* v. *Butler* (3); *Helvering* v. *Davis* (4); *Charles C. Steward Machine Co.* v. *Davis* (5). Whether or not s. 81 is to be limited as has been submitted, both the *National Welfare Fund Act* and the *Pharmaceutical Benefits Act* are invalid. The *National Welfare Fund Act* has no constitutional authority. It is not an appropriation Act; it does not authorize the expenditure of any money. It, therefore, cannot be supported by the appropriation power. On the other hand, it does more than merely create a fund as by way of suspense account. It is not a finance Act at all. Its subject matter is " welfare " and " social services," as to which there is no legislative power. It purports to isolate Commonwealth revenue for the purposes mentioned, which are not " purposes of the Commonwealth." Even if it is assumed that under s. 81 of the

(1) (1935) 52 C.L.R., at pp. 567, 568.
(2) (1943) 67 C.L.R. 95, at p. 107.
(3) (1936) 297 U.S. 1, at pp. 64 et seq. [80 Law. Ed. 477, at pp. 487 et seq.].
(4) (1937) 301 U.S. 619, at p. 640 [81 Law. Ed. 1307, at p. 1314].
(5) (1937) 301 U.S. 548 [81 Law. Ed. 1279].

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Constitution the Commonwealth has an unlimited spending power, so that it can appropriate money for "pharmaceutical benefits" or any other purpose over which it has no legislative power, nevertheless the power to spend money will not support the provisions contained in the *Pharmaceutical Benefits Act*. The real nature of the Act is to provide a partial scheme of public health. It cannot be said that the object of the Act is to appropriate money and that the other matters for which it provides are merely incidental to the appropriation so that they may be supported by s. 51 (xxxix.) of the Constitution. On the contrary, the appropriation of money is the incidental matter in this Act. The Act purports to regulate the actions of doctors, chemists and people generally in a way for which there is no constitutional authority.

Tait K.C., *Coppel* K.C. (with them *Sholl*), for the defendants.

Tait K.C. The *Pharmaceutical Benefits Act* is valid as an appropriation Act under s. 81 of the Constitution. Under that section the Parliament has power to appropriate money for any purpose which is for the benefit of the people of the Commonwealth. It is for Parliament to decide what is for the benefit of the people, and s. 51 (xxxix.) gives power to provide for all matters incidental to the appropriation. The covering clauses of the Constitution Act provide that it shall be lawful for the Queen to proclaim that "the people of" the States "shall be united in a Federal Commonwealth" (clause 3); "the Commonwealth" means "the Commonwealth of Australia as established under this Act" (clause 6); "The Commonwealth shall be established . . . on and after the day . . . appointed" (clause 4). Accordingly, unless the context points to some more limited meaning, "the Commonwealth" means "the people of Australia organized in a body politic"; and, in s. 81, "purposes of the Commonwealth" means purposes of the people of Australia. Sometimes the Constitution speaks of "the Commonwealth" in what is obviously a more limited sense, as meaning the Federal body as distinguished from the States (e.g., s. 78), and sometimes the expression appears to be merely a geographical description; but in sections such as ss. 51 and 81 there is no context which suggests a limited meaning. It follows that in s. 81 "purposes of the Commonwealth" is not limited to purposes within the legislative competence of the Commonwealth, i.e., within the enumerated legislative powers. It is clear from s. 81 that the power to appropriate must extend to expenditure for which the

Constitution itself provides: e.g., ss. 3, 48, 71 (iii.), 82, 84, 87. There is no reason, however, why this should be regarded as the limit of the expenditure covered by s. 81, and the terms of ss. 82 and 87 suggest that this is not the limit. The provision in s. 82 that the revenue "shall in the first instance be applied to the payment of the expenditure of the Commonwealth" suggests that in that section "expenditure" is limited to what may be called the domestic or governmental expenditure, the necessary expenses of carrying out the functions of the Government. So, also, as to the reference to expenditure in s. 87. That is to say, expenditure of the kind referred to in those sections is not contemplated as the whole field of Commonwealth expenditure; the "purposes of the Commonwealth" referred to in s. 81 constitute the larger field. This is supported by s. 61; although it does not deal with appropriation of moneys, it refers to two matters, the execution and maintenance (1) of the Constitution and (2) of the laws of the Commonwealth. If s. 81 was meant to be limited to those two matters, one would have expected to find a similar method of expression: that money was to be appropriated for the purposes of executing the provisions of the Constitution as to the application of Commonwealth revenue and for the purposes provided by the laws of the Commonwealth. The provision of s. 83 that no money shall be drawn from the Treasury "except under appropriation made by law" does not mean that the appropriation must be made by Act of Parliament; "by law" means by the machinery of law and includes the provisions of the Constitution (e.g., s. 84) which themselves appropriate moneys. [He referred to *R.* v. *Commonwealth Court of Conciliation and Arbitration* (1); *New South Wales* v. *The Commonwealth* (2); *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (3); *Commonwealth* v. *Colonial Ammunition Co. Ltd.* (4); *Osborne* v. *The Commonwealth* (5); *Resch* v. *Federal Commissioner of Taxation* (6); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (7).] In this view of the words "for the purposes of the Commonwealth" in s. 81, the effect of the section is analogous with that which is attributed to article 1, s. 8, clause 1, of the United States Constitution. The Commonwealth Parliament has passed many Acts appropriating money which would, or might, be invalid if the plaintiff's argument were right. A few of the many instances are the *Science and Industrial Research Acts* 1920 and 1926, the *Maternity*

(1) (1912) 15 C.L.R. 586, at p. 609.
(2) (1908) 7 C.L.R. 179, at p. 187.
(3) (1922) 31 C.L.R. 421, at pp. 431, 446-448.
(4) (1924) 34 C.L.R. 198, at pp. 222-224.
(5) (1911) 12 C.L.R. 321, at pp. 352, 355.
(6) (1942) 66 C.L.R. 198, at p. 222.
(7) (1920) 28 C.L.R. 129, at p. 149.

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Allowance Act 1912, the *Child Endowment Act* 1941 and the *Widows' Pensions Act* 1942. It is not suggested that the legislature's view of the meaning of the Constitution is conclusive, but great weight should be given to the legislative practice (*Field* v. *Clark* (1); *Myers* v. *United States* (2)). The *Pharmaceutical Benefits Act* is an appropriation Act appropriating money for the provision of pharmaceutical benefits for all citizens of the Commonwealth. In so far as the Act goes beyond the mere appropriation of money its provisions are directed to enabling those benefits to reach those who require them and are ancillary and incidental to the purpose of the Act; they are, therefore, supported by s. 51 (xxxix.) of the Constitution. [He referred to *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (3); *Graziers' Association of New South Wales* v. *Labour Daily Ltd.* (4); *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (5); *New South Wales* v. *The Commonwealth* [*No.* 1] (6).] The Act will not impinge on any State law prohibiting or regulating the sale of particular drugs. There is no compulsion in the provisions of the Act (See ss. 8, 9) relating to the prescribing and supply of drugs; no-one is compelled to give a prescription at all, and there is nothing to preclude compliance with such a State law as has been mentioned. As to the *locus standi* of the plaintiff, it is submitted that the Court has no jurisdiction to hear a suit at the instance of anyone (including a State) where the matter challenged is purely an appropriation of Commonwealth funds; that is, where no right of an individual or of a State is infringed or threatened. In all the decided cases there has been an interest or right which was alleged to be infringed or threatened. The Court should adopt the view taken in the United States, that the mere appropriation of money is a political matter and is not justiciable: See *Massachusetts* v. *Mellon* (7); *Willoughby, Constitution of the United States*, 2nd ed. (1929), vol. 1, p. 106. Moreover, no existing State legislation is affected, and the mere fact that such legislation in the future might conflict with the Act now challenged is not sufficient to give present jurisdiction. In these circumstances there is no interest, no *lis*. The question is merely an abstract one and cannot be litigated. *The National Welfare Fund Act* merely sets aside money, and there is no ground for the contention that it is invalid. In any case, it does not infringe any rights, and the challenge to it is not justiciable.

(1) (1892) 143 U.S. 649, at pp. 690, 691 [36 Law. Ed. 294, at p. 309].
(2) (1926) 272 U.S. 52, at p. 174 [71 Law. Ed. 160, at p. 189].
(3) (1908) 8 C.L.R. 330, at pp. 364, 365.
(4) (1930) 44 C.L.R. 1.
(5) (1920) 28 C.L.R. 23.
(6) (1932) 46 C.L.R. 155.
(7) (1923) 262 U.S. 447 [67 Law. Ed. 1078].

Coppel K.C. In the United States the power to tax conferred by article 1, s. 8, clause 1, of the Constitution has been interpreted as giving an equally extensive power to expend money to pay the debts and to provide for the defence and general welfare of the United States. The expression " the United States " is used in the Constitution in a variety of meanings, just as is " the Commonwealth " in our Constitution. There is no provision corresponding with our s. 81, and no express provision regarding appropriation apart from article 1, s. 9, clause 7, which, like our s. 83, provides that no money shall be drawn from the Treasury except by appropriation made by law. The view that has been taken is that the power to spend is as wide as the power to tax: See *Harvard Law Review* (1922-1923), vol. 36, p. 548, " The Spending Power of Congress " ; *United States* v. *Butler* (1) ; *Charles C. Steward Machine Co.* v. *Davis* (2) ; *Helvering* v. *Davis* (3). The result of the American authorities is that the power to tax to provide for the general welfare of the United States is to be read in its widest form, and, although the Constitution contains no express provision as to appropriation, it is implicit in the very nature of government that the Federal Government has capacity to spend for purposes as large as the purposes for which it is empowered to raise money. The same view could be taken in Australia if there were no s. 81, and that section contains nothing inconsistent with the view. The means by which the result is reached in Australia is different in form, but the result is the same. In the United States such limitation as there is on the power to tax is accepted as the limitation on the power to spend. In Australia regard must first be had to the power to spend under s. 81. Then, as to the power to tax, it is seen that it is subject to two limitations: (1) there shall be no discrimination between States ; (2) the law with respect to taxation must be for the peace, order and good government of the Commonwealth. In practice it will be found that there is no real distinction between the power to tax for the peace, order and good government of the Commonwealth and the power to tax for the general welfare of the United States ; whatever limitation the one imposes is substantially the same as the limitation imposed by the other. If there is any difference, it is in favour of the view that the power in Australia, not being limited by reference to any purpose other than the peace, order and good government of the Commonwealth, is even wider than in the United States ; it is, perhaps, for all practical purposes unlimited. [He

(1) (1936) 297 U.S., at pp. 64, 68, 69, 80, 86 [80 Law. Ed., at pp. 487, 489, 490, 495, 498].

(2) (1937) 301 U.S., at pp. 574, 581, 586, 587, 592, 605 [81 Law. Ed., at pp. 1284, 1288, 1291, 1294, 1300].

(3) (1937) 301 U.S., at p. 640 [81 Law. Ed., at p. 1314].

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referred to *Johnston Fear & Kingham & The Offset Printing Co.* v. *The Commonwealth* (1); *Pidoto* v. *Victoria* (2); *South Australia* v. *The Commonwealth* (3).] The power expressly granted by s. 81 of our Constitution to appropriate "for the purposes of the Commonwealth" is at least as wide as the American power. Accordingly, s. 81, in conjunction with s. 51 (xxxix.), affords authority for a statute which not only provides for the spending of money for a purpose of the Commonwealth but also provides conditions controlling the manner of expenditure, the circumstances in which the benefit of the expenditure is to be received, any necessary machinery to give effect to the distribution of the money and penal provisions to prevent fraud and the like. The *Pharmaceutical Benefits Act* is within this description and is, therefore, valid.

P. D. Phillips, in reply.

Cur. adv. vult.

Nov. 19.

The following written judgments were delivered:—

LATHAM C.J. Demurrer to statement of claim in an action in which the Attorney-General for the State of Victoria at the relation of certain officers of the Medical Society of Victoria sues the Commonwealth of Australia, the Director-General of Health of the Commonwealth, and the Minister for Health of the Commonwealth, for a declaration that the *Pharmaceutical Benefits Act* 1944 is invalid and void. The defendants demur on the grounds that the facts alleged in the statement of claim do not show any cause of action, that the *Pharmaceutical Benefits Act* is valid, and that the *National Welfare Fund Act* 1943, which constitutes a trust fund, and the appropriation out of the fund of public moneys by or under the authority of the *Pharmaceutical Benefits Act*, are within the legislative powers of the Commonwealth Parliament.

It is contended for the defendants that the *Pharmaceutical Benefits Act* is authorized under the power of the Commonwealth Parliament to make laws for the appropriation of money for the purposes of the Commonwealth Constitution, s. 81. The plaintiff contends that the Act is much more than an appropriation Act. It is not disputed that the Act is invalid as Federal legislation unless it can be justified as a law appropriating public moneys.

It is argued for the plaintiff that the Attorney-General, as representing the interests of the public of the State of Victoria, is entitled

(1) (1943) 67 C.L.R. 314, at p. 317.
(2) (1943) 68 C.L.R. 87, at pp. 101, 123, 127.
(3) (1942) 65 C.L.R. 373, at pp. 413, 423, 424, 449, 454.

to take proceedings for a declaration of invalidity on the ground that the Act is an attempt to usurp State legislative power. It is further argued that, if the appropriation of moneys contained in the Act is illegitimate, the moneys which the Act purports to appropriate are surplus revenue of the Commonwealth to which the States, including the State of Victoria, are entitled under the Constitution, s. 94, by virtue of the *Surplus Revenue Acts* (No. 15 of 1908—No. 8 of 1910) and the *State Grants Act* (No. 4 of 1927), s. 5. I reject the second argument for the reason that, if a State claims that surplus revenue is due to it from the Commonwealth, the proper course is for the State to sue for payment of the sum due, and not to institute an action *ex relatione* a citizen of the State by the Attorney-General of the State for a declaration that the sum is due. The right to surplus revenue sought to be established is the right of the Crown as represented by the State, and not a right of the general public which can be protected by an action *ex relatione*. If money is due and unpaid it is recoverable by an ordinary action. An example of such an action is to be found in *New South Wales* v. *The Commonwealth* (1), where New South Wales claimed moneys alleged to be due as surplus revenue. I am therefore of opinion that the right of the Attorney-General to sue in this form of action cannot be supported upon the ground (even if it be established) that the State of which he is the Attorney-General is entitled to illegitimately appropriated (and therefore really unappropriated) moneys of the Commonwealth as surplus revenue.

But upon the first ground there is, according to the decisions of this Court, a cause of action in the Attorney-General for a declaration of the invalidity of Federal legislation as an invasion of a purely State field of legislative power, and as therefore interfering with the public rights of the citizens of the State, who are properly represented in litigation with respect to those rights by the Attorney-General of the State: See *Attorney-General for New South Wales* v. *Brewery Employés Union of New South Wales* (2)—see also *Commonwealth* v. *Queensland* (3) (where the Attorney-General for the Commonwealth sued a State in order to obtain a declaration of the invalidity of State legislation); *Tasmania* v. *Victoria* (4); *Attorney-General for Victoria* v. *The Commonwealth* (5). In the last-mentioned case the position which has been established by the decisions of the Court is stated in the following words by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ.: "It must now be taken as established that the

(1) (1908) 7 C.L.R. 179.
(2) (1908) 6 C.L.R. 469, at pp. 498, 520, 552, 553, 557, 558.
(3) (1920) 29 C.L.R. 1.
(4) (1935) 52 C.L.R. 157.
(5) (1935) 52 C.L.R. 533.

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Attorney-General of a State of the Commonwealth has a sufficient title to invoke the provisions of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents" (1).

The success of the action will, of course, depend upon whether the plaintiff can make out a case of invalidity, but the claim by the Attorney-General of a State that Commonwealth legislation is invalid because, not being justified by the powers conferred upon the Commonwealth Parliament by the Constitution, it interferes with the exercise of State legislative powers is, according to our decisions, a justiciable matter.

In stating this conclusion I do not express any opinion upon the question whether a State or a person has *locus standi* to complain of a Federal appropriation Act which is simply an appropriation Act, that is to say, which merely authorizes the expenditure of money: See *Massachusetts* v. *Mellon* (2). Professor Sir *Harrison Moore*, in his work *The Commonwealth of Australia*, 2nd ed. (1910), p. 149, said: "Appropriations of public money took nothing out of the pockets of the people: they were burdens on the Crown or the revenue." In my opinion, for reasons to be stated, it is not necessary to deal with this question in the present case.

The statement of claim alleges the enactment of the *Pharmaceutical Benefits Act* 1944, which provides for the granting of pharmaceutical benefits to all persons ordinarily resident in the Commonwealth without payment by such persons for such benefits, and for the payment by the Commonwealth to approved pharmaceutical chemists at rates to be prescribed under the Act for the supplying of the said pharmaceutical benefits. The payments to be made by the Commonwealth to the chemists are, according to the Act, to be made out of a trust account established under the *National Welfare Fund Act* 1943. The plaintiff alleges that the provisions of the Constitution do not authorize the enactment of the *Pharmaceutical Benefits Act* or the appropriation of public moneys for the purposes of the Act. The statement of claim proceeds to allege that the Parliament of the State of Victoria has sole power in and for the State of Victoria to make laws with respect to the subject matter of the challenged Federal Act, and further alleges that the Director-General of Health and the Minister for Health intend to carry the Act into execution and to spend moneys of the Commonwealth in so doing contrary to law.

The *National Welfare Fund Act* 1943 in s. 4 provides that there shall be a trust account, to be known as the National Welfare Fund,

(1) (1935) 52 C.L.R., at p. 556. (2) (1923) 262 U.S. 447 [67 Law. Ed. 1078].

which is to be a trust account for the purposes of s. 62A of the *Audit Act* 1901-1934. Section 5 provides that there shall be paid out of the Consolidated Revenue Fund " which is hereby appropriated accordingly, for the purposes of the National Welfare Fund, in each financial year . . . the sum of Thirty million pounds," or a sum equal to one-quarter of the amount received in that financial year as income tax from individual persons, whichever is the less. Section 6 is as follows :—" Moneys standing to the credit of the National Welfare Fund shall be applied in making such payments as are directed by any law of the Commonwealth to be made from the Fund, in relation to health services, unemployment or sickness benefits, family allowances, or other welfare or social services."

Although s. 5 contains words of appropriation, the effect of the Act is only to establish a fund into which moneys are paid. The Act may provide for expenditure in one sense (*New South Wales* v. *The Commonwealth* (1)), but it does not itself contain any authority for expenditure of Commonwealth moneys in the sense of payment out of the Treasury. Section 6 provides that moneys standing to the credit of the fund shall be applied in making payments from that fund for what may generally be described as social services if such payments are directed by any law of the Commonwealth to be made from the fund. Such a " law " must be a valid law, and if it is a valid law no objection can be raised against payments out of the fund. Accordingly, the *National Welfare Fund Act* itself does not infringe any provision of the Constitution.

The *Pharmaceutical Benefits Act* 1944 provides a scheme of gratuitous pharmaceutical benefits available to all persons resident in the Commonwealth, to be supplied through approved pharmaceutical chemists and hospitals and other approved persons, the cost of the scheme to be met out of Commonwealth moneys. The Act contains twenty-seven sections. Section 17 is as follows :—

" Payments in respect of pharmaceutical benefits shall be made out of the Trust Account established under the *National Welfare Fund Act* 1943 and known as the National Welfare Fund."

If this provision is valid it operates to authorize the application of Federal moneys in order to supply the pharmaceutical benefits referred to in the *Pharmaceutical Benefits Act.*

It is not disputed by the defendants that, if this section were not contained in the Act, the Act would be invalid, but it is said that s. 17 makes an appropriation of money and that all the other provisions contained in the Act are incidental to this appropriation, or to the purpose for which the money is appropriated, namely the provision

(1) (1908) 7 C.L.R. 179.

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of pharmaceutical benefits. It is contended that s. 51 (xxxix.) of the Constitution, which provides that the Parliament may make laws with respect to "Matters incidental to the execution of any power vested by this Constitution in the Parliament . . .", therefore authorizes the enactment of the provisions other than s. 17. I agree that s. 51 (xxxix.) authorizes the making of laws for the purpose of securing that public money is applied to the purposes for which it is appropriated and not otherwise. But s. 51 (xxxix.), applied to the power to make laws for the appropriation of money, though it authorizes legislation with respect to matters incidental to the expenditure of the money, does not authorize legislation which is incidental only to the purposes for which the money appropriated is to be expended, unless there is power to make laws for such purposes.

The Act does more than merely define the pharmaceutical benefits to be provided by Commonwealth expenditure. It contains provisions which (it is contended by the plaintiff) encroach upon the sphere of State legislative power by assuming control of matters relating to public health generally and also relating to the conduct of doctors, of pharmaceutical chemists, of hospitals, and of persons dealing with them, and the possession and standards of drugs, medicines and medical and surgical appliances.

Before examining the provisions of the Act in detail, it will be useful to consider the nature and extent of the appropriation power of the Commonwealth Parliament.

The power of the Commonwealth Parliament to appropriate money, that is, to provide by law for the expenditure of moneys of the Commonwealth, depends upon the terms of the Constitution. Section 83 provides that no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law. Accordingly, any expenditure of Commonwealth money must be authorized by a law made by the Commonwealth Parliament. It would not be sufficient, for example, for one House only of the Parliament to pass a resolution approving a proposed expenditure.

Section 81 is in the following terms :—

"All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution."

Section 82 is as follows :—

"The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall

form the first charge thereon ; and the revenue of the Commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth."

Sections 81, 82 and 83 are the provisions which introduce Chapter IV. of the Constitution, which is entitled " Finance and Trade."

At one stage of the argument it was suggested on behalf of the plaintiff that the appropriation power is limited to purposes for which the Commonwealth Parliament has power to make laws for the reason that, with the exception of s. 96 (which provides for financial grants by the Commonwealth to States), the only power to appropriate moneys to be found in the Constitution is that contained in s. 51 (xxxix.). It was said that the power to spend money is incidental to the execution of the Commonwealth powers to make laws with respect to the other subject matters mentioned in s. 51, and it was suggested that, apart from placitum (xxxix.), there might not have been power to expend money in connection with the various matters mentioned in placita (i.) to (xxxviii.).

In my opinion this argument cannot be accepted. Each power to make laws with respect to a particular subject matter includes a power to make a law providing for the expenditure of money in relation to that subject matter. For example, the power contained in s. 51 (vii.) to make laws with respect to lighthouses, lightships, beacons and buoys in itself includes a power to provide for the expenditure of money in relation to lighthouses, &c. The position is the same with respect to the other subjects mentioned in s. 51.

Section 83 provides that no money shall be drawn from the Federal Treasury except under appropriation made by law. Appropriation may be, and normally is, made by a Commonwealth statute, but there are many provisions in the Constitution itself which either appropriate or authorize the appropriation of moneys. I refer to s. 3—salary of the Governor-General ; s. 48—allowances to Members of Parliament ; s. 66—salaries of Ministers ; s. 72—salaries of judges ; s. 84—payments to transferred State officers ; s. 85—payments for State property taken over by the Commonwealth. Sections 87, 89, 93 and 94 all relate to payments to be made by the Commonwealth to the States. Section 96 expressly authorizes the Parliament to grant financial assistance to any State ; ss. 105 and 105A provide for the application of Commonwealth money towards payment of interest and principal of the debts of the States. Under s. 122 the Commonwealth Parliament may spend Federal moneys as it thinks fit in the Territories of the Commonwealth.

It is plain, therefore, that appropriations are made, or may be made, by law otherwise than under the powers contained in s. 51 (xxxix.) of the Constitution.

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It was argued for the plaintiff that the phrase " the purposes of the Commonwealth " in s. 81 refers to legislative purposes of the Commonwealth, that is, purposes for which the Commonwealth Parliament has power to make laws. It is plain that the Commonwealth has executive and judicial purposes as well as legislative purposes. The very existence of the Commonwealth, apart from any legislation, creates some purposes of the Commonwealth: See *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co. Ltd.* (1). But as laws may be made with respect to executive and judicial purposes, legislative purposes could be held to include the other purposes mentioned. The principal argument for the plaintiff was that a Commonwealth purpose (for which alone appropriation of money is said to be legitimate) must be found in powers conferred upon the Parliament by some other provision than s. 81; that s. 81 conferred no legislative power whatever, but was based upon the assumption that the purposes of the Commonwealth were defined or limited by other provisions of the Constitution; so that " the purposes of the Commonwealth " must be construed as meaning " purposes for which the Commonwealth Parliament has power to make laws."

But when it was desired to refer to the legislative purposes of the Commonwealth in this sense a definite and unambiguous phrase was used. Section 51 (xxxi.) is a provision that the Parliament shall have power to make laws with respect to " The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws." This is a precise and particular reference to the legislative purposes of the Commonwealth. In s. 81 a different phrase is used, namely, " the purposes of the Commonwealth." In my opinion it would be contrary to well-recognized principles of statutory construction to regard these distinct phrases as identical in meaning unless, indeed, there were something in the context which showed that they must be so construed. I have been unable to discover any reason in the terms of the Constitution for regarding such different phrases as identical in meaning. Prima facie at least, such a definite difference in language points to a real difference in signification.

It is contended for the defendants that the provision that Federal revenues shall form one consolidated fund " to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution " in itself confers a power to appropriate money for " the purposes of the Commonwealth," which power is to be exercised by making laws—s. 83.

(1) (1922) 31 C.L.R. 421, at p. 441.

The plaintiff, on the other hand, contending that these words do not confer any legislative power, submits that all the words in s. 81 after the words "one Consolidated Fund" produce no effect, but merely repeat provisions to be found elsewhere in the Constitution. Prima facie no words in any statute should be regarded as meaningless, but I admit that I find it difficult to give any effect to the words "in the manner and subject to the charges and liabilities imposed by this Constitution." Sections 53, 54 and 56 of the Constitution contain provisions relating to the manner in which laws appropriating money shall be made. Section 81, in its provision with respect to the "manner" of making appropriations by law, adds nothing to those provisions. The same observation must, I think, be made with respect to the words "subject to the charges and liabilities imposed by this Constitution." Those charges and liabilities are imposed by the Constitution independently of the reference to them in s. 81. I therefore agree that some of the words in s. 81 have no practical effect. But a meaning should, if possible, be attached to all the words used. There may be difficulty in finding any effective meaning for the words referring to "manner" and "charges and liabilities," but the position is different in the case of the words "for the purposes of the Commonwealth." These words can be interpreted as providing that all appropriations (which must be "made by law"—s. 83) must be for purposes which can be shown to be purposes of the Commonwealth. In other words, there cannot be appropriations in blank, appropriations for no designated purpose, merely authorizing expenditure with no reference to purpose. An Act which merely provided that a minister or some other person could spend a sum of money, no purpose of the expenditure being stated, would not be a valid appropriation Act.

But this statement only raises the question: What are purposes of the Commonwealth within the meaning of the section?

I approach the consideration of this question with the prima facie opinion that the words "purposes of the Commonwealth" (which plainly *include* purposes "in respect of which the Parliament has power to make laws") are not identical in meaning with the latter words. I have already stated my opinion that each such power includes a power to authorize the expenditure of money. A meaning is given to the words "to be appropriated for the purposes of the Commonwealth" if they are read as intended to show positively that there may be other Commonwealth purposes than those in respect of which power to make laws is given elsewhere in the Constitution. Otherwise the words have no legal effect whatever.

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What then is the authority which can determine what purposes are purposes of the Commonwealth ? As the appropriation is to be made by law (s. 83), the natural answer is—the authority which makes Commonwealth laws, that is, the Commonwealth Parliament, not the executive authority which administers laws when made, nor the judicial authority which interprets and applies the laws. Thus, in my opinion, the Commonwealth Parliament has a general, and not a limited, power of appropriation of public moneys. It is general in the sense that it is for the Parliament to determine whether or not a particular purpose shall be adopted as a purpose of the Commonwealth. I take as illustrations some past appropriations for purposes in relation to which the Parliament has approved the expenditure of moneys but where, when the purposes are considered in themselves, there is no power to legislate with respect to the matters to which the expenditure relates. In some cases there is only an appropriation of money for the purpose stated, in other cases there are statutes containing detailed provisions for the establishment of organizations for the purpose of spending the money. I mention appropriations for Antarctic exploration, medical research, literary grants and pensions, subscriptions to international organizations, such as the Agricultural Institute at Rome, public health, assistance to distressed Australians abroad. Among statutes I mention those conveniently to be found under the heading of Research and Science in vol. III. of the *Commonwealth Acts* 1901-1935—Institute of Anatomy, Economic Research, Forestry Bureau, Geo-physical Survey, Science and Industry, Endowment and Research. (I omit the Act relating to a Solar Observatory at Canberra, because there is no doubt that, in relation to the Territories of the Commonwealth, the Parliament has a quite general power of appropriation for any purpose whatever.) The application of Commonwealth moneys to these objects, so far as it merely involves the expenditure of money, is, in my opinion, authorized by the Constitution. Such expenditures do not interfere with the rights of the States or of any persons, and if the Commonwealth Parliament approves the expenditure there is, in my opinion, full legal justification for the expenditure.

The Supreme Court of the United States has taken the same view of the Constitution of the United States. *Alexander Hamilton* was of opinion that the appropriation power was a general power in the sense which I have stated. *Madison*, on the other hand, took a more limited view of the nature of that power. The controversy, after proceeding for many years, has ultimately been resolved by recent decisions which have definitely adopted *Hamilton's* view

(*United States* v. *Butler* (1); *Helvering* v. *Davis* (2); *Charles C. Steward Machine Co.* v. *Davis* (3)). The reasoning upon which these decisions are based, however, depends in large measure upon the fact that the Constitution of the United States in section VIII., dealing with the legislative powers of Congress, provides: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . ." The power to tax is here closely associated with the power to spend. This article has been interpreted as meaning that the power to spend money for the general welfare is correlative with the taxing power. The taxing power of Congress is unlimited and, accordingly, it has been held that the power to spend money is similarly unlimited. This precise argument does not apply to the Australian Constitution, because there is not the same collocation and association of words.

But the Commonwealth Constitution does contain a completely general power (subject to one qualification) to legislate with respect to taxation. This power is contained in s. 51 (ii.)—"The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . .: (ii.) Taxation; but so as not to discriminate between States or parts of States." The prohibition of discrimination is a limitation upon the taxing power. A law with respect to taxation must be a law for the peace, order and good government of the Commonwealth. It has not hitherto been suggested that this provision, which is not easily distinguishable from a power to make laws "to provide for the general welfare," makes it even theoretically possible for a court to declare that a taxing law is invalid upon the ground that the law providing for the tax is not a law for the peace, order and good government of the Commonwealth. (I omit any reference to territorial limitations upon legislative power, because they are irrelevant for the present purpose.) The decision whether any particular taxation Act is or is not a law for the peace, order and good government of the Commonwealth depends entirely upon the will of the Commonwealth Parliament. There is no legal criterion which would enable any court to decide that one tax is valid as falling within this description, and that another tax is invalid because not falling within the description. The determination whether legislation with respect to any of the subject matters mentioned in s. 51 is for the peace, order and good government of the Commonwealth is

(1) (1936) 297 U.S. 1 [80 Law. Ed. 477].
(2) (1937) 301 U.S. 619 [81 Law. Ed. 1307].
(3) (1937) 301 U.S. 548 [81 Law. Ed. 1279].

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entirely a political matter, and not a matter for determination by any court.

Similarly, in my opinion, the determination whether a particular purpose should be regarded and adopted as a Commonwealth purpose is a political matter. If the proposed limitation to "legislative purposes" in the sense stated is rejected, no test has been suggested which would enable a court to undertake a judicial review upon any legal basis of the multifarious expenditure which a Parliament may consider it necessary or desirable to undertake.

The words "purposes of the Commonwealth" should not, in my opinion, be construed as meaning for the governmental purposes of the political organism called the Commonwealth. In the introductory provision of s. 51 (that laws are to be made for the peace, order and good government of the Commonwealth) the word "Commonwealth" is used to describe the people of the Commonwealth in the area which is the Commonwealth in the geographical sense. The laws of the Commonwealth operate directly upon the people of Australia, and it is the good government of those people with which the Constitution is concerned, not the government of the Government itself. In s. 81 in the phrase "the purposes of the Commonwealth" the word "Commonwealth" should, in my opinion, be interpreted in the same sense. The word "Commonwealth" there plainly does not mean the geographical area known as the Commonwealth. Neither, in my opinion, does it mean the Commonwealth as a political organism. I see no reason for limiting the words "the purposes of the Commonwealth" to governmental purposes in the sense of the discharge of legislative, judicial or executive functions. The word "Commonwealth" in this section refers to the people who, by covering clause 3 of the Constitution, are "united in a Federal Commonwealth under the name of the Commonwealth of Australia."

For these reasons, in my opinion, the provisions of s. 81 can fairly be read as intended to mean that it is the Commonwealth Parliament, and not any court, which is entrusted with the power, duty and responsibility of determining what purposes shall be Commonwealth purposes, as well as of providing for the expenditure of money for such purposes.

This conclusion, however, relates only to laws providing for the expenditure of money. It does not follow that the Commonwealth Parliament, because it can, as it were, subscribe towards the support of what it considers to be worthy objects, can take legislative control of matters relating to any such objects in respect of which there is no other grant of legislative power. A company may have power to

subscribe to a hospital or a football club without having power to conduct a hospital or to organize and control a football club.

I illustrate the position as I understand it by taking public health legislation as an example. Under s. 51 (ix.) the Commonwealth Parliament has power to make laws with respect to quarantine. Quarantine legislation may be regarded in most, if not all, of its aspects as a particular form of public health legislation. In relation to quarantine the Commonwealth Parliament has full powers of legislation. It can not only provide that money shall be spent upon quarantine, but it can devise and put into operation a whole compulsory system of quarantine under which duties can be imposed upon persons and penalties inflicted for breach of the law. But in relation to other aspects of public health the Commonwealth (once again leaving out of account the Territories) has no such power of legislation. The Commonwealth can, in my view, authorize the expenditure of public money on inquiries, investigations, research and advocacy in relation to matters affecting public health. But the Parliament could not pass a law requiring citizens of the States to keep their premises clean or to submit to vaccination or immunization. The power to appropriate and expend money, however wide that power may be, does not enable the Commonwealth to extend its legislative powers beyond those marked out and defined by the Constitution, although (in my opinion) those powers include a general appropriation power.

The attack upon the *Pharmaceutical Benefits Act* is based upon the contention that it invades the State legislative arena. I do not regard any objection to Commonwealth legislation as well-founded which *begins with* the proposition that a certain area of possible legislation is reserved to the States. The proposition that some area is so reserved may emerge as a conclusion from other propositions, but it cannot be adopted as an original premise. The first inquiry into the validity of any Commonwealth legislation is an inquiry into Commonwealth power, not into State power. If the legislation is legislation with respect to a subject with respect to which the Commonwealth Parliament has power to make laws, and if it is not prohibited by some provision of the Constitution, the legislation is valid and prevails over any inconsistent State legislation: Constitution, s. 109. When the Commonwealth power has been defined, an Act which is authorized under the power must be held to be valid (in the absence of any relevant prohibition), whatever may be the effect upon actual or potential State laws. The States are the residuary legatees of legislative power and the specific grants of power to the Commonwealth are not to be construed by first assuming

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the content of the residue (*Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1)).

The question therefore is whether the *Pharmaceutical Benefits Act* falls within the sphere of Commonwealth legislative power. If it is an Act for the appropriation of money, s. 51 (xxxix.) of the Constitution would authorize the inclusion in the Act of provisions to prevent the use of the money for purposes other than those declared by Parliament. But the power to make laws for the appropriation of money can go no further than this. If the Act can properly be described as an Act for the appropriation of money with safeguards against wrongful expenditure of the money, it is in my opinion valid. If, on the other hand, it is an Act which, though it appropriates money, is really an Act for the control of doctors, chemists, sale of drugs and the conduct of persons who deal with doctors and chemists, then in my opinion it is invalid, for the reason that the Act is an Act with respect to subjects which are not committed to the Federal Parliament.

The Act contains provisions for the approval of pharmaceutical chemists and the free supply to customers of medicines &c. by them, the Commonwealth paying the chemists. Only approved chemists can supply pharmaceutical benefits in accordance with the Act, and it is obvious that the result of the operation of the Act might be that chemists would in practice be compelled to apply for approval or to lose a great deal of their business. Similarly, doctors might practically be compelled to write prescriptions in accordance with the Commonwealth Formulary so that their patients could obtain medicines &c. free—or the doctors would run the risk of losing their practice. I do not, however, base my conclusion with respect to the validity of the Act upon these probable consequences of its operation. From the point of view of the law a chemist is free to abstain from applying for approval and a doctor is free not to use the Commonwealth Formulary in the prescribed form. But there are various provisions in the Act, essential to its operation, which purport to confer rights and to impose duties. I proceed therefore to examine the Act in detail.

Section 4 of the Act contains definitions of "hospital authority," "medical practitioner," "pharmaceutical benefits," "pharmaceutical chemists." Sections 5 and 6 provide for administration. Sections 7 and 8 are as follows :—

"7. The pharmaceutical benefits referred to in this Act shall consist of—

(*a*) uncompounded medicines the names of which, and medicinal compounds the formulae of which, are contained in a

(1) (1920) 28 C.L.R. 129.

prescribed formulary to be known as the Commonwealth Pharmaceutical Formulary; and

(*b*) materials and appliances (not being uncompounded medicines or medicinal compounds) the names of which are contained in a prescribed addendum to the Commonwealth Pharmaceutical Formulary.

8. (1) Subject to this Act, every person ordinarily resident in the Commonwealth shall be entitled to receive pharmaceutical benefits.

(2) A person receiving any pharmaceutical benefit in accordance with this Act shall not be under any obligation to make any payment therefor to the person supplying the pharmaceutical benefit.

(3) Notwithstanding the provisions of the last preceding subsection, a person supplying a pharmaceutical benefit in accordance with this Act shall be entitled to make such special charges (if any) as are prescribed."

The effect of these provisions is that every person ordinarily resident in the Commonwealth is entitled to receive, without making any payment, pharmaceutical benefits as specified in the Commonwealth Pharmaceutical Formulary. Section 19 provides that there shall be a Formulary Committee, which, presumably, will settle the Formulary. Section 21 provides that it shall be an offence for any person to demand or receive any payment in respect of any pharmaceutical benefit supplied in accordance with the Act from the person to whom the benefit was supplied.

Section 8 (1) provides that persons ordinarily resident in the Commonwealth shall be entitled to receive the medicines, appliances, etc., contained in the Formulary. This section, if valid, gives, by a Federal law, a right to such persons. If it is valid, any State law which is inconsistent with it becomes inoperative. Thus a State law which prohibited the obtaining of a medicine or appliance contained in the Formulary would not operate. So also (by reason of s. 8 (2)) a State law would be inoperative if it required payment for such things to be made by the person to whom they were supplied. There is no reason for doubt that such provisions as s. 8 (1) and (2), taken by themselves, cannot be supported under any power conferred by the Constitution upon the Commonwealth Parliament. Is this position changed by the fact (s. 13 and s. 17) that the Commonwealth is prepared to pay for the medicines &c. ? In my opinion the answer to this question must be in the negative. The provision that the Commonwealth will pay for the medicines &c. has no relation whatever to the provisions of s. 8 that a person shall have a right to get medicines &c. and that he shall not pay for them. The grant of money is one thing : the creation of a right which will prevail over

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State laws is an entirely different thing. There is no category of Commonwealth legislative power which can justify such Federal legislation as is contained in s. 8 (1) and (2). Sub-section (3) is open to a similar objection.

Hospitals as well as individual persons are entitled to receive pharmaceutical benefits—ss. 11, 13. If this is a right effectively granted by Federal law, it cannot be affected or prejudiced by any State legislation. But once again there is no category of Federal legislative power under which such a provision (which would deprive the States of some forms of hospital control) may be enacted.

There is a provision in s. 22 which directly controls the conduct of medical practitioners. It provides that: "A medical practitioner shall not write a prescription in accordance with any prescribed form unless he is satisfied, by personal examination of the person in respect of whom the prescription is written, that the pharmaceutical benefit specified in the prescription is necessary for the treatment of that person. Penalty: Fifty pounds or imprisonment for three months." Section 27 provides for the making of regulations by the Governor-General prescribing matters which are required or permitted to be prescribed. Thus, under ss. 22 and 27, a common form of prescription, possibly universally used by doctors, could be prescribed, and then a doctor could not use that prescription unless the conditions of s. 22 were satisfied. Probably s. 22 would be interpreted also to mean that a "repeat" prescription could never be written without a further personal examination of the patient on each occasion. Some such provision may be thought necessary in a scheme for providing free medicine. This provision directly and compulsorily operates in relation to medical practitioners by preventing them carrying on their practice as they may be allowed to carry it on under the laws of the State. In my opinion the Commonwealth Parliament has no power to control medical practice in this manner. The position cannot be altered by the fact that the Commonwealth is prepared to pay for any medicine &c. specified in the Formulary which the doctor may prescribe for a patient.

Section 23 provides, *inter alia*, that a person shall not "obtain any pharmaceutical benefit to which he is not entitled." The pharmaceutical benefits are defined in s. 4 of the Act as meaning pharmaceutical benefits specified in s. 7. Section 7, which has already been quoted, provides that the pharmaceutical benefits referred to in the Act shall consist of medicines and appliances, the names of which are contained in the Commonwealth Formulary or in an addendum thereto. Section 7 therefore relates simply to certain substances and appliances named in the Formulary or addendum, e.g. quinine

or a truss, not to such things when supplied under or in accordance with the Act. Quinine and trusses are, according to the Act, pharmaceutical benefits (if contained in the Formulary or addendum), whether they are in fact supplied free to anybody under the Act or not. Accordingly, anyone who " obtained " quinine or a truss " to which he was not entitled " (presumably under the Act) would be guilty of an offence. Anyone who bought quinine or a truss in the ordinary way would be obtaining " a pharmaceutical benefit," namely quinine or a truss, and he would not be entitled to it *under the Act.* The person who accepted payment would be guilty of an offence against s. 21 of the Act and would be liable to a penalty of £50 or imprisonment for three months. There is no Commonwealth head of power to which such legislation can be referred. Again, the grant of money does not affect the matter.

Section 23 (1) (*d*) provides that a person shall not, not being a medical practitioner, write a prescription in accordance with the prescribed form. The effect of this section is that the Governor-General may prescribe a form of prescription, and that anyone who is not a medical practitioner who thereafter writes down the words of the prescription is guilty of an offence. There is no head of Commonwealth power which can justify such a provision in a Federal law, and the fact that the Commonwealth makes a grant of money for free medicines &c. does not alter this fact.

Section 25 is as follows :—

" For the purposes of this Act, any person authorized by the Minister or the Director-General to act under this section may—

(*a*) enter at all reasonable times the premises of any approved pharmaceutical chemist ;

(*b*) make such examination and inquiry as he thinks fit for the purposes of ascertaining whether the provisions of this Act are being complied with ;

(*c*) take samples of drugs, medicines, substances, materials or appliances which may be supplied as pharmaceutical benefits ;

(*d*) examine any person employed in any such premises with respect to any matter under this Act ; and

(*e*) exercise such powers and functions as are prescribed."

The powers sought to be conferred by this section are extensive and far-reaching. Under s. 25 (*b*) an authorized person may make such examination and inquiry (apparently from any person or in any place) as he thinks fit as to whether the provisions of the Act are being complied with. Refusal to submit to such examination and inquiry would, if the provision is valid, be an offence: See

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Crimes Act 1914-1932, s. 76. Section 25 (*b*) is not a provision for the expenditure of Commonwealth money, nor is it incidental to such expenditure. It is incidental only to a scheme for providing free medicine &c. Under s. 25 (*c*) an authorized person may take samples of any drugs, medicines, substances, materials or appliances "which may be supplied as pharmaceutical benefits." Under this provision such a person could take samples of any drugs &c. whatever upon the ground that they might thereafter be supplied as pharmaceutical benefits. Under this power samples could be taken from persons who had nothing whatever to do with the pharmaceutical benefits scheme. This provision might well be part of a scheme for controlling the sale of drugs &c., but it goes beyond authorizing the expenditure of money.

Under s. 27 the Governor-General may make regulations for prescribing, *inter alia*, the standards or composition or purity of pharmaceutical benefits subject to which payments in respect of the supply thereof shall be made. It may be that a State Parliament would prohibit the use of certain drugs &c. altogether. But under s. 27 (if it were valid) the Governor-General could prescribe a standard inconsistent with the State standard, and then persons would have the (Federal) right to receive drugs the possession of which might be prohibited by State law. There is no power in this field to create such a paramount Federal right.

Federal legislation, when it is valid, does not exist on sufferance—it prevails over all inconsistent State legislation (Constitution, s. 109). Where the Commonwealth Parliament is expressly empowered to make a particular benefit available to the people as, for example, in the case of invalid and old-age pensions, there is, in my opinion, no doubt that the Commonwealth Parliament would have power to legislate to prevent any State interfering with the operation of a scheme approved by the Commonwealth Parliament. State legislation to the effect that no person residing in a State should accept a Commonwealth invalid or old-age pension could certainly not prevail over any Federal legislation with which it was inconsistent. It would be inconsistent with a Federal law which declared that such persons should be entitled to such a pension. But it was conceded in argument for the defendants that in the case of the *Pharmaceutical Benefits Act*, although the Commonwealth Parliament had power to confer the benefits and to provide a scheme for their administration, any State Parliament could pass valid laws which were inconsistent with the Commonwealth law, and that it would be the Commonwealth law, and not the State law, which would become inoperative

in that State. It was necessary to make this concession in order to avoid the admission that the validity of the Act would mean that the State Parliaments were prevented by the Act from legislating with respect to many matters relating to doctors, chemists, hospitals, medicines &c. But the conception of valid Federal law being subordinate to any State law is, in my opinion, completely inconsistent with the whole basis of the Federal Constitution. The Constitution is founded upon the principle that valid Commonwealth legislation renders inconsistent State legislation inoperative and, in my opinion, does not leave room for the view that Commonwealth legislation expressed in general terms can be rendered either invalid or legally inoperative in particular States by State legislation. But I do not base this judgment in any way upon this concession.

For the reasons stated I reach the conclusion that the Court should not accept the only argument which has been used in support of the validity of the Act, namely that the Act is an exercise of the power of the Commonwealth Parliament to make laws for the appropriation of public money. The Act is far more than an appropriation Act; it is just the kind of statute which might well be passed by a parliament which had full power to make such laws as it thought proper with respect to public health, doctors, chemists, hospitals, drugs, medicines and medical and surgical appliances. The Commonwealth Parliament has no such power. The result of a contrary view would be that, by the simple device of providing for the expenditure of a sum of money with respect to a particular subject matter, the Commonwealth could introduce a scheme which in practice would completely regulate and control that subject matter. The Commonwealth Parliament would thus have almost unlimited legislative power. The careful delimitation of Commonwealth powers made by the Constitution prevents the adoption of such an opinion.

Argument in this case commenced on 5th October and was completed on 10th October. It is proper to refer to the fact that on 10th October assent was given by the Governor-General to the *Pharmaceutical Benefits Act* 1945. That Act repealed and amended certain sections of the *Pharmaceutical Benefits Act* 1944. No question as to the validity of the 1945 Act is raised by these proceedings. The repeals and amendments made by that Act do not, however, affect the substantial character of the original Act. I have considered each particular provision of the amending Act and none of them are of such a nature as to affect the conclusions which I have stated.

In my opinion, for the reasons stated, the demurrer should be overruled.

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RICH J. This case submits two questions for our determination. The first question which stands on the threshhold is whether the Attorney-General is competent to challenge the validity of the Act the subject of the action. A similar question arose in previous decisions of this Court, and for myself I adhere to what I said in *Tasmania* v. *Victoria* (1) and *Attorney-General for Victoria* v. *The Commonwealth* (2), and accordingly determine that he is entitled to maintain the action. The second question has been fully dealt with in the judgment of my brother *Dixon*, which I have had the advantage of reading, and as I am in substantial agreement with his reasons I cannot usefully add to them.

The demurrer should be overruled.

STARKE J. Demurrer: The question is whether the *Pharmaceutical Benefits Act* 1944 is within the constitutional power of the Commonwealth. The object of the Act is to make provision for the supply of pharmaceutical benefits to persons ordinarily resident in Australia without any obligation to make any payment therefor to the person supplying the pharmaceutical benefit. The benefits consist of medicines the formulae of which are contained in the Commonwealth Pharmaceutical Formulary and materials and appliances the names of which are contained in an addendum to the Formulary.

Pharmaceutical chemists who are willing to supply such benefits may be approved by the Director-General of Health, and no person is entitled to receive any benefits except from an approved chemist and on presentation of a written order in a prescribed form by a medical practitioner. The payments in respect of such benefits are made out of the trust account established under the *National Welfare Fund Act* 1943, which appropriates the sum of thirty million pounds in each financial year for the purposes of the National Welfare Fund, which is a trust account established by the Act. And moneys standing to the credit of the National Welfare Fund shall be applied in making such payments as are directed by any law of the Commonwealth to be made from the fund, in relation to health services, unemployment or sickness benefits, family allowances, or other welfare or social services. The *Pharmaceutical Benefits Act* provides for payment of approved chemists who supply benefits in accordance with the Act. And agreements may be entered into with medical practitioners providing for their services without charge to members of the public for the purpose of furnishing prescriptions and orders for the purposes of the Act. And powers are given to enter the

(1) (1935) 52 C.L.R. 157, at p. 171. (2) (1935) 52 C.L.R. 533, at pp. 560, 561.

premises of any approved chemist, take samples of drugs and materials and exercise such other powers and functions as may be prescribed. And various sanctions are imposed by the Act which I shall do no more than mention.

Constitutional authority for the Act was referred to: s. 81 and s. 51 (xxxix.) of the Constitution. No authority for the Act can be found in any other constitutional power of the Commonwealth.

"All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution" (Constitution, s. 81). And "no money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law" (Constitution, s. 83). And the Parliament has, subject to the Constitution, power to make laws for the peace, order and good government of the Commonwealth with respect to matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth (Constitution, s. 51 (xxxix.)). The Commonwealth contends that this power of appropriation is unlimited, that the Parliament can appropriate the revenues and moneys of the Commonwealth for any purpose it thinks proper, and that the appropriation of the revenues and moneys of the Commonwealth is a political decision, which is not examinable in any court of law. And the incidental power, it is contended, enables the Parliament to enact such legislation as it deems necessary or expedient for effectuating any appropriation.

Undoubtedly in the United States the power of appropriation seems unlimited and the source of that power is referred to the constitutional provisions that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States (Art. IV., s. 3), and to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and the general welfare of the United States (Art. I., s. 8 and Preamble; *Willoughby* on the *Constitution of the United States*, 2nd ed. (1929), vol. 1, p. 98 et seq.; *Willis's Constitutional Law of the United States*, p. 393; *United States* v. *Butler* (1); *Helvering* v. *Davis* (2)).

The Commonwealth power of appropriation, however, is explicit; it is for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by the Constitution.

(1) (1936) 297 U.S. 1 [80 Law. Ed. 477].

(2) (1937) 301 U.S. 619 [81 Law. Ed. 1307].

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This power must be construed liberally; it is a great constitutional power, but it does not authorize the Commonwealth appropriating its revenues and moneys for any purpose whatever "without regard to whether the object of expenditure is for the purpose of and incident to some matter which belongs to the Federal Government" (*Harrison Moore, Constitution of the Commonwealth of Australia*, 2nd ed. (1910), pp. 523-527). Indeed, the provisions in s. 96 of the Constitution for financial assistance to the States appear superfluous if the power of the Parliament were as extensive as is now claimed. The purposes of the Commonwealth are those of an organized political body, with legislative, executive and judicial functions, whatever is incidental thereto, and the status of the Commonwealth as a Federal Government. And where else but from the Constitution and other Acts conferring authority upon the Commonwealth can its purposes or functions be discovered? Those purposes include matters in respect of which it can make laws by virtue of the Constitution or any other Act, and they also include the exercise of executive and judicial functions vested in the Commonwealth by the Constitution or by any other Act. Among other purposes of the Commonwealth must also be included, I think, matter arising from the existence of the Commonwealth and its status as a Federal Government. Thus, I should think that moneys appropriated for payment &c. of members of Parliament, exploration and so forth, would be within the authority of the Commonwealth.

But the *Pharmaceutical Benefits Act* 1944 is beyond any purpose of the Commonwealth. No legislative, executive or judicial function or purpose of the Commonwealth can be found which supports it, and it cannot be justified because of the existence of the Commonwealth or its status as a Federal Government.

I would add, that if the Commonwealth had unlimited power to appropriate its revenues and moneys for any purpose that it thought proper, then I should have some difficulty in denying to the Commonwealth power to provide for the manner and method of its expenditure under the incidental power in the Constitution.

An objection was taken to the competence of this action based upon the decision of the Supreme Court of the United States in *Massachusetts* v. *Mellon* (1), but this objection has long been untenable in this Court, having regard to its own decisions (*Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.* (2); *Tasmania* v. *Victoria* (3); *Attorney-General for Victoria* v. *The Commonwealth* (4)).

The demurrer should be overruled.

(1) (1923) 262 U.S. 447 [67 Law. Ed. 1078].
(2) (1908) 6 C.L.R. 469.
(3) (1935) 52 C.L.R. 157.
(4) (1934) 52 C.L.R. 533.

DIXON J. The purpose of this suit is to obtain a decision concerning the validity of the *Pharmaceutical Benefits Act* 1944. The demurrer of the Commonwealth to the statement of claim raises two questions. The first is whether the suit is maintainable at all, and the second, if the suit be maintainable, is whether the Act is invalid.

I have felt more difficulty with reference to the first question than I have been able to find in the second. For the legislation appears to me only too clearly to be *ultra vires*. In discharging our duty of passing upon the validity of an enactment, we should make every reasonable intendment in its favour. We should give to the powers conferred upon the Parliament as ample an application as the expressed intention and the recognized implications of the Constitution will allow. We should interpret the enactment, so far as its language permits, so as to bring it within the application of those powers and we should not, unless the intention is clear, read it as exceeding them. Then, if it appears impossible to refer all the provisions of a statute to the legislative power belonging to the Parliament, we should examine it to see whether there is any divisible part of the legislation for which support can be found. But when all this has been done, the *Pharmaceutical Benefits Act* emerges as a statute which must be held completely invalid upon the simple ground that it is not relevant to any power which the Constitution confers upon the Parliament. It is entitled an Act to make provision for the supply of pharmaceutical benefits, and the title describes its central purpose. The purpose is carried out with some elaboration by the enactment, which provides a detailed and coherent plan. It is enough to state briefly the chief features of the plan. A pharmaceutical formulary is to be prepared on behalf of the Commonwealth containing formulae for uncompounded medicines and medicinal compounds and to it there is an addendum naming materials and appliances. The expression "pharmaceutical benefits" is used to describe what is contained in the formulary and the addendum. Pharmaceutical chemists who are willing to supply such benefits may obtain approval for the purposes of the Act. A chemist, when approved, must display at his shop a sign in a prescribed form showing that he is an approved chemist. He must, on presentation by a customer of a prescription, in proper form, signed by a medical practitioner, supply the medical benefit mentioned in the prescription and he must make no charge to the customer. If he demands any payment from the customer he commits an offence. He is entitled to be paid by the Commonwealth but at rates fixed, not by him, but by regulations made under the Act. He may not supply the same pharmaceutical benefit again to the customer unless the prescription

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is renewed or a fresh one is presented. Forms of prescription are to be furnished to medical practitioners, but a medical practitioner may not use the form for a prescription unless by a personal examination of the person prescribed for, or by some other sufficient means, he is satisfied of the necessity for the prescription. If he fails in this respect, he commits an offence. Various other offences are created. Most of them are directed at repressing dishonesty or abuse of the plan. Among them is one that has wider implications. It penalizes anybody who is not a duly registered or licensed medical practitioner if he writes a prescription in accordance with the form. There are powers of entry upon the premises of approved chemists and of examination and inquiry, including the taking of samples, and there are powers to make regulations for carrying out or giving effect to the Act and in particular for a number of specified purposes. Two independent powers are specifically given to the Minister administering the Act the exercise of which would take its operation further. One of them enables him to make special arrangements for those living in isolated areas or under special conditions to supply them with benefits in lieu of those provided for by the Act. The other empowers him to enter into agreements with medical practitioners providing that their services shall be available without charge to members of the public for the purpose of furnishing prescriptions and orders under the Act.

An amending Act, passed while these proceedings were pending, provides for bringing certain provisions into immediate operation, for the approval of the premises at which pharmaceutical benefits may be supplied by approved chemists, for limited approval in the case of dispensaries of friendly societies and for some other minor matters.

It need hardly be said that the subject of the foregoing legislation does not fall within any of the enumerated matters that are assigned by the Constitution to the legislative power of the Commonwealth. No one has suggested the contrary. In attempting to support the validity of the Act, counsel relied only on the power of expenditure and upon the incidental power. There is, indeed, nothing else which he could possibly invoke. But I am unable to think that, even with the widest conceivable construction of the power of appropriation and the fullest application thereto of the power to make laws with respect to incidental matters, any sufficient support can be found there for the *Pharmaceutical Benefits Act*.

Though, of course, the expenditure of money is indispensable to the scheme of the Act yet, as appears from the foregoing, it contains a general legislative plan covering much more than the spending of

money and involving, moreover, control and regulation by law operating directly upon the individual. It was said that s. 81 of the Constitution, in referring to appropriation for the purposes of the Commonwealth, empowers the Parliament to expend money for any purpose that is for the benefit of the people of the Commonwealth, or for the advancement of their interest and that, for the rest, s. 51 (xxxix.) warranted an amplification or extension of the area of legislation once the description of benefit or advancement had been determined on. This is not the view which in the past I have entertained of the power of appropriation given by s. 81 and of the requirement expressed by s. 83 that the appropriation must be "by law." No-one, I think, suggests, and I certainly do not, that any narrow interpretation or application should be given to these provisions. Even upon the footing that the power of expenditure is limited to matters to which the Federal legislative power may be addressed, it necessarily includes whatever is incidental to the existence of the Commonwealth as a state and to the exercise of the functions of a national government. These are things which, whether in reference to the external or internal concerns of government, should be interpreted widely and applied according to no narrow conception of the functions of the central government of a country in the world of to-day. There is no reason why such matters should be taken to fall outside the province of Federal appropriation though ascertained and defined by reference to the legislative power of the Commonwealth. But the claim is made that, under ss. 81 and 83, the Parliament has power to authorize the expenditure of money without any limitation of purpose. The claim means that, though the Commonwealth is a government of defined and enumerated powers, the power to spend money is independent of the limitations which affect the other powers of the Commonwealth and is not to be restricted by reference to the purposes for which, otherwise, the Commonwealth is conceived to have been established. There has not been wanting support for this view among those who have written about the Constitution, though I think the more general opinion has been against it. But I cannot see that this case requires us to choose between the two views. If it be conceded to the full that the power of appropriation authorizes the expenditure of money on any purpose the Parliament may think fit without restriction as to subject matter, it nevertheless appears to me to be a proposition that has little or no relevance to this case. It is certainly not one that can support the *Pharmaceutical Benefits Act* as a whole. If it were true that the Act was primarily an appropriation for expenditure and that it did not appear impossible to sever

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the provisions which went beyond what is incidental to such an appropriation, it would be then necessary to consider how much could be supported under s. 81 and how much of the rest could be stripped from the enactment without changing its essential character. But the fact is that under the *Pharmaceutical Benefits Act* appropriation of money is the consequence of the plan; the plan is not consequential upon or incidental to the appropriation of money. There is only one matter that appears to me to arise in this case for decision in respect of s. 81. It is the suggestion that it might be read as if it were the power in the American Constitution authorizing the raising of revenue to provide for the general welfare of the United States. The suggestion means to my mind that we should read or write into the Australian provisions a conception foreign to them. Article I., s. 8, of the Constitution of the United States confers upon Congress power "to lay and collect Taxes Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States." Upon this text there has been an historic controversy. The conclusions of the Supreme Court which largely have set the controversy at rest, are embodied in the following passages from the opinion of the Court in *United States* v. *Butler* (1):—"It is not contended that this provision grants power to regulate agricultural production upon the theory that such legislation would promote the general welfare. The Government concedes that the phrase 'to provide for the general welfare' qualifies the power 'to lay and collect taxes.' The view that the clause grants power to provide for the general welfare, independently of the taxing power, has never been authoritatively accepted. Mr. Justice *Story* points out that if it were adopted 'it is obvious that under color of the generality of the words, to "provide for the common defence and general welfare," the Government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers' (*Story, Commentaries on Constitution of United States*, 5th ed., vol. 1, s. 907). The true construction undoubtedly is that the only thing granted is the power to tax for the purpose of providing funds for payment of the nation's debts and making provision for the general welfare" (2). "While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of s. 8 which bestow and define the legislative powers of the Congress. It results that the power of Congress to authorize expenditure of public moneys for

(1) (1936) 297 U.S. 1, at pp. 64, 66 [80 Law. Ed. 477, at pp. 487, 488].

(2) (1936) 297 U.S. 1, at p. 64 [80 Law. Ed. 477, at p. 487].

public purposes is not limited by the direct grants of legislative power found in the Constitution " (1).

In that opinion it was said: " We are not now required to ascertain the scope of the phrase 'general welfare of the United States.'" But that conception was described in the following year in the opinion of the Court in *Helvering* v. *Davis* (2):—" Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. . . . Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times."

We would not, in my opinion, be justified in reading the words " general welfare " or the conception which they are understood to embody into our Constitution as an object of the legislative power to appropriate money. To do so would be to amend the Constitution, not to interpret it. The words of our Constitution are " purposes of the Commonwealth " and whether ultimately they are, or are not, held to be consistent with a power of expenditure unrestrained in point of subject matter or purpose, they cannot be regarded as doing the work which the words " general welfare " have been required to do in the United States. That is all, I think, that need be decided in the present case about the power of expenditure under the Commonwealth Constitution.

But it is perhaps as well that I should add that hitherto my own view has always been, on the one hand, that s. 81 has little or no bearing upon the matter because it is a provision in common constitutional form substituting for the usual words " public service " the word " purposes " of the Commonwealth only because they are more appropriate in a Federal form of government, and, on the other hand, that s. 83, in using the words " by law " limits the power of appropriation to what can be done by the enactment of a valid law. In deciding what appropriation laws may validly be enacted it would be necessary to remember what position a national government occupies and, as I have already said, to take no narrow view, but the basal consideration would be found in the distribution of powers and

(1) (1936) 297 U.S. 1, at p. 66 [80 Law. Ed. 477, at p. 488].

(2) (1937) 301 U.S. 619, at p. 640 [81 Law. Ed. 1307, at p. 1315].

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functions between the Commonwealth and the States. I have not yet seen any reason to desert this opinion. But, I repeat, this case requires us to go no further than to distinguish the carefully chosen words of our Constitution from the very different words of that of the United States.

In my opinion the *Pharmaceutical Benefits Act* 1944 is *ultra vires* of the Commonwealth Parliament.

I have stated my opinion upon the validity of the legislation first because I think that, upon the authority of the decisions of this Court, we must decide that the suit is maintainable. Whether it is maintainable is a question which must have great importance with respect to enactments that are likely to escape challenge by individuals, and of this the statute now in question may be thought an example. It involves an application of principle that is not plain or simple. We cannot allow the validity of Acts of Parliament to be submitted to our decision as abstract questions. The Court pronounces upon the validity of a law only when called upon to do so in determining a cause or matter within the Court's jurisdiction. Speaking broadly, it must arise in a proceeding in which a right or immunity is asserted or a wrong or threatened wrong is complained of. It is the traditional duty of the Attorney-General to protect public rights and to complain of excesses of a power bestowed by law and in our Federal system the result has been to give the Attorney-General of a State a *locus standi* to sue for a declaration wherever his public is or may be affected by what he says is an *ultra vires* act on the part of the Commonwealth or of another State.

This application to the Federal system of a doctrine developed in the English unitary system has been worked out in this Court, but not without difficulty. The Commonwealth contends that the present suit goes further than the precedents warrant. The contention is based upon the view that the *Pharmaceutical Benefits Act* involves for the most part administrative action and the expenditure of money and but little exertion of coercive power, that it does not tend to the prejudice of any rights or immunities enjoyed as of common right, and, further, that the field upon which it enters is not occupied by any actual legislation of the State of Victoria.

An examination of the decided cases has satisfied me that these considerations are not enough. It is sufficient, I think, to say that the settled doctrine of this Court was accurately expressed by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. in *Attorney-General for Victoria* v. *The Commonwealth* (1) when they said : " In our opinion, it must now be taken as established that the Attorney-General of a State of the Commonwealth has a sufficient title to invoke the

(1) (1935) 52 C.L.R. 533, at p. 556.

provision of the Constitution for the purpose of challenging the validity of Commonwealth legislation which extends to, and operates within, the State whose interests he represents."

In my opinion the demurrer of the Commonwealth should be overruled.

McTIERNAN J. In my opinion the *Pharmaceutical Benefits Act* 1944, except s. 8 (3), is a valid law of the Commonwealth. The Act with the exception of s. 8 (3) is, I think, within the powers which are vested in the Commonwealth Parliament by s. 81 and s. 51 (xxxix.) of the Constitution of the Commonwealth.

I state my reasons as briefly as I can. The words " to be appropriated " in s. 81 imply a grant of power to the Parliament to control the expenditure of the Consolidated Revenue Fund, subject to such exceptions as the Constitution provides. The words " for the purposes of the Commonwealth " in the section mark the only limits of the power of appropriation which the section confers upon the Parliament.

The ordinary meaning of the word Commonwealth is a body of people united in a body politic governed on democratic principles. The preamble to the Imperial Act establishing the Commonwealth of Australia declares that " the people " of the States agreed " to unite in one indissoluble Federal Commonwealth." The word Commonwealth here means the whole of the people of Australia.

Section 51 of the Constitution provides that the Parliament shall, subject to the Constitution, have power to make laws for the peace, order and good government of " the Commonwealth." This section contemplates a state of affairs to be enjoyed by the people of Australia. The words " the Commonwealth " in that context, s. 51, mean the people. The same meaning must I think be given to the word " Commonwealth " in s. 81. It is for the purposes of the people united in the Australian Federal Commonwealth that the power of appropriation is given to the Parliament.

The words " for the purposes of the Commonwealth " in s. 81 are general words and no limitation on them is expressed. They are not convertible into such a phrase as " for purposes in respect of which the Parliament is given the powers of legislation contained in s. 51 or any other section," or into such a phrase as " for the purposes of the Constitution." The purposes of the Commonwealth are, I think, such purposes as the Parliament determines. This view of the meaning of the words " the purposes of the Commonwealth " is consistent with the union of the people of the States in a Commonwealth.

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Any purpose for which the elected representatives of the people of the Commonwealth determine to appropriate the revenue is a purpose of the Commonwealth. If it were otherwise, judicial scrutiny of a purpose for which Parliament appropriated revenue could take place in order to determine whether the purpose was lawful or not. The Constitution puts the power of the purse in the hands of Parliament, not in the hands of the Courts. I think that the object of s. 81 is to put this power in the hands of Parliament.

An appropriation is not a departure from the Constitution merely for the reason that it is made for a purpose not envisaged by the makers of the Constitution. As the Constitution is an instrument of government it has the quality of adaptability to new needs and conditions. The purposes of the Commonwealth are not fixed or immutable. They expand and change with the growth and development of the nation. As the Constitution is an instrument of government it should not be construed as if it were merely an Act of Parliament or a contract. When Parliament has appropriated revenue for any purpose the Court could not decide the question whether it was a purpose of the Commonwealth without entering into a consideration of matters of policy which are peculiarly and exclusively within the legislative sphere.

I think therefore that the *Pharmaceutical Benefits Act* cannot be impugned on the ground that the provision of pharmaceutical benefits is not a purpose of the Commonwealth for which the Parliament may appropriate the revenue.

The tests which are within the judicial province and are to be applied to the provisions of the Act in order to determine their validity are whether they define or specify or limit the purpose of the appropriation, or are incidental to the execution of the power of appropriation vested in the Parliament.

It is part of the statement of the purpose of the present appropriation to prescribe the pharmaceutical benefits upon which the revenue appropriated is to be expended and their standard. It is also part of the statement of the purpose to prescribe the persons who are entitled to be supplied with the pharmaceutical benefits upon which the appropriated revenue is to be expended, and the extent of the medical need which entitles a person to such benefits. Section 9 (2), for example, provides that a person who has received any pharmaceutical benefit under the Act shall not be entitled to receive it again without a direction from the medical practitioner.

The purpose of the appropriation is not the supply of pharmaceutical benefits in the air. I think that all the provisions of the Act with the exception of s. 8 (3) can be justified either because

they define, specify or limit the purpose to which the revenue is appropriated or because they are merely machinery for the expenditure of the money appropriated or provide safeguards for its due expenditure on the purpose of the appropriation, and in the latter case are accordingly incidental to the execution of the power of appropriation.

Section 8 (3) purports to give a right to a person supplying a pharmaceutical benefit in accordance with the Act to make such charges, if any, as may be prescribed. This provision is not a specification or limitation of the purpose of the appropriation nor is it incidental to the expenditure of the appropriated revenue.

The Constitution vests legislative powers in the Parliament of the Commonwealth and saves the legislative powers of the States which are not exclusively vested in the Parliament of the Commonwealth or withdrawn from the States. It is to be noticed that what on the one hand are granted to the Commonwealth, and on the other preserved for the States, are not subjects for legislation, but legislative powers. A provision of a Federal Act is not invalid merely because it is of the kind which it would be within the State legislative power preserved by the Constitution to include in an Act relating, for example, to health. A provision of a Federal Act, for example, with respect to inter-State trade and commerce, would not be *ultra vires* merely because the provision is of the kind which a State Parliament could validly enact under the legislative powers preserved to the State, for example, as part of a health Act. I think, therefore, that the test to be applied to any provision of the Federal Act, now in question, in order to determine whether it is invalid, is not whether such provision could be validly enacted under the legislative powers of the States. The test is whether the provision may properly be part of a Federal Act appropriating Commonwealth revenue. The provision may do so if it defines, specifies or limits the purpose of the appropriation or is incidental to the expenditure of the appropriated revenue.

For these reasons I arrive at the conclusion that the whole of the Act except s. 8 (3) is valid ; this sub-section is severable.

In the view which I take of the Act it is hardly necessary for me to deal fully with the question whether the Attorney-General of the State of Victoria is competent to sue for the relief claimed. The action is brought on the relation of persons who are joined as relators, but it is none the less the Attorney-General's action (*Attorney-General* v. *Wimbledon House Estate Co. Ltd.* (1)). The right of the Attorney-General of the State to sue is supported by the cases in this

(1) (1904) 2 Ch. 34, at p. 39.

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Court cited in argument. I reserve my opinion on the question whether the principles applied in those cases are decisive in favour of the *locus standi* of a State Attorney-General to claim a declaration that any Act passed under s. 81 of the Constitution is invalid. Granting that the present action lies at the suit of the Attorney-General of a State I think that the declaration which should be made is that s. 8 (3) only is invalid; subject to that reservation I should allow the demurrer and dismiss the action.

WILLIAMS J. This is a demurrer to an action brought by the Attorney-General for the State of Victoria *ex relatione* against the Commonwealth of Australia, the Director-General of Health for the Commonwealth of Australia, and the Minister of State for Health of the Commonwealth of Australia claiming a declaration that the *Pharmaceutical Benefits Act* 1944 is invalid and void, and an injunction restraining the two last-named defendants from carrying into execution any of the provisions of the Act or expending any of the moneys of the Commonwealth in pursuance of the provisions or for the purposes of the Act.

Two questions arise on the demurrer: (1) Whether the Court has jurisdiction to entertain the action; and (2) Whether the *Pharmaceutical Benefits Act* is a valid exercise of the legislative powers of the Parliament of the Commonwealth.

The plaintiff contends that there is jurisdiction to entertain the action on a number of grounds. Of these grounds, I need only mention one, namely that the *Pharmaceutical Benefits Act* is not authorized by the Constitution, and is an attempt by the Parliament of the Commonwealth to invade a legislative field upon which it has no authority to intrude. The legislative powers conferred upon the Commonwealth Parliament by the Constitution are limited to the specific powers therein enumerated. In so far as they extend they are plenary in the fullest sense of the word, and are binding upon Australians because they are citizens of the Commonwealth. But Australians are also citizens of a State. Beyond the legislative field which the Parliament of the Commonwealth is entitled to occupy in the exercise of these powers, apart from Acts of the Imperial Parliament, the Parliaments of the States, and those Parliaments alone, have the power to bind the citizens of a State by legislation. The citizens of each State have, therefore, a collective public right to complain if the Parliament of the Commonwealth exceeds its legislative powers and purports to bind them by laws which it has no authority to make. In popular language a cause of action is the act

on the part of the defendant which gives the plaintiff his cause of complaint (*Jackson* v. *Spittall* (1)).

If legislation of the Parliament of the Commonwealth is of such a nature that it purports to interfere with the private rights of individuals as such, or such individuals suffer special damage peculiar to themselves, such individuals can sue as individuals, but if the relief or advantage claimed is of such a nature that it does not specially affect them as individuals but only as members of the general public, then the Attorney-General is a necessary party to the action (*London Passenger Transport Board* v. *Moscrop* (2)). In the present case the only plaintiff is the Attorney-General for the State of Victoria. There are no individual plaintiffs. The right alleged to be infringed is the public right of the citizens of the State of Victoria not to be subjected to legislation which the Parliament of the Commonwealth has no authority to enact. As *Isaacs* J. pointed out in *Attorney-General for N.S.W.* v. *Brewery Employés Union of N.S.W.* (*The Union Label Case*) (3), " the Attorney-General for a State in such case does not depend upon the infringement of rights possessed by individuals as Australians under a Federal statute, but protects on behalf of the Crown those rights and functions with which the King, guided solely by his State representatives and advisers, is invested in respect of the State."

But counsel for the defendants, after pointing out that the Parliament of the State of Victoria has not yet legislated in the field alleged to have been invaded by the *Pharmaceutical Benefits Act*, contended that, as there was no existing conflict between State and Commonwealth legislation, the declaration claimed involved a mere abstract question of law, so that there was no " matter " within the meaning of s. 75 of the Constitution. It was, of course, held in *In re Judiciary Act* (4) that there is no " matter " within the meaning of this section unless there is some immediate right, duty, or liability to be established by the determination of the Court. But, as I have said in two recent cases, *Whitney* v. *Vegetable Seeds Committee* (5) and *French* v. *McCarthy* (6), I do not understand this statement to mean that the jurisdiction of this Court under order IV. of the Rules of Court to make declarations in cases where it has original jurisdiction is less than the corresponding jurisdiction of the English Courts under order XXV., rule 5. In those cases the opinion was expressed that the words in order IV. " in an action

(1) (1870) L.R. 5 C.P. 542, at p. 552.
(2) (1942) A.C. 332, at pp. 345, 351.
(3) (1908) 6 C.L.R. 469, at pp. 557, 558.
(4) (1921) 29 C.L.R. 257, at pp. 265-267.
(5) Unreported.
(6) Unreported.

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properly brought" mean in an action in which this Court has original jurisdiction.

The present action, in my opinion, raises more than abstract questions. The Act has not yet been proclaimed, but we were informed by counsel for the defendants that it will be proclaimed at the beginning of next year, and that in the meantime the necessary preliminary steps are being taken so that it may then be brought into effective operation. The question will therefore arise in the immediate future whether the public in each of the States are entitled to the benefits and subject to the obligations imposed by the Act. The cause of action relied upon is not founded upon any conflict between State and Federal legislation, but upon the right, in some instances of the individual, and in other instances of the public or a section of the public, to restrain a public body clothed with statutory powers exceeding those powers. The cause of action was discussed and explained by *O'Connor* J. in the *Union Label Case* (1), and by my brothers *Rich* and *Dixon* in *Tasmania* v. *Victoria* (2). In England no question can arise as to the validity or invalidity of an Act of the Imperial Parliament, but such questions can arise with respect to regulations or executive acts purported to be made or done under the authority of Imperial Acts, and in England a claim for a declaration that such regulations or executive acts are beyond power would clearly constitute a cause of action. Instances where individuals who could claim some special interest in themselves have litigated such causes of action are illustrated by such cases as *Dyson* v. *Attorney-General* (3); *Burghes* v. *Attorney-General* (4); *Wigg* v. *Attorney-General for the Irish Free State* (5); *Yoxford and Darsham Farmers' Association Ltd.* v. *Llewellin* (6); while instances where it would be necessary to join the Attorney-General are discussed by Viscount *Maugham* in *Moscrop's Case* (7). As the Chief Justice has said in *Toowoomba Foundry Pty. Ltd.* v. *The Commonwealth* (8), "it is now . . . too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid." The rights and liabilities created in favour of and imposed upon the public of the State of Victoria by the *Pharmaceutical Benefits Act* are just as immediate as the impact upon individuals

(1) (1908) 6 C.L.R. 469, at pp. 550-553.
(2) (1935) 52 C.L.R. 157, at pp. 171, 186-188.
(3) (1911) 1 K.B. 410; (1912) 1 Ch. 158.
(4) (1912) 1 Ch. 173.
(5) (1927) A.C. 674.
(6) (1945) 173 L.T. 103.
(7) (1942) A.C. 332.
(8) (1945) A.L.R. 282, at p. 289.

of the legislation in question in that case and the other cases cited by the Chief Justice. The only difference is that in those cases the plaintiffs were seeking to enforce individual rights, whereas in the present case the plaintiff is seeking to enforce a right of the public generally.

For these reasons I am of the opinion that there is jurisdiction to entertain the action.

I shall now proceed to consider the second question. The *Pharmaceutical Benefits Act* has already been set out in considerable detail in the judgments of the Chief Justice and my brother *Dixon*, so that I shall only refer briefly to its main provisions. Its purpose, to be gathered from its title and contents, is to make the pharmaceutical benefits contained in the Commonwealth Pharmaceutical Formulary available free of charge to every person ordinarily resident in the Commonwealth. In order to obtain these benefits a person must be personally examined by a qualified medical practitioner, who, if satisfied that the pharmaceutical benefit is necessary for his treatment, must write and sign a prescription, which must be in the prescribed form and written on a form supplied by the Commonwealth. The person then takes the prescription to an approved pharmaceutical chemist, who supplies the prescribed pharmaceutical benefit free of charge and is paid by the Commonwealth at the prescribed rate. The Act contemplates that qualified medical practitioners will make the necessary personal examinations, and that pharmaceutical chemists will apply for approval. But it also authorizes the Minister to make special arrangements in the case of isolated areas, and to make arrangements with medical practitioners so that their services will be available without charge to members of the public for the purpose of furnishing prescriptions and orders for the purposes of the Act. It creates a number of criminal offences for failure to comply with its provisions, and empowers authorized persons to enter the premises of approved pharmaceutical chemists, and, *inter alia*, take samples of drugs &c. which may be supplied as pharmaceutical benefits, and examine any person employed in any such premises with respect to any matter under the Act. It also authorizes the Governor-General to make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, and which are necessary or convenient to be prescribed for carrying out or giving effect to the Act, and in certain particulars, including the standards of composition or purity of pharmaceutical benefits subject to which payment in respect of the supply thereof will be made.

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There is nothing in the Act which legally requires a medical practitioner to examine patients and give prescriptions or which prevents a medical practitioner writing a prescription not in the prescribed form, after or without a personal examination, for a medicine included in the Commonwealth Formulary and the patient having that prescription made up at his own expense, or which compels a pharmaceutical chemist to apply for approval, although the practical compulsion to implement the Act, particularly in the case of pharmaceutical chemists, would be great. But I am unable to see how the constitutional validity of the Act can depend upon the question whether or not the pharmaceutical benefits included in the Commonwealth Formulary can only be obtained in accordance with its provisions.

Section 17 of the Act provides that payments in respect of pharmaceutical benefits shall be made out of the account established under the *National Welfare Fund Act* 1943 and known as the National Welfare Fund. The latter Act provides that there shall be paid out of the Consolidated Revenue Fund, which is thereby appropriated accordingly, for the purposes of the National Welfare Fund in each financial year the sum of £30,000,000, or a sum equal to one quarter of the amount received in that financial year as income tax from persons other than companies, whichever is the less; and that moneys standing to the credit of the National Welfare Fund shall be applied in making such payments as are directed by any law of the Commonwealth to be made from that fund, in relation to health services, unemployment or sickness benefits, family allowances, or other welfare or social services. The purpose of the *Pharmaceutical Benefits Act* is therefore to authorize the expenditure of part of the revenues of the Commonwealth upon the provision of free medicine for persons ordinarily resident in the Commonwealth. But it does not merely authorize the appropriation of money for this purpose. It contains provisions affecting the relationship, contractual or under the laws of the States, of medical practitioners and patients, of customers and chemists, and many other provisions which can only be described as legislation upon the subject matter of public health.

There is no express power in the Constitution for the Parliament of the Commonwealth to legislate upon this subject matter except to make laws with respect to quarantine and as incidental to the execution of any powers vested in the Commonwealth by the Constitution. And no attempt was made on behalf of the defendants to uphold the validity of the Act under any provisions of the Constitution except those contained in s. 81. That section provides that: "All revenues or moneys raised or received by the Executive Government

of the Commonwealth shall form one Consolidated Revenue Fund to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution." It was contended that this section contains an independent grant of legislative power, and that upon its true meaning it is for the Parliament of the Commonwealth and not for the Court to decide upon what purposes the Commonwealth can expend its moneys. Reference was made to Article I., s. 8, of the Constitution of the United States of America which authorizes Congress "to lay and collect Taxes Duties Imposts and Excises, to pay the Debts and provide for the common Defence and general welfare of the United States."

At the date of the *Commonwealth of Australia Constitution Act* opinion was still divided in the United States of America whether this power to tax and expend moneys, whilst not unlimited, was confined only by the clause which bestowed it, or by s. 8, which bestowed and defined the legislative powers of Congress. Recently it has been held that the power of Congress to authorize the expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution, and that, while the line must still be drawn between one welfare and another, between particular and general, the discretion must be left to Congress unless the choice is clearly wrong (*United States* v. *Butler* (1); *Helvering* v. *Davis* (2)). But the relevant provisions in the Constitution of the United States of America are different in structure and wording to those in the Constitution of the Commonwealth. In the Constitution of the Commonwealth the power to tax is a separate power contained in Chapter I. headed "the Parliament", whereas the power to appropriate is contained in Chapter IV. headed "Finance and Trade." One of the main purposes of s. 81 is to provide for the formation of the Consolidated Revenue Fund. It is s. 83 which provides that no money shall be withdrawn from the Treasury of the Commonwealth except under appropriation made by law. Under s. 81 money can be so appropriated by law only for the purposes of the Commonwealth and in the manner and subject to the charges and liabilities imposed by the Constitution. The charges and liabilities so imposed are those contained in s. 82. The manner of appropriation appears to refer to ss. 53, 54 and 56. The important words are, therefore, those contained in the phrase "for the purposes of the Commonwealth." They are more specific than the words "the general welfare of the United States." The Act to constitute the

(1) (1936) 297 U.S. 1, at pp. 66, 67 [80 Law. Ed. 477, at pp. 488, 489].

(2) (1937) 301 U.S. 619, at pp. 640, 641 [81 Law. Ed. 1307, at pp. 1314, 1315].

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Commonwealth of Australia provides that the Commonwealth shall mean the Commonwealth of Australia as established under this Act. It is in this sense that the words "the Commonwealth" are, in my opinion, used in the phrase. The phrase must have been inserted to have some effect, and if it is to have any effect it must place some constitutional limitation upon the purposes for which the Commonwealth Parliament can pass an appropriation Act. The object of the Constitution was to superimpose on the existing body politics consisting of the States a wider overriding body politic for certain specific purposes. It was for these particular purposes and these alone that the body politics consisting of the States agreed to create the body politic known as the Commonwealth of Australia. These purposes must all be found within the four corners of the Constitution.

The Parliament of the Commonwealth is empowered by s. 51 (xxiii.) to make laws with respect to invalid and old age pensions, and it can therefore appropriate moneys out of the Consolidated Revenue Fund for this purpose, but it has no general power to legislate for social services. This general power is left to the States. The Commonwealth only has power under s. 96 to make grants to the States for such general purposes. The *Pharmaceutical Benefits Act* cannot, therefore, be supported under s. 81 because it purports to appropriate money for a purpose which is not a purpose of the Commonwealth. This objection goes to the Act as a whole and to all its parts, so that no parts are severable from others under s. 15A of the *Acts Interpretation Act* 1903-1941.

For these reasons I would overrule the demurrer.

Demurrer overruled.

Solicitors for the plaintiff, *a'Beckett, Chomley and Henderson.*

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

E. F. H.