[HIGH COURT OF AUSTRALIA.]

THE STATE OF VICTORIA AND ANOTHER . . . . PLAINTIFFS ;

AND

THE COMMONWEALTH . . . . . DEFENDANT ;

THE STATE OF NEW SOUTH WALES AND ANOTHER . . . . . } PLAINTIFFS ;

AND

THE COMMONWEALTH . . . . . DEFENDANT.

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SYDNEY, *April* 29, 30; *May* 1-3, 6-8; *Aug.* 23.

Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

Constitutional Law (Cth.)—Income Tax—"Uniform taxation"—Financial assistance—Grants to States—Terms or conditions imposed—Non-imposition of income tax by States—Validity of terms or conditions—Nature and extent of terms and conditions attachable to grants—Claim to priority for payment of Commonwealth tax over State tax—Taxing power—Incidental power—Validity of exercise—The Constitution (63 & 64 *Vict. c.* 12), *ss.* 51 (*ii.*), (*xvii.*), (*xxxvi.*), (*xxxix.*), 96—*States Grants* (*Tax Reimbursement*) *Act* 1946-1948 (*No.* 1 *of* 1946—*No.* 43 *of* 1948), *ss.* 5, 11—*Income Tax and Social Services Contribution Assessment Act* 1936-1956 (*No.* 27 *of* 1936—*No.* 101 *of* 1956), *s.* 221 (1) (*a*), (*b*) (i), (ii).

The *States Grants* (*Tax Reimbursement*) *Act* 1946-1948 is a valid enactment of the Parliament of the Commonwealth finding its basis in s. 96 of the Constitution which empowers the Parliament to grant financial assistance to any State on such terms or conditions as it thinks fit.

So *held* by the whole Court.

Victoria v. *The Commonwealth* (1926) 38 C.L.R. 399 ; *Deputy Federal Commissioner of Taxation* (*N.S.W.*) v. *W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735 ; (1940) A.C. 838 ; (1940) 63 C.L.R. 338, and *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 on this point, applied ; *Melbourne Corporation* v. *The Commonwealth* (1947) 74 C.L.R. 31, distinguished.

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Per Dixon C.J. and *Kitto* J.: There is nothing in the power conferred by s. 96 of the Constitution which enables the making of a coercive law, that is one demanding obedience. The essence of an exercise of such power must be a grant of money or its equivalent and beyond that the Parliament can go no further than attaching conditions to the grant. Once a law either valid under s. 96 or not at all is seen to contain a grant of financial assistance to the States, the further inquiry into its validity must be limited to the admissibility of the terms and conditions sought to be imposed. The grant of money may supply the inducement to comply with the terms or conditions, but beyond this no law passed under the section can go.

The interpretation placed upon s. 96 of the Constitution by the decisions in *Victoria* v. *The Commonwealth* (1926) 38 C.L.R. 399 and *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1939) 61 C.L.R. 735; (1940) A.C. 838; (1940) 63 C.L.R. 338 is inconsistent both with the view that there must be a need for relief or a reason for giving assistance which is not itself created by the Commonwealth legislation connected with the grant and with the view that the terms or conditions attached to such grant cannot require the exercise of governmental powers of the State and the compliance of the State with the desires of the Commonwealth in their exercise.

Per Webb J.: Section 96 empowers the Commonwealth to make a grant of financial assistance to a State on terms or conditions. Such terms or conditions must be consistent with the nature of a grant, that is to say, they must not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement contemplated by the section.

Per Fullagar J.: The nature of the terms or conditions attached to a grant made pursuant to s. 96 ought not to be limited in any way, save that where such terms or conditions call for action by the State such action must be within its constitutional powers.

Section 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 provides: "(1) For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—(*a*) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable."

Held, by *Dixon* C.J., *McTiernan*, *Kitto* and *Taylor* JJ., *Williams*, *Webb* and *Fullagar* JJ. dissenting, that par. (*a*) of s. 221 (1) is *ultra vires*, in that it is not a provision incidental to the power to make laws with respect to taxation conferred on Parliament by s. 51 (ii.) of the Constitution.

South Australia v. *The Commonwealth* (1942) 65 C.L.R. 373, on this point disapproved by *Dixon* C.J., *McTiernan* and *Kitto* JJ.

Per Taylor J.: The question which here arises in relation to s. 221 (1) (*a*) is clearly distinguishable from the question which arose before the Court in

South Australia v. *The Commonwealth* (1942) 65 C.L.R. 373 and nothing then said requires a conclusion that the present section is valid. When the section ceased to be a temporary measure designed to deal with a very special situation and became a permanent provision intended to operate in undefined and unpredictable circumstances it assumed a character and operation which could not be justified under Commonwealth legislative power.

Per Dixon C.J. and *Kitto* J.: The exceptional course of declining to follow the decision of *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 on the constitutional validity of s. 221 (1) (*a*) should be taken for the reasons that (i) it is an isolated decision, receiving no support from prior decisions and forming no part of a line of authority; (ii) it gives an application to the constitutional doctrine of incidental powers which may have great consequences and which is thought to be unsound; and (iii) the question falls within s. 74 of the Constitution and affects the States in many aspects besides "uniform tax".

The cases of *The Commonwealth* v. *State of Queensland* (1920) 29 C.L.R. 1; *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (1940) 63 C.L.R. 278 and *In re Silver Bros. Ltd.* (1932) A.C. 514, distinguished and their application by the Court in *South Australia* v. *The Commonwealth* (1942) 65 C.L.R. 373 disapproved, as to all three by *Dixon* C.J. and *Kitto* J., as to the case last mentioned by *McTiernan* J.

Per Williams and *Fullagar* JJ.: Having regard to the facts that the very questions here raised were litigated fifteen years ago in actions brought by four States of which the plaintiff State of Victoria was one, that the challenged enactments assumed their present permanent character in 1946 and have since then subsisted without challenge from any State and that the present challenge is sustained by only two States, the questions decided in 1942 ought not to be reopened and the case is the clearest possible for the application of the rule of *stare decisis*.

Dicta by *Dixon* C.J., *McTiernan*, *Williams*, *Fullagar* and *Kitto* JJ. as to the validity of par. (*b*) (i) and (ii) of s. 221 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 and as to the paragraphs of s. 51 of the Constitution which would justify its enactment.

DEMURRERS.

The State of Victoria and its Attorney-General on 23rd December 1955 and the State of New South Wales and its Attorney-General on 23rd November 1956 issued writs out of the High Court of Australia against the Commonwealth of Australia by which they sought to challenge the validity of certain enactments of the federal taxation legislation. By their amended statements of claim as filed the plaintiffs challenged several enactments, but ultimately they claimed only that *States Grants (Tax Reimbursement) Act* 1946-1948, the *States Grants (Special Financial Assistance) Act* 1955 and s. 221

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of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 were beyond the powers of the Parliament of the Commonwealth and were accordingly invalid and they sought declarations accordingly.

The statements of claim set out the history of the challenged legislation and the limiting effect which such legislation and the operations of the Commonwealth thereunder was alleged to have had upon the fiscal policy and arrangements of the plaintiff States and charged that the amounts of grants made by the Commonwealth by way of tax reimbursement to the States from taxation collected by it pursuant to the legislation were not distributed amongst the States—(a) in proportion to the population of each State; or (b) in the same proportion as the amounts of income tax collected in each State by the Commonwealth under the *Income Tax Act* and the *Income Tax and Social Services Contribution Assessment Act*; or (c) in the same proportions as the amounts of revenue derived by each State from taxes upon income imposed by each such State in the year 1942 or in any year prior thereto. In addition such statements of claim contained a great deal of material in tabulated form showing actual tax collections by the plaintiffs prior to 1942 and by the Commonwealth thereafter and, as regards the latter, actual distributions made and suggested methods by which they might have been made, but for present purposes such material need not be set out.

To each amended statement of claim the defendant Commonwealth of Australia demurred upon the grounds :—(1) that the Acts of Parliament sought to be declared invalid are valid enactments of the Parliament of the Commonwealth and are within its powers under the Constitution; (2) the power to enact the aforementioned Acts and the mode of exercising the powers adopted by the Parliament of the Commonwealth have already been held by the Full Court of the High Court to be within the powers of the Parliament under the Constitution and to be valid thereunder respectively.

The demurrers came on for argument before the Full Court of the High Court.

The history of the legislation in question and the relevant provisions thereof appear fully in the judgments of the Court hereunder.

H. A. Winneke Q.C., Solicitor-General for the State of Victoria, and Sir *Garfield Barwick* Q.C. (with them *D. I. Menzies* Q.C. and *C. I. Menhennitt*), for the State of Victoria and the Attorney-General for that State.

H. A. Winneke Q.C. The constitutional validity of certain Acts of the Commonwealth Parliament which operate substantially to destroy the power of the State to impose and collect tax on incomes, is here challenged. The acquisition of such control by one partner in a federal Commonwealth is irreconcilable with basic federal principles. [He referred to Acts Nos. 22 and 23 of 1942 and to s. 31 of the former Act introducing a new s. 221 in the *Income Tax Assessment Act* 1936-1941.] The substantial effect of s. 221 is to defer a taxpayer's liability to a State for State income tax and make it impossible of collection as a matter of practical administration. It is not properly a priority section and s. 221 (*a*) finds no support in the taxation, incidental or bankruptcy powers. The need for the *States Grants* (*Income Tax Reimbursement*) *Act* 1942 (No. 20) emphasises the Commonwealth recognition that the earlier enactments had effectively deprived the States of the power to raise their own revenue. (See s. 4). [He referred to the *Income Tax* (*War-time Arrangements*) *Act* 1942 (No. 21), ss. 4, 11, 13, 16.] The 1942 enactments were a war-time measure designed to economise on manpower in the collection of income tax revenue and to provide the system considered best suited to obtaining the maximum revenue for income tax for the effective prosecution of the war. In 1946 s. 221 (*a*) of the *Assessment Act* was amended to assume a permanent form in the legislation. [He referred to the *States Grants* (*Special Financial Assistance*) *Act* 1956 and the *States Grants* (*Tax Reimbursement*) *Act* 1946-1948, ss. 5, 11.] The latter Act is unlimited in point of duration, operating on a permanent formula to create an annual liability in the Commonwealth. [He then dealt in detail with the history of State income tax both before and since 1942, illustrated the impracticability of State taxation whilst the Commonwealth legislation remained, and submitted that the overall effect was to make the State dependent upon the Commonwealth for a substantial part of its revenue for governmental services.] The plaintiffs do not press any claim for a declaration of invalidity of the *Tax Act*, but seek to bring down s. 221 (1) (*a*) of the *Assessment Act* and the whole of the *Grants Act*. In refraining from pressing for such declaration of invalidity, however, the plaintiffs reserve their right to question the validity of any future use of the Commonwealth tax power in such manner as to prevent the imposition or collection of State income tax. [He then handed to the Court a document containing seven heads of argument on the *Grants Act* 1946-1948, s. 221 (1) (*a*) and (*b*) of the *Assessment Act*, the earlier case of *South Australia* v. *The Commonwealth* (1) and

(1) (1942) 65 C.L.R. 373.

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the protection of the independence of the States under the Constitution, all of which were developed in detail by Sir *Garfield Barwick* in his argument to the Court reported hereunder.] The operation of the challenged enactments is completely incompatible with the existence of the States as separate but co-ordinate bodies politic under the Constitution, and further they are destructive of the "federal principle". [He referred to *Birch* on *Federalism* (1955) p. 119; *Wheare* on *Federal Government* 3rd ed. (1953), on pp. 11, 13, 15, 17, 32, 112-114; *Australian Communist Party* v. *The Commonwealth* (1).] The real issue here is whether the Constitution provides any legal protection for the rights of the State. The remarks of *Latham* C.J. in *South Australia* v. *The Commonwealth* (2) are incorrect. If State rights are not so protected there would seem little purpose in the union of the States into one "indissoluble Federal Commonwealth."

Sir *Garfield Barwick* Q.C. The tax imposed by the Commonwealth in 1942 was to be uniform not merely in the sense that the federal tax was to be the same for each State but also in the sense that the total rate of tax to be paid by the individuals was to be uniform. Three features were essential to that plan. First, the rate of tax levied was to be higher than a rate necessary to yield revenue sufficient to service the Commonwealth departments. Secondly, no State was to levy income tax. Thirdly, there must be a system of grants, uniform in the sense that they were determined by a common formula. The scheme must provide the States with the grant as of right; it could not remain of grace. The same features were necessary for the continuance of the scheme after the war. The conclusion is inescapable that by the *Grants Act* the Commonwealth intended to place the States in a situation where they were not free to follow the course which they otherwise might have taken. When legislation has as its object the control of a State in the manner of the exercise of its powers, and secures such object not by prohibiting such exercise but by ensuring its exercise in a particular way then there is an unwarranted interference with the integrity of the State. [He referred to *Melbourne Corporation* v. *The Commonwealth* (3).] The problem should be approached from the object of the exercise of the Commonwealth power, and to discern such object it is important to bear in mind that the legislation expressly challenged here forms a part in the

(1) (1951) 83 C.L.R. 1, at pp. 202, 203.
(2) (1942) 65 C.L.R., at p. 429.
(3) (1947) 74 C.L.R. 31, at pp. 78, 79.

overall plan, some sections of which are not attacked. The Constitution is fundamentally federal in that it provides for the Commonwealth and States as separate organs independent of each other and co-ordinate in their respective spheres and prevents any law of the Commonwealth operating to destroy or weaken the independence or integrity of a State or to place a particular disability or burden upon an operation or activity of a State and more especially upon the execution of its constitutional powers : see the *Melbourne Corporation Case* (1). In the distribution of powers under the Constitution there are granted powers and residual powers. Coming to a residual power, a State may not subject the Commonwealth specifically to the burden of its laws, but that limitation on the State's power cannot be read out of mere construction of its residual powers. It comes out of the federal structure itself. What is true of the State is true of the Commonwealth, save that in the construction of a granted power, unless there be something to the contrary, a State may be bound. But it is submitted that under a granted power the federal structure places upon the Commonwealth a limitation so far as the State's constitutional powers are concerned. A clear majority of this Court has adopted the principle for which the plaintiffs here contend. [He referred to the *Melbourne Corporation Case* (2) ; *The Commonwealth* v. *Bogle* (3) ; *In re Richard Foreman & Sons Pty. Ltd.* ; *Uther* v. *Federal Commissioner of Taxation* (4) ; *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (5) ; *Essendon Corporation* v. *Criterion Theatres Ltd.* (6).] Tax is imposed at the point of time at which income falling within the description of the levy is earned. The income tax to which s. 221 of the *Assessment Act* refers is the final tax assessed, which assessment is usually made in the year following that in which the income is earned, by which time tax for such following year has been imposed within the meaning of the Act so that there is hardly a point of time at which an individual is not subject to a liability to pay tax imposed. Under s. 221 a State could be paid tax in respect of a past year but would have to wait really two years before it could accept any tax from a taxpayer. [He referred to ss. 204, 206 of the *Assessment Act.*] Section 221 is thus a direct command to a citizen not to pay a State tax until some date which is in control of the Commonwealth. The command relates only to State tax, leaving the taxpayer free to

(1) (1947) 74 C.L.R., at p. 75.
(2) (1947) 74 C.L.R., at pp. 46, 47, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62, 65, 66, 70, 71, 75, 77, 78, 80-83, 84, 87, 89, 91, 94, 98, 99.
(3) (1953) 89 C.L.R. 229, at pp. 259, 260.
(4) (1947) 74 C.L.R. 508, at p. 528.
(5) (1940) 63 C.L.R. 278, at p. 308.
(6) (1947) 74 C.L.R. 1, at pp. 17-24.

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liquidate any other of his liabilities. The State is singled out and is effectively subjected to the control of the Commonwealth. *South Australia* v. *The Commonwealth* (1) was determined not so much by argument as by authority, and the authorities relied upon do not support the proposition that s. 221 is valid. [He referred to *South Australia* v. *The Commonwealth* (1), per *Latham* C.J. (2), per *Rich* J. (3), per *Starke* J. (4), per *Williams* J. (5).] In the passages cited their Honours relied strongly upon *In re Silver Bros. Ltd.* (6), but this case does not support the view that the Commonwealth may direct the citizen not to pay his State tax until some later date within the control of the Commonwealth, nor as a matter of decision that the Commonwealth could give its debt priority in the strict sense over a State's debt in the case of bankruptcy or liquidation. [He referred to *In re Silver Bros. Ltd.* (7).] What was there decided was that the debts would rank *pari passu*, that is that the provincial attempt to give priority was not effective, but there was no specific claim or argument that one party might assert a priority over the other. The questions here raised were never considered by the Privy Council, and this view appears to be confirmed by the judgments in the court below: see (8).

[McTIERNAN J. Is what *Latham* C.J. said (2) concerning *Silver's Case* (6) based simply on concession made and not upon a conclusion reached by the Privy Council?]

Yes, and not strictly a relevant assumption in relation to this case because it was not sought to solve the problem here raised, but to see whether the inconsistency doctrine could work a priority of one Crown over the other, because it was conceded that each Crown could give itself absolute priority. Nothing said in *Silver's Case* (6) requires the conclusion that s. 51 (ii.) of the Constitution justifies s. 221 of the *Assessment Act*. The taxation power will not go the length of including the so-called priority provision, nor can the incidental penumbra within and around the power include such a provision, bearing in mind what is sought to be done in relation to the power of taxation given. [He referred to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (9).] The decision in *The Commonwealth* v. *State of Queensland* (10) relied upon in *South Australia* v. *The Commonwealth* (1)

(1) (1942) 65 C.L.R. 373.
(2) (1942) 65 C.L.R., at pp. 434, 435.
(3) (1942) 65 C.L.R., at p. 436.
(4) (1942) 65 C.L.R., at pp. 440, 441, 442.
(5) (1942) 65 C.L.R., at pp. 464, 465.
(6) (1932) A.C. 514.
(7) (1932) A.C. at p. 520 et seq.
(8) (1929) 1 D.L.R. 681; (1929) Can. S.C.R. 557, at p. 559; (1930) 1 D.L.R. 141.
(9) (1940) 63 C.L.R., at p. 317.
(10) (1920) 29 C.L.R. 1.

was not a decision on the extent of the tax power. No argument such as here put was there raised. [He referred to *The Commonwealth* v. *State of Queensland* (1).] The Commonwealth was there saying not, as here that what was already due should not be paid but rather that property would be created which would never fall within the description of property subject to State income tax, so that there would never be any debt due to the State. There is nothing in *R.* v. *The Commonwealth Court of Conciliation and Arbitration* (2), per *Isaacs* J. (3) which supports the proposition that the equivalent of s. 221 is warranted or that the Commonwealth can exert its taxation powers to prevent the State from collecting its revenue. [He referred to *West* v. *Commissioner of Taxation (N.S.W.)* (4); *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (5); *Silver's Case* (6).] The validity of s. 221 was decided in *South Australia* v. *The Commonwealth* (7) as a matter of authority, but as already submitted none of the authorities relied upon bear out the proposition or conclude the matter against the plaintiffs and it now falls for consideration by the Court as a matter of principle. The only American authority approximately in point is *United States* v. *Fisher* (8) and it does not support the proposition. The taxation power is *sui generis* and there is nothing in the power or the word "taxation" or anything incidental to it to warrant the present section. Taxation is a concurrent power under the Constitution and it cannot be converted into an exclusive power, which in its practical effect is what the challenged section seeks to do by driving the State out of the concurrent field. The taxation power is one which does not naturally lead to conflict, the imposition of two taxes does not involve any inconsistency, and the full extent of any paramountcy of the Commonwealth law over State law is to be found in s. 109 of the Constitution. This particular exercise of power does not lead to inconsistency, for it does not set up a substantive rule of conduct which clashes with some other substantive rule of the State. [He referred to *Ex parte McLean* (9).] Section 221 does not prescribe a rule of conduct as to federal tax but as to State tax. Here there are two obligations, one to pay federal tax, the other to pay State tax and between these there is no conflict. To attempt to postpone one to the other is not to raise an inconsistency but to make a law about

(1) (1920) 29 C.L.R., at pp. 6, 10, 11, 20, 21.
(2) (1936) 38 C.L.R. 563.
(3) (1936) 38 C.L.R., at p. 570.
(4) (1937) 56 C.L.R. 657, at pp. 670, 675, 677.
(5) (1940) 63 C.L.R., at p. 324.
(6) (1932) A.C., at p. 521.
(7) (1942) 65 C.L.R. 373.
(8) (1903) 6 U.S. 214, at p. 235 [2 Law Ed. 304, at p. 317.]
(9) (1930) 43 C.L.R. 472, at p. 483.

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the other's relationship and rights. Section 221 (1) (*b*) (i) is conceded to be within the bankruptcy power but the words " in priority to all other unsecured debts other than debts etc." therein should be limited in construction by the words " other than debts due to the State in respect of taxes." To allow the definition its full verbal force would be to interfere with the States in the collection of their revenues and so with their independence : see the *Melbourne Corporation Case* (1). What has been submitted on s. 221 (1) (*a*), except so much as depends upon singling out the State for special mention, applies also to s. 221 (1) (*b*) (ii). The *Grants Act*, without s. 221, would still disadvantage the States and force them not to exercise their powers. If one State were to seek to exercise its right to levy taxation it would be in a hopeless position *qua* the others. The option to levy or not to levy is in reality an option to all not to any one. Looking at the *Grants Act* from the Commonwealth end the effect of its operation and its evident purpose as is admitted by the pleadings is to make the imposition of tax impracticable : see *South Australia* v. *The Commonwealth* (2). The States are thus coerced into not exercising their powers, and that significance can be given to practical as opposed to legal coercion is recognised in *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills Ltd.* (3). [He referred to *Federal Council of the British Medical Association* v. *The Commonwealth* (4).] When the question is whether a statute is designed and does operate to control a State in its exercise of governmental functions, it is nothing to the point to say that it is not done by direct legal enforceable command. When the apparent freedom of the State is for all practical purposes gone and it is obliged to conform in the manner intended, then all the necessary elements are present to make the use of the power improper. In *W. R. Moran Pty. Ltd.* v. *Deputy Federal Commissioner of Taxation* (*N.S.W.*) (5) the question of the improper use of s. 96 was left open. The purpose of s. 5 of the *Grants Act* is to control the State in the exercise of its discretion as to whether it will tax or not. It was intended to secure the result that it will not, and make the situation such that it is impracticable for the State to levy a tax. The *Grants Act* is not a valid exercise of the power contained in s. 96. The existence of s. 96, although not prefaced by the words " subject to this Constitution ", does not in any way change the nature of the Constitution and the fact that the federal government is one of specific granted powers. [He referred to *Attorney-General* (*Vict.*) v.

(1) (1947) 74 C.L.R., at p. 66.
(2) (1942) 65 C.L.R., at p. 411.
(3) (1937) 56 C.L.R. 390, at pp. 398, 400, 404, 405, 411-413, 418, 421.
(4) (1949) 79 C.L.R. 201, at pp. 252, 253, 256.
(5) (1940) A.C. 838, at pp. 857, 858; (1940) 63 C.L.R. 338, at p. 349.

The Commonwealth (1).] Section 96 contemplates only *ad hoc* grants, and a system of standing grants to which there is a right on performance of a consideration with a predetermined uniform formula irrespective of the current need of a State or States is inconsistent with the section. [He referred to ss. 87, 88, 89, 93-96 of the Constitution.] In the first ten years of the Commonwealth the function of s. 96 was to enable the Commonwealth to debit *ad hoc* grants to the States as Commonwealth expenditure in determining surplus revenue under s. 94, and it does not lose that function on the expiration of the ten year period. The terms and conditions referred to are terms and conditions touching the thing granted. [He referred to *Inglis Clark Studies in Australian Constitutional Law* 2nd ed. (1905) pp. 214-216; *W. Harrison Moore*: *The Constitution of the Commonwealth of Australia* 2nd ed. (1910) pp. 524-527; *Quick & Garran*: *The Annotated Constitution of the Australian Commonwealth* (1901) pp. 869-871.] A system of standing grants is thus seen to be foreign to the underlying idea of s. 96. Section 5 of the *Grants Act* does not grant within the meaning of s. 96. The idea of " grant " suggests bounty not purpose, and s. 5 is purely a means of determining a fact. The original idea of s. 96, contemplating a distribution to States in the case of some emergency or inequality and the deduction of the sum so distributed as Commonwealth expenditure before ascertaining the amount of surplus revenue for division between all the States, accords well with the idea of gift or bounty and the word " grant " is an appropriate way of expressing that idea. Section 5 is in essence a purchase and falls outside s. 96 *in limine*. The Commonwealth purchases the States' concurrence in the non-imposition of State income tax by creating a debt in favour of those who have furnished the consideration. The provision made by the *Grants Act* cannot fulfill the description of " financial assistance " in s. 96, for, whether or not the particular State is in need of money, under the system of standing grants it gets it as of right provided only that it does not impose a tax on income. To ignore the need of the State in question in relation to the moneys granted is to step beyond the contemplation of s. 96. Nor can the Commonwealth create the need by the conditions attached to the grant. The Privy Council's decision in *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation* (*N.S.W.*) (2) is not a considered authority against the arguments put on s. 96 and in this Court in the same case (3) whilst the point was taken that

(1) (1945) 71 C.L.R. 237, at pp. 263, 271, 272.

(2) (1940) A.C. 838; (1940) 63 C.L.R. 338.

(3) (1939) 61 C.L.R. 735.

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the legislation there was not a grant of financial assistance (1), it seems to have been implicitly rather than expressly answered by identifying the need of the farmer with that of the State. It was acknowledged that the grant had to be for the financial assistance of the States and the facts of the case were fitted within that proposition. The *Grants Act* does not result in a grant but in an accruing right to be quantified on a formula uniform amongst the States. It is not related to any individual State's condition. The debt arises on the performance of a condition that is in some sense foreign to the grant. [He referred to *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (2).] The defence power loomed large in the first uniform taxation case, see *South Australia* v. *The Commonwealth* (3), and the matter would thus require reconsideration in the light of the changed circumstances. That case is not here decisive because the legislation here in question is materially different from that there considered, particularly in that the 1942 legislation was limited to the duration of the war and one year thereafter and was supported by the defence power in the circumstances then obtaining. Since 1942 the true nature and character of the uniform tax legislation have become apparent by experience and illustrate that the legislation does not give the States a free choice whether to tax or not to tax. Furthermore later decisions of this court are inconsistent with the earlier uniform taxation case, viz., the *Melbourne Corporation Case* (4) and *Bogle's Case* (5). The Constitution is fundamentally federal in that it provides for the Commonwealth and States as separate organs independent of each other and co-ordinate in their respective spheres and prevents any law of the Commonwealth operating to destroy or weaken the independence or integrity of a State or to place a particular disability or burden upon an operation or activity of a State more especially upon the execution of its constitutional powers: see the *Melbourne Corporation Case* (4). The *Grants Act* and the *Assessment Act*, s. 221, do this. [He then handed to the Court the following list of authorities touching the matters argued: *Australian Railways Union* v. *Victorian Railways Commissioners* (6); *New South Wales* v. *The Commonwealth (No. 1)* (7); *West* v. *Commissioner of Taxation (N.S.W.)* (8); *Tasmanian Steamers Pty. Ltd.*

(1) (1939) 61 C.L.R., at p. 743.
(2) (1939) 61 C.L.R., at pp. 760-762, 763, 774, 775.
(3) (1942) 65 C.L.R., at pp. 463, 464.
(4) (1947) 74 C.L.R. 31.
(5) (1953) 89 C.L.R. 229.
(6) (1930) 44 C.L.R. 319, at pp. 390-393.
(7) (1931) 46 C.L.R. 155, at pp. 176, 177.
(8) (1937) 56 C.L.R. 657, at pp. 668, 669, 679, 681, 683, 687, 688, 690, 693, 695, 698, 701, 706, 707.

v. *Lang* (1); *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (2); *South Australia* v. *The Commonwealth* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (4); *Pidoto* v. *Victoria* (5); *Victoria* v. *Foster* (6); *Essendon Corporation* v. *Criterion Theatres Ltd.* (7); *Melbourne Corporation* v. *The Commonwealth* (8); *In re Foreman & Sons Pty. Ltd.*; *Uther* v. *Federal Commissioner of Taxation* (9); *Bank of N.S.W.* v. *The Commonwealth* (10); *The Commonwealth of Australia* v. *Bogle* (11).]

R. R. Downing, Attorney-General of New South Wales, and *R. Else-Mitchell* Q.C. (with them *K. J. Holland*), for the State of New South Wales and the Attorney-General for that State.

R. R. Downing. These plaintiffs adopt in general the arguments already advanced. The sovereignty of the plaintiff State is impaired by the application of the *Assessment Act* and ss. 5 and 11 of the *Grants Act*, and we seek to destroy the controlling and limiting effects which these enactments have had upon the State and its activities. The challenged legislation threatens to destroy the federal nature of the Commonwealth and is rendering dissoluble that which the preamble to the Constitution declared to be indissoluble. The meaning of the word "federal" as applied to the Constitution is illustrated by the passage in *Wheare* on *Federal Government* 3rd ed. (1953) p. 97 and *W. Harrison Moore*: *The Constitution of the Commonwealth of Australia* 2nd ed. (1910) pp. 68, 407, 509. The uniform tax legislation is aimed at the control of the State in the exercise of its governmental functions and is unauthorised by the Constitution. The vice of the challenged legislation is that it concentrates the power to level and collect income tax exclusively in the Commonwealth. By creating this monopoly in itself the Commonwealth has chosen the most effective method of bringing about the subordination of the States, there being no other source of revenue available to the States sufficient to replace that which would otherwise be derived from a tax on incomes. Having a

(1) (1938) 60 C.L.R. 111, at pp. 125, 126.
(2) (1940) 63 C.L.R., at pp. 312-317.
(3) (1942) 65 C.L.R., at pp. 441-444.
(4) (1942) 66 C.L.R. 488, at pp. 505, 513-515, 533.
(5) (1943) 68 C.L.R. 87, at pp. 103, 106, 116.
(6) (1944) 68 C.L.R. 485, at pp. 492, 497, 500.
(7) (1947) 74 C.L.R., at pp. 14, 18-25.
(8) (1947) 74 C.L.R., at pp. 52-62, 65-67, 70-75, 78-84, 98-101.
(9) (1947) 74 C.L.R., at pp. 527-534.
(10) (1948) 76 C.L.R. 1, at pp. 240, 242, 243, 299, 304, 305, 336-338, 397.
(11) (1953) 89 C.L.R., at pp. 249, 255, 259, 260, 274, 284.

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monopoly on the collection of income tax the Commonwealth is able to dictate to the States the terms upon which funds shall be made available and thus to force the States to carry out Commonwealth policies. The uniform tax scheme virtually reduces the States to the level of Commonwealth departments save that they are not yet called upon to submit detailed estimates. By appropriating moneys to trust funds the Commonwealth has ensured that there is no surplus revenue available for distribution and this practice has been given greater significance since the operation of the uniform taxation scheme, for it means that the States are obliged to take the moneys made available by the *Grants Act*. If this legislation is valid then the Constitution has failed to erect and preserve the federation. Such a result can only be reached if the Court were to hold that there is nothing in the Constitution requiring the powers of the Commonwealth enumerated therein to be so limited as to preserve the federal nature of the Commonwealth. We would submit that there is such a limitation on Commonwealth power.

R. Else-Mitchell Q.C. The rate of tax imposed by the Commonwealth has the practical effect of precluding the States from entering the income tax field. The suggestion made by *Starke* J. in *South Australia* v. *The Commonwealth* (1) is impracticable and may be added to the other matter mentioned by other counsel as illustrating the coercive nature of the *Grants Act*. The provisions of Div. 3 Pt. VI of the *Assessment Act* relating to provisional tax and advance payments are an added factor to be taken into account in looking at the operation of the *Grants Act* and s. 221 of the *Assessment Act* because they operate to postpone further the date when the State can exercise its legal right of attempting to collect tax due to it. We rely upon the federal character of the Constitution to support our submissions and adopt what has already been put in this regard. The taxation power, however aided by the incidental power, only enables tax to be imposed and collected but does not permit of the deferment of some other liability, and in particular a liability to State tax, to the liability to pay Commonwealth tax. Support for the view taken by the plaintiff in these actions is to be found in a consideration of certain provisions of the Constitution. The powers conferred by s. 51 of the Constitution are all concurrent and should be contrasted with those conferred by s. 52 which are exclusive in the sense that the Commonwealth was intended to dominate the field, and the solution to the present case is to be found in the distinction between the two types of powers. The

(1) (1942) 65 C.L.R., at pp. 442, 443.

powers conferred by the former section cannot be used by the Commonwealth so as to exclude the States from the employment of similar powers. We also call in aid the provisions of Chap. IV of the Constitution to assist in this approach particularly those dealing with Commonwealth-State financial relations. These provisions are not intended to confer legislative power, but indicate that the source of legislative power to which they are to be applied is to be found in ss. 51 and 52. [He referred to *Attorney-General (Vict.)* v. *The Commonwealth* (1).] Support is there found for the view that s. 96 does not give any legislative power but simply prescribes a purpose for which appropriations may be made and conditions prescribed and also for the view that the delimitation of powers is a factor governing s. 96 by implication just as it governs s. 51 expressly. Chapter IV by its detailed provisions in ss. 87, 89-94, shows that the question of Commonwealth-State financial relationships was one of some consequence and although most of those provisions were regulatory for a period of ten years it was apparent that the balance of rights was of no small consequence and one which should not be left to any overriding legislative power of the Commonwealth. The provisions of Chap. IV taken in conjunction with the delimitation of powers in the Constitution support three broad propositions. First, the taxation and finance powers of the Commonwealth and of the States were to be concurrent in the sense that neither the State nor the Commonwealth was intended to dominate except in the field of customs and excise and this apart altogether from the financial agreement and s. 105A. Secondly, there can be no inconsistency between Commonwealth and State taxation or Commonwealth and State borrowing laws which can lead to the overriding effect of the Commonwealth laws with the consequence of giving the Commonwealth exclusive power in either field. [He referred to *Stock Motor Ploughs Ltd.* v. *Forsyth* (2).] Thirdly, s. 96 and the powers it confers are equally subject to the principle that the Commonwealth cannot destroy the States by the exercise of its power to make grants. [He referred to *South Australia* v. *The Commonwealth* (3).] Section 11 of the *State Grants (Tax Reimbursement) Act* 1946-1948 shows the true purpose which Parliament had in enacting this statute and its critical importance is that it converts advances of grants into debts if the conditions be not fulfilled. This statute differs in significant respects from its 1942 counterpart. In the 1942 Act there was no provision comparable to s. 11. The 1942

(1) (1945) 71 C.L.R., at pp. 263, 264, 268-270, 282.
(2) (1932) 48 C.L.R. 128, at pp. 147, 148.
(3) (1942) 65 C.L.R., at pp. 415, 419, 424, 429, 441-444.

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Act was of limited operation relating to the war, whilst s. 6 of such Act gave some indication of financial assistance. Lastly, the 1942 Act differs from the 1946 Act in that it specified actual amounts in the schedule which the States would have expected to obtain in 1942 by levying their own income tax. The *States Grants (Tax Reimbursement) Act* is not a grant of financial assistance and this is particularly so when the basis for the calculation set out in the schedule is looked at. The need for reimbursement is itself created by the Commonwealth by virtue of the provisions of the *Taxing Acts* and is a calculated consequence of such Acts. As to ss. 5 and 11 the condition imposed in respect of these grants is a void condition and it may be that both sections fall and thus the whole Act fails. The only source of power for a condition of this character is s. 96 of the Constitution and s. 51 (xxxvi.) does not enlarge the powers contained in that section. [He referred to *Quick & Garran*: *The Annotated Constitution of the Australian Commonwealth* (1901) pp. 869, 870.] The condition is in form and in substance an interference with the States' independence and powers and we adopt the reasons given by *Starke* J. for that view in *South Australia* v. *The Commonwealth* (1). Finally the condition is coercive and does not leave any real practical freedom of choice and we adopt the argument already put on this by Sir *Garfield Barwick* for the other plaintiffs. The situation has to be considered against the background of the *Surplus Revenue Act* and it is clear that the rejection of the grants does not mean that the States will become entitled to anything by way of surplus revenue. That is another coercive element in the legislation. Section 221 of the *Assessment Act* is, properly characterised and construed, not within the taxation power, nor the taxation power aided by the incidental power. Secondly, it infringes the principle of the federal system by singling out the States for adverse action. The *Assessment Act* is addressed to the taxpayer and penalises him if he pays the State in breach of its terms, but for the purpose of the federal doctrine it is nonetheless directed against the States. The injunction of s. 221 if the taxpayer cannot pay applies irrespective of the amount involved, irrespective of any deficiency or insufficiency of assets in the taxpayer, irrespective of the reason for non-payment of the federal tax, irrespective of whether there has been a dispute over liability for the federal tax, irrespective of whether proceedings are pending in respect to the payment of the federal tax. Notwithstanding that, it postulates in its terms a valid and existing State liability and a valid and existing State liability under a State Act still in force. It is not the case of the Commonwealth substituting for the

(1) (1942) 65 C.L.R., at pp. 441-444.

provisions of a State law some body or rules inconsistent with it and excluding its operation. A law having those characteristics and that operation is not and cannot possibly be within the scope of s. 51 (ii.) as a law with respect to taxation. Finally a power to make laws with respect to taxation is a power limited to the imposition or levy of a tax and to the collection and enforcement of the exaction, meaning the collection and enforcement by the authority making the imposition. Such a law travels outside power as soon as it seeks to deal with a liability imposed by any other authority. [He referred to *Bank of N.S.W.* v. *The Commonwealth* (1).] The incidental power cannot extend to denying the operation of a State law or altering the period of obligation imposed by a State law for payment of an assessment. [He referred to *West* v. *Commissioner of Taxation* (*N.S.W.*) (2).] A law which seeks to do more than provide for the imposition, collection and recovery of tax by the Commonwealth is not a law about taxation at all. On the second argument addressed to invalidity we adopt what has already been said on the subject. In so far as any Commonwealth law seeks to impinge upon the forbidden field and to gain the benefit of s. 109 by postponing or denying the State right, then that law will be invalid as going beyond the taxation power. [He referred to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (*In Liquidation*) (3).] Legislation of this type cannot be supported and cannot give the Commonwealth the right to absolute priority and compel the citizen to pay his federal tax in the way in which s. 221 does. The decision in *South Australia* v. *The Commonwealth* (4) rested, largely if not expressly so, on the defence power so that it ought not here be relied upon. The Acts then in question were limited in operation to the duration of the war, whereas the present Acts are unlimited in point of time. If the decision in the present case is not distinguishable, then it should be overruled as no longer having any application.

K. H. Bailey, Solicitor-General of the Commonwealth of Australia, and *P. D. Phillips* Q.C. (with them *K. A. Aickin*), for the Commonwealth of Australia.

K. H. Bailey. The defendant contends that it is from the Constitution as it is and not from any *a priori* or abstract concept of federalism or the federal principle that implications are to be drawn, and that the Constitution is not susceptible of any implication

(1) (1948) 76 C.L.R., at p. 187.
(2) (1937) 56 C.L.R., at p. 686.
(3) (1940) 63 C.L.R., at pp. 312, 313.
(4) (1942) 65 C.L.R. 373.

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which will strike down the *Grants Act*. The grounds of challenge to s. 221 have nothing to do with uniform tax or with the relation of s. 221 to the system of the *Grants Act* and the *Rates Act* of the Commonwealth. If uniform tax were to be abandoned the contention of the plaintiffs would be unchanged. No conclusions such as those drawn by the Solicitor-General for Victoria and the Attorney-General for New South Wales could properly have been drawn from the provisions of the Constitution as they stood in 1900. Any such conclusion is contrary to the express provisions of the Constitution, principally s. 87. States which had previously relied substantially upon receipts from customs and excise for the raising of their revenues, being now excluded by the operation of the Constitution from the imposition of their former taxes, were left with their remaining taxes plus a grant provided by the Constitution itself from the Commonwealth of a total which was in the discretion of the Commonwealth. One could not postulate of the Constitution at that time that it was inconsistent with the character of the Constitution that a State should find itself in the position in which a substantial portion of its revenue lay in the discretion of another authority, because that was exactly the position in which the Constitution by its express words unequivocally placed all the States. The machinery provisions are much less significant in this regard than the first paragraph of s. 87. Secondly Chap. IV did in other material provisions contemplate the support of the States from Commonwealth revenue : see particularly ss. 94, 96. We do not regard s. 96 as a purely transitional provision but as a substantive provision linked as it was with the financial clauses of the Constitution and left to ultimate termination by the Parliament. The whole development of Commonwealth-State relationships, particularly in the sphere of finance, has been in the very opposite direction from that indicated by the plaintiffs' propositions and has indeed been a development in the direction of interlocking responsibility rather than mutual non-interference. Section 51 (xxxvi.) does at least set at rest any doubts that might otherwise exist as to the constitutional position that would arise if and when Parliament exercised its power under any of the provisions to which the paragraph relates to provide otherwise than the provisions made in the Constitution. It is in fact a law with respect to the matter in respect of which the Constitution made provision. [He referred to *Quick & Garran* : *The Annotated Constitution of the Australian Commonwealth* (1901) pp. 647, 648.] The question of what is the matter in respect of which the Constitution has made provision in s. 96 is not itself free from doubt since the substance of the section is the

provision that Parliament may do something. It is open to argument that the matter in respect of which the Constitution has made provision is merely the period during which the Parliament may exercise the power stated, but the preferable view of the section is to treat the matter in respect of which the Constitution does make provision as the provision by Parliament of grants of financial assistance to the States. It cannot be said that a State is destroyed, or its independence taken away, by the mere fact that some other authority has the discretion to determine, and by a determination to grant, a substantial portion of that State's revenue. That is too wide an implication to be drawn from the federal system. On that analysis of the structure and history of the Constitution, the raising of substantial sums by the Commonwealth and their distribution by way of grants to the States is consistent with the letter, spirit and essence of the Constitution, notwithstanding that the States are in the practical position that a substantial portion of the revenues which they expend is in the discretion of the Commonwealth, and no implication to the contrary can be drawn from the federal character of the Constitution. The same issues raised by the present plaintiffs were raised substantially by four of the States in 1942 and by majority were determined in favour of the Commonwealth. Unless demonstrated to be manifestly wrong the decision in *South Australia* v. *The Commonwealth* (1) ought not to be departed from. That decision so far as the enactments now under attack are concerned did not rest upon the defence power and it cannot now be distinguished on the ground of inapplicability to the peace-time powers of the Commonwealth. A majority of the Court as then constituted upheld both s. 221 and the *Grants Act* under ss. 51 (ii.) and 96 of the Constitution and no judge held either measure valid under the defence power alone. [He referred to *South Australia* v. *The Commonwealth* (2).] The amendments made to the Act since 1942 do not in any sense go to validity.

P. D. Phillips Q.C. The plaintiffs err in submitting that there is here no grant within s. 96 because of the nature of the condition attached. The nature of the condition cannot change what would otherwise be a grant into a non-grant. The true test is whether the impugned condition is one such as s. 96 contemplates. It is not right to assimilate the idea of a grant upon conditions to a bargain between individuals, to assimilate constitutional capacity

(1) (1942) 65 C.L.R. 373.

(2) (1942) 65 C.L.R., at pp. 412-429, 429-433, 434, 435, 436, 440, 441, 442, 448, 449, 453, 454, 456, 460, 461, 463.

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to the institutions of private law. Such an assimilation is foreign to the concept of s. 96. Section 5 of the *Grants Act* is no more and no less than an exercise of the power contained in s. 96. It is said by the plaintiffs that this is not a grant of financial assistance. In the light of *Moran's Case* (1) the qualifying words " of financial assistance " must now be taken as meaning no more than of money, quite apart from conditions. The nature of a condition cannot turn a grant not of financial assistance into one of financial assistance and *vice versa*. Upon the authority of *Moran's Case* (1) need or its satisfaction is not a necessary element in the idea of granting financial assistance. The mere handing over of money or money's worth upon terms that it will be parted with upon receipt complies with the conception of grant of financial assistance as expressed in s. 96. The present case falls within this conception. If it be said that the element of need is necessary, then there is a need here, albeit that it may arise from the observance of the conditions. The grant does not cease to be a grant of financial assistance within s. 96 because the need arises from some action of the Commonwealth and not from some independent activity of or situation obtaining in the States. The characteristic form of need—if it be a necessary element—is that it is created by the Commonwealth in the implementation of federal policy. The founders of the Constitution had that very matter in their mind and this is a typical feature of a federal system. The association of the power with the Braddon clause is important. So far as conditions are concerned the nature of the conditions is not a justiciable issue. It is not for the judiciary to deduce criteria of permissible conditions, or the contrary. That right is given to Parliament. The judicial control of the conditions which Parliament sees fit to impose is not necessary to maintain the division of powers between the Commonwealth and States and therefore to maintain the essential working of the Constitution. If the States do not want grants they will not take them ; there is no constitutional interest to be protected by any kind of control of Parliament's selection of conditions. If contrary to the submission the legal propriety of a condition is a justiciable issue then the only kind of condition which would be vicious would be one which infringes some implied constitutional prohibition on the legislative power of Parliament. Put another way, one cannot spell out of the subject matter any criterion for limiting the kind of conditions. There is nothing in the Constitution which indicates that it is not permissible for Parliament to include in the conditions matters unrelated to grants or which requires conditions to be significant

(1) (1939) 61 C.L.R. 735; (1940) A.C. 838; (1940) 63 C.L.R. 338.

to the grants. If it be necessary to show a logical relation between the grant and the condition it exists here. The condition is financial in its character. If there is anything in the suggestion of inducement or coercion made by the plaintiffs it is not that it destroys the condition as a permissible one but that it leads to some other vice in the law as a whole after the law is found to be one granting financial assistance on conditions. The *Grants Act* is clearly a law granting financial assistance to the States upon conditions which Parliament thinks fit and in all those terms it is constitutionally unobjectionable and is within s. 96. If it be invalid, it is so despite the fact that it is a law within s. 96 and because of other consequences. The question then arises whether it is obnoxious to some implied constitutional prohibition affecting a law upon a granted subject matter. The Act cannot infringe any implied prohibition upon the exercise by the Commonwealth of its constitutional powers except by what it does by its direct operation. The present law does no more than make a grant and, that being so, the matter is concluded in favour of the Commonwealth. If a law otherwise within subject matter is by virtue of its actual compulsive legal operation as opposed to its ultimate operation destructive of the continued existence of the State, the implied constitutional limitation steps in to strike such law down. No law under s. 96 can ever infringe these implied constitutional limitations because it is never compulsive in its operation and such a law does not come within the sphere of operation of such limitations. All such a law does is to make a grant on condition, nothing more. [He referred to *Attorney-General* (*N.S.W.*) v. *Homebush Flour Mills Ltd.* (1); *Melbourne Corporation* v. *The Commonwealth* (2).] With the ultimate effect of a law as opposed to its direct actual operation the Court has no concern; there is no difference in this regard between the question of whether the law is within some permitted subject matter or whether it offends against some implied limitation. [He referred to *Fish Board* v. *Paradiso* (3); *Wragg* v. *State of New South Wales* (4).] The distinction between the cases cited is that in the first the legislation was legally compulsive and bad, whilst in the second it was not legally compulsive, though economically persuasive, and good. [He referred to *British Medical Association* v. *The Commonwealth* (5).] Subject to the submission made that the problem never arises in relation to laws under s. 96, laws may be

(1) (1937) 56 C.L.R., at pp. 398, 400, 402, 403, 407, 408.
(2) (1947) 74 C.L.R., at p. 80.
(3) (1956) 95 C.L.R. 443, at pp. 451, 452.
(4) (1953) 88 C.L.R. 353, at pp. 385, 386.
(5) (1949) 79 C.L.R., at pp. 251, 252, 253, 268, 269, 277.

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vitiated in two ways, either because they are not within subject matter or because although within subject matter they operate so as to destroy or substantially to hinder or embarrass the operation of the States as independent partners in the federation. A law within subject matter is valid notwithstanding that it may be pointed against a State or States. Implied prohibitions or limitations will not strike it down unless its effect is seriously to interfere with the existence of the States as independent integers in the federal structure. [He referred to *West* v. *Commissioner of Taxation (N.S.W.)* (1); *Melbourne Corporation* v. *The Commonwealth* (2).] The case secondly cited, provides no sound basis for the view that a law having a legitimate connexion with subject matter will nevertheless be bad if it is confined in its operation to the State and is prejudicial to the State in its operative effect or consequence. [He referred to *Melbourne Corporation* v. *The Commonwealth* (3); *West* v. *Commissioner of Taxation (N.S.W.)* (4); *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (5).] A valid law under s. 96 can never be attacked because it deals only with the States because, necessarily, the power is confined to that subject and it does not bind the State. Upon the foregoing considerations the *Grants Act* involves no such threat to the existence of the States as integers in the federation. What has been said about the *Grants Act* involves the view that the indirect ultimate effect of political power is irrelevant and, however wide the doctrine expressed by *Latham* C.J. in the *Melbourne Corporation Case* (6) may be applied, it can never be applied when the indirect effects are the consequence of voluntary action and not the consequence of compulsive power. There is no political pressure here which could offend against any implied prohibition. Turning to the *Assessment Act*, s. 221 stands or falls as a law with respect to taxation. It is such a law (see *In re Silver Bros. Ltd.* (7)) and, notwithstanding that it is a law on subject matter, it can only be bad if it is the use of federal power to control or burden the exercise of State executive authority in the very widest sense of that doctrine. The federal taxation power extends to all laws the operative effect of which is to secure the collection of more tax moneys than would be collected without such a law. Apart from questions of implied limitations on Commonwealth power a law providing for the effective collection of revenue by subjecting State tax debts to inferiority is within

(1) (1937) 56 C.L.R., at p. 687.
(2) (1947) 74 C.L.R., at pp. 60, 61.
(3) (1947) 74 C.L.R., at pp. 47, 48, 49, 61, 78, 79, 80, 81, 82, 83.
(4) (1937) 56 C.L.R., at p. 702.
(5) (1920) 28 C.L.R., at p. 155.
(6) (1947) 74 C.L.R., at p. 80.
(7) (1932) A.C. 514.

the taxation power. [He referred to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (1).] Such a law in its impact upon the States does not so drastically affect them as to bring it into conflict with the implied prohibitions. The nature of the implied limitations was discussed in the *Melbourne Corporation Case* (2), per *Rich* J. (3), per *Starke* J. (4), per *Dixon* J. (5), and per *Williams* J. (6). None of the four tests expressed in these passages is the same. Looking at s. 221 in the light of the tests expressed in the passages cited it is supportable on certain of them and does not involve the grave interference with State functions necessary to contravene the implied limitations. So far as the bankruptcy portion of s. 221 is concerned the bankruptcy power includes power to postpone the States and the fact that the States are postponed in relation to a prerogative right cannot affect the validity of the section. [He referred to *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd. (In Liquidation)* (7).]

R. Else-Mitchell Q.C., in reply.

D. I. Menzies Q.C., in reply.

Cur. adv. vult.

Aug. 23.

The following written judgments were delivered :—

Dixon C.J. The validity of two distinct provisions of laws of the Commonwealth is attacked in these proceedings. The provisions are s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 and ss. 5 and 11 of the *States Grants (Tax Reimbursement) Act* 1946-1948. If ss. 5 and 11 are invalid the whole *Tax Reimbursement Act* must, it is said, go with them, for they cannot be severed from the rest of the provisions of that Act, but that is not a necessary part of the attack.

On behalf of the two States who seek to establish the invalidity of the provisions in question we are told that the provisions are indispensable to the system which is called uniform taxation and that without them that system must come to an end. No satisfactory legal reason could be advanced in support of this prophecy. So far as the law goes, all that can be said is that the invalidation of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* would remove one obstacle to the States breaking away

(1) (1940) 63 C.L.R., at pp. 314, 315.
(2) (1947) 74 C.L.R. 31.
(3) (1947) 74 C.L.R., at p. 66.
(4) (1947) 74 C.L.R., at p. 75.
(5) (1947) 74 C.L.R., at pp. 80, 81.
(6) (1947) 74 C.L.R., at pp. 98, 99.
(7) (1940) 63 C.L.R., at pp. 313, 314, 316.

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from the system and the invalidation of the *States Grants (Tax Reimbursement) Act* would remove one powerful inducement to the States to abide by it.

No attempt is made to invalidate the imposition by the Commonwealth Parliament of income tax at rates which suffice to produce revenue large enough to cover payments to the States of grants on the same scale as heretofore made to the States by way of tax reimbursement. Nor is there any attempt to deny that the power of the Commonwealth Parliament would enable it to authorise such payments unconditionally as grants of financial assistance. The denial of power is very much more limited. What is denied amounts to two things. First, it is denied that the power of that Parliament enables it to enact, as a condition of the grant, that the federal Treasurer must be satisfied that the State has not imposed a tax on incomes, or to enact that, if he makes advances, they shall be repaid by a State that in the event fails to observe the condition. Second, the power is denied to say that a taxpayer upon whom a State Parliament might impose a liability to pay to the State a tax upon income for any given year must not pay the tax until first he has discharged his liability to the Commonwealth to pay income tax in respect of the same year. This in effect is what is done by s. 221 (1) (*a*) of the *Income Tax and Social Services Contribution Assessment Act*. These provisions, the States say, are the buttress of the system of uniform taxation.

As between the States all Commonwealth taxation must be uniform if it is to be constitutional. To call the system one of uniform taxation may seem therefore to be strange. But the name was not chosen for the constitutional lawyer. It was chosen to describe the operation of the system as one replacing that existing in which, besides a federal income tax, there were taxes on income imposed by all the States which varied greatly in the burden they placed upon the respective taxpayers of the different States. Under the new system the proceeds of a necessarily uniform income tax would provide the moneys which otherwise the States must respectively raise for themselves by their own varying income taxes. Thus the incidence of the aggregate burden of tax would not differ as between States and in that sense a uniform burden of income tax would be imposed upon taxpayers throughout Australia, and at the same time there would be no change in the unequal degree in which the different States relied upon the proceeds of the taxation of income as a source of revenue.

The system was introduced at what perhaps may for this country be regarded as the crisis of the war. It was done by four Acts of

Parliament that were assented to on 7th June 1942, the day after the battle of Midway Island ended.

First: the *Income Tax Act* 1942 (No. 23) imposed taxes upon income at rates which reached an unprecedented level, the proceeds of which would cover the reimbursement of their lost income tax to the States as well as contributing to the wartime budgetary necessities of the Commonwealth what that source of revenue could be expected to bear.

Second: the *States Grants (Income Tax Reimbursement) Act* 1942 (No. 20) provided, upon a condition, for the payment to the six States of sums which in fact, though it did not so appear on the face of the statute, were fixed by reference to the amounts which the respective States had, in their more recent budgets, raised by the taxation of incomes and substantially represented the annual revenue which might then have been expected from that source. The Act was expressed to continue in operation until the last day of the first financial year to commence after the date on which His Majesty ceased to be engaged in the war and no longer.

Third: the *Income Tax Assessment Act* 1942 (No. 22), s. 31, inserted in the principal Act of 1936-1941 s. 221, forbidding a taxpayer to pay his State tax for any given year in which such a tax might be imposed until he had first paid his federal tax. In s. 221 in its then form the introductory words were "For the better securing to the Commonwealth of the revenue required for the prosecution of the War", and by sub-s. (2) its operation was limited to the war in the same terms as were used in the *Income Tax Reimbursement Act* of 1942. The words "for the prosecution of the War" were replaced in 1946 by the expression "for the purposes of the Commonwealth" and sub-s. (2) containing the limitation was repealed. (No. 8 of 1946, s. 20.)

Fourth: by an Act the long title of which was "An Act to make provision relating to the collection of taxes and for other purposes" and the short title the *Income Tax (War-time Arrangements) Act* 1942 (No. 21), provision was made requiring the transfer to the Commonwealth service of State officers who were engaged in duties which, in the opinion of the Treasurer, were connected with the assessment and collection of taxes upon incomes. The transfer required was to be temporary and after the Act ceased to operate there was to be a retransfer of the officers. The Act contained ancillary and consequential provisions relating to the terms and conditions on which the temporarily transferred officers were to be employed by the Commonwealth, and the like. It provided further for the transfer of offices and furniture and of records so far

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as they touched Commonwealth taxation. The operation of the Act, like that of the *Income Tax Reimbursement Act* and of s. 221, was limited to the last day of the financial year in which His Majesty should cease to be engaged in the war. Further, by a preamble it was recited that it was necessary or convenient to make the provisions with a view to the public safety and defence of the Commonwealth and of the several States and for the more effectual prosecution of the war.

Four States at once brought suits claiming declarations that the statutes were invalid in whole or in part. The leading argument for the States was delivered by Mr. *Ligertwood* K.C., as he then was, who appeared for South Australia. His opening sentence as reported provides the foundation of the attack. The learned counsel said, "An examination of the four statutes under consideration shows that they are in fact a single legislative scheme, and that the substance, purpose and effect of it is to make the Commonwealth Parliament the exclusive taxing authority in the Commonwealth in respect of income tax, and to prevent the States from exercising their constitutional powers in relation to income tax." (1)

The counsel for the Commonwealth met the attack in detail but the general tone is made manifest by the first proposition with which the leading counsel (Mr. *Ham* K.C.) began, viz., "In times of national emergency, as at present existing, the defence power is limited only by the necessity of self-preservation" (2).

The decision of the Court was in favour of the validity of all four Acts of Parliament. As to the *War-time Arrangements Act*, which was supported only under the defence power, *Latham* C.J. and *Starke* J. dissented. As to the *Income Tax Reimbursement Act*, which was supported under s. 96 of the Constitution, *Starke* J. dissented. The decision, which is reported under the title of *South Australia* v. *The Commonwealth* (3), was delivered on 23rd July 1942. In New South Wales an Act was passed on 17th November 1942 called the *Income Tax Suspension Act* 1942 (No. 18) by which the further imposition of income tax was suspended as from 30th June 1942. In Victoria the annual taxing Act applied only to each financial year beginning on 1st July (see Act No. 4826) and none was passed imposing a tax for the year beginning 1st July 1942 or for any subsequent year. The other four States also terminated their imposition of taxation upon incomes and so qualified for "tax reimbursement" by the Commonwealth. The *States Grants (Income Tax Reimbursement) Act* 1942 has been replaced by

(1) (1942) 65 C.L.R., at p. 385.
(2) (1942) 65 C.L.R., at p. 396.
(3) (1942) 65 C.L.R. 373.

the *States Grants (Tax Reimbursement) Act* 1946-1948, the duration of which is not limited, and for the last fifteen years there has been no State taxation of incomes, the only income tax being that of the Commonwealth.

The whole plan of uniform taxation has thus become very much a recognised part of the Australian fiscal system. How far it really rests on the validity of the condition which forms an integral part of the *Tax Reimbursement Acts* and of s. 221 (1) (*a*) of the *Income Tax and Social Services Contribution Assessment Act* is, I think, open to question. But on the footing that it does so, the Court is now invited to depart from the decision in *South Australia* v. *The Commonwealth* (1), either by treating it as wrongly decided or by distinguishing it as a decision resting in an essential degree on the scope of the defence power in time of war. Having regard to the lapse of time in which no State has taken proceedings seeking judicial relief against the statutes, to overrule the decision or even so to distinguish it must involve a grave judicial responsibility.

In the present proceedings the argument for the States took a course which differed from that adopted in the earlier case. It was more restricted. Then all four enactments assented to on 7th June 1942 were impugned as together forming a legislative scheme or plan of an unconstitutional character. The "*Arrangements*" *Act* has of course done its work and is spent. Of the three remaining statutory elements necessary to the "plan" or "scheme" upon which the argument in the earlier case based the attack, it was recognised that the validity of the *Taxing Act* must be conceded. There are two such Acts at present, the *Income Tax and Social Services Contribution Acts* 1956 (Nos. 28 and 102). On its face such a measure is simply a taxing Act every word of which is within the power to make laws with respect to taxation. All that could be said is that the rates of tax are doubtless higher than they would have been if there were no "tax reimbursement" to the States. Each of the two provisions left, that is to say, s. 221 of the *Assessment Act* and the *Tax Reimbursement Act*, is made the subject of a separate attack, on the ground that it lies outside the legislative power to which it has been referred and moreover attempts an unconstitutional interference with the States. The constitutional power to which s. 221 is referred is of course that given by s. 51 (ii.) of the Constitution with perhaps s. 51 (xxxix.) operating in aid, and that to which the *Tax Reimbursement* provisions are referred is the power contained in s. 96 of the Constitution.

(1) (1942) 65 C.L.R. 373.

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But while the ground for impugning validity in the case of each enactment is confined to a separate argument of *ultra vires* and is not based on the disclosure of an unconstitutional plan or scheme by the enactments considered in combination, reliance is placed on the planned interconnexion of the provisions as giving each a purpose which may be material in considering whether it is a true exercise of the legislative power upon which its validity depends.

The question whether s. 96 suffices to support the enactment of the *States Grants (Tax Reimbursement) Act* 1946-1948 is the first matter to decide. It is affected more by decided cases than is the validity of s. 221 which, as it seems to me, has the support of no judicial decision except *South Australia* v. *The Commonwealth* (1).

A brief description of the statute itself is enough for present purposes. The short title is *States Grants (Tax Reimbursement) Act*, a title which differs only from the Act of 1942, which it repeals, by the omission of one word. The earlier Act used the expression " (*Income Tax Reimbursement*)". The later Act commenced on 1st July 1946 (s. 2). The material part of its main provision (s. 5) is to the effect that in respect of any year during its operation, in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State an amount calculated in accordance with the provisions of the Act. Section 6 then fixes a figure of forty million pounds for 1947 and 1948 and, having done that, provides a base figure for the future from which the aggregate grant for the successive years is to be calculated annually. The base figure is forty-five million pounds and the calculation is to be made by finding how much that was per head of the population of the six States as at 1st July 1947, and then multiplying the amount per head by the population of the subsequent year. The sum obtained is to be further increased by the addition of a percentage, if there be an increase in average wages in the previous year. The same percentage is to be added as the percentage of the increase in the average wages in the previous year. Section 7 provides elaborately for the division of the aggregate among the six States. It fixes three periods viz. (1) the financial years 1946-1947 and 1947-1948; (2) the succeeding financial years until 30th June 1957; (3) subsequent financial years. In each period a proportionate distribution of the aggregate is prescribed. It is perhaps not necessary to say more about these proportions than that in the third period which has now commenced the distribution is in accordance with the adjusted populations of the States, a term which although

(1) (1942) 65 C.L.R. 373.

defined elaborately may be left as in itself sufficiently descriptive for present purposes. By s. 10 provision is made for consultation between the government of a State and that of the Commonwealth with a view to the Parliamentary increase of the grant to the State. Section 11 contains two sub-sections. The first empowers the Treasurer of the Commonwealth to make in any year monthly or other advances to a State of portions of the grant to which it appears to him that the State will be entitled under the Act in respect of that year. The second sub-section is as follows :—" (2) Any such advance shall be made on the condition that the State shall not impose a tax upon incomes in respect of that year, and if, after the close of that year, the Treasurer gives notice in writing to the Treasurer of the State that he is not satisfied that the State has not imposed such a tax, the advances shall be repayable and shall be a debt due by the State to the Commonwealth." This of course means that if a State receives by way of advances during a financial year a large part of the grant appropriated and then before the end of the financial year seeks to raise additional revenue by imposing an income tax, that State must at once refund the advances. Section 12 provides that payments in accordance with the Act should be made out of the Consolidated Revenue Fund which shall thereby be appropriated accordingly.

The constitutional basis for this enactment is s. 96. Section 96 forms part of the financial clauses of the Constitution which we know as a matter of history were the final outcome of the prolonged attempts to reconcile the conflicting views and interests of the colonies on that most difficult of matters.

The fact that it came out of the Premiers' Conference of 1899 (see the Victorian statute *Australasian Federation Enabling Act* 1899 (No. 1603) particularly s. 2 and first schedule), when the opening words of s. 87 (the Braddon clause) were inserted, does not assist in its construction nor ought the fact to be used for such a purpose, notwithstanding that now it has a place, however inconspicuous, as part of the history of the country. But it may explain why the terms in which it was drafted have been found to contain possibilities not discoverable in the text as it emerged from the Conventions, and also why the same opening words were adopted as in the Braddon clause as to the duration of the power, although in a context where they seem to have no purpose or effect that is intelligible, or at all events credible. It is, perhaps, as well to set out s. 96. It is as follows :—" 96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant

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financial assistance to any State on such terms and conditions as the Parliament thinks fit." One may guess that s. 96 was regarded as connected with the Braddon clause, s. 87, and that the purpose of the opening words was to enable the Parliament to terminate the operation of both together. See *Quick and Garran*: *The Annotated Constitution of the Australian Commonwealth* (1901) pp. 869, 870, and per *Evatt* J., in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1). But s. 51 (xxxvi.) confers upon the Parliament legislative power " with respect to matters in respect of which this Constitution makes provision until the Parliament otherwise provides ". On its face par. (xxxvi.) presupposes that the Parliament is authorised to provide otherwise as to " matters " with respect to which the Constitution immediately provides: they will be matters defined, like those enumerated in s. 51, in such a way as to be subjects " with respect to " which laws may be made. Section 87 does deal with such a matter, viz. the disposal of the net revenue of the Commonwealth. In the same way subject matters " with respect to " which legislative powers may be exercised are specified by the other provisions of the Constitution, except s. 96, in which the phrase occurs " until the Parliament otherwise provides " (cf. ss. 3, 7, 10, 22, 24, 29, 30, 31, 34, 39, 46, 47, 48, 65, 66, 67, 73 and 97).

In all such cases the Constitution makes directly an interim provision for the subject matter and s. 51 (xxxvi.) operates to confer power on the Parliament to make thereafter such provisions with respect thereto as from time to time may appear appropriate. But s. 96 does not deal with a legislative subject matter; it does not make some interim provision with respect thereto. It confers a bare power of appropriating money to a purpose and of imposing conditions. Either the power is terminated or it continues. It would be easy to understand if it terminated when another provision under or " with respect to " s. 87 was made but, however much one may suspect it, there is nothing in the Constitution itself to warrant any such construction. The conclusion reached in *Quick and Garran*: *The Annotated Constitution of the Australian Commonwealth* (1901) p. 870 was that the section might be considered for all practical purposes as a permanent part of the Constitution; and the Constitutional Commission of 1927-1929, after hearing the meaning discussed of the limitation to " a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides ", reported that they considered the words to be ineffective and recommended that they be repealed. In the cases in this Court in which s. 96 has been considered, except

(1) (1939) 61 C.L.R., at p. 803.

in the passage to which a reference has already been made in the judgment of *Evatt* J. in *Moran's Case* (1), it seems to have been taken for granted that the scope and purpose of the power conferred by s. 96 was to be ascertained on the footing that it was not transitional but stood with the permanent provisions of the Constitution.

On this basis it is apparent that the power to grant financial assistance to any State upon such terms and conditions as the Parliament thinks fit is susceptible of a very wide construction in which few if any restrictions can be implied. For the restrictions could only be implied from some conception of the purpose for which the particular power was conferred upon the Parliament or from some general constitutional limitations upon the powers of the Parliament which otherwise an exercise of the power given by s. 96 might transcend. In the case of what may briefly be described as coercive powers it may not be difficult to perceive that limitations of such a kind must be intended. But in s. 96 there is nothing coercive. It is but a power to make grants of money and to impose conditions on the grant, there being no power of course to compel acceptance of the grant and with it the accompanying term or condition.

There has been what amounts to a course of decisions upon s. 96 all amplifying the power and tending to a denial of any restriction upon the purpose of the appropriation or the character of the condition. The first case decided under s. 96 was *Victoria* v. *The Commonwealth* (2). The enactment there in question, the *Federal Aid Roads Act* 1926 (No. 46), did not express its reliance on s. 96 either in terms or by reference to the grant of financial assistance. It authorised the execution by or on behalf of the Commonwealth of an agreement in a scheduled form with each of the States. It established a trust account in the books of the Treasury to be known as the Federal Aid Roads Trust Account and appropriated for payment into the fund such amount as was necessary for each agreement so executed. The scheduled form of agreement set out in detail a plan or scheme for the construction of roads at the combined expense of State and Commonwealth. The roads, called Federal Aid Roads, fell into three classes, (1) main roads opening up and developing new country ; (2) trunk roads between important towns ; and (3) arterial roads carrying concentrated traffic from developmental main trunk and other roads. Very specific provisions were made by which what the State did in pursuance of the plan was made subject to the control or approval of the Commonwealth. The amounts contributed by a State were to be about three-fourths

(1) (1939) 61 C.L.R., at p. 803. (2) (1926) 38 C.L.R. 399.

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of those contributed by the Commonwealth. The contributions of the Commonwealth were to extend over ten years. It was provided that payments would be made to the State out of the moneys for the time being in the trust account in such amounts and at such times and subject to such conditions as the Commonwealth Minister might determine. The form of agreement should perhaps be studied in detail to appreciate how much is implied by the decision of the Court, but for present purposes the foregoing outline may be enough. The validity of the legislation was upheld by this Court as authorised by s. 96. This means that the power conferred by that provision is well exercised although (1) the State is bound to apply the money specifically to an object that has been defined, (2) the object is outside the powers of the Commonwealth, (3) the payments are left to the discretion of the Commonwealth Minister, (4) the money is provided as the Commonwealth's contribution to an object for which the State is also to contribute funds. Road-making no doubt may have been conceived as a function of the State so that to provide money for its performance must amount to financial assistance to the State. But only in this way was there " assistance ".

In *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (1), one of the matters decided was the validity of s. 6 of the *Wheat Industry Assistance Act* 1938 (No. 53). It is unnecessary to describe the legislative plan or scheme of which that section formed a part or to discuss the constitutional question from which I have isolated the question whether s. 6 was valid. The provision was upheld (*Evatt* J. dissenting) on the ground that it amounted to an exercise of the power contained in s. 96.

Section 5 of the *Wheat Industry Assistance Act* established a fund fed from Consolidated Revenue to be called the Wheat Industry Stabilization Fund. Sub-section (1) of s. 6 provided that subject to the Act the moneys standing to the credit of the fund should be applied in accordance with the Act in making payments to the States as financial assistance ; sub-s. (6) provided that after certain deductions the amount paid in to the fund in any year should be applied in making payments to the States in effect in proportion to the quantities of wheat produced. Sub-section (7) then made the following provision—" Any amount granted and paid to a State in pursuance of the last preceding sub-section shall be paid to that State upon condition that it is distributed to the wheat growers in that State in proportion to the quantity of wheat sold or delivered for sale by each wheat grower during the year in respect of which the payment is made to the State." Now it might have been thought

(1) (1939) 61 C.L.R. 735.

that these provisions were outside s. 96 because they gave no assistance to the State as a body politic but used it only as a conduit or an agency by which the moneys would be distributed among the wheat growers of the State. In that light the provision could not presumably have been upheld as an exercise of the power conferred by s. 51 (iii.) to make laws with respect to bounties on the production or export of goods but so as not to discriminate between States or parts of States. The reason why apparently it could not be justified under that power was because the basis of the distribution of the moneys was not the production but the sale of wheat. In fact, however, the provision was considered to amount to financial assistance to the State notwithstanding that the State was bound to distribute the money it received to the wheat grower.

The decision, which was affirmed in the Privy Council (1), without express reference to this use of s. 96, must mean that s. 96 is satisfied if the money is placed in the hands of the State notwithstanding that in the exercise of the power to impose terms and conditions the State is required to pay over the money to a class of persons in or connected with the State in order to fulfil some purpose pursued by the Commonwealth and one outside its power to effect directly. I should myself find it difficult to accept this doctrine in full and carry it into logical effect, but the decision shows that the Court placed no limitation upon the terms or conditions it was competent to the Commonwealth to impose under s. 96 and regarded the conception of assistance to a State as going beyond and outside subventions to or the actual supplementing of the financial resources of the Treasury of a State.

From the reasons given in the Privy Council it clearly appears that their Lordships considered that it is no objection to a purported grant of financial assistance under s. 96 that it discriminates as between States or that it is for the purpose of a distribution to a class of the people of a State ; but what was said did not necessarily include such an imperative requirement as s. 6 (7) imposes : for that provision was not mentioned : (2).

In *South Australia* v. *The Commonwealth* (3) the dissent of *Starke* J. was on the ground that the *Income Tax Reimbursement Act* of 1942 included the object of " making the Commonwealth the sole effective taxing authority in respect of incomes and compensating the States for the resulting loss in income tax " (4). " No doubt ", said

(1) (1940) A.C. 838 ; (1940) 63 C.L.R. 338.
(2) (1940) A.C. at pp. 857-859 ; (1940) 63 C.L.R., at pp. 349-350.
(3) (1942) 65 C.L.R. 373.
(4) (1942) 65 C.L.R., at p. 443.

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his Honour, " means can be found to give the States financial assistance without crippling them in the exercise of their powers of self-government if the Commonwealth taxation creates economic difficulties for them. But I cannot agree that the provisions of s. 96 enable the Commonwealth to condition that assistance upon the States abdicating their powers of taxation or, which in substance is the same thing, not imposing taxes upon income " (1). Unless this view involves a departure from what was decided in the two cases with which I have dealt, *Starke* J. said nothing in derogation of the interpretation of s. 96 which those decisions involve. The judgments of the members of the Court forming the majority place positive reliance upon the decisions as affording definite support to the conclusion that the *Income Tax Reimbursement Act* was a valid exercise of the power conferred by s. 96. Those judgments pronounce specifically against the view that that Act was invalid as attempting an interference with the exercise by the States of their constitutional functions. *Latham* C.J. concluded his discussion of this objection to validity by saying that the Act did not give any command or impose any prohibition with respect to the exercise of any State power, legislative or not. " The *Grants Act* authorizes payments to States which choose to abstain from imposing income tax, and is valid by reason of s. 96 of the Constitution, unless it is bad as involving some prohibited discrimination or preference " (2). It is unnecessary to say that the prior decisions were enough to show that his Honour's proviso could not result in the invalidity of the Act. *Rich* J. agreed in the judgment of *Latham* C.J. on this matter. *McTiernan* J. also rejected the contention that there was any interference with the constitutional functions of the States. His Honour did not leave the provisions now standing as s. 221 out of account in his explanation of the constitutional justification of the *Income Tax Reimbursement Act*, which places the validity of that Act on s. 96. His Honour said: " The Commonwealth Parliament has, in the exercise of its clear constitutional rights, tremendously increased the burden of Commonwealth taxation, and given priority to that burden. It has left the States free to decide whether they should impose an additional burden of taxation in any financial year. The Act provides that, if ' the Treasurer is satisfied that a State has not imposed a tax upon incomes,' the amount specified in the schedule is payable to that State. The payment is in truth and in fact made to relieve a disability arising from the incorporation of the State in the Commonwealth. The money is paid to reimburse the State for the loss of revenue which it has not been expedient

(1) (1942) 65 C.L.R., at pp. 443, 444. (2) (1942) 65 C.L.R., at p. 427.

to collect because of the circumstances flowing from the operation of valid Commonwealth law " (1). *Williams* J. overruled the contention of the States that the Act was invalid for reasons which very clearly appear from the following passage: " There is no illegal interference with the sovereignty of the States, because the matter of levying or not levying their own income tax is left entirely to the discretion of their own Parliaments. An analogous case would be where the Commonwealth Parliament offered a State assistance on condition it ceased to carry on the mining of a profitable ore, which the Commonwealth thought it was inadvisable to exhaust in the national interest, the Commonwealth offering the State assistance under s. 96 to offset the loss of revenue it would suffer by doing so " (2).

In the present attack upon the validity of the *Tax Reimbursement Act* 1946-1948 the two States that are plaintiffs naturally rest heavily upon the argument that the Act is a law for the restriction or control of the States in the exercise of their taxing powers, that on its face the purpose appears of compelling the States to abstain from imposing taxes upon income. If s. 96 came before us for the first time for interpretation, the contention might be supported on the ground that the true scope and purpose of the power which s. 96 confers upon the Parliament of granting money and imposing terms and conditions did not admit of any attempt to influence the direction of the exercise by the State of its legislative or executive powers. It may well be that s. 96 was conceived by the framers as (1) a transitional power, (2) confined to supplementing the resources of the Treasury of a State by particular subventions when some special or particular need or occasion arose, and (3) imposing terms or conditions relevant to the situation which called for special relief of assistance from the Commonwealth. It seems a not improbable supposition that the framers had some such conception of the purpose of the power. But the course of judicial decision has put any such limited interpretation of s. 96 out of consideration. In any case it must be borne in mind that the power conferred by s. 96 is confined to granting money and moreover to granting money to governments. It is not a power to make laws with respect to a general subject matter, which for reasons such as I gave in *Melbourne Corporation* v. *The Commonwealth* (3), may be taken to fall short of authorising a special attempt to control the exercise of the constitutional powers of the States where there is a connexion with some part of the subject matter of the federal

(1) (1942) 65 C.L.R., at p. 455.
(2) (1942) 65 C.L.R., at p. 463.
(3) (1947) 74 C.L.R. 31.

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power. The very matter with which the power conferred by s. 96 is concerned relates to State finance. Further there is nothing which would enable the making of a coercive law. By coercive law is meant one that demands obedience. As is illustrated by *Melbourne Corporation* v. *The Commonwealth* (1), the duty may be imposed, not on the State or its servants, but on others and yet its intended operation may interfere unconstitutionally with the governmental functions of the State in such a way as to take the law outside federal power. But nothing of this sort could be done by a law which in other respects might amount to an exercise of the power conferred by s. 96. For the essence of an exercise of that power must be a grant of money or its equivalent and beyond that the legislature can go no further than attaching conditions to the grant. Once it is certain that a law which is either valid under s. 96 or not at all does contain a grant of financial assistance to the States, the further inquiry into its validity could not go beyond the admissibility of the terms and conditions that the law may have sought to impose. The grant of money may supply the inducement to comply with the term or condition. But beyond that no law passed under s. 96 can go.

Once the interpretation is accepted in full which the decisions in *Victoria* v. *The Commonwealth* (2), and in *Moran's Case* (3) combine to place upon the section it becomes difficult indeed to find safe ground for saying that the condition of the grant of financial assistance may not be that a particular form of tax shall not be imposed by the State. The interpretation flowing from these two decisions is not consistent with the view that there must be a need for relief or a reason for giving assistance which is not itself created by the Commonwealth legislation connected with the grant. It is inconsistent with the view that the terms or conditions cannot require the exercise of governmental powers of the State and require the State to conform with the desires of the Commonwealth in the exercise of such powers. It seems a short step from this to saying that the condition may stipulate for the exercise or non-exercise of the State's general legislative power in some particular or specific respect. Once this step is taken it becomes easier to ask than to answer the question—"Why then does this not apply to the legislative power of imposing this or that form of taxation?"

In short the result of my consideration of the two prior decisions upon s. 96 has been to convince me that the decision of the majority

(1) (1947) 74 C.L.R. 31.
(2) (1926) 38 C.L.R. 399.
(3) (1939) 61 C.L.R. 735; (1940) A.C. 838; (1940) 63 C.L.R. 338.

of the Court with respect to the *Tax Reimbursement Act* in *South Australia* v. *The Commonwealth* (1) was but an extension of the interpretation already placed upon s. 96 of the Constitution. The three decisions certainly harmonise and they combine to give to s. 96 a consistent and coherent interpretation and they each involve the entire exclusion of the limited operation which might have been assigned to the power as an alternative.

Before the meaning of s. 96 and the scope of the power it gives had been the subject of judicial decision no one seems to have been prepared to speak with any confidence as to its place in the constitutional plan and its intended operation. It may be said perhaps that while others asked where the limits of what could be done in virtue of the power the section conferred were to be drawn, the Court has said that none are drawn; that any enactment is valid if it can be brought within the literal meaning of the words of the section and as to the words "financial assistance" even that is unnecessary. For it may be said that a very extended meaning has been given to the words "grant financial assistance to any State" and that they have received an application beyond that suggested by a literal interpretation.

But even if the meaning of s. 96 had seemed more certain, it would, in my opinion, be impossible to disregard the cumulative authority of the three cases I have discussed and conclude that ss. 5 and 11 of the *Tax Reimbursement Act* are invalid. I therefore think that the validity of that Act must be upheld.

The question of the validity of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* does not appear to me to stand in the same position. The decision of the Court in *South Australia* v. *The Commonwealth* (1) upholding the validity in its earlier form of the provision contained in par. (*a*) of that section appears to me to stand by itself. I do not think that s. 221 (1) (*a*) has a parallel and I do not think that there is any real analogy to it in any provision that has been judicially considered. It is hardly necessary to say that these are not considerations which in themselves would make it proper for the Court to review a prior decision. But they do distinguish the case of the validity of s. 221 (1) (*a*) from the case of the validity under s. 96 of the Constitution of the *Tax Reimbursement Act*.

Section 221 in its present form is the result of Act No. 22 of 1942, s. 31, Act No. 6 of 1946, s. 20, and Act No. 43 of 1954, s. 12. The section falls into two parts. The second part is comprised in par. (*b*) (i) and (ii). Sub-paragraph (i) of par. (*b*) is concerned only

(1) (1942) 65 C.L.R. 373.

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with the order of priority in which federal income tax is to be paid by a trustee in bankruptcy administering the estate of the bankrupt. I would unhesitatingly uphold the validity of this provision as a law made in the exercise of the power conferred by s. 51 (xvii.) of the Constitution to make laws with respect to bankruptcy and insolvency. Sub-paragraph (ii) of par. (*b*) is concerned with a similar priority in the liquidation of a company. Probably this also is to be upheld as an exercise of the same power. For in Canada and in the United States the analogous power has been held to extend to liquidations of insolvent corporate trading bodies. See *Shoolbred* v. *Clarke*; *In re Union Fire Insurance Co.* (1); *Re Colonial Investment Co. of Winnipeg* (2); *Continental Illinois National Bank & Trust Co.* v. *Chicago Rock Island & Pacific Ry. Co.* (3). But in any case, it is purely a provision for priority in the administration of assets and has no bearing on the controversy in the present case and it can be neglected.

Paragraph (*a*) is of a different nature. It is as follows :—" 221. (1) For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—(*a*) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable."

It will be seen that this provision is not concerned with priorities in an administration of assets. It is a direct prohibition laid on the taxpayer making it an offence on his part to pay State income tax unless he has first satisfied his liability for federal income tax. At the end of the section very heavy maximum penalties for breach are attached. But before dealing with the constitutional validity of this provision it is perhaps desirable to make one or two observations which while not very material to that question may make the meaning and effect of the provision clearer.

In the first place by definition " taxpayer " means a person deriving income : s. 6 (1) of the *Assessment Act*. Thus it is not simply the person who has been assessed who is subject to the prohibition but a person who has derived income, that is to say, for the relevant period. In the next place the expression " Act with which this Act is incorporated " means what is ordinarily called the taxing Act. There are two in current operation—No. 28 of 1956 with

(1) (1890) 17 Can. S.C.R. 265, at p. 274.
(2) (1913) 15 D.L.R. 634, at pp. 642, 646; (1913) 14 D.L.R. 563.
(3) (1935) 294 U.S. 648 [79 Law. Ed. 1110 and annotation at pp. 1133 et seq.].

respect to companies and No. 102 of 1956 with respect to persons other than companies. The words " by or under any Act " in reference to taxing Acts are hard to understand. The tax is imposed by such an Act. But it can hardly be said to be imposed " under " the taxing Act even if by virtue of the *Assessment Act* the liability only arises on the formation of some opinion or exercise of some discretionary or other authority by the commissioner. The relevance of this is that clearly enough s. 221 (1) (*a*) means to affect every person deriving income liable to federal tax from the time of derivation and not merely from the time of assessment. " Year of income " is of course a defined expression. In the case of a company it means the preceding financial year (or substituted accounting period), in the case of other persons that for which income tax is levied : s. 6 (1). But it is to be noted that the tax which the taxpayer must pay before paying State tax does not include provisional tax : s. 221YA (2).

Section 221 (1) (*a*) is directed to the taxpayer but of course by virtue of s. 109 of the Constitution any State law which assumed to place upon him a duty to pay State income tax irrespective of his prior payment of his federal tax for the same year of income would be void *pro tanto*. Whether a State could escape inconsistency with s. 221 (1) (*a*) by imposing an income tax otherwise than upon the income of a " year of income " may be doubted. But for present purposes we need not concern ourselves with a possibility of such a kind. For it is obvious that s. 221 (1) (*a*) was meant to cover the whole ground and that it must cover most of it. Its intended operation is not dependent upon the amount of the federal tax for which a taxpayer is prospectively liable nor upon the existence of claims of the State that actually do compete with those of the Commonwealth at any given time. It has nothing to do with bankruptcy, insolvency or liquidation or any other administration of assets. It simply is a command directed to the taxpayer not to pay the State tax pending the assessment and payment of the Commonwealth tax quite independently of any consideration beyond the existence of the two taxes in the same field for the same year.

Where is to be found a legislative power in the Parliament of the Commonwealth which will suffice as authority for such an enactment ? The defence power must now be put aside, whatever use might have been made of it in 1942. The power by which it has been supported is that given by s. 51 (ii.) to make laws with respect to taxation carrying with it, as the power does, everything incidental to the main purpose of the power. Inevitably there is added the power conferred by s. 51 (xxxix.) with respect to matters

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incidental to the execution of any power vested and so on. It is unnecessary for the present purpose to distinguish between the incidental power contained in the grant of the main power and that derived from s. 51 (xxxix.): cf. *Le Mesurier* v. *Connor* (1).

The first observation to make is that the power to make laws with respect to taxation has never been, and, consistently with the federal character of the Constitution could not be, construed as a power over the whole subject of taxation throughout Australia, whatever parliament or other authority imposed taxation. "The taxation referred to is federal taxation for federal purposes" per *Griffith* C.J. in *Municipal Council of Sydney* v. *The Commonwealth* (2). See *W. Harrison Moore—The Constitution of the Commonwealth of Australia*, 2nd ed. (1910) pp. 510, 511—who remarks (at p. 511): "The State power of taxation for its own purposes is something quite distinct which does not legally (though of course it may economically) compete with the Commonwealth power, they are what have been called 'concurrent and independent powers'."

Clearly enough s. 221 (1) (*a*) can find no justification unless it be as something incidental to the main power. But when you are considering what is incidental to a power not only must you take into account the nature and subject of the power but you must pay regard to the context in which you find the power. Here we are dealing with powers of taxation in a federal system of government. Further, you must look at the purpose disclosed by the law said to be incidental to the main power. Here the purpose is to make it more difficult for the States to impose an income tax. No doubt s. 221 (1) (*a*) stands or falls as a separate legislative provision but it would be absurd to ignore the place the section takes in the plan for uniform taxation and examine it as if it were appurtenant to nothing and possessed no context. To support s. 221 (1) (*a*) it must be said to be incidental to the federal power of taxation to forbid the subjects of a State to pay the tax imposed by the State until that imposed upon them by the Commonwealth is paid and, moreover, to do that as a measure assisting to exclude the States from the same field of taxation. This appears to me to go beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, to attempt to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States.

Section 221 (1) opens with the words "for the better securing to the Commonwealth of the revenue required for the purposes of

(1) (1929) 42 C.L.R. 481, at p. 497. (2) (1904) 1 C.L.R. 208, at p. 232.

the Commonwealth ". This recital may be read as a statement of the kind of purpose seen in par. (*b*) but both the nature and history of par. (*a*) make it clear that it refers really to the occupation of the field of income tax to the exclusion of the States. Recitals do not suffice to bring statutes within legislative power, but if the rationale of s. 221 (1) (*a*) were merely to insure that federal taxes were paid, it might be asked why should a debt for State income tax be picked out as the indebtedness the discharge of which would lessen the taxpayer's ability to pay. Why should not other debts be postponed too ? The resources of a taxpayer are as certainly diminished by making any other payment of like amount, whether it be to a mortgagee, to a vendor, a landlord or anybody else. But is it not sufficiently obvious that the incidental power cannot extend to authorising laws postponing the payment of civil debts until all or some particular indebtedness to the Commonwealth is discharged ? Would it not strike the mind as absurd if the incidental power arising from s. 51 (v.) and (xxxix.) were treated as authorising a law forbidding a subscriber to the telephone services to pay debts or some particular debt whether to the State or to other persons until he had paid his telephone account ? Another analogy would be a law as under s. 51 (xiii.) and (xxxix.) postponing the payment of the indebtedness of a person happening to be a customer of the Commonwealth Bank until he had cleared off or reduced his overdraft, indebtedness for example to another bank or to take another example, to the State, or again to all or any class of his creditors. Yet, if s. 221 (1) (*a*) is to be held valid on the ground that to insure, so far as may be, the payment of taxes is incidental to the power conferred by s. 51 (ii.) and the paragraph contains no more than what may be properly directed to that end, then it would follow that these are examples of what may validly be enacted.

For the reasons I have given I would, if it were not for the authority of *South Australia* v. *The Commonwealth* (1), have held a clear opinion that s. 221 (1) (*a*) is *ultra vires*.

It is, however, one thing to hold a clear opinion opposed to a decision of this Court and another thing to decline to follow the decision. After full consideration, however, I have come to the conclusion that upon the question of the validity of par. (*a*) of s. 221 (1) I should take the exceptional course of not following the decision.

I shall summarise my reasons for this view and then develop a little more fully the first of the reasons I shall give. (1) It is that I regard the decision as isolated, as receiving no support from prior

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decisions and as forming no part of what in one metaphor is called a stream of authority and in another a *catena* of cases. (2) Secondly, I think the decision gives an application to the constitutional doctrine of incidental powers which may have great consequences and which I believe to be unsound. What I have said already in dealing in principle with the validity of s. 221 (1) (*a*) will be enough to indicate why I say this. (3) In the third place the question relates to the Constitution and falls within s. 74 and affects the States in many aspects besides " uniform tax ".

The foregoing reasons, though stated separately, are interdependent but in combination they appear to me to form ground enough for departing on this point from the authority of *South Australia* v. *The Commonwealth* (1).

As to the first reason I have given it is necessary to say that both in the reasons of the judges forming the majority in that case and in the arguments of counsel certain decisions were relied upon as warranting, or going some distance to warrant, the conclusion that s. 221 (1) (*a*) is valid. With great respect I find myself unable to agree as to the effect of these decisions. The decisions in question were applied by their Honours and the counsel who cited them not always to the same purpose. But I shall not discuss the precise points of their application but I shall simply say why I do not think the cases should affect the reasons I have given.

(1) In *The Commonwealth* v. *State of Queensland* (2) the Court upheld the validity of the federal enactment providing that income derived from stock or Treasury bonds should not be liable to State income tax. I regard this case as depending entirely on the power conferred by s. 51 (iv.) to make laws with respect to borrowing money on the public credit of the Commonwealth. I include, of course, what is incidental to the subject matter of the power. In the reasons of *Isaacs* and *Rich* JJ. the following passage occurs with reference to the power and it covers the whole case : " It is a power to make laws with respect to Commonwealth borrowing. It includes the power to fix the terms of the bargain between the Commonwealth and the lenders, and to ensure by appropriate and paramount legislation that the terms it provides shall be enforced. Representing the whole nation, it may guarantee that the lender shall have, and may retain to the full, so far as any authority in Australia is concerned, the remuneration promised him by the Commonwealth. The loan is a transaction outside the jurisdiction of the States ; the interest is an income of the lender created by the Commonwealth. And, being created by the Commonwealth

(1) (1942) 65 C.L.R. 373. (2) (1920) 29 C.L.R. 1.

for its own purpose, it may be surrounded with such characteristics as to secure to the Commonwealth the full benefit it desires to obtain. If States could tax Commonwealth bonds in the hands of the holder or the interest he receives, notwithstanding Commonwealth legislation to the contrary, the financial operations of the whole nation might be frustrated by the action, and possibly divergent action, of portions of the nation. The Court is invited by the defendants to say that the provision of s. 52B protecting the interest from State income tax is not incidental to the power of borrowing " (1). Their Honours proceed to reject such a notion.

(2) *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (2) is concerned only with a competition between Commonwealth and States as creditors claiming in an administration of assets in the liquidation of a company. The decision was in favour of equality. But in any case a decision that the Commonwealth provisions there discussed gave priority would have been beside the question with reference to s. 221 (1) (*a*).

(3) *In re Silver Bros. Ltd.* (3) is a case concerning priorities between Dominion and Province each claiming in respect of taxes in an administration in bankruptcy of the deficient assets of an incorporated trading company. The liquidation of such a company in Canada takes place in bankruptcy. The conflict or competition of claims arose in the following way. The Province of Quebec claimed or proved in the bankruptcy of the company in respect of taxes due under a Provincial statute taxing commercial corporations. The Dominion claimed or proved for a much larger amount, an amount exceeding the fund available for distribution, in respect of sales tax levied under a special *War Revenue Act*. The Dominion *Bankruptcy Act* had reserved the priorities of taxes imposed by provincial law (4) and if the matter rested there the debts were apparently regarded as ranking equally.

By a provision of the Dominion *War Revenue Act* (s. 17) it was provided, stating it compendiously, that notwithstanding other provisions of statute or law the liability for taxes specified in that Act should constitute a first charge on the assets of the party liable and should rank for payment in priority to all other claims of whatsoever kind arising, with certain immaterial exceptions. On the other hand a Quebec statute provided that all sums due to the Crown should constitute a privileged debt ranking immediately after law costs.

(1) (1920) 29 C.L.R., at p. 21.
(2) (1940) 63 C.L.R. 278.
(3) (1932) A.C. 514.
(4) (1930) 1 D.L.R. 141, at p. 142.

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The construction of the Dominion provision was subject to an *Interpretation Act*, s. 16 of which provided that no provision or enactment in any Act should affect in any manner whatsoever the rights of His Majesty unless it was expressly stated therein that His Majesty should be bound thereby. If the claim of the Dominion prevailed over that of Quebec the Province would receive nothing. The Quebec Court of King's Bench, on appeal from the Court in Bankruptcy, decided that the Dominion provision did not prevail and the debts ranked *pari passu* (1), taking the view that " The two rights are co-existent and not mutually exclusive and are both exercisable to the fullest extent " (2). This judgment was reversed in the Canadian Supreme Court by *Anglin* C.J.C., *Mignault*, *Newcombe*, *Lamont* and *Smith* JJ., *Duff* and *Rinfret* JJ. dissenting (3). In the Privy Council the judgment of the Quebec Court of King's Bench was restored. The ground was that s. 16 of the Dominion *Interpretation Act* applied to s. 17 of the *Special War Revenue Act* so as to exclude the Crown in right of the Province from its operation (4).

Lord *Dunedin* delivered the judgment of the Privy Council. The conclusion was stated as follows :—" Upon the whole matter, therefore, their Lordships think that the plea of the appellant is good. The effect of s. 16 is, so to speak, to add to the words of s. 17, ' but this priority shall not operate against any right in the Crown in a Province, where such right would be diminished by the priority being asserted against it.' Whether the strict result of this view should be to give to the Province an overriding priority need not be discussed. Counsel for the Province did not ask for such relief; he was content that the two debts should rank *pari passu* " (5). From the foregoing it will be seen that the decision has nothing to do with the present case. But at stages in the progress of the case through the courts points were made concerning the validity of the statutory provisions involved and although, on the view taken by the Privy Council, there could be no room for these points, they occasioned certain *obiter dicta* that have been relied upon. The legislative powers to which s. 17 of the Dominion *Special War Revenue Act* was referred were those conferred as part of the exclusive legislative authority by s. 91 (3) of the *British North America Act* 1867, viz. " The raising of money by any mode or system of Taxation " and by s. 91 (21) " Bankruptcy and Insolvency ". The provision of the Province giving priority was referred to the

(1) (1929) 1 D.L.R. 681.
(2) (1929) 1 D.L.R., at p. 686.
(3) (1929) Can. S.C.R. 557; (1930) 1 D.L.R. 141.
(4) (1932) A.C. 514.
(5) (1932) A.C., at pp. 524, 525.

exclusive power under s. 92 (2) " Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes " and apparently to the power under s. 92 (16) " generally all matters of a merely local or private nature in the Province ". The latter power cannot, by reason of the last paragraph of s. 91, comprise any matter coming within any of the subjects enumerated in s. 91. In the Supreme Court of Canada *Anglin* C.J.C., with whom *Lamont* and *Smith* JJ. concurred, expressed his agreement with *Mignault* J. and said: " The right of the Dominion Parliament, under the legislative jurisdiction conferred upon it by heads 3 and/or 21 of s. 91 of the *B.N.A. Act*, to enact s. 17 appears to me to be so clear as to admit of no question. If so construed as to avoid any conflict with over-riding Dominion legislation, the provincial statute is, no doubt, within the authority given by head 2 of s. 92 " (1). The learned Chief Justice took the view that there was a conflict in which the Dominion provision must prevail.

Mignault J. in a full judgment expressed the like view, having first given reasons for excluding the application of s. 16 of the *Interpretation Act* to s. 17. He accepted the view that " there being a conflict here between Dominion and provincial legislation in a field open to both, the Dominion statute must prevail " (2). *Newcombe* J. excluded the *Interpretation Act* also and so adopted the same view, having first expressed the opinion that s. 17 was " bankruptcy legislation under item 21 of the Dominion powers " (3). *Rinfret* J. (as he then was) based his dissenting judgment on the view afterwards taken in the Privy Council, viz. that s. 17 was governed by s. 16 of the *Interpretation Act* and did not affect the priority of the claim by the Province (4). But he prefaced this by the following observation: " These two paragraphs (91 (3) and 92 (2)) confer absolute and independent powers, neither of which can impinge on the other, whether because of their very nature or by application of s. 125 of the *B.N.A. Act* (as is remarked by my brother *Duff*, whose reasoning I accept). If, consequently, the federal legislation here invoked ('An Act to amend the *Special War Revenue Act* 1915,' 1922 (Can.), c. 47, s. 17) had for its object the creation of a ' first charge ' intended to rank prior even to a privileged debt of the Crown in right of the Province of Quebec (R.S.Q. 1909, s. 1357), I must conclude that to that extent such legislation is *ultra vires* " (4). *Duff* J. (as he then was) in his

(1) (1929) Can. S.C.R., at p. 561; (1930) 1 D.L.R., at p. 142.
(2) (1929) Can. S.C.R. at p. 566; (1930) 1 D.L.R., at p. 147.
(3) (1929) Can. S.C.R., at p. 569; (1930) 1 D.L.R., at p. 149.
(4) (1929) Can. S.C.R., at p. 571; (1930) 1 D.L.R., at p. 151.

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dissenting judgment referred to s. 125 of the *British North America Act* which provides that " no lands or property belonging to Canada or any province shall be liable to taxation " and expressed the view that s. 17 might give priority over a security or charge of the province and so operate inconsistently with that section. *Duff* J. relied upon that as an additional reason for applying s. 16 of the *Interpretation Act* to s. 17 in the same way as the Privy Council afterwards did (1). The *obiter dicta* which are relied upon as supporting the validity of s. 221 (1) (*a*) occur in the following passage from the judgment of Lord *Dunedin* speaking for the Privy Council. " The appeal before their Lordships was argued upon two grounds. The first, and it is this which bulks almost exclusively in the judgments of the Courts below, was that on the proper construction of the well-known ss. 91 and 92 of the *British North America Act* the Dominion had no power to enact the s. 17 above quoted so as to prejudice the rights of the Government of the Province of Quebec. As to that question their Lordships have no hesitation in preferring the views of the majority of the judges of the Supreme Court. It would be of no service to go over again the familiar ground of what may be called the competing claims of the two sections and to re-state what has been so often stated. As lately as 1929, in the case of *Att.-Gen. for Canada* v. *Att.-Gen. for British Columbia* (2), Lord *Tomlin*, delivering the judgment of the Board, laid down four propositions regarding the conflict of Dominion and Provincial jurisdiction in terms which need not here at length be repeated. Now, looking at s. 17 and the way it speaks of the preference, it would not be difficult to hold that it was a rule only applicable in bankruptcy. If that is so, then the matter is ended, for bankruptcy is head 21 of s. 91. But let it be assumed that it is rather a natural concomitant of taxation, then the case falls clearly under the fourth proposition laid down in the judgment delivered by Lord *Tomlin*; it runs thus: 'There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.' As a matter of fact, this is the textual reproduction of what had been said by Lord *Dunedin* as long ago as 1907 in the case of the *Grand Trunk Rly. Co. of Canada* v. *Att.-Gen. of Canada* (3). Now here, so far as taxation itself is concerned, the field is clear. The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to

(1) (1929) Can. S.C.R., at p. 562; (1930) 1 D.L.R., at p. 143.
(2) (1930) A.C. 111, at p. 118.
(3) (1907) A.C. 65.

the concomitant privileges of absolute priority they cannot stand side by side and must clash; consequently the Dominion must prevail" (1). (It is perhaps a matter of no importance at this date but I have not found it easy to follow Lord *Dunedin's* remark that the first ground bulks almost exclusively in the judgments of the Canadian Courts in view of what appears in the reports of those judgments.)

I have dealt rather fully with *In re Silver Bros. Ltd.* (2), because of the importance which has been attached to it in relation to the validity of s. 221 (1) (*a*). It appears to me that a full statement of the case is enough to show that not only the decision but the *obiter dicta* belong to an entirely different field from that with which we are concerned. The only thing which, as it seems to me, can be extracted from the reasons of the Privy Council that has any relevance lies in the statement "But let it be assumed that it is rather a natural concomitant of taxation" (3). This of course shows that their Lordships were prepared to entertain the assumption. But if their Lordships had gone further and had adopted the assumption as correct, would it have mattered? Section 17 of the *Dominion Act* neither in its purpose, its form or its context possesses any real resemblance to s. 221 (1) (*a*) of the Commonwealth statute. But what is perhaps of more general importance is that the relations between ss. 91 and 92 of the *British North America Act* have no parallel in the Australian federal system. It is strange indeed if in a question within s. 74 our decisions were based on a passing observation of the Privy Council in relation to such a matter.

I have thought it right to state why I do not share the view that the three cases mentioned affect the question of the validity of s. 221 (1) (*a*) because my conclusion is that on that point *South Australia* v. *The Commonwealth* (4) should not be followed.

I think that par. (*a*) of s. 221 (1) of the *Income Tax and Social Services Contribution Assessment Act* should be declared invalid.

Whether such a declaration is of practical importance in relation to the system of uniform taxation is a matter about which I may be permitted to remain sceptical, but it is part of the relief for which the plaintiffs have asked.

I would overrule the demurrers and make declarations in each suit that par. (*a*) of s. 221 (1) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is *ultra vires* and void but give no other relief.

(1) (1932) A.C., at pp. 520-521.
(2) (1932) A.C. 514.
(3) (1932) A.C., at p. 521.
(4) (1942) 65 C.L.R. 373.

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McTiernan J. When the argument of these demurrers began the plaintiffs stated that they would argue only that the *States Grants (Tax Reimbursement) Act* 1946-1948 and s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 are invalid and that they would not pursue the challenge in their statements of claims to the Tax Acts 1956. The latter was a wise choice in view of the reasons which the Court gave in *South Australia* v. *The Commonwealth* (1) for upholding the *Income Tax Act* 1942. It is convenient to refer to the provisions attacked by the plaintiffs as the *Tax Reimbursement Act* and s. 221 of the *Assessment Act* respectively.

The *Tax Reimbursement Act* authorises the payment of money to a State as financial assistance on condition that the Treasurer of the Commonwealth is satisfied that the State has not, in the relevant year, imposed a tax on incomes. The Act is applicable to any State. Section 12 appropriates the Consolidated Revenue Fund to provide for the payments: this section is enacted on the basis that the payments are purposes of the Commonwealth within the meaning of the Constitution. If they are, s. 12 is supported by ss. 81 and 83 of the Constitution. Whether the payments are purposes of the Commonwealth or not depends on their being within the scope of s. 96 of the Constitution. Section 96 says: "During a period of ten years after the establishment of the Commonwealth and thereafter until Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as it thinks fit." The intention of the words "unless the Parliament otherwise provides" is not clear. It is not necessary here to construe them. Parliament has not enacted anything which alters the specific power, vested in it by s. 96, to grant financial assistance to any State on such terms and conditions as Parliament thinks fit. Now grants of money are clearly financial assistance. But it is argued for the plaintiffs that the effect of the *Tax Reimbursement Act* is this, that the Parliament binds the Commonwealth to pay money to a State in consideration of the surrender by the State of its right to impose tax on incomes; this, the argument continues, is not to grant money to the State, even if the money can be described as financial assistance. I do not agree with the view of what Parliament has done. Parliament has done no more than to authorise payments of money to a State, on condition that the Treasurer of the Commonwealth is satisfied that the State has not in fact imposed any tax on incomes. This is not making a contract. It seems to me that it is truly a conditional grant.

(1) (1942) 65 C.L.R. 373.

Section 96 permits such grants. It is further argued that the condition creates the need for the grant and the money payable is therefore not truly financial assistance and the condition is beyond the scope of Parliament's discretion. But the power conferred by s. 96 is a very general one, and the terms and conditions on which the Parliament may grant financial assistance to any State are within its discretion. This discretion is limited only by the scope and object of the power. I am of the opinion that even though a State's need is caused by its abstaining, as required by the condition of the Commonwealth grant, from imposing tax on incomes, still the character of financial assistance cannot be denied to money paid to meet that need. It is not a condition of the power conferred by s. 96 that a State should be in need of financial assistance. In the present case, the condition of the grant is that the recipient State should not impose a tax on incomes. Would a condition that the State concerned should not increase, or again, that it should actually reduce a tax be bad ? I do not think that either condition would be beyond the discretion of Parliament. Nor do I think that it would be beyond the scope of that discretion to make a condition that the State should positively increase a tax of its own. I cannot regard differently the instant condition, namely that a State receiving assistance should impose no tax upon incomes. This condition is not rendered *ultra vires* and bad, simply because Commonwealth and State taxpayers may be the same people—this fact, indeed, might justify it—or because " financial assistance " is paid from the proceeds of Commonwealth taxation.

Another attack which the plaintiffs make upon the condition is founded on the reasons of the majority in the *Melbourne Corporation Case* (1). I think that this case is not in point here. The *Tax Reimbursement Act* contains no provision commanding a State to cease imposing tax on incomes and to take the financial assistance instead. The State may choose between these alternatives without exposing itself to any sanctions. The considerations on which it would act are beyond the range of legal criteria. To such matters justice is blind.

The *Tax Reimbursement Act* which is attacked is similar in substance to that which was one of the measures whereby the Commonwealth was constituted the sole taxing authority in the field of income tax during the war. I shared the opinion of the majority in *South Australia* v. *The Commonwealth* (2) that the earlier Act, the *States Grants* (*Income Tax Reimbursement*) *Act* 1942, was validly enacted under s. 96 of the Constitution. It was expressed to be an

(1) (1947) 74 C.L.R. 31. (2) (1942) 65 C.L.R. 373.

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Act which would continue in operation until the last day of the first financial year beginning after the war. Alternatively, I considered that the Act could possibly be justified by the doctrine *Farey* v. *Burvett* (1), because it was a constituent of a fiscal plan justified by the crisis of the war. The argument that the *Tax Reimbursement Act* is invalid could not be accepted without overthrowing the decision of the majority in the above-mentioned case that the earlier Act of the same kind was properly enacted under s. 96. I would not make a declaration avoiding the *Tax Reimbursement Act*. The refusal of this relief does not prejudice the right of either State, which is a plaintiff, to choose between imposing a tax on incomes or taking the financial assistance authorised by the statute.

Section 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 has a preamble which declares that its purpose is "For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth." Privileges of the nature of those which s. 221 aims at giving Commonwealth income tax were introduced by s. 31 of the *Income Tax Assessment Act* 1942. That section, however, had a preamble declaring that its purpose was "the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war". A preamble is not in itself confirmatory of constitutional validity. The preamble of s. 31 and the limitation of its operation to the end of the first financial year after the war stamped this section as avowedly an exercise of the defence power. The section purported to postpone liabilities for State income tax until federal income tax is fully paid and gave priorities to the latter over unsecured debts, in bankruptcy and winding up of companies. The priorities over such debts are embodied in sub-s. (1) (*b*) of s. 221 of the *Assessment Act*. It is sufficient to say here that such priorities could be referred to s. 51 (xvii.) of the Constitution—"Bankruptcy and Insolvency". I would not declare sub-s. (1) (*b*) of s. 221 invalid.

The plaintiffs contend that sub-s. (1) (*a*) of s. 221 would render worthless any State law that might be passed to impose a tax on incomes. An analysis was made in argument of the processes of the *Assessment Act* that might take place before the federal income tax is fully paid. It lends much force to what the plaintiffs contend. The Commonwealth seeks to justify sub-s. (1) (*a*) of s. 221 by reference to the power conferred by s. 51 (ii.) of the Constitution to make laws with respect to: "Taxation".

(1) (1916) 21 C.L.R. 433.

Griffith C.J. said in the *Municipal Council of Sydney* v. *The Commonwealth* (1) that this power refers to "federal taxation for federal purposes" (2). The plaintiffs argue that sub-s. (1) (*a*) of s. 221 exceeds the subject matter of the power; and, alternatively, that the provision in question is calculated to subvert the federal structure of the Constitution and is invalid for the same sort of reasons as those on which the majority of the Court in the *Melbourne Corporation Case* (3) held that s. 48 of the *Banking Act* was invalid. I decided in *South Australia* v. *The Commonwealth* (4) that because invasion was threatening the country the defence power was ample authority for enacting s. 31 of the *Income Tax Assessment Act* 1942. This section, as stated above, enacted privileges for federal income tax in war-time; s. 221, as it now stands, purports to continue those privileges. I considered that s. 31 was justified by the defence power because it was specifically connected with the prosecution of the war. It could clearly operate as a means whereby the Commonwealth could get in more of the sinews of war. I refrained from expressing any opinion on the question whether s. 31 was validly enacted under the power conferred on the Parliament by s. 51 (ii.) of the Constitution. It was unnecessary for me to do so, since I took the view that s. 31 was warranted by the defence power. The other members of the Court, leaving the war-time preamble out of consideration, decided that s. 31 was validly enacted under the taxation power. They cited the case of *In re Silver Bros. Ltd.* (5) as an authority for that conclusion. As I read this case, the point whether a provision, said to be similar to sub-s. (1) (*a*) of s. 221, was a concomitant of a legislative power of taxation was assumed for the purpose of the reasoning, but it was not actually decided. Sub-section (1) (*a*) of s. 221 provides for the eventuality that State income tax may emerge. According to the terms of this provision, whoever pays his State income tax before fully paying up his federal income tax is exposed to a fine or imprisonment or both. Sub-section (1) (*a*) of s. 221 would, if valid, operate to alter the time which State law may fix for the payment of State income tax. If the utility of the provision in getting in federal revenue makes it a valid law of taxation, the same would be true of a law postponing, in a similar way, debts due to trades people. I cannot agree that the powers to make laws with respect to taxation extends so far as to interfere with the contractual rights of creditors *vis-a-vis* their solvent debtors. Such a law would be, in substance,

(1) (1904) 1 C.L.R. 208.
(2) (1904) 1 C.L.R., at p. 232.
(3) (1947) 74 C.L.R. 31.
(4) (1942) 65 C.L.R. 373.
(5) (1932) A.C. 514.

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about debts; but not about federal taxation. Sub-section (1) (*a*) of s. 221 purports to fix the time for the payment of State income tax by reference to the time when federal income tax is fully paid. This, in my opinion, is not sufficient to make the provision a law with respect to federal taxation. It is in substance a law with respect to State income tax. I do not follow the decision of the majority in *South Australia* v. *The Commonwealth* (1) on the point under discussion because I think it is manifestly wrong. If I am right in deciding that sub-s. (1) (*a*) of s. 221 is beyond the power conferred upon the Parliament by s. 51 (ii.) of the Constitution, it is unnecessary for me to enter upon the question of the application to this provision of the *Melbourne Corporation Case* (2). I would declare invalid sub-s. (1) (*a*) of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956.

WILLIAMS J. The purpose of these actions is to challenge the constitutional validity of the scheme of income tax at present in force in the Commonwealth of Australia, usually called the uniform tax system. It was first introduced at the height of the war by four Commonwealth Acts, Nos. 20 to 23 inclusive, all assented to on 7th June 1942. The scheme was challenged as unconstitutional and invalid in this Court by the States of South Australia, Victoria, Queensland and Western Australia. The nature of the scheme is fully explained in that litigation (1). One of the Acts, the *Income Tax* (*War-time Arrangements*) *Act* 1942 is no longer of any importance. The legislation there discussed which has an important bearing on the present argument is firstly s. 221 of the *Income Tax Assessment Act* 1936-1942, and secondly the *States Grants* (*Income Tax Reimbursement*) *Act* 1942. Section 221 of the *Income Tax Assessment Act* 1936-1942 was first introduced by s. 31 of the Act No. 22 of 1942. Sub-section (1) of this section commenced with the words: "For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war". Paragraphs (*a*) (*b*) (i) and (ii) followed. They were in the following terms: "(*a*) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable; and (*b*) notwithstanding anything contained in any other Act or State Act—(i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933

(1) (1942) 65 C.L.R. 373. (2) (1947) 74 C.L.R. 31.

shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date of the order of sequestration) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of that Act; and (ii) the liquidator of a company which is being wound up shall apply the assets of the company in payment of tax due under this Act (whether assessed before or after the date of the commencement of the winding up) in priority to all other unsecured debts: Provided that, where, under the law of any State relating to the payment of debts on the winding up of a company, debts of the classes specified in paragraph (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of the *Bankruptcy Act* 1924-1933 are preferred to all unsecured debts due to the Crown in the right of that State, debts of those classes may also be paid in priority to any tax due under this Act." Sub-section (2) provided that " This section shall have operation during the present war and until the last day of the first financial year to commence after the day on which His Majesty ceases to be engaged in the present war, and no longer." By s. 8 of the *States Grants* (*Income Tax Reimbursement*) *Act* 1942 the operation of that Act was confined to the same period. Section 4 of that Act was in the following terms: " In every financial year during which this Act is in operation in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in the Schedule to this Act against the name of that State, less an amount equal to any arrears of tax collected by or on behalf of that State during that financial year."

The date on which His Majesty ceased " to be engaged in the present war " has not been proved but the date is immaterial because s. 221 of the *Income Tax Assessment Act* and the *States Grants* (*Income Tax Reimbursement*) *Act* became the subject of subsequent legislation. By the *Income Tax Assessment Act* (No. 6 of 1946, s. 20), s. 221 of the principal Act was amended (a) by omitting from sub-s. (1) the words " the efficient prosecution of the present war " and inserting in their stead the words " the purposes of the Commonwealth "; (b) by omitting sub-s. (2). This section came into force on 13th April 1946. The *States Grants* (*Income Tax Reimbursement*) *Act* 1942 was repealed and replaced by the *States Grants* (*Tax Reimbursement*) *Act* (No. 1 of 1946), which came into force on 1st July 1946. Section 5 of this Act provides that: " In respect of any year during which this Act is in operation and in respect of which the Treasurer is satisfied that a State has not

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imposed a tax upon incomes, there shall be payable by way of financial assistance to that State an amount calculated in accordance with the provisions of this Act (other than this section) less an amount equal to any arrears of tax collected by or on behalf of that State during that year." Section 11 provides: "(1) The Treasurer may, in any year, make monthly or other advances to any State of portions of the grant to which it appears to him that State will be entitled under this Act in respect of that year. (2) Any such advance shall be made on the condition that the State shall not impose a tax upon incomes in respect of that year, and if, after the close of that year, the Treasurer gives notice in writing to the Treasurer of the State that he is not satisfied that the State has not imposed such a tax, the advances shall be repayable and shall be a debt due by the State to the Commonwealth." Section 12 provides: "Payments in accordance with this Act shall be made out of the Consolidated Revenue Fund, which is hereby appropriated accordingly."

The legislation which is now under particular challenge is s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 and ss. 5 and 11 of the *States Grants (Tax Reimbursement) Act* 1946-1948. It is not disputed that under s. 51 (ii.) of the Constitution, "Taxation; but so as not to discriminate between States or parts of States", the Commonwealth Parliament can levy income tax at such rates as it thinks fit. But it is disputed that it can give the Commonwealth priority by requiring taxpayers to pay the Commonwealth tax before they pay the State tax or that it can under s. 96 of the Constitution make a grant of financial assistance to a State upon the condition that the State shall not exercise its constitutional power to levy income tax. Section 96 of the Constitution provides that: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit." The inclusion of s. 221 in the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 and the enactment of the *States Grants (Tax Reimbursement) Act* 1946-1948 indicates clearly enough the intention of the Commonwealth Parliament to continue indefinitely in peace time, if this is constitutionally possible, the scheme of taxation introduced in 1942 as a major war financial measure. Section 221 of the *Income Tax and Social Services Contribution Assessment Act* and ss. 5 and 11 of the *States Grants (Tax Reimbursement) Act*, particularly ss. 5 and 11 of the latter Act, form important buttresses in the

execution of that intention. Section 11 of the *States Grants (Tax Reimbursement) Act* which enables the Treasurer of the Commonwealth in any year to make monthly or other advances to a State to which it will become entitled under s. 5 is plainly ancillary and incidental to s. 5 of that Act and must stand or fall with the latter section. Accordingly only the constitutional validity of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* and s. 5 of the *States Grants (Tax Reimbursement) Act* need be considered.

Although the operation of the corresponding provisions of the original Acts was confined to the period of the war it is clear, I think, that s. 221 of the *Income Tax Assessment Act* 1936-1942 was upheld as a valid exercise of the taxation power by four of the five members of the Court (*McTiernan* J. also held that the section was valid but relied on the defence power) and that the *States Grants (Income Tax Reimbursement) Act* 1942 was upheld as a valid exercise of the grants power by four members of the Court (*Starke* J. dissenting). Accordingly it will be necessary to overrule the previous decision of this Court before s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 or s. 5 of the *States Grants (Tax Reimbursement) Act* 1946-1948 can be held to be invalid. The previous decision, which was reached after full argument directed to the precise questions, has stood since 1942 and the scheme of uniform taxation has continued to operate since that date. In these circumstances it would be a very serious step for this Court now to take. Before it would be justified in doing so the Court must be clearly satisfied that the previous decision was manifestly wrong. It is not, in my opinion, a step the Court should now take. Firstly, I am of opinion that the previous decision on both points was right. Secondly, I am of opinion that, even if it was wrong, it was not manifestly wrong and that the principle of *stare decisis* should be applied.

It is unnecessary to discuss at any length whether s. 5 of the *States Grants (Tax Reimbursement) Act* is a valid exercise of the grants power. The section and the Act of which it forms part seem to me to be clearly justified by the plain language of s. 96 of the Constitution. The opening words of s. 96 can be ignored because Parliament has not otherwise provided and the operative words are that " the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit ". The section therefore authorises Parliament to grant financial assistance to any State and to do so on such terms and conditions as it thinks fit. The amounts payable to the States under the *States Grants*

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(*Tax Reimbursement*) *Act* are clearly grants of financial assistance and the provision that in consideration of the grant a State shall not impose a tax upon incomes is clearly a condition which Parliament may think fit to impose as a condition of making the grant. The grant is made out of Commonwealth moneys and it is for the Commonwealth Parliament to say on what terms and conditions such moneys shall be made available. Nothing could be wider than the words " on such terms and conditions as the Parliament thinks fit " and they must include at the very least any terms or conditions with which a State may lawfully comply. The section authorises Parliament to grant financial assistance to the States and to determine the terms and conditions, if any, on which the grant shall be made. Accordingly the making of such grants is a purpose of the Commonwealth within the meaning of s. 81 of the Constitution.

The question whether pars. (*a*) and (*b*) (i) and (ii) of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 are constitutionally valid poses perhaps a more difficult question but the Court in 1942 decided that these provisions were a valid exercise of the power of taxation and nothing has been said in the present argument which leads me to think that this decision should now be overruled. The paragraphs contemplate three cases, par. (*a*) where the taxpayer, if an individual, has not been made bankrupt or if a company is not being wound up, par. (*b*) (i) where a trustee is administering the estate of a bankrupt, and par. (*b*) (ii) where a liquidator is winding up a company. Paragraph (*b*) (ii) is not limited to the winding up of an insolvent company, but no question of priority could arise unless the company was insolvent. *Dixon* C.J. has expressed the opinion that par. (*b*) (i) is a valid exercise of the bankruptcy power, s. 51 (xvii.) of the Constitution, and with that opinion I respectfully agree. But I am of opinion that this paragraph would also be justified by the taxation power. It has also been suggested that the provisions of par. (*b*) (ii) might be justified by the bankruptcy power. But the provisions of par. (*b*) (ii) relate to the winding up of companies incorporated under State laws. Such companies are, as this sub-paragraph acknowledges, wound up in accordance with State laws. With respect I cannot see how the Commonwealth bankruptcy power could affect such laws but I can see how the Commonwealth taxation power could do so where the company was in debt to the Commonwealth for a Commonwealth tax. The provisions of par. (*b*) (ii) can, to my mind, be justified, if at all, only under the taxation power aided if necessary by the incidental power: s. 51 (xxxix.)

of the Constitution. Paragraph (*a*) and sub-par. (*b*) (ii) appear to me to be in the same constitutional position. They must rest on these powers and no others, and the incidental power would add little, if anything, to the taxation power because an express power includes within its content power to enact everything that is reasonably necessary to carry it into effect. The power to tax must therefore include the power to enact all such provisions as are reasonably necessary to ensure that the tax will be paid promptly and in full. To provide that a taxpayer must pay the Commonwealth income tax imposed in respect of any year of income before he pays a State income tax imposed in respect of the same year is one way of ensuring that the Commonwealth tax will be paid promptly and in full. It is a way of giving the Commonwealth tax priority over the State tax. In these days of high income taxation there could clearly be a clash between the personal obligations of a taxpayer to pay a Commonwealth income tax and a State income tax in the sense that a taxpayer would not be able to pay both taxes promptly and in full. Such a provision as that contained in par. (*a*) cannot be said to go beyond what the Commonwealth Parliament could reasonably consider to be necessary in the circumstances to make its taxation law effective. There is no distinction in substance between the provisions of pars. (*a*) and (*b*) (i) and (ii). If the Commonwealth can give its debt priority in the bankruptcy of an individual or the winding up of a company, it must equally be able to give itself priority while the taxpayer, natural or artificial, outwardly at least, is still a going concern.

This conclusion, to my mind, derives strong support from the judgment of the Privy Council in *In re Silver Bros. Ltd.* (1). In that case the facts were briefly that a company in liquidation was indebted to the Dominion for tax assessed under the *Special War Revenue Act* 1915, a Dominion Act, and to the Province of Quebec for provincial taxes. The question was whether the Dominion debt was entitled to priority of payment over the provincial debt. Section 17 of the *Special War Revenue Act* provided "Notwithstanding the provisions of the *Bank Act* and the *Bankruptcy Act*, or any other statute or law, the liability to the Crown of any person, firm or corporation, for the payment of the excise taxes specified in the *Special War Revenue Act* 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses

(1) (1932) A.C. 514.

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of an assignee or other public officer charged with the administration or distribution of such assets." The Quebec Statute provided that "All sums due to the Crown in virtue of this section shall constitute a privileged debt, ranking immediately after law costs". Section 16 of the *Interpretation Act* 1906, another Dominion Act, provided "No provision or enactment in any Act shall affect, in any manner whatsoever, the rights of His Majesty, his heirs or successors, unless it is expressly stated therein that His Majesty shall be bound thereby". The question of priority was first argued in the Superior Court of Quebec. *Panneton* J. decided in favour of the Dominion. There was an appeal to the Court of King's Bench which decided that because of the *Interpretation Act* the two debts should be paid *pari passu* (1). There was a further appeal to the Supreme Court of Canada consisting of seven judges five of whom (*Anglin* C.J.C., *Mignault*, *Newcombe*, *Lamont* and *Smith* JJ.) were in favour of allowing the appeal (*Duff* and *Rinfret* JJ. dissenting) (2). Finally there was the appeal to the Privy Council (3). In the Privy Council the judgment of the Supreme Court of Canada was reversed and the judgment of the Court of King's Bench restored. It was restored on the ground, upheld in that Court, that the *Interpretation Act* removed the priority which the Dominion would otherwise have had by virtue of s. 17 of the *Special War Revenue Act*. It is perfectly clear that but for the *Interpretation Act* the Privy Council would have upheld the judgment of the Supreme Court of Canada. The first ground argued for the appellant, the Attorney-General for Quebec, before the Privy Council was that s. 17 of the *Special War Revenue Act* was not within the Dominion power as to bankruptcy though it touched bankruptcy incidentally. The subject was taxation and the section was only ancillary to that head. If its effect was to give priority in respect of a Dominion tax the provision was *ultra vires* under the *British North America Act* 1867. On that point counsel for the respondent, the Attorney-General of Canada, was not called upon. Lord *Dunedin*, delivering the judgment of the Privy Council, said: "The appeal before their Lordships was argued upon two grounds. The first, and it is this which bulks almost exclusively in the judgments of the Courts below, was that on the proper construction of the well known ss. 91 and 92 of the *British North America Act* the Dominion had no power to enact the s. 17 above quoted so as to prejudice the rights of the Government of the Province of Quebec. As to that

(1) (1929) 1 D.L.R. 681.
(2) (1929) Can. S.C.R. 557; (1930) 1 D.L.R. 141.
(3) (1932) A.C. 514.

question their Lordships have no hesitation in preferring the views of the majority of the judges of the Supreme Court" (1). The views of the majority of the judges of the Supreme Court were that the Dominion had this power and in the opinion of *Anglin* C.J.C., (with whom *Lamont* and *Smith* JJ. concurred) had it beyond question " under the legislative jurisdiction conferred upon it by heads 3 and/or 21 of s. 91 of the *B. N. A. Act*" (2) (that is under the power to tax or the bankruptcy power). I can see no distinction in principle between the position that would arise under the *British North America Act* 1867 where the Dominion of Canada imposed a tax under s. 91 (3) of that Act for Dominion purposes and a Province imposed an income tax under s. 92 (2) for Provincial purposes and the position that would arise under our Constitution where the Commonwealth imposed an income tax for the purposes of the Commonwealth and a State imposed an income tax for the purposes of the State. Lord *Dunedin* continued: " . . . looking at s. 17 and the way it speaks of the preference, it would not be difficult to hold that it was a rule only applicable in bankruptcy. If that is so, then the matter is ended, for bankruptcy is head 21 of s. 91. But let it be assumed that it is rather a natural concomitant of taxation, then the case falls clearly under the fourth proposition laid down in the judgment delivered by Lord *Tomlin* ; it runs thus : 'There can be a domain in which Provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.' . . . Now here, so far as taxation itself is concerned, the field is clear. The two taxations, Dominion and Provincial, can stand side by side without interfering with each other, but as soon as you come to the concomitant privileges of absolute priority they cannot stand side by side and must clash ; consequently the Dominion must prevail" (3). His Lordship is here discussing the effect of s. 17 of the *Special War Revenue Act* as a concomitant of taxation. He is prepared to assume that it is a natural concomitant and that there could be a clash in priority between a Dominion and a Provincial tax.

In the previous case in this Court *Latham* C.J., with whom *Rich* J. agreed on this point, after citing certain authorities in this Court, referred to *In re Silver Bros. Ltd.* (4) and said : "Apart from these

(1) (1932) A.C., at p. 520.
(2) (1929) Can. S.C.R., at p. 561 ; (1930) 1 D.L.R., at p. 142.
(3) (1932) A.C., at p. 521.
(4) (1932) A.C. 514.

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authorities the case of *In re Silver Bros. Ltd.* (1) is really conclusive on the matter" (2). His Honour then summarised the decision and said: "This decision does not depend upon any special provisions of the Canadian Constitution. It is simply an interpretation of a power to make laws in relation to the subject of taxation. The decision is applicable to the Commonwealth Constitution. Thus the Commonwealth has power, by a properly framed law, to make Commonwealth taxation effective by giving priority to the liability to pay such taxation over the liability to pay State taxation" (3). *Starke* J. said: "It was said that the Commonwealth had no power to give itself priority in payment of its income taxes over the taxes of the States. But that contention, despite some *dicta* to the contrary, is precluded by the decision of this Court in *The Commonwealth* v. *State of Queensland* (4), and by the decision of the Judicial Committee in *In re Silver Bros. Ltd.* (1)" (5). I said: "But the Privy Council in *In re Silver Bros. Ltd.* (1), and the majority of the Justices of this Court in *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (6), appear to me to have considered, I would respectfully say correctly, that it is possible for the Canadian and Australian national Parliaments respectively, by aptly framed legislation, to give priority to their taxation statutes over those of the Provinces in the case of Canada and of the States in the case of Australia, where they come into conflict in the same field in the sense that a taxpayer who has to pay the two exactions is unlikely to be able to meet them both in full" (7). Four judges were therefore of opinion that the reasoning in *In re Silver Bros. Ltd.* (1) was as applicable to the Australian Constitution as to the Canadian Constitution and that not only par. (*b*) but also par. (*a*) of sub-s. (1) of s. 221 of the *Income Tax Assessment Act* 1936 was valid. In *Federal Commissioner of Taxation* v. *Official Liquidator of E. O. Farley Ltd.* (6), *Evatt* J. said: "Further, although it is a decision on the Canadian Constitution, the case of *In re Silver Brothers Ltd.* (1) suggests, not obscurely, that, under the taxation power, the Commonwealth Parliament is competent to enact that its taxation assessments shall be paid in priority to debts owing by the same debtor to the State Governments. Such an enactment is strictly relevant to the subject of taxation for Commonwealth purposes. It would be otherwise if it attempted to destroy altogether the States' claim to priority over private creditors; for in such a case,

(1) (1932) A.C. 514.
(2) (1942) 65 C.L.R., at p. 434.
(3) (1942) 65 C.L.R., at p. 435.
(4) (1920) 29 C.L.R. 1.
(5) (1942) 65 C.L.R., at pp. 440, 441.
(6) (1940) 63 C.L.R. 278.
(7) (1942) 65 C.L.R., at pp. 464, 465.

the Commonwealth enactment could no longer be regarded as sufficiently connected with the subject matter of Commonwealth taxation mentioned in s. 51 (ii.) of the Constitution" (1). In *The Commonwealth* v. *State of Queensland* (2) it was held that under the legislative power of the Commonwealth with respect to borrowing, s. 51 (iv.) of the Constitution "Borrowing money on the public credit of the Commonwealth", the Commonwealth Parliament, in order to make its borrowing effective, could enact a law exempting bondholders from payment of income tax upon the interest from their bonds imposed by State law. If the Commonwealth Parliament can so provide to make its borrowing power effective, surely it must have power to require a taxpayer to pay a Commonwealth tax in priority to a State tax to make its taxation power effective. The *British North America Act* does not contain a section similar to s. 109 of our Constitution so that the Commonwealth Parliament would appear to be in a stronger position than the Dominion Parliament where it is possible for the personal obligations of a taxpayer under *Tax Acts* of the Commonwealth and a State or States to clash. And who could doubt that such a possibility exists to-day? I entirely agree with the statement of *Starke* J. that "there is no distinction in principle between the Commonwealth giving itself priority in the administration of assets in bankruptcy and in giving itself priority in payment of the personal obligations imposed by an income tax" (3).

Finally it was contended that even if pars. (*a*) and (*b*) of s. 221 (1) of the *Income Tax and Social Services Contribution Assessment Act* are justified by the terms of the taxation power and s. 5 of the *States Grants (Tax Reimbursement) Act* by the grants power, nevertheless, because of the federal nature of the Constitution which creates the Commonwealth and States as separate organs independent of each other and co-ordinate in their respective spheres there is a necessary implication that these powers could not be exercised singly or jointly so as to destroy or weaken the independence or integrity of the States or so as to place a particular disability or burden upon an operation or activity of a State and more especially on its constitutional powers. The same argument was addressed to the Court in the previous case and was rejected. But it is now urged that this contention should be reconsidered because the previous decision may have rested partly on the defence power and also because the judgments in the later case of the *Melbourne Corporation* v. *The Commonwealth* (4) throw a great deal of new

(1) (1940) 63 C.L.R., at p. 326.
(2) (1920) 29 C.L.R. 1.
(3) (1942) 65 C.L.R., at p. 441.
(4) (1947) 74 C.L.R. 31.

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light on the nature of the implication and its operation. But as I have said the decision in the previous case that s. 221 of the *Income Tax Assessment Act* 1936-1942 and the *States Grants (Income Tax Reimbursement) Act* 1942 were valid did not really rest on the defence power but on the taxation and grants powers and I can find nothing in the judgments in the *Melbourne Corporation Case* (1) which suggests that the previous decision that these laws did not involve any illegal interference with the sovereignty of the States was wrong. Section 48 of the *Banking Act* 1945, the constitutional validity of which was in issue in the *Melbourne Corporation Case* (1), is set out in the report (2) and need not be repeated. The section in effect prohibited the private trading banks conducting any business for the States or their authorities, including a local Government authority except with the consent of the Treasurer of the Commonwealth. Although the section was in terms addressed to the private banks, it operated so as to prevent the States depositing their moneys in these banks without his consent. In other words it deprived the States of the power to make their own banking arrangements. The direct operation of the law was to clothe the Treasurer of the Commonwealth with authority to impose his will upon the Treasurers of the States in a matter which fell completely within State sovereignty. It was held that s. 48 infringed the implication. It was a law which sought to give directions to the States as to the manner in which they should perform an essential governmental function. The power to make laws with respect to banking, s. 51 (xiii.) of the Constitution, was a power to make such laws for the peace, order and good government of the Commonwealth and would not justify such a law. Such a law was not a law for the peace, order and good government of the Commonwealth. It was an unlawful intervention in the constitutional affairs of the States and therefore outside Commonwealth power. Section 221 of the *Income Tax and Social Services Contribution Assessment Act* and ss. 5 and 11 of the *States Grants (Tax Reimbursement) Act* are of a different character. Each is a federal law which in the words of *Dixon* J. (as he then was), in the *Melbourne Corporation Case* (1) " has an actual and immediate operation within a field assigned to the Commonwealth as a subject of legislative power " (3). His Honour said : " Speaking generally . . . that is enough " (3). Section 5 does not operate to prevent the States exercising their powers to levy income tax. It is not, like s. 48 of the *Banking Act*, a coercive law at all. It does not compel the States to do anything.

(1) (1947) 74 C.L.R. 31.
(2) (1947) 74 C.L.R., at p. 43.
(3) (1947) 74 C.L.R., at p. 79.

It is simply a law authorising grants to be made to the States which they may accept or refuse at their own option. It is for the States to decide whether or not to levy an income tax. If a State decides to do so it will not qualify for the grant. If it decides not to do so it will qualify. *Dixon* J. pointed out (1) that the fact that a federal law discloses a purpose which lies outside the area of federal power will not in general suffice to invalidate the law. Valid federal laws may " reach as a matter of purpose into fields lying under State legislative authority " (2). This must be particularly so in the case of grants made under s. 96 of the Constitution. It has been held that this section authorises grants to be made to States to induce them to carry out some purpose outside Commonwealth power, per *Latham* C.J. (3) (adopted in *Pye* v. *Renshaw* (4)), and it must equally authorise grants to induce them to refrain from carrying out some purpose within their power. To grant a State financial assistance on such conditions enables the Commonwealth indirectly to do something or to prevent something being done which it could not do or prevent directly. It is true that pars. (*a*) and (*b*) (i) and (ii) of sub-s. (1) of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* and particularly par. (*a*) may operate to make it difficult for a State to levy its own income tax. If this was their sole purpose, the legislation could be an unlawful interference with State sovereignty. But it is also true that these paragraphs disclose another purpose that is to say to ensure that the federal tax will be paid promptly and in full or in other words to make the federal tax effective. If this latter purpose be, as it must be, within the taxation power, the legislation in question could not be said to be an illegal intrusion into the affairs of the States. It is a consequence which follows from the structure of the Constitution and in particular from s. 109 which makes Commonwealth laws paramount over State laws and invalidates them to the extent of the inconsistency. The legislation seeks to give priority to an unsecured debt to the Commonwealth over one type of unsecured debt only, that is unsecured debts to the States, and in this respect singles out and discriminates against the States. But the reason for the discrimination is not difficult to detect. It is apparent that the debt most likely to compete with the debt to the Commonwealth for income tax would be a debt to a State or States for a similar tax. There must be a limit to the capacity of taxpayers to pay income tax if they are to provide for themselves and their families and remain solvent or be left with an incentive

(1) (1947) 74 C.L.R., at pp. 79, 80.
(2) (1947) 74 C.L.R., at p. 80.
(3) (1942) 65 C.L.R., at p. 417.
(4) (1951) 84 C.L.R. 58, at p. 83.

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to work, and the Commonwealth Parliament may well consider that it is already exploring this taxable capacity to the full. Discrimination against a State, where it can be seen to be justified, is not a ground for invalidating a Commonwealth law which would otherwise be authorised by a legislative power conferred on the Commonwealth Parliament. It was not contended, and in my opinion could not be contended, that discrimination in itself would be sufficient to invalidate such a law.

Finally I wish to express my complete agreement with the reasons for judgment of *Fullagar* J.

In my opinion, the demurrers should be allowed.

WEBB J. These are defendant's demurrers in separate actions, one brought by the State of Victoria and the other by the State of New South Wales, each action being for a declaration that six Acts of the Commonwealth Parliament, or some part or parts thereof, are or is *ultra vires* and unconstitutional and invalid. The six Acts are :—1. *Income Tax and Social Services Contribution (Companies) Act* 1956 ; 2. *Income Tax and Social Services Contribution (Individuals) Act* 1956 ; 3. *Income Tax (War-time Arrangements) Act* 1942-1946 ; 4. *Income Tax and Social Services Contribution Assessment Act* 1936-1956, s. 221 ; 5. *States Grants (Tax Reimbursement) Act* 1946-1948 ; and 6. *States Grants (Special Financial Assistance) Act* 1956.

However before the conclusion of the argument the claims of invalidity were limited to s. 221 of the *Assessment Act* and ss. 5 and 11 of the *Grants Act* 1946-1948.

On 7th June 1942 the *Income Tax Act* 1942 (No. 23), the *Income Tax (War-time Arrangements) Act* 1942 (No. 21), the *Income Tax Assessment Act* 1942 (No. 22) and the *States Grants (Income Tax Reimbursement) Act* 1942 (No. 20) were enacted by the Commonwealth Parliament. The rates of tax imposed by the first-mentioned Act, an annual Act, were the highest ever imposed in Australia. Since 1942 Parliament has enacted income tax Acts every year. In 1950 the *Income Tax and Social Services Contribution Assessment Act* imposed income tax and social services contribution and later Acts imposed a tax by that name until the financial year commencing 1st July 1956 when income tax and social services contribution were imposed by two Acts, one for companies and the other for individuals. The *War-time Arrangements Act* 1942 was amended in 1943, 1944 and 1947 but no question now arises on this Act in these proceedings. The *Assessment Act* 1942 by s. 31 amended the *Assessment Act* 1936-1941 by including in it s. 221 which was

then expressed to be " For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war ". Section 221 was amended by s. 20 of the *Assessment Act* 1946 so as to be " For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth " and so became a permanent provision. The *States Grants (Income Tax Reimbursement) Act* 1942 was repealed by the *States Grants (Tax Reimbursement) Act* 1946, which was amended in 1947 and 1948; and *States Grants (Special Financial Assistance) Acts* were enacted for each of the years 1951 to 1956 inclusive. The latter Acts supplemented the grants made under the 1946-1948 Act.

The validity of the Acts as enacted in 1942 was sustained by this Court in *South Australia* v. *The Commonwealth* (1). All five justices agreed that the *Income Tax Act* 1942 was valid. By a majority of three to two the *War-time Arrangements Act* 1942 was held valid; by a majority of four to one the validity of the *States Grants (Income Tax Reimbursement) Act* 1942 was also sustained. The justices were unanimous in holding that s. 221 of the *Assessment Act* was valid; but *McTiernan* J. based his decision solely on the defence power and found it unnecessary to decide whether s. 221 was also valid under the taxation power in s. 51 (ii.) of the Commonwealth Constitution or the incidental power in s. 51 (xxxix.). Of the other four justices *Latham* C.J. regarded the case of *In re Silver Bros. Ltd.* (2) as conclusive of the matter (3); *Rich* J. agreed generally with *Latham* C.J.; *Starke* J. treated that case as precluding the contention that the Commonwealth had no power to give itself priority in payment of its income taxes over the taxes of the States (4) and *Williams* J. considered that the case made it possible for the Commonwealth Parliament to give that priority (5). It will be seen then that four justices of this Court were of the opinion that s. 221 was a valid exercise of the taxation powers of the Commonwealth, apart from the defence power, and that their view was supported by *In re Silver Bros. Ltd.* (2).

No question has hitherto been raised in this Court as to the validity of any of the subsequent legislation. It is now raised here for the first time.

Many of the allegations in the Victorian statement of claim are repeated in the New South Wales statement of claim; but there are differences, e.g. in the Victorian claim it is alleged that the direct effect and operation of this Commonwealth legislation have been

(1) (1942) 65 C.L.R. 373.
(2) (1932) A.C. 514.
(3) (1942) 65 C.L.R., at p. 434.
(4) (1942) 65 C.L.R., at pp. 440, 441.
(5) (1942) 65 C.L.R., at p. 464.

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that since 7th June 1942 the imposition of a tax on income by the State has been impracticable ; whereas New South Wales is content to allege that the field in which that State could impose a tax on income and provide for the assessment and collection of such tax is now and for many years past has been limited by reason of the rates of income tax imposed by the Commonwealth and the operation of the provisional tax sections. But New South Wales also makes the allegation that the Commonwealth claims that the income tax collected by the Commonwealth is required for Commonwealth purposes and for financial assistance to the States, for the reduction of inequalities in the financial resources of the States, for the promotion of national stability, and for greater uniformity of development in the Commonwealth, and that these are purposes of the Commonwealth under the Constitution. Clearly these are legitimate purposes of the Commonwealth acting within its powers.

During argument counsel for the plaintiffs made the following submissions in writing :—

(1). The *Grants Act* is invalid because—

(a) It does not grant financial assistance within the meaning of s. 96 of the Commonwealth Constitution :

(b) It is a law with respect to the consideration for making the money available :

(c) Its operation, effect and intendment, contrary to the fundamentally federal nature of the Constitution, are to impel the States to refrain from exercising their constitutional power of imposing a tax on incomes :

(d) It is a law with respect to the imposition by States of a tax on incomes.

(2). (a) The *Assessment Act*, s. 221 (1.) (*a*) is invalid because—

(i) It is a law forbidding the payment and collection of State income tax :

(ii) Such a law is—

(A) not authorised by any provision of the Constitution ;

(B) a law specially directed to the States only ;

(C) inconsistent with the fundamental federal principle of the Constitution.

(iii) It is not a law giving Commonwealth tax " priority " over State tax.

(b) Section 221 (1) (*b*) in so far as it purports to give tax priority to the Commonwealth is unconstitutional for the reasons set out in (a) (ii) above.

(3). The *Grants Act* and the *Assessment Act*, s. 221 taken together, having regard to the *Tax Act*, were intended to have and have had the direct effect and operation of preventing the States from imposing and collecting income tax. Such laws are *a fortiori* unconstitutional for the reasons set out (1) and (2) above.

(4). The plaintiffs do not submit nor do their arguments involve the conclusion that the *Tax Acts* are invalid. But they must not be taken to concede that the exercise of the Commonwealth taxation powers by an *Income Tax Act* must in all circumstances be valid.

(5). Although the *Arrangements Act*, as passed in 1942, was invalid no question here arises for determination with respect to it.

(6). *South Australia* v. *The Commonwealth* (1) is not decisive because—

(a) the legislation here in question is materially different from that there in question, particularly in that the 1942 legislation was limited to the duration of the war and a year thereafter and was supported by the defence power in the circumstances then obtaining;

(b) since 1942 the true nature and character of the legislation have become apparent by experience so that here the Commonwealth concedes allegations set out above as to the effect and operation of the legislation, and it has become apparent that the legislation does not give the States a free choice whether to tax or not to tax;

(c) later decisions of the High Court are inconsistent with *South Australia* v. *The Commonwealth* (1), viz. *Melbourne Corporation Case* (2) and *The Commonwealth* v. *Bogle* (3).

(7). The Constitution is fundamentally federal in that it provides for the Commonwealth and States as separate organs independent of each other and co-ordinate in their respective spheres, and prevents any law of the Commonwealth operating to destroy or weaken the independence or integrity of a State, or to place a particular disability or burden upon an operation or activity of a State, and more especially upon the execution of its constitutional powers, or which seeks to control the exercise of any constitutional function or capacity or power of the State; and the *Grants Act* and the *Assessment Act*, s. 221 do this.

As already noted, there is no submission that any provision of this legislation is invalid except the *Grants Act* and s. 221 of the *Assessment Act*.

(1) (1942) 65 C.L.R. 373.
(2) (1947) 74 C.L.R. 31.
(3) (1953) 89 C.L.R. 229.

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Then as to (1). The *Grants Act*: Section 96 of the Commonwealth Constitution provides: "During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."

Section 51 of the Constitution provides:—"The Parliament shall, subject to this Constitution, have power to make laws . . . with respect to . . . (xxxvi.) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides."

The *Grants Act* 1946-1948 provides—(a) by s. 5 that—"In respect of any year during which this Act is in operation and in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State an amount calculated in accordance with the provisions of this Act (other than this section) . . .". [Then follow provisions for calculating the grant up to and beyond 1957 and for a review of grants. Nothing turns on these provisions.] (b) By s. 11 that—"(1.) The Treasurer may, in any year, make monthly or other advances to any State of portions of the grant to which it appears to him that the State will be entitled under this Act in respect of that year. (2.) Any such advance shall be made on the condition that the State shall not impose a tax upon incomes in respect of that year, and if, after the close of that year, the Treasurer gives notice in writing to the Treasurer of the State that he is not satisfied that the State has not imposed such a tax, the advances shall be repayable and shall be a debt due by the State to the Commonwealth." (c) By s. 12 that—"Payments in accordance with this Act shall be made out of the Consolidated Revenue Fund, which is hereby appropriated accordingly."

It is unnecessary to set out any of the provisions of the other *Grants Acts* referred to, as nothing turns on them so far as I understand the submissions of the parties. So I proceed to express my views on the *Grants Act* 1946-1948.

The creation of a debt in s. 11 is an exercise of the power conferred and s. 12 is enacted in compliance with ss. 81 and 83 of the Commonwealth Constitution.

Section 96 gives power to make a grant of financial assistance to a State on terms and conditions; but naturally the terms and conditions must be consistent with the nature of a grant, that is to say, they must not be such as would make the grant the subject of a binding agreement and not leave it the voluntary arrangement

that s. 96 contemplates. Then the *Grants Act* must not be read as providing for a contract to make a payment, if its language permits, as I think it does, because s. 5 can properly be regarded as addressed to the Treasurer of the Commonwealth, and not as being a communication to the States of an offer subject to a condition. The mention of a condition is not made by s. 5; it is made by s. 11. But the Treasurer need not apply s. 11. He can wait until the end of the relevant year, in which event the transaction would be voluntary throughout. But if he does apply s. 11, as most likely he would, and makes advances of portions of the grant in anticipation of the State not resorting to income tax, the condition for repayment if the State does resort to it does not materially affect the voluntary nature of the transaction. The decision to make the grant and the payment under it, whether by way of advances under s. 11 or in one sum at the end of the year, are still voluntary, and that is consistent with s. 96. In any event to hold that a binding agreement is contemplated by s. 5 would be to impute to the Parliament, without sufficient justification in view of the somewhat indefinite language of s. 5, the erroneous opinion that a State Parliament can make the non-exercise of its taxation powers the subject of bargaining and of a binding agreement and that for this purpose the State Parliament can bind its successors. *Pye* v. *Renshaw* (1), as I understand it does not imply that a binding agreement might validly be made for a grant under the *Grants Act*.

Then the *Grants Act* imposes no obligation on a State except the obligation to repay advances under s. 11 if the situation the Act is designed to relieve against thereafter ceases to exist in the relevant year, that is to say, the situation of need for financial assistance when the State does not impose income tax, which hitherto had been the principal source of revenue of every State and of some more than others. It is immaterial that this situation is created by the Commonwealth itself, even deliberately, if it is the result of the enactment of Commonwealth legislation otherwise valid, and even if, as must be assumed, it has the effect of making the imposition of a State income tax impracticable in Victoria.

I would hold that the *Grants Act* is valid, at all events if s. 221 is valid. The validity of the *Income Tax and Social Services Contribution Acts*, the other factors in the creation of the situation referred to, is not questioned in these proceedings.

I have not dealt separately with the submission of the plaintiffs that the *Grants Act* does not provide financial assistance, as I understand this submission to be based on the assumption that the

(1) (1951) 84 C.L.R., at p. 83.

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creation of the situation which otherwise warrants the financial assistance has been deliberately and invalidly brought about by the Commonwealth. So I do not find it necessary to deal with *Victoria* v. *The Commonwealth* (1) or *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (2), the cases on the scope of " financial assistance " within s. 96.

Then (2) as to s. 221 of the *Assessment Act*:

Section 221 reads :—" (1) For the better securing to the Commonwealth of the revenue required for the purposes of the Commonwealth—(*a*) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable; and (*b*) notwithstanding anything contained in any other Act or State Act—(i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date on which he became a bankrupt) in priority to all other unsecured debts other than debts of the classes specified in pars. (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of that Act; and (ii) the liquidator of a company which is being wound up shall apply the assets of the company in payment of tax due under this Act (whether assessed before or after the date of the commencement of the winding up) in priority to all other unsecured debts: Provided that, where, under the law of any State relating to the payment of debts on the winding up of a company, debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of the *Bankruptcy Act* 1924-1933 are preferred to all unsecured debts due to the Crown in the right of that State, debts of those classes may also be paid in priority to any tax due under this Act. Penalty: One hundred pounds or imprisonment for six months, or both, and, in addition, the court may order the person, trustee or liquidator, as the case may be, to pay to the Commissioner a sum not exceeding double the amount of tax due . . . ".

There has been no change in s. 221 since the decision in *South Australia* v. *The Commonwealth* (3) which makes that decision inapplicable. It would suffice then to say that I agree, as I respectfully do, with that decision. However counsel for the plaintiffs submit that two of their Honours who were parties to the decision

(1) (1926) 38 C.L.R. 399.
(2) (1939) 61 C.L.R. 735.
(3) (1942) 65 C.L.R. 373.

departed in a later case from the reasoning they applied in reaching that decision, and further that five members of this Court as at present constituted have since acted on a view of the federal principle which is inconsistent with the reasoning in *South Australia* v. *The Commonwealth* (1). The subsequent cases that counsel refer to are *Melbourne Corporation* v. *The Commonwealth* (2) and *The Commonwealth* v. *Bogle* (3). They further submit that *South Australia* v. *The Commonwealth* (1) is not supported by the reasoning of their Lordships in *In re Silver Bros. Ltd.* (4) and that in any event that reasoning is *obiter dicta*. As to the reasoning being *obiter*, I adhere to my attitude as stated in *Wragg* v. *State of New South Wales* (5).

As to the *Melbourne Corporation Case* (2) I find it difficult to resist the conclusion that there was a change in the reasoning of two of their Honours, as regards the application of the federal principle. *Bogle's Case* (3) held that a State could not prescribe the uses which might be made by the Commonwealth of its own property, or the terms upon which this property might be let to tenants or upon which the Commonwealth might provide accommodation for migrants, and so appears to me to have no application here. In any case, I propose to be guided by what I understand to be the views of their Lordships in *Silver Bros. Case* (4). It is true that the actual decision turned on the scope of the *Interpretation Act* of the Dominion of Canada. But the reasoning of their Lordships seems to me to exclude the application of the federal principle, which it is not questioned is as much a feature of the Canadian Constitution as it is of the Australian Constitution. Their Lordships thought the principle did not prevent the Dominion Parliament from enacting that in an administration of assets there should be priority of payment of Dominion taxes over Provincial taxes and other claims against the assets. Whatever view is taken as to the extent to which their Lordships' reasoning goes it extends at least that far, even if the reasoning is confined to the Dominion's bankruptcy power, to which it certainly extends, and does not affect the Dominion taxation power, as the headnote to the case asserts. But if such an essential power of the States as the taxation power can validly be interfered with by the Commonwealth in the exercise of its bankruptcy power, I fail to see why it cannot validly be interfered with in the exercise of the Commonwealth's taxation power. The Commonwealth's power is to make laws *in respect of*

(1) (1942) 65 C.L.R. 373.
(2) (1947) 74 C.L.R. 31.
(3) (1953) 89 C.L.R. 229.
(4) (1932) A.C. 514.
(5) (1953) 88 C.L.R., at p. 390.

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taxation and to make laws incidental to the execution of its powers: s. 51 (ii.) and (xxxix.) of the Constitution. These two powers are wide enough to authorise s. 221 unless the federal principle operates to restrict them, although it fails to do so in the case of priority of payments under a federal bankruptcy law. It is true that when the Commonwealth enters the bankruptcy field the States are excluded from that field, and that on the other hand the entrance of the Commonwealth to the income tax field does not exclude the States from imposing income tax not merely on the same persons but also in respect of the same income and to the same extent. The debts created are separate obligations, but so far there is no conflict to be resolved by s. 109 of the Commonwealth Constitution. The conflict arises when the Commonwealth gives itself priority of payment over the State tax.

But why should the Commonwealth await payment of its income tax in the ordinary course when the taxpayer is solvent, as is mostly the case, but be able to ensure and expedite payment, as it does in s. 221 (1) (*b*) when the taxpayer is bankrupt, or is a company being wound up even voluntarily? Why should the federal principle operate in the one case but not in the other? I am unable to supply an answer, unless it be that s. 221 (1) (*a*) is really unnecessary, which it is not for this Court to decide, or that there is discrimination against the State in respect of its income tax. If there is discrimination it is in respect of only one obligation to a State. But discrimination is not in itself a vitiating factor: to have an invalidating effect it must be such as to show that s. 221 is not really a law under s. 51 (ii.) or s. 51 (xxxix.) but is a law dealing *exclusively* with State taxation. It certainly is in a sense a law dealing with State taxation. One thing is clear: that the Commonwealth could not reasonably be expected to enact a law postponing the discharge of all other obligations, both private and public, to the payment of Commonwealth income tax. That would have a most disturbing and undesirable if not chaotic effect on the community. So there is a practical necessity to single out obligations for the postponement of their discharge. But only one kind is singled out, although there must be others that could also in all fairness be singled out with as little disadvantage to the community as that caused by the postponement of payment of State income tax. However the discharge of the obligation to pay State income tax ordinarily involves the payment of such vast sums of money in all States that it is not possible to deny that the postponement of its discharge would contribute appreciably to the prompt, if not to the certain payment of the Commonwealth income tax. But if

that is so s. 221 has a real and substantial connexion with the Commonwealth's taxation power and cannot properly be held to be neither a law with respect to Commonwealth income tax under s. 51 (ii.) nor a law incidental to the execution of the power to impose such tax under s. 51 (xxxix.), although in a sense it is also a law with respect to State income tax. The power is not lost by unfairness in its exercise.

I would allow both demurrers.

FULLAGAR J. On 23rd December 1955 the State of Victoria commenced an action in this Court against the Commonwealth, claiming a declaration that certain enactments of the Parliament of the Commonwealth were unconstitutional and invalid. On 23rd November 1956 the State of New South Wales commenced an action in this Court against the Commonwealth, claiming a similar declaration with regard to the same enactments. In each case a statement of claim was delivered, to which, after certain amendments had been made, the Commonwealth demurred. The demurrers now come before the Court, the two cases being heard together. Legislation similar in substance to, though not in all respects identical with, the legislation which is now challenged has already been considered by this Court, and it will be convenient to approach the matter historically.

On 7th June 1942 four Acts of the Parliament of the Commonwealth received the Royal Assent. These were the *States Grants (Income Tax Reimbursement) Act* 1942 (No. 20 of 1942), the *Income Tax (War-time Arrangements) Act* 1942 (No. 21 of 1942), the *Income Tax Assessment Act* 1942 (No. 22 of 1942), and the *Income Tax Act* 1942 (No. 23 of 1942). These Acts have for brevity been referred to respectively as the *Grants Act*, the *Arrangements Act*, the *Assessment Act* and the *Tax Act*. Nothing, I think, can turn on the order in which these enactments became law, but it might be thought, having regard to their immediate purpose and practical effect, that it would have been more logical if they had received the Royal Assent in the reverse order, and I will deal with them in that order.

All that need be said about the *Tax Act* 1942 is that it imposed an income tax for the financial year beginning on 1st July 1942 (i.e. on incomes derived in the year ending 30th June 1942) at unprecedentedly high rates. To illustrate the severity of the impost, it is only necessary to say that a person in receipt of income from personal exertion exceeding £4,000 would pay tax on his income up to £4,000 at the rate of 12s. 4d. in the pound, and on his income

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in excess of £4,000 at the rate of 18s. in the pound. Theoretically, of course, there is no limit on the rates of income tax, or any other kind of tax, which may be imposed either by the Commonwealth or by a State. But it is clear that the *Tax Act* of 1942 was calculated to strain the capacity of taxpayers to the utmost and, as a matter of practical politics, to leave little room for the effective imposition of income tax by the States for the year to which the Act applied.

The *Assessment Act* of 1942 contained a number of provisions, but the only relevant provision is that which was contained in s. 31. That section introduced a new s. 221 into the *Income Tax Assessment Act* 1936-1941. This s. 221 was in the following terms :— "(1) For the better securing to the Commonwealth of the revenue required for the efficient prosecution of the present war—(*a*) a taxpayer shall not pay any tax imposed by or under any State Act on the income of any year of income in respect of which tax is imposed by or under any Act with which this Act is incorporated until he has paid that last-mentioned tax or has received from the Commissioner a certificate notifying him that the tax is no longer payable ; and (*b*) notwithstanding anything contained in any other Act or State Act—(i) a person who is a trustee within the meaning of the *Bankruptcy Act* 1924-1933 shall apply the estate of the bankrupt in payment of tax due under this Act (whether assessed before or after the date of the order of sequestration) in priority to all other unsecured debts other than debts of the classes specified in paragraphs (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of that Act ; and (ii) the liquidator of a company which is being wound up shall apply the assets of the company in payment of tax due under this Act (whether assessed before or after the date of the commencement of the winding up) in priority to all other unsecured debts : Provided that, where, under the law of any State relating to the payment of debts on the winding up of a company, debts of the classes specified in paragraph (*a*), (*d*) or (*e*) of sub-section (1) of section eighty-four of the *Bankruptcy Act* 1924-1933 are preferred to all unsecured debts due to the Crown in the right of that State, debts of those classes may also be paid in priority to any tax due under this Act. Penalty : One hundred pounds or imprisonment for six months or both, and, in addition, the court may order the person, trustee or liquidator, as the case may be, to pay to the Commissioner a sum not exceeding double the amount of tax due by him, or by the bankrupt estate or company in liquidation, as the case may be, on the date on which the offence occurred. (2) This section shall have operation during the present war and until the last day of the first financial year to commence

after the day on which His Majesty ceases to be engaged in the present war, and no longer."

The *Arrangements Act* of 1942 contained a preamble in the following terms: "Whereas, with a view to the public safety and defence of the Commonwealth and of the several States and for the more effectual prosecution of the war in which His Majesty is engaged, it is necessary or convenient to provide for the matters hereinafter set out". Sections 4 and 11 contained the main operative provisions. Section 4 provided: "The Treasurer may at any time and from time to time, after receipt of a recommendation from the Public Service Board, by notice in writing addressed to the Treasurer of any State, notify him that, as from the date specified in the notice, it is, in his opinion, necessary for the efficient collection of revenue required for the prosecution of the war, for the effective use of manpower, or otherwise for the defence of the Commonwealth, that any officers of the State service specified in the notice who have been engaged on duties which, in the opinion of the Treasurer, are connected with the assessment or collection of taxes upon incomes should be temporarily transferred to the Public Service of the Commonwealth, and any officer so specified shall, by force of the notice, be temporarily transferred to the Public Service of the Commonwealth accordingly as from that date." Section 5 (1) provided that, unless sooner re-transferred, every transferred officer should be re-transferred to the State Service immediately after the Act ceased to operate. Section 11 (1) provided: "The Treasurer may at any time and from time to time, by notice in writing addressed to the Treasurer of any State, notify him that, as from the date specified in the notice, it is, in his opinion, necessary for the efficient collection of revenue required for the prosecution of the war, for the effective use of manpower, or otherwise for the defence of the Commonwealth, that the Commonwealth should, during the operation of this Act, have the possession and use of any office accommodation, furniture and equipment specified in the notice (whether specified particularly or in general terms) and the Commonwealth shall have the possession and exclusive use of that office accommodation, furniture and equipment accordingly as from that date." The rest of the Act contained provisions relating to such incidental matters as the rights of transferred officers and the payment of compensation for office accommodation etc. which might be taken over by the Commonwealth. These provisions were amended as to matters of detail in 1943 and again in 1944. Section 16 provided: "This Act shall continue in operation until the last day of the

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first financial year to commence after the date on which His Majesty ceases to be engaged in the present war, and no longer."

The *Grants Act* of 1942 provided by s. 4 that: "In every financial year during which this Act is in operation in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State the amount set forth in the Schedule to this Act against the name of that State, less an amount equal to any arrears of tax collected by or on behalf of that State during that financial year." The expression "arrears of tax" was defined by s. 3 as meaning (in effect) income tax payable to the State concerned for any financial year prior to that commencing on 1st July 1942. Section 5 provided for payment to the States, after the expiration of the Act, of an amount equal to arrears of tax collected by them, which amount was to bear interest at a rate not less than three per cent. Section 6 provided for certain additional grants to the States if the Treasurer was of opinion that the payments under s. 4 were "insufficient to meet the revenue requirements of the States". Section 7 provided that payments in accordance with the Act should be made out of the Consolidated Revenue Fund, which was appropriated accordingly. Section 8 provided: "This Act shall continue in operation until the last day of the first financial year to commence after the date on which His Majesty ceases to be engaged in the present war, and no longer." In the schedule were set out the respective amounts referred to in s. 4. The largest sum (£15,356,000) was payable to New South Wales, and the smallest (£888,000) to Tasmania. It would appear from *South Australia* v. *The Commonwealth* (1) that the amounts set out in the schedule represented substantially the average of the amounts raised by each State by way of income tax in the financial years ended 30th June 1940 and 30th June 1941. It may be mentioned that exactly parallel provisions were made in relation to *Entertainments Tax* by Act No. 43 of 1942, which came into force by proclamation on 1st October 1942. The Commonwealth, by Act No. 42 of 1942, imposed an entertainments tax, but nothing corresponding to s. 221 of the *Assessment Act* or to the *Arrangements Act* appears ever to have been enacted in relation to entertainments tax.

Immediately after the passing of these Acts, all the States except New South Wales and Tasmania took steps to challenge their validity, and writs were issued out of this Court against the Commonwealth and the Treasurer of the Commonwealth, claiming declarations that the Acts were unconstitutional and injunctions to restrain

(1) (1942) 65 C.L.R., at p. 380.

their being put into effect. Applications for interlocutory injunctions, treated by consent as the trial of the actions, came on for hearing on 22nd June 1942 before a Court consisting of *Latham* C.J. and *Rich*, *Starke*, *McTiernan* and *Williams* JJ. The judgment of the Court was given on 23rd July 1942: *South Australia* v. *The Commonwealth* (1). All the Acts were held to be valid. As to the *Tax Act* and the *Assessment Act*, the Court was unanimous. As to the *Arrangements Act*, *Latham* C.J. and *Starke* J. dissented. As to the *Grants Act*, *Starke* J. dissented.

It is now necessary to refer to the subsequent history of the legislation in question, which may be stated shortly.

The *Tax Act* of 1942 was simply an ordinary taxing Act. Its only notable intrinsic feature was the heaviness of the burden which it imposed. It has been succeeded by a series of annual taxing Acts. After 1946 there was, broadly speaking, a progressive reduction in the rates of tax. Under the Act of 1956 the maximum rate for an individual person is reached when the income exceeds £16,000, at which point the rate on the excess is 13s. 4d. in the pound. It may be mentioned that liability to pay what is called "provisional tax" was introduced by the *Income Tax Assessment Act* 1944, and that in 1950 the title of the *Assessment Act* was changed to *Income Tax and Social Services Contribution Assessment Act*. It is to be noted, however, that the effect of s. 221YA is that the word "tax" in s. 221 does not include provisional tax.

Section 221 of the *Assessment Act*, which was introduced into that Act by the *Assessment Act* of 1942, would, if sub-s. (2) thereof had been left to operate, have ceased to be in force on (I think) 30th June 1947. The section was, however, amended by s. 20 of the *Income Tax Assessment Act* 1946 (No. 6 of 1946), which came into force on 13th April 1946. By this amendment sub-s. (2), which limited the duration of the Act, was omitted, and in the introductory passage the words "the purposes of the Commonwealth" were substituted for the words "the efficient prosecution of the present war". Section 221 thus became an enactment which purported to operate permanently, and any connexion which it might have been thought to have had with the defence power of the Commonwealth was severed.

As to the *Arrangements Act* 1942, the powers given to the Treasurer by ss. 4 and 11 of this Act appear to have been exercised immediately after the decision of this Court that they were valid was pronounced on 23rd July 1942. It does not appear whether the effect of those two sections was thereby completely exhausted, though one would

(1) (1942) 65 C.L.R. 373.

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suppose that to all intents and purposes it was. It does appear, however, that from 1942 onwards there has been no imposition of any income tax by any State, and the assessment and collection of income taxes imposed from time to time by Commonwealth legislation has been exclusively in the hands of the Commonwealth. The Act would, by virtue of s. 16, have expired on (I think) 30th June 1947. In 1946, however, the Parliament of the Commonwealth enacted the *Income Tax (War-time Arrangements) Act* 1946 (No. 3 of 1946) which received the Royal Assent on 13th April 1946. This Act repealed ss. 4, 6, 7, 7A, 8, 9 and 10 but not s. 11 of the *Arrangements Act* of 1942. It also amended s. 5, which had provided for the automatic re-transfer of State officers to the State service on the expiration of the Act by giving the transferred officers an option, to be exercised within a limited time, of re-transfer to the State service.

The *Grants Act* of 1942 would also, by virtue of s. 8 thereof, have expired on (I think) 30th June 1947. But again the Parliament of the Commonwealth took action in 1946. By s. 3 of the *States Grants (Tax Reimbursement) Act* 1946 (No. 1 of 1946), which came into force on 1st July 1946, the whole of the *Grants Act* of 1942 was repealed. Section 5 provided: "In respect of any year during which this Act is in operation and in respect of which the Treasurer is satisfied that a State has not imposed a tax upon incomes, there shall be payable by way of financial assistance to that State an amount calculated in accordance with the provisions of this Act (other than this section), less an amount equal to any arrears of tax collected by or on behalf of that State during that year." The expression "arrears of tax" is defined by s. 4 as having the same meaning as in the repealed *Grants Act*. Section 6 stated the aggregate amount which was to be distributed in grants to the States in each ensuing year. For the years ending 30th June 1947 and 30th June 1948 the amount was £40,000,000. For every subsequent year the amount was to be calculated in a manner, which need not be stated in detail, by reference to the populations of the respective States and the average wages per person employed in the respective States. Sections 7 and 8 provided for the manner in which the aggregate grant should be divided among the States. For the years ending 30th June 1947 and 30th June 1948 it was to be divided in accordance with the table in the first schedule to the Act. For ensuing years it was to be divided according to a somewhat complicated method which may be sufficiently described for present purposes as a population basis. Section 11 provided: "(1) The Treasurer may, in any

year, make monthly or other advances to any State of portions of the grant to which it appears to him that the State will be entitled under this Act in respect of that year. (2) Any such advance shall be made on the condition that the State shall not impose a tax upon incomes in respect of that year, and if, after the close of that year, the Treasurer gives notice in writing to the Treasurer of the State that he is not satisfied that the State has not imposed such a tax, the advances shall be repayable and shall be a debt due by the State to the Commonwealth." The *Grants Act* of 1946 was amended in minor respects in 1947 and 1948. In 1949 and in each succeeding year up to and including 1956 Acts were passed by the Parliament of the Commonwealth which appropriated for " financial assistance " for the States very considerable sums in addition to those calculated under ss. 6, 7 and 8 of the *Grants Act* of 1946 : see Acts Nos. 48 of 1949, 25 of 1950, 10 of 1951, 35 of 1951, 56 of 1952, 63 of 1953, 38 of 1954, 44 of 1955 and 108 of 1956.

The position which subsists today, fifteen years later, is thus seen to be substantially that which came into existence immediately after the passing of the tetralogy of Acts of the Parliament of the Commonwealth in 1942. The Commonwealth has in each year imposed an income tax at uniform rates throughout Australia. In no year has any State imposed an income tax. The *Arrangements Act* has, so to speak, been fully executed, and the greater part of it has been repealed : the result of its operation has been that the assessment and collection of income taxes has been exclusively in the hands of the Commonwealth. In each year each State has received its grant of " financial assistance " with additions. Section 221 of the *Assessment Act* remains, or purports to remain, in force, but, since no income tax has been imposed by any State, there has never been any occasion for its application in any respect.

When the former actions were before the Court in 1942, each of the four Acts in question was attacked individually, but the main contention of the plaintiff States was that the four statutes constituted a single legislative scheme, the purpose and effect of which was to make the Commonwealth the exclusive taxing authority in respect of income tax, and to prevent the States from exercising their constitutional power to impose and collect a tax on incomes : see the argument of Mr. *Ligertwood* K.C. (as he then was) (1). In the present cases the existing *Tax Act* could hardly have been challenged as being anything but a plain exercise of the taxation power of the Commonwealth, and the *Arrangements Act*, having

(1) (1942) 65 C.L.R., at p. 385.

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been fully carried into effect long ago, had for practical purposes ceased to exist, although some incidental remnants of it remain on the statute book. Accordingly, counsel for the States confined their attack to the *Grants Act* and s. 221 of the *Assessment Act*, though the grounds of their attack were basically the same as those which were put forward in 1942 against the alleged " legislative scheme ". The argument rested on the essentially federal nature of the Constitution, and, although it naturally ranged over a wide field and invoked a number of decided cases to support or illustrate it, it is clearly enough summarised in the last paragraph of the written précis of argument handed to the Court by counsel. That paragraph reads :—" The Constitution is fundamentally federal in that it provides for the Commonwealth and the States as separate organs independent of each other and co-ordinate in their respective spheres, and prevents any law of the Commonwealth from operating to destroy or weaken the independence or intregrity of a State or to place a particular disability or burden upon an operation or activity of a State, and more especially on its constitutional powers."

It is clear that no estoppel is created by the decision of 1942. The statutes attacked are not identical with those which were attacked in 1942. In any case, one of the plaintiffs, the State of New South Wales, was not a party to the proceedings of 1942. Although, however, there is no estoppel, and it was never suggested that there was any estoppel, the substance of the legislation now attacked is precisely the same as that of the *Grants Act* and the *Assessment Act*, which were attacked in 1942, and the ground of the attack is precisely the same. It is clear, in my opinion, that the present actions cannot be decided in favour of the plaintiffs without overruling *South Australia* v. *The Commonwealth* (1). It was indeed sought to distinguish that case on the ground that the *Grants Act* and the *Assessment Act* were at the time of that decision limited in operation to the duration of the war, and could be supported by the defence power in the circumstances then existing. It is true, I think, that the validity of the *Arrangements Act* was rested on the defence power, and, so far as it applied to personnel, perhaps could not have been rested on any other power. But the *Arrangements Act* is not now in question. It is true also that *McTiernan* J. upheld the *Assessment Act* as an exercise of the defence power, and, while regarding the *Grants Act* as fully justified by s. 96 of the Constitution, was of opinion that that Act also might possibly be justified as an exercise of the defence power (2). But *Latham* C.J.

(1) (1942) 65 C.L.R. 373.

(2) (1942) 65 C.L.R., at p. 456.

and *Rich, Starke* and *Williams* JJ. regarded the *Assessment Act* as authorised by the taxation power (s. 51 (ii.) and (xxxix.)) and the *Grants Act* as authorised by s. 96. It would in truth, as it seems to me, have been impossible, if the objection taken to them had been otherwise valid, to sustain either the *Grants Act* or the *Assessment Act* as a lawful exercise of the defence power. For the objection taken then, which is the objection taken now, is fundamental. It asserts what is said to be a basic principle of the Constitution—that the Commonwealth cannot prohibit or fetter or control the exercise by the States of their constitutional powers. If this principle exists and is violated by the *Grants Act* or the *Assessment Act* as they now stand, it existed and was violated by those Acts as they stood in 1942, whatever the head of power by reference to which the Commonwealth might have sought to justify them. It is, in my opinion, impossible, so far as those two Acts are concerned, to distinguish the decision of 1942 from the present cases by referring that decision to the defence power.

The very questions which are now raised by the States of New South Wales and Victoria were thus litigated and decided fifteen years ago in actions brought by four States, of which the State of Victoria was one. The enactments now challenged assumed their present permanent character in 1946. The state of affairs which resulted from the original enactments in 1942 followed immediately on those original enactments, and has subsisted ever since without challenge from any State. Even now the enactments are challenged by only two of the six States. In all the circumstances the questions decided in 1942 ought not, in my opinion, now to be reopened. Indeed I would say that, if ever there was a case for the application of the rule of *stare decisis*, this is that case. It is not really necessary for me to say more, but I wish to make one or two observations on each of the provisions in question.

So far as the *Grants Act* is concerned, it seems to me impossible to maintain that it is not a valid enactment. It is authorised by s. 96 of the Constitution. Section 96 does not confer legislative power in the same sense in which s. 51 confers legislative power. It authorises the appropriation of money for a specific purpose, declaring, in effect, that the purpose of providing financial assistance for any State is a " purpose of the Commonwealth " within the meaning of s. 81. Very great difficulty is occasioned by the words " until the Parliament otherwise provides ", which have to be read with s. 51 (xxxvi.). I cannot agree with the suggestion that the effect is to give to the Parliament power *pro tanto* to amend the Constitution by restricting or expanding its own powers. The

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difficulty, however, need not be faced in the present case, because the Parliament has made no attempt to " otherwise provide ", and may therefore still today " grant financial assistance to any State on such terms and conditions as it thinks fit". Even if the reference to terms and conditions had been omitted, it would not, I think, have been easy to maintain that the Commonwealth could not impose conditions on the making of a grant to a State. But it is expressly provided that conditions may be imposed, and I can see no real reason for limiting in any way the nature of the conditions which may be imposed. It may be said that, if a condition calls for State action, the action must be action of which the State is constitutionally capable. But I can see no reason for otherwise limiting the power to appropriate for payment to a State subject to a condition.

The *Federal Aid Roads Act* 1926 authorised the Commonwealth to enter into agreements with the States under which the Commonwealth was to pay moneys to the States, and the States were to expend those moneys on the construction and reconstruction of roads. Moneys were appropriated by the Act for payment to the States under the agreements. The Commonwealth had, of course, no power directly to appropriate moneys for application to the making or maintenance of roads, and in *Victoria* v. *The Commonwealth* (1) the State attacked the validity of the Act. It was argued that the terms and conditions mentioned in s. 96 were financial terms and conditions, e.g. as to time and mode of payment or repayment. Alternatively it was argued that the terms and conditions must relate to matters with respect to which the Commonwealth has legislative power. Both arguments received what can fairly be described as short shrift. In *South Australia* v. *The Commonwealth* (2) *Latham* C.J., after pointing out that the *Grants Act* had no compulsive effect, said :—" The Commonwealth may properly induce a State to exercise its powers (e.g. the power to make roads : see *Victoria* v. *The Commonwealth* (1)), by offering a money grant. So also the Commonwealth may properly induce a State by the same means to abstain from exercising its powers " (3). The first part of this passage was quoted with approval by a Court consisting of *Dixon*, *Williams*, *Webb*, *Fullagar* and *Kitto* JJ. in *Pye* v. *Renshaw* (4). If the first part of the passage is true, the second follows.

A word should be said about s. 11 of the *Grants Act* of 1946, because that section did not appear in the Act of 1942. That section enables the Treasurer to make periodical advances to a

(1) (1926) 38 C.L.R. 399.
(2) (1942) 65 C.L.R. 373.
(3) (1942) 65 C.L.R., at p. 417.
(4) (1951) 84 C.L.R., at p. 83.

State of portions of the grant to which it appears to him that the State will become entitled at the end of the financial year. If after payment of an advance the State does impose an income tax, the advance is repayable to the Commonwealth. This seems to me to be merely an ancillary or incidental provision, obviously designed for the benefit of the States. If s. 5 is valid, it follows that s. 11 is valid.

The question of the validity of s. 221 of the *Assessment Act* is, to my mind, a more controversial question, though it is probably of less practical importance.

It cannot be doubted, as a general proposition, that the Commonwealth could not by a naked prohibition prevent the States from exercising any of their constitutional powers, including the power to impose taxes. Nor could the Commonwealth by a naked prohibition prevent the States from collecting taxes lawfully imposed in the exercise of that power. But the powers which are preserved by ss. 106 and 107 of the Constitution are preserved subject to the Constitution, and the legislative power granted to the Commonwealth by s. 51 enables the Commonwealth, in the course of exercising affirmatively its power with respect to any of the subjects mentioned, to exclude expressly or by implication State legislation on the same subject, and in effect to say that its own law shall be the whole law and the only law on the subject. There has been such an express exclusion in the *Bankruptcy Act*, the *Life Insurance Act*, the *Patents Act* and other Acts. The power to make laws with respect to taxation (s. 51 (ii.)) has generally been regarded as standing on a special footing: see *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1). This is, of course, because the power to make laws with respect to taxation has been regarded as a power to make laws imposing taxation, and a legal conflict between a Commonwealth power to impose taxation and a State power to impose taxation is seen as an impossibility. A very real conflict, however, may arise between the taxing powers of the States and some other power of the Commonwealth, and, apart altogether from *South Australia* v. *The Commonwealth* (2), I would regard it as settled law that the Commonwealth, when it legislates within its powers to confer rights upon itself or create rights against itself, may by express enactment make those rights subject to, or immune from, the taxing power of the States: *Chaplin* v. *Commissioner of Taxes (S.A.)* (3); *The Engineers' Case* (4); *The Commonwealth* v.

(1) (1920) 28 C.L.R., at pp. 143, 144.
(2) (1942) 65 C.L.R. 373.
(3) (1911) 12 C.L.R. 375.
(4) (1920) 28 C.L.R. 129, at p. 157.

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State of Queensland (1). By a parity of reasoning, I think that the Commonwealth, though it cannot prohibit the States from exercising their taxing powers, must have power, by virtue of its own taxing power, to take all necessary steps to ensure the collection of its own taxes, and to that end to give priority to the obligation to pay its own taxes over the obligation to pay State taxes.

When s. 221 of the *Assessment Act* is examined in the light of these considerations, the only real question which emerges is seen, I think, to be a very narrow question, and just the very kind of question as to which this Court should regard itself as bound by a clear prior decision.

Sub-section (1) (*b*) (i) of s. 221 gives to Commonwealth income tax priority in a bankruptcy. This part of s. 221 is clearly valid: it could be supported either under the bankruptcy power (s. 51 (xvii.)) or, in the light of what I have said, under the taxation power (s. 51 (ii.)). Sub-section (1) (*b*) (ii) of s. 221 gives to Commonwealth income tax priority in the winding up of a company. It is equally clear, in my opinion, that this provision is valid. The question which remains relates to the validity of sub-s. (1) (*a*), and is as I see it, whether that paragraph goes beyond what can reasonably be considered necessary for securing that Commonwealth income tax shall be paid in priority to any State income tax. It may be said that adequate protection is given to the Commonwealth by the provisions of sub-s. (1) (*b*). On the whole, however, I am disposed to agree with what was said by *Williams* J. in *South Australia* v. *The Commonwealth* (2) and, even if I were not, I do not think, as I have said, that any sound reason has been shown for overruling the decision in that case.

The demurrers should, in my opinion, be allowed.

KITTO J. My consideration of the very important questions which these cases raise has led me to the same conclusions as the Chief Justice. I agree entirely in his Honour's judgment, and there is nothing that I would add.

TAYLOR J. In my opinion the attack made by the plaintiffs upon the provisions of the *States Grants (Tax Reimbursement) Act* 1946-1948 must fail. It is, of course, only too clear that the reasons of this Court in *South Australia* v. *The Commonwealth* (3) made the annihilation of ss. 5 and 11 of that Act a task of unusual difficulty. Indeed it may have been enough to say that no sufficient reasons

(1) (1920) 29 C.L.R. 1.
(2) (1942) 65 C.L.R., at pp. 464, 465.
(3) (1942) 65 C.L.R. 373.

appear to justify us in reconsidering what is, in effect, the very question which was decided adversely to the plaintiffs' contentions some fifteen years ago. But in deference to the arguments advanced on behalf of the plaintiffs I wish to add that I am satisfied that acceptance of the plaintiffs' arguments would involve not only overruling the decision in that case but also an unjustified departure from the considered views expressed and acted upon in *Victoria* v. *The Commonwealth* (1) and in *Deputy Federal Commissioner of Taxation (N.S.W.)* v. *W. R. Moran Pty. Ltd.* (2). I agree with the observations of the Chief Justice concerning the relevance of those views to the present problem and, accordingly, I am of the opinion that the plaintiffs must fail on this branch of the case.

The question of what should now be said concerning the provisions of s. 221 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956 is, however a matter of greater difficulty. It is true, of course, that in the form in which it then stood, s. 221 sustained the attack made upon it in *South Australia* v. *The Commonwealth* (3). And it is equally true that for all practical purposes s. 221, as it now stands, is in the same form. But, to my mind, the circumstances in which the earlier section was designed to operate were vastly different from those in which we are now called upon to consider the effect and operation of the present section and to pronounce upon its true substance and character.

Before referring to the nature and relevance of these differentiating circumstances it is of importance to observe that in 1942 the members of the Court regarded the provision (s. 221) introduced by Act No. 22 of 1942, merely, as a measure designed to secure " priority " for Commonwealth income tax as against claims of the several States for like imposts and this view was of the very essence of the decision that the section was a valid legislative enactment: see *South Australia* v. *The Commonwealth*, per *Latham* C.J. (4); per *Rich* J. (5); per *Starke* J. (6); per *McTiernan* J. (7) and per *Williams* J. (8). I agree at once that the provisions of s. 221 (1) (*b*) were and are provisions of this character and I see no reason to doubt that the Commonwealth Parliament may, with respect to circumstances such as those in which this sub-section was designed to operate, legislate to give priority to outstanding claims for income tax validly imposed. Such a provision may, in the language of *Starke* J.,

(1) (1926) 38 C.L.R. 399.
(2) (1939) 61 C.L.R. 735; (1940) A.C. 838; (1940) 63 C.L.R. 338.
(3) (1942) 65 C.L.R. 373.
(4) (1942) 65 C.L.R., at pp. 434, 435.
(5) (1942) 65 C.L.R., at p. 436.
(6) (1942) 65 C.L.R., at p. 441.
(7) (1942) 65 C.L.R., at p. 453.
(8) (1942) 65 C.L.R., at pp. 464, 465.

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be regarded as an exercise of " . . . Commonwealth authority to make its taxation effective and to secure to it the full benefit thereof " (1), and so achieve validity. But I recognise a clear distinction between a provision which secures " priority " to a Commonwealth claim for income tax in the administration of a bankrupt estate or in the winding up of a company on the one hand and, on the other, a provision which, irrespective of the means available to a taxpayer to satisfy his outstanding obligations, makes it an offence for him to discharge a liability for income tax levied by a State until such time as his Commonwealth income tax for the same year has been assessed and paid. There can be no point in the creation of " priorities " with respect to the payment of debts except to provide for cases where it is seen that a debtor is or may be unable with the means at his disposal to discharge his obligations in full or where assets to which creditors may resort for payment are or may prove to be insufficient to satisfy all claims that may be made upon them. Except in such cases no additional security is provided for any outstanding debt by the prescription of a " priority " and, except in cases of that character, the provisions of s. 221 (1) (*a*) can do nothing to make the Commonwealth's " taxation effective " or " to secure to it the full benefit thereof " ; in cases where a taxpayer's estates are sufficient to meet all his outstanding obligations those provisions will operate, merely, to postpone payment of State income tax without providing for the Commonwealth any additional guarantee that its claim for income tax will be met.

It may be said that the criticism of s. 221 (1) (*a*) which is evident in these observations is concerned with the form of that sub-section rather than with its substance and operation. To some extent this may be true but the point which it is necessary to stress is that the sub-section is designed to apply to and, if valid, will apply to every taxpayer whatever his financial circumstances may be. It may, therefore, be said with some degree of conviction that the section fails to specify as a condition of its operation the existence of any circumstance relevant to the exercise by the Commonwealth of a legislative power to protect its revenues.

I do not suggest and I do not believe that these rather obvious considerations were overlooked or discarded when s. 221 in its original form was previously considered by the Court. Indeed there is every reason for thinking that the problem which then arose was of a very special character. As has been said already, the

(1) (1942) 65 C.L.R., at p. 441.

section was originally enacted at a critical stage of the war and income tax rates had been increased to an unprecedented level. Indeed they had been increased to such an extent that it was no far-fetched assumption that the burden so created was one which could not, together with income tax levied by the several States, be borne by the general body of taxpayers. Moreover the provisions of s. 221 were designed as a temporary measure. They were to continue in operation only until the expiration of a short period after the war and there was every reason for thinking that the demands of the war would maintain taxation at the same level during that period. In these circumstances it was a simple matter to assume that the general body of taxpayers would, at the very least, find difficulty in meeting both Commonwealth and State demands for income tax and to regard the provisions of s. 221 (1) (*a*) as a measure designed to secure, in competition with the States, priority for payment of Commonwealth income tax. At all events these were the circumstances in which the question was decided and they were circumstances which were vastly different from those which now present themselves. The present section is no temporary provision designed to deal with a special and transient situation. Nor, much as experience may pessimistically incline one to think otherwise, is there any sound reason for concluding that rates of income tax will remain indefinitely at a level which will require the Commonwealth and the States—if any of the latter should see fit to levy income tax—to endeavour, in competition with one another to collect their respective imposts from a body of taxpayers which, in general, will be unable or likely to be unable to pay both.

These considerations induce me to think that the question which now arises in relation to s. 221 (1) (*a*) is clearly distinguishable from the question which arose in *South Australia* v. *The Commonwealth* (1) and that nothing that was then said requires us to conclude that the sub-section, as re-enacted, is valid. Indeed, when regard is had to the complexion which it now bears and to the effect and operation which, as a permanent provision of the *Income Tax and Social Services Contribution Assessment Act*, it now so plainly has, it may be possible to say that the reasoning in that case would not, alone, justify such a conclusion. Accordingly I am of the opinion that when s. 221 (1) (*a*) ceased to be a temporary measure designed to deal with a very special situation and became a permanent provision intended to operate in undefined and unpredictable circumstances it assumed a character and operation which cannot

(1) (1942) 65 C.L.R. 373.

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be justified under Commonwealth legislative power. That being so I am of the opinion that a declaration should be made that the provisions of that sub-section are invalid and that the demurrers must, therefore, be overruled.

Order in each case :—

Demurrer overruled. Declare that par. (a) of s. 221 (1) *of the Income Tax and Social Services Contribution Assessment Act* 1936-1956 *is ultra vires and void. Refuse all other relief claimed. Order that the parties abide their own costs.*

Solicitor for the plaintiffs, the State of Victoria and the Attorney-General thereof, *Thomas F. Mornane,* Crown Solicitor for the State of Victoria.

Solicitor for the plaintiffs, the State of New South Wales and the Attorney-General thereof, *F. P. McRae,* Crown Solicitor for the State of New South Wales.

Solicitor for the defendant Commonwealth of Australia in each action, *H. E. Renfree,* Crown Solicitor for the Commonwealth.

R. A. H.