REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1920-1921.

[HIGH COURT OF AUSTRALIA.]

THE COMMONWEALTH AND THE ATTORNEY-GENERAL FOR THE COMMONWEALTH . . . . . } PLAINTIFFS;

AGAINST

THE STATE OF QUEENSLAND AND THE COMMISSIONER OF INCOME TAX (QUEENSLAND) . . . . . } DEFENDANTS.

H. C. OF A. 1920.

MELBOURNE, *Oct.* 18, 19, 21.

SYDNEY, *Dec.* 6.

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

Commonwealth Stock and Bonds—Interest—Prohibition of taxation by State—State income tax—Rate of tax dependent on amount of interest received—Validity of State Act—Validity of Commonwealth legislation—Remedy—Action by Attorney-General of Commonwealth—Declaration of invalidity of State Act—Jurisdiction of High Court—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (IV.) *—Commonwealth Inscribed Stock Act* 1911-1918 (*No.* 20 *of* 1911—*No.* 7 *of* 1918), *sec.* 52B—*Income Tax Acts* 1902-1920 (*Qd.*) (*2 Edw. VII. No.* 10—10 *Geo. V. No.* 35), *secs.* 7 (1), (12), 12.

Sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918 provides that "The interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State unless the interest is declared to be so liable by the prospectus relating to the loan on which the interest is payable."

Sec. 7 (1) of the *Income Tax Acts* 1902-1920 (Qd.) imposes income tax in respect of the annual amount of the incomes of all persons at progressive rates which, in the case of income from property, begin at $12\frac{4}{10\,0\,0}$d. on the first £1

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

of income over £200 and rise to 36d. in the £ on each £ exceeding £4,000. Sec. 7 (12) provides that "The amount of the taxpayer's income which is exempt from tax under" *par.* "(viii.) *of section twelve of this Act* shall, notwithstanding anything in this Act or any other Act contained, be taken to be part of the taxpayer's gross income, and shall be returned in the taxpayer's return; and the rate of tax shall be calculated as if the amount so exempted were part of his taxable income," &c. Sec. 12 provides that there shall be exempt from income tax, *inter alia*, "(viii.) Income arising or accruing from debentures, stock, bonds, certificates, or Treasury bills issued by the Government of Queensland or of the Commonwealth of Australia."

Held, by *Knox* C.J., *Isaacs*, *Higgins* and *Rich* JJ. (*Gavan Duffy* and *Starke* JJ. dissenting), that the effect of sec. 7 (12) of the *Income Tax Acts* 1902-1920 is to make interest derived from Commonwealth stock or Treasury bonds "liable to income tax" within the meaning of sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918, and that the sub-section is to that extent invalid.

Held, also, by *Knox* C.J., *Isaacs* and *Rich* JJ. (*Higgins* J. dissenting), that an action lies by the Attorney-General of the Commonwealth for a declaration that sec. 7 (12) of the *Income Tax Acts* 1902-1920 is invalid *pro tanto*.

Attorney-General for New South Wales v. *Brewery Employees' Union of New South Wales*, 6 C.L.R., 469, followed.

Held, further, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918 is valid under the power conferred by sec. 51 (IV.) of the Constitution to make laws with respect to "borrowing money on the public credit of the Commonwealth."

ACTION referred to Full Court of High Court.

An action was brought in the High Court by the Commonwealth and the Attorney-General for the Commonwealth against the State of Queensland and the Commissioner of Income Tax of that State, in which the statement of claim was as follows:—

The plaintiffs say:—

1. The Commonwealth of Australia has from time to time created stock and issued bonds in respect of loans bearing interest which are now unredeemed.

2. None of the prospectuses relating to such loans declared such interest to be liable to income tax under any law of the State of Queensland.

3. The Commonwealth of Australia has issued a prospectus for a new loan to be secured by stock and bonds bearing interest. Such

prospectus does not declare such interest to be liable to income tax under any law of the State of Queensland.

4. On 11th March 1920 the Parliament of the State of Queensland enacted the *Income Tax Act Amendment Act of* 1920.

5. (1) By sec. 4 of such Act sec. 7 of the Principal Act is repealed, and in lieu thereof a section therein set out is inserted. (2) Sub-sec. 12 of such section so inserted would, if valid, operate (*a*) to render the interest derived from all stock or Treasury bonds of the Commonwealth liable to income tax under a law of the State of Queensland; (*b*) to impose upon citizens of the Commonwealth amenable to the laws of the said State a higher rate and greater quantum of tax in virtue of the receipt by them of any such interest.

6. The defendants claim that the provisions of such sub-section are valid and are demanding compliance therewith, and will unless restrained proceed to enforce them.

7. The said enactment and the matters alleged in the last paragraph tend to deter persons from subscribing to the loan mentioned in par. 3 hereof.

And the plaintiffs claim :—

(1) A declaration that sub-sec. 12 of sec. 7 inserted in the Principal Act by sec. 4 of the *Income Tax Act Amendment Act of* 1920 is invalid in so far as it relates to income arising or accruing from debentures, stock, bonds, certificates or Treasury bills issued by the Government of the Commonwealth of Australia.

(2) An injunction restraining the defendants from proceeding to enforce the same.

(3) Such other or further order as to the Court may seem right.

By their defence the defendants said :—

1. The defendants admit the allegations contained in pars. 1, 2, 3 and 4 of the statement of claim.

2. As to par. 5 of the statement of claim the defendants admit that by sec. 4 of the *Income Tax Act Amendment Act of* 1920, sec. 7 of the Principal Act is repealed, and in lieu thereof a section therein set out is inserted. The defendants do not admit the further allegations contained in par. 5 or either of them.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

3. As to par. 6 of the statement of claim the defendants admit the allegations contained therein.

4. As to par. 7 of the statement of claim the defendants do not admit the allegations contained therein or either of them.

The action was referred by *Starke* J. to the Full Court.

Owen Dixon, for the plaintiffs.

Latham, for the defendants, took a preliminary objection. The statement of claim discloses no cause of action. It shows no right of the plaintiffs infringed, and is an attempt to obtain an advisory binding opinion of this Court before facts have arisen which render a decision necessary. Invalid State legislation is nugatory, and is not an infringement of any legal right. There is no allegation of threatened acts, and, if there were threats, the holders of Commonwealth stocks or bonds are the persons who could rely on them. There is no interference with the Commonwealth Executive. The States are not in any respect subordinate bodies to the Commonwealth, and are not subject to any control by the Crown so far as it acts through the Commonwealth, and are as much strangers to the Attorney-General of the Commonwealth as to the Attorney-General of Great Britain.

[HIGGINS J. referred to *South Hetton Coal Co.* v. *North-Eastern News Association* (1).

[RICH J. referred to *London County Council* v. *Attorney-General* (2).]

The only rights which can be said to be infringed, if sec. 7 (12) of the *Income Tax Acts* 1902-1920 (Qd.) is invalid, are those of persons who are owners of Commonwealth stock or bonds, and not the rights of the community in general, and therefore the Attorney-General for the Commonwealth has no right to sue (*Attorney-General* v. *Garner* (3)). The Attorney-General for Queensland might possibly sue (*Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (4)). [Counsel also referred to *Guaranty Trust Co. of New York* v. *Hannay & Co.* (5).]

(1) (1894) 1 Q.B., 133.
(2) (1902) A.C., 165, at p. 168.
(3) (1907) 2 K.B., 480, at p. 487.
(4) 6 C.L.R., 469.
(5) (1915) 2 K.B., 536.

Owen Dixon. This case is within *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (1). The Commonwealth comes as a sovereign State to vindicate its sovereign power. The Crown in right of the Commonwealth can take proceedings to prevent an act which can be done only under some power drawn from the Crown and which is done beyond that power. Where there is an illegal act being done which tends to the injury of the public, the Attorney-General can sue without showing damage or injury to any person (*Attorney-General* v. *Shrewsbury (Kingsland) Bridge Co.* (2)). It is sufficient for him to show that the act is done without authority. The Attorney-General for the Commonwealth is the proper person to sue, because the act complained of could only lawfully be done under a Commonwealth law.

KNOX C.J. We will proceed with the case.

Owen Dixon. Secs. 52A and 52B of the *Commonwealth Inscribed Stock Act* 1911-1918 are within the powers conferred by sec. 51 (IV.) of the Constitution, to make laws with respect to "borrowing money on the public credit of the Commonwealth." It is within that power to make a law that interest paid by the Commonwealth on money borrowed by the Commonwealth shall be free from both Commonwealth and State taxation. Sec. 7 (12) of the *Income Tax Acts* (Qd.) has the effect of imposing "income tax" within the meaning of sec. 52B of the *Commonwealth Inscribed Stock Act.* If the amount of tax is calculated in some manner by reference to the income from a particular source, that is an "income tax" upon income from that particular source. Apart from sec. 52B the Federal Parliament has shown an intention to cover all the rights and obligations of persons in respect of Commonwealth stocks and bonds held by them, and therefore any State legislation which imposes obligations conditioned upon the exercise or acquisition of those rights is inconsistent with the Commonwealth legislation and is invalid. The Federal Parliament has appropriated the particular field of legislation.

Latham. There is no inconsistency between sec. 7 (12) of the

(1) 6 C.L.R., 469. (2) 21 Ch. D., 752.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Queensland Act and sec. 52B of the Commonwealth Act. A tax which makes no deduction from the interest received by a person on Commonwealth bonds and imposes no liability on a person whose whole income is derived from such bonds does not make that income "liable to income tax" within the meaning of sec. 52B. Where there is a prohibited field of legislation a taxing Act may fix the rate of tax by reference to matters within the prohibited field (*Maxwell* v. *Bugbee* (1); *Flint* v. *Stone Tracy Co.* (2); *Plummer* v. *Coler* (3)).

[ISAACS J. referred to *Commercial Cable Co.* v. *Attorney-General of Newfoundland* (4).]

Assuming that sec. 52B does not apply, sec. 7 (12) of the Queensland Act is not inconsistent with the Commonwealth Act. Sec. 52B is not within the power conferred by sec. 51 (IV.) of the Constitution. That only authorizes legislation as to the terms of the contracts between the Commonwealth and the lender, and confers no powers to impose conditions on third persons. It does not give the Commonwealth power to control everything which may have an effect upon the rate of interest at which the Commonwealth can borrow or may render it less probable that persons will subscribe to loans. Such a provision as that in sec. 52B cannot be regarded as necessary or conducive to the exercise of the power conferred by sec. 51 (IV.) of the Constitution, and so is not within the power conferred by sec. 51 (XXXIX.) (*Australian Boot Trade Employees' Federation* v. *Whybrow & Co.* (5); *R.* v. *Kidman* (6); *Montreal City* v. *Montreal Street Railway* (7)). The incidental power applies to the borrowing only, and does not cover matters which affect the general state of the money market upon which the operation of borrowing money may depend. (See *McGlew* v. *New South Wales Malting Co. Ltd.* (8); *R.* v. *Brisbane Licensing Court*; *Ex parte Daniell* (9).) Sec. 7 (12) does not infringe any provision of the Constitution express or implied.

Owen Dixon, in reply. The incidental power in relation to the power conferred by sec. 51 (IV.) of the Constitution is a power to

(1) 250 U.S., 525.
(2) 220 U.S., 107, at p. 165.
(3) 178 U.S., 115.
(4) (1912) A.C., 820.
(5) 11 C.L.R., 311, at p. 337.
(6) 20 C.L.R., 425, at pp. 433, 440, 453.
(7) (1912) A.C., 333, at p. 344.
(8) 25 C.L.R., 416, at p. 420.
(9) 28 C.L.R., 23.

prevent the imposing of conditions which are contingent upon the fact that the Commonwealth is borrowing, and a person is lending to the Commonwealth, money. Sec. 52B means that the receipt of interest from Commonwealth bonds cannot be made the occasion of paying anything by way of income tax.

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

KNOX C.J. The plaintiffs claim a declaration that sub-sec. 12 of sec. 7 of the consolidated *Income Tax Acts* 1902 *to* 1920 of the State of Queensland is invalid so far as it relates to income arising or accruing from debentures, stock, bonds, certificates or Treasury bills issued by the Government of the Commonwealth of Australia, and an injunction restraining the defendants (the State of Queensland and the Queensland Commissioner of Income Tax) from proceeding to enforce the same. Mr. *Latham*, for the defendants, raised a preliminary objection on the ground that the Attorney-General of the Commonwealth could not maintain an action for a declaration that an Act of a State legislature was *ultra vires* without showing some direct infringement of a legal right of the Commonwealth. In my opinion the ground taken is covered by the decision of this Court in the *Union Label Case* (1), and the objection should be overruled.

The facts admitted on the pleadings are as follows: (1) The Commonwealth of Australia has from time to time created stock and issued bonds in respect of loans bearing interest which are now unredeemed; (2) none of the prospectuses relating to such loans declared such interest to be liable to income tax under any law of the State of Queensland; (3) the Commonwealth of Australia has issued a prospectus for a new loan to be secured by stock and bonds bearing interest—such prospectus does not declare such interest to be liable to income tax under any law of the State of Queensland; (6) the defendants claim that the provisions of sub-sec. 12 of sec. 7 of the Queensland *Income Tax Acts* 1902-1920 are valid and are demanding compliance therewith, and will unless restrained proceed to enforce them.

(1) 6 C.L.R., 469.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

KNOX C.J.

The relevant provisions of the Queensland Act are as follows:— Sec. 7 (1). "Subject to this Act, there shall be charged, levied, collected, and paid for the use of His Majesty . . . an income tax in respect of the annual amount of the incomes of all persons at the rates following, that is to say:— . . . (ii.) On all taxable income derived from the produce of property." (Then follows a scale of graduated rates of tax ranging from $12\frac{4}{100}$d. on the first £ to 36d. in the £ on each £ exceeding £4,000.) Sec. 7 (12). "The amount of the taxpayer's income which is exempt from tax under paragraphs (vii.) and (viii.) of section twelve of this Act shall, notwithstanding anything in this Act or any other Act contained, be taken to be part of the taxpayer's gross income, and shall be returned in the taxpayer's return; and the rate of tax shall be calculated as if the amount so exempted were part of his taxable income, but notwithstanding the provisions of paragraph (i.) of sub-section one of section thirteen of this Act he shall be entitled for the purposes of any deductions allowable under this Act to treat the amount so exempted as if it were part of his taxable income." Sec. 12. "The following incomes, revenues, and funds shall be exempt from income tax:— . . . (viii.) Income arising or accruing from debentures, stock, bonds, certificates, or Treasury bills issued by the Government of Queensland or of the Commonwealth of Australia." Sec. 13 (1). "In estimating the income subject to the tax, there shall be deducted from the gross income of every person—(i.) All losses and outgoings actually incurred in Queensland by him in production of that part of his income which is not exempted from tax." Sec. 21. "Subject to this Act, income tax shall be payable—(i.) Generally, by the person to whom the income arises or accrues, or who, during the year in respect of which the assessment is made, is entitled to the receipt thereof."

Sec. 52B of the *Commonwealth Inscribed Stock Act* is in the following words, viz.: "The interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State unless the interest is declared to be so liable by the prospectus relating to the loan on which the interest is payable."

It is plain that the necessary effect, and presumably the object, of the Queensland Act is that if a person deriving in Queensland income from a source which is not exempt from taxation receives, in addition to such income, interest on stock or bonds issued by the Commonwealth Government, he becomes liable by reason of the receipt of such interest to pay by way of income tax an amount in excess of that which he would have been liable to pay had he not been in receipt of such interest.

From this state of facts two questions emerge for decision, namely: (1) Does the provision contained in sec. 7 (12) of the Queensland Act contravene the provisions of sec. 52B of the Commonwealth Act? (2) If so, is the enactment contained in sec. 52B of the Commonwealth Act within the powers of the Commonwealth Parliament?

The answer to the former of these questions depends on the meaning to be given to the words "The interest . . . shall not be liable to income tax" in sec. 52B. It is contended for the defendants that the effect of the Queensland Act is not to make this interest "*liable to income tax*" inasmuch as by sec. 12 (viii.) of that Act such interest is expressly declared to be exempt from income tax, and it is said that the Act does no more than make use of the amount of such interest received by the taxpayer as a factor in the calculation of the amount of income tax which he is liable to pay.

For the Commonwealth it is argued that as income tax is not by this Act or by income tax Acts generally imposed on, in the sense of being charged on or made payable out of, the income of the taxpayer or any particular portion of such income, but is merely a tax the amount of which is calculated by reference to the income of the taxpayer, who must pay it as best he can, the phrase "interest shall not be liable to income tax" would be inapt if construed literally as meaning merely that payment of income tax shall not be exacted out of such interest, and that the expression must be regarded as elliptical and as meaning that the receipt of such interest shall not be made the criterion of liability to pay any sum of money whatever by way of income tax. Mr. *Dixon* also stated his argument

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Knox C.J.

in another form, by urging that to predicate of a subject such as interest from a given source that it is liable to income tax means that the liability to pay a sum of money by way of income tax is made dependent on the condition that the taxpayer is in receipt of income from that source. I am inclined to think that the meaning attributed to the words in question in the argument last stated is their natural meaning, but, even if it be not, it is, I think, indisputable that the words in question are at least capable of being construed as having either of the two meanings suggested by the opposing arguments indicated above, and, this being so, resort must be had to the ordinary rules for the construction of written documents for the purpose of determining which meaning should be attributed to them. In determining this question, it is of course proper to inquire what appears from the Act to have been the occasion for the enactment of that provision.

Looking at the words of the section, it is clear that its provisions were intended to enable some protection or advantage to be given by the Commonwealth Government to persons subscribing to its loans, and that the intention was to publish in connection with each loan a prospectus setting out the conditions on which subscriptions might be made, and particularly a condition relating to liability to income tax under Commonwealth or State laws. Under these circumstances it is, I think, proper in construing the section to attribute to its words the meaning which would naturally and reasonably be attributed to them by persons who might be expected to subscribe to the loan on the faith of a statement in the prospectus that interest was (or was not) liable to Commonwealth and/or State income tax. Regarding the matter from this point of view I am clearly of opinion that the construction put on the section by counsel for the plaintiffs is correct, and that sec. 7 (12) of the Queensland Act is in contravention of sec. 52B of the Commonwealth Act. It would matter nothing to an investor whether or not an amount payable by him by way of income tax could be said strictly not to be imposed on a particular portion of his income, or whether a particular portion of his income could be said strictly to be not liable to income tax if in the result he was compelled to pay a greater sum by way of income tax, than he would otherwise have had to pay, because,

and only because, he was in receipt of income from that particular source. It is true that under the Queensland Act if a person has no income other than interest on Commonwealth bonds he pays no income tax, but it is equally true that if he has income from another source he pays a larger amount as tax because, and only because, he receives the interest on his Commonwealth bonds.

In my opinion the words used in sec. 52B are at least fairly open to the meaning which I attribute to them, even assuming it is not their primary or natural meaning; and I can see no reason for construing them in the narrow and restricted sense contended for by the defendants. Consequently, I think the attempt that has been made to circumvent the provisions of sec. 52B fails.

It remains to consider whether the provisions of sec. 52B are within the powers of the Commonwealth Parliament. On this question I feel no doubt whatever. By sec. 51 (IV.) of the Constitution the Commonwealth Parliament is empowered to make laws with respect to "borrowing money on the public credit of the Commonwealth," and in my opinion this power covers a condition such as this. It is clear that the power must cover legislation as to the rate of interest to be paid and generally as to the conditions on which subscriptions to loans are invited; and I can see nothing in this condition to place it outside the scope of the power in question.

For these reasons I am of opinion that the plaintiffs are entitled to the declaration claimed.

ISAACS AND RICH JJ. (delivered by ISAACS J.). In this action the Commonwealth and its Attorney-General sue the State of Queensland and its Commissioner of Income Tax for a declaration that sub-sec. 12 of sec. 7 of the State *Income Tax Act* is invalid in so far as it relates to income arising or accruing from debentures, stocks, bonds, certificates or Treasury bills issued by the Commonwealth Government, and for an injunction restraining the defendants from proceeding to enforce that provision.

Cause of Action.—Learned counsel for the defendants raised a preliminary objection—in substance a demurrer *ore tenus*, which the Court overruled, reserving its reasons—that such an action is incompetent. He urged that neither the Commonwealth nor its

H. C. OF A. 1920. THE COMMONWEALTH v. STATE OF QUEENSLAND. Isaacs J. Rich J.

Attorney-General had any status as the guardian of the rights of the citizens of Queensland, the only persons affected by the State law, even supposing it to be invalid, and that the only competent plaintiff for the purpose of questioning the validity of the enactment is either an individual citizen of Queensland affected by the Act or the Attorney-General of that State on behalf of all its citizens. In that contention there is a fundamental error. The plaintiffs do not assume to represent the people of Queensland as citizens of that State, and the action is not for their protection in that relation. The plaintiffs represent the people of Australia, including those of them that are in Queensland, but in that sense Queensland is not a separate part of the Commonwealth—the rights of Australians there which are sought to be protected are rights not referable to the Queensland Constitution, but are rights of a larger citizenship arising under and protected by the Australian Constitution. Under that Constitution paramountcy is conferred upon Commonwealth legislation throughout any area it lawfully covers. State authority in opposition to that legislation is unlawful; and any State executive action in contravention of the appropriate Commonwealth law is as much a usurpation of authority and a resort to mere force unwarranted by law, as a similar attempt to exercise unjustifiable judicial authority. In each case the law provides a proper method in proper cases of restraining the usurpation as well as of correcting it should it have occurred. The principle establishing the status of the Attorney-General of New South Wales to sue the Commonwealth in the *Workers' Trade Marks Case* (1), and stated at pp. 557-558 of the report, applies *e converso* to the present case, and is sufficient for the purpose.

Is this a proper case, assuming, as the demurrer assumes, that the alleged invalidity exists? If the Commonwealth's main contention is sound, the State in contravention of an express Commonwealth law has declared it compulsory under penalties on those inhabitants of Queensland who receive interest on Commonwealth loans, to contribute in respect of it to the State revenue, and by the law of Queensland it is the ministerial duty of officials to enforce that declaration and to compel obedience. It is much more than

(1) 6 C.L.R., 469.

a mere threat. In the absence of judicial decision condemning the statutory provision, it is unquestionable that very large numbers of persons will be harassed—improperly, on the assumption—and will be sought to be coerced into submission. In these circumstances the right of the Attorney-General of the Commonwealth to institute the action is not open to doubt. He is not bound to wait until the coercion has actually commenced, nor is he bound to leave the vindication of the Commonwealth authority to individuals. Mr. *Latham* urged that it would be hard if States could be compelled to defend their legislation whenever the Commonwealth thought fit to challenge it. The answer is that the Court has the means of controlling the process and confining its use to legitimate occasions.

Proceeding to the questions raised by the case itself, they are three: (1) the meaning of sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918; (2) the legal effect of the Queensland *Income Tax Acts* 1902-1920 on Commonwealth interest; and (3) the extent of the Commonwealth legislative power under sec. 51 (IV.) of the Constitution.

1. *The Commonwealth Act.*—The defendants contend that the words "the interest derived from stock or Treasury bonds shall not be liable to income tax" are limited to a tax directly placed on that interest *eo nomine*. They insist that those words must receive a strict construction, so as merely to prohibit an income tax that specifically takes part or proportion of the interest itself, but not so as to prohibit a tax or an extra tax which is calculated by finding a proportion of other income, but solely conditioned on receipt of the Commonwealth interest, and even if to some extent at least the tax or extra tax is proportioned to the amount of that interest. The plaintiffs contend that a tax or extra tax of the nature mentioned is only doing indirectly what is forbidden, and is within the terms of the section on its proper construction.

The defendants' contention appears to us to be very clearly opposed both to the letter and to the spirit of the enactment. The provisions of the section are framed so as to apply in precisely the same way both to States and Commonwealth: what is permitted to the State without departing from the prohibition of the section, is equally permissible to the Commonwealth consistently with the

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Isaacs J. Rich J.

section, and therefore if, once we ascertain what Parliament intended as to the Commonwealth itself, we get the answer as to the States. Let us see, then, how far the Commonwealth could, consistently with a proper reading of sec. 52B, do what is suggested by the defendants' argument.

The history of secs. 52A and 52B, for they run together, should be borne in mind. In the original Act they did not occur. In 1915, by Act No. 26, two new sections were introduced into the Principal Act, and numbered respectively 52A and 52B. They then read thus :—" 52A. Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, and transfers of stock or Treasury bonds shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State. 52B. The interest received from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State." The immunity thus established was unqualified. So far the Commonwealth enactment has a double operation with regard to its own legislation. Pre-existing Commonwealth Acts had to be read as not including the matters mentioned, and future Acts, if merely general, would be controlled by the special provisions, so long as those special provisions stood. True, as a matter of strict constitutional power, the Commonwealth Parliament might, at any time, have repealed the sections and brought both bonds and interest under taxation. But that would have been a clear departure from the assurance given to the lenders. In 1918, by Act No. 7, these sections were added to :— To sec. 52A : " unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued " ; to sec. 52B : " unless the interest is declared to be so liable by the prospectus relating to the loan on which the interest is payable." Past loans remained unaltered. Future loans might or might not be qualified as to taxation, according to the prospectus. Now, the immediate point to consider is whether by sec. 52A, on its true construction, we can gather that the Commonwealth Parliament left itself free to do what the defendants contend the State is left free to do. If it did, then both Commonwealth and State are free to do it, and the bondholder may be doubly taxed in that way. We have to remember, in order to arrive

at a correct interpretation, to whom those sections were addressed. They were addressed to the general public in Australia and to investors in Great Britain and elsewhere, in order to induce them to lend money to the Commonwealth. The issue of a prospectus was contemplated, and attention was specifically directed to it. If it were silent—then there was to be no taxation of interest; if taxation were permissible it would be expected to be plainly stated. The language of the section is not technical: it was for the reading of men of all classes of occupation, including business men, at least as much as for lawyers, and above all it was an assurance given by the Commonwealth of Australia to persons contemplating investment. Where, as here, the prospectus is silent, containing no notice that there is liability to taxation of interest, we cannot think it consistent with the Commonwealth enactment that the Commonwealth Parliament should proceed to tax a bondholder in the way contended for. To abstain from taxing the recipient of the interest on the interest *eo nomine*, but all the same to tax him, or to tax him higher on other income *because* he received the interest, seems to us to be doing indirectly the same thing within the possible limits of the other income. As Lord *Halsbury* L.C., for the Privy Council, said in *Madden* v. *Nelson and Fort Sheppard Railway* (1), "it is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly." As between private individuals, where a bargain or a set of instructions has been framed throughout by one of them, the language, the terms and conditions all determined by him, and the other party merely assents to it trusting to the form in which it is cast, the person who selected the language may have to bear the burden of any ambiguity he has caused. A relevant example may be given. In *United Insurance Co.* v. *Cotton* (2) the Privy Council, with reference to certain instructions by a principal to an agent, observed:—"Of course a more limited construction may be put upon it. Their Lordships merely desire to indicate that the wider construction is one which might, in their estimation, be reasonably put upon it by the person to whom it was addressed." In this instance it was the Commonwealth of Australia that framed the terms of the bargain, and if there were ambiguity the creditor

(1) (1899) A.C., 626, at p. 627. (2) 19 S.A.L.R., 124, at p. 127.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Isaacs J. Rich J.

should not suffer. But there is not, in our opinion, any ambiguity. Read as an ordinary business transaction, in which a country assuming to have the necessary legislative authority assures prospective lenders that "interest shall not be liable to income tax under any law of the Commonwealth," the fair meaning of that assurance is that neither directly nor indirectly shall any income tax be applied so as to diminish the net amount of consideration by way of interest which the Treasury undertakes to pay the lender. We entertain no doubt whatever that the words "'the interest . . . shall not be liable to income tax under any law of the Commonwealth" are simply an elliptical but perfectly well understood mode of saying that "no person receiving the interest . . . shall be compelled by any law of the Commonwealth to pay income tax by reason of receiving that interest." Or, putting it more shortly, it means that interest shall be wholly exempt from liability to income tax. That is the contention of the Commonwealth in this case, upholding the first terms of the legislative compact it has made. As we have said, if that is the proper interpretation of the section in relation to the Commonwealth, it is necessarily so as to the States. We now have to see whether the Queensland Act contravenes sec. 52B.

2. *The Queensland Act.*—We should state at the outset that the conclusion we have arrived at in this branch is that the Queensland Parliament, endeavouring by a well-intentioned and very ingenious method to keep within the terms of the Federal law and yet not forego any revenue which it considered necessary for the State and within its powers, has nevertheless undoubtedly, by a misunderstanding of the nature of the subject, infringed the prohibition of sec. 52B of the Commonwealth Act. The point made by the defendants is that the Queensland Act does not put any tax on the interest; all it does is to put a tax on other income and merely apply a differing rate of taxation to that other income according as the taxpayer does or does not receive Commonwealth interest. The mere statement of that fact admits discrimination. There is discrimination between taxpayers who do and taxpayers who do not receive Commonwealth interest—the latter paying more in the way of income tax than the former; and in some cases between themselves—

the taxpayers who receive more Commonwealth interest paying at a higher rate than those who receive less. That is taxing the interest to some extent, however the transaction is complicated. It is only a devious route to the same point. The question, however, is a broad one, and does not stand in need of very microscopic examination.

The income tax enactments of Queensland follow the model which is well established in England and the Dominions. It is a tax on *persons*, natural or artificial, in respect of the income received by them. Lord *Macnaghten* said in *London County Council* v. *Attorney-General* (1): "It is one tax, not a collection of taxes essentially distinct." The general character of the Queensland Act is the same as all Australian Income Tax Acts, including the Federal Act. The position of a taxpayer under the Federal Act was stated by the Court in *Melrose* v. *Federal Commissioner of Taxation* (2) in these words: "The dominating idea is that the taxpayer is regarded as a receiver of income which, in its totality, represents his ability to contribute to the revenue of the country." That is the characteristic idea of all Australian Income Tax Acts, as well as of the English Act (see per *Garrow* B. in *Attorney-General* v. *Coote* (3)), and that conception must have been present to the mind of the Federal Parliament when passing sec. 52B. The established scheme of Australian Income Tax Acts is that the taxpayer's ability is estimated by his income—that is, by such income which, as a totality, the Legislature thinks should be taken into account to measure his ability. In some cases persons are entirely exempted; in others a minimum income is exempted; in others certain classes of income are exempted; in others specified deductions are considered just allowances, whether as part of the cost of production or as desirable expenditure. Again, differences are recognized as to the sources of income, whether from personal exertion or from property, and as to the amount of net income in the particular case. But all these considerations lead to one conclusion: what is the true measure of each person's ability to pay the one tax called "income tax"?

Differences of detail attributable to local circumstances or policy of course, occur, but the general scheme is followed by the Queensland Act. There is some variation of language in the Act, but the

(1) (1901) A.C., 26, at p. 35. (2) 26 C.L.R., 494, at p. 498.
(3) 4 Price, 183, at p. 189.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Isaacs J. Rich J.

sense is evident. The governing section for the present purpose is sec. 7. Sub-sec. 1 says : "Subject to this Act, there shall be *charged, levied, collected, and paid* for the use of His Majesty in aid of the Consolidated Revenue for each year *an income tax* in respect of the *annual amount* of the incomes of all persons at the *rates* following, that is to say :— " Then follow a series of differential rates according to the nature of the income. The words just quoted, the governing words of sub-sec. 1, the division of taxable income into two main classes, namely, that derived from personal exertion and that derived from property, the words in par. (iii.) of the first sub-section, "*he shall be charged on his taxable income*," indicate that the tax is a tax on the person in respect of his total income.

Sec. 11 very distinctly supports this, because in case of poverty or difficult circumstances the Commissioner may "*release such person wholly or in part from liability to income tax for that year.*" There the "person" is under the liability. Sec. 12A speaks of "incomes liable to tax." But that must mean, when regard is paid to the other sections, that the incomes referred to are those in respect of which the person is liable to pay the tax. In sec. 13 the expression is "income subject to the tax" ; so, in sec. 16. In sec. 21 the phrase is "in respect of income." In sec. 32 (2) the agent is spoken of as "liable to income tax." In sec. 34, in the last proviso we find the "person" mentioned as "liable to pay tax"; and so in sec. 36, which also speaks of the person as "chargeable with income tax." Sec. 44 uses the phrase "liability to income tax" with reference to the person, and similarly in secs. 58 and 59. Sec. 10 enacts that the tax shall be "charged, levied, collected, paid, and enforced upon assessments." Sec. 39 enacts that the assessment shall be preceded by returns, and the returns are to be based on "the amount of income" earned, derived or received during the *previous year*. It is inevitable, therefore, that any argument based on the notion that an "income tax" connotes taking a part of specific income is a fallacy. Very much the same erroneous view was urged before the Privy Council in *Attorney-General of British Columbia* v. *Ostrum* (1), and dealt with by Lord *Macnaghten* thus (2): "The scheme of the Assessment Act and of every other income tax Act

(1) (1904) A.C., 144.

(2) (1904) A.C., at p. 147.

with which their Lordships are familiar is to provide for the collection of the tax on the basis of the gains and profits of an earlier period." The tax is a personal one, in respect of income received during the preceding year, all of which may have been spent, and as to which (except so far as we can discover in the one case of live stock sold with a grazing business—sec. 12A, sub-sec. I., cl. 2 (iv.)) there is no charge on the income itself. Sec. 13 (2) strongly confirms the unity of the tax, because permitted deductions, if they exceed the class to which they belong, may, as to the surplus, be taken from the other class.

That being the position, we find two provisions round which the argument centred. Sec. 12 (viii.) specifically exempts from income tax (*inter alia*) "income arising from debentures, stock, bonds, certificates, or Treasury bills issued by the Commonwealth of Australia." Sec. 7, sub-sec. 1, by par. (ii.) provides that "On all taxable income derived from the produce of property . . . on the first £1 the rate shall be $12\frac{4}{100}$d. and the rate shall progressively increase by $\frac{4}{100}$d. for each and every additional £ until the taxable income reaches £3,000, when the rate shall be 24d. in the £." It is unnecessary to quote that paragraph further. "Taxable income" is defined by sec. 3 to be "income on which income tax is chargeable after allowing for all deductions and exemptions allowable under this Act." "Gross income" is defined by sec. 3 to be "Income without any deductions or exemptions allowable under this Act." "Income Tax" is defined by sec. 3 to include "any additional rate of income tax." Then comes the challenged provision contained in sub-sec. 12 of sec. 7. It runs as follows: "The amount of the taxpayer's income which is exempt from tax under paragraphs (vii.) and (viii.) of section twelve of this Act shall, notwithstanding anything in this Act . . . contained, be taken to be part of the taxpayer's gross income, and shall be returned in the taxpayer's return." The object of that requirement is shown by the next sentence: "*and the rate of tax shall be calculated as if the amount so exempted were part of his taxable income*; but notwithstanding the provisions of paragraph (i.) of sub-section one of section thirteen of this Act he shall be entitled for the purposes of any deductions allowable under this Act to treat the amount so exempted as if it were part of his taxable income." The operation of that sub-section is not

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Isaacs J. Rich J.

doubtful. A person who is in receipt of Commonwealth interest must make a return of it as gross income. As it is exempted by sec. 12 (viii.) it is not "taxable income" within the definition. Consequently, no rate would so far be calculated upon it, because sec. 7. sub-sec. 1, par. (ii.), already quoted, applies the rate to taxable income only, "exempted income" being excluded before the calculation is made. The sub-section, however, says that, notwithstanding anything else in the Act, the interest is *not* to be excluded before calculating the rate; it is for that purpose to be treated as "taxable income." In other words, it is treated partly as "taxable income" and partly as "exempted income" in the course of the statutory operation of arriving at the amount of income tax laid upon the taxpayer. The result is that thereby *the recipient is compelled to pay an amount of income tax greater than if the interest were wholly exempt, though less than if it were fully taxable.* It is brought into account as taxable income, and kept there long enough to perform one part of the process of taxing the person, namely, the ascertainment of the rate at which he is to pay, and the rate may be thereby increased; and then, having completed that function, it is turned out while the next step is being performed, namely, the application of the increased rate to the fully taxable income. In the result, the prohibition of sec. 52B of the Commonwealth statute is contravened, because *the taxpayer is compelled to pay an extra amount of tax on account of his interest*, but the contravention does not go so far as if the interest were treated as "taxable income" throughout.

3. *The Constitutional Power under Sec.* 51 (IV.).—The defendants deny the power of the Commonwealth Parliament to enact a prohibition going so far as that above indicated. The argument eventually came to this point: that the Commonwealth power under sub-sec. IV. of sec. 51 went no further than to fix the legal relations between the lender and the Commonwealth. To attempt to control others in relation to the financial undertakings of the Commonwealth was, so it was urged, beyond the competency of the Parliament.

Sec. 51 says: "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . (IV.) Borrowing money on the public credit of the Commonwealth." This is much more than

a power in the Commonwealth to borrow. 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 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 sec. 52B protecting the interest from State income tax is not incidental to the power of borrowing. As to this we are of opinion that the true principle to be applied is stated in the following words in *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (1): "The Court has necessarily the ultimate duty and power of protecting the Constitution from excess in this respect as in every other, but unless it can be shown that Parliament has infringed some positive restriction or prohibition of the Constitution, or has enacted as incidental to a main power some provision which no reasonable men could in any conceivable circumstances honestly regard as incidental, no Court has . . . any justification for attempting to review the action of the Legislature and declaring that to be impossible of attainment, which Parliament has in its discretion thought and declared to be desirable for the public welfare." It is not, in our opinion, possible for a Court to say that such a provision as sec. 52B—which certainly protects a borrower from the Commonwealth against State taxation of the interest as such which he receives from the Commonwealth,

(1) 6 C.L.R., 309, at p. 376.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Isaacs J. Rich J.

but does so for the benefit of the Commonwealth itself to facilitate its own finance—is beyond the bounds of reasonable incidence.

Chaplin v. *Commissioner of Taxes* (*S.A.*) (1) established the immunity of Federal salaries from State income tax. This Court has recently, in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (2), expressed its opinion that the decision was correct, by reason of the controlling force of Federal legislation. It is in point here, and is in line with the reasoning of this judgment.

In our opinion the plaintiffs are entitled to the declaration claimed.

HIGGINS J. The Commonwealth and its Attorney-General have jointly issued a writ against the State of Queensland and its Commissioner of Income Tax, claiming a declaration that a certain section of the Queensland *Income Tax Acts of* 1902-1920 is invalid, so far as it relates to interest arising from Commonwealth stock, &c., and an injunction restraining the defendants from proceeding to enforce the section. The first question is: Has the Commonwealth any cause of action? There are a statement of claim and a defence; some of the allegations of the statement of claim are not admitted, and no evidence has been taken; but, as I understand, we are to treat the allegations as proved, for the purpose of this argument. The allegations are, in effect, that the Commonwealth has issued stock, &c., bearing interest, and is now issuing a prospectus for a new loan; that Queensland on 11th March 1920 amended its *Income Tax Act* by purporting to impose on its taxpayers a higher rate in virtue of the receipt by them of any such interest; that the defendants will, unless restrained, proceed to enforce the Act; and that persons will thereby be deterred from subscribing to the new loan. The plaintiffs contend that the Act is invalid, to the extent aforesaid, by virtue of sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918.

If the Act is invalid, the proceedings to enforce it will fail. The point of invalidity will be open to any taxpayer in the proceedings. What cause of action has the Commonwealth? As to the stock that is to be issued (or, rather, was at the date of the writ to be issued) the Queensland Act certainly tends to make it less desirable

(1) 12 C.L.R., 375. (2) 28 C.L.R., 129.

and less marketable. This means, or may mean, loss—*damnum*—to the Commonwealth; but where is there any *injuria*—any tort on the part of Queensland, such as the law recognizes? If Queensland has passed an Act which is invalid, what is the wrong done to the Commonwealth? If Queensland seeks to enforce the invalid Act against the taxpayer, what wrong is done to the Commonwealth? The nearest analogy to such an action as the present is an action for slander of title; but, apart from other distinctions, there is here no allegation of falsehood or of actual malice.

If the Federal Government could bring such an action in the United States, there could surely be some instance adduced; but none has been cited from the long series of reports recording the struggle between the Federal power and the power of the States. The position as summarized by *Willoughby* (*Constitution*, p. 13) is: "The Courts will not pass upon the constitutionality of a law except in suits duly brought before them at the instance of parties whose material interests are involved." A taxpayer of Queensland who holds Commonwealth bonds would have his material interests affected by this Act; but even he would not be entitled to a declaration of invalidity or injunction on the allegations here made. The matter has been recently discussed in *Boisé Artesian Water Co.* v. *Boisé City* (1); and the Court said (2): "It has been held uniformly that the illegality or unconstitutionality of a State or municipal tax or imposition is not of itself a ground for equitable relief in the Courts of the United States." The aggrieved party must accept his remedy at law unless he allege facts which bring the case under some recognized head of equitable jurisdiction (*Dows* v. *Chicago* (3)).

The case of *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (4) does not conclude the question in this case. That case establishes the right of an Attorney-General to sue in respect of a tort done (or to be done) to residents of his State; whereas the question here is, is there any tort—is there any cause of action which justifies either an injunction or a declaration? Unfortunately, too much stress has been laid in the argument on the position of the Attorney-General.

But I shall now assume that there is a cause of action, and address

(1) 213 U.S., 276.
(2) 213 U.S., at p. 282.
(3) 11 Wall., 108.
(4) 6 C.L.R., 469.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Higgins J.

myself to the construction and effect of the Commonwealth Act and of the Queensland Act.

The only ground on which it was finally urged in this case that the Queensland Act was invalid was that it violated the provisions of sec. 52B of the *Commonwealth Inscribed Stock Act* 1911-1918. There was no attempt made to apply the doctrines laid down in the United States decisions, such as *Weston* v. *Charleston City Council* (1); and I shall therefore confine myself to the effect of sec. 52B. Mr. *Latham*, speaking for the State of Queensland and its Commissioner, urged that the Queensland Act did not infringe sec. 52B. That section provides: "The interest derived from stock or Treasury bonds shall not be liable to income tax under any law of the Commonwealth or a State" (unless in a certain contingency which has not happened). What the Queensland Act does is this: it imposes a progressive tax on property income over £200, beginning (as to income from property) with $12\frac{4}{10}$d. on £1, and increasing by $\frac{4}{10}$d. with every £1 till the income is £3,000, and then the rate is 2s. in the £1 (sec. 7 (1) (ii.) and (iv.)). The tax on incomes of £4,000 is 2s. 6d. in the £1. As I understand, a man having £1,000 ordinary income would have to pay 1s. 4d. in the £1; and if he had £3,000 income he would have to pay 2s. in the £1. By sec. 12 all income from stock, &c., of the Commonwealth is expressed to be "exempt from income tax"; but by sec. 7 (12) the exempt income is to "be taken to be part of the taxpayer's gross income, and shall be included in the taxpayer's return; and the rate of tax shall be calculated as if the amount so exempted were part of his taxable income." In effect, the man is ostensibly taxed on his ordinary income only, but at a rate which is increased because he has the interest from the Commonwealth stock. In the instance put, his tax is increased, by reason of his having the Commonwealth stock, from £66 8s. to £300. It is urged, however, that this device is not an infringement of the Commonwealth Act—that there is no tax on the Commonwealth interest, that the tax on the ordinary income is merely increased because the man has Commonwealth interest; and reliance is placed on United States decisions, and in particular on the recent case of *Maxwell* v. *Bugbee* (2).

(1) 2 Peters, 449.

(2) 250 U.S., 525.

That case was a decision of five Justices, four dissenting. It did not turn on the construction of an Act such as the Queensland Act, but on the effect of certain peculiar provisions of the United States Constitution. A deceased person had resided in the district of Columbia, had property in Idaho and also in New Jersey. Under a graduated inheritance tax of New Jersey, the tax was to be ascertained on the entire estate as if the deceased were a resident of New Jersey, with all his estate there; and the tax was assessed in the proportion that the taxable New Jersey estate bore to the entire estate. The objections taken were (1) that the tax infringed art. IV. (2), par. 1, of the Federal Constitution—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States"; and the Fourteenth Amendment as to "privileges and immunities of citizens of the United States"; (2) that it infringed the Fourteenth Amendment by depriving a person of property "without due process of law"; (3) that it infringed the same Amendment by denying to a non-resident "the equal protection of the laws." It was held that "equal protection of the laws" did not mean absolute equality in taxation, but involved equal operation of the laws upon all persons in like circumstances. The learned Justices who constituted the majority declared that in order to invalidate the tax there must be such difference in the manner of assessing transmission of property, as between resident and non-resident decedents, as is "wholly arbitrary and unreasonable" (1). The Justices who constituted the minority thought that "when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used" (2). It is enough for us to say that we have not to apply such constitutional provisions as were the subject of discussion in that case; we have to construe and apply sec. 52B of the *Commonwealth Inscribed Stock Act*.

This is a mere question of construction of that section. I quite recognize that to avoid a breach of the law is not to break the law: that a shipowner can avoid harbour dues by landing his goods a few yards outside the boundary; and that a man can avoid turnpike tolls by driving through his own field instead of through the

(1) 250 U.S., at p. 542. (2) 250 U.S., at p. 544.

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Higgins J.

turnpike gate (see *Maxwell*, 5th ed., p. 199). Unless sec. 52B forbids that which the Queensland Act has done, or purported to do, the Queensland Act is valid. I have stated the words of sec. 52B, so far as material. The words used are not technical; they are words of popular phraseology, elliptically expressed. When it is enacted that "the interest derived from stock . . . shall not be liable to income tax," the interest itself, of course, cannot pay, or be liable to pay, anything. The taxpayer is liable, and may be sued. Income tax—at all events under this Queensland Act—is not deducted from each item of income, is not even charged on any specific item of income; it is a general, personal liability of the taxpayer, payable in respect of the annual amount of the incomes of all persons from all sources (sec. 7 (1)). The words of sec. 52B are not that the interest from the stock is not to have income tax charged "out of" it or "on" it: and they must mean that the taxpayer who gets interest from the Commonwealth stock shall not be liable to pay income tax in respect of that interest, or to pay more income tax than he would otherwise pay by reason of that interest. Sec. 52B, as well as secs. 52A and 52C, between which it appears, is obviously designed to make the stock more attractive to investors, more marketable; and we should give the words such a construction as will be consistent with this design, if the words will fairly bear the construction. But I confess that I am wholly unable to paraphrase the words of sec. 52B otherwise than as saying that taxpayers are not to have their assessment increased by reason of their having Commonwealth stock.

Mr. *Latham* has also urged that the section is beyond the powers of the Commonwealth Parliament. As to this point, I have no doubt. The Parliament has power to make any laws for the peace, order and good government of the Commonwealth "with respect to . . . borrowing money on the public credit of the Commonwealth" (sec. 51 (IV.)); and this is a law prescribing the terms on which the borrowing is to be made. The position which I take is expressed in *R.* v. *Licensing Court of Brisbane*; *Ex parte Daniell* (1), as to the Commonwealth law forbidding a poll for any State purpose on the day for Federal elections. The Commonwealth Parliament can

(1) 28 C.L.R., at p. 32.

make such laws as it thinks fit with respect to its own borrowing; and just as it can, under the defence power, isolate specified ground from the intrusion of the public, so it can under the borrowing power, isolate its stock from State taxation.

I am of opinion that this taxation Act is invalid so far as it purports to increase the tax because of the interest on Commonwealth stock.

GAVAN DUFFY AND STARKE JJ. The *Income Tax Acts* of Queensland impose a tax in respect of the annual amount of the incomes of all persons, but declare that income arising or accruing from debentures, stock, bonds, &c., issued by the Government of the Commonwealth of Australia shall be exempt from such tax (see secs. 7 and 12).

The question in this case turns upon the provision contained in sec. 7, sub-sec. 12, of the Act. It is, so far as material, as follows: "The amount of the taxpayer's income which is exempt from tax . . . shall . . . be taken to be part of the taxpayer's gross income, and shall be returned in the taxpayer's return; and the rate of tax shall be calculated as if the amount so exempted were part of his taxable income." The effect of this provision is clear. No tax is imposed upon a person in respect of the exempted income. His rate of tax, it is true, is increased on other income (if any) by reason of the fact that he also has exempted income. It might have been increased by reason of any number of circumstances, but we apprehend that it could not then be rightly said that the person was taxed in respect of that circumstance, and not in respect of the income upon which he was compelled to pay a higher rate. Illustration may be given of the effect of the section. A person residing in Queensland has £1,000 income from Commonwealth Government stock and has no other income. No tax is imposed upon him under the Queensland Act. Another person has £1,000 income; £500 from Commonwealth Government stock, and £500 from other sources. The income from the stock is expressly exempted from income tax, but sec. 7, sub-sec. 12, fixes the rate of tax on the rest of his income at a rate appropriate to his whole

H. C. OF A. 1920.

THE COMMONWEALTH v. STATE OF QUEENSLAND.

Gavan Duffy J. Starke J.

income, and he must pay tax only on £500 but at a rate of so much in the pound as is prescribed for an annual income of £1,000.

It is said that the provisions of sec. 7, sub-sec. 12, of the Queensland Act contravene the provisions of the *Commonwealth Inscribed Stock Act* 1911-1918, sec. 52B. Apart from this Act there can be no doubt of the power of Queensland to arrange the incidence of its taxes in any way its thinks proper. This constitutional power should not be denied unless the enactment of a superior authority contains clear words or a necessary implication to the contrary. The Commonwealth Act, sec. 52B, is elliptical. An income tax, as generally understood, is imposed upon persons in respect of income, but the section provides that the interest derived from stock, &c., shall not be liable to income tax under any law of the Commonwealth or a State. It must be understood in the sense that no person shall be liable to income tax in respect of interest derived from any stock, &c., under any law of the Commonwealth or a State. The meaning of the section then seems clear and unambiguous. The learned counsel for the Commonwealth contends, however, that the section is but a compendious expression meaning that the receipt of interest from Government stock shall not be the occasion or condition of paying income tax. This is a very free rendering of sec. 52B, and is unwarranted, in our opinion, by the words actually used.

Mr. Justice *Starke* concurs in the opinion of the majority of the Court that sec. 52B is within the constitutional power of the Commonwealth.

The action should, in our opinion, be dismissed.

Judgment for plaintiffs for declaration as asked, with costs.

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

Solicitor for the defendants, *W. F. Webb*, Crown Solicitor for Queensland, by *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.