[HIGH COURT OF AUSTRALIA.]

THE KING AND THE MINISTER OF STATE FOR THE COMMONWEALTH ADMINISTERING THE CUSTOMS . . . } PLAINTIFFS;

AND

BARGER . . . . . DEFENDANT.

THE COMMONWEALTH AND A. W. SMART, COLLECTOR OF CUSTOMS . . . . } PLAINTIFFS;

AND

McKAY . . . . . DEFENDANT.

Commonwealth legislation, validity of—Form of Act—Substance of Act—Motive and object of legislation—Direct and indirect effect—Power of taxation—Method of discrimination—Interference with domestic affairs of State—Implied prohibition—Regulation of conditions of labour—Excise Act dealing with other matters—Discrimination—Preference—Excise Tariff 1906 (*No.* 16 *of* 1906)—*The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51, 55, 90, 99.

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MELBOURNE, *March* 4, 5, 6, 9, 10, 11, 12, 13, 14; *June* 26.

Griffith C.J., Barton, O'Connor, Isaacs and Higgins JJ.

In determining whether a particular law is or is not within the power of th Commonwealth Parliament to enact, regard must be had to its substance rather than to its literal form.

The circumstance that an indirect effect may be produced by the exercise of an admitted power of legislation is irrelevant to the question whether the legislature is competent to prescribe the same effect by direct law. So are the motive which actuated the legislature and the ultimate end desired to be attained.

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So long as the limits of the power of taxation are not transgressed, Parliament may select the persons or the things in respect of which the exercise of power is to operate.

If the control of the domestic affairs of the States is in any particular forbidden by the Constitution, either expressly or by necessary implication, the power of taxation cannot be exercised so as to operate as a direct interference with those affairs in that particular.

The selection of a particular class of goods produced in Australia for taxation by a method which makes the liability to taxation dependent upon conditions to be observed in the industry in which they are produced is as much an attempt to regulate those conditions as if the regulation were made by distinct enactment.

The *Excise Tariff* 1906 (No. 16) is not an Act imposing duties of Excise, but is an Act to regulate the conditions of manufacture of agricultural implements, and is therefore not an exercise of the power of taxation conferred by the Constitution.

Even if it were otherwise within the competence of the Commonwealth Parliament to deal with the conditions of labour, the *Excise Tariff* 1906 (No. 16), which, if invalid, would have the effect of regulating the conditions of manufacture, would be invalid as dealing with matters other than duties of Excise contrary to sec. 55 of the Constitution.

Even if the term "taxation," uncontrolled by any context, were capable of including the indirect regulation of the domestic affairs of the States by means of taxation, its meaning in the Constitution is limited by the implied prohibition against direct interference with matters reserved exclusively to the States.

The *Excise Tariff* 1906 (No. 16), if otherwise valid, is invalid on the ground that it authorizes discrimination, and therefore discriminates, between States or parts of States within the meaning of sec. 51 (ii.) of the Constitution, and authorizes the giving, and therefore gives, preference to one State or a part thereof over another State or a part thereof within the meaning of sec. 99 of the Constitution.

Held, therefore (*Isaacs* and *Higgins* JJ. dissenting), that the *Excise Tariff* 1906 (No. 16) is invalid.

Per Isaacs and *Higgins* JJ. :—1. The powers substantively granted to the Commonwealth by the Constitution may be exercised to their utmost extent and in as plenary a manner as if the Commonwealth were a unitary State, subject only to the express limitations found in the Constitution itself and [*per Isaacs* J.] to the necessary freedom of the States to exercise without interference the powers reserved to them.

2. Commonwealth powers are not to be limited by first assuming the extent of State powers. The reserved powers of the States are those which remain after full effect is given to the powers granted to the Commonwealth, and cannot control the extent of those constitutional grants.

3. If a legislative power is once granted, neither its abuse, nor its consequences, nor any purpose, motive, or object of the legislature can render its exercise illegal; any remedy for abuse, so long as the limits of the power are not exceeded, must rest with the electors and not with the Court.

4. The objections raised to the validity of the *Excise Tariff* 1906 (No. 16) on the ground alleged that it in substance regulates conditions of remuneration of labour, are in reality objections based on abuse of power, consequences, and the purpose, motive, and object of Parliament, and are therefore beyond the competency of the Court to entertain.

5. Compulsory contribution to the consolidated revenue, demanded irrespective of any legality or illegality in the circumstances upon which the liability depends, is taxation.

6. Pecuniary penalty, imposed as a punishment for an unlawful act or omission, is regulation.

7. The *Excise Tariff* 1906 (No. 16) should be construed according to the natural meaning of the language used by the legislature, and should not be turned by an argument of equivalence of effect into an enactment of a totally different character.

8. Properly construed the Act imposes taxation upon implements which are not in fact manufactured under described conditions to be ascertained in prescribed modes, but does not render any conditions unlawful. It is consequently not a regulative Act which a State could pass in the same terms, but an exercise of the power of Excise taxation, and, if passed by a State legislature, would be invalid.

9. As the Act merely imposes Excise taxation, sec. 55 of the Constitution is not contravened.

10. The proviso does not discriminate between localities at all, but describes standards applicable to Australia generally, irrespective of its division into States or parts of States, and does not offend against the prohibition contained in sec. 51 (ii.) of the Constitution.

Per Isaacs J.:—The discrimination forbidden by sec. 51 (ii.) of the Constitution is between localities considered and treated as States and parts of States, and not as mere Australian localities or parts of the Commonwealth considered as a single country.

DEMURRERS.

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An action was brought by His Majesty the King and the Minister of State for the Commonwealth administering the Customs against William Gabriel Barger wherein the statement of claim alleged that the defendant, a manufacturer of agricultural implements, on the 8th, 9th and 10th January 1908, manufactured in Melbourne certain specified implements, being "stump jump ploughs," and "cultivators other than disc cultivators"; that such implements were dutiable goods specified in the Schedule to the *Excise Tariff* 1906 (No. 16), and were not manufactured under any of the conditions as to the remuneration of labour specified in the proviso to sec. 2 of that Act; that the implements were not manufactured pursuant to the provisions of the *Excise Act* 1901; and that the defendant manufactured the implements specified without having obtained a licence to manufacture from the Collector of Customs pursuant to the *Excise Act* 1901, and without having a licence to manufacture in force in any State on the days mentioned, or at all. The plaintiffs jointly and severally claimed a penalty in respect of each of the implements specified.

The defendant demurred to the whole of the statement of claim, and the demurrer was set down for hearing before the Full Court, the question being whether the *Excise Tariff* 1906 (No. 16) was valid.

Another action was brought by the Commonwealth and Archibald William Smart, Collector of Customs for the State of Victoria, for and on behalf of the Commonwealth, against H. V. McKay and in the statement of claim it was alleged that the defendant, a manufacturer of agricultural implements, had on and between 1st January 1907 and 8th November 1907 manufactured certain stripper harvesters of which the defendant was the owner; that all the implements were dutiable goods specified in the Schedule to the *Excise Tariff* 1906 (No. 16), and were not manufactured under any of the conditions as to the remuneration of labour specified in the proviso to sec. 2 of that Act; and that the defendant had not paid the duties of Excise imposed in respect of such implements by the *Excise Tariff* 1906 (No. 16), and still refused to do so.

The plaintiffs jointly and severally claimed £20,000, the amount of the Excise duties payable in respect of such implements.

The defendant demurred to the whole of the statement of claim, and the demurrer was set down for hearing before the Full Court, the question being the same as that in the first mentioned action.

Both the demurrers were heard together.

The State of Victoria obtained leave to intervene in both cases.

Mitchell K.C. and *Glynn*, for the defendant Barger. The question whether these goods are exciseable or not depends upon whether the *Excise Tariff* 1906 (No. 16) is valid or not. Although the Act on its face purports to be an exercise of the power of taxation, it is not so. The real substance and effect of the Act must be looked at in order to determine what is the nature of the Act: *Tucker's Constitution of the United States* vol. I., p. 465; *Lefroy's Legislative Power in Canada*, p. 416; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1); *Russell* v. *The Queen* (2).

[ISAACS J. referred to *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (3).]

Regard must be had to the "substance and not the form": *Deakin* v. *Webb* (4); *Pollock* v. *Farmers' Loan and Trust Co.* (5); *Fairbank* v. *United States* (6). That this principle only applies to the case of State Acts, as seems to be stated in *McCray* v. *United States* (7), is not borne out by the other American cases.

[GRIFFITH C.J. — That case is perfectly consistent with *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1).]

The object sought to be obtained by this Act is not to impose taxation, but to compel observance of the conditions under which exemption from taxation is purported to be given, that is to say, it is legislation with respect to the conditions and remuneration

(1) (1896) A.C., 348.
(2) 7 App. Cas., 829., at p. 839.
(3) (1902) A.C., 73, at p. 77.
(4) 1 C.L.R., 585, at p. 611.
(5) 157 U.S., 429, at p. 581.
(6) 181 U.S., 283, at p. 296.
(7) 195 U.S., 27, at p. 59.

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of labour. The Commonwealth Parliament has no power to legislate directly with respect to the conditions and remuneration of labour—except so far as limited power is given under the conciliation and arbitration clause of sec. 51 of the Constitution, and this Act is an attempt to legislate indirectly in that respect. It is established in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1) that, even as regards inter-state traffic, the power of the Parliament does not extend to regulating the terms and conditions of employment.

[HIGGINS J.—I do not think that case bears on the present case.]

This case is much stronger because this Act does not even relate to inter-state trade and commerce. The exclusive power of the Commonwealth Parliament to impose duties of Excise does not cover the imposing of a licence fee on the carrying on of a certain business: *Peterswald* v. *Bartley* (2). That case is also an authority for the proposition that, for the purpose of determining whether an Act is invalid, the real substance and effect of the Act must be looked at. This Act may be paraphrased so as to make it a prohibition against carrying on a certain business without paying certain wages under a penalty of paying certain duties.

[HIGGINS J.—It is admitted that Commonwealth legislation may interfere with State action, and conversely. At what point is such interference a trespass? Would you go the length of saying that no conditions can be imposed upon the payment of Excise?]

It may be that conditions as to something in respect of which the Commonwealth Parliament has power to legislate may be imposed. But the question can only be answered satisfactorily in a concrete case. In *Attorney-General for Quebec* v. *Queen Insurance Co.* (3), it was held that an Act which purported to be a licensing Act was not in substance a licensing Act but was a stamp Act, and was therefore *ultrâ vires* the provincial legislature.

(1) 4 C.L.R., 488, at pp. 539, 544. (2) 1 C.L.R., 497, at p. 507.
(3) 3 App. Cas., 1090.

This Act is not a taxing Act. This is quite a novel form of legislation, and, if held to be valid, will give to the Commonwealth Parliament complete control over everything which was intended to be reserved to the States. Under the guise of a taxing Act with exemptions the Commonwealth Parliament could control the whole of the business and social relations of the people of the Commonwealth, and the provisions of the Constitution intended to reserve to the States the right of managing their internal affairs, would be worthless. It imposes a penalty on persons who do not comply with certain conditions. The words of the Act purport to give to certain designated persons the widest power of control over the conditions as to the remuneration of labour, and even those powers are apparently not wide enough to carry out the intention of the Parliament, for it has been found necessary to enact the *Excise Procedure Act* 1908. The latter Act indicates the intention of the *Excise Tariff* 1906 (No. 16).

[HIGGINS J.—*The Customs Tariff* 1906, passed on the same day should also be looked at. The object of Parliament was that protection should not be given to certain industries unless the workers are benefited.]

That Act strengthens the argument that the *Excise Tariff* 1906 (No. 16) is not a taxing Act.

[ISAACS J.—Supposing an Act purported to give a bounty on a condition that fair wages were paid, would it be valid ?]

Not if the condition were similar to that in this Act.

[ISAACS J.—If the Commonwealth Parliament cannot validly enact this Act, then could not a State Parliament enact it ?]

A State Parliament cannot by means of a penalty, viz., an Excise duty, as to which it has no power of legislation, attempt to enforce legislation which it has power to enact. In *Helwig* v. *United States* (1), what a federal Statute described as a "further duty" was held to be a penalty. See also *Lefroy's Legislative Power in Canada*, p. 423, citing *Tai Sing* v. *Maguire* (2); *Bentham's Works*, vol. I., p. 394.

[HIGGINS J. referred to *Bryce's American Commonwealth*, 3rd ed., vol. I., p. 331, citing *Ho-Ah-Kow* v. *Nunan* (3).

(1) 188 U.S., 605.
(2) 1 B.C. (Irving), 101.
(3) 5 Sawyer (Circuit Court Rep.), 552.

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As to the validity of protective duties legislation, see *Cooley's Principles of Constitutional Law*, 3rd ed., p. 58.

[HIGGINS J. referred to *Story's Commentaries*, pars. 958 *et seq.*]

If this be a taxing Act, it is not within the power of taxation given to the Commonwealth Parliament. That power is not unlimited, but it is limited to federal taxation for federal purposes: *Municipal Council of Sydney* v. *Commonwealth* (1).

[GRIFFITH C.J.—That statement was made *alio intuitu*.]

In the United States Congress has not power to tax for those purposes which are within the exclusive province of the States: *Gibbons* v. *Ogden* (2); *M'Culloch* v. *Maryland* (3); *Slaughter-House Cases* (4); *Civil Rights Cases* (5); *Peterswald* v. *Bartley* (6).

The Commonwealth Parliament can only tax existing things, and cannot legislate so as to produce a class and then tax that class, at any rate when that class is produced by enacting something as to which the Parliament has no power. Congress cannot authorize a trade or business within a State in order to tax it: *Licence Tax Cases* (7). Here the tax is upon something which is to be ascertained by machinery created by the Act. See *Pollock* v. *Farmers' Loan and Trust Co.* (8); *McCray* v. *United States* (9).

[ISAACS J.—What is taxed is an implement solely.]

No. An implement which is not made in accordance with certain conditions to be fixed under the Act.

[HIGGINS J.—*Primâ facie*, the implement is to be taxed, and the manufacturer must bring himself within the exemption in order to escape taxation.]

It must be shown that the person from whom the tax is sought to be recovered is liable. At the moment the thing is manufactured it is uncertain whether it will be liable to the tax. That can only be known when application is made for a certificate under the Act. If the thing is exciseable the manufacturer requires under sec. 35 of the *Excise Act* 1902 a licence to

(1) 1 C.L.R., 208, at p. 232.
(2) 9 Wheat., 1, at p. 199.
(3) 4 Wheat., 316, at p. 423.
(4) 16 Wall., 36, at p. 78.
(5) 109 U.S., 3.
(6) 1 C.L.R., 497, at p. 507.
(7) 5 Wall., 462, at p. 470.
(8) 157 U.S., 429.
(9) 195 U.S., 27, at p. 43.

manufacture it, but if the manufacturer afterwards get a certificate, no licence is necessary.

The Act either discriminates between States or parts of States, within the meaning of sec. 51 (ii.) of the Constitution, or it enables the Courts or persons designated by it so to discriminate, in either of which cases the Act is invalidated. The Courts or persons designated may make declarations as to what are reasonable wages, and these may vary in different States or in different parts of a State, and according as the declarations vary they will discriminate between States or parts of States.

[HIGGINS J.—If a power may be applied validly and may also be applied invalidly, the power is good. *Slark* v. *Dalcyns* (1).]

Under the conditions which naturally exist in the Commonwealth it is impossible not to discriminate.

[ISAACS J.—As to the meaning of "discriminate" see *Colonial Sugar Refining Co.* v. *Irving* (2).]

The giving to designated persons a power to discriminate is the same thing as if the Act itself discriminated, for the decisions of the designated persons might be considered to be set out in a Schedule to the Act.

[HIGGINS J.—The discrimination, if any, which is authorized by the Act is not between States or parts of States but between individuals.

GRIFFITH C.J.—It is discrimination between localities, which is the same thing as between parts of States.

O'CONNOR J.—It is discrimination according to the circumstances under which each manufacturer carries on his business.]

The tribunal might, in determining what are fair wages, take into consideration the cost of living, and that must vary in different parts of the Commonwealth.

[ISAACS J.—A tax of £1 per head on all horses in the Commonwealth would not be a discriminating tax. Would an *ad valorem* tax on all horses in the Commonwealth be discriminating?]

No. It is a tax on the value of horses. Here there is power to fix the remuneration of labour without any criterion being given as to how it is to be fixed. The Act is altogether uncertain.

Sec. 55 of the Constitution invalidates the whole Act, for its

(1) L.R. 10 Ch., 35 at p. 39. (2) (1906) A.C., 360.

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parts are not severable. Although a taxing Act may include means of calculation, it cannot include a provision for determining what is the article to be taxed.

The power of taxation granted to the Commonwealth Parliament does not authorize the impairment of the power reserved to the States to regulate wages. Any presumption in this matter is in favour of the States from which the Commonwealth was created, and in which is the reserved power. To say that this Act is valid would be to defeat the object of federation. Other Acts that are invalid for the same reasons that this is are the *Excise Tariff* 1906 (No. 20) and the *Australian Industries Preservation Act* 1906. The object in giving powers to the Commonwealth was uniformity —to have one rule instead of several. But there cannot be uniformity as to wages and conditions of labour throughout the Commonwealth. Looking at secs. 89-95 of the Constitution as well as at its spirit, Excise duties, equally with Customs duties, must be uniform. This Act does not impose uniform duties of Excise because it discriminates between the manufacturers of the particular goods. A tax upon harvesters must be upon all harvesters of the same kind. See *Miller on the Constitution of the United States*, p. 240; *Tucker's Constitution of the United States*, vol. I., p. 463. The power of taxation of the Commonwealth does not extend to destroy the effect of Acts of the Parliaments of the States which are within their exclusive powers. See *D'Emden* v. *Pedder* (1); *Pollock* v. *Farmers' Loan and Trust Co.* (2); *Loan Association* v. *Topeka* (3).

[HIGGINS J. referred to *State Tax on Railway Gross Receipts* (4).]

If powers are not expressly granted, or if they are not necessary for the exercise of a power expressly granted to the Commonwealth, the presumption is that those powers remain in the States. "Uniform" in reference to a duty means that there must be one rate; to "discriminate" means to exempt persons in one part of the Commonwealth from a burden which is to be borne by those in another part.

[GRIFFITH C.J. referred to *Melbourne, Mayor &c. of* v. *Attorney-General for Victoria* (5).]

(1) 1 C.L.R., 91, at p. 111.
(2) 157 U.S., 429, at p. 599.
(3) 20 Wall., 655.
(4) 15 Wall., 284, at p. 293.
(5) 3 C.L.R., 467; s.c. *sub nom. Attorney-General for Victoria* v. *Melbourne Corporation*, (1907) A.C., 469.

[Counsel also referred to:—*May's Parliamentary Practice*, 11th ed., p. 545; *Quick & Garran's Australian Constitution*, p. 550; *Cooley on Taxation*, p. 260; *Mugler* v. *Kansas* (1); *Henderson* v. *Mayor New York* (2); *Minnesota* v. *Barber* (3); *Walling* v. *Michigan* (4); *Tiernan* v. *Rinker* (5); *Scott* v. *Donald* (6); *Tucker's Constitution of the United States*, vol. I., p. 465; *Prentice's Federal Powers over Carriers and Corporations*, p. 54; *Cooley's Constitutional Limitations*, 6th ed., p. 206.]

Irvine K.C. (with him *Coldham*), for the defendant McKay. This Act, when its true nature and character are considered, is not within the power of the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth. In dealing with the fundamental elements of a Constitution the Court is entitled to look at the circumstances and history in which the federal compact has been brought about. Nothing could have been further from the minds of those who brought about this union, or of those who sanctioned it, than that the power of taxation would be used, or was capable of being used, for the purpose of enabling the Commonwealth Parliament to completely usurp the field of State functions. Another principle that applies to the strict interpretation of such a Constitution as this is that the Court will test any claim to legislative power by the logical conclusions to be drawn from its exercise if carried to an extreme point. If this legislation were valid, then legislation by a State Parliament to control by taxation and exemption matters over which the Constitution gives exclusive power to the Commonwealth would equally be valid. The Commonwealth Parliament might, by imposing a tax on fishermen, with an exemption of those who use nets having a mesh above a particular size, control fisheries within the territorial limits of the States, though the power of the Commonwealth is by sec. 51 (x.) of the Constitution limited to Australian waters beyond territorial limits. Or, by putting a tax on gold won in mines with an exemption in favour of mines which used some specified machinery, the Commonwealth Parliament might

(1) 123 U.S., 623, at p. 661.
(2) 92 U.S., 259, at p. 268.
(3) 136 U.S., 313, at p. 319.
(4) 116 U.S., 446.
(5) 102 U.S., 123.
(6) 165 U.S., 58, at p. 92.

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compel all mines to use that machinery or shut down. Or the Commonwealth Parliament might impose an income tax or a poll tax, with a proviso that the Act should not apply to those who proved that they had in a particular year attended so many services of a particular church, and might thereby impose a religious observance notwithstanding the prohibition contained in sec. 116 of the Constitution.

Does Parliament express and endeavour to enforce a desire that manufacturers shall pay good wages or a desire to induce them not to pay good wages? In other words, does Parliament wish to make manufacturers pay good wages or to raise revenue from those who do not pay good wages?

[HIGGINS J.—But the legislation for the prohibition of the opium trade is valid: *Black's Constitutional Law*, p. 341; *Ex parte Rapier* (1)].

That class of legislation is to be justified only under the power as to external trade and commerce. There is no case in which the mere prohibition of something, the regulation or control of which lies within the exclusive domain of State legislation, has been held to be *intra vires*. If it is a direction of this Act that these manufacturers shall pay certain wages, then it is a regulation of the conditions of labour in the trade, and, if it be inconsistent with any regulation made by a State Parliament, the former, if valid, would prevail. In ascertaining the character of an Act its purpose and object may be looked at. *Morgan's Steamship Co.* v. *Louisiana Board of Health* (2); but the face of the Act only can be looked at to see what is its purpose and object.

The Commonwealth Parliament can tax any person and any thing; and it can divide persons and things into classes for the purpose of taxation. But the moment the particular *discrimen* for distinguishing between one class and another in itself involves a regulation of conduct which is within the exclusive power of the State legislature, the Commonwealth legislation is invalid.

[HIGGINS J.—How is that principle reconcilable with the decisions as to legislation for the suppression of lotteries?]

(1) 143 U.S., 110. (2) 118 U.S., 455, at p. 462.

The validity of that legislation rests exclusively and absolutely on the power of the Commonwealth Parliament to deal with services performed by it, *e.g.*, the post office service: *The King* v. *Arndel* (1).

Having arrived at what is the real thing the Commonwealth Parliament wishes to effect by this Act, it is not open to say that one of its incidental effects is to benefit one class to the disadvantage of another, and to create a protective system. The proposition on which the validity of protective legislation rests is that the motive which induces Parliament to exercise its legislative power cannot be inquired into. It is a fallacy, however, to argue that, because Parliament can enact protective legislation, that is therefore a new power upon the basis of which other new powers may be created. See *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (2).

[BARTON J., referred to *Ex parte Rapier* (3)].

In *Passenger Cases* (4), it was pointed out that there were two realms of legislative authority marked out by the United States Constitution, each exclusive of the other, and it was held that an Act of Congress, which in effect would tax or regulate intra-state commerce, would be invalid.

[ISAACS J.—In *Grand Trunk Railway Co. of Canada* v. *Attorney-General of Canada* (5) it was held that the Dominion Parliament had power to legislate to prohibit "contracting out" by railway companies from the liability to pay damages for personal injuries to their servants, though the Provincial legislatures had exclusive power to legislate as to civil rights.]

The companies affected were those concerned in inter-state railway traffic, and it was held that the legislation in question was ancillary to railway legislation, which was within the power of the Dominion Parliament. The case depended also on the character of the demarcation between the powers of the Dominion and those of the Provinces. See *British North America Act* 1867, secs. 91, 92. In the *Lottery Case* (6) it was held that the

(1) 3 C.L.R., 557.
(2) 4 C.L.R., 488.
(3) 143 U.S., 110.
(4) 7 How., 283.
(5) (1907) A.C., 65.
(6) 188 U.S., 321, at p. 345.

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federal legislation in question was good because the carrying of lottery tickets was commerce, and that the power to regulate commerce included the power to prohibit any particular kind of commerce. The principle that the power to regulate involves the permitting the thing which may be regulated to continue does not apply to the Constitution.

[GRIFFITH C.J.—The express power given to the Commonwealth Parliament to deal with foreign and inter-state trade and commerce implies a prohibition against interfering with inter-state trade and commerce, and that must be remembered in dealing with the other powers given.]

A rule which may apply to the construction of powers as to trade and commerce may not, however, apply to the construction of powers as to taxation. The Court must read the general description of powers given to the Commonwealth subject to such implied limitations as will prevent those powers from interfering with powers given or reserved to the States.

[ISAACS J. referred to the *The Queen* v. *Burah* (1).]

Taxation is the taking of money for public purposes. See *Miller on the Constitution of the United States*, pp. 234, 242. Although the Court cannot inquire into the purpose for which taxation is imposed, yet, in order that the taxation may be valid, it must first be a getting in of money.

[ISAACS J.—The difference between a pecuniary penalty and a tax is that the former is a sum required in respect of an unlawful act, and the latter is a sum required in respect of a lawful act.]

That would not be a sufficient definition of a tax so as to determine the scope of taxation under sec. 51 of the Constitution. If an Act according to its true nature involves the enforcement of the payment of money under certain circumstances, that may either be a tax or a penalty. If on the face of an Act the payment of money is merely intended as a sanction to an obligation no expression of a wish, then in effect it is a penalty. See *Loan Association* v. *Topeka* (2). The words "for the peace, order, and good government of the Commonwealth" in sec. 51 of the Constitution do not enlarge the powers granted by that section, but are only words of geographical limitation. See *Illinois Central*

(1) 3 App. Cas., 889, at p. 904. (2) 20 Wall., 655, at p. 664.

Railway Co. v. *Decatur* (1); *Cooley on Taxation*, pp. 9, 14; *Ex parte Burnett* (2).

[ISAACS J. referred to *Cooley on Taxation*, pp. 188, 191.]

It is the meaning of "taxation" at the time of the inception of the Commonwealth which is material here, and the decisions in the United States before that time are to a certain extent incorporated in the Constitution, while those decisions since that time are only opinions of eminent persons. The implied limitations upon the constitutional powers are based upon principles which apply, not only to the instrumentalities of government, but also to the legislative and administrative functions of government: *M'Culloch* v. *Maryland* (3). There is great necessity for cutting down the meaning of taxation, for the wide meaning would prevent the States from legislating within their limits.

There may be some exercise of the power to grant bounties which would give rise to the same objections as exist in regard to the power of taxation. There is not, however, the same reason to limit the power to grant bounties as there is to limit the power of taxation. There is not the danger of abuse of the power to grant bounties which exists in the case of taxation, and therefore there is not the same necessity for implied restrictions. See *M'Culloch* v. *Maryland* (4). The expression by a law-giver of a wish for the observance of a certain course of conduct, coupled with a promise of reward if the wish is complied with, amounts to a command: *Austin's Science of Jurisprudence*, vol. I., p. 89.

The Commonwealth Parliament, having no power to discriminate, cannot give to its delegate such a power.

Mitchell K.C. (with him *Harrison Moore*), for the State of Victoria. As to the meaning of taxation see *Veazie Bank* v. *Fenno* (5); *Lane County* v. *Oregon* (6). The fact that an Act calls something a tax does not make it a tax. Thus in the *Head Money Case* (7) it was held that what purported to be an exercise of the power of taxation could be validly done under the power

(1) 147 U.S., 190, at p. 197.
(2) 30 Alabama, 461.
(3) 4 Wheat., 316.
(4) 4 Wheat., 316, at p. 431.
(5) 8 Wall., 533.
(6) 7 Wall., 71.
(7) 112 U.S., 580.

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as to trade and commerce. As to the case of *Slark* v. *Dakyns* (1), no general rule was there laid down with regard to all powers. See *Phipson* v. *Turner* (2); *Rous* v. *Jackson* (3).

[HIGGINS J. referred to *Farwell on Powers*, 2nd ed., p. 115.]

The rule has nothing to do with powers given by a Constitution.

Groom A-G. and *Duffy* K.C. (with them *McArthur* and *Starke*), for the plaintiffs in each case. The validity of this Act is based on sec. 51 (i.) of the Constitution. The power of taxation is, within the limits prescribed by that section, plenary and absolute. Within those limits of subjects and area the Commonwealth Parliament is supreme and has the same authority as the Imperial Parliaments would have under like circumstances: *Hodge* v. *The Queen* (4). The Parliament can select any person or any property for taxation, and any basis that it thinks fit for discriminating between classes of persons or of property. It has unlimited power as to the amount of taxation and as to the rules of evidence for determining liability to taxation. The only limits on the power of taxation are those prescribed by the Constitution either expressly or, to the extent which has been determined by this Court, by necessary implication. The limitation now sought to be placed upon the power of taxation would have the effect of preventing the Commonwealth from carrying out its purposes.

[GRIFFITH C.J.—Under the power to tax the power to select any subject for taxation, or, for that purpose, to differentiate between classes of subject matter by any means that the Commonwealth Parliament thinks fit, must be limited by the proviso that the mode of differentiation must not be one which is forbidden either expressly or impliedly by the Constitution].

It lies on the other side to prove that there is an implied prohibition against the mode of differentiation used in this Act. This mode is not forbidden by the Constitution, but is included in the power of taxation. The power of taxation being absolute in its terms, the burden is on the other side to cut it down.

(1) L.R. 10 Ch., 35.
(2) 9 Sim., 227.
(3) 29 Ch. D., 521, at p. 525.
(4) 9 App. Cas., 117, at p. 132.

[O'CONNOR J.—The Commonwealth Parliament can exercise only powers which are given to it. It must therefore be shown that the particular power exercised here is given to it.]

The only attempt which has been make to cut down the the power of taxation is by extending the principle laid down in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1) to an invasion of the legislative power of the States. The Act upon which *McCray* v. *United States* (2) was decided is on the same lines as the Act now under consideration. There oleomargarine was taxed, and its manufacture, importation and exportation were regulated by Congress, and it was held that the Act was valid.

[GRIFFITH C.J.—There the article sought to be taxed itself afforded the evidence upon which its liability to taxation was to be determined.]

The motive or purpose of an Act cannot be looked at for the purpose of determining its character. This Act is on its face an Excise Act, and the fact that its indirect affect is to interfere with the manufacture of harvesters no more affects the character of the Act than does the fact that any Excise Act, if large enough, may have the effect of prohibiting the manufacture of the article taxed affects the character of that Act.

[GRIFFITH C.J.—Sec. 51 (i.) of the Constitution confers on the Commonwealth Parliament power to regulate "trade and commerce with other countries, and among the States." That section does not give power to regulate domestic trade and commerce. That is reserved to the Parliaments of the States by sec. 107. The effect of sec. 51 (i.) and 107 together is that the regulation of domestic trade and commerce is forbidden to the Commonwealth Parliament as effectively as if it had been so stated in express words, and those sections are a prohibition against any Commonwealth Statute which is substantially a Statute to regulate domestic trade and commerce. Further, sec. 51 (ii.) must be read subject to that prohibition.]

In *McCray* v. *United States* (2), the Act dealt with was obviously intended to discourage the manufacture of oleomar-

(1) 4 C.L.R., 488.

(2) 195 N.S., 27.

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garine, but the Supreme Court of the United States made no such implication there. See also *Powell* v. *Pennsylvania* (1); *Schollenberger* v. *Pennsylvania* (2); *Ex parte Kollock* (3).

[HIGGINS J. referred to *United States* v. *Eaton* (4).]

The form and substance of an Act may be looked at to determine what power is exercised by it, but *primâ facie*, its form indicates the power which is exercised. The form of this Act is that commonly used for an Excise Act, and *primâ facie*, that is what it is. The Constitution gives to the Commonwealth Parliament power to regulate domestic trade and commerce so far as it can be brought within, or is involved in, the enumerated powers. See *Knowlton* v. *Moore* (5). As to *Attorney-General for Quebec* v. *Queen Insurance Co.* (6), although the Act there in question used the word licence, it was on its face not a licensing Act. The test was put that, if everything about licences was left out of the Act, its effect would still be the same. This Act would be meaningless if the words imposing the Excise were left out. The words of this Act are precise and unambiguous, and in themselves alone best declare the intention of Parliament: *Tasmania* v. *Commonwealth* (7). In order to say that this is not a taxing Act the Court would have to say that no revenue would be raised by it. The power of taxation is intended to be exercisable to the furthest extent to which it can be exercised. Conditions may be imposed which will induce persons to take one course rather than another: *United States* v. *De Witt* (8). See also *Story on the Constitution*, vol. II., p. 26; *Buttfield* v. *Stranahan* (9).

[GRIFFITH C.J.—In *Attorney-General* v. *Mersey Railway Co.* (10), the difference between the indirect effect of carrying out a power and dragging in other forbidden powers is pointed out.]

The Commonwealth Parliament could give a bounty making the same discrimination as exists in this Act, and bounties and exemption from taxation are the same thing. As to the argument based on the *Licence Tax Cases* (11) that the tax must be on

(1) 127 U.S., 678.
(2) 171 U.S., 1.
(3) 165 U.S., 526.
(4) 144 U.S., 677.
(5) 178 U.S., 41.
(6) 3 App. Cas., 1090.
(7) 1 C.L.R., 329, at p. 339.
(8) 9 Wall., 41.
(9) 192 U.S., 470, at p. 493.
(10) (1907) A.C., 415.
(11) 5 Wall., 462, at p. 471.

existing things, Parliament does not attempt here to impose the tax upon all persons who carry on a particular business.

In reading an Act of the Commonwealth Parliament for the purpose of determining whether it does or does not carry out the powers of the Commonwealth Parliament, the power which it purports to carry out should be looked at first, then, if the words used in the Act are fit and apt to carry out the power, the Court will not investigate the motives, aims or intention of the Parliament. It is enough to say: "There is the power. The words aptly carry it out." If in an Act of the Parliament there is a grant of what seem to be two inconsistent powers to two bodies, it may be the duty of the Court to give a limited meaning to one of them, but in the Constitution, if there is to be any limitation, it should be a limitation of the powers of the States rather than of those of the Commonwealth. Here the limitation should be on the reserved powers of the States. Sec. 51 of the Constitution rendered certain powers, which had until then been exclusively vested in the States, exercisable by the Commonwealth. Included in those powers is the power of taxation. Then by virtue of sec. 90 the power of taxation by means of Customs and Excise duties has become exclusively vested in the Commonwealth. If it is found that the power of taxation by means of Customs and Excise duties comes into conflict with those powers which are reserved to the States, why should that power, which is specifically given, be limited in order to keep whole that which is in general terms reserved? So much of power over domestic trade and commerce is reserved to the States as is not specifically given to the Commonwealth. There is no need here for a conflict of powers. A taxing Act by its nature cannot come into conflict with any Act of a State which regulates domestic trade and commerce, for no taxing Act enacts anything as to conduct—what a man must do or abstain from doing—beyond enacting that he shall pay money.

[GRIFFITH C.J.—The grant of power by sec. 51 (i.) of the Constitution, taken with the reservation of powers to the States by sec. 107, is a denial of the power of the Commonwealth Parliament to interfere with domestic trade and commerce, except so

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far as is necessary to carry into effect the powers specifically given to the Commonwealth.]

The power given as to taxation is not expressly limited except as to discriminations. Taxation means nothing more or less than raising money which is to be applied to the public service. The motive or expressed object of the taxation is immaterial. There is no distinction between the direct and the indirect results in such a case. In the Canadian cases the language was examined for the purpose of seeing what power had been exercised. So here, the only question is, is the language used appropriate to impose taxation. In *McCray* v. *United States* (1) the fact that language appropriate to impose taxation was accompanied by language appropriate to affect matters over which Congress had no power, was held not to render the Act any the less an exercise of the power of taxation.

[GRIFFITH C.J.—Has not a State the power to pass legislation having precisely the same result, not only indirectly, but also directly, as this Act ?]

Yes. Further, a State Parliament can directly prohibit a manufacture, but the Commonwealth Parliament cannot. It is further said that this tax is used as a penalty, but that can be said of every case where there is a general tax with exemptions. There is nothing in the Constitution suggesting that the particular *discrimen* or diacritical mark used here cannot be used. The *discrimen* is only used by way of description, and the words of description do not exercise a power which interferes with a power reserved to the States. A taxing Act such as this does not command anything as to domestic trade and commerce, and therefore does not interfere with the reserved power of the State. Even if the power to tax is to be limited so as not directly to interfere with domestic trade and commerce, there is no interference unless there is a distinct usurpation of legislative power and that is not the case here. This Act is a strong inducement to manufacturers to take a certain course, but it is not a command. The States Parliaments might immediately prohibit that course being taken. The proper test as to an interference is, does the Act which is challenged give a command which is or

(1) 195 U.S., 27.

may be inconsistent with a command of the State as to something within the exclusive power of the State? That the Act may have a tendency to prevent persons from following the command of the State is immaterial. In *Peterswald* v. *Bartley* (1) an Excise duty is defined as "a duty analogous to a Customs duty imposed upon goods either in relation to quantity or value when produced or manufactured." This Act imposes an Excise duty within the meaning of that definition, and, even if it does not, the tax imposed is one which the Commonwealth Parliament has power to impose.

The discrimination referred to in sec. 51 (ii.) of the Constitution must be discrimination between two States or between part of one State and part of another State. The object is that one State shall not benefit at the expense of another, not uniformity. See sec. 51 (iii.) The discrimination which is prohibited must be on the ground of locality, must be made by the Act which is challenged, and must appear on the face of the Act itself which is challenged. It is not sufficient that the result of the Act is to discriminate. There is no discrimination if the same rule is applied to the whole of the Commonwealth.

[ISAACS J. referred to the *Head Money Case* (2).]

The fact that the rule may operate differently in different localities does not create a discrimination. If there is any discrimination in this Act, it is between persons and not between States and parts of States. If any one of the conditions under which exemption may be obtained is valid, or if none is valid, the Act will stand. The fact that one means of obtaining exemption from the tax is bad, or that all those means are bad, does not invalidate the Act. The conditions of exemption are severable from the rest of the Act.

Mitchell K.C. in reply. As to the last argument, the effect of altering the conditions of exemption is to alter the whole character of the legislation. The Act is not severable: *Pollock* v. *Farmers' Loan and Trust Co.* (3). For the purpose of seeing whether the exercise of a power is valid the inquiry is, not what

(1) 1 C.L.R., 497, at p. 509. (2) 112 U.S., 580.
(3) 158 U.S., 601, at p. 635.

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has been done under the exercise of the power, but what may be done under it: *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1); *Toronto Corporation* v. *Bell Telephone Co.* (2). As showing the true nature and character of this Act, the use in sec. 2 (*a*) of the words "fair and reasonable" shows that the intention of the Parliament was to bring about fair and reasonable conditions of employment, and not to raise revenue from taxation. That is also borne out by the reference to the *Commonwealth Conciliation and Arbitration Act* 1904.

The object and aim disclosed on the face of the Act is one of the materials to be considered in determining the true nature and character of the Act. The Act is not an exercise of the power of taxation given by sec. 51 (ii.) of the Constitution because, (*a*) what are termed duties of Excise in sec. 2 of the Act are really burdens imposed as a sanction to enforce the carrying out of what the Act really aims at, viz., the regulation of domestic industry so far as the remuneration of labour is concerned—see *Story on the Constitution*, 5th ed., p. 674; *Bentham's Works*, vol. I., p. 394; *Austin's Jurisprudence*, p. 89; *Morgan's Steamship Co.* v. *Louisiana* (3); and (*b*) because the necessary and logical consequence of the principles laid down by this Court, viz., that the Commonwealth Parliament cannot tax State instrumentalities, and that the Commonwealth Parliament has power to impose taxation for federal purposes only, is to establish a further limitation that the power of taxation cannot be used by the Commonwealth Parliament to usurp the legislative power reserved by the Constitution to the States exclusively. See *D'Emden* v. *Pedder* (4); *Federated Amalgamated Government Railway & Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (5); *McCray* v. *United States* (6); *Baxter* v. *Commissioners of Taxation (N.S.W.)* (7). That further limitation is also to be inferred from the fact that otherwise the specific grant of the majority of the other powers enumerated in sec. 51 of the Constitution would be unnecessary.

(1) 9 App. Cas., 157, at p. 165.
(2) (1905) A.C., 52, at p. 58.
(3) 118 U.S., 455, at p. 461.
(4) 1 C.L.R., 91.
(5) 4 C.L.R., 488.
(6) 195 U.S., 27.
(7) 4 C.L.R., 1087, at p. 1102.

The Commonwealth Parliament cannot, by the exercise of powers expressly or impliedly forbidden by the Constitution, create a class for the purpose of taxing it.

Irvine K.C., in reply, adopted the arguments of *Mitchell* K.C.

Cur. adv. vult.

The judgment of GRIFFITH C.J., BARTON J. and O'CONNOR J., was read by

GRIFFITH C.J. The question for decision in these two cases is, shortly, whether the Act No. 16 of 1906, intituled "An Act relating to Duties of Excise," and having for its short title the "*Excise Tariff* 1906" (No. 16), is a valid exercise of the legislative powers of the Commonwealth Parliament.

The second section of the Act is as follows:—"Duties of Excise shall on and from the first day of January one thousand nine hundred and seven be imposed on the dutiable goods specified in the Schedule at the rates specified in the said Schedule.

"Provided that this Act shall not apply to goods manufactured by any person in any part of the Commonwealth under conditions as to remuneration of labour which—

(*a*) are declared by resolution of both Houses of Parliament to be fair and reasonable; or

(*b*) are in accordance with an industrial award under the *Commonwealth Conciliation and Arbitration Act* 1904; or

(*c*) are in accordance with the terms of an industrial agreement filed under the *Commonwealth Conciliation and Arbitration Act* 1904; or

(*d*) are, on an application made for the purpose to the President of the Commonwealth Court of Conciliation and Arbitration, declared to be fair and reasonable by him or by a Judge of the Supreme Court of a State or any person or persons who compose a State Industrial Authority to whom he may refer the matter."

The goods specified in the Schedule are agricultural implements

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of different sorts, and the duty imposed is in some cases at fixed rates and in others at *ad valorem* rates. Barger's case is an action for penalties for manufacturing exciseable goods, viz., agricultural implements of the kind described in the Schedule, without a licence as required by the *Excise Act* 1901, sec. 35. The formal question in this case is whether the goods are exciseable goods. McKay's case is an action to recover the fixed duties in respect of similar goods manufactured by him, and as to which he is not entitled to the benefit of the proviso. The defendants in both cases object that, notwithstanding the title and phraseology of the Act, it is, in substance, not an exercise of the power of taxation conferred on the Parliament by the Constitution, but an attempt to regulate the internal trade and industry of the States, which, it is said, is not within the powers of the Parliament but is reserved to the States. They also contend that, even if the Act is an exercise of the power of taxation, it is void because it authorizes discrimination between States and parts of States.

The question for decision is entirely one of construction. Whether it is in the best interests of the Commonwealth that the Federal Parliament should have the powers contended for, or whether those interests would be best furthered by the exercise of the powers reserved to the States, are matters with which this Court has no concern. Our duty is to declare the law as we find it, not to make new law.

The Act in question does not impose the tax upon all goods of the specified classes, but only upon some of them. Goods which are indistinguishable by any physical attributes are nevertheless differentiated for the purpose of taxation according as certain prescribed conditions of the remuneration of labour have or have not been observed in their manufacture. Commenting upon this provision, the defendants contend that, if the Commonwealth can by the exercise of the power of taxation make the liability or non-liability to taxation conditional upon the observance of rules of conduct defined in the taxing Act, a complete power to regulate such conduct is in effect conferred. Thus, the Commonwealth Parliament might impose a tax, under the name of a licence fee, upon all persons carrying on any specified trade or occupation, with a remission of the tax to all persons who

carry it on in accordance with specified conditions, and the amount of the fee might be made so large as to be prohibitive except on compliance with these conditions. The same result might be achieved by a poll tax with similar remissions.

The defendants contend, in the first place, that, in determining whether a particular law is or is not within the power of the Parliament, regard must be had to the substance of the legislation rather than to its literal form. This proposition is supported by high authority binding upon this Court. In the case of *Attorney-General for Quebec* v. *Queen Insurance Co.* (1), the validity of a Statute of the province of Quebec was tested on this principle, and it was held that, although the Statute in form purported to be an exercise of the power of direct taxation possessed by the provincial legislature, it was in substance an attempted exercise of the power of indirect taxation, which was within the exclusive domain of the Dominion legislature. In the case of *Russell* v. *The Queen* (2), which raised a similar question, it was said by the Judicial Committee that the true nature and character of the legislation in the particular instance under discussion must always be determined in order to ascertain the class of subject to which it really belongs. In the case of *Peterswald* v. *Bartley* (3) this Court said:—"In considering the validity of laws of this kind we must look at the substance and not the form. If the Statute is good in substance, the Court will regard the substance, and hold the law to be valid, whatever the form may be." The converse proposition is equally true.

The same rule is applied in the United States. In *Guy* v. *Baltimore* (4), *Harlan* J., delivering the judgment of the Supreme Court, in a case in which the City of Baltimore, which had large powers of taxation, had attempted to impose certain taxation under the form of wharfage dues, said:—

"The city of Baltimore, if it chooses, can permit the public wharves which it owns to be used without charge. Under the authority of the State, it may also exact wharfage fees, equally, from all who use its improved wharves, provided such charges do not exceed what is a fair remuneration for the use of its

(1) 3 App. Cas., 1090.
(2) 7 App. Cas., 829, at pp. 839-40.
(3) 1 C.L.R., 497, at p. 511.
(4) 100 U.S., 434, at p. 442.

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property. . . . But it cannot employ the property it thus holds for public use so as to hinder, obstruct or burden inter-state commerce in the interest of commerce wholly internal to that State. The fees which it exacts to that end, although denominated wharfage dues, cannot be regarded, in the sense of our former decisions, as compensation merely for the use of the City's property, but as a mere expedient or device to accomplish, by indirection, what the State could not accomplish by a direct tax, viz., build up its domestic commerce by means of unequal and oppressive burdens upon industry and business of other States."

The question for our consideration, then, is the nature of the power conferred upon the Commonwealth Parliament with respect to taxation, and whether the ambit of that power is circumscribed by any, and what limits. For, within the ambit of its powers, the authority of the Commonwealth is plenary, supreme, and unchallengeable: *The Queen* v. *Burah* (1); *Hodge* v. *The Queen* (2).

In examining the language of the Constitution it is necessary to bear in mind the distinction between means and ends—between the ends that can be attained by exercise of the legislative power and the means that can lawfully be adopted to attain those ends. It is not disputed that the effect of the Act now in question, if valid, is to enable the Commonwealth to exercise a large though indirect influence upon the conditions of labour employed in the manufacture of agricultural implements in the several States.

The Attorney-General claimed that the Commonwealth should have this power, and very properly pointed out that in many cases the result of the exercise of the power of taxation is to bring about indirect consequences which are desired by the legislature, and which could not practically, or could not so easily, be brought about by other means. The policy of protective tariffs rests upon this basis. The effect of a protective tariff may be to raise or lower prices, or to raise or lower rates of wages. In a Federal State it may not be within the competence of the taxing authority to interfere directly with prices or wages, but the circumstance that a tax affects those matters indirectly is irrelevant to the question of competence to impose the tax. In other words,

(1) 3 App. Cas., 889. (2) 9 App. Cas., 117.

the circumstance that an indirect effect may be produced by the exercise of admitted power is irrelevant to the question whether the legislature is competent to prescribe the same result by a direct law. An illustration of this doctrine is afforded by a comparison of the cases of *United States* v. *De Witt* (1), and *McCray* v. *United States* (2). In the former case it was held that an Act of Congress, which made it a misdemeanour to mix for sale naptha and illuminating oils, or to sell such a mixture or offer it for sale, or to sell or offer for sale petroleum containing certain inflammable oils, was invalid, as relating exclusively to the internal trade of the States. In the latter case an Act imposing a duty of Excise upon goods adulterated in a specific manner was held valid, although the tax was so large as to be, in effect, prohibitive of the adulteration. In that case objection was also taken to various detailed provisions of the Act, as relating to matters of State concern. But they were all provisions of such a nature as are common in Acts relating to the collection of internal revenue, being incidental to the prevention of evasions of the tax itself, and the objection was overruled.

Again, the motive which actuates the legislature, and the ultimate end desired to be attained, are equally irrelevant. A Statute is only a means to an end, and its validity depends upon whether the legislature is or is not authorized to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences.

The scheme of the Australian Constitution, like that of the United States of America, is to confer certain definite powers upon the Commonwealth, and to reserve to the States, whose powers before the establishment of the Commonwealth were plenary, all powers not expressly conferred upon the Commonwealth.

This is expressed by sec. 107 of the Constitution, which provides that :—"Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."

(1) 9 Wall., 41. (2) 195 U.S., 27, at p. 59.

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The corresponding provision of the American Constitution is:—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (Art. X.).

Sec. 51 provides that:—"the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

"ii. Taxation; but so as not to discriminate between States or parts of States."

The corresponding provision of the Constitution of the United States is "to lay and collect taxes, duties, imposts, and Excises; but all duties, imposts, and Excises shall be uniform throughout the United States" (Art. 1, sec. 8, sub-sec. 1).

The first question that arises at this point is:—What is the meaning of the word "taxation" as used in the Constitution, an instrument which became law in the year 1900?

It is possible that since that time the word may have been used in Australia in a wider or more limited sense, but whatever it meant in 1900 it must mean so long as the Constitution exists, so far as regards the nature and extent of the power conferred on the Parliament with respect to it.

The primary meaning of "taxation" is raising money for the purposes of government by means of contributions from individual persons.

Taxation differs from exaction in that the obligation to contribute depends upon prescribed differentiations of the persons from whom, or the things in respect of which, the contribution is to be made. The power to tax necessarily involves the power to select the subjects of taxation. In the case of things the differentiation or selection is, in practice, usually made by reference to objective facts or attributes of the subject matter, so that all persons or things possessing those attributes are liable to the tax. The circumstance that goods come from abroad or from a particular foreign country, or that particular processes or persons have been employed in their production, or that they possess certain ingredients, are instances of attributes which have been chosen for the purpose of differentiation. In a State possessing plenary powers of legislation any condition whatever may be

imposed as a basis of selection for taxation purposes, and it is immaterial whether the differentiation should properly be regarded as an exercise of the power of taxation or of some other power.

But where the competency of Parliament is limited, as in a Federal State, to specific matters, it is material, and indeed necessary, to inquire whether an attempted exercise of the power of legislation falls within some one or more of the enumerated powers. In the present case the only relevant power is that of taxation.

The grant of the power of taxation is a separate and independent grant. This is the accepted law in the United States. In interpreting the grant it must be considered not only with reference to other separate and independent grants, such as the power to regulate external and inter-state trade and commerce, but also with reference to the powers reserved to the States.

It was not contested in argument that regulation of the conditions of labour is a matter relating to the internal affairs of the States, and is therefore reserved to the States and denied to the Commonwealth, except so far as it can be brought within one of the thirty-nine powers enumerated in sec. 51.

In some instances, when it was intended to allow the Parliament to regulate the domestic affairs of the States, the power was conferred by express words. See, for instance, paragraphs:—

> xii. Currency, coinage, and legal tender:
> xiii. . . . The incorporation of banks, and the issue of paper money:
> xv. Weights and measures:
> xvi. Bills of exchange and promissory notes:
> xvii. Bankruptcy and insolvency:
> xx. Foreign corporations, and trading or financial companies formed within the limits of the Commonwealth.

We are thus led to the conclusion that the power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament.

The fact that taxation may produce indirect consequences was fully recognized by the framers of the Constitution. They

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recognized, moreover, that those consequences would not, in the nature of things, be uniform throughout the vast area of the Commonwealth, extending over 32 parallels of latitude and 40 degrees of longitude. The varying conditions of climate—tropical, sub-tropical and temperate—and of locality—near or at great distances from the seaboard—make an effectual discrimination for many purposes between the several portions of the Commonwealth. Lest, however, the Parliament should desire to bring about equality in the incidence of the burden of taxation, or what has been called an equality of sacrifice, by discriminating between such different portions, they were expressly prohibited from doing so. The words of placitum ii. "Taxation; but so as not to discriminate between States or parts of States" recognize the fact that nature has already discriminated, and prescribe that no attempt shall be made to alter the effect of that natural discrimination. So in placitum iii. "Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth," the Parliament is precluded from attempting to equalize the conditions which nature has made unequal. Again, by sec. 88 it is prescribed that "uniform duties of Customs" shall be imposed within two years. The inequality of the indirect effect of Customs duties in different parts of the Commonwealth is obvious to all persons acquainted with its conditions, but any attempt to correct this inequality is forbidden. This is well illustrated by the case of the *Colonial Sugar Company* v. *Irving* (1), which related to the Excise duty imposed on all sugar in respect of which Customs duty had not been already paid. It was objected by the appellants that the Act offended against the prohibition of discrimination because in some States the rate of Customs duty on sugar had been higher than in others, from which it followed that the actual burden of the new Excise duty was unequal in its incidence. This contention was rejected by the Judicial Committee, who said that the discrimination, if any, was not effected by the Act imposing the Excise duty, but by the operation of the State laws previously existing. *E converso*, if the Excise duty had been made to vary in inverse proportion to the Customs duties in the several States

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

so as to make the actual incidence of the burden practically equal, that would have been a violation of the rule of uniformity. The object of the provision is further shown by sec. 92, which provides that "On the imposition of uniform duties of Customs, trade, commerce, and intercourse among the States . . . shall be absolutely free."

It follows from what has been said that the power of taxation is subject to some limits. On the other hand, so long as the prescribed limits are not transgressed, the Parliament may select the persons or the things in respect of which the exercise of the power is to operate. It is contended for the Commonwealth that this power of selection is only limited by the express words of placitum ii. and sec. 88, and that the discrimination or selection may be made to depend upon any other condition whatever, including conditions relating to personal conduct, or the regulation of domestic industrial conditions. The defendants contend, on the other hand, that the limitation of the power of selection is to be found, not only in the express words of sec. 51, placitum ii., and sec. 88, but also in other parts of the Constitution, so that the grant of the power of taxation, which, as already said, is an independent power, must be so construed as to be not inconsistent with the other provisions of that instrument. If this latter contention be rejected, it would follow that the power of taxation is an overriding power, which would enable the Parliament to invade any region of legislation, although it is impliedly forbidden to enter it, and this by the simple process of making liability to the taxation depend upon matters within those regions. In this connection I will read a passage from the judgment of this Court in *Peterswald* v. *Bartley* (1):—"In construing a Constitution like this it is necessary to have regard to its general provisions as well as to particular sections, and to ascertain from its whole purview whether the power to deal with such matters was intended to be withdrawn from the States, and conferred upon the Commonwealth. The Constitution contains no provisions for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States, or to restrict the power of the States to regulate the carrying on of

(1) 1 C.L.R., 497, at p. 507.

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any businesses or trades within their boundaries, or even, if they think fit, to prohibit them altogether. That is a very important matter to be borne in mind in considering whether this particular provision ought to be construed so as to interfere with the States' powers in that respect. If the majority of the Supreme Court were right, the Constitution will have given to the Commonwealth, and withdrawn from the States, the power to regulate their internal affairs in connection with nearly all trades and businesses carried on in the States. Such a construction is altogether contrary to the spirit of the Constitution, and will not be accepted by this Court unless the plain words of its provisions compel us to do so."

The defendants contend that the doctrine laid down by this Court in the case of *D'Emden* v. *Pedder* (1) and applied in the *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (2) to the case of attempted interference by the Commonwealth with functions reserved to the States, prohibits any interference, by means of the exercise of the power of taxation, with matters as to which direct interference is expressly or impliedly prohibited. The rule, however, applicable to the present case is different, but it is founded upon the same principles. The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. If two provisions are in apparent conflict, a construction which will reconcile the conflict is to be preferred. If, then, it is found that to give a particular meaning to a word of indefinite, and possibly large, significance would be inconsistent with some definite and distinct prohibition to be found elsewhere, either in express words or by necessary implication, that meaning must be rejected. It follows that, if the control of the internal affairs of the States is in any particular forbidden, either expressly or by necessary implication, the power of taxation cannot be exercised so as to operate as a direct interference. *Primâ facie*, the selection of a particular class of goods for taxation by a method which makes the liability to taxation dependent upon conditions to be observed in the industry in which they are produced is as

(1) 1 C.L.R., 91. (2) 4 C.L.R., 488.

much an attempt to regulate those conditions as if the regulation were made by direct enactment.

The distinction has already been pointed out between the indirect effect of the imposition of taxes upon the importation or production of particular goods, which may, in effect, be prohibitive, and the direct regulation of the conditions of the production of goods.

We propose now to inquire what is the true nature and character of the Act before us, and in this connection it will be convenient to inquire whether it is such an Act as could be passed by a State legislature with regard to domestic matters. It is clear that the power to pass such an Act must be vested either in the Parliament or in the State legislatures. If the tax is an Excise duty within the meaning of sec. 90, the power of the Parliament is exclusive, and the State could not impose it.

The circumstance that the Act is called an Act relating to Excise, a subject matter within the exclusive powers of the Commonwealth, is no more material than the circumstance that in the *Attorney-General for Quebec* v. *Queen Insurance Co.* (1) the tax was called a licence tax.

It will be relevant at this point to consider the meaning of the term "Excise" as used in the Constitution. In the case of *Peterswald* v. *Bartley* (2) the Court fully examined the question, and, after pointing out that in England the word had of late years come to have a widely extended interpretation, said :—

"With respect to the Australian use of the term, we are entitled to take notice of the sense in which it has been understood and used in the legislation of the various States. We know that in some of them there were in existence for many years 'duties of Excise,' properly so called, imposed upon beer, spirits and tobacco. There were other charges which were never spoken of as Excise duties, such as fees for publicans' licences, and for various other businesses, such as slaughtermen's, auctioneers', and so forth, but these were not commonly understood in Australia as included under the head of Excise duties. Bearing in mind that the Constitution was framed in Australia by Australians, and for the use of the Australian people, and that the word 'Excise' had a distinct

(1) 3 App. Cas., 1090.

(2) 1 C.L.R., 497, at p. 509.

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meaning in the popular mind, and that there were in the States many laws in force dealing with the subject, and that when used in the Constitution it is used in connection with the words 'on goods produced or manufactured in the States,' the conclusion is almost inevitable that, whenever it is used, it is intended to mean a duty analogous to a Customs duty imposed upon goods either in relation to quality or value when produced or manufactured, and not in the sense of a direct tax or personal tax."

This is not conclusive of the question whether the tax imposed by the Act now in question is an Excise duty, but it is very relevant to the question of the real character of the Act.

Now, it is clearly within the competence of a State legislature to regulate the conditions of labour employed in the manufacture of agricultural implements. It is equally clear that a State legislature, having prescribed such conditions, could impose a pecuniary burden upon everyone who did not conform to them, and that the payment might be made proportionate to the number of articles produced. Yet, if such payment were a duty of Excise, the State could not impose it, for the power of the Parliament to impose duties of Excise is exclusive. Such an Act might be framed in several different ways. It might be prescribed that certain conditions as to the remuneration of labour should be observed in the manufacture, and that any manufacturer who failed to comply should be liable to a penalty of so much for every article manufactured. Or, without formally prescribing any such condition, it might provide that any manufacturer who did not observe certain conditions should be liable to a penalty of so much per article. Or it might, instead of using the word penalty, say that the manufacturer who did not comply with certain conditions should be bound to pay a licence fee, the amount of which should be computed at so much for every article manufactured. Or it might provide that every manufacturer should at his option either comply with certain prescribed conditions or pay to the State Treasurer a sum computed &c., and in default should be liable to a penalty of &c. Or, finally, it might provide that any manufacturer who did not comply with certain specified conditions should pay a tax at a specified rate. In all the cases supposed the substance would be the same,

though the form would differ. And, in every case, the substance would be a regulation of the conditions of labour in the industry in question. Attention has already been drawn to the immateriality, as far as regards the validity of an Act, of the motives or indirect results in contemplation of the legislature. The professed purpose of an Act is generally stated in its Title. In any of the cases supposed the purpose of the Act, apparent on its face, whatever attempt might be made to disguise it in the Title, would be, not to raise money for the purposes of government, but to regulate the conditions of labour. From this point of view an inquiry into the purpose of an Act is not an inquiry into the motives of the legislature, but into the substance of the legislation. And for the purpose of determining whether an attempted exercise of legislative power is warranted by the Constitution regard must be had to substance—to things, not to mere words.

In this connection reference may be made to the case of *Rossi* v. *Edinburgh Corporation* (1). In that case the question arose upon a Local Act, by which it was provided that any person who should use a house, &c., other than an hotel, for the sale of ice-cream without having obtained a licence from the magistrates, who were "hereby empowered to grant the same," for the house, &c., should be liable to a penalty. The magistrates granted conditional licences, the conditions of which related to days and hours of trading, being embodied in the licences. It was held by the House of Lords that they had no power to do so. Lord *Halsbury* L.C. said:—"My Lords, the question here may be reduced to a very short point, namely, whether the civic authorities have power to make these regulations which are complained of, because in substance they are regulations although they are contained in the form of a licence which they issue and which involves the power to make a regulation. Whether it is called a regulation or a by-law, it is a legislative power which, in my view, the legislature has not confided to them.

"My Lords, it is idle to say that a great many of these things, as has been urged in the arguments which have been addressed to your Lordships, would be very desirable for the sake, it is said,

(1) (1905) A.C., 21, at p. 25.

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of public order. . . . I do not know what the evil aimed at was. I can give, therefore, no general view of what is the intention and purpose of the Statute. I can only look at the Statute itself and construe it, and when I construe the Statute I find there is in the Statute itself a plain prohibition with respect to certain things. The magistrates, of course, are not only empowered but bound to give effect to legislation which has been passed; but when it is argued that because they are given the power to restrict, within certain hours, the sale of ice-creams therefore they have implied power to do all that might be desirable or expedient with reference to the times and circumstances under which ice-creams shall be sold, it seems to me the argument entirely fails. What is sought to be done, whether directly by by-laws, or indirectly by the language of the licence that is issued, is something that can only be done by the legislature. It is a restraint of a common right which all His Majesty's subjects have—the right to open their shops and to sell what they please subject to legislative restriction—and, if there be no legislative restriction which is appropriate to the particular thing in dispute, it seems to me that it would be a very serious inroad upon the liberty of the subject if it could be supposed that a mere single restriction which the legislature has imposed could be enlarged and applied to things and circumstances other than that which the legislature has contemplated."

So—to adapt the language of the learned Lord Chancellor—when it is argued that, because the Commonwealth Parliament has had given to it the power to tax manufactures, therefore they have power to do all that might be desirable or expedient with regard to the times and circumstances under which a manufacture shall be carried on, it seems to us that the argument entirely fails. What is sought to be done, whether directly by the Statute or indirectly by the conditions attached to the taxation, is something that can only be done by the competent legislature, that is, in this instance, the State legislature.

This case also supplies an answer to the argument that such conditions are not in substance a regulation of the manufacture.

It is, however, suggested that, so regarded, the regulation is not in the nature of a law, since the concept of law imports that

the legislature can and does visit its displeasure upon those who disobey its commands or fail to comply with its wishes. This visitation is called the "sanction" of the law. If the mode in which the displeasure is visited is by imposition of a pecuniary liability, it cannot be material whether that liability is enforceable in one Court as a debt or in another Court under the name of penalty. The sanction is the same in substance, and equally effectual, in either case. If this were not so, the Commonwealth Parliament might assume and exercise complete control over every act of every person in the Commonwealth by the simple method of imposing a pecuniary liability on every one who did not conform to specified rules of action, and calling that obligation a tax, not a penalty.

In our opinion the exclusive power of the Parliament to impose duties of Excise cannot be construed as depriving the States of the exclusive power to make such enactments as we have suggested above. The substantial nature and character of the legislation is the same whether it is passed by one legislature or the other. It follows that such an Act would not be in substance an Act imposing duties of Excise within the meaning of sec. 90 of the Constitution. If, then, the Act in question is not, in substance, an Act imposing duties of Excise, what is it? We think that it is an Act to regulate the conditions of manufacture of agricultural implements, and not an exercise of the power of taxation conferred by the Constitution.

A further argument was founded upon sec. 55, which provides that:—"Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect." This provision seems to indicate that the word "taxation" was used in its ordinary sense, and not in a sense which would authorize the dealing with matters that would ordinarily be dealt with in a separate Act. Such matters were to be dealt with by separate laws, as to which the competency of Parliament could be examined and determined upon independent grounds. The proviso in the Act in question cannot, of course, be regarded as "of no effect," for to do so would be "to make a new law, not to enforce an old one": *United*

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States v. *Reese* (1). But, since other provisions are forbidden to be inserted in a law imposing taxation, it follows that if such provisions are inserted, and if by rejecting them the Act would have an operation inconsistent with the expressed intention of the legislature, the whole Act must fail of effect.

The foregoing arguments lead to the conclusions:—

1. That the Act in question is not in substance an exercise of the power of taxation conferred upon the Commonwealth Parliament by the Constitution.

2. That, even if it were within the competence of that Parliament to deal with the conditions of labour, the Act would be invalid as being in contravention of sec. 55.

3. That, even if the term "taxation," uncontrolled by any context, were capable of including the indirect regulation of the internal affairs of a State by means of taxation, its meaning in the Constitution is limited by the implied prohibition against direct interference with matters reserved exclusively to the States.

We pass to the objection that the Act, if otherwise valid, is invalid on the ground that it discriminates between States and parts of States. In this connection sec. 99 of the Constitution should be read, which provides that:—"The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give any preference to one State or any part thereof over another State or any part thereof."

Attention has already been drawn to the provisions requiring Customs duties to be uniform, and to the physical conditions of Australia which make effective discrimination in many respects between different parts of it.

The words "States or parts of States" must be read as synonymous with "parts of the Commonwealth" or "different localities within the Commonwealth." The existing limits of the States are arbitrary, and it would be a strange thing if the Commonwealth Parliament could discriminate in a taxing Act between one locality and another, merely because such localities were not coterminous with States or with parts of the same State. The proviso to sec. 2 of the *Excise Tariff* 1906 (No. 16) exempts

(1) 92 U.S., 214, at p. 221.

from taxation goods which are manufactured by any person in any part of the Commonwealth under certain conditions as to the remuneration of labour. These conditions are divided into four categories :—(*a*), (*b*), (*c*), (*d*).

The first (*a*) is: such conditions as "are declared by resolution of both Houses of Parliament to be fair and reasonable." If the Act stopped at this point, then, if a resolution were passed, and if by it identical conditions were made applicable to the whole Commonwealth, no objection could be made on the ground of forbidden discrimination. The improbability of Parliament ever passing a resolution declaring identical conditions to be fair and reasonable throughout the Commonwealth need not be considered.

The second category (*b*) is: such conditions as "are in accordance with an industrial award under the *Commonwealth Conciliation and Arbitration Act* 1904." In order to ascertain the effect of this provision it is necessary to refer to that Act. Sec. 38 expressly provides (par. (*g*)) that, in the case of a common rule made to give effect to an award, the Court may direct: "with due regard to local circumstances within what limits of area, if any, and subject to what conditions and exceptions, the common rule so declared shall be binding upon the persons engaged in the industry whether as employers or employés, and whether members of an organization or not."

It follows that, if such an award as contemplated came into operation, the conditions of exemption from taxation under the Act now in question might vary according to the area within which the manufacture was carried on. The same observations apply to the third category (*c*) which is: such conditions as "are in accordance with the terms of an industrial agreement filed under the *Commonwealth Conciliation and Arbitration Act* 1904." Such an agreement must necessarily operate beyond the limits of any one State, and the conditions imposed by it may vary in different States or different areas within a State.

The fourth category is: such conditions as "are, on an application made for the purpose to the President of the Commonwealth Court of Conciliation and Arbitration, declared to be fair and reasonable by him or by a Judge of the Supreme Court of a State or by any person or persons who compose a State Industrial

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Authority to whom he may refer the matter." In this case there may be as many different sets of conditions as there are Judges and State Industrial Authorities in the Commonwealth, for there is no obligation upon them to come to a uniform decision as to the conditions reasonable in the States in which they exercise their authority.

It is abundantly clear from these provisions that the legislature not only purported to authorize the prescribing of conditions reasonable according to the circumstances of locality, but intended, and indeed prescribed, that discrimination according to locality might be made. Any other rule would be manifestly unjust. Yet this is the very thing which, so far as regards liability to taxation, is prohibited by the words under consideration. It was suggested that, though the Act thus authorizes discrimination between States and parts of States, it does not itself discriminate, since, it is said, the conditions actually prescribed by any or all of the specified authorities might in fact be identical throughout the Commonwealth. The legislature may in some cases delegate the power of fixing the incidence of taxation: *Powell* v. *Apollo Candle Co.* (1), but it would be a strange thing to hold that, while it cannot itself discriminate between localities, it can, by delegation, confer power to make such discrimination. If different rates had been fixed by the divers authorities, or by the same authority as to different localities, what would be the conditions to be observed by a manufacturer? Might he claim the benefit of the lowest rate of wages fixed for the time being in any part of the Commonwealth? If so, every authority would, in effect, have power to overrule the decisions of every other authority. It is not conceivable that such a result was intended.

It is clear that Parliament cannot by delegation do that which it is forbidden to do directly.

It follows that, if there were no other objection to the Act in question, it would be invalid as transgressing the provisions of sec. 51 (II.) and sec. 99 of the Constitution.

It was suggested that any condition which is obnoxious to the prohibition against discrimination may be rejected, and the

(1) 10 App. Cas., 282.

others enforced. But this would be to make the incidence of the tax depend upon conditions different from those prescribed by Parliament—"to make a new law, not to enforce the old one."

For these reasons we are of opinion that the Act in question was not authorized by the Constitution, and that the defendants in both cases are entitled to judgment.

ISAACS J. The Act imposes Excise duties on specific agricultural machinery, some at fixed rates, others *ad valorem*. The proviso excepts from the operation of the Act goods manufactured in any part of the Commonwealth under described conditions as to the remuneration of labour. The way in which the Act operates is clear. Assume a hundred implements made in any part of Australia, and ranged side by side, they are all made liable to duty, except those that have come into existence in the described way. The articles liable to taxation, and the articles free from taxation are in case of dispute respectively identifiable by one of the four methods specified in the Statute. There is nothing more than that in the Act.

Apart from legal intricacies, such an enactment would be instantly recognized according to the ordinary views of British precedent as a taxing Act. The defendants, however, dispute that character, and have submitted a number of reasons why the Court should hold that it is not a taxing Act at all; and further, if it is, why it should be held unlawful because it offends against sec. 55 of the Constitution, and because it discriminates between States and parts of States.

Now, I do not think I can better approach the consideration of this momentous question than by adopting the observations made by the Supreme Court of the United States in 1898 in the case of *Nichols* v. *Ames* (1):—"The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive." I propose to consider in order the various objections to the validity of the Act. It is said that it is not a taxing Act because it assumes to

(1) 173 U.S., 509, at p. 515.

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regulate a branch of internal trade, to penalize the payment of unreasonable wages to employés and, therefore, to invade a legislative territory exclusively assigned to the States. It is added that this is the effect of the proviso, and that the Court is consequently at liberty, and bound to hold, in spite of the express enactment of an Excise duty on agricultural implements, that no Excise duty whatever has been imposed, and to say, therefore, that the Act is not within the scope of the taxing power. The words granting that power are very large and very clear. The power itself is conferred by one word, "taxation"—a word so plain and comprehensive that it would be difficult to devise anything to surpass it in simplicity and amplitude. The words of limitation immediately coupled with it, namely, "but so as not to discriminate between States or parts of States," demonstrate that, so far as that clause is concerned, the power is otherwise unlimited. The main question here is whether the *Excise Tariff* 1906 (No. 16) is "taxation." A distinction is sought to be established between "taxation," and "taxation within the meaning of the Constitution." I can understand a limitation of the exercise of the power of taxation to certain subjects, and the exception of other subjects from its sphere of operation. I recognize, too, that conditions in the mode of exercising the power may be consistently attached to the grant; but, the imposition of a tax on any person or thing for the benefit of the Consolidated Revenue is taxation, and taxation within the meaning of the Constitution. Not all taxation can be sustained as valid. Thus, if imposed upon any State instrumentality or act of Government, or if it discriminates between State and State or parts of States: (secs. 51 (II.) and 99), or offends against sec. 55, or contravenes sec. 92, or is a tax against State property within the meaning of sec. 114, or, in breach of sec. 117, discriminates between residents of different States, the Act would be invalid, at least *pro tanto*. Nevertheless it would still be taxation, and taxation within the meaning of that word in the Constitution, but it would not be valid or authorized taxation. I therefore lay aside as unmeaning any such distinction, and proceed to examine the other arguments advanced to establish the invalidity of the Act. It is said for one defendant that the

power of taxation does not extend to matters within the jurisdiction of the States, that the Commonwealth Parliament cannot do by taxation anything which is reserved exclusively to the States. For the other defendant the same idea was pressed in varied language. It was argued that where the *discrimen* is based upon conduct within the power of the State to regulate, and not expressly given to the Federation, it is beyond the power of the Federal Parliament. This limitation is arrived at, it is said, from reading the Constitution as a whole, and from a contemplation of the results which would arise if plain and expressive words were accorded their ordinary signification. On what words in the instrument is such a construction based? Counsel were unable to point to a syllable or a phrase which supported their interpretation—nor is any such to be found. First, there is the grant of power to the Commonwealth, then, there are express limitations on the grant, and next, the cluster of sections, beginning with sec. 106, saving the State Constitutions and powers, but "subject to this Constitution," that is, subject to the grant of the enumerated powers to the national authority which are declared to be supreme. The powers of the State Parliament referred to in sec. 107 cannot be greater than those comprised in the State Constitution, and which is "subject to the Federal Constitution." We search in vain for any declaration that the grant of power is subject to the powers reserved, for that would be either meaningless or would nullify the grant. The Commonwealth's powers are given definitely, and without further reservations than those expressly stated; the powers not granted or withdrawn remain with the States.

When, as here, the Supreme Court of the United States in 1824 in the celebrated case of *Gibbons* v. *Ogden* (1) was invited to apply a strict construction to the American Constitution, counsel at the bar presented by way of argument and prophecy the disastrous consequences to the States of the opposite course. To give full play to the language of the Constitution, it was then picturesquely urged, "makes a wreck of State legislation, leaving only a few standing ruins, that mark the extent of the desolation." The argument was at once rejected: time has proved the

(1) 9 Wheat., 1.

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prophecy untrue. The ample construction has not destroyed the States or stayed their development, but it has made the Nation possible. *Marshall* C.J. answered the claim for strict construction of federal powers in these words (1):—"Why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means of carrying all others into execution, Congress is authorized 'to make all laws which shall be necessary and proper' for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it." Further on, in speaking of the Commerce power, he employs words which are the master key of the Constitution (2):—"This power, like *all others* vested in Congress, is complete in itself, *may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.*"

There can be no derogations from the grant expressly made, except those which are expressly stated or which of necessity inhere. It is an inherent consequence of the division of powers between governmental authorities that neither authority is to hamper or impede the other in the exercise of their respective powers, but that doctrine has no relation to the extent of the powers themselves; it assumes the delimitation *aliunde*. It is contrary to reason to shorten the expressly granted powers by the undefined residuum. As well might the precedent gift in a will be limited by first assuming the extent of the ultimate residue.

The States retain their police powers, as the reserve powers of internal regulation and control are comprehensively termed, and may exercise them at will provided they do not trench upon the exclusive federal powers, but they cannot control the constitutional prohibitions or the constitutional grants: *Plumley* v. *Massachusetts* (3); still less can they prevent the exercise of federal powers by the Parliament. There is no limitation to the

(1) 9 Wheat., 1, at p. 187. (2) 9 Wheat., 1, at p. 196.
(3) 155 U.S., 461.

powers of taxation but those expressly enacted. If the power be exercised, it may be exercised at the will of Parliament as fully and effectually as if it were the legislature of a unitary State. For purposes of federal taxation—whether Customs or other taxation—Australia is one indivisible country.

The Privy Council in *The Queen* v. *Burah* (1) has laid down a rule which, to my mind, is decisive of this question. Lord *Selborne* first affirmed the plenary powers of a colonial legislature (in that case the Indian) within its limits—powers which his Lordship said were as large and of the same nature as those of the Imperial Parliament itself. He also declared its incapacity outside its limits, and then laid down the rule which is to guide the Courts. His Lordship said (2):—"The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done in legislation, within the general scope of the affirmative words which give the power, and if it violates no *express* condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

In *Hodge* v. *The Queen* (3) the Privy Council again, speaking of a colonial legislature (in this case Canadian), said that its powers were "as plenary and as ample within the limits . . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow."

The Privy Council has further distinctly held that even if the power be abused that is no ground of illegality. In *Attorney-General for Canada* v. *Attorney-General for Ontario* (4) Lord *Herschell*, speaking for the Judicial Committee, said:—"The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will

(1) 3 App. Cas., 889.
(2) 3 App. Cas., 889, at p. 904.
(3) 9 App. Cas., 117, at p. 132.
(4) (1898) A.C., 700, at p. 713.

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be *improperly used*; *if it is, the only remedy is an appeal to those by whom the Legislature is elected.*" The ultimate authorities, therefore, both in Imperial and American jurisprudence, concur in these fundamental principles.

Among the multitude of judicial decisions in America since its Constitution was framed—nearly 120 years—not one has been or can be produced which places on the taxing power the limitation which the defendants contend for. On the contrary the doctrine of *Marshall* C.J., which entirely accords with the Privy Council rule, has under a federal Constitution like our own been repeatedly affirmed and enforced.

The case of *McCray* v. *United States* (1), decided as recently as 1903, collects and reaffirms various American enunciations of the principle. Quoting from previous decisions it declared that the power of Congress to tax was given with only one exception and two qualifications. It could not tax exports, and direct taxes must be apportioned and indirect taxes uniform. "*Thus limited, and thus only, it reaches every subject, and may be exercised at discretion* (2)." It said that in *Pacific Insurance Co.* v. *Soule* (3), referring to the *unlimited nature of the power of taxation* conferred upon Congress, it was observed:—"Congress may *prescribe the basis*, fix the rates, and require payment as it may deem proper."

I may here interpose the question, what has the Act now under consideration done beyond prescribing the basis of taxation, fixing the rates, and requiring the payment?

The American Court proceeded again to refer to the *express* limitations already mentioned, and then approvingly quoted from the same case; "With *these exceptions*, the exercise of power is, in all respects, *unfettered*."

Another citation is:—"The right of taxation, where it exists, is necessarily *unlimited in its nature*. It carries with it inherently the power to embarrass and destroy."

In face of this overwhelming authority the defendants contend that, as the taxation embarrassed a manufacturer in the manner of carrying on his business, it is not taxation.

(1) 195 U.S., 27.

(2) 195 U.S., 27, at p. 56.

(3) 7 Wall., 433.

It is not surely asking too much of those who so contend to adduce at least one instance where a Court has so held in the face of an affirmative word of such unambiguous import.

Incidentally it was suggested that the Act was not within the scope of the taxing power, because it was, on inspection, not enacted for public purposes. But, as the declared purpose is to augment the Commonwealth Treasury, that is obviously unsound. See *Hanson* v. *Vernon* (1); *Loan Association* v. *Topeka* (2); *Olcott* v. *Supervisors* (3); *Cole* v. *La Grange* (4). Every argument that has been presented by the defendants to invalidate the *Excise Tariff* 1906 (No. 16) is answered by reference to what has been done under the Constitution of the United States by Congress and the Courts. All the possibilities of the central Parliament usurping the functions of the States, if once its taxation power were permitted to be used for the general welfare of the Nation, exist in precisely the same way in America, though on a more gigantic scale, and yet, as I shall show, they are but chimerical, and Congress has not abstained from so exercising its powers, and much more amply, directly and extensively than anything that is contained in the *Excise Tariff* 1906 (No. 16), and in so doing it has been fully sustained by the Supreme Court. I say this after a most careful examination of the cases and the Statutes upon which they arose.

It will be necessary to look somewhat in detail at one class, and one class only, of these cases, for I think it will be found decisive.

The occasion demands our best and fullest consideration, because the most important power of the Commonwealth is challenged in its operation, and it is not easy to foresee the outcome of this decision.

In August 1886 Congress, for the obvious purpose of protecting the public against deception in the sale of butter, passed legislation to afford safeguards in this respect. It was, of course, unable to regulate the sale by an independent enactment, that is without using the taxing power, because, as was in fact decided in *United States* v. *De Witt* (5), as far back as 1869, a simple

(1) 1 Am. Rep., 215.
(2) 20 Wall., 655.
(3) 16 Wall., 678.
(4) 113 U.S., 1.
(5) 9 Wall., 41, at p. 44.

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prohibition by Congress on the sale of goods in internal commerce is void. Unless, as *Chase* C.J. then said, the regulation is on the very articles which are the subject of taxation Congress is acting beyond its power. "*Standing by itself*, it is plainly a regulation of police," said the Court, and as there was no tax in that case upon the articles the sale of which it sought to control, the statutory prohibition was held invalid. Profiting by that decision, Congress, in legislating for the welfare of the American people, has not hesitated in many directions to use the taxing power to control internal commerce; and in no single instance, apart from express constitutional prohibition such as taxing exports, has the legislation ever been successfully questioned. No one has yet persuaded the Court to say that in substance the Act was not a taxing Act, and so outside the power. In view of the well settled principles of constitutional interpretation consistently adhered to by that Court, and firmly applied in the cases I am about to refer to, such an attempt would appear hopeless.

The Act of 1886 was called the *Oleomargarine Act*. Its very title showed the motive of its enactment. It styled itself "An Act defining butter, also imposing *a tax* upon and *regulating the manufacture, sale, importation and exportation of oleomargarine*;" and imposed special taxes on manufacturers and dealers in oleomargarine, prescribed penalties for manufacturing or dealing without payment of the tax, prescribed the manufacturer's duty as to keeping books and the conduct of this business. It went much further than anything in the *Excise Tariff* 1906 (No. 16). It compelled the manufacturer to pack oleomargarine in new firkins, tubs or other wooden packages, each containing not less than 10lbs., and marked, stamped and branded as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury should prescribe. Retail dealers were bound to sell only from original stamped packages not exceeding 10lbs. and to pack in suitable wooden or paper packages marked and branded as the Commissioner and the Secretary approved, under severe penalties of fine up to 1,000 dollars, and imprisonment up to two years. It required manufacturers to affix a label on each package under a penalty; penalized a person purchasing a package wrongly branded; provided for a chemist

and microscopist in the office of the Commissioner; and then came a provision of importance on the second branch of this case —the Commissioner was authorized to decide what substances &c., submitted to inspection in contested cases should be taxed under the Act. Sec. 15 was in these terms:—"That all packages of oleomargarine subject to tax under this Act that shall be found without stamps or marks as provided, and all oleomargarine intended for human consumption which contains ingredients adjudged, as hereinbefore provided, to be deleterious to the public health, shall be forfeited to the United States." That section assumes the tax on oleomargarine; assumes that it cannot lawfully be sold, except in compliance with the taxing directions; and then, as one of the directions, adds the exclusion of ingredients adjudged by a public officer to be deleterious to the public health. So that the tax was not merely a tax on articles as they existed, but on articles selected as not deleterious to health; and it was forbidden to mix with these any ingredients that were deleterious to health. In *Ex parte Kollock* (1), a man named Kollock was fined for having as a retail dealer sold and delivered one half-pound of oleomargarine not packed in a package with certain marks and brands on it as prescribed by the Commissioner. The validity of the Act was contested. There can be no doubt as to the motive and intention of Congress, and as to the inner and main purpose of the Act. It was to protect the public by regulating the sale of oleomargarine; and as Mr. Judson in his work on *Interstate Commerce*, says, at p. 82, it was for the avowed purpose of destroying the business. Plainly a question for the State alone, would the defendants say here. The Court, however, did not proceed to inquire as to the substance of the Act or its purpose or object apart from the primary effect of the Act appearing on its face, namely, taxation, and notwithstanding its further significant title as to regulation. Enough for the Court that Congress had imposed the tax. Though the whole Act was an undisguised blow at deception in internal trade in butter—that is to say, at the methods of manufacturers and dealers in the conduct of their business, methods ordinarily within the regulative power of the States—the Court found a tax imposed on goods,

(1) 165 U.S., 526.

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and acknowledged the right of Congress, if it thought fit, to use its power of taxation for any other purpose in conjunction with the revenue, however small a part the revenue played in the enactment. Its mere presence was sufficient. The tax, as here, was placed on the goods; the actuating reason, as probably in this case, was an intangible circumstance extraneous to the goods —public deception and public health there, under-payment of employés here. But, whatever the ulterior object in fact, it was and is immaterial. Chief Justice *Fuller* said (1):—"The Act before us is *on its face* an Act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object *must be assumed* to be the raising of revenue."

"Must be assumed," that is, it is an irrebuttable presumption of law that, when Congress imposes a tax on goods for any reason whatever, the Act is an exertion of the taxing power. Does the Australian Constitution differ in this respect from the American?

The Statute was again questioned as late as 1901 in the case of *Dougherty* v. *United States* (2), but upheld, and the decision of the Circuit Court was affirmed by the Supreme Court (3).

In May 1902 Congress carried the matter further. It amended the Act, extending its provisions to a wider circle of persons, and imposed a new tax, which it would be absurd to consider as intended to have any real effect upon the public revenue. It was manifestly intended to control the deceptive practices of traders in adulterating or imitating butter and cheese, and offered an alluring opportunity to the Court, if it felt itself at liberty, to question the language of the legislature, and by proceeding on the doctrine of equivalents to hold the Act to be in substance other than Congress had made it. On oleomargarine generally was placed a tax of 10 cents a pound to be paid by the manufacturer, and then a proviso that is of some interest because of its partial resemblance to the proviso in the *Excise Tariff* 1906 (No. 16). It runs thus:—"Provided, when oleomargarine is free from artificial colouration that causes it to look like butter

(1) 165 U.S., 526, at p. 536. (2) 108 Fed. Rep., 56.
(3) 181 U.S., 622.

of any shade of yellow, said tax shall be one fourth of one cent per pound." In other words, what Congress aimed at was the deceitful conduct injurious to the public of manufacturers artificially colouring oleomargarine yellow so as to make it look like butter. The difference between the two rates of taxation is eloquent. The dishonest trader pays forty times as much taxation as the honest trader. The revenue manifestly plays an insignificant part in the legislation.

Renovated butter—that is, butter melted, clarified or refined, and made to resemble "prime butter," involves manufacturers in a tax of 50 dollars a year, and adulterated butter requires 600 dollars a year.

Wholesale dealers in adulterated butter pay 480 dollars a year, and a retail dealer 48 dollars a year.

Provisions as to packages are somewhat similar to those already mentioned.

Every manufacturer of renovated or adulterated butter must, *inter alia*, "conduct his business under the surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require," and give a bond not less than 500 dollars. He is compelled to put up such *signs at his factory* as he may in like manner be required. Further, he is obliged to paste on every package of adulterated butter he manufactures a label on which is printed "Notice—that the manufacturer of the adulterated butter herein contained has complied with all the requirements of law," &c. A penalty is provided for contravention of this requirement. It would be difficult to frame an Act that more thoroughly regulated the conduct of business in relation to taxed merchandise—conduct, too, that had certainly not more intimate connection with the article taxed than its manufacture by underpaid workers.

The constitutionality of this Act was fully raised before the Supreme Court in 1903 in a case greatly, and, in my opinion, properly, relied on by the learned Attorney-General: *McCray* v. *United States* (1).

The appellant had been fined for having knowingly purchased

(1) 195 U.S., 27.

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for resale a fifty pound package of oleomargarine artifically coloured to look like butter, but having affixed revenue stamps at the rate of one fourth of a cent per pound instead of ten cents per pound. He contended that the Act was repugnant to the Constitution.

The propositions submitted against the validity of the Act included precisely the main arguments here. They were these :—

(I.) The power to regulate the manufacture and sale of oleomargarine being solely reserved to the several States, it follows that the Acts enacted by Congress for the purpose of supporting the manufacture and sale of oleomargarine when artifically coloured are void, because usurping the reserved power of the States, and therefore exerting an authority not delegated to Congress by the Constitution.

(II.) As the necessary operation and effect of the tax is to suppress the manufacture of artificially coloured oleomargarine and to aid the butter industry, therefore the Act is void.

(III.) Wherever the judiciary is called on to determine whether a power which Congress has exerted is within the authority conferred by the Constitution, the duty is to test the validity of the Act, not merely by its face, or to use the words of the argument " by the label placed upon it by Congress," but by the necessary scope and effect of the assailed enactment.

The Court answered these and other propositions in the following manner, as I am of opinion they should be answered in this case :—

(I.) It said that all of the propositions obviously rested not only on inferences drawn from the face of the Acts, but also on deductions made from what it assumed must have been the motives or purpose of Congress in passing them.

(II.) That the Court had no authority to declare an Act of Congress repugnant to the Constitution, either because it was unwise or unjust, or because a lawful power was exerted for an unlawful purpose, and thus by abusing the power made to accomplish a result not intended by the Constitution. It disagreed with the argument that, unless it interfered in such a case, all limitations of power must disappear, and said that such abuses of power must be cured, not by the Court itself abusing

its own powers, but by the people. Such a legislative abuse is identical with wrongful object, motive or purpose. In this answer the views of the Court are identical with those of the Privy Council in *Attorney-General for Canada* v. *Attorney-General for Ontario* (1).

(III.) It collected and re-affirmed the repeated declarations of the Court as to the unlimited and unfettered right of Congress in respect of taxation, subject only to express limitations as already mentioned.

(IV.) Having set aside purpose or motive, it then said (2):— "Undoubtedly, in determining whether a particular Act is within a granted power, its scope and effect are to be considered. Applying this rule to the Acts assailed, it is self-evident that *on their face they levy an Excise tax.* That being their necessary scope and operation, *it follows that the Acts are within the grant of power.*" It repeated the observations in *Kollock's Case* (3) that the primary object of the Act must be assumed to be the raising of revenue.

(V.) The consequence or result of the Act in destroying or restricting manufacture is an immaterial circumstance.

(VI.) That the decisions upon the effect of State Acts (many of which were cited for the defendants in the present case) are not in point because, if the necessary effect and operation are to run counter to an exclusive federal power, they are void.

From a survey of the Oleomargarine Acts nothing can be more evident than their substance from a practical point of view to regulate the public sale of the article, and the taxing power was the instrument for the purpose. The cases decided upon the Acts demonstrate that the Court recognized the validity of the instrument for that or any other purpose not expressly prohibited. The Court separated the questions into three—first, antecedent considerations, which resolve themselves into purpose, motive, object, reasons or any similar expression; next, the tax itself, whatever it be placed upon; and lastly, the subsequent considerations, as consequences, results, &c.

The first and last the Court abstained from touching: the

(1) (1898) A.C., 700, at p. 713. (2) 195 U.S., 27, at p. 59.
(3) 165 U.S., 526.

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presence of the second was regarded as conclusive. The Court declined to paraphrase a taxing Act and convert it into something which it was not. The Court refused to translate it, by a doctrine of equivalents, into a merely regulative and non-taxing enactment, and then to strike it down as outside the taxing power. It found on the face of the Act the solemn legislative enactment of an Excise duty, and left it so.

If the Commonwealth Parliament, with a view to the protection of purchasers in Australia of agricultural implements, had imposed on these articles an Excise duty, and had provided that they should be manufactured under the surveillance of Commonwealth officers, that no parts should be used which on inspection by those officers were pronounced to be inferior, that no inferior metal or paint should be used, that no old metal should be re-smelted and employed, that no deceptive words should be painted on the goods, that the manufacturer should put up whatever signs at his factory that he might be directed, that he should brand his machines as directed, it might even be a brand "not made by black labour," or "made by fairly paid labour" or any other notice to the public, that he should give a bond not to disobey this law, that any member of the public purchasing a machine not branded as directed should be liable to a fine, then, unless the American precedent is to be disregarded, and I do not understand it to be questioned, all this would have been precisely on all fours with the *Oleomargarine Case* (1), and would have been covered by that case as valid taxation, and no interference with State powers, because no *mere* regulation of internal trade. Place this side by side with the comparatively mild provisions of the present Act. Reference might be made to other Acts of a cognate nature in America, such as the *Adulterated Cheese Act* of 1896, and the *Tobacco Act* of 1897 aimed at excluding from packages of tobacco or cigarettes, &c., lottery tickets and indecent pictures, matters which primarily are of State concern.

The unlimited nature of the taxing power is therefore incontestable. Its exercise upon all persons, things and circumstances in Australia is, in my opinion, unchallengeable by the Courts, unless, as Lord *Selborne* said, a judicial tribunal finds it repug-

(1) 195 U.S., 27.

nant to some express limitation or restriction. It may be exercised upon circumstances which have only intangible existence, as a verbal sale of goods, or the privilege of selling property at an exchange, in which case the power of Congress goes so far as to enable it to require a written memorandum to be made of the real transaction so as to enable a stamp tax to operate: *Nichol* v. *Ames* (1). "Impost duties," said the Court in *Knowlton* v. *Moore* (2), "take every conceivable form." The Privy Council has held that a tax by way of licence as a condition of the right to fish is an exercise of the power of taxation (3).

Then why is the tax on implements not valid? On its face the Act is a taxing Act, and on precedent that is conclusive.

My learned colleagues who have preceded me have, however, seen their way to arrive at a conclusion which places this Act outside the pale of that power. Examining the Statute, they hold that, in substance, the *Excise Tariff* 1906 (No. 16) is not a taxing Act but purely an Act regulating intra-state manufacture. This view, it seems to me, can only be arrived at in opposition to the language of the Act itself. The material words are "Duties of Excise shall . . . be imposed upon the dutiable goods specified in the Schedule" at certain rates, and provided that the Act shall not apply to goods manufactured under specified conditions of labour. Yet the conclusion is that the Statute does not do what its words expressly enact, namely, impose a tax; and does do something which no word in it can be found to say, namely, prescribe or command a rule of conduct, to disobey which is unlawful.

The authority to so construe an Act is rested mainly on the case of the *Attorney-General for Quebec* v. *Queen Insurance Co.* (4). I am deeply conscious of the weight of the judgment with which I have the misfortune to disagree, but, with the utmost deference, I am of opinion that none of the cases cited justify or support any such principle. *The Queen Insurance Co.'s Case* (4) was this:—A Quebec Act was challenged as being a Stamp Act, and therefore beyond the power of the provincial legislature. It

(1) 173 U.S., 509.
(2) 178 U.S., 41, at p. 88.
(3) (1898) A.C., 700, at p. 713.
(4) 3 App. Cas., 1090.

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was called "An Act to compel assurers to take out a licence," but when examined it was found to be in substance a Stamp Act. But how did the Privy Council arrive at that result? They took its very words, and found that the only payment insisted on was by requiring stamps to be affixed to policies, receipts and renewals. But not a word was changed in the Act, not a word was added to it. The fullest ordinary meaning was given to its own terms as they stood. To make that case an authority for the defendants at all it should be shown that the Privy Council had arrived at their decision by assuming an equivalent. *Russell* v. *The Queen* (1) affords no assistance. Under the Canadian Constitution legislation on the drink question falls within the competency of the Dominion or of a Province, according as the purpose and effect of the Act is to suppress intemperance generally throughout Canada or locally in the Province. To ascertain, therefore, which legislature had the power, the Privy Council considered the purpose and effect of the Act. Again, the case of *Guy* v. *Baltimore* (2) is one of a numerous class of cases in which the United States Supreme Court has adjudged that where a State law, even admittedly within its ordinary powers, so that no question of validity could arise upon the construction of the State Constitution under which it is made, nevertheless in its effect conflicts with an exclusive federal power, it is *pro tanto* void as being in conflict with the United States Constitution. In such a case it is material to ascertain the effect of the Statute, because, although the *power* to pass it is derived from the State Constitution, the *restriction* is found in the Federal Constitution, and the restriction is violated by the effect.

Rossi v. *Edinburgh Corporation* (3) sets up no new principle. Magistrates were empowered to grant a licence to sell ice-cream, with powers to restrict by special regulation, in particular cases, the hours at night after eight o'clock during which it might be sold on any lawful day. They proceeded to pass a general regulation restricting the days also on which it might be sold, and refused to grant a licence otherwise. The House of Lords held

(1) 7 App. Cas., 829.
(2) 100 U.S., 434.
(3) (1905) A.C., 21.

that, not being entrusted with general legislative authority, or any such authority except to fix night hours, the regulation was invalid. If a Licensing Court here attempted to limit by general rules of Court an hotel licence to certain days in the year it would be met by *Rossi's Case* (1) But I fail to see how it can be relied on to restrict the action of a national Parliament having plenary legislative power with respect to taxation.

Therefore, in the result, as the Court said in *McCray's Case* (2), such a conclusion, as my learned brethern preceding me have reached, necessarily gives determinative force to the purpose and effect of the Act, and the assumed object and motive of the legislature in passing it, and this is not permissible in such a case.

The Act is by this process taken to be equivalent to an enactment containing no reference to a tax, and consisting merely of regulative provisions; the words of the Commonwealth Parliament are rejected, and others it has not used are constructively substituted. No similar case can be found. It would be perfectly easy to destroy every Excise Act in a similar manner. All that is necessary is to apply the doctrine of equivalence. The Commonwealth imposes, say, a gun tax or a dog tax of £1 a year. That might be regarded as a penalty on keeping a gun or a dog; such a tax is very frequently said colloquially to be a penalty. A motor car tax might, in like manner, be held equivalent to a penalty on the possession of motor cars. The State might penalize the possession of opium by £100 fine for every ounce. If the Commonwealth, for the purpose of suppressing the evil, imposes a tax of £100 an ounce, could it be said it was only a penalty for regulation, and not a tax? But I do not see how such an Act could stand, if this *Excise Tariff* 1906 is bad. Let us get even closer to the present Act. Take the case of cigarettes. A differential Excise tax of, say, sixpence per pound is placed on cigarettes if made by machine. Is that a penalty on using machinery, and unlawful? If not, could the differential tax be placed on cigarettes made by black labour, or by women, or boys, or consumptives? Would it be said to be no tax whatever, but mere regulation by penalty in respect of trade? If an affirmative answer is given, it cuts across all the principles of the unlimited

(1) (1905) A.C., 21. (2) 195 U.S., 27.

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power of taxation, which have been emphasized in the examples already cited. If, however, it be admitted that black labour, or the employment of women and children, may be made the basis of differentiation, why not under-paid labour? What difference of principle is there between any of the cases suggested? In all of them the tax is on the goods, but for various reasons, motives, objects, or purposes which seem to the legislature appropriate to actuate it in the exercise of the granted power. If it be doubted whether the tax as a tax is really on the goods, though for the purpose of securing fair conditions of labour, an easy test is at hand. Assume, first, the proviso deleted. The Act then stands as a clear and unmistakeable tax on all the machinery specified. A machine made under unreasonable conditions of labour is taxed, so is a machine alongside it made under reasonable conditions. Now assume the proviso to operate. It exempts the latter machine, and says nothing about the former; but the former remains liable as it was before, it is not interfered with. How can it be said the article is not taxed because the legislature, for its own reasons, chooses to differentiate between it and another article which has come into existence under different circumstances? If the tax had been imposed by one Act without a proviso, and then a year or a day after another Act were passed, not as a proviso but independently, exempting machines made under the circumstances specified in the proviso, could anyone have reasonably argued the unconstitutionality of the first Act as not being a taxing Act at all? And if substance is the main thing, why, in the absence of express restriction, apply a different rule of validity according as the legislature puts it into one document instead of two?

It must not be forgotten that, always apart from express restrictions—there being no more limit on the power of Commonwealth taxation than on that of a State—persons may be taxed in any class, at any rate, for any reason. Manufacturers may be taxed at one rate, for one reason, at another for another, or exempted for a third. How can a Court step in and say the employment of labour at low rates is not a reason which the legislature may select, and adjudge that such a reason converts the Act into one of penal regulation.

We are therefore thrown back on the fundamental distinction between taxation and regulation.

The true test as to whether an Act is a taxing Act, and so within the federal power, or an Act merely regulating the rates of wages in internal trade, and so within the exclusive power of the State, is this: Is the money demanded as a contribution to revenue irrespective of any legality or illegality in the circumstances upon which the liability depends, or is it claimed as solely a penalty for an unlawful act or omission, other than non-payment of or incidental to a tax?

It is not sufficient to say the effect is the same. It may even be the very purpose of the federal taxing authority to drive the taxed object out of existence; but as the power to tax includes the power "to embarrass or to destroy," neither the purpose nor the effect is an objection to the exercise of the power. And as held in *Ellis* v. *United States* (1), "the fact that Congress has not general control over the conditions of labour does not make unconstitutional a law otherwise valid, because the purpose of the law is to secure to it certain advantages, so far as the law goes."

Miller on the Constitution of the United States at p. 235 says:— "The definition by both Webster and Story is that 'a tax is a contribution imposed by Government on individuals for the service of the State.'" A penalty is never spoken of as a contribution.

In *Merced County* v. *Helm* (2), quoted by the Supreme Court of the United States in *Flanigan* v. *Sierra County* (3), the Court said, distinguishing between the taxing power and the police power, that the latter "is exercised in the enforcement of a penalty prescribed for the non-compliance with the law, or for the doing of some prohibited act."

Youngblood v. *Sexton* (4) is a very important case because, though a State legislature is usually unlimited with regard to internal concerns, the legislature of Michigan had no power to pass the Act under consideration except as a taxation Act. *Cooley* J. had, therefore, to determine whether a Statute amounted to a tax, or to a liquor licence. The first was permissible under the State

(1) 206 U.S., 246, at p. 256.
(2) 102 Cal., 159.
(3) 196 U.S., 553, at p. 559.
(4) 20 Am. Rep., 654.

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Constitution, the latter was prohibited. The learned Judge said (1):—"This law, in imposing the tax, did not declare the trade illegal in case the tax was not paid. So far as we can perceive, a failure to pay the tax no more renders the trade illegal than would a like failure of a farmer to pay the tax on his farm render its cultivation illegal. The State has imposed the tax in each case, and made such provision as has been deemed needful to insure its payment; but it has not seen fit to make the failure to pay tax a forfeiture of the right to pursue the calling. *If the tax is paid, the traffic is lawful; but if not paid, the traffic is equally lawful.*"

A converse case arose in the *City of New York* v. *Second Avenue Railway Co.* (2) before the Court of Appeal. The City Corporation had made an Ordinance requiring the company to procure a licence under a penalty of 50 dollars, and sued for the penalty. The law forbade them to tax, but permitted them to regulate. The Ordinance was held invalid because it was a tax. The Court reiterated the distinction between tax and regulation (3). "Regulations of police are regulations of internal or domestic government, forbidding some things, and enjoining the performance of others, for the security and protection, and to promote the happiness, of the governed. The only act enjoined by the Ordinance in question is the payment of the 50 dollars, and the only act which it forbids and prohibits is the running of the cars without the payment of the money. If the legislature should by law require every head of a family throughout the State to pay to the collector the sum of 20 dollars, and take his receipt therefor, it would be a fiscal measure, an expedient to replenish the Treasury, not a regulation of police, prescribing a rule of action and conduct." That was the view of the Court of Appeal. The defendants here, however, would say it was penalizing the raising of a family. So, too, if a bachelor tax was imposed, they would, I presume, contend it was penalizing celibacy, and not a tax. Applying the distinction so clearly recognized to the present case, it is clear that the *Excise Tariff* 1906 (No. 16) in no way commands or prohibits any course of action by the manufacturer, and in no way makes the payment

(1) 20 Am. Rep., 654, at p. 663. (2) 32 N.Y., 261.
(3) 32 N.Y., 261, at p. 273.

of unreasonable wages unlawful, and, consequently, there is in law no regulation and no penalty. Whether the tax is paid or not the rate of wages is lawful. How can there be a penalty for an act admittedly lawful?

Up to this point I have regarded the question solely from the standpoint of Commonwealth power. How does it appear, however, when looked at from the aspect of State power, and what is the consequence of holding this Act to be in no sense an Excise Act, and to be in substance nothing more than a regulation of trade entirely within the competency of States? As the power to pass such an Act must reside somewhere, I agree with my learned colleagues that it follows from their view that the States possess it. Now, by sec. 90 of the Constitution the States are forbidden to pass Acts imposing Excise duties. Nevertheless, since this Act is held not to be equivalent to Excise, the States have an obviously easy task to break through the prohibition of the 90th section. They may with the utmost facility and safety, if this decision be adhered to in its integrity, disorganize and destroy at will the most carefully framed fiscal arrangements of the Commonwealth. They may take this Act as their model, actually say on the face of their enactments that they impose a duty of Excise on spirits, tobacco, woollens, machinery, and all other articles manufactured or produced in Australia, and by merely inserting by way of proviso some conditions of labour exempting persons in compliance therewith, safely rely on this decision to maintain the Act as a State Regulation Act, and not in substance an Excise duty. The Commonwealth Parliament's exclusive authority to regulate Excise, and even Customs, becomes merely nominal; uniformity in these branches of taxation is impossible, and effective federal control disappears. To those who have hitherto thought that the Australian Constitution was at least as national in its character as the American Constitution, this will come as a revelation.

For nearly a century and a quarter the Supreme Court of the United States has acted upon the opposite doctrine, and consistently repressed all action on the part of the States even where otherwise fully authorized by their Constitutions—if that action in any way amounted to interference with federal exclusive power

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such as Excise duties are. In *Walling* v. *Michigan* (1) the Court said:—"The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby."

And in *Morgan's Steamship Co.* v. *Lousiana* (2), *Miller* J. said:—"It has been repeatedly held that when the question is raised whether the State Statute is a just exercise of State power, or is intended by roundabout means to invade the domain of federal authority, this Court will look into the operation and effect of the Statute to discern its purpose." Here, then, we have the proper instances where operation, effect, and purpose are lawful considerations for the Court. And why? Because the grants of federal power in the Constitution are absolute, and cannot be interfered with, and, apart from State instrumentalities, have no limitations but those expressly enacted. They are supreme, and to obstruct them indirectly is as much a violation of the grant as direct interference. The reserved powers of the States do not include any right of interference with the granted powers of the Commonwealth. "That which is not supreme must yield to that which is supreme," said *Marshall* C.J. in *Brown* v. *Maryland* (3). Therefore the purpose and effect of a State Act are important in its relation to federal powers. But the converse is not true. A federal power may be exerted to the full, for it is either paramount or exclusive, and the grant of the power is incompatible with a restraining or controlling power: *Weston* v. *Charleston* (4). The purpose and effect of its exercise are therefore for the legislature alone. On these principles I consider that, if a State passed an Act in the terms of this *Excise Tariff* 1906, it would in effect and operation conflict with the prohibition of the 90th section and be void. And the mere fact that such an Act is passed by the State legislature in absolute good faith is immaterial: *Scott* v. *Donald* (5).

The unlimited character of federal power, once it attaches to a subject, is strikingly exemplified in the most recent of the great constitutional decisions of the American Supreme Court. In

(1) 116 U.S., 446, at p. 460.
(2) 118 U.S., 455, at p. 462.
(3) 12 Wheat., 419, at p. 448.
(4) 2 Pet., 449.
(5) 165 U.S., 58, at p. 91.

what is known as *The Employers Liability Cases* (1), decided last January, that tribunal had to consider the validity of an Act of Congress, which provided that inter-state carriers should be liable to the personal representatives of an employé who died from injuries resulting from negligence of the employer or servants, or from negligent defects in the plant or works; it altered the law as to contributory negligence in respect of liability; it directed how the jury should deal with damages, and for whose benefit, whether widow, children, parents or next of kin of the deceased; it prevented contracting out, &c. All these were, needless to say, strictly matters covered by the police powers of the States, at all events until Congress legislated.

The Act was declared invalid by five Judges to four, but only on the ground that in its terms these provisions extended to purely inter-state commerce. On the question of power, which is the only matter of importance here, six Judges held that all the provisions were fully within the competency of Congress if limited to inter-state commerce.

Now, if the defendants' argument here is correct, the Court should have held that, to descend into the contractual relations of employer and employé, is departing from the subject placed under federal control, viz., intra-state commerce. The defendants would have argued—as indeed it was argued—(I extract from the judgment of the Court (2)—"that the Statute inordinately extends the power of Congress and unduly diminished the legislative authority of the States, since it seeks to exert the power of Congress as to the relation of master and servant, a subject hitherto treated as being exclusively within the control of the States, and that in practice its execution will cripple the State and enlarge the federal judicial power."

This was dismissed by the Court from its consideration as concerning merely the expediency of the Act and not the power of Congress to pass it. It went back to *Gibbons* v. *Odgen* (3); it turned to the words of the illustrious jurist whose judgment has ever since guided the course of constitutional development in America, and upon that judgment decided the case. They

(1) 207 U.S., 463.

(2) 207 U.S., 463, at p. 491.

(3) 9 Wheat., 1.

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quoted the passages from the judgment of *Marshall* C.J. to which I have already referred, and need not repeat, as to the plenary power of Congress as if it were a single government subject to the restrictions prescribed by the Constitution itself.

The Court then put the following illustration. Congress could regulate inter-state commerce, and therefore a train moving in that commerce, and then the relation of the master and his servants operating the train, and the relations of the servants between themselves. To refuse to extend the power to these contractual relations would, as the Court said (1) "be to concede the power and then to deny it, or at all events to recognize the power and yet to render it incomplete."

Moody J., who dissented on the minor question of construction of the Act, was in accord with the majority on the point of power. He dismissed as futile the objection of novelty in the character of legislation, describing it as an argument that misunderstands the nature of the Constitution, undervalues it usefulness, and forgets that its unchanging provisions are adaptable to the infinite variety of the changing conditions of the national life. He traced the gradual steps of Congress to deal with national problems as they arose, and instanced postal legislation, commerce legislation, the safety appliance law, and the Act *limiting the hours of service of employés* engaged in inter-state commerce—an Act which the defendants would, of course, contend was *ultra vires*. He concluded with the Act then before the Court.

A distinction may be attempted to be established between the commerce power and the taxing power. But there is none in this respect. Each is plenary, subject only to the prescribed limitations. If the power to regulate inter-state commerce includes power to regulate it in respect of conditions of labour connected with it, even to the extent of limiting the number of hours of labour per day, why does not the power to tax manufactures, among other things, include the power to tax manufactured articles in respect of the conditions of labour connected with them, and by which they are brought into existence? The labour of the employés is as much an inseparable part of the manufactured article as the iron and steel in it,

(1) 207 U.S., 463, at p. 495.

and at least as much so as in the case of transporting the same articles from the factory to another State. The cost, source, quality, and nature of the materials clearly form legitimate consideration for the legislature in imposing the tax, and why not so with respect to the labour?

To accept the defendants' arguments here appears to me to do violence to the plain words of the Constitution, and to recede altogether from the accepted notion of federal powers in America, on the Constitution of which our own was supposed to be based, and to judicially limit, rather than interpret, the grant of national powers.

This I cannot see my way to do, and accordingly rest my judgment on this branch of the case on the clear principles of the plenary power of Parliament, as plenary as in a single Government, subject only to express limitations, with respect to every subject enumerated in the grant. No other principle can, to my mind, satisfy the conception of the great document it is our duty to interpret, or enable the national legislature to fulfil with confidence or advantage the responsible functions for which it has been created.

On the first branch of the case I am, therefore, of opinion the defendants have failed.

It follows necessarily from what has already been said, and, indeed, is involved in it, that the Act does nothing but impose duties of Excise, and that consequently there is no contravention of sec. 55 of the Constitution.

The last ground for invalidating the Statute is that it offends against the express limitation in sub-sec. (II.) of sec. 51 contained in the words, "but not so as to discriminate between States or parts of States." In connection with this sub-section it is necessary to read sec. 99:—"The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof."

Before determining the proper construction of the words under consideration, it is desirable to look at the corresponding provisions in the American Constitution. The first is Article 1, sec. 8, clause 1:—"All duties, imposts, and Excises, shall be uniform

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throughout the United States." The second is Article 1, sec. 9, clause 5:—"No preference shall be given to any regulation of commerce or revenue to the ports of one State over those of another."

At the time the Australian Constitution was framed it had been decided in America in 1884, in *The Head Money Cases* (1), that the uniformity referred to in the American Constitution meant geographical uniformity, and not intrinsic uniformity, of the tax. In other words, that a Tax Act was uniform if it operated with the same force and effect in every place where the subject of it was found. This decision was re-affirmed in *Knowlton* v. *Moore* (2). The Court in that case added:—"The preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception." It is clear, therefore, that, if the American uniformity clause had been adopted in Australia, every taxing Act must have operated with exactly the same force and effect on the same articles, whether in Tasmania or at the Gulf of Carpentaria, and, although the tax was nominally uniform, might have pressed much more severely on the taxpayer in the one place than in the other. But the clause was not adopted. The word "uniform" is used in connection with Customs duties, and the separate use of that expression, coupled with the marked change of language in the words of the limitation in sec. 51 (II.), naturally leads to the belief that there was an intentional departure from the American rule of uniformity. That belief is considerably strengthened by two circumstances, the first is the language of the limitation itself. The word "taxation" confers power on a national Parliament; a power to be exercised over all persons, things and circumstances, without regard to the existence of separate States. It would have been a simple and natural method, if the adoption of the American rule of geographical uniformity were desired, to have inserted in this Constitution the words of its prototype, or to have had forbidden discrimination "between any parts of the Commonwealth." But "States and parts of States" are referred to, and that expression more naturally lends

(1) 112 U.S., 580. (2) 178 U.S., 41, at p. 106.

itself to the assumption that the prohibition to the Federal Parliament was against differentiating in its measure of taxation between States and parts of States, because they were particular States or parts of States.

The second circumstance referred to is the similarity of the language in the primary limitation and in sec. 99. The expressions "Discriminate between States" in the one and "Give preference to one State over another State" in the other, seem to me identical in purport and effect.

"Discriminate between parts of States" in the one, may or may not be identical with "Give preference to any part" of one State "over any part" of another State.

But, if there is any distinction between the last mentioned phrases, one point of similarity is indelible. It is this; that the treatment that is forbidden, discrimination or preference, is in relation to the localities considered as parts of States, and not as mere Australian localities, or parts of the Commonwealth considered as a single country.

Considerable light is thrown upon this question by another leading American case decided as far back as 1855, *Pennsylvania* v. *Wheeling and Belmont Bridge Co.* (1), where the preference clause was considered. *Nelson* J. said:—"The history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one State over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several States." But, he added, what is very important to notice, that "it is a mistake to assume that Congress is forbidden to give a preference to a port in one State over a port in another," and he illustrated this position by pointing out that a port in one State might be made a port of entry by Congress, which might at the same time refuse to make another port in another State a port of entry. He added:—"The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different States, but discrimination *between States*; and if so, in order to bring this

(1) 18 How., 421, at p. 435.

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case within the prohibition, it is necessary to show, not merely discrimination between Pittsburg (which was in Pennsylvania) and Wheeling (which was in Virginia), but discrimination between the ports of Virginia and those of Pennsylvania."

In other words the preference prohibited was preference for one State as against another.

When it is remembered that the American clause is worded so as to inhibit preference "to the *ports* of one State over those of another" it comes very near to the limitation in sec. 51 (II.) regarding discrimination "between parts of States." It is not necessary to determine whether this prohibition against discrimination is confined to discrimination between parts of different States, or whether it extends to protect different parts of the same State, because, by favouring one part of a State, an adjoining State might be indirectly but substantially preferred. If, for instance, discrimination were made in favour of one part of a State against the rest of it, the discrimination, though nominally between parts of the same State, might easily and materially benefit an adjoining State. This, I say, may very possibly and reasonably be included within the prohibition. I have not to determine that finally now; but, in any case, the pervading idea is the preference of locality merely because it is locality, and because it is a particular part of a particular State. It does not include a differentiation based on other considerations, which are dependent on natural or business circumstances, and may operate with more or less force in different localities; and there is nothing, in my opinion, to prevent the Australian Parliament, charged with the welfare of the people as a whole, from doing what every State in the Commonwealth has power to do for its own citizens, that is to say, from basing its taxation measures on considerations of fairness and justice, always observing the constitutional injunction not to prefer States or parts of States.

If, then, this be the true interpretation of the words of limitation, as I conceive it to be, there is an end of the last ground of objection, because no one could possibly suggest there is in the *Excise Tariff* 1906 (No. 16) any discrimination for or against part of Australia merely because it is a particular State in any contradistinction to any other State or States, or because it is a

particular part of a State in contradistinction to any other part of the same State or to any other State.

But conceding for the sake of argument, and contrary to my opinion, that the limitation extends to the case of an Act which discriminates between localities as parts of the Commonwealth, and as if, notwithstanding the words used, States were non-existent, still how does this Act offend ?

Paragraphs (*a*) and (*c*) of the proviso are, to my mind, clearly, and beyond argument, inoffensive.

Paragraph (*b*) enables a manufacturer to claim exemption if the goods are manufactured under conditions of remuneration of labour which are in accordance with an industrial award in the *Commonwealth Conciliation and Arbitration Act* 1904.

How can this paragraph possibly discriminate between localities? It is said the Arbitration Court may declare the award to apply to certain areas, that the area may even be a whole State, and therefore the taxing Act discriminates between States. In my opinion, this contention ought not to prevail. Does the *Commonwealth Conciliation and Arbitration Act* show partiality for some localities as against other localities ? Does it discriminate between States and parts of States ? I am astonished to hear that it does. If it does, it ought not be difficult to point out the localities it favours or the States or parts of States for which it shows preference. It enables industrial disputes extending beyond the limits of a State to be settled by an award. The award determines the questions in dispute, and in settling these, as, for instance, wages or hours of employés, the Court is not bound to examine separately and in detail the circumstances of every establishment in the industry involved in the dispute. It may make an award binding the parties appearing, represented or summoned, and may further bind others in the industry, wherever situated, by making its determination a common rule. So far there is no pretence at differentiating between localities as such. But because one common rule binding the whole industry everywhere in Australia would probably, and, indeed, almost certainly, work injustice, the Court is empowered to have regard to "local circumstances," not to the mere fact of locality, much less any particular locality, and, so far as these circumstances are

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substantially similar, to make a common rule apply. The extent of the similar circumstances must necessarily be coincident with some area of territory, which may be delimited; and it may coincide with State boundaries, or comprise only a small portion of a State, or include a region falling partly within one State and partly within another, or embrace two States. These are mere accidents and have no relation to States as such. The area is marked out by the circumstances, not the circumstances by the area. The area is merely a convenient label to indicate similar industrial circumstances, irrespective of State boundaries, or State districts. The Act applies the one rule to goods made "in any part of the Commonwealth," the one standard, reasonableness, or if any variation of rule is possible, it is variation of the Court's idea of justice, and in no way determined by the mere fact of locality. So far from finding in the Act partiality for any special localities, I discern the most absolute impartiality, and absence of discrimination in favour of or against any particular locality. Discrimination between localities in the widest sense means that, because one man or his property is in one locality, then, regardless of any other circumstance, he or it is to be treated differently from the man or similar property in another locality. No such design or necessary result can be gathered from the *Excise Tariff* 1906 (No. 16) or the *Commonwealth Conciliation and Arbitration Act* 1904.

As well might the Act be said to discriminate between localities because wages were in fact higher in one place than another, and a fixed duty therefore pressed harder on some manufacturers than on others. *The Colonial Sugar Refining Co.* v. *Irving* (1) is, in my view, an authority against the defendants' contention. The Privy Council there said of the *Excise Act* 1901:—"The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

So, here, the rule is a general one, applicable to all parts of the Commonwealth alike, and the fact that it operates unequally in different localities arises, not from anything done by the Parlia-

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

ment, but from the inequality of existing industrial circumstances, which are merely recognized and given effect to by an award. Reference to the award is merely a convenient and compendious method of indicating proved fairness under similarity of circumstances, and not anything that can be fairly designated partiality or discrimination between localities or between States or parts of States.

Paragraph (*d*) seems to me so unexceptional as to be unnecessary to specially deal with it.

I conclude that the Act is not open to the objection of illegal discrimination.

If, however, the proviso be, with respect to any one of its paragraphs, discriminating within the words of limitation, I agree that the whole Act is invalidated. To delete an exemption is to increase the area of taxation intended by Parliament and, as this can only be done by the legislature, it is not within the competency of this Court. This Act must stand or fall in its entirety.

In the result the Statute should, in my opinion, be sustained, and judgment entered for the plaintiffs.

I wish to add, having regard to some observations that fell from me during the argument on the subject of bounties, that I recognize, in view of this decision, it may be argued that even a bounty Act would fall within the prohibition of sec. 99. I can understand the contention being presented that discrimination between two necessarily includes preference for one, and therefore an enactment in the terms of the proviso of the *Excise Tariff* 1906 (No. 16) would invalidate a bounty Act equally with a taxing Act. Of course, I express no opinion on the subject, but, as a good deal was said during the progress of the case, I wish, in view of the present decision, to guard myself against being thought to have any opinion one way or the other with respect to bounties.

HIGGINS J. The arguments in these cases have taken many shapes, but there is really only one question—a question as to the limits of the power of the Federal Parliament to "make laws . . . . with respect to . . . . taxation." If this Act is within the ambit of the power, and if it does not

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discriminate between States or parts of States, the motives of the Parliament in passing the Act are immaterial, and the Act is valid. Nor do the consequences of the Act—whether direct or indirect—affect the validity of the Act. The weighing of motives and of consequences is for the legislature and for public opinion, not for the judiciary. Moreover, the validity of the Act depends on its substance, not on its form—on its true character, not on what the legislature calls it. So far, we are on common ground, and there is no dispute.

No doubt, this Act does tend to encourage employers who pay fair wages to their employés; and it was meant to do so. Therefore, with our limited experience of the working of a federal system, our first and superficial impressions must be adverse to the constitutionality of the Act. "This is," we say, "an attempt of the Federal Parliament to regulate wages. Wages are a matter for the State Parliament only; why should the Federal Parliament be meddling with what is not its business?" Yet in this short argument there are two misleading expressions. Every one agrees that if this Act *regulates* wages, in the sense of prescribing wages, commanding what wages shall be paid, making it illegal, in any sense, to pay other wages, the Act is, to that extent, void. But it is competent for the Federal Parliament to use any of its admitted powers in such a manner as to *affect* or *influence* the rate of wages, however materially. The truth is that, where two law-making powers operate over the same territory and the same people, the laws of one authority must necessarily touch, at every point, the subjects committed to the other authority, and must frequently affect the conduct of persons with regard to those subjects. It would profoundly affect the exercise of the State powers with regard to State subjects if the Federal Parliament were to prohibit the importation of foreign books, to forbid inter-state carriage of cattle, or the export of wool, or the import of scientific apparatus, to sweep away all lighthouses, to abolish the marriage tie, to prescribe that all infants shall be sent to the custody of certain institutions. The electors would have something to say as to such legislation; but its influence on State businesses, State education, State railways, State morals, or State solvency, would

not make it void. It is true that, if the Federal Parliament can make its taxation depend on the scale of wages paid by an employer, it can make its taxation depend upon other things—the length of each man's foot, his abstinence from tobacco and beer, the number of his children; or it can impose a licence fee on all persons carrying on a specified trade, with remission to those who carry on under specified conditions. But it is idle to say that neither the Convention nor the British Parliament intended such things. Of course it did not; but it intended that the Federal Parliament should be free to deal with federal subjects as it thought best for the people of Australia—it did not intend that the Federal Parliament should move in leading strings. The mere fact, therefore, that the Federal Parliament lays down certain unusual *conditions* as to wages in a taxation Act does not make that Act void, provided that it does not purport to *regulate* wages in the sense of making a law, a legislative command, to pay wages. The second fallacy lurks in the statement that wages are a matter for the State Parliaments only. It is true that the Federal Parliament has no power to make laws prescribing wages. But, in the exercise of its admitted powers, the Federal Parliament may—indeed, must—often touch wages incidentally; and, if and so far as the federal law is within the admitted powers, it is valid, no matter what the State laws may say (Constitution, sec. 109). To say that the Federal Parliament cannot make a law because legislation on the subject belongs to the States is rather to invert the true position. The Commonwealth has certain powers, and as to those powers it is supreme; the State has the rest. We must find what the Commonwealth powers are before we can say what the State powers are. The Federal Parliament has certain specific gifts; the States have the residue. We have to find out the extent of the specific gifts before we make assertions as to the residue. The question, then, is merely what is the extent of this power of taxation given to the Federal Parliament, and how far may the power be applied? It is not contended for the Federal Parliament, as was contended, it seems, for the magistrates in *Rossi* v. *Edinburgh Corporation* (1), that it has power to

(1) (1905) A.C., 21, at p. 25.

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amplify its powers, and to prescribe all that may seem to be "desirable or expedient" as an addition to its powers. It is merely contended that what has been done in this Act is within the plenary power of taxation actually granted. Now, by section 51 of the Constitution, the Parliament has, subject to the Constitution, "power to make laws for the peace, order, and good government of the Commonwealth with regard to . . . . taxation; but so as not to discriminate between States or parts of States." So the Parliament has, *primâ facie*, power to tax whom it chooses, power to exempt whom it chooses, power to impose such conditions as to liability or as to exemption as it chooses. But the Constitution expressly forbids discrimination between States or parts of States; and, according to the dictum of the High Court in *Federated Amalgamated Government Railway and Tramway Service Association* v. *New South Wales Railway Traffic Employés Association* (1), the Federal Parliament has no power to tax State officers or State agencies. Subject to this latter implication, which has been based on the nature of the Constitution, there is only one limitation—the Parliament must not discriminate between States or parts of States. The fact that this limitation is expressed excludes all limitations by implication: *expressio unius exclusio alterius*. With the qualifications which I have mentioned, (and certain others immaterial for the present purpose: see secs. 92, 99, 114, 117), the taxing power of the Federal Parliament is plenary and absolute; unlimited as to amount, as to subjects, as to objects, as to conditions, as to machinery. "If the right to impose the tax exists, it is a right which in its nature acknowledges no limits": *Weston* v. *Charleston* (2); *McCray* v. *United States* (3). This position also has not been disputed by the defendants—at all events, expressly.

Next, to examine the Act in question. The first section states the title. The second section says that duties of Excise are to be imposed on the goods and at the rates mentioned. So far, it is a taxing Act pure and simple; for an obligation is created to pay to the Crown Excise duty in respect of the goods specified. Then follows a proviso that the Act is not to apply to goods manufac-

(1) 4 C.L.R., 488, at p. 537. (2) 2 Pet., 449, at p. 466.
(3) 195 U.S., 27, at p. 57.

tured under such conditions as to the remuneration of labour as are sanctioned in any one of four methods. That is to say, the Act taxes all manufacturers of the goods, but exempts those who fulfil certain conditions; and there is full power under the Constitution to discriminate between persons, although not between States. In this case, the discrimination, the boundary line, between those who have to pay is placed within the area of what is, with the qualifications which I have stated, a State subject —the conditions of labour; just as a federal Act might fix the boundary line for a postal district or for a defence or a quarantine area, at Lake Eyre or at Ipswich, or at other places subject to State control; and, conversely, a State Parliament might, I presume, discriminate—if it thought such a discrimination wise—in its labour legislation, between those who pay and those who do not pay Excise duty—commanding those who do not pay Excise duty to pay higher wages than those who do. There is power for the Federal Parliament to exempt all persons having black eyes, all persons not having horses, all persons who subscribe to certain hospitals, all persons who can speak French, all persons who give their employés a half holiday every week, all persons who are teetotallers. No doubt, such taxation would tend, more or less, to induce men to get rid of their horses, or to subscribe to the hospitals, or to learn French, or to give the half holiday, or to abstain from drink. Yet horses and hospitals, education and the relations of employers and employés, morality, health and social habits, are all matters for the State legislature. Only the State Parliament can (so far as we are concerned in the present case) prescribe what horses a man may own, can make commands as to sanitary arrangements or as to employment, can create offences in connection with such subjects, can visit the persons to whom the command is addressed with punishment if they do not comply. Inasmuch as labour laws cannot be said to be ancillary to its taxing legislation, in this case, the Federal Parliament cannot legislate on labour so as to make that lawful which the State makes unlawful; or so as to make that unlawful which the State makes lawful.

This very Act is part of a scheme of protection to manufacturers (see *Customs Tariff* 1906, assented to on the same date).

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Protection to some extent is given to all the manufacturers; but it is given to a greater extent to those who pay fair wages. Now manufactures are not the concern of the Commonwealth; and any argument based on the Commonwealth's meddling in State affairs would be equally applicable to the framing of a Customs tariff with a view to the protection of manufacturers. Yet the power to protect by the tariff is admitted by all. Why should the Commonwealth Parliament be able to levy taxation with a view to the benefit of manufacturers, and not be able to levy taxation with a view to the benefit of their employés? Why should it be compelled to protect all manufacturers, if it protect any? It has to be steadily borne in mind that the Federal Parliament has power to discriminate between persons, though it has not power to discriminate between States or parts of States.

If the Federal Parliament has power to tax, it can tax whom it chooses, it can exempt whom it chooses. The defendants' counsel were so evidently pressed by this admitted doctrine that they were driven to urge boldly that this Act is not, in substance, taxation at all. But *if it is not a taxation Act, it is nothing—it is not a command of the legislature at all.* For the only command is to pay duties; the clauses as to fair and reasonable remuneration do not, in form or in substance, contain a command, or anything in the nature of a command. The Act says, "Duties of Excise shall . . . . be imposed on the dutiable goods specified . . . . at the rates specified" (sec. 2). Why is this not a taxing Act? Does the fact that there is a proviso for exemption based on labour conditions make it other than a taxing Act? I shall deal presently with the more difficult question as to the limits of the right of the Federal Parliament to interfere with a State subject. The question now is, does the addition of a proviso, which may (I shall assume for the present) be beyond the Federal Parliament's powers, convert that which would otherwise be a taxing Act into a non-taxing Act? Would it be a taxing Act from the point of view of the British Parliament? This Constitution is contained in an Act of the British Parliament; and we should expound the words according to their meaning in an Act of the British Parliament in 1900. For instance, if there were any variance between the British *Acts Interpretation Act*

and the Australian, the British would govern the meaning of the Constitution. Our Interpretation Act, made *under* the Constitution, could not affect the meaning of the Constitution. Would this Act be treated by the British Parliament as coming under the words "laws . . . . with respect to . . . . taxation"? Fortunately, we have a very good practical test. In the British Parliament, as in other Parliaments formed on its model, there are certain very definite rules of practice and procedure applicable to taxation and other money bills, as distinguished from ordinary bills. A taxation bill has to be proposed by a Minister of the Crown; it has to originate in a committee of the whole House of Commons; and the House of Lords never ventures to initiate or to amend such a bill. Any parliamentarian would open his eyes with amazement if he were told that this practice would not be applicable to a bill in the terms of this Act, or that this is not a taxation Act. The fact that the United Kingdom is a unified or unitary State does not affect this matter. The meaning of "laws . . . . with respect to . . . . taxation" is the same in a unified State as in a federation, although the legislature in a federation may be more hampered by limitations of its powers. This is, then, a taxation Act; and it is an Excise taxation Act, as the tax is imposed on the production or manufacture of commodities (see *Peterswald* v. *Bartley* (1)). It is, therefore, a tax such as the Federal Parliament can impose, and the State Parliament cannot impose (Constitution, secs. 90, 93). The State, indeed, could prescribe the rates of wages, and could impose penalties proportioned to the number and the character of the articles manufactured. But the Federal Parliament alone can create an obligation to pay Excise duty; and the State alone can create an obligation to pay certain rates of wages; and this is a vital difference.

"But," the defendants urge, "the real substance of this '*Excise Tariff*' is to ensure that workmen shall have higher wages." The most dangerous fallacies are often folded up in a felicitous phrase. What does this phrase mean? It must refer either to the motives of the legislators, or to the consequences of the legislation, or to both. It can refer to nothing else. What the Act does is

(1) 1 C.L.R., 497.

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to impose a tax, with a proviso for exemptions based on wages. If it is true that the tax is so imposed with the view of getting higher wages for the workmen, or that the tax so imposed will have such an effect, the fact does not concern this Court. Indeed, unless motives, or consequences, are brought into the defendants' argument in the disguise of a deftly turned phrase, I do not think that the defendants' argument would stand an hour's consideration.

Subject to the objection taken that this Act discriminates between States, if it is once conceded that this is a taxation Act, the matter is really ended. For the Federal Parliament can tax and exempt whom it chooses; can prescribe such conditions of exemption, however absurd, as it chooses; and it does not matter, so far as regards the validity of the Act, what the legislators' motives may be—even if it be to encourage or to discourage people in acting in a certain way with regard to a subject reserved to the States. The motives of the legislators are for their constituents to consider. If a tax be laid upon motives and grounds "wholly beside the intention of the Constitution," the remedy . . . . is "solely by an appeal to the people at the elections" (*Story, Comm.*, § 374). The Courts have merely to determine what the Act does, what it enacts in substance, not in name; and whether it is within the power conferred by the Constitution. It is conceded on all sides that this Court is not to be bound by the name which Parliament has chosen to give to the Act, but is to consider what the Act is in substance—what it does, what it commands or prescribes. But if, in fact, the Act purport to impose a tax, the Court has to assume that the primary object is the raising of revenue, even though the Act should in fact be passed with the view of destroying State banks in favour of national banks: *Veazie Bank* v. *Fenno* (1); or of protecting manufacturers; or of preventing oleomargarine from being sold as butter: *Ex parte Kollock* (2); or of discouraging speculative sales in Wall street, New York: *Treat* v. *White* (3). In some cases the American Courts seem to treat this assumption as a *præsumptio juris et de jure*—a presumption that cannot be

(1) 8 Wall., 533.
(2) 165 U.S., 526.
(3) 181 U.S., 264.

rebutted. But, at all events, the doctrine is clearly established. The question, then, for us, is not why, or with what object, the Federal, or State Parliament has passed an Act, but whether it is within the scope of its powers; not why the Federal Parliament ploughs this ground, but is the ground within the boundaries of any of the federal powers? This doctrine, as to the immateriality of motives, is not an exceptional doctrine, applicable only to Constitutions. According to English law, a man who has a legal right to property cannot be interfered with in the exercise of his rights, even if he exercise them with vindictive or blackmailing motives: *Bradford Corporation* v. *Pickles* (1).

"But," it is urged, "the Federal Parliament has no power to regulate wages." This is true—with certain qualifications—if by "regulate" we mean to impose a command or obligation on employers to pay according to any scale of wages. In this sense of the word, no one can say that this Act "regulates" wages. If we mean that the Federal Parliament cannot by its legislation *affect* wages—cannot in the exercise of its admitted powers impose obligations dependent on a wages standard, cannot discriminate in its taxation, for instance, between those who pay and those who do not pay fair wages—then there is no foundation for the statement. The word "regulate" is not the word of the Constitution; but if it is to be used in discussing the operation of this Act, we must understand clearly in what sense it is used. The point is that in this Act there is no law prescribing wages, no command or anything in the nature of a command with regard to wages. *The substance of the Act is the obligation which it imposes; and the only obligation imposed is to pay Excise duty.* It does not *regulate* the internal trade and industry of the States, except in the sense that it *affects* the conditions of that trade and industry; and so long as it achieves this result by virtue of the unlimited discretion of the Federal Parliament as to the conditions to be annexed to its power of taxation, or any other admitted power, the Act is valid.

The Act does not conflict, and cannot conflict, with any possible State law prescribing wages. Under the State law, the manufacturer may be commanded (*e.g.*, under a Factories Act or an

(1) (1894) 3 Ch., 53.

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Arbitration Act) to pay 6s. a day. By paying the 6s. he satisfies the law; but he also gets a remission of Excise duty if he pay 7s. The Federal Parliament does not say "You must pay fair wages." It says:—"You will be rewarded by an exemption from Excise duty if you pay fair wages. If this Act were an Act prescribing wages, the manufacturer who does not comply with the standard of wages referred to in the Act would be breaking the law; whereas here the man who does not comply would not (assuming the Act to be valid) break the law any more than the man who does. The case of *United States* v. *De Witt* (1), on which the defendants rely, is, therefore, no authority in their favour. In that case, the federal Act purported to *prohibit* the mixing of naphtha and illuminating oils, and the selling of such a mixture; it created an obligation on the subject of illuminating oils, and thus interfered with the internal concerns of each State. *The Excise Tariff puts the employer under no legal obligation whatever as to wages.* The manufacturer who pays low wages acts as lawfully as the man who pays high wages. There is an essential difference between being under a legal obligation and not being under it; between breaking the law and keeping it; between being under a command enforceable by some kind of punishment, criminal or civil, and being merely subject to an inducement. Even punishment does not constitute a law; there must be a command, or something in the nature of a command, some obligation imposed, expressly or by implication. A tyrant may punish a messenger who brings bad news; but this is not for breach of any law. Moreover, it is a mistake to say that the term "sanction," in connection with laws, can be applied to rewards as well as to punishments. As was clearly pointed out by *Austin* (*Jurisprudence*, 3rd ed., vol. I., p. 93), "Rewards are indisputably motives to comply with the wishes of others. But to talk of commands and duties as sanctioned or enforced by rewards, or to talk of rewards as obliging or constraining to obedience, is surely a wide departure from the established meaning of the terms." A man is punished for breaking the law. This is the juridical sense of "punish." If, as is urged for the defendants, he is to be punished for not paying

(1) 9 Wall, 41.

certain wages, where is the provision for any trial for such an offence? Suppose an information to be drawn up, "For that A.B. being a manufacturer did not pay," &c. Such an offence is not to be found in any federal Act. In the case of this Act, the only offence to be found is non-payment of Excise duty; and the manufacturer can be sued for the duty, and cannot escape an order unless his wages are approved in some one of four methods. But he cannot be sued, either civilly or criminally, for not paying the approved wages. No employé can sue him for the difference between the wages paid and the wages declared by the Conciliation Court to be fair and reasonable. In this case the manufacturer is rewarded for not making use of his right to act in a manner perfectly lawful, but not favoured by the Federal Parliament; and there is, after all said and done, a difference between using a stick to a beast and offering him a bundle of carrots. It may even be conceded that the suffering is the same in substance, whether we call it punishment or not. But if the municipal rates in Bathurst are higher than the municipal rates in Bendigo, it would be a mere rhetorical misuse of words to say that people are "punished" for living in Bathurst.

I understand that many of these harvesters are exported to the Argentine Republic. The Federal Parliament has at least as much power to affect wages in Australia as the Argentine legislature. If the Argentine legislature passed an Act on the lines of this Act, and made it applicable to imported as well as to home-made implements, it would operate precisely in the same way as this Act; and yet it could not be regarded as a law regulating or prescribing wages in Australia. It would be simply a law settling the conditions under which revenue will be collected in the Argentine, although it might vitally affect this Australian industry. The essential feature of the position is that this law makes no command as to wages, but does make a command as to payment of an Excise tax; and that, therefore, it could not be enacted by the State legislature, but can be enacted by the Federal legislature. This Act, then, does not regulate wages in the sense of imposing an obligation, of making a law, with regard to wages. But it undoubtedly has, or may have, an effect on wages. It holds out a strong inducement to manufacturers to come within

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the class of those exempted from Excise duty by paying wages under some one of the four standards mentioned in the proviso. This does not make the law invalid.

It is impossible that the federal law should not affect people in their actions with regard to State subjects. We cannot partition a man or a community into separate federal and State pieces, one to be touched by the Federal and the other by the State Parliament. As has been said in the Supreme Court of the United States, in the converse case of a State Act which interfered with the operation of the federal law as to inter-state and foreign commerce: "Legislation, in a great variety of ways, may affect commerce and persons engaged in it *without constituting a regulation of it*, within the meaning of the Constitution": *Sherlock* v. *Alling* (1); *Hall* v. *De Cuir* (2). If the contrary doctrine is to be adopted in Australia, the State Governments, although one of them supports the defendant McKay in his attack on the Commonwealth law, will be grievously crippled in their action. At present, under the United States doctrine, a State legislature is treated as having power to exclude, in the interests of public health, goods coming from a diseased port. But, according to the defendants' argument, this would be an invalid interference with the exclusive power of the Federal Parliament on the subject of foreign commerce—unless, indeed, the extreme view put for the defendants be accepted, that because the State has such a police power the Federal Parliament has no power at all to exclude such goods under its trade and commerce power. If the defendants are right, the State cannot, it seems—unless the same extreme view be accepted—enact a valid licence law, or local option law, or prohibit the sale or manufacture of intoxicating liquors; for it would discourage importation, diminish the profits of the importers, and lessen the federal revenue (see *Licence Cases* (3); *Kidd* v. *Pearson* (4)). If the defendants are right, the State cannot give that encouragement to industries which it often has given—say to the growth of hemp, of oil plants—for the home production distinctly interferes with foreign commerce and Customs revenue. If the defendants are

(1) 93 U.S., 99, at p. 103.
(2) 95 U.S., 485.
(3) 5 How., 504.
(4) 128 U.S., 1.

right, it is hard to see how the State can exclude pestilence to body or mind, plague, cholera, or obscene pictures, lottery tickets, convicts, opium (see *Licence Cases* (1)). If the defendants are right, the doctrine must be applied so as to make State laws invalid as well as to make federal laws invalid: and legislation of the State must be treated as void which affects people in their actions with regard to federal subjects by encouraging or discouraging them in a definite direction. If the defendants are right, how can a State Act for Sunday observance be supported, if it check inter-state commerce? If the defendants are right, there lies before us the prospect—agreeable, perhaps, to a limited class—of perpetual struggles, in which attempts will be made to treat State laws as invalid because they affect (incidentally, as in this case) federal subjects, and federal laws as invalid because they affect similarly State subjects; and the State Governments will probably find that the doctrine will re-act with baneful pressure on their own activities.

There is certainly no support for the defendants' doctrine in our Australian legislation since Federation; and there is distinct authority against the defendants in the United States and in Canada. Consider our first *Excise Tariff* 1902. There were many kanakas in Queensland; and, in order to induce planters to employ white labour, Parliament gave to the producers of sugar cane by white labour a rebate of 4s. per ton in the sugar Excise duty. That Act had nothing to do with immigration, or with foreign or inter-state commerce; it was based on the taxing power; and it was clearly meant to influence the action of planters with reference to a subject reserved to the States. Subsequently, with a view to the book-keeping clauses of the Constitution, the same benefit was given under the name of a bounty (*Sugar Bounty Act* 1905). But, whether we call it a remission of duty, or a bounty, the principle is the same—discrimination between producers based on their system with regard to employés. Our *Customs Tariff* contains exemptions in favour of the Universities and Hospitals, in favour of the blind and physically helpless. Yet these are the concern of the State; and if Parliament may, in its taxation, favour the physically

(1) 5 How., 504, at p. 628.

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helpless, why may it not favour the economically helpless—the day labourer? If the defendants are right, I cannot see how much of our "White Australia" legislation can be supported: or, indeed, any protective duty.

If the defendants are right, they have discovered a constitutional objection which the acutest minds in the United States have failed to discover in 120 years—that Congress cannot use its admitted powers with the object of affecting or influencing people in their conduct with regard to subjects reserved to the States. Congress imposes a far higher duty on opium prepared for smoking than on the crude opium. Defendants' counsel, in answer to my question, admitted at first that such a law is invalid if designed for the suppression of opium smoking; but afterwards he withdrew the admission, and said he did not know. The dilemma was obvious. Religious and charitable institutions, libraries, exhibitions (State concerns) enjoy many exemptions from duties. The Constitution does not give Congress any concern in agriculture. Yet, from 1839 onwards, Congress has been appropriating federal revenue in aid of State enterprise and institutions. It has collected statistics, distributed cuttings and seeds, promoted botanical and chemical investigations, endowed State colleges. One of the members of the President's cabinet is Secretary of Agriculture. Congress has exempted from Excise duties distillers who use home grown materials. But the greatest instance of federal interference with a State subject is to be found in the levying of protective duties by Congress. The discussion on the subject was very prolonged and bitter, but the power of Congress is not now questioned. It is treated as resting, not only on the taxation power, but on the power to regulate foreign commerce. But why may the power to regulate foreign commerce be used so as to affect State subjects if the power of taxation may not? How is protection of the employer by means of the commerce power right, if protection of the employé by means of the taxation power is wrong?

In the United States, the recognized position is that stated briefly by Mr. Black (*Constitutional Law*, 2nd ed., p. 341)—that an Act of Congress "is *not to be declared invalid merely because it has a purpose and design which ranks it as a*

police regulation." Therefore, Congress has forbidden lottery tickets to be carried by the United States mails. The object was, admittedly, to discourage gambling; and the morals and habits of the people are matter for the States, not for Congress. It was not pretended that the Act would make the postal service more profitable or more efficient. The same author also instances the federal Acts against trusts, adulterated foods, oleomargarine, diseased persons, quarantine, opium imported by Chinese, as being valid Acts, though aimed at and actually affecting subjects reserved to the States. So far as I can find, in every instance in the United States, in which a federal Act has been attacked for interfering with a State subject, in a taxation Act otherwise within the powers of Congress, the Act has been held valid. The case of *Veazie Bank* v. *Fenno* (1) was followed in *National Bank* v. *United States* (2). In the *Licence Tax Cases* (3) Congress did not, as in our *Excise Tariff*, merely impose a tax, and exempt those who fulfil a certain condition. It enacted that no person should engage in selling lottery tickets, or in the retailing of liquors without a licence, and paying the licence fee to the revenue. It was urged that the internal trade of a State was not subject to federal legislation; the object of the tax—to discourage the liquor traffic and gambling—was obvious; one of the States in question had actually prohibited lottery tickets; and yet the Act of Congress was held valid. But the latest oleomargarine case is very instructive (*McCray* v. *United States* (4)). There, a federal Act is treated as valid which goes further than this Act in the direction of controlling or influencing men's actions with regard to a State subject. The purpose is boldly avowed in the title: "An Act to make oleomargarine and other imitation dairy products subject to the laws of any State . . . . into which they are transported, and to change the tax on oleomargarine, and to impose a tax to provide for the inspection and regulate the manufacture and sale of certain dairy products." So the purpose is (*inter alia*) to *regulate* manufacture and sale. The Act then imposes a tax on oleomargarine of ten cents per pound; but if the article is free from

(1) 8 Wall., 533.
(2) 101 U.S., 1.
(3) 5 Wall., 462.
(4) 195 U.S., 27.

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artificial colouring designed to make it look like butter, the tax is only ¼ cent per pound. An action was brought for a penalty against a retail dealer who had purchased for resale oleomargarine artificially coloured and not stamped at the rate of ten cents per pound. It was urged for him that the Act was an unwarranted interference with police powers, a usurpation of the State powers; that the Act was not for the purpose of raising revenue at all. The "bogey" argument was used as it has been used in this case—the awful possibilities of legislation if Congress were treated as having such a power. It was urged "that if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear." But the Court held that the exercise by Congress of the power of taxation was unfettered (save so far as expressly excepted in the Constitution); that the motive or purpose of Congress was to be left out of consideration, and only the actual scope and effect of the Act were to be regarded; that the consequences alleged, the destruction of the industry, were nothing to the purpose. "Since . . . . *the taxing power conferred by the Constitution knows no limit except those expressly stated in that instrument*, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise" (1). "The right of Congress to tax within its delegated power being unrestrained, except as limited by the Constitution, it was within the authority conferred on Congress to select the objects upon which an Excise should be laid" (2). "The judiciary is without authority to avoid an Act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax . . . . , the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress" (3).

There is, indeed, one point in which the *Oleomargarine Case* differs from the present, and it has been pressed on us for all

(1) 195 U.S., 27, at p. 59. (2) 195 U.S., 27, at p. 61.
(3) 195 U.S., 27, at p. 63.

that it is worth. The classification there was based on the inherent character, quality or description of the subject matter. This is, of course, the most common basis of differentiation. But we have no right to import into the Constitution a qualification of the plenary power to make laws "with respect to . . . . taxation" by laying down that every differentiation *must* be made on this basis. In the United States, as well as in Australia, there are frequent cases of Congress classifying by facts other than the character, quality, or description of the article. Take petroleum. A duty is imposed on any petroleum coming from a country which produces petroleum, if it imposes a duty on United States petroleum. Other examples are to be found in reciprocity duties, which depend on the foreign country's fiscal attitude towards the United States. The prohibition of goods made by prison labour is another instance—it depends, not on the character of the goods, but on the character of the workers. Sometimes the tax depends on the machines used for making. I find a tax on lace window curtains if made on the Nottingham lace curtain machines. I find also an extra tax imposed on printing paper against countries which impose an export duty on pulpwood exported to the United States. Yet the manufacture of paper is a State subject; and the tax is not based on the character or quality of the printing paper. A duty is imposed on sculpture if produced by professional sculptors, not if produced by others. Goods are often made free of duty if imported for this or that specific exhibition. But there is no need to multiply such instances. It is abundantly manifest that the United States Congress, even though it is a Parliament of limited powers, differentiates in its taxation on the basis of any facts of any kind that it thinks fit; and that it actually differentiates on the basis of the labour employed in production, although it has not been given any authority to regulate labour. If the case of *Peterswald* v. *Bartley* (1) lays down a different principle—which is very doubtful—the expression of that principle was not necessary for the decision, and does not bind me; and I respectfully differ from it.

The rule in Canada is the same. The Supreme Court says:—

(1) 1 C.L.R., 497.

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"This Court has, in various cases, held that the Federal Parliament, on the matters left under its control by sec. 91 of the *British North America Act*, must have a free and unfettered exercise of its powers, *notwithstanding that, by doing so, some of the powers left under provincial control by sec. 92 of the Act, might be interfered with*": *Citizens' Insurance Co.* v. *Parsons* (1); and see *Cushing* v. *Dupuy* (2); *Tennant* v. *Union Bank of Canada* (3); *Toronto Corporation* v. *Canadian Pacific Railway* (4). In Canada, the Provincial Parliaments have power over local matters, and in particular have exclusive power to grant licences for the liquor business. The Dominion Parliament has exclusive power over trade and commerce. The Dominion Parliament passed a temperance Act, reciting that "it is very desirable to promote temperance in the Dominion"; and under its local option clauses one Burke could not get the licence which the State law allowed to him. He attacked the Dominion law as unconstitutional, and was unsuccessful. *Ritchie* C.J. said (*City of Fredericton* v. *The Queen* (5)):—"If . . . Parliament, in its wisdom, deems it expedient . . . so to regulate trade and commerce as to restrict . . . the trade and traffic in, or dealing with, any articles . . . it matters not, . . . whether such legislation is prompted by a desire . . . to encourage native industry, or local manufactures, or with a view to the diminution of crime or the promotion of temperance, . . . The effect of a regulation of trade may be to aid the temperance cause, . . . but surely this cannot make the legislation *ultra vires*, if the enactment is, in truth and in fact, a regulation of trade and commerce, foreign or domestic. The power to make the law is all we can judge of . . . It may be, that all who voted for this Act may have thought it would promote temperance, and were influenced in their vote by that consideration alone. . . . Still, if the enacting clauses of the Act itself deal with the traffic in such a manner as to bring the legislation within the powers of the Dominion Parliament, no such declaration in the preamble . . . can so control the enacting clauses as to make the Act

(1) 4 Can. Sup. Ct. Rep., 216, at p. 308.
(2) 5 App. Cas., 409.
(3) (1894) A.C., 31, at p. 47.
(4) (1908) A.C., 54.
(5) 3 Can. Sup. Ct. Rep., 505, at p. 533.

ultra vires." *Taschereau* J. added (1), quoting Chief Justice *Taney* in the *Licence Cases* (2):—"*The object and motive of the State are of no importance, and cannot influence the decision. It is a question of power.*" A temperance Act is not the less a regulation of trade and commerce "because it has been enacted in the view of promoting temperance." This decision was reviewed by the Privy Council in a later case (*Russell* v. *The Queen* (3)), and upheld under the power of the Dominion Parliament to legislate for public order and safety; but the Privy Council expressly declined to dissent from the view that it could be also upheld under the commerce power. "Legislation of the kind referred to," said the Judicial Committee (4), "*though it might interfere with the sale or use of an article included in a licence granted under sub-sec.* 9, (the power to grant licences for the sale of liquor), is *not in itself legislation upon or within the subject of that sub-section.*" Their Lordships pointed out the absurdity of the position if the Dominion Parliament could not prohibit the sale of arms because the Provincial Parliament had made laws for making revenue from the sale of arms. Conversely, in *Attorney-General of Manitoba* v. *Manitoba Licence Holders Association* (5), a provincial prohibition law was held valid, although it interfered with Dominion revenue, and with trade and commerce operations outside the Province.

These are merely a few out of the many precedents on this subject. But I shall only add that these cases are clearly distinguishable from those cited to us on behalf of the defendants in which there was a sham exercise of power. If it is an exercise of the Parliament's power in fact, it makes no matter that it has been passed from motives or with objects outside the power. But if the Parliament pretend to exercise a power which belongs to it, and in fact exercise a power which does not belong to it, the Act is invalid. This is the explanation of the cases relating to State Acts which purported to regulate Chinese in the State, but which were in fact attempts to regulate commerce with foreign

(1) 3 Can. Sup. Ct. Rep., 505, at p. 559.
(2) 5 How., 583.
(3) 7 App. Cas., 829.
(4) 7 App. Cas., 829, at p. 838.
(5) (1902) A.C., 73.

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nations and immigration: *Chy Lung* v. *Freeman* (1); *Tai Sing* v. *Maguire* (2). So also in *Attorney-General for Quebec* v. *Queen Insurance Co.* (3), the Provincial Parliament having power to impose a licence tax, and having no power to impose a stamp tax, imposed a stamp tax on insurance policies, and called it a "licence" tax. The Judicial Committee, having ascertained that the Act was in truth a stamp tax, declared it void. In all such cases, if the Act had been passed by the legislature of a unified State, such as the United Kingdom, or France, it could not have been described as an Act of the nature which it professed to be. That is a fair test: how should the Act be properly described in a country in which there is no limitation of powers? The case of this Excise tariff is very different. Not only has the Federal Parliament not imposed any legal obligation whatever on the manufacturers with regard to the remuneration of labour, or given any command, or anything in the nature of a command, on the subject; but the Act in question is one which, if it were passed in the United Kingdom, or in any other unified State, would be a taxation Act, and taxation by way of Excise. Moreover, the very recent case, *Employers Liability Cases* (4), shows that the Supreme Court of the United States goes even further than is claimed in this case on behalf of the federal power. It shows that Congress can even *regulate*—create obligations as to—the conditions of labour as between employers and employés, provided that it confine itself to foreign or inter-state trade and commerce. *A fortiori*, in this case, the Federal Parliament, confining itself to its power of taxation, which is plenary, can impose labour conditions as a condition of the incidence of its taxation.

I come now to the objection that by this Act Parliament discriminates "between States or parts of States." It is to be observed that it is *Parliament*—that is to say, the Act of Parliament, that must not discriminate: "The Parliament shall . . . have power to make laws for the peace, order and good government of the Commonwealth with respect to . . . taxation; but so as not to discriminate between States or parts of States." Now, there is certainly nothing on the face of this Act which

(1) 92 U.S., 275.
(2) 1 B.C. (Irving), 101.
(3) 3 App. Cas., 1090.
(4) 207 U.S., 463.

makes any such discrimination. *There is not one rate of Excise for Queensland and another for West Australia. Nor is there one set of conditions of exemption for Tasmania and another for Victoria.* Each manufacturer is to be treated on his own merits; and all the four bases for exemption are applicable to all manufacturers, wherever they are found in Australia. It is not prescribed in the Constitution that taxation must be uniform—uniform in any of its numerous senses. Every manufacturer is exempted from duty if his goods are manufactured under wage conditions which (*a*) are declared fair and reasonable by both Houses of Parliament, or (*b*) are in accordance with an industrial award under the *Commonwealth Conciliation and Arbitration Act* 1904, or (*c*) are in accordance with an industrial agreement filed under that Act; or (*d*) are declared to be fair and reasonable by the President of the Arbitration Court (or his deputy). *These alternative means for getting exemption are open to all manufacturers everywhere.* It is true that there may have been an industrial award extended by common rule over a definite area of New South Wales or Victoria, and that this award probably could not be used by manufacturers in Western Australia. But Parliament does not discriminate between States when it applies the same rule to all the States, even if some of the means of exemption are not for the time being in fact applicable in all the States. *Parliament may not discriminate between States; but the facts may, and often must: Colonial Sugar Refining Co.* v. *Irving* (1). In that case the Commonwealth *Excise Tariff* 1902 allowed an exemption in the case of goods on which Customs or Excise duty had been paid under State legislation before the imposition of the Commonwealth duties. In Queensland there had been no State Excise duty; and it was urged, on behalf of a sugar company manufacturing in Queensland, that the *Excise Tariff* discriminated against Queensland manufacturers by making them pay Excise duties while manufacturers in other States were exempted. But the argument was overruled. Lord *Davey*, in delivering the judgment of the Judicial Committee, said (2):—"The rule laid down by the Act is a general one, applicable to all the States alike, and the fact that it operates unequally in the

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

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

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several States arises not from anything done by the Parliament, but from the inequality of the duties imposed by the States themselves."

"But," it is urged, "this Act *authorizes* discrimination." I am inclined to think, with my brother *Isaacs*, that it does not in any case authorize discrimination "between States *or parts of States*" in the sense of the Constitution. The meaning of "parts of States" is shown in sec. 99 (and see *Pennsylvania* v. *Wheeling & Belmont Bridge Co.* (1)). But assume that it does authorize discrimination in the sense of leaving the conditions as to wages to several delegates without any express direction that there must be no discrimination between States; that fact does not make the Act invalid. Discrimination between States &c. is not a *necessary* result of the Act. Even granting—what is by no means established—that clauses (*a*) (*b*) (*c*) and (*d*) of the proviso make such discrimination possible, it has not taken place; and even if it had, it might be a ground for attacking any discriminating order or award or exemption, but not for treating the Act as void. When a power is created which, by its terms, allows a thing to be done either in a lawful or in an unlawful way, the power is not unlawful; but the exercise of the power will be valid or invalid according as it follows the lawful or the unlawful course: *Griffith* v. *Pownall* (2); *Slark* v. *Dalyns* (3). No one contends that Parliament may, by delegation, confer power to discriminate. The point is, *the Court is not to assume that the unlawful course will be taken; and if it should be taken, the Act is not thereby rendered invalid.* This principle was fully recognized in the two Canadian cases which were actually cited to us to prove the opposite. The Dominion Parliament, in pursuance of its powers, incorporated a company to carry on business in Canada or elsewhere. The company confined its operations to Quebec, and the power to incorporate companies for business in Quebec belonged to the Quebec legislature. Yet it was held that the fact of the company so confining its operations did not affect its incorporation: *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (4); *Toronto Corporation* v. *Bell Telephone*

(1) 18 How., 421, at p. 435.
(2) 13 Sim., 363.
(3) L.R. 10 Ch., 35.
(4) 9 App. Cas., 157.

Co. of Canada (1). Moreover, it is quite possible that there will be no industrial award, no industrial agreement, no resolution of both Houses applicable to these manufacturers; and, for aught that appears on this demurrer, the President will apply the same rigid standard to all the manufacturers in all the States. It is even possible for any industrial award, and any industrial agreement, and any resolution of Parliament, and the President to adopt precisely the same standard. How, then, can it be said that Parliament, by this Act, makes any discrimination directly or by delegation between States or parts of States? The truth is that all the four authorities will have to deal with each manufacturer on his merits, according to *all* the conditions of life and of business in which he moves; and locality would be merely one of the facts influencing the conditions. It may be that in the back blocks food and freights are dearer than on the coast; but rent and other expenses may be cheaper. *Locality must affect conditions of life; but the discrimination is not based on locality.* This is obvious as to the President; but it is true also as to awards which may be made a common rule as to certain districts by reason of similarity of conditions within the district. The same basis—similarity of conditions—would have to be applied in the making of an industrial agreement, or in the passing of a resolution by Parliament. Even if (to take an extreme case, not alleged) exemption were allowed to A. B. and C. in South Australia, and refused to D. E. and F. in New South Wales, all six paying the same rate of wages, there would be no discrimination "between States or parts of States," but a lawful discrimination between persons on the basis of the totality of their conditions. As the case of the *Colonial Sugar Refining Co.* v. *Irving* (2) shows, it would not be a discrimination "between States or parts of States" if a graduated income tax were passed, and if it happened that the incomes in Western Australia were larger than in the other States. Finally, inasmuch as the same taxation, and the same rate of taxation, are applied to all those manufacturers who, in whatever State they reside, cannot bring themselves within any one of the same alternative conditions of exemption, I am of opinion that this Act creates no discrimination "between States or parts of States."

(1) (1905) A.C., 52. (2) (1906) A.C., 360.

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I have not felt any difficulty with regard to sec. 55 of the Constitution. It is the corollary of secs. 53 and 54. The Senate has not the same powers over appropriation bills or over taxation bills as over other bills (sec. 53); therefore, by sec. 54 it is prescribed that ordinary appropriation bills must deal only with ordinary appropriations; and by sec. 55 it is prescribed that taxation bills shall deal only with the imposition of taxation. In my opinion, this Act deals only with the imposition of taxation; it taxes, and it defines the persons to be exempted from the tax. This is all it does. There is no "provision therein dealing with any other matter." There is no obligation laid on any one to do anything except to pay the tax.

No arguments have been addressed to us with regard to the severability of the proviso in this Act from the part imposing duties. I should not like, however, to be regarded as assenting to the defendants' view. The test, according to American cases, seems to be, is it clear that Parliament would not have imposed the duties even if it knew that it had not power to enact the proviso? If we are at liberty to conjecture from what one sees in newspapers, one might be disposed to say No to this question. But if we are confined, on this demurrer, to an examination of the Act within its four corners, I can find at present no ground for saying No. According to *Stevenson* v. *Colgan* (1), in passing upon the constitutionality of a Statute, the Court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If we are to look outside the Act at all, there is, on the other hand, very strong ground for thinking that the import duties on agricultural implements would not have been imposed by the *Customs Tariff* of the same date if this *Excise Tariff* had not been enacted. But, if the *Excise Tariff* be treated as void, the manufacturers get the benefit of the protective duty without fulfilling the conditions on which it was granted to them—a result certainly not intended by Parliament. The point will have to be reconsidered some time. A condition annexed to a gift may be invalid (*e.g.*, on ground of public policy), and yet the gift be good and effectual, at all events, if it be a condition sub-

(1) 25 Am. St. Rep., 230.

sequent: *In re Beard* (1). The same principles are applied to the exercise of powers. But I do not like to pronounce definitively on a question which has not been argued, and which will make no difference in the actual decision of this case.

My opinion is that the *Excise Tariff* 1906 (No. 16) is not unconstitutional, and that the demurrers ought to be overruled. I should express this opinion without doubt or hesitation, if I were dealing with this case as a single Judge; and nothing but the fact that three of my learned colleagues hold a contrary opinion can moderate my confidence. Even in the case of doubt, however, it is my duty to bear in mind the words of *Marshall* C.J., in *Dartmouth College* v. *Woodward* (2):—"that in no doubtful case would it (the Court) pronounce a legislative act to be contrary to the Constitution;" and also the words of the same eminent Judge in *Gibbons* v. *Ogden* (3):—"Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it a magnificent structure indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles."

Judgment for the defendants in both cases, with costs.

Solicitor, for the plaintiff, *C. Powers*, Commonwealth Crown Solicitor.

Solicitors, for the defendants, *Derham & Derham*; *M. Cohen.*

B. L.

(1) (1908) 1 Ch., 383.

(2) 4 Wheat., 518, at p. 625.

(3) 9 Wheat., 1, at p. 222.