

OSBORNE v. COMMONWEALTH.

not be called upon to pay a greater rate of interest than they might expect to get from the investments of the estate, namely, four per cent.

The costs should be paid out of the estate, because this litigation is merely a means of ascertaining the meaning of the will generally, those of the trustees as between solicitor and client. Lest in other cases it should be thought that this rule applies, I wish to add that I am not saying that Order LV., r. 64, applies at all to this class of case where there has been no judgment or order. It was merely given as an illustration.

[Solicitors—For plaintiff, Moule, Hamilton and Kiddle; for defendants, Godfrey and Godfrey, Dui-gan, and Moule, Hamilton and Kiddle.] S. E. H.

## High Court of Australia.

FULL COURT—(Griffith, C.J., Barton, O'Connor, Isaacs and Higgins, JJ.) (Melbourne.)	}	May 23-26, 29, 31.
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### OSBORNE v. THE COMMONWEALTH.

*Constitutional law—Land Tax—"Land Tax Act" (No. 21 of 1910)—"Land Tax Assessment Act" (No. 22 of 1910)—Validity of.*

By the "Land Tax Act 1910" of the Commonwealth Parliament, a progressive Land Tax was imposed, at rates declared therein, and the "Land Tax Assessment Act 1910" was expressly incorporated with it. The Assessment Act, which did not receive the Royal assent until the day after the Land Tax Act, contained provisions for assessment, collection and enforcement of the Land Tax.

By the Assessment Act it was declared that the holder of a perpetual lease of Crown lands at a fixed rent, and the conditional purchaser of land from the Crown, after fulfilment of all conditions except payment of purchase money, should be deemed taxable owners. It was also declared that Land Tax should be a first charge upon all land taxed, and land owned by a State was exempted from tax.—

*Held*, that such provisions did not purport to create a charge upon the interest of the Crown in taxable land, and were therefore not invalid under the Constitution, section 114.

The Assessment Act also declared that land owned by a Company should be deemed to be owned by the members as joint owners proportionately, such members to be separately assessable. Also, that, in the case of absentee owners, the taxable minimum should be lower, and the rate of taxation higher. Further, that if two companies consisted substantially of the same members, they should both be assessed in respect of all land held by either one of them. Further, that as to land owned by a mutual life assurance society, it should be deemed to be owned as trustee for the Australian policy-holders proportionately. Further, that if a husband transferred land to his wife or a wife to her husband, in trust for the transferee, all land held by either of them should

be deemed to be owned by both of them jointly, unless the Commissioner was satisfied that the transfer was not made to evade land tax.

*Held*, that even if certain of the provisions were attempts to assess persons who were not legally interested in the land, the subject-matter of the taxation was land, and the Act, even if regarded as a law imposing taxation, did not violate the second paragraph of section 55 of the Constitution by dealing with more than one subject of taxation.

The Act also contained provisions for the forfeiture of land in case of fraud, and for the acquisition by the Commonwealth of land which was undervalued in the taxpayer's returns, and for invalidating agreements directed to changing the incidence of the tax.

*Held*, that such provisions were clearly separable, even if impliedly forbidden by the Constitution as an invasion of State rights or otherwise. The omission of all or any of them would not render the Act substantially a different law as to subject-matter; their inclusion would, therefore, not affect its validity.

The tax imposed was a progressive tax upon unimproved land values, with an exemption up to £5000 in the case of residents, but with no exemption in the case of absentees, and with no deduction allowed for the amount of mortgages.

*Held*, that the Acts were in substance Acts imposing land tax, and therefore a valid exercise of the taxing power, notwithstanding that discouragement of large individual holdings and of absentee ownership, might result, and might have been contemplated by Parliament.

The principles enunciated in *The King v. Barger*, 14 A.L.R. 374, applied.

Observations as to the construction of section 55 of the Constitution.

### SPECIAL CASE.

Frank Osborne sued the Commonwealth of Australia and George Alexander McKay, Commissioner of Land Tax, seeking a declaration that the "Land Tax Act" (No. 21 of 1910), and the "Land Tax Assessment Act" (No. 22 of 1910), were not within the powers of the Commonwealth Parliament, and were invalid, and a declaration that secs. 10, 11 and 12 of the "Land Tax Assessment Act" did not lawfully impose or charge any tax upon the land of the plaintiff or upon the plaintiff in respect of his ownership of such land, and an injunction to restrain the defendant McKay from assessing the plaintiff under such Acts. The plaintiff, a resident of New South Wales, was owner of freehold land of an unimproved value of £6525, and of other leasehold land, and was trustee of other lands for absentees, and was holder of shares in the Sydney Ferries Limited, a Company owning land, and was joint holder with others of shares in such Company, and in the North Shore Gas Company, also a Company owning land, and was the holder of life policies in mutual assurance societies. The parties concurred in stating a Special Case for the opinion of the Full Court.

*Mitchell, K.C., and Knox, K.C. (with them Blackett),* for the plaintiff.—The plaintiff contends that these Acts are invalid, on four main grounds—That they

are contrary to the Constitution, sec. 55, in dealing with more than one subject of taxation. Various sections of Act No. 22 are unconstitutional, and if they fail of effect, the Act will be a substantially different Act. The Acts are not essentially for raising revenue, but to control a matter left to the States, namely—the mode of disposing of Crown lands and the holding of land by residents or absentees, and the extent of holdings. Further, the Acts discriminate between States or parts of States. The power of taxation does not permit of selecting individuals. Taxation must be on some existing class—*License Tax Cases*, 72 U.S. 462; *McCray v. United States*, 195 U.S. 27. Here the Board has power to exempt persons in case of hardship. The Act violates sec. 114 of the Constitution in that the State is taxed by the charge created on land held on conditional purchase. Here are created new entities for the purpose of taxing them—such as the common shareholders in two companies. The Constitution shows that the Commonwealth power to control land is limited to specific matters—The Constitution, secs. 51 (xxx.), 52 (i.), 111, 114, 123. The land acquired under Part VI. of Act No. 22 would not necessarily be for public purposes. A power to sell the land might be valid. Act No. 21 and its schedule would be unworkable without Act No. 22. It is a tax on persons in respect of various matters—land ownership, residence, shares in a company holding land. It aims at taxing in the largest way. Shareholders in certain companies are to be deemed joint owners, and certain life companies are made trustees for the Australian policyholders, the Company itself not being taxed. As to the operation of sec. 55 of the Constitution—*The King v. Barger*, 14 A.L.R. 374; *Stephens v. Abrahams*, 9 A.L.R. at 91, 29 V.L.R. at 241; Quick and Garraon on *The Constitution* p. 675; Sutherland on *Statutory Construction* (2nd ed.), 180. In America the question was whether the provisions were covered by the title of the Act—*Dorsey's Appeal*, 72 Penn. 192; *Commonwealth v. Martin*, 107 *ib.* 185; *La Plume v. Gardner*, 148 *ib.* 192; *The Bootmakers' Case*, 16 A.L.R. 185, 373. Taxation is imposed upon tenants for life and upon tenures existing in some States and not in others. The Acts make a Crown tenant owner even if only 10 per cent. of his purchase money has been paid. The taxation is not in respect of his interest but of the whole of the land. The power to release individuals makes the Act like an imposition on individuals—1 Cooley on *Taxation* (3rd ed.), p. 4; *Delaware Railroad Tax*, 18 Wall. at 225. The taxation of Crown tenants is a taxation of the State—*Kansas Pacific Railway v. Prescott*, 16 Wall. 603; *Union Pacific Railway v. McShane*, 22 Wall. 444; *Wisconsin Railway v. Price*, 133 U.S. 496 at 504. These principles were adopted in *Municipal Council of Sydney v. The Commonwealth* 1 C.L.R. 208, 233, 10 A.L.R. (C.N.) 29, [ISAACS, J. referred to—*Northern*

*Pacific Railway v. Traill*, 115 U.S. at 609]; Judson on *Taxation*, p. 26. An Act of 1886 afterwards rendered lands subject to State taxation, notwithstanding non-payment of survey fees—*Forbes v. Gracey*, 94 U.S. 762. [ISAACS, J., referred to *Buford v. Houtz*, 133 U.S. at 332.] Until Act No. 22 was passed, no taxation was imposed at all by Act No. 21. Imposition does not include collection—*Stephens v. Abrahams*, 9 A.L.R. 89, 29 V.L.R. 201. In taxing shares the Acts are not taxing land; and they drag in persons who would not be taxable otherwise. As to taxing absentees—*Louisville Ferry v. Kentucky*, 188 U.S. 385. [ISAACS, J.—These shareholders are not taxed in respect of shares, because all their interest in the Company's other assets goes free.] Taxation must relate to persons, property, or business within the jurisdiction—*Cleveland, &c., Co. v. Pennsylvania*, 15 Wall. 300; *Black Tax Cases*, 3 Wall. 573, where the Corporation escaped because it was an instrumentality of the Federal Government, yet the shareholders were taxable. [BARTON, J.—The rule that shares are personalty is a statutory fiction. HIGGINS, J., referred to Buckley on *Companies* (7th ed.), 3031.] As to taxing absentees—*Woodruff v. Ontario*, (1908) A.C. 508; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. at 208. As to sec. 39 of the Act No. 22, this tax on shareholders is not the same subject as a tax on land. If sec. 39 is invalid, it will alter the whole scheme of the Act—Lindley on *Companies*, 383; *Salomon v. Salomon*, (1897) A.C. 22; Cooley on *Taxation* (7th ed.), 211. The motive is immaterial, but the real object here is to control land and burst up large holdings. Hence no deduction for mortgages—*Barger v. The Commonwealth*, 14 A.L.R. 374; *Miller v. Major*, 13 A.L.R. 127; *Russell v. Reg.*, 7 A.C. 829; Prentice and Egan on the *Commerce Clauses*, p. 129; *Attorney-General for Quebec v. Queen Insurance Co.*, 3 A.C. 1090; *Hall v. Campbell*, 1 Cowp. 213; *Pollock v. Farmers' Trust Co.*, 158 U.S. at 635.

*Knox, K.C.*—Land Tax means either a tax on ownership of land, or some interest therein, or to be paid by the owners of land or of some interest therein, and the interest must be such as is known to the law of the place in which the tax operates. Anything in this Act other than that is not Land Tax, and is contrary to the Constitution, sec. 55. Sec. 36 (2) makes a husband taxable in respect of land which he has never had. If it were a penalty clause, Parliament might have taxed him in respect of what he once had. The plain meaning of these words must be taken—*Pacific Coal Co. v. Railways Commissioners of New South Wales*, (1904) A.C. 795; *Bank of New South Wales v. Piper*, (1897) A.C. 383. And because of this section the husband is liable for an increased rate as to his own land. As to sec. 39—the status of a shareholder may be different in distribution of a company's residue of assets from his position when it is a going concern—*Birch v. Cropper*, 14 A.C. at 543. The tax is on the shareholder in respect of

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something he does not own. It is not mere suretyship. Sec. 40 has a similar effect—a shareholder may have to pay for land in which he has no interest whatever. Parliament cannot select an artificial class and tax them thus. If sec. 41 falls it alters the whole Act, because that would impose tax on people otherwise exempt. But for sec. 41 the societies would be liable as companies, and therefore pay away the money of all policy-holders not of this limited class. A large sum is affected by this section. A trustee without funds available does not pay personally unless he has alienated property. This is not land tax. Sec. 55 is mandatory—Sutherland on *Statutory Construction* (2nd ed.), p. 187.

*Duffy, K.C.*, and *Piddington* (with them *Armstrong*), for the defendants.—The Act discussed in *Barger v. The Commonwealth*, 14 A.L.R. 374, was held not to be a taxing Act at all. This Act is not one solely to destroy rights, as suggested in *McCray v. United States*, 195 U.S. 27. The inclusion of two subjects of taxation will not invalidate the Act. But there are not two subjects here. Act No. 22 is not the sort of Act aimed at in sec. 55. It is an attempt to tax land, however much it may fail. It is the interest in the land which is aimed at. The word "land," as appears by the "Acts Interpretation Act," is to be so read. If secs. 30, 36, 37, 39 are bad they are severable. Those provisions are incidental to the taxing power. As to sec. 39, a shareholder is peculiarly interested in the company's contract—*Todd v. Robinson*, 14 Q.B.D. 739. As to sec. 40, the companies are so mixed up that the real owners are not clear, and they are left to settle the problem themselves. It is an exceptional case, and is necessary to prevent fraud. As to Part VI. When the public purpose involved in acquiring the land is exhausted, it is sold. The Court will strive in favour of the validity of the Act—1 Sutherland on *Statutory Construction* (2nd ed.), p. 192. Act No. 21 merely provides that for everything necessary for interpretation, Act No. 22 must be looked to. They form one Act for interpretation only. The Bill for Act No. 21 the Senate could not amend. The Bill for Act No. 22, if it increased the burden on the people, the Senate could amend, so long as it did not increase the burden. The Commons power of the purse was the foundation of secs. 53-56, and the main point is in sec. 55 (1), which alone provides any penalty. The object is to protect the rights of the Senate. [HIGGINS, J.—The absence of a penalty does not deprive sec. 55 (2) of operation—Maxwell on *Statutes* (4th ed.).] The intention and whole scope must be regarded in ascertaining whether it is mandatory—*Howard v. Bodington*, 2 P.D. at 210. There is no subject in the Acts outside the general power of the Commonwealth. If sec. 26 dealt with Crown land, the Court would read it down. As to secs. 30 and 63, they are remedies which could be eliminated from the Act. They are merely incidental—*Addyston Pipe Co. v. United States*, 175 U.S. 211;

*Federated Railway and Tramway Service Association v. New South Wales Railway Traffic Employés' Association*, 13 A.L.R. 273; *Pacific Insurance Co. v. Soule*, 74 U.S. 433; *Grand Trunk Railway v. Attorney-General of Canada*, (1907) A.C. 65.

*Piddington*.—Sec. 55 of the Constitution was to effectuate the known Parliamentary practice, and Acts No. 21 and 22 must be considered separately as to this. The one purpose of sec. 55 is to protect the Senate. Under sec. 53 (III.) of the Constitution, there may be an Act relating to a burden on the people which is not a taxing Act. In New South Wales a machinery Act was passed first, and afterwards a Land and Income Tax Act to vitalise the machinery Act. The latter Act would be covered by sec. 53 (III.). Act No. 22 is not a law imposing taxation. A law dealing with the imposition of taxation is not the same as one imposing taxation.

*Mitchell, K.C.*, in reply.

*Cur. adv. vult.*

GRIFFITH, C.J.—The substantial relief claimed in this action is a declaration that Act No. 21 of 1910, which is entitled—"An Act for the imposition of a "land tax upon unimproved values," and was assented to on 16th November last, and Act No. 22 of the same year, which is entitled—"An Act relating to the imposition assessment and collection of a land tax upon unimproved values," and which was assented to on the following day, are invalid. The short title of Act No. 22 is the "Land Tax Assessment Act 1910." Act No. 21, the short title of which is the "Land Tax Act," merely provides that the "Land Tax Assessment Act 1910" is to be incorporated and read as one with it, and that land tax is imposed at the rates declared in the Act and in the Schedule, and that it shall be levied in and for the financial year beginning 1st July, 1910, and for each financial year. There are under the Schedule higher rates in respect of an absentee than in respect of one who is not an absentee. The nature of Act No. 22 is sufficiently expressed in the title, which I have read.

Various grounds of objection are taken to these Acts, which may be thus summarised. First, that as the "Land Tax Assessment Act" referred to in sec. 2 of Act No. 21 was not in existence as a law on 16th November, the reference to it in the Act of that day is meaningless, and the Act itself is inoperative. Second, that the Acts are not in substance an exercise of the taxing power of the Commonwealth, but an attempt to regulate the holding of land in the Commonwealth, which, it is contended, is *extra vires* of the Commonwealth Parliament. Third, that the Acts, together or separately, are in contravention of the provisions of sec. 55 of the Constitution. Fourth, that several provisions of Act No. 22 are invalid for various reasons, and that the invalid parts are so closely bound up with the remainder, that the whole Act must be held invalid in accordance with the rule laid down by this Court in *The*

*Bootmakers' Case* (No. 2), 16 A.L.R. 373, 11 C.L.R. 1, and applied in the *Kalibia Case*.

The first point—that the attempted incorporation of the "Land Tax Assessment Act" with the "Land Tax Act" is meaningless, and the latter Act is therefore invalid, was not seriously pressed—indeed, it could not be. In construing any Act, the duty of the Court is to ascertain what the Legislature meant. What did they mean when they spoke of the "Land Tax Assessment Act 1910?" As a matter of common sense, there is no doubt that Parliament meant to refer to an Act called by that name which was in process of enactment. As soon as it became law, the Act No. 21, although before that ineffective, became effective. So there is nothing in that objection.

In support of the second objection—that the Acts are not a real exercise of the taxing power—it is contended that the real purpose of the so-called taxation is not so much to raise revenue, as to prevent the holding of large quantities of land by a single person. No doubt that may be the indirect consequence of the imposition of a progressive Land Tax, and it may well be that that consequence was contemplated and desired by the Legislature; but it was pointed out by this Court in *The King v. Barger* (*supra*), that although it is a frequent result of taxation to bring about a consequence which could not practically, or could not so easily, be brought about by other means, yet the circumstance that taxation has such a result is irrelevant to the question of the competence of the Legislature to impose the tax. In my opinion, these Acts are in substance, as well as in form, Acts imposing taxation, although there may be provisions in them open to objection on other grounds. This objection therefore fails.

The objection founded upon sec. 55 of the Constitution takes two forms. That section contains two provisions—"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. Laws imposing taxation except" "laws imposing duties of Customs or of Excise" "shall deal with one subject of taxation only but" "laws imposing duties of Customs shall deal" "with duties of Customs only and laws imposing" "duties of Excise shall deal with duties of Excise" "only." The objection based on the first paragraph goes to some provisions only; that based on the second paragraph goes to the whole Act. I will deal with the second branch first. It is contended that the Acts in question deal with more than one subject of taxation, and are therefore wholly invalid. An interesting argument was addressed to the Court as to the effect of a violation of this provision of sec. 55, and a subsidiary argument on the point whether the Act No. 22 is a law imposing taxation within the meaning of the section. In the view that I take of another objection, it is not necessary to express any

concluded opinion on the point, but I think it right to say a few words about it. Some confusion was introduced into the argument by the tacit assumption that a law dealing with the imposition of taxation is necessarily a law imposing taxation. That is not so. The terms are not synonymous. An Act imposing taxation may, like the Imperial Annual Finance Acts, both impose taxes and contain a complete scheme for their collection, or it may merely impose a tax *eo nomine*, leaving the collection to be regulated by other laws. Act No. 22, when examined, does not purport to impose taxation at all. Sec. 10, which is the foundation of the whole structure of the Act, provides that—"Subject to the provisions of" "this Act land tax shall be levied and paid upon" "the unimproved value of all lands within the Com-" "monwealth which are owned by taxpayers and which" "are not exempt from taxation under this Act." The term "land tax" is defined by sec. 2 as meaning the "land tax imposed as such by any Act as assessed" "under this Act." If we substitute the words given in the interpretation clause for the words "land" "tax" in sec. 10, we get this—"land tax imposed as" "such by any Act shall be levied and paid by so-and-" "so." The Act then goes on to make provision for assessing and for levying the tax which is assumed to have been imposed by another Act. That does not, however, dispose of the objection, for it is said that, if the Act No. 22 itself deals with more than one subject of taxation, though under one name, Act No. 21, by incorporating it, is guilty of the same offence, and is obnoxious to sec. 55. So that question must be examined.

On the question whether a transgression of the provisions of the second paragraph of sec. 55 is fatal to the validity of the Act, I remark that the change of language in sec. 55 from secs. 53 and 54 *prima facie* suggests a change in intention. Secs. 53 and 54 speak of "proposed laws"—that is, bills or projects of law still under the consideration of Parliament, and not assented to. They lay down rules to be observed with respect to proposed laws at that stage, and whatever obligations are imposed or enjoined by those sections are directed to the Houses of Parliament, whose conduct of their internal affairs is not subject to inquiry or review by a Court of law. Sec. 55, on the other hand, deals with proposals which have received the Royal assent, and which fall to be reviewed by Courts of law if they offend against constitutional provisions. I should hesitate very much to hold that a provision, such as that, which is in substance prohibitory, is a mere counsel of perfection. I think, on the other hand, that Courts would lean rather to support than to deny the validity of the Act in the case of a mere technical or incidental transgression of the injunction not affecting the substance of the legislation, and if the particular provision objected to were capable of two constructions, would, if possible, adopt that which would not invali-

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date the law. I have thought it right to say so much, but it is not necessary to say more on this point.

I proceed now to refer to the provisions relied on as infringing the rule laid down by sec. 55. I take first sec. 39 as the best illustration. That section provides that all land owned by a company shall be deemed (though not to the exclusion of the liability of the company or of any other persons) to be owned by the shareholders of the company as joint owners, in the proportions of their interests in the paid-up capital. And it goes on to provide—"The provisions of sec. 38 of this Act shall apply accordingly." Sec. 38 provides that joint owners of land shall be jointly assessed and liable in respect of the land as if it were owned by a single person, and each joint owner shall in addition be separately assessed, and liable in respect of his individual interest in the land as if he were the owner of a part of the land in proportion to his interest, and shall be assessed and liable in respect of any other land owned by him in severalty, and his individual interests in any other land. In sec. 39, Parliament has clearly proceeded on the assumption that the members of a joint stock company which owns land are in substance the beneficial owners of the land in proportion to their interests in the paid-up capital of the Company. In support of that view, the words of Lord Macnaghten in *Birch v. Cropper*, 14 A.C. at 543, were referred to—"Every person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part in the capital of the company." The learned Lord was speaking of the rights of members of a company, where the debts have been paid and it is merely a question of distributing the surplus assets amongst its members. No doubt, in a very real sense those rights are as there stated. The contention is that that is an erroneous view, and that members of a company have in the eye of the law no interest in the land. If the question is considered apart from positive law relating to the juridical relations *inter se* of joint stock companies and their members, the assumption is in accordance with the actual facts. It is true that members have no legal estate in the land. But why should not Parliament act on the basis of the substantial and beneficial interest? The only ground that could be assigned for saying that Parliament cannot so act is that to do so would be *extra vires* as interfering with a matter pertaining exclusively to the States. Reduced to its naked form, the objection is that the Parliament has attempted to make a person who is not owner of land liable to pay land tax in respect of it. Suppose they have. The subject of taxation is still land, though there is an attempt to make a person pay tax who has no connection with the land. It is not necessary to express any opinion as to the validity of the provision itself as an attempt to make a person who is not owner of the land pay

the tax; but I do not encourage anyone to act upon the assumption that it is invalid.

Take next sec. 41. It provides that the land owned by a mutual insurance society shall be deemed to be owned by the society as trustee for the several Australian policy-holders in proportion to the surrender values of their policies. In declaring that the society shall be deemed owner as trustee, reference is made implicitly to secs. 33 and 62, which deal with trustees. Sec. 33 provides that any person in whom land is vested as a trustee shall be assessed and liable as if he were beneficially entitled to the land. Each policy-holder in the society is deemed to be the beneficial holder of a separate piece of land of a value proportioned to the surrender value of his policy, and the society is to be deemed to hold those different pieces of land in severalty, and is to be deemed to be trustee for each policy-holder entitled to a beneficial interest. Sec. 62 (f) provides that every trustee is personally liable for the land tax payable in respect of the land if while the tax remains unpaid he alienates charges or disposes of any real or personal property which is held by him in his representative capacity, but he shall not be otherwise personally liable for the tax. That is the only case, and the trustee is not otherwise liable to the tax. It follows that if the land is taxable as property of the policy-holder—i.e., if its value is such that, with or without the other land of which he is the owner, it is liable to the tax, the society is responsible for the tax in one event only—namely, if it has property of the policy-holder in its hands, and disposes of it without providing for the tax. The general funds of the society are not liable for the tax. If for any reason the land is not taxable as property of the policy-holder, no question arises. If it is, he must pay, but the society is not liable in respect of it, except by way of penalty upon making away with the policy-holder's property in its hands. Whether the policy-holder can be made liable in this way is substantially the same question as that discussed under sec. 39, and must be resolved in the same way. It may be that the provisions may be ineffectual to reach the policy-holders or some of them; for instance, non-participating policy-holders. But, in any view, the subject-matter of taxation is land, and nothing else.

Secs. 36 and 40 raise substantially the same question. Sec. 36 provides that where a husband has directly or indirectly transferred land to or in trust for his wife, or a wife has directly or indirectly transferred land to or in trust for her husband, the husband and wife shall, unless the Commissioner is satisfied that the transfer was not for the purpose of evading land tax, be deemed to be joint owners of all the land owned by either of them. Sec. 40 provides that any two or more companies which consist substantially of the same shareholders shall be deemed to be a single company,

and shall be jointly assessed and liable accordingly. That is, that land held by either shall be deemed to be held by both. Then it provides that two companies shall be deemed to consist substantially of the same shareholders if not less than three-fourths of the paid-up capital of each of them is held by or on behalf of shareholders of the other. In each case the provision, if valid, may render a person liable directly or indirectly for land tax on land in which he has no estate legal or equitable. But whether that provision is valid or not, the subject-matter of taxation is still land, and it is at worst an ineffectual attempt to strike a man who cannot be struck by this obligation. It is not necessary to refer in detail to two or three other sections, which it is contended are open to the same objection. The result is that the Act as a whole is not invalid on that ground.

The objection based on the first paragraph of sec. 55 is not material. The only effect is that if the Act is a law imposing taxation any provisions in it which do not deal with the imposition of taxation are of no effect. They go out, but the rest of the Act remains in force. The sections mainly relied on under this objection are secs. 30 and 63, which purport to render invalid certain agreements relating to the burden of land tax, a matter which, it is contended, is within the exclusive competence of the State Legislature. I express no opinion on the validity of the objection. It may some day fall to be decided in a concrete case.

I now turn to the sections objected to as being *extra vires* of the Parliament on grounds other than those based on sec. 55, and said to be so intimately bound up with the Act that if they go, all the Act goes. I will refer first to sec. 26, which provides that the holder of land under a purchase or a right of purchase from the Crown upon conditions under the laws of a State relating to the alienation or disposition of Crown lands, shall be deemed to be the owner of the land if all the conditions other than the payment of purchase money have been fulfilled, but not otherwise. Sec. 29 provides that the owner of a leasehold estate under the laws of a State relating to the alienation or occupation of Crown lands or relating to mining (not being a perpetual lease without re-valuation, or a lease with a right of purchase) shall not be liable to assessment or taxation in respect of the estate. It is suggested that these sections impose a tax on Crown lands, which, of course, would be in contravention of sec. 114 of the Constitution. Sec. 26, dealing with land held under conditional purchase, treats of a form of tenure very well known in Australia, and particularly in New South Wales. A person who holds a certificate of fulfilment of conditions has a marketable title practically equivalent to a grant in fee subject to a mortgage for the balance of the purchase money. He is substantially the owner, and the Act says that he is to be deemed to be owner for the purposes of land tax, just

as a mortgagor is. Then secs. 27 and 28 deal with leasehold estates, and sec. 29 provides that, notwithstanding anything in secs. 27 and 28, the owner of a leasehold estate in Crown lands, other than one with the right of purchase or one with a perpetual lease without re-valuation, shall not be liable to taxation. There are these two exceptions—the holder of a perpetual lease at a fixed rent, who has an interest practically the same as a fee, and the holder of a lease with a right of purchase. Sec. 29, where it refers to a lease with a right of purchase, is to be read with sec. 26 and as referring to the same subject. If it were not, then there would be an apparent repugnancy between the two sections. But the objection is taken under sec. 56 that, even in such case, the land is charged in the hands of the Crown, because sec. 56 provides that the land tax shall be a first charge upon the land in priority over all other encumbrances. If sec. 56 were construed so as to give a charge on the right or interest of the Crown in the land, it would, of course, *pro tanto*, be invalid under sec. 114 of the Constitution, which forbids the taxation of the property of any State. I do not think that that is the true construction; but, if it were, it would only be inoperative.

Sec. 48 contains provisions for the acquisition of land which has been undervalued. That is intended by way of penalty. It is contended that such a wholesale acquisition of land by the Commonwealth to be held free from State taxation is not only not authorised by the Constitution but impliedly forbidden. The question is one of some difficulty, but the provision stands quite apart from the taxing provisions of the Act. A similar argument is used in respect of secs. 69 and 71, which purport to impose forfeiture of land as a penalty for fraud. It is the same objection, and I give the same answer to it. It has nothing to do with the taxation of land. It is merely a provision for enforcing payment. It is not necessary to express any definite opinion as to the validity of those provisions, and I refrain from doing so.

Even if the sections objected to are invalid, as being *extra vires* of the Parliament—as to which I express no opinion—they are all clearly separable from the rest of the Act, since the Act with those sections omitted would (to adopt my own words in the *Bootmakers' Case*, 16 A.L.R. 382, 11 C.L.R. 27) not be a substantially different law as to the subject-matter dealt with by the remaining sections from what it would be with those sections forming part of it. I have only to add one observation. When an Act creates a debt payable by A, and also attempts to enforce payment of A's debt by B, I think that the law, so far as regards the relations between A and his creditor, is substantially the same, whether the attempt to enforce the debt against B is, or is not, effectual.

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The argument based on the power of exemption in hard cases was not pressed.

For these reasons, all the objections fail, and judgment will be entered for the defendants.

BARTON, J., read the following judgment:—The facts and contentions are set out in the Special Case. The question for decision is whether, by reason of any of these facts, and the contentions founded upon them, the "Land Tax Act" (No. 21 of 1910), and the "Land Tax Assessment Act" (No. 22 of 1910), are, or either of them is, invalid. It is the legislation as a whole, or each Act as an entire unit of legislation, that is attacked. Unless, therefore, an attack on any part or parts is successful to the extent of invalidating the whole, it may be disregarded for the purpose in hand.

The "Land Tax Act" provides in its second section that the "Land Tax Assessment Act" "shall be incorporated and read as one with" the Tax Act. The Royal Assent was given to the Tax Act on the 16th November, 1910, and to the Assessment Act on the next day. A contention was raised for the plaintiff that the Assessment Act could not be incorporated and read as one with the Tax Act on the 16th of November, as the reference was to something in the shape of a law which had not then become a law; that the reference did not become effective when the Assessment Act received assent on the 17th November; and that without such effect the Tax Act could not and did not become operative, but was unworkable, and indeed unintelligible, and therefore that for the imposition of taxation reliance must be placed on the Assessment Act alone, with the result that it became inconsistent with the provisions of the 55th section of the Constitution. The alleged consequence as to sec. 55 need not be discussed in this connection, for naturally the objection was not persevered with, and it could not in any event be seriously regarded. It is immaterial whether Act No. 21 was workable on the 16th of November or not. It was made applicable to its purpose on and after the 17th, for it was the clear intention of Parliament that the other measure, which the dates show to have completed, or nearly completed, its passage through both Houses by the 16th, should when assented to be read with No. 21. The first Act may be compared to an engine, which, though finished and good on the date of its completion, cannot be worked until its necessary adjunct, a boiler, is added to it. The second Act performs that function here.

It was further contended that the reference section in No. 21, if effective, constituted the two Acts one piece of legislation. So it did, but only for purposes of interpretation. The section could not make either Act valid or invalid, save so far as it helped to elucidate the meaning of either.

The next objection is that the Tax Act, as explained by the Assessment Act, is not truly an exercise of the

power conferred by the Constitution in the second clause of sec. 51, but is an attempt to regulate the holding of land, a subject within the exclusive competence of the States. The power is one to make laws, subject to the Constitution, "for the peace order and good government of the Commonwealth in respect of . . . taxation but so as not to discriminate between States or parts of States." Apart from any such discrimination, the power is unlimited. If that which purports to be an exercise of it is in reality a tax, it cannot be successfully challenged in this Court as a breach of Clause 2 unless it discriminates in the manner forbidden. If, on the other hand, it is only a tax in name, then the fact that it designates itself by that name will not make it valid, and it must fail unless it can be supported as an exercise of some other law-making power. If it is really an attempt to exercise a power reserved exclusively to each State, such, for instance, as the control of its lands, its domestic trade or its industrial affairs, then it is not a law at all, decked though it may be in the garb of a tax; for styling an Act a tax does not make it one, if the substance shows it to be something else. That this matter of clear sense is the law of the Constitution was declared by the case of *The King v. Berger*, 6 C.L.R. 41. The Judicial Committee of the Privy Council had already applied the same principle in the Canadian case of *The Attorney-General of Quebec v. The Queen Insurance Company*, 3 A.C. 1690. The plaintiff relies mainly on these decisions to support his contention that what is intended is not in substance taxation. But he must show that the terms of the legislation entitle him to rely on them. This, I think, he has not done.

A law must be construed by its terms, and by these alone. It is only when it plainly appears from them, of course including any clear inference from them, to be an attempt to deal with a matter outside the ambit of the power conferred, that the Court is entitled to declare it invalid on that ground. Conceding this, the argument for the plaintiff is that it is apparent on the face of the Acts that the object is to exercise powers reserved to the States. One proof of this, he says, is that the Land Tax is, and is designated a "progressive" one—that is, a graduated one, since the increase of the sum payable is not merely in proportion to the value assessed, but by grades of rate progressing with grades of value. This, he says, indicates that the object is in effect to make the burden of large estates intolerable to the holder, and thus "to prevent persons resident in the Commonwealth from holding and owning large areas of land." The plaintiff further argues that the exemption from taxation of land of an unimproved value of £5000 when owned by a resident of Australia, an exemption not granted where the land is owned by an absentee, not only goes to emphasise the purpose stated, but to show that the legislation is also designed to prevent land-holders from residing out of Australia, or to

prevent others than residents from owning lands within the Commonwealth. The purpose first alleged is, he contends, further accentuated by the absence of the exemption in respect of the value of lands under mortgage. Now, it is not the function of the Court to say that drastic taxation on landed interests will prevent residents from owning large areas, or prevent land-holders from residing out of Australia, or prevent absentees from holding land within the Commonwealth. Nor is it our function to say what degree of inducement to abstain from doing these things amounts to a prevention of the doing of them. The alleged objects are not to be collected from the terms of this legislation. Even assuming that such designs existed, they would not alter the construction of an Act or make it less an exercise of the taxing power. They may be the motive or even the ultimate object. We have not to do with either of these things. The arguments in effect predict certain results as consequences of the oppressive operation of the tax. These predictions are not for us to examine, because they are not relevant to the question of lawful authority.

Conceding, for example, that in some cases heavy tax may when administered operate, by the pressure of its severity, to destroy an industry which a State alone has power to control, or to force holders of large landed estates to sell them, or to remain in this country when they would rather live elsewhere, these are questions of the policy or wisdom of the tax, and belong to the people, directly or through their representatives, and not to the Court. And this is true even if the tax is so heavy and so carefully adjusted as to appear intended to produce the results foreboded. Questions of the abuse of power are for people and Parliament. We can only determine whether the power exists, and if so, whether Parliament has in fact and in substance acted within it. It is of the essence of the taxing power that when exercised to the full it may destroy the interest or the industry taxed. But even so, interference would involve the Court in the political function of deciding in what degree Parliament is justified in using a power on the exercise of which the Constitution itself places no limit. As was said by the majority of this Court in *The King v. Barger*, at page 67—"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." . . . "The motive which actuates the Legislature, and the ultimate result 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 authorised to enact the particular provisions in question, entirely without regard to their ultimate indirect consequences."

The reasoning of the Supreme Court of the United States in *McCray's Case*, 195 U.S. 27, is cogent upon this subject, and the case itself is very much in point.

The conclusion drawn is thus expressed, in words which I venture to adopt (p. 56)—"The often-quoted statement of Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power, because of the destructive effect of the exertion of the authority." Other objections are taken by the plaintiff to the legislation as a whole on the ground of its usurpation of State powers. So far as these involve the scope and purpose of both or either of the Acts, I am of opinion that they are covered by what I have already said.

On the remaining grounds of attack I will take next that which alleges that certain sections are invalid on grounds apart from the effect of sec. 55 of the Constitution, to be considered presently, and are so interwoven with the rest of the legislation that they cannot be severed without results fatal to the whole of it. In the *Bootmakers' Case* (No. 3), 11 C.L.R. page 1, this question of severability was dealt with exhaustively in argument, and the judgments laid down lines which should serve as a test in the present and in future cases. The criterion, in the opinion of the learned Chief Justice, was whether, supposing the invalidity of some part or parts of an Act to be established, the Statute, with the invalid portions omitted, would be substantially a different law, as to the subject-matter dealt with by what remains, from what it would be with the omitted portions forming part of it. My learned brothers O'Connor and Isaacs agreed with this proposition, the latter adding (page 55) a quotation from the judgment of Shaw, C.J., in *Warren v. Charlestown*, 2 Gray 84 at page 99, in which the view is taken that the whole Act fails where the connection with each other, and the mutual dependence of the valid and the invalid provisions, as conditions, considerations or compensations for each other are such that the elimination of the bad would leave the good a different law in effect. Agreeing in substance with the test put by the Chief Justice, which differs from that put in some of the leading American cases on the subject, I came to the following conclusion as to the Act then in question—"If the sections challenged be left out of consideration, there remains a law which is not radically different. . . . That law is armed with machinery adapted to its purpose, and not maimed as to that purpose by the severance. In that sense it is a workable measure, consistent in its parts and adapted to the end it has in view, without the necessity of expanding or restricting its sense with regard to its proper subject-matter." Holding that view as to the Act without the provisions objected to, I came to the conclusion that it was a valid exercise of power. That passage, I think, states in sufficiently strict terms the test to which such legislation as we are now considering should answer, and I think it does answer such a test.



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even if all the provisions challenged are left out of consideration. I do not decide that any one of them is invalid; but in my judgment, there is not one of them which cannot be left out of consideration without so maiming the measure as to leave it a substantially different law, and not one "dealing effectively, even if not comprehensively, with so much of the subject-matter as is within the legislative power."

Sec. 26 appears to refer to such holders as the conditional purchaser in New South Wales, and the lessee with an accrued and present right of purchase in Victoria, in either case with all his conditions fulfilled except payment of the balance of his purchase money. Either of them may have his grant on payment of his balance, and meanwhile he has a right to hold even against the Crown, subject to payment, if a time is prescribed therefor, and where no time is prescribed, subject to the payment of interest. He is in as good a position as a mortgagor, if not in a better position, and may lawfully sell and transfer. It is his interest, and not any interest of the Crown as representing the State, that the section is framed to reach with the land tax. Such lands are in substance no longer owned by the Crown.

The whole tenor of secs. 27 and 28 shows that the tax is payable only one the interest of the taxpayer, who cannot as contended be the State. Indeed, sec. 29 removes any doubt on this head, if any serious doubt could have subsisted without it. But there are two exceptions to sec. 29. One of them prevents any possible inconsistency with sec. 26, by excluding from the exemption a lease from the Crown with a right of purchase; the other excludes from that exemption a perpetual lease from the Crown without re-valuation, which is at least as secure a title, and practically, though not technically, as large an estate as any estate dealt with by sec. 26.

In respect of this group of sections, the contention that they interfere with the exclusive right of the State to regulate the disposal of Crown land, or that they amount to a tax on property of the State—Constitution, sec. 114—seems to me to fail entirely. But it was argued that the Crown lands of the State are affected unconstitutionally by sec. 56, which makes the tax a first charge on the land taxed. Before this section, however, could be held to be invalid even in part, it must be clear that it applies to Crown lands. It is not only not clear, but there is reason to think, by virtue of sec. 13 (a) it cannot so apply.

Under this head of objection the plaintiff impeaches Part VI., *i.e.*, sec. 48, which empowers the Commonwealth to acquire land in certain cases of under-valuation, and also secs. 69 to 71, authorising forfeiture for fraudulent under-valuation and for wilful or fraudulent evasion or attempted evasion of assessment or taxation. There is room for argument on both sides as to these sections, and since, like other doubtful ones, they may hereafter come before us in

some proceeding necessarily involving their validity, I do not think it meet to pronounce an opinion on them in a case like the present, in which their severability renders it unnecessary to do so.

I turn now to the objection founded on sec. 55 of the Constitution. The provisions which are challenged, not as dealing with subjects of taxation other than land, but as dealing with something which is not the imposition of taxation, must be considered in relation to the first part or branch of sec. 55. If the Assessment Act is a law imposing taxation, that part prohibits it from dealing with matters other than the imposition of taxation. But the consequence of the failure of the law so to confine itself is not its invalidity. The offending provisions are to be of no effect. The Act, apart from them, survives, and is in force. As this suit is brought to obtain a declaration of the total invalidity of the legislation, it is obvious that these sections cannot form any foundation for such a declaration. Their alleged invalidity may, however, be put forward in future proceedings as ground of complaint or defence. This, therefore, is not the time to pronounce on that subject.

The provisions which as I thought sustained the brunt of the plaintiff's attack were those which were said to violate the second part of sec. 55, which enacts that "laws imposing taxation, except laws imposing 'duties of Customs or of Excise shall deal with one 'subject of taxation only, &c.'" The consequence of such a violation, if only in one instance, was declared by the plaintiff and denied by the defendants to be the total invalidity of the legislation. The Assessment Act, it was contended, was a law imposing taxation. It is not every Statute dealing with the imposition of taxation that is a taxing law. In terms the Assessment Act does not purport to be such a law. It certainly is "an Act relating to," that is, it "deals with," "the imposition assessment and collection of a Land Tax." That does not make it a law imposing taxation. The tax for which it provides machinery is expressly defined to be "the Land Tax imposed by any 'Act or assessed under' the Assessment Act No. 22—see sec. 3. Until other provision is made by Parliament, the reference is to the tax imposed by the Act No. 21. It is the tax already so imposed, therefore, which the Assessment Act (sec. 10) says shall be "levied and paid" upon the unimproved value of lands not exempted, and that tax is to be "at such rates as "are declared by Parliament," *i.e.*, by No. 21 or by any subsequent enactment taking its place, and not by this Assessment Act. The provisions for assessment and collection are therefore proper to an Act not imposing taxation. Still, provisions may have been inserted in the Assessment Act which "deal with" a subject or subjects of taxation other than land, and the incorporation of that measure by the Tax Act would in that event cause the last-named law to deal with more than one subject of taxation. That might bring the Tax Act into conflict with the second branch

of sec. 55. I shall say something presently on the construction of that part of it. But if the Assessment Act does not include any provision dealing with any subject of taxation other than land, the objection fails, whichever of the interpretations placed on the constitutional provision be the correct one. Let us see then how this matter stands.

The provisions most relevant in this connection are, in order, secs. 36, 39, 40 and 41. As to each one of these I am of opinion that they deal only with the same subject-matter as that on which the Act No. 21 imposes a tax. They may be effective or ineffective, valid or invalid. But if the subject-matter of the whole legislation is one and the same, there is no violation of sec. 55. It is said that sec. 39 imposes a tax on shareholders in companies in respect of their shares; and this must be so, it is urged, because their shares are not in law interests in real property. I do not think the section attempts to tax shares. It is an endeavour, whether it succeeds or not, to treat the shareholders as joint owners in respect of the taxable lands vested in the company. Their holding in shares is merely made the measure of the proportions in which they are assessable. Clearly the subject-matter is land taxation, whether the section is valid or not. Sec. 41 proceeds on the principle of assessing the Australian policy-holders in mutual life assurance societies as holders of beneficial interests in the taxable lands vested in the society. It treats them as equitable owners in severalty of the lands so vested. The measure in which they are to be assessed as such is proportioned to the surrender values of their policies. It cannot, I think, be said that this is taxation of life policies, any more than that sec. 39 is taxation of shares in companies. Though the lands are legally vested in the company or the society, it is only the shareholders in the one case and the policy-holders in the other who benefit by their use and management. The profits yielded by the land are, it may be at short intervals, it may be at long last, divisible among them. The principle of these and other sections appears to be to ensure the assessment of those who are in substance the owners of land, or of an interest therein, or who derive pecuniary benefit from the use of land—whether they be freeholders or leaseholders, conditional purchasers, and lessees with right of purchase, perpetual lessees without re-valuation, mortgagors, shareholders in companies that own land, or policy-holders in life assurance societies that own it. The principle may be faulty, or may in some instances fail in its application. Still, the provisions deal only with land as the subject-matter of taxation.

Secs. 36 and 40 are condemned on grounds rather similar to those urged against 39 and 41, as attempts to treat people as owners of land in which they have no interest whatever, and this seems to me to be true of both sections to a material extent. And in these cases there is not the justification of owner-

ship in substance to the extent of the liability. Yet that is an objection which, while it may be argued to affect the validity of the provisions, does not go to the subject-matter. That is still land, and only land. I am of opinion, therefore, that the Acts are not, nor is either of them, invalid as dealing with more subjects of taxation than one.

I will conclude with some observations on the able arguments addressed to us upon the meaning of the second branch of sec. 55 of the Constitution. It was strongly urged that this provision was obligatory, so that any intrusion of a provision dealing with a second subject-matter of taxation into a taxing law would render the Act into which it entered invalid.

It is very plain that secs. 53, 54, 55 and 56 show a sharp distinction between "proposed laws" and "laws." So do all the remaining sections of Part V. No lawyer, still less one who has any acquaintance with the practice of Parliaments, can doubt that a "proposed law" is what is known as a bill, and a "law" is what is known as an Act or Statute. The one is a *projet de loi*, not necessarily passed even by one House of Parliament, the other an actual law made effective by passage through both Houses, and by the Royal Assent. Up to the moment of that assent there is only a proposed law or Bill. This was not contested at the Bar. But it was contended by the plaintiff that while secs. 53 and 54 relates, as is clear, only to the order of business between the two Houses in dealing with the progress of Bills, and are therefore, and from the necessity of the thing, merely directory, sec. 55 depends on quite different considerations. It is then the completed Act that is put to the test, and while the first part of the section uses clear terms to show that a violation of it can only be attended by the annulment of the offending provisions, no such qualification is imparted to the second part. But for the concluding words of the first branch, it was pointed out, that provision, evidently addressed to the Court, since there was no other authority which after the Royal assent could interpret or enforce it, must have been regarded as obligatory, and it was still more evident from the qualification of the first part that the second, which stood unqualified, was obligatory on the Court. On the other hand, the defendants strenuously contended that as secs. 53 and 54 were admittedly only directory, the change in designation from "proposed law" to "law" in sec. 55 was not enough to give any part of that section a more stringent character, especially as its first branch was expressly made only directory; and that there was no reason why the character of the provision should be held to have changed as it passed into its second branch.

As at present advised, I am impressed with the view of this question put forth for the plaintiff. But any opinion expressed on it would be merely *obiter*, and in no sense decisive, since even on the plaintiff's construction of the second part of sec. 55 the Acts

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do not in my view violate the Constitution. I may say, however, that it would take strong argument to convince me that the second part is not obligatory, since that construction would remove all effective check on that which the section is on its face designed to prevent, namely, the tacking together of tax bills of different kinds and unlimited number in one measure. This would be to annihilate the intended powers of the Senate, who, favouring some and dissenting from the rest, would find themselves forced either to pass the entire agglomeration, perhaps including much that they considered an outrage on the interests of the States they represented; or to reject all, and thus perhaps cripple the finances of the Commonwealth. This consideration is the graver when it is remembered that the sections dealing with the powers of the two Houses *inter se*, viz., 54 & 54, contain no provisions whatever against the "tacking" of tax bills, and only one against the tacking of extraneous matter to an appropriation bill, and that, the ordinary annual one. We cannot fail to remember that the Constitution designed the Senate to be a House of greater power than any ordinary second Chamber. Not only by its express powers, but by the equality of its representation of the States, the Senate was intended to be able to protect the States from aggression. And from no source could aggression be more dangerous than from measures of finance when unjustly bound together. It seems probable, though I repeat that I do not offer a decisive opinion on the matter, that the omission of such provisions as to mere Bills and their inclusion with reference to Acts, was to render obligatory that which, in relation to the position of the States under the Constitution, was regarded as vital.

It may be added, as a further reason why the second paragraph of sec. 55 should be held to be obligatory, that where the tax Bill deals with more subjects than one, there is ordinarily no means, as there is in respect of Bills within the first paragraph, of casting out that which offends against the Constitution, as there is no means of knowing which subject of taxation represents more than the other or others the will of Parliament. As this last reason will not exist in the case of the incidental or casual intrusion of some unimportant provision which might be held in strictness to introduce a second subject-matter, there may be, as the Chief Justice has suggested, good reason why the Court should, where possible, place a benignant interpretation on such a provision, where two constructions are open, "that the matter may rather avail than perish." Again I say, however, that I do not attempt to decide conclusively a question that has not become essential to the determination of this case. In the result I am of opinion that judgment ought to pass for the defendants.

O'CONNOR, J., read the following judgment:—  
The taxation legislation, which is the subject of this

Special Case, is contained in two Statutes, which, for the purposes of administration, must be read together. The Act first assented to, which I shall describe as the Tax Act, is restricted to declaring the imposition of the tax and fixing the rate. The other Act, assented to on the day after, I shall refer to as the Assessment Act. Without its provisions no tax could be collected under the Tax Act, but of itself it imposes no tax. Although by sec. 10 it enacts that, subject to the provisions of the Act, land tax shall be levied and paid, that section must be read with the interpretation of the word "land tax" in sec. 3. So read, it is plain that the imposition of the tax is affected by the first Act, and that sec. 10 and the other provisions of the second Act, are directed merely to assessing the amount to be paid, and making it payable according to the assessment. The plaintiff's first objection is founded on sec. 55 of the Constitution, which, quoting only the part material in this case, is as follows:—"Laws imposing taxation except laws imposing duties of Customs or of Excise shall deal with one subject of taxation only."

The Tax Act, which, as I have pointed out, deals only with the imposition of taxation, plainly deals only with one subject of taxation—land. The Assessment Act is not in itself a law imposing taxation, and could not, if read alone, come within the words I have quoted. To make the objection at all arguable, it is necessary to embody the provisions of the Tax Act in the Assessment Act, and to read them as one enactment. The plaintiff, so reading the Tax Act into the Assessment Act, contends that the latter is a law imposing land tax, and that it deals with other subjects of taxation as well as land. There are two answers to the objection. First, that the Assessment Act is not a law imposing taxation within the meaning of sec. 55; secondly, that if it is, there is no section of it dealing with any subject of taxation other than land.

In inquiring whether a law imposes taxation within the meaning of sec. 55, each Act must be judged separately. No doubt, in inquiring whether an Act imposes taxation, it must be read in accordance with its legal operation, that is, in connection with existing laws. But it does not follow that every section of an existing Act so read with the Act under inquiry is to be regarded as part of it for the purposes of sec. 55. The distinction drawn in that section between "imposing taxation" and "dealing with a subject of taxation" must be always kept in view. The object of sec. 55 of the Constitution is to secure that each enactment imposing taxation shall be framed in a certain form. The frame of the enactment is important only for reasons of Parliamentary procedure. The section is in the middle of a group of sections dealing with the legislative powers of the Senate and House of Representatives, and with the Governor's assent to proposed laws, their reservation and disallowance. Every section of the group relating to

Parliamentary procedure deals with proposed laws, and is directed to preserving the privileges of the House of Representatives with respect to proposed laws for appropriating moneys and imposing taxation, and to safeguarding the Senate from the abuse of those privileges by providing that the proposed laws which the Senate are forbidden to amend shall be framed in the manner prescribed. This Court can have no cognisance of proposed laws, nor can it in any way interfere in questions of Parliamentary procedure. Its jurisdiction arises only when the proposed law becomes a law. In enacting sec. 55, the Constitution has given the Court jurisdiction to examine the frame of a law, obviously with the object of giving a sanction to its directions for the framing of legislation dealing with taxation and the appropriation of money in accordance with the provisions of in sec. 53 and the sections immediately following. From no other point of view can the form in which an Act is framed be of any moment. Sec. 55 may therefore be applied to each piece of legislation, as it becomes law, just as either House would apply the provisions of secs. 53 and 54 of the Constitution to proposed laws as they came before them. Immediately a proposed law becomes a law, it is subject to examination in the light of sec. 55. If it is framed in accordance with that section, it is valid, and cannot afterwards be made to contravene it by the operation of subsequent legislation. Judged separately on these principles, neither the Tax Act nor the Assessment Act is open to the objections taken. The former, which is a law imposing taxation, clearly deals with one subject of taxation only, that is land; the latter, though dealing with taxation, does not, as I have pointed out, impose taxation, and is therefore not within the section. Considering both Acts together, to ascertain the intention of the Legislature, it is quite clear that Parliament intended to impose taxation by the Tax Act, and not by the Assessment Act, and that it framed the latter expressly in the form which did not impose taxation, so that it might be open to amendment by the Senate. Assume, however, that the Acts may be read together, as the plaintiff contends, and that the Assessment Act is a law imposing taxation, the objection must still fail on another ground, namely, that in none of its provisions does the Act deal with any other subject of taxation than land. I propose to refer only to the sections on which Mr. Mitchell principally relied. It was contended that, in fixing the special rate on absentees, a new subject of taxation was introduced. It is, however, quite clear that when the provisions of the Act referring to assessing the lands of absentees are examined, that land is the only subject of the tax. The fact of absence from Australia places a taxpayer in a separate class from taxpayers resident in Australia. In respect of the former class, the taxable amount begins earlier, and the rate is heavier, but the subject of taxation is still

the taxpayer's land. As to sec. 30, it is plain that one subject of taxation only is dealt with. The policy of the Act is to place liability directly on the owner. The section is directed to preventing that liability from being transferred to the lessee. The same answer may be made to a similar objection raised to sec. 32. I was at first disposed to think that there was something in Mr. Mitchell's contention that in sec. 39 the subject of taxation was shares, not land. But an examination of the section makes it clear that it is the shareholder's interest in the land of the company, not his shares in the company, which is the subject of taxation.

Technically, no doubt, the holder of shares in a company has no interest in the lands of the company. But, looking at the substance of the matter, every owner of a share is interested in the land of a company proportionately to the number of his shares, just as a partner is interested in the lands of a partnership. The Legislature, disregarding the provisions of company law, imposes the tax according to the real interest of the shareholder, taking the number of his shares as the measure of his interest. It may be that the section is open to objection on the ground that it is not a valid exercise of the power of taxation. But whether the Legislature could, or could not, carry out its intention validly, it is quite clear, from the language of the section, that it intended to tax land, and nothing else. Similarly, on reading secs. 40, 41 and the other sections to which Mr. Mitchell directed his arguments, it is apparent on the face of them, whatever objections may be raised to them on other grounds, that the only subject of taxation with which they deal is land. That, indeed, may be said of all the sections against which this objection has been urged. After a careful examination of their provisions, I am of opinion that none of them are open to the criticism that they deal with subjects of taxation other than land.

For these reasons, therefore, I am of opinion that the Acts under consideration, whether taken separately or together, deal with no subject of taxation other than land, and therefore do not contravene the directions of sec. 55 of the Constitution. Holding that view, it is unnecessary to consider the very important question, raised during the argument, as to whether an Act contravening the provisions of sec. 55 of the Constitution was thereby rendered absolutely void. Upon that question I reserve my opinion until an occasion arises when it becomes necessary to determine the matter.

I turn now to another ground on which the validity of both Acts was questioned. It was argued by Mr. Mitchell that, when the real nature and substance of the legislation is looked at, it is not an exercise of the power of taxation, but an attempt to restrict and regulate the holding of land—to force the holders of large estates to divide and sell their land under the compulsion of the graduated tax. In support of that

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contention he relied upon *Barger's Case*, 14 A.L.R. 374, as applicable. The Statute under consideration in that case, whatever may have been its form, was not in its nature and substance an Act imposing taxation. But in the Acts now before us I can see nothing to suggest that they are not taxing Acts. Their whole plan, the object of all their provisions, is plainly directed to the imposition of a graduated tax on the unimproved value of land. The principles to be applied in considering such a ground of invalidity are laid down in *Barger's Case*; it is unnecessary to repeat them here. It is sufficient, I think, to say that the effect and consequences of an Act, even the motives of the Legislature in passing it, are immaterial. If the Act itself, according to the fair construction of its provisions, is an exercise of the power conferred. The grounds of objection going to the validity of the whole of both Acts being thus, in my opinion, untenable, I shall refer shortly to the plaintiff's contention, raised as to several sections of the Assessment Act, that they went beyond the power of taxation conferred on the Parliament of the Commonwealth. In the case of some sections attacked, it is plain that the contention must fail. For instance, taking secs. 26, 29 and 56 together, I can see no ground for the contention that State lands are taxed contrary to sec. 114 of the Constitution. The objections raised to sec. 48 relating to the acquisition of lands of taxpayers who understate the values of their lands, are of an entirely different kind, as also are those raised to secs. 36, 39, 40 and 41—objections that they exceed the powers of Commonwealth legislation in disregarding the State laws of property and contracts, in attributing ownership of lands for purposes of taxation to persons who, under the State laws, could have no interest in the lands. With regard to all these sections, difficult questions of wide general importance respecting the taxation power of the Commonwealth, are raised for the first time.

It would, of course, be necessary to determine them in this case if the sections alleged to be invalid were not separable from the rest of the Act. The principle upon which the separability of the invalid from the valid portions of an enactment are to be determined was laid down in the *Bootmakers' Case*, 16 A.L.R. 185, and has been applied in subsequent cases, the latest of which is the *Kalibia Case*, decided at the end of last year. The learned Chief Justice, in the *Bootmakers' Case*, after referring to the American authorities, puts the matter thus—"I venture to think 'that a safer test is whether the Statute, with the 'invalid portions omitted would be substantially a 'different law as to the subject-matter dealt with 'by what remains from what it would be with the 'omitted portions forming part of it.'" With respect to each of the sections attacked, I assume them to be invalid, and apply the test. Is the Statute with those sections, taken separately or together, omitted, substantially a different law as to the subject-matter

dealt with by what remains from what it was while the omitted portions formed part of it? Clearly it is not. Assume, for instance, that the Commonwealth has no right, as provided in sec. 48, to acquire the land of the taxpayer who makes a return undervaluing his land. Omit the section, and the Act remains the same as before with regard to other taxpayers. Again, assume that the Commonwealth cannot legislate to make the husband liable to pay land tax on his wife's lands, under the circumstances mentioned in sec. 36. Omit the section as invalid, and the operation of the Act upon other taxpayers is unaffected by the omission. The same test may be applied to all the other sections to which I have referred, and with the same result. Under these circumstances, it is unnecessary for the Court to express any opinion on the difficult and important questions raised with regard to the sections to which I have been referring. With regard to them I do not think it necessary to say more than this, that if the objections were upheld, and the sections declared void, they are all so clearly separable from the rest of the Act that its operation, and therefore its validity, remains undisturbed by their omission. For these reasons, I am of opinion that all the plaintiff's objections fail, and judgment on the Special Case must be entered for the defendants.

ISAACS, J., read the following judgment:—"The legislation effected by the two Acts Nos. 21 and 22 of 1910 read in conjunction is impeached in various ways. First, it is contended that the enactments are totally invalid, and this contention is rested on two separate grounds. One is that they are not in substance an exercise of the taxing power at all, and therefore—as no other granted power can be suggested to support them—they are outside sec. 51 of the Constitution altogether. The basis of this position is, that when the Acts are looked at, as a whole, and particularly in the light of certain provisions, such as the exemption of £5000, and the inclusion of mortgages a legislative purpose of controlling the ownership of land can be perceived behind the mere words and their primary effect.

As a result, it is said the Court should pass by the mere legal nature and operation of the taxing sections as they appear upon ordinary principles of construction; and, regarding only the true character of the legislation as governed by the discovered purpose, should declare it to be merely a disguised attempt to invade State powers by regulating the ownership of land. As to this, I apply the test I have applied in earlier cases. Lord Selborne, for the Privy Council, in *R. v. Burah*, 3 A.C. at 904, laid down the golden rule of constitutional interpretation in these terms—"If what has been done in legislation is 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 . . .

"it is not for any Court of Justice to inquire further. "or to enlarge constructively those conditions and "restrictions." That was not merely a specific instance of the ordinary rules of statutory interpretation, but was also an authoritative canon of construction specially applied by His Majesty in Council to Imperial grants of constitutions to dependencies, and as such must be taken to have guided the Imperial Parliament in passing our own Constitution.

On the face of the legislation itself, construing it according to recognised principles and methods, and giving to it the full effect to which such construction naturally leads, it imposes a tax on land and provides means for its effectual enforcement. That is necessarily a taxation measure, and within the grant of sec. 51 (II.), comprised in the one simple and comprehensive word, "taxation." The purpose for which the measure is enacted, that is for which the power is exercised, is exclusively a matter for the legislative mind, and is not open to review by a Court of Law. The judiciary concerns itself only with the existence and extent of the power, not with the occasion or purpose which may call for its exercise. And its existence and extent do not depend upon the fact that its exercise may or does incidentally interfere with circumstances which standing by themselves are controllable only by some other authority, or even with the operation or results of other powers distinct in nature possessed by other legislatures.

The lines of human affairs from their inherent complexity cross each other at innumerable points and it is impossible to frame an arbitrary classification, such as that contained in sec. 51 of the Constitution, which will completely segregate the transactions of life. Consequently, it is impossible to deny the existence of a stated power along a given line merely because another line not included in the list is affected at the intersection. *Russell v. The Queen*, 7 A.C. at p. 839, is explicit. There the Privy Council, with reference to public order and safety, for which in the present instance, land taxation may be substituted, said—"That is the primary matter dealt with, and "though incidentally the free use of things in which "men may have property is interfered with, that "incidental interference does not alter the character "of the law."

In the more recent *Manitoba Case*, (1902) A.C. 73, a provincial Act was upheld as valid, although, as the Privy Council said, it must interfere with Dominion revenue, with trades licensed under Dominion law, and indirectly at least, with business operations beyond the limits of the Province. This decision is very much to the point, because in Canada the residual power is in the Dominion, and yet the provincial Act was held valid. The same principle obtains in America. The words of Chief Justice Fuller, in *Re Kollock*, 165 U.S. 526 at 536, are—"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." The Act there was avowedly passed for the purpose of preventing public deception in the sale of the article, but as it imposed a tax for the purpose, the Court was bound by what the Legislature did, and was not entitled to regard the purpose of the legislative action. This ruling in *Kollock's Case* was followed and reaffirmed in *McCray's Case*, 195 U.S. at p. 59. And still more recently (1908), the present Chief Justice of the United States, in *Hammond Packing Co. v. Arkansas*, 212 U.S. at p. 340, speaking of a State Statute impeached on the ground of its real purpose, said—"The mere incident or purpose for which the lawful "power was exerted affords no ground to deny its "existence."

In my opinion, therefore, the Court is entitled only to apply the ordinary principles of construction to a legislative Act, and after thus ascertaining its true legal effect, is bound to say, irrespective altogether of any collateral purpose, whether it falls within or beyond the scope of the asserted power. For the Court to go further, as it has been invited to do, would be to set itself up as a censor of Parliament, and not the interpreter of the law.

Then another reason was advanced also for total invalidity. The Acts, it is said, have dealt with more than one subject of taxation, in violation of the second part of sec. 55 of the Constitution. The strongest provisions in favour of this contention are contained in secs. 39 and 41 of the Assessment Act (No. 22). In view of the conclusions I arrive at, as to the effect of the challenged sections themselves, it is not necessary to come to any final decision respecting the effect of a violation of the constitutional provision. But I am not prepared to assent to a proposition that a violation is immaterial. The power of Parliament to pass laws, even within the admitted range of the specified subject-matters, is given with the express restrictions "subject to this Constitution;" and in sec. 55 we find the very distinct provision referred to. It is not a matter which relates to intermediate procedure, or the order of events between the Houses, or a matter which requires to be established by extraneous evidence. If there be a contravention of the fundamental law, there it stands apparent on the face of the enactment, manifest to the Court on mere production. Is such a law valid or not? At first sight, at all events, it appears to be struck by the words of Lord Selborne already quoted.

One object of the express restriction undoubtedly was to secure to the people of the Commonwealth a consideration of every tax imposed on them, free from the disturbing influence caused by the presence of any other tax in the same measure—Customs items, and Excise items, being respectively considered as appertaining to one species of tax. That is a most important consideration enforced not by mandate, which

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could not be made the subject of judicial interposition. but by restriction on power that can; and, as at present advised, I am not disposed to consider that a public safeguard of this nature, directed to both Houses of Parliament alike, could be always deliberately ignored without consequences. So far as light can be obtained from American precedent, it tells in favour of insisting on legislative compliance with such a restriction. Various State authorities were referred to during the argument, and prominently *State v. Lancaster Co.*, 17 Neb. 87. These at present need not be closely examined, more particularly as there has been a pronouncement on the subject by the Supreme Court of the United States in the case of *Montclair v. Ramsdell*, 107 U.S. 147. That case arose under the New Jersey Constitution, which requires that—"Every law shall embrace but one subject, and that shall be expressed in the title." The two requirements are distinct. From the judgment of Harlan, J., delivering the opinion of the Court, it is to be seen that that tribunal in no way doubted a clear contravention of the State Constitution would create a conflict between it and the Statute which would involve invalidity, but the learned Judge added the qualifying words—"The objections should be grave, and the conflict between the Statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object."

Assuming, therefore, though without deciding, that a distinct violation of the constitutional provision in question would nullify a law, it is plain that the Court must be extremely cautious before it concludes that a violation exists. The Legislature is presumed to know its powers and their limits, and not to intend transgression. If, therefore, any other construction of its language be reasonably open, that should be adopted. That would be so even if the sections objected to were originally contained in the "Land Tax Act" (No. 21) itself. No doubt as that Act, by sec. 2, incorporates the provisions of the Assessment Act (No. 22), it follows that No. 21 must be read as if every word of No. 22 were written into it as one Act—see *per* Lord Selborne in *Canada Southern Railway Co. v. International Bridge Co.*, 8 A.C. at 727; and *Re Wood's Estate*, *per* Lord Esher, 31 Ch. D. 615. And if secs. 39 and 41 of the Assessment Act were obnoxious to the criticism of imposing a tax upon a subject other than land, the question of the effect of sec. 55 of the Constitution would arise, so far as No. 21 is concerned. The Assessment Act is certainly an independent Statute, and stands *proprio vigore*, ready to aid and enforce any valid Land Tax Act.

But as the argument that secs. 39 and 41 impose taxation on another subject than land, and thereby constitute a fatal violation of sec. 55 of the Constitution, if good at all, would destroy Act No. 21, the Assessment Act would of itself be admittedly impotent to impose a tax, in which case the plaintiff

would succeed, and therefore I do not pursue it further. But I guard myself against offering any opinion as to whether any distinction can be drawn between laws imposing taxation, and laws dealing with the imposition of taxation, or whether imposition of taxation includes the collection of the tax. When that question becomes necessary to determine, reference may be usefully made, not only to secs. 53 to 56, but also to sec. 86 and following sections. This branch of the case, however, depends on whether secs. 39 and 41 have the effect contended for. I entertain no doubt they are free from that objection.

Each of these sections, it is said, imposes a tax on what I may term the intangible interest which the taxpayers hold in the respective corporations mentioned, and not upon the land. As a matter of simple construction, sec. 39, for instance, purports to tax nothing whatever, not even land. It assumes the land is already taxed by some other Act, its effective provisions relate to assessment, and the personal liability of the shareholders for a land tax *aliunde* imposed.

The argument that as shareholders have no interest recognised by law in the land itself, such a construction is not legitimate, is wanting in substance. I referred during the argument to the words of Lord Macnaghten in *Birch v. Cropper*, 14 A.C. at 543, where he said—"A person who becomes a member of a company limited by shares of equal amount becomes entitled to a proportionate part of the capital, and unless otherwise provided, entitled as a necessary consequence to the same proportionate part in all the property of the company." The learned Lord was stating as one step in the reasoning, a fact representing the real substance of the matter. Mr. Knox urged that the statement referred to had no application beyond the circumstances or nature of the case. But that is not so. The incorporation of a company is not a fiction of course; it is a statutory fact, but while it remains a fact for all the purposes for which it was designed, it does not annihilate, but on the contrary, is in aid of, the ultimate truth which underlies the matter—namely, the beneficial ownership of those who for the moment compose the company. Incorporation gives a special character and status to the partnership, and surrounds it with certain legal attributes and conditions, but it does not destroy it. Lord Macnaghten's words only state very tersely what other learned Judges have said on the subject. The important nature of the objection—one going to the power of Parliament—and the strenuous reliance placed upon it—induce me to refer to two of those judicial utterances.

In *Smith v. Anderson*, 15 Ch. D. at p. 273, James, L.J., in 1880, said—"A company or association (which I take to be synonymous terms) is the result of an arrangement by which parties intend to form a partnership which is constantly changing; a partnership to-day consisting of certain members, and to-

"morrow consisting only of some of those members along with others who have come in, so that there will be a constant shifting of the partnership, a determination of the old, and a creation of a new, partnership, and with the intention that, so far as the parties can by agreement between themselves bring about such a result, the new partnership shall succeed to the assets and liabilities of the old partnership. This object as regards liabilities could not in point of law be attained by any arrangement between the persons themselves, unless the persons contracting with them authorised the change by a novation, or unless by special provisions in Acts of Parliament sanction was given to such arrangements." And in (1903) 1 K.B. at p. 465, Lord Chancellor Halsbury said—"I think the confusion which has arisen in some of the cases is due to not sufficiently observing what is meant by what we call 'the share,' and the 'sale of the share,' and by not recognising that the share makes the holder of it a member of a trading partnership, and as such subject to all those liabilities of the partnership which the Legislature has imposed upon it by what I may call the statutory deed of partnership."

The essence of the matter is the partnership—or in other words the co-partnership of property and enterprise by the persons forming the partnership. The shareholders then—subject to liabilities and to securities for creditors provided by Statute—are the real and only masters of the property under the general law of the land, and the Commonwealth Legislature may properly lay hold of this essential concept, and, disregarding circumstances that though not fictitious are certainly factitious, make it the foundation or the guarantee of the tax imposed by it upon the property itself. No legal reason therefore exists which renders either impossible or improbable the primary import of the words of sec. 39. The same reasoning applies to sec. 41. There may be difficulties of construction so far as concerns the application and effect of its provisions in a given case; but none whatever as to the point now under consideration. The contention as to total unconstitutionality consequently fails.

Then partial invalidity was insisted on. Various sections were pointed to as exceeding the power of Parliament for various reasons. Apart from merely getting rid of these sections for their own sake, it was urged that their excision was fatal to the whole legislation. The Crown contends for their validity, but says that in any case they are separable, and when separated leave the residue substantially the same enactment. If "substantially" used in that connection means identical in effect, I agree with it, but if it means "approximately" I am not able to adopt the expression. Parliament cannot make a valid law contrary to the Constitution, but nothing is a law unless made by Parliament. To be a law, it must be precisely, not approximately, what Parlia-

ment has declared, and whether the departure from that declaration be great or small, to that extent it is not law at all; and unless the excess is itself separable so as to leave the remainder just what Parliament has directed, and not a fraction more, the whole must fall, because unauthorised by the organic law. If the unavoidable consequence of eliminating an invalid portion of an Act were to increase a number of taxpayers or the burden on any of them, beyond the intention of Parliament as apparent on the face of the Act as framed, in whatever proportion the additional taxpayers stood to those intended, and even if the additional tax were as small as that against which Hampden fought, it is not the identical law passed by Parliament, and none other is authorised by the Constitution. A man not taxed by Parliament at all, or as much cannot be taxed or further taxed by the Court, by eliminating a provision which, though unauthorised, was intended to prevent or limit his liability. There cannot be any *cy près* doctrine, as I understand the matter. And the test must, as it appears to me, come to that which I have stated in the *Bootmakers' Case*, 16 A.L.R. at p. 392; and *Re the Kalibia* [not yet reported].

The latest American recognition of that view is in *International Text-book Co. v. Pigg*, 217 U.S. at p. 113, in 1909. There Harlan, J., speaking for the majority, said—"The several parts of the section are not capable of separation if effect be given to the legislative will. It is well settled that if a Statute is in part unconstitutional, the whole Statute must be deemed invalid, if the parts not held to be invalid are so connected with the general scope of the Statute that they cannot be separately enforced, or if so enforced, will not effectuate the manifest intent of the Legislature." If the Court were, for instance, constrained to reject sec. 41, I should require further time to consider whether a burden was not placed on the society, and some of its shareholders different from and more serious than that intended by the Legislature.

I deal now with the particular sections complained of. Sec. 26 was challenged as affecting Crown land, and therefore contrary to sec. 114 of the Constitution. But the expression "land" is elastic, adapting itself to the context by virtue of the "Acts Interpretation Act," sec. 22, defining "land" and the "State," and it includes the equitable interest of a purchaser. Sec. 26 contemplates the assessment of persons who have fulfilled every condition properly so called, and who therefore stand in the situation of absolute purchasers, payment and conveyance being concurrent, and reciprocal rights and obligations. Speaking of the words "conditional purchaser" under the Acts of New South Wales, the Privy Council recently said—*Chippindall v. Laidley and Co.*, (1909) A.C. at p. 209—that the payment of the stamp and the deed fee, and the application for the conveyance, cannot be treated as conditions inasmuch as these are things



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which a purchaser is obliged to do under the most absolute form of contract of purchase. And so is payment in exchange for conveyance.

Once the purchase becomes absolute, the doctrine of *Shaw v. Foster*, L.R. 5 H.L. at p. 338, applies to establish the purchaser's interest. There Lord Cairns said—"I apprehend there cannot be the slightest doubt of the relation subsisting in the eyes of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser. The purchaser was the real beneficial owner in the eyes of a Court of Equity of the property." and subject, of course, to the vendor's right to protect his own interest. Reading sec. 26 in this way, and confirming this interpretation by reference to sec. 13, expressly exempting all land owned by a State, there appears to be no objection to the enactment.

Secs. 27 and 28 affect Crown lands only to the extent of the interest of a perpetual lessee, without re-valuation, which is substantially a fee simple for the purposes of enjoyment, and the interest of a lessee, with a right of purchase, which means an absolute right of purchase, bringing the case within the reason of sec. 26. Sec. 30 and sec. 63 were said to offend as an invasion of the State power to control general contracts. But if the Commonwealth Parliament has the right to say that the lessor shall bear the burden of the tax, it has the right to insist on its will being obeyed, and its insistence may take the form of prohibiting any contractual device for shifting the burden to the lessee, who, it determined, should go free. Lord Chancellor Selborne, in *Small v. Smith*, 10 A.C. at p. 129, laid down the rule in these terms—"When you have got a main purpose expressed, and ample authority given to effectuate that main purpose, things which are incidental to it, and which may reasonably and properly be done, and against which no express prohibition is found, may and ought *prima facie* to follow from the authority for effectuating the main purpose by proper and general means."

Story in his work on the *Constitution*, says (par. 1248)—"To employ the means necessary to the end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable." Then in par. 1252 he says—"It is no valid objection to this doctrine (that is the doctrine of liberal latitude in the selection of means) to say that it is calculated to extend the powers of the Government throughout the entire sphere of State legislation. The same thing may be said and has been said in regard to every exercise of power by implication and construction. There is always some chance of error or abuse of every power, but this furnishes no ground of objection against the power, and certainly no reason for an adherence to the most rigid construction of its terms which would at once arrest the

whole movements of the Government." In par. 1253 he adverts to the meaning of the word "proper" apparently in the sense in which Lord Selborne used it. Judged then by this standard, sec. 30 is obviously *intra vires*. Sec. 63 expressly limits the avoidance to the purposes necessary to protect the legislation, and is equally clear of objection.

Sec. 36 is said to be invalid as taxing a person in respect of land in which he has no interest. But it is not a tax primarily considered. It is a penalty for doing what is intended to evade the Act, because if the parties can satisfy the Commissioner there was no such intention, the section has no application. Sec. 37 holds, in certain circumstances, both legal and equitable owners of land which has been sold but only partially paid for, responsible for the tax, but providing for equitable adjustment. Sec. 39 is attacked on the further ground that the Commonwealth Parliament is bound by a territorial restriction, and cannot tax non-resident shareholders in foreign companies which own land in Australia.

The answer given to the earlier constitutional objection to the same section applies with equal force to this. And so with respect to sec. 41. The intermediate sec. 40 is a precautionary measure, to prevent among other things a company owning land, launching one or more offshoots with slightly different shareholders, transferring portions of its land to nominally different but practically identical owners, and so evading the progressive nature of the tax. It is not to be overlooked that Parliament has provided for the indemnity of those not really concerned in the other's land. Sec. 48 is another section devised to secure as far as possible an honest and careful valuation by the owner in his return. If the discrepancy between the true value and the returned value is as much as one-fourth the former, the owner may have the burden of satisfying a Justice of the honesty of his purpose. The method and means he employed, and the care he bestowed in framing his return, are peculiarly within his knowledge, and ought to be easy to establish. If he fails to support an honest purpose he has to forfeit his property, but gets a value he cannot complain of. He is taken at his word with respect to unimproved value; but gets full value of improvements, with 10 per cent. added for compulsory taking. The Commonwealth acquire the land, not as a primary or main power, but as ancillary to the taxation power and by way of forfeiture only, and it either hands it over to the State without profit, retains for required public purposes, or disposes of it. Those are the only possible uses. To allow the use of the word acquisition to dominate the manifest and declared purpose of the section would be to bow to mere verbal tyranny. Sec. 71, an ordinary forfeiture clause for fraud, stands in the same position. As to secs. 48 and 71, the case of *Taylor v. United States*, How. 197, may with advantage be perused. Both sections are valid. Discrimination was mentioned but

not pressed. The objection is obviously untenable and is met by *Colonial Sugar Refining Co. v. Attorney-General*, (1901) A.C. 544. In the result the plaintiff's case entirely fails.

HIGGINS, J., read the following judgment:—I concur in the opinion that this action should be dismissed. The course of a great part of the argument for the plaintiff must seem to an outsider rather grotesque. Learned Counsel have taken the two Acts, and have examined every nook and cranny with microscopic care, in order to find, if possible, some provision which has transgressed the Constitution in any particular even the most insignificant; and then they have applied great industry and ingenuity to demonstrate that, if such-and-such a provision be treated as invalid, the remainder of the Acts would be "substantially different" from what Parliament intended, and must be invalid also. It is not pretended that the impugned provisions affect the plaintiff; but if the plaintiff can show that the whole of the legislation is bad, because of some provision which does not concern him, he will be free from obligation to pay the tax. Into such barren intellectual gymnastics we are forced in this case, and probably in cases to come.

In this case, however, I am glad to find that, whatever our individual opinions may be as to the proper principles of severability, all the members of the Court agree in the view that either no invalidity has been shown, or that, if there is any invalidity, the invalid provision can be severed from the rest of the Acts, which remain valid. Substantially, I agree with the results at which my learned brothers have arrived on this subject; and it is unnecessary for me to refer to the several provisions in detail.

But there is one argument to which I should like to refer in particular, to avoid any misapprehension. It is urged that the Assessment Act (Act No. 22) is, either alone or in conjunction with the Act No. 21, a "law imposing taxation;" that it deals with more than one subject of taxation; and that it is therefore altogether void by virtue of sec. 55 of the Constitution (second clause). The plaintiff has to establish the three propositions in order to succeed. Personally, I am inclined to agree with the plaintiff as to the first; for Act No. 21 does not impose taxation without the aid of Act No. 22. Act No. 21 prescribes what rates of taxation shall be payable; but it does not prescribe who is to pay. Even assuming it to be possible to have a tax without a taxpayer—a person under a direct obligation to pay—it is clear that in this case there was to be a taxpayer, and the taxpayer is fixed by Act No. 22. This essential part of the imposition of the tax was left for the Act No. 22. But, as to the second proposition, I concur with what has been said, that there is not from first to last, in either of the Acts, anything dealing with any subject of taxation except that subject of taxation which is indicated in the title of one Act as "a progressive

"land tax upon unimproved values;" and in the other as "a land tax upon unimproved values." The prohibition contained in the second clause of sec. 55 applies only to a law containing two or more subjects of taxation. There may be as many objects of taxation—persons to be taxed—as Parliament pleases. Here, the only subject of taxation throughout is land, or rather, land values. The tax is based on the value of the land. There is no tax apart from the value of the land; although the classes of persons selected as liable to pay the tax, primarily or secondarily, seem, in some instances, to be rather artificial and arbitrary. It is unnecessary for me to discuss the provisions of the Acts further after what has been said by my colleagues. But, in my opinion, sec. 55, in both its clauses, allows Parliament much more freedom of action than the plaintiff is disposed to concede. The provision is not that laws imposing taxation shall only impose taxation, but that they shall deal only with the imposition of taxation. The provision is not that laws imposing taxation shall only tax one subject of taxation, but that they shall deal with one subject of taxation only. The words seem to allow the insertion of any provision which is fairly relevant or incidental to the imposition of a tax on one subject of taxation.

As for the third proposition, I am not at all prepared to accept the assumption of the plaintiff that if an Act imposing taxation deals with more than one subject of taxation, it is void. There are no words in the Constitution expressly making the Act void; and I cannot find that it is void by necessary implication. True, it is reasonable to infer from the change of language in sec. 55—"law," instead of "proposed law" or Bill—that there is to be a change of result; but what is the change? Why are we to infer that invalidity of the whole Act is the necessary result? Under sec. 51, Parliament has power, "subject to this Constitution," to make laws; but the provisions for making "proposed laws" are quite as much part of the Constitution as the provision for "laws;" and yet it is admitted that an infraction of the provisions for "proposed laws" does not make the Act invalid. Nor can it be maintained that the secs. 53, 54, 56, &c., dealing with "proposed laws" deal only with directions to the Houses directions as to the mode of handling Bills, for sec. 54 prescribes that "proposed laws" appropriating moneys for the ordinary annual services "shall deal only with such appropriation." Why is an appropriation Act not invalid by reason of its substance, if a taxation Act is invalid by reason of its substance? Ordinarily, if the first part of a section prescribe a prohibition and a penalty, and the second part prescribe a prohibition only, we should say that the second provision carries no penalty; and why does that principle not apply here? The penalty of partial invalidity contained in the first clause of sec. 55 is in the form of an addition to the prohibition, not in the form of a reduction

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of penalty. The fact that there is no remedy specified for non-compliance with sec. 55 (2) does not show that the clause is imperative—*Maxwell* (4th ed.), 567; nor the fact that the words are negative in substance—*Craies*, 233; and no doubt the word "only" implies a negative. Perhaps it was thought that if the Senate were coerced by circumstances into accepting two taxes in one bill, the power of the King could be invoked, under sec. 59, and the Bill would cease to have operation from the date of disallowance. At the worst, however, the prohibition can be treated as merely directory. The theory that the whole Act was to be invalidated rests really on mere conjecture. Where are the words making the law (and a "law" means a valid law) invalid? However, the point is, fortunately, not necessary for our decision.

It was also urged by the plaintiff that the Acts, in their true nature and character, are not taxation Acts at all—that they were not passed for the purpose of raising revenue, but in order to control matters which are essentially within the reserved powers of the States—the holding of land, the holding by absentees, the holding of land of great value, &c. For this purpose, reference was made to matters of internal evidence, in the Acts themselves, which show an intention to dictate an economic policy as to lands, a policy which it is for the State to dictate. I admit that if I were able to accept the view of the majority of the Court in *Barger's Case*, I should find much more difficulty in answering this argument. But as I am sitting now in Full Court, I need only say that as these Acts create an obligation to pay taxes, they are taxation Acts, whatever conditions they impose, whatever State subject they affect. I can find no discrimination between States or parts of States. I concur in the opinion that this action should be dismissed, and with costs.

GRIFFITH, C.J.—Judgment will be entered for the defendants, with costs. *Judgment for defendants.*

[Solicitors—For plaintiff, Norton, Smith and Co. and Blake and Riggall; for defendants, Powers, Crown Solicitor.]

S. K. II.

## Supreme Court.

FULL COURT—(Madden, C.J., { May 2, 3, 4, 5.  
Hodges and Hood, JJ.) { June 1, 2, 8.

### GRUNDEN and Others v. NISSEN and Others.

*Trustee—Commission—Allowance of—Breach of trust—Shares in no-liability Company—Payment of calls thereon by executor—Appointment of new trustee—Trustee making profit out of the trust estate.*

Commission cannot be allowed to executors or trustees except on their passing their accounts, and then in respect of past transactions only.

Where under a will trustees are given a discretion to postpone the sale of the testator's personal property, which includes shares in a no-liability company, and they retain such shares in the honest exercise of that discretion, they will be allowed payments for calls made upon those shares.

The defendants were trustees under the testator's will, which authorised them to carry on the testator's business for the benefit of his children, and to leave the entire management of the business to any manager on such terms of remuneration as they thought fit. The defendants carried on the business, and for some time one of them, Wilhelm Pallin, acted as manager at a salary. Objection having been taken on behalf of the beneficiaries to the employment of one of the trustees as manager, Pallin resigned his trusteeship, joined with the other defendant in appointing one Sheldon as trustee in his place, and retained the position of manager.—

*Held*, that as the real purpose of this arrangement was the retention by Pallin of the benefits to himself as manager, the appointment of Sheldon was not such an exercise of the power of appointing new trustees as a Court of Equity requires, and was therefore invalid.

In the absence of any provision therefor in the will, executors may lawfully expend a reasonable sum in the erection of a headstone on the testator's grave.

APPEAL by the plaintiffs from the decision of A'Beckett, J., reported 16 A.L.R. 636, where all the material facts are given.

The plaintiffs, who sued by their next friend, Lawrence Magnus Gillberg, were the infant children of Knut Adolph Grunden, and beneficiaries under his will. The defendants were Carl Johan H. Nissen and Wilhelm Pallin, the executors and trustees of that will. The action was based upon breaches of trust alleged to have been committed by the defendants in the administration of the testator's estate.

*Weigall, K.C.*, and *Stanley Lewis* for the appellants.

*Hayes* for the respondents.

The following authorities were cited:—*Sugden v. Crossland*, 3 Sm. & G. 192; *Re Boles and British Land Co.'s Contract*, (1902) 1 Ch. 244; *Head v. Gould*, (1898) 2 Ch. 250, 268; *Lewin on Trusts* (11th ed.), 305; *Re Skeats' Settlement*, 42 Ch. D. 522, 526; *Re Short*, 11 V.L.R. 634; *Re Dean*, 7 V.L.R. (I.) 46; *Re Swan*, 7 V.L.R. (I.) 49; *Re Hine*, 4 V.L.R. (I.) 64; *Re Winter-Irving*, 13 A.L.R. 298; *Hayes v. Wilson*, 11 V.L.R. 640; *Dearman v. Dearman*, 15 A.L.R. 287; *Healey v. Bank of New South Wales*, 5 A.L.R. 34, 24 V.L.R. 694; *Cock v. Smith*, 15 A.L.R. 526; *Knight v. Knight*, 10 V.L.R. (Eq.) 195; *Trustees, Executors and Agency Co. v. Thorpe*, 6 A.L.R. 83, 26 V.L.R. 99; *Godefroi on Trusts* (3rd ed.), 360; *Re Chapman, Cocks v. Chapman*, (1896) 2 Ch. 763; *Hiddings v. Denysen*, 12 App. Cas. 624; *Re Norrington*, 13 Ch. D. 654.

*Cur. adv. vult.*

MADDEN, C.J.—In this case a man who was proprietor of a restaurant specially directed to the provision of fish and oysters, and things of that kind, made his will and died. By his will he appointed Nissen and Pallin, fellow-countrymen of his, the executors of his will. The terms of the will need not